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The cover of this journal features the painting *Close Haulled*, a drawing by Rockwell Kent, 1930, electrotype on paper.

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Editor’s Note
Welcome!

Victoria Prussen Spears

Many of you have enjoyed the *Dispute Resolution Journal* over the years, and we welcome you back to a reinvigorated and redesigned publication!

The newly revamped *Journal* will contain the same high-quality content you have grown accustomed to, with a broader editorial focus encompassing all aspects of alternative dispute resolution being employed in ever expanding areas of practice.

The *Journal* will be published six times a year, and will include content exploring and analyzing the hottest and most significant developments in arbitration and mediation taking place in the United States and around the world.

For those of you seeing this *Journal* for the first time, welcome! We are certain that all of you will appreciate the timely and informative articles we present to you in this issue and that we will present to you in every issue.

A Board of Editors

We would like to mention one particularly significant change from the past: We now have a Board of Editors!

Board members were selected from the absolute top dispute resolution and law firms in the world; some are based outside the United States, at least one was a judge on a federal circuit

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1 Victoria Prussen Spears, Editor of the *Dispute Resolution Journal*, is Senior Vice President of Meyerowitz Communications Inc. A graduate of Sarah Lawrence College and Brooklyn Law School, Ms. Spears was an attorney at a leading New York City law firm before joining Meyerowitz Communications. Ms. Spears may be contacted at vpspears@meyerowitzcommunications.com.
court of appeals, and many lead their firm’s arbitration or international arbitration practice. These distinguished individuals are ADR practitioners and thought leaders, and over time they will be authoring articles for this exciting relaunch of the Dispute Resolution Journal!

In This Issue

We also are pleased to briefly describe the articles in this issue.

Legal Research

We begin with an article titled “Legal Research, Honorable Engagements and an Integrated Theory of Arbitration.” Here, Charles H. Barr, of counsel to Health Sciences Law Group LLC, reviews two articles that essentially conclude that an arbitrator should not conduct legal research without the express authorization of the parties. He then examines the theory of arbitration underlying that answer and articulates an alternative theory of arbitration. The author then unequivocally concludes that arbitrators may, in fact, conduct legal research without the parties’ express authorization.

Subpoenas

The article that follows is titled “Enforcement of Arbitration Subpoenas in Federal Court in the United States.” In this piece, Thomas F. Bush of Smith, Gambrell & Russell LLP discusses Section 7 of the Federal Arbitration Act, which authorizes a federal court to enforce an arbitration subpoena and for which no Supreme Court decision addresses when a federal court can act.

Corruption

Jenna Anne de Jong of Norton Rose Fulbright Canada LLP is the author of the next article, “Arbitrating Disputes Involving
Allegations of Corruption: Considerations and Strategies for Counsel and Clients.” Here, the author focuses on two key issues that can arise when arbitrating disputes involving allegations of corruption. First, the author addresses the differences in the standards and thresholds that may apply in the criminal and regulatory context and in a contractual dispute subject to arbitration. Second, the author addresses issues of legal privilege in terms of protecting internal anticorruption investigations and how this may become more complicated in cases involving subsequent arbitrations. Additionally, the author considers the challenges that may arise when allegations of bribery are made within the context of investor-state arbitrations.

Generative AI

Generative AI is one of the hot subjects throughout the law (and, of course, otherwise), and the subject is covered in the article titled “Dispute Resolution Enhanced: How Arbitrators and Mediators Can Harness Generative AI.” The authors are David L. Evans, Stacy Guillon, Ralph Losey, Valdemar Washington, and Laurel G. Yancey, all of whom are American Arbitration Association panelists.

Arbitration Clauses

In the article titled “Top 10 Issues in Arbitration Clauses in Singapore and Hong Kong,” Paul Tan, Alex Wong, Jonathan T.R. Lai, and Viraen Vaswani of Gibson, Dunn & Crutcher LLP consider the top 10 issues regarding arbitration clauses that arise nowadays, and the extent to which the courts of Singapore or Hong Kong have dealt with them.

Lincoln

Dennis J. Curran, a retired judge who is now a Boston-based arbitrator for the American Arbitration Association®, and Emma
Kingdon, an LL.M. student at The Judge Advocate General’s Legal Center & School in Charlottesville, Virginia, are the authors of the article titled “Honest Abe and ADR.” Their title says it all!

* * *

We welcome your feedback. You can reach me by email at vpspears@meyerowitzcommunications.com. You can reach my partner, Steven A. Meyerowitz, who is the Editor-in-Chief of this journal, at smeyerowitz@meyerowitzcommunications.com. Enjoy!
Legal Research, Honorable Engagements, and an Integrated Theory of Arbitration

Charles H. Barr¹

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

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

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

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

² Paul Bennett Marrow, “Can an Arbitrator Conduct Independent Legal Research? If Not, Why Not?,” New York State Bar Ass’n Jour. (May 2013), pp. 24-31; Kate Krause, “May an Arbitrator Conduct Independent Legal Research—A Brief Overview—Part I,” ABA Section on Dispute Resolution’s
arbitrator’s power to conduct legal research can be implied but they take a narrow view of the circumstances sufficient to do so.

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

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

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

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

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

4 See Marrow, supra note 2, at 25.

5 Krause, supra note 2, at 1.
The first three categories, according to the Krause article, should be within an arbitrator’s implied powers.6 But the first category (reading cited cases) is not really legal research. The second and third categories (cite-checking cited cases and reading cases cited in those cases) describe legal research of the most rudimentary sort: in effect, an arbitrator reading and cite-checking what the parties put in front of her rather than conducting an independent search for illuminative authority.

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

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

Significance of the Question

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

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6 Id. at 1, 3-4.
7 Marrow, supra note 2, at 24.
8 Krause, supra note 2, at 5.
such research essential to resolving the case and concludes she has the implied power to conduct it is in a worse position than before she sought the parties’ consent.⁹

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

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

An a Priori Theory of Arbitration

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

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


¹¹ See id.
1. Ascertaining the relevant facts,
2. Ascertaining the rules of decision under governing substantive law and the tribunal’s procedural rules, and
3. Applying those rules of decision to the facts.

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

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

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

In arbitration, parties can contractually agree to give up strict adherence to the law (which must be applied in court), in favor of a more informal process customized to their needs. They can decide for themselves what law they want to govern their agreement and any dispute that may arise, and they can even go so far as to mandate than arbitrator not apply law and instead prescribe principles they deem fair and just. . . . And even if parties
want the law to apply, there is nothing to stop them from requiring that a version of law mutually agreed to shall govern, even if that version is seen by the arbitrator to be just plain wrong.\textsuperscript{12}

If the arbitration agreement provides the arbitrator with extralegal rules of decision or enjoins her to decide according to what she considers “fair and just,” there is no occasion for the arbitrator to conduct legal research. Moreover, under the Marrow article’s theory of arbitration there is no default rule or presumption that the arbitrator is to apply governing substantive law in the absence of indication otherwise: “Silence on any issue, independent legal research being no exception, requires the arbitrator to pause before considering an action not otherwise provided for in the parties’ written instructions.”\textsuperscript{13}

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

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

\textsuperscript{12} Marrow, supra note 2, at 25 (emphasis in original).

\textsuperscript{13} Id.

\textsuperscript{14} See Shulmister, supra note 2, at 267 (“It appears there is no case involving an arbitration agreement that contained a provision that a law, otherwise applicable, shall not apply.”).
those supplied by governing substantive law, because under the latter rules one of them will win.

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

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

16 To be sure, courts have occasionally remarked to the effect that an arbitrator can ignore the law and decide according to her personal conviction of what is “fair and just.” See, e.g., Fagan v. Village of Harriman, 140 A.D.3d 868 (N.Y. App. Div.) (“An arbitrator is not bound by principles of substantive law … and may do justice and apply his or her own sense of law and equity to the facts….”) (internal quotations and citations omitted), leave to appeal
As for opening the door to results of arbitration under an *a priori* theory that are “bizarre” from a legal perspective, an eventuality that the Marrow article admits, its response is “no harm, no foul”: since arbitration awards are confidential and non-precedential, “parties get what they bargained for, and the legal system suffers no adverse impact because the ruling isn’t binding on anyone but the parties.” But not all awards are confidential. For example, Financial Industry Regulatory Authority (FINRA) awards are published on FINRA’s website, and therefore may be cited in FINRA cases for their persuasive value. Even in other arbitration forums in which awards are not published, awards known to a party may be produced and cited for their persuasive value. This practice is prevalent in mass arbitrations, where thousands of cases with common facts and legal issues, which could have been aggregated in a class action if a judicial forum were available, are separately filed against the same respondent. Awards cited for their persuasive value may in fact persuade. To the extent awards based on an arbitrator’s *ad hoc* conception of what is “fair and just” or on other extralegal rules of decision can be and are produced and cited for persuasive value, the potential for adverse impact on the reliability and integrity of arbitration is apparent.

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

17 Marrow, supra note 2, at 25.

An Integrated Theory of Arbitration

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

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

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

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

20 See Marrow, supra note 2, at 24.

21 Krause, supra note 2, at 3.
Many arbitration agreements also require that the arbitrator issue a reasoned award. The Marrow article postulates that “where a reasoned award based solely on a determination of the facts is unsupportable without a discussion of law,” the reasoned award requirement implies the arbitrator’s power to research the law.\footnote{Marrow, supra note 2, at 27.} This implicitly concedes that an award \textit{not} based on governing substantive law—that is, in which the rules of decision, whether or not expressed, are derived extralegally or from an arbitrator’s personal conception of what is “fair and just”—is not “reasoned.” Moreover, in light of the prescribed methodology discussed above for resolving legal disputes, a discussion of law (or at least brief reference to it in a simple case) is invariably necessary to comport with the requirement of a reasoned award.

Only if an arbitration agreement fails to specify controlling law and does not require a reasoned award should resort to arbitral forum rules be necessary to imply the arbitrator’s power to conduct legal research. The Marrow article looks first at the Commercial Rules of the American Arbitration Association\textsuperscript{®} (AAA\textsuperscript{®}) and posits that they “have nothing to say about the selection and implementation of law.”\footnote{See id. at 28.} That proposition is questionable. The AAA rule that specifies preliminary hearing procedures for commercial cases includes on the checklist of items to be addressed at the preliminary hearing the “substantive law govern[ing] the arbitration.”\footnote{Telesca et al., supra note 16, at 351; AAA Commercial Arbitration Rules and Mediation Procedures, Rule P-2(a)(v)(c) at 37.} Specification of the source of such law is \textit{de rigueur} in AAA preliminary hearing orders. Moreover, the Krause article points out that the AAA’s Code of Ethics for Arbitrators in Commercial Disputes envisions that the arbitrator may have a “research assistant,” which permits if not requires the inference that “some type of legal research” by or on behalf of the arbitrator is appropriate.\footnote{Krause, supra note 2, at 2 (citing AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII(B) (2014)). It is unclear, however, whether the Krause article considers “some type of legal research” to include “independent” (i.e., other than rudimentary) legal research.}
In any event, all other arbitration rules cited in the Marrow and Krause articles do say something about selection and implementation of substantive law.\textsuperscript{26} For example, Judicial Arbitration and Mediation Services (JAMS) Rule 24(c) provides that an arbitrator “shall be guided by the rules of law” as designated by the parties or, if there is no such designation, by the arbitrator. According to the Marrow article, “[i]ncorporating the JAMS rules into an arbitration clause establishes that, no matter what, applying some law is a given.”\textsuperscript{27} Ironically, the Marrow article may overread the rule to the detriment of its own \textit{a priori} theory of arbitration,\textsuperscript{28} but even under a more nuanced construction, the requirement that an arbitrator be “guided by the rules of law” suffices to imply the power to conduct legal research to ascertain what those rules are for the case at hand.

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

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

\textsuperscript{26} See Marrow, supra note 2, at 28-29; Krause, supra note 2, at 2.

\textsuperscript{27} Marrow, supra note 2, at 29.

\textsuperscript{28} See Telesca et al., supra note 16, at 351 (suggesting that under rule arbitrator can be “guided by” but not bound by law).


\textsuperscript{30} JAMS arbitrators are required to be attorneys.
skill in exchange for a compensating skill in the industry from which the dispute arose.

The Marrow article cites two cases holding that an arbitrator’s failure to ascertain the legal principles that govern a particular claim through independent legal research does not constitute manifest disregard of the law.\(^3^1\) Those cases premise that holding on the fact that arbitrators are not always required to be attorneys or possess “a certain standard of legal knowledge.”\(^3^2\) But the fact that an arbitrator may choose (or, more accurately, does not risk vacatur by choosing) to rely solely on the parties’ expositions of the law to ascertain the rules of decision does not logically dictate that an arbitrator may not legitimately make the opposite choice and conduct legal research herself or through a research assistant.\(^3^3\)

The Krause article notes that there are “[n]o known cases” discussing the prospect of vacatur for evident partiality, arbitrator misconduct, or exceeding arbitral authority by means of arbitrator-conducted legal research.\(^3^4\) Neither does the Marrow article point to any such case.\(^3^5\) The absence of case law discussing an arbitrator’s legal research, much less vacating an award on

\(^3^1\) Marrow, supra note 2, at 27 (citing Wallace v. Buttar, 378 F.3d 182 (2d Cir. 2004); Metlife Securities, Inc. v. Bedford, 456 F. Supp. 2d 468 (S.D.N.Y. 2006), aff’d 254 F. App’x 77 (2d Cir. 2007)).

\(^3^2\) Wallace, 378 F.3d at 191 n.3.

\(^3^3\) See Shulmister, supra note 2, at 276 (“[C]laiming the lack of duty to research the law equates to a prohibition of research without authority is a logical non sequitur.”) Yet the title of the Shulmister article is: “Attorney Arbitrators Should Research Law: Permission of the Parties to Do So Is Not Required” (italics added). That does not go far enough. All arbitrators are permitted to and should research the law to the best of their abilities and to the extent required to resolve the case properly. Whether they are required to do so, in the sense of risking vacatur if they do not (as opposed to the obligation to do the job right), is a separate question, and one that does not depend on whether or not they are attorneys. See also Krause, supra note 2, at 5 (holding of lack of duty to research law may imply that arbitrator has power to do so under some circumstances).

\(^3^4\) Krause, supra note 2, at 3.

\(^3^5\) See Marrow, supra note 2, at 24-26.
that basis, is significant. It suggests that disappointed parties to arbitration are not even raising the issue in petitions to vacate.

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

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

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

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

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

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40 Marrow, supra note 2, at 25.

41 See Barr, supra note 39, at 10.

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

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

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


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

44 See, e.g., JoMar Group, Ltd. v. Brown, 2023-Ohio-98, 206 N.E.2d 8, 12-13 (Ct. of App.) (reciting elements of specific performance, which do not include contract’s express authorization of remedy).
engagement authorizes an arbitrator to depart from the law in any other respect.\textsuperscript{45}

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

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

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

\textsuperscript{46} Park, supra note 36, at 75-76; see also Marrow, supra note 2, at 27.

\textsuperscript{47} Park, supra note 36, at 76.

\textsuperscript{48} Id. n.221.

\textsuperscript{49} Marrow, supra note 2, at 27 (citing UNCITRAL Model Law Article 28(3)) and n.19.
in which, under an arbitration agreement containing an honorable engagement clause, a court has upheld an arbitral remedy that arguably impaired a party’s statutory or contractual right. 50

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

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

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

51 See id. at 822.

52 See, e.g., Banco de Seguros, 344 F.3d at 261-62 (relying on interpretation of agreement to waive immunity from prejudgment attachment, in addition to arbitrators’ broad remedial discretion under honorable engagement clause); Employers Ins., 202 Wis. 2d at 684-86 (relying on ambiguity of provision regarding deadline for submissions to arbitrators, in addition to honorable engagement clause, to uphold arbitrators’ extension of period for fact finding and discovery).
Legal Research Should Not Lead to Vacatur

Under an integrated theory of arbitration, an arbitrator is in all cases—leaving aside the ephemeral possibility of an arbitration agreement that expressly requires departure from the law—implicitly authorized and indeed obligated to conduct the legal research necessary to ascertain the substantive law that supplies the rules of decision. That is true regardless of whether or how well the parties brief the legal issues;\footnote{Cf. Marrow, supra note 2, at 28, 29 (suggesting that whether or the extent to which parties brief legal issues may affect arbitrator’s research authority); Krause, supra note 2, at 4 (suggesting that when one party cites no case law and the opposing party misrepresents the law, the arbitrator has research authority, and a contrary result when neither party cites case law).} the parties’ briefing proficiency affects only the extent and type (rudimentary or “independent”) of legal research required. It is true regardless of the relative sophistication of the parties and the differences or equality between them with regard to the existence or proficiency of their briefs.\footnote{See Marrow, supra note 2, at 27 (quoting Wallace, 378 F.3d at 191 n.3) (suggesting that disparity in sophistication of parties may affect arbitrator’s duty to research law).} It is true regardless of whether any or all of the parties are represented by counsel. It is true even with respect to an issue the parties have not raised if addressing that issue is necessary to resolve the case under governing substantive law.\footnote{See Krause, supra note 2, at 2 (contending that the AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon V(A), prohibits an arbitrator from deciding, and therefore implicitly from researching, any “issue” that has not been submitted to the arbitrator). The problem with that contention is the canon’s use of the word “issue.” Parties normally submit a dispute, not discrete issues, to arbitration. Submission of a dispute is submission of all issues necessary to resolve in order to resolve the dispute. It is possible for parties to reach a partial settlement resolving some issues, and in that case, of course, the arbitrator’s legal research on issues settled by the parties is unnecessary and inappropriate.}

An arbitrator is authorized to conduct legal research in all cases because in a government of laws and not of people, there is one correct result under the facts and governing law in each legal dispute. There is similarly one correct resolution of each
constituent legal issue, whether it is a binary issue such as liability or a “sliding scale” issue such as damages or comparative negligence. It is an arbitrator’s mission to find and deliver the correct result in each case she decides, no less than it is a judge’s mission to find and deliver the correct result in each case she decides.

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

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

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

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

58 *Shaffer*, 779 F. Supp. 2d at 1093.

59 Id. at 1091.
arbitrator does her own legal research without assistance, and under an integrated theory of arbitration that should be true in virtually all cases, regardless of whether the arbitration agreement expressly requires adherence to governing substantive law.

Implications for a Fair Hearing

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

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

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

60 Krause, supra note 2, at 5.
61 See Marrow, supra note 2, at 25.
62 Krause, supra note 2, at 3.
delay, counter to one of the principal motivations for choosing arbitration in lieu of litigation. The solution lies in a balance between the competing goals of fairness on one hand and expedition and economy on the other. In this respect an important distinction exists between an issue and argument or analysis of that issue. If the parties have identified and addressed all relevant legal issues, but the arbitrator’s analysis of one or more issues differs from that of the parties, fairness does not inexorably demand an opportunity for the parties to rebut or support the arbitrator’s analysis. But if an arbitrator finds it necessary to research an issue no party raised, or where all parties demonstrably misapprehended a crucial issue, the balance should ordinarily tip toward requesting supplemental briefs or providing the parties some other meaningful opportunity to respond. One would hope a conscientious and fair-minded judge would do the same.

**Conclusion**

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

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

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63 See, e.g., Amer. Arb. Ass’n Code of Ethics for Arbitrators in Commercial Disputes, Canon VI.B.
Enforcement of Arbitration Subpoenas in Federal Court in the United States

Thomas F. Bush

In this article, the author discusses Section 7 of the Federal Arbitration Act, which authorizes a federal court to enforce an arbitration subpoena and for which no Supreme Court decision addresses when a federal court can act.

Several sections of the Federal Arbitration Act (FAA) authorize a “United States district court” or a “United States court” to grant relief to a party in arbitration:

- Section 4 (compelling arbitration),
- Section 7 (enforcing arbitral subpoenas),
- Section 9 (confirming a final award),
- Section 10 (vacating a final award), and
- Section 11 (correcting a final award).²

Notwithstanding this language, the U.S. Supreme Court has held that the FAA does not itself establish federal court jurisdiction.³ For some of these sections, the Supreme Court has defined the requirements for federal jurisdiction. This article discusses FAA § 7, which authorizes a federal court to enforce an arbitration

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² 9 U.S.C. §§ 4, 7, 9, 10, and 11. In addition, Section 5 authorizes “the court” to appoint an arbitrator or umpire in certain circumstances but does not refer to a “United States court.”

³ Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 26 n.32 (1983).
subpoena and for which no Supreme Court decision addresses when a federal court can act.

**Importance of Federal Court Enforcement of Arbitration Subpoenas**

Federal court jurisdiction generally is not critical to parties seeking juridical relief relating to arbitration. Every state has enacted an arbitration statute that authorizes the state’s courts to compel arbitration, to appoint arbitrators when necessary, and to confirm, vacate, and correct arbitration awards on grounds that largely mirror the grounds for such relief under the FAA.⁴ It is unlikely that the substantive benefits offered by these provisions of the FAA would be unavailable to a party required to seek relief in state court.

The same point is not true for the enforcement of arbitral subpoenas. Every state arbitration law authorizes arbitrators to issue subpoenas and bestows jurisdiction on the state’s courts to enforce those subpoenas.⁵ However, a state court’s subpoena is not enforceable outside of the territory of the state.⁶ A federal court’s subpoena, by contrast, “may be served any place within the United States.”⁷ Without access to a federal court, evidence required by a party in arbitration may be beyond the reach of a subpoena.

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⁴ See Uniform Arbitration Act §§ 2, 3, 11, 12, 13; Revised Uniform Arbitration Act §§ 7, 11, 22, 23, 24. A large majority of states have adopted one of these uniform laws. See also CA Civ. Pro. Code §§ 1281.2, -6, 1285, 1286, 1286.2, 1286.6, 1287.4; NY CPLR §§ 7503, 7504, 7509, 7510, 7511.

⁵ See T. Bush, Subpoenas to Third Parties in Arbitration, Appendix 2 (Mealey’s Litigation Reports April 26, 2021).


⁷ Fed. R. Civ. P. 45(c)(1). Prior to the 2013 amendments to the Federal Rules, federal court subpoenas could be enforced only in a limited geographic area, generally a 100-mile radius around the courthouse.
Supreme Court Decisions on Federal Court Jurisdiction Under the FAA

In a 1983 decision, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court wrote: “The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction.” This decision raised the question of how to establish federal court jurisdiction for petitions under the FAA.

The Court first addressed that question in 2009 in *Vaden v. Discover Bank*, which involved a petition to compel arbitration under Section 4 of the FAA. Section 4 authorizes petitions to compel arbitration to proceed in “any United States district court which, save for such [arbitration] agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.” The Court interpreted the “save for” language to establish a “look through” analysis, which grants the federal court jurisdiction when the court would have jurisdiction over the underlying controversy in the absence of an agreement to arbitrate.

Following *Vaden*, lower federal courts split on whether the “look through” analysis applies to petitions filed under other provisions of the FAA. In 2022, the Court held that it did not in *Badgerow v. Walters*, which involved petitions to conform and to vacate an arbitration award under Sections 9 and 10. Because those two sections did not contain language similar to

8 460 U.S. 1, 26 n. 32 (1983) (cleaned up).
11 556 U.S. at 53-54.
the “save for” language in Section 4, “a court may look only to the application actually submitted to it in assessing its jurisdiction.”

Section 7 of the FAA is similar to Sections 9 and 10 in that it contains no language similar to the “save for” language of Section 4. Badgerow clearly forecloses the application of a “look through” analysis under Section 7. Federal jurisdiction must be established on the basis of the petition to enforce a subpoena, not the underlying dispute. Beyond that one point, federal question jurisdiction for arbitral subpoenas is unclear.

**Federal Question Jurisdiction**

Federal courts have jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.”

A “case arises under federal law when federal law creates the cause of action asserted.” Petitions to confirm or vacate awards do not qualify for this grant of federal question jurisdiction, according to Badgerow, because the parties are contesting not their underlying dispute “but the enforceability of an arbitral award.” That award, the Court explained, “is no more than a contractual resolution of the parties’ dispute—a way of settling legal claims. And quarrels about legal settlements—even settlements of federal claims—typically involve only state law, like disagreements about other contracts.”

This explanation does not apply to petitions to compel arbitral subpoenas. The target of the subpoena usually is a witness who is not a party to the arbitration agreement or to any contract that might obligate them to provide testimony or to produce documents for use in the arbitration. The rights that the petitioner is
asserting were created entirely by a federal statute. This seems to be a clear case of federal question jurisdiction.\(^{19}\)

The Supreme Court has never considered whether petitions under FAA § 7 specifically qualify for federal question jurisdiction. However, in ruling on cases involving other provisions of the FAA, the Court has broadly described the Act as “bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.”\(^{20}\) No lower federal court has found that FAA § 7 confers federal question jurisdiction. Every federal court of appeals to address the issue has relied on the Supreme Court’s broad language to hold that it does not.\(^{21}\) So while a substantial argument can be made for federal question jurisdiction, the existing caselaw makes the success of that argument doubtful.

**Diversity Jurisdiction**

Parties seeking to enforce arbitral subpoenas are most likely to seek to establish federal jurisdiction on the basis of diversity of citizenship.\(^{22}\) Several issues arise in these cases.

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\(^{19}\) This assumes that the arbitration agreement is found in a “maritime transaction” or a “transaction involving commerce,” and hence is subject to the FAA. 9 U.S.C. § 1.

\(^{20}\) Moses H. Cone Memorial Hospital, supra note 3, at 26 n.32; accord Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 581-82 (2008); Vaden, supra note 9, at 59; Badgerow, supra note 12, at 8.

\(^{21}\) Maine Community Health Options v. Albertsons Cos., 993 F.3d 720, 722 (9th Cir. 2021); Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1156 (11th Cir. 2019); Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 572 (2d Cir. 2005); American Federation of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1007 (6th Cir. 1999); Amgen, Inc. v. Kidney Center of Delaware County, Ltd., 95 F.3d 562, 567 (7th Cir. 1996); see also Neighbors Credit Union v. Lawrence, 2023 WL 3055320 (E.D. Mo. Apr. 24, 2023); Zurich Insurance PLC v. Ethos Energy (USA) LLC, 2016 WL 4363399, at *2 (S.D. Tex. Aug. 16, 2016); Chicago Bridge & Iron Co. v. TRC Acquisition, LLC, 2014 WL 3796395, at *2 (E.D. La. July 29, 2014).

\(^{22}\) 28 U.S.C. § 1332(a).
Citizens of Different States

Diversity jurisdiction requires complete diversity of citizenship; no party can be a citizen of the same state as any party on the other side of the dispute. Badgerow holds that jurisdiction is determined by the petition before the Court. Therefore, the witness targeted by the subpoena may not share citizenship with any party seeking to enforce the subpoena.

Prior to Badgerow, some federal courts held that diversity jurisdiction should be based on the citizenship of the parties to the underlying arbitration. Other lower courts held that diversity jurisdiction is not defeated by parties to the arbitration who have not joined the petition to enforce the subpoena. These parties are not seeking relief on the petition. Nor are they parties that must be joined to the petition, because the court can grant complete relief on the petition without them, and their absence will not prejudice them or any existing party to the petition. For these reasons, courts that have considered the issue have held that the citizenship of parties to the arbitration who do not join the petition needs to be considered when determining diversity jurisdiction.

The dissent in Badgerow suggested that the citizenship of the arbitrators may be relevant. FAA § 7 requires that a majority of the arbitrators sign and issue subpoenas. The arbitrators have an interest in enforcing their subpoenas, because the subpoenas will provide them with evidence that they have determined to be

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23 Strawbridge v. Curtiss, 7 U.S. 267 (1806).
24 596 U.S. at 9.
28 596 U.S. at 23.
Enforcement of Arbitration Subpoenas

material to the dispute that they will decide. However, the argument for treating the arbitrators as parties to the enforcement action is not strong, given that they rarely join the petition or participate in the proceedings before the court. So far, no court has found that the citizenship of the arbitrators is relevant to diversity jurisdiction.

Jurisdictional Amount

Diversity jurisdiction also requires that “the matter in controversy exceeds the sum or value of $75,000, exclude of interest and costs.”  30 A petition to compel compliance with a subpoena seeks non-monetary relief comparable to an injunction. The Supreme Court has held in “actions seeking declaratory or injunctive relief,” that “the amount in controversy is measured by the value of the object of the litigation.”  31 Several courts have applied this rule to petitions to enforce arbitral subpoenas, reasoning that they are comparable to injunctions.

From the perspective of the witness opposing enforcement, the value of the object of the petition includes the avoidance of the costs of compliance. Hence, the jurisdictional amount is met if the cost of compliance will exceed $75,000.  32 This may be the case where the subpoena requires production of documents that will be expensive to locate and produce. If the subpoena requires only that the witness appear to testify and bring a small volume of readily accessible documents, the jurisdictional amount might not be satisfied. And a party seeking to enforce a subpoena may be reluctant to assert that compliance will cost the witness more than $75,000, as that assertion could support an objection of undue burden.

From the perspective of the party seeking to enforce the subpoena, the value of the object of the petition is the value of

the evidence that the subpoena seeks. How to value the evidence is unclear.

In one of the leading cases on this issue, the U.S. Court of Appeals for the Second Circuit noted that diversity jurisdiction required only a good faith allegation that the value exceeds $75,000 and that the allegation will be sufficient “unless it appears to a legal certainty that the claim is really for less.” The petition before the court sought to enforce a subpoena in the arbitration of a claim for $134 million. “It does not appear to a legal certainty that the amount is really for less because even if the documents required by the summonses pertain to only a small fraction of the award sought, the amount in controversy requirement would still be satisfied.” The U.S. Courts of Appeals for the Sixth and Ninth Circuits have taken a similar approach.

Some district courts have rejected this approach. One reasoned that it “should not have to make a determination as to the relevance of the documents sought in a subpoena—often the ultimate issue in a Section 7 case—before deciding the threshold matter of whether it has subject matter jurisdiction over the case.” Other courts have held more simply that reference to the amount of the claim in the underlying arbitration is inappropriate on a petition to enforce a subpoena.

At this point, it is uncertain how courts will resolve the issue of how to determine the amount in controversy for a petition

33 Washington National, supra note 26, at 135 (2d Cir. 2020) (cleaned up).
34 Id. (cleaned up).
under FAA § 7. One clear point is that there will be cases where the jurisdictional amount cannot be established.

**New York Convention**

An international treaty known as the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” also known as the “New York Convention,” applies to arbitration agreements with an international dimension. A federal statute implementing the Convention provides that an “action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States” and that U.S. district courts “shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.” The Ninth Circuit has held that when an arbitration agreement “falls under the Convention,” federal courts have jurisdiction to enforce arbitral subpoenas. An arbitration agreement “falls under the Convention,” when it arises from a commercial relationship and has some relationship with a foreign state, such as the involvement of a foreign party, performance abroad or property abroad.

**Ancillary Jurisdiction**

The doctrine of ancillary jurisdiction “recognizes federal courts’ jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them.” Some courts have applied this doctrine to cases where a federal court compels arbitration under FAA § 4, holding

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42 As noted, a federal court has jurisdiction under FAA § 4 whenever it would have jurisdiction over the underlying dispute in the absence of an agreement to arbitrate. Vaden, supra note 9.
that the court retains jurisdiction to hear petitions in the same arbitration including petitions to enforce arbitral subpoenas.\textsuperscript{43}

\section*{Work-Arounds}

In the event that arbitrators subpoena a witness or documents located outside of the state where the arbitration is being heard and federal jurisdiction cannot be established, processes under state arbitration laws may provide a means of enforcing the subpoena.

The Revised Uniform Arbitration Act (RUAA), which has been adopted in 23 states, provides that a court of the state “may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State.”\textsuperscript{44} When the witness is located in an RUAA state, the arbitrators can issue a subpoena for a witness to testify at a deposition in the state, and potentially to produce documents, and the parties can seek enforcement in the state’s courts.

If the witness or documents are not located in an RUAA state, a process might still be available to enforce the subpoena. The process involves calling a special hearing in the witness’s state for the limited purpose of the arbitrators receiving the witness’ testimony and documents. This special hearing is used in federal courts to address a limitation that most courts have found in the FAA, which is that arbitrators have no authority to issue subpoenas for prehearing discovery; they can only compel a witness to attend a hearing.\textsuperscript{45} By holding a special hearing in the witness’s state, the party seeking to enforce the subpoena can ask a court of that state to issue an in-state subpoena.

This process increases the cost of arbitration, by requiring a separate hearing in a location that is not necessarily convenient to

\begin{footnotesize}
\textsuperscript{43} Stolt-Nielsen SA v. Celanese AG, supra note 21, at 573; Amgen, supra note 21, at 566.
\textsuperscript{44} RUAA § 17(g).
\textsuperscript{45} See Stolt-Nielsen SA v. Celanese AG, supra note 21, at 577-80.
\end{footnotesize}
the parties or the arbitrators. The process might not be available if the arbitration clause calls for the hearing to be conducted in a specific location outside of the witness’s state and the parties do not agree to the separate hearing within the state.\textsuperscript{46} And it is not established that such a limited hearing within the state is sufficient to invoke the court’s authority to enforce a subpoena under the state’s arbitration laws. No state court has considered the issue. However, no state’s arbitration law contains language that would preclude the process.

For arbitrations pending in California, the state’s Arbitration Act provides that if the arbitrator “orders the taking of the deposition of a witness who resides outside the state, the party who applied for the taking of the deposition shall obtain a commission, letters rogatory, or a letter of request therefrom from the superior court.”\textsuperscript{47} The party can then use the commission to obtain a subpoena from the court in another state under the statute authorizing the court to enforce subpoenas issued by other states’ courts.\textsuperscript{48}

Ten states have adopted the UNCITRAL Model Law on International Commercial Arbitration, which applies to international arbitrations. Like the California Arbitration Act, the UNCITRAL Model Law authorizes a party to “request from a competent court of this State assistance in taking evidence.”\textsuperscript{49} This statute

\textsuperscript{46} Some state arbitration laws set a place for the hearing, see, e.g., NE Code 25-2606(c), but the parties can still agree to a hearing in a different place. See Damrow v. Murdoch, 739 N.W.2d 229, 239-40 (Neb. App. 2007).

\textsuperscript{47} CA Civ. Pro Code § 1283. The statute applies to a deposition “to be taken for use as evidence and not for discovery,” id.

\textsuperscript{48} See, e.g., Uniform Interstate Deposition and Discovery Act §§ 2(2), 3(b) (authorizing the enforcement of a “foreign subpoena,” which is defined as “a subpoena issued under authority of a court of record of a foreign jurisdiction”); see also Matter of Roche Molecular Systems, Inc., 76 N.Y.S.3d 752, 756 (N.Y. Sup. Ct. 2018) (the petitioner “does not rely on an arbitral subpoena, but rather on a commission obtained from a court of record based on the arbitrator’s authorization to seek such a commission”).

\textsuperscript{49} Article 27. The Model Law has been adopted in California, Connecticut, Florida, Illinois, Louisiana, North Carolina, Ohio, Oregon, Texas, and Washington.
authorizes a court to issue a commission for an out-of-state deposition, which can be enforced in the courts of another state.50

Finally, if a party is able to serve a subpoena on an out-of-state witness while that witness is found in a state where the subpoena can be enforced, a court of that state would have “tag jurisdiction” to enforce the subpoena.51

These work-arounds are extensive, but they do not necessarily reach all potential witnesses. There will be cases where witnesses are simply beyond the reach of an arbitral subpoena.

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50 See Roche Molecular, supra note 48, at 755-57.
51 See In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002).
Arbitrating Disputes Involving Allegations of Corruption
Considerations and Strategies for Counsel and Clients

Jenna Anne de Jong

In this article, the author focuses on two key issues that can arise when arbitrating disputes involving allegations of corruption. First, the author addresses the differences in the standards and thresholds that may apply in the criminal and regulatory context and in a contractual dispute subject to arbitration. Second, the author addresses issues of legal privilege in terms of protecting internal anticorruption investigations and how this may become more complicated in cases involving subsequent arbitrations. Additionally, the author considers the challenges that may arise when allegations of bribery are made within the context of investor-state arbitrations.

Allegations of corruption in commercial and investment arbitration have become increasingly commonplace following anticorruption reform such as amendments to Canada’s Foreign Corrupt Practices Act (CFPOA), the introduction of the UK’s Bribery Act 2010, as well as earlier amendments to the Foreign Corrupt Practices Act (FCPA) in the United States. Companies are often required by their domestic criminal law and regulatory requirements to terminate contracts with parties they suspect have engaged in corruption. If they fail to do so, they themselves risk being subject to criminal prosecution and penalties.

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However, the termination of a contract may lead to a subsequent commercial dispute with the counterparty. Parties arbitrating disputes involving allegations of corruption may find that there is a tension between their obligations under criminal law and their contractual and other obligations. Understanding these tensions can enable appropriate preparation prior to and during an arbitration involving corruption allegations.

This article focuses on two key issues. First, this article addresses the differences in the standards and thresholds that may apply in the criminal and regulatory context and in a contractual dispute subject to arbitration. Second, it addresses issues of legal privilege in terms of protecting internal anticorruption investigations and how this may become more complicated in cases involving subsequent arbitrations.

Different legal counsel will often be involved in any anticorruption investigation as compared with the commercial arbitration arising because of action taken by the company. Both sets of counsel and the client should be alert to these issues. Additionally, this article considers the challenges that may arise when allegations of bribery are made within the context of investor-state arbitrations.

How Arbitrations Involving Corruption Allegations Arise

A commercial party whose contract has been terminated or who has had performance withheld on the grounds of corruption, and who considers such action to be wrongful, may seek recourse by commencing arbitration under the dispute provisions in the contract. Similarly, in an investor-state context, an investor may allege that it has suffered discrimination, expropriation, or another violation of an applicable investment treaty where the state party’s action or inaction harms an investor or investment. In its response, the state party may allege that the investor’s claim is inadmissible as the investment was initially obtained through corruption of a state official.
The Potential for Mismatch Between Regulatory and Contractual Requirements

An example of corrupt activity that can give rise to criminal prosecution is the bribery of public officials. It is axiomatic among the anticorruption bar that nearly all prosecutions for bribery of foreign public officials will involve an agent, local partner, or other intermediary (agents). There are many reasons for this: in some cases, only a local will know who to bribe and how. Agents who are paid a success fee or commission may be incentivized to pay bribes to local officials if they believe the financial upside outweighs the risk to them personally (particularly if domestic laws are perceived to be lax). Under current anticorruption regimes, a similar incentive rarely applies to large global companies that face penalties in the millions, or even billions, for involvement in such activities. However, companies can be at risk of prosecution for the actions taken by the local agents with whom they have contracted.

Most sophisticated companies now have detailed anticorruption warranties and representations in their agency contract templates to address this risk and enable the company to take steps under the contract where allegations of corruption arise. However, difficulties may arise in many scenarios. For example:

1. Where corrupt acts are alleged to have taken place prior to the agency contract being updated to reflect modern anticorruption legislation,
2. Where there is no written contract with the agent, or
3. Where the law of the contract or the law governing an arbitration following termination of the contract is different from the law of the jurisdiction where the company faced potential criminal or regulatory liability.

In such cases, there can be a mismatch between what a company is required to do under criminal law and applicable regulations and what it is permitted to do under the law and terms of the contract with the agent. By way of example, while still allowed under U.S. law, facilitation payments were made illegal under Canadian law in 2017 and under the UK’s Bribery Act 2010.
Facilitation payments, colloquially known as “grease” payments, are typically aimed at expediting an otherwise routine administrative process (such as customs or port clearances, to use two common examples). One can readily imagine a scenario where a Canadian company hires a U.S. agent under a contract governed by U.S. law to perform work in some third country. The agent may make small facilitation payments to prevent work required by the contract from being unduly delayed by bureaucratic red tape. In this scenario, the agent’s conduct may be excusable under the law of the contract and its home jurisdiction, but if the Canadian company, after learning that a facilitation payment has been made, does not take steps to stop further payments to the agent, it could face prosecution in Canada. If the contract with the agent does not address this situation, it creates a difficult situation for the company and the potential for a dispute.

Similarly, there can be a disparity between criminal and commercial obligations where criminal law or regulation requires a company to take steps on the mere suspicion of corrupt activities, and whether it is in the company’s best interests to do so. At this stage of an internal anticorruption investigation, the priority and focus will rarely be the same as in any subsequent commercial arbitration dealing with the termination of a contract following the investigation. In an internal anticorruption investigation, the focus is on limiting a client’s exposure to criminal and civil liability for corrupt activities, particularly as penalties for companies can be large. The client will want to establish whether the threshold imposed by applicable criminal laws and regulations has been met, either triggering liability on the part of the client or requiring the client to take active steps, such as terminating the agent, to avoid facing criminal or regulatory penalties. Corruption by an agent may also attract liability for the client. Many anticorruption regimes impose criminal or other forms of liability where continued payments are made in the face of early warning signals indicative of the agent engaging in corruption. If corrupt activities are suspected, counsel will want to distance their client as much as possible from the activity. What is permitted by the law and within the terms of the contract with the agent at this stage (where there
is no conviction or direct evidence of bribery) may be of secondary consideration if the amounts at stake are comparably smaller.

We can see examples of this in Canadian law. In Canada’s *Criminal Code*, liability may be imposed on a company as an accessory if a court concludes they have been willfully blind to the prospect of bribery by an agent.

A similar mismatch can occur where certain conduct is proscribed by the criminal law or regulations to prevent corruption, but such conduct may not provide grounds to terminate the contract. In the United States, the “books and records” offense in the FCPA does not require proof of bribery, but rather the statute requires listed entities in the United States to keep books and records that fairly and accurately reflect the corporation’s transactions. Individuals have been charged for failing to adequately supervise employees to make and keep accurate books and records and implement an adequate set of internal controls, despite not necessarily having direct knowledge or involvement in a bribery scheme.

For example, Con-way Inc. was charged with violations of the FCPA after a subsidiary in the Philippines in its freight forwarding business allegedly paid hundreds of thousands of dollars in small sums to customs and other government officials. Con-way was not prosecuted for bribery. Instead, the complaint was based on the allegation that (1) none of the improper payments made by its subsidiary to government officials were accurately reflected in Con-way’s books and records, and (2) that Con-way knowingly failed to implement a system of internal accounting controls concerning its subsidiary complying with the FCPA and require that the payments it made to foreign officials were accurately reflected on its books and records. In the case of agents, prosecutors may point to abnormally large commissions as a sign that employees of the principal knew or were willfully blind to such funds being used to pay bribes.

Accordingly, to avoid the risk of criminal prosecution, companies often need to take proactive steps to end the relationship with parties who cannot provide assurance that their activities are legal, even where there may not yet be sufficient evidence to convict the agent.
Under the terms of a contract, the threshold for termination may be higher or lower (or simply different) to when termination is required in the criminal or regulatory context. Where a contract is terminated for a regulatory offense that does not require direct evidence of bribery, such as improper record keeping, this may be necessary from the perspective of avoiding prosecution but (depending on the law and terms of the contract) may not, on its own, justify termination of the contract.

Ultimately, in such circumstances, while the evidence uncovered in an internal anticorruption investigation will be helpful in subsequent disputes relating to contractual termination, the core focus of such investigations will likely be different from the issues in dispute in an arbitration. Arbitration counsel should therefore consider whether the grounds and evidence required to meet the contractual threshold for termination are different from those triggering termination in a criminal or regulatory context.

Privilege Considerations

An internal anticorruption investigation typically results in a report by legal counsel setting out legal advice in response to the evidence uncovered during an investigation. This may include an assessment of whether the client faces any liability for the acts of their agent, future steps for the client to prevent any further criminal or regulatory liability from accruing, and an assessment by investigation counsel of whether the agent is likely to have committed the bribery or another suspected corruption offense. The latter point may be relevant to a claim by an agent for wrongful termination.

However, there will often be good reasons why arbitration counsel will not wish to waive privilege over such a report in a subsequent arbitration with the agent. For one, for the purposes of the report, investigation counsel may have found it unnecessary to reach firm conclusions on whether the agent committed bribery. As discussed above, if there is no explanation from the agent for suspicious conduct, a client may have to terminate the agent’s contract to avoid potential liability under criminal or
regulatory law. In some cases, this may satisfy the contractual threshold for termination. However, where there is an absence of clear language in the contract supporting termination in such circumstances, some jurisdictions may require that bribery be proven on the civil standard for it to succeed as grounds for termination.

Furthermore, in an anticorruption investigation, facts may be learned which are irrelevant to a subsequent arbitration, but which are nonetheless critical to the client as part of the client’s compliance efforts. For example, an investigation may reveal that a client’s due diligence practices in the terminated agent’s jurisdiction were satisfactory, but that due diligence on agents in another jurisdiction fall short. A client may reasonably object to such irrelevant but sensitive information being disclosed in an arbitration, even where confidentiality protections are in place.

Considerations in the Investment Arbitration Context

In investor-state arbitrations where a state has made an allegation of bribery, there are two competing needs from an investigation: first, the need to gather evidence to refute the allegations of bribery in the arbitration, and second, the more general need to investigate the allegations and determine if remedial action needs to be taken.

In the context of investor-state disputes, different challenges arise. For an investor who is accused by a state of having achieved an investment through bribery, there is the potential difficulty that the original investment was made many years prior and that witnesses who could refute allegations that it had been obtained through bribery are no longer available, either to testify or to participate in an internal investigation.

If the investor was not aware of any allegations of bribery prior to commencing a claim against the state, allegations by the state that the investment was obtained through bribes may come as an unpleasant surprise. For the investor who commenced the arbitration believing that the dispute was about the interpretation and application of a treaty, their focus will now have to shift to a
different area of the law—refuting evidence that the investment at issue was obtained through bribery.

It is critical that claimant counsel be aware of indicia of corruption and seek appropriate advice if they have reason to believe an investment may have been achieved through a bribe. In one of the best-known arbitration awards where the arbitral tribunal rejected a claim because an investment had been obtained through bribery, the evidence of bribery came from the claimant’s own witness statement and prompted the arbitral tribunal to make its own inquiries about whether bribery had occurred.

In *World Duty Free Co. Ltd. v. Republic of Kenya*, the claimant, a company incorporated in the United Kingdom, commenced an arbitration against Kenya. Unlike most investment arbitrations pursued under investment treaties, this arbitration was commenced pursuant to an arbitration agreement contained in a contract between the claimant and Kenya entered by the parties in 1989 (the 1989 Contract). Under the 1989 Contract, the claimant was to construct, maintain, and operate duty-free complexes at two airports in Kenya. The claimant alleged Kenya had breached this agreement. The arbitral tribunal ultimately held that the claimant had obtained the 1989 Contract through a bribe to the former President of Kenya. As a result, the claimant had no right to pursue or recover under any of its pleaded claims under the 1989 Contract, because it had obtained the contract through bribery.

What is unusual about the case is that the evidence of bribery came, apparently unprompted, in the form of a witness statement from the claimant’s chief executive officer, where he described making a “personal donation” to the former president of Kenya to obtain the 1989 Contract.

While there may have been strategic reasons why the claimant’s counsel chose to risk the introduction of this evidence, this case highlights the importance of arbitration practitioners being aware of indicia of bribery by their own client when preparing their case.

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In the context of bribery of state officials, some commentators have suggested that the existence of bribery should not be grounds for inadmissibility of an investment claim, since (the argument goes) the state shares complicity for the bribery of the official. The problem with this argument is that it fundamentally ignores the nature of bribery: the state—or rather the citizens it represents—are the victims of the state official who committed the bribery. A similar argument was advanced in World Duty Free Co. Ltd. v. Republic of Kenya but rejected by the tribunal. Arbitration counsel should accordingly be aware that such arguments are unlikely to gain much sympathy from arbitrators.

Recommendations

Many steps can be taken to proactively address the dynamics described above.

During an Investigation

If an arbitration has not been commenced but is anticipated in the future, one option is to seek separate opinions following an internal anticorruption investigation: (1) one giving the client advice on what it should do to protect itself from criminal or regulatory liability, and (2) a separate opinion from different counsel assessing whether the evidence supports terminating the agent’s contract. The risk in this approach is the potential for conflicting opinions, and waiving privilege over the latter report could give rise in some jurisdictions to arguments that privilege has also been waived over the first report.

When there is more than one legal system involved, it may be necessary to have reports or opinions under the laws of different jurisdictions. For example, for an internal anti-bribery investigation, a Canadian company will typically need legal advice on what constitutes bribery under Canadian law and often U.S. law (as those are the states most likely to claim jurisdiction). However, if the contract with the agent or other party accused of bribery is governed by the law of a different jurisdiction altogether, then
legal advice will be needed from that jurisdiction to determine whether the law of the contract permits termination based on the facts uncovered by the investigation.

In cases where there are signs of bribery by the agent or partner, but no conviction or other direct evidence of bribery, the advisable course from an anticorruption perspective may nonetheless be to terminate the contract. At the same time, depending on the law governing the contract and the terms of the contract, indirect evidence of bribery may be insufficient to justify contractual termination. In such cases, a client will have to weigh the respective risks, and may determine that the heavy penalties imposed in bribery prosecutions outweigh the risk of an adverse award in a subsequent arbitration claim for wrongful termination.

When an Arbitration Is Underway

Where an arbitration is already underway, it is often appropriate to obtain an expert report from an anticorruption expert to address whether the conduct described by the evidence meets the threshold for termination in the contract. Expert evidence on anticorruption obligations is also vital where a contract contains anticorruption obligations of a general nature, to explain what conduct is prohibited. Because there are often local nuances to how bribery occurs—the form of the bribe and how, where, and when it is made—expert evidence explaining why particular conduct is suspicious and indicia of bribery are often critical.

Expert evidence may also be vital when the underlying reason for the termination is the potential for a regulatory offense that does not require direct evidence of bribery, such as a books and records offense. Expert evidence will also be important when the law of the contract or the arbitration is different from the law of the jurisdiction where the respondent faces potential criminal or regulatory liability.

The trend in some jurisdictions, particularly the United States, to resolve anti-bribery charges through negotiated settlements (such as deferred prosecution agreements) can mean that there is little or no case law resolving difficult legal issues,
such as the adequacy of the state’s jurisdiction to prosecute. This makes expert evidence particularly important in establishing that what has occurred satisfies the provisions in the contract permitting termination.
Dispute Resolution Enhanced
How Arbitrators and Mediators Can Harness Generative AI

David L. Evans, Stacy Guillon, Ralph Losey, Valdemar Washington, and Laurel G. Yancey

This article examines contemporary applications for generative artificial intelligence within the domain of arbitration and mediation and explores prospective applications, offering insights into potential future developments at the intersection of technology and dispute resolution.

Introduction

The legal world has been buzzing with discussions about the potentials of artificial intelligence (AI), especially in its aid to advocates. However, a significant yet less discussed transformation is unfolding within the offices of arbitrators and mediators. This article, penned by the AI Working Group assembled by the American Arbitration Association® (AAA®), seeks to shine a light on this nuanced application of AI technology in the world of neutral decision-making and alternative dispute resolution (ADR). The authors are arbitrators serving on AAA’s panels, and we have collectively put these tools to use in arbitrations and mediations, both as neutrals and as advocates.

While fears and speculations abound regarding AI’s potential to replace human judgment, our current perspective is not about

1 Together with AAA staff members, the authors, who are all AAA panelists, comprise AAA’s AI Working Group. The content of this article was finalized in early November 2023.

2 In the spirit of our exploration, we used ChatGPT-4 to assist us in drafting this article’s title, introduction, and conclusion, exemplifying the very blend of human expertise and machine capabilities we discuss in this article.
replacement, but rather enhancement. For the arbitrator and mediator, generative AI stands as a promising tool to enhance efficiency, offer deeper insights, and provide a level of precision previously unattainable.

This article begins with an examination of contemporary applications for generative AI within the domain of arbitration and mediation, identifying specific purposes for which neutrals can use this technology to benefit the parties before them. We also compare various AI tools’ effectiveness at these tasks. While OpenAI’s ChatGPT may be the most widely recognized generative AI platform, there are others, including some that have been tailored for the legal industry. Then, we transition to prospective applications, offering insights into potential future developments in this intersection of technology and dispute resolution.

**Current Uses**

Large language models (LLMs) represent a remarkable advancement in the realm of generative AI. These models are trained on vast and diverse data sets sourced from a wide array of materials, including books, images, and web content. LLMs, such as the generative pre-trained transformers (GPT), serve as the foundation for platforms like ChatGPT and Anthropic’s Claude. Generative AI’s Natural Language Processing capacity means it can “understand,” interpret, and generate human language at an advanced level. Its level of “understanding” can be quite deep; it can identify patterns, relationships, and anomalies within document training sets. And, importantly, AI can perform those tasks at a herculean scale within a matter of minutes (or less).

1. Document Analysis and Comparison

   **a. Document Analysis Applications**

   Like most legal work, arbitrations and mediations can be document intensive, which creates enormous opportunities to use LLMs. Here, we offer a few ways in which arbitrators and
mediators can use AI to improve the quality and efficiency of their work.³

*Search and Index*: At the most basic level—perhaps offering an ideal entry point for AI newbies—neutrals can use this feature to answer substantive questions about a large document set’s contents. Because AI retrieves relevant content based on meaning, it is far more effective than a tool that simply finds exact word matches. For example, in preparing for a hearing, an arbitrator could upload the case documents and ask AI to comb them all for a particular fact. Some AI tools, as we discuss in more detail below, link directly to their sources within the document set, directing the neutral to the relevant page(s), so she can read the information firsthand. These tools will even compile the basis for their answers from various sources when the subject matter has been addressed in multiple exhibits and filings. AI’s speed allows a neutral to use these tools in real time; for instance, by typing in a question raised about an expert’s report during a hearing to navigate directly to the responsive section rather than flipping through pages or having to pause the hearing to ask for page numbers.

*Compare Content*: These tools can also analyze the similarities and differences between positions taken in various documents. An arbitrator could prompt the tool to identify evidentiary inconsistencies across multiple deposition transcripts, or a mediator could prepare for a session by asking the tool to identify the parties’ overlapping interests.

*Contract Review*: Some AI platforms have been specially trained to analyze contracts. With these tools, neutrals can home in on contract provisions that govern the dispute resolution process, even if that text is scattered throughout the contract.

*Summarize*: AI tools can summarize documents with varying levels of detail. Neutrals can put this to use to create outlines that guide neutrals to key sections without requiring them to spend (and bill) time digging through extraneous text. For instance, a mediator could generate a detailed summary of a preliminary injunction hearing transcript to grasp efficiently the procedural

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³ We are not addressing the separate issues of disclosure or independence associated with the use of AI by neutrals. We are identifying use cases.
history of the case. Or, where counsel have pointed to excerpts of a deposition, an arbitrator could generate a comprehensive summary of the full deposition transcript to direct him to additional sections he should read before deciding a substantive motion.

**Timeline Generation:** During an arbitration hearing or a mediation, many neutrals like to refer to timelines. When counsel did not provide them, we used to have to manually identify, compile, and order the various dates. But, after reviewing the entire document set, AI can digest that information for us and generate a timeline of the case’s events.

* b. **Platform Comparison: Document Summary**

This section compares query results from the Generative AI models Casetext’s CoCounsel, Anthropic’s Claude Pro, and OpenAI’s ChatGPT-4.

First, we compare CoCounsel’s and Claude’s summaries of the proposed “Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act” or “The RESTRICT Act.” Then, we compare CoCounsel’s and ChatGPT-4’s summaries of an Intellectual Property Cross-License Agreement.

i. **CoCounsel vs. Claude: Summarizing**

1) **CoCounsel Summary—The RESTRICT Act**

CoCounsel acts as an AI legal assistant and has been identified as a generative AI model currently used in arbitration.  

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4 Casetext’s CoCounsel 2.0 Beta, October 2023 version, https://casetext.com/v2/cocounsel. Casetext provided AAA’s AI Working Group, including the authors of this report, CoCounsel subscriptions in conjunction with our exploration of using AI in arbitrations and mediations.


8 Andrea Seet et al., Arbitration Tech Toolbox: Looking Beyond the Black Box of AI in Disputes Over AI’s Use, Kluwer Arbitration Blog, May
From the CoCounsel Skills options, the Summarize Skill was chosen. As shown in the screenshot below, the skill generates three levels of detail: (1) Brief Summary (High level overview of document in 1-3 paragraphs), (2) Detailed Summary (Multi-page detailed summary that includes all important information from the documents), or (3) Comprehensive Summary (Page by page summary of the document, for comprehensive overview). The Comprehensive Summary was chosen.

CoCounsel produced a 16-page Comprehensive Summary report of The RESTRICT Act, a 55-page document. The Comprehensive Summary listed pages 1 to 55 with each page providing defined key items in three to four bulleted paragraphs.

Key points excerpted from the summary:

- The bill, S. 686, would authorize the Secretary of Commerce to review and prohibit certain transactions between the U.S. and foreign adversaries.
- The bill further clarifies the definition of “covered transaction” to include current, past, or potential future transactions.

• The bill also defines “entity” broadly to include a variety of organizations, such as firms, governments, labor unions, and corporations.
• The bill defines “holding” as an equity interest, stock, security, share, partnership interest, interest in a limited liability company, membership interest, or any participation, right, or other equivalent.
• The bill defines “information and communications technology products or services” as any hardware, software, or other product or service that enables information or data processing, storage, retrieval, or communication.
• The bill defines “transaction” broadly, encompassing any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology (ICT) product or service.
• The document also outlines civil forfeiture procedures, which allow for the seizure and forfeiture of any property used to commit or facilitate a violation, as well as any proceeds from the violation.
• The document outlines criminal forfeiture procedures, which include the forfeiture of any property used to commit or facilitate a violation, as well as any proceeds from the violation.

2) Claude Summary—The RESTRICT Act

When prompted to summarize the Act and report results, Claude produced a one-and-one-half-page summary. Key points excerpted from the summary:

The Restrict Act is a proposed bill that would authorize the Secretary of Commerce to review and prohibit certain transactions between persons in the United States and foreign adversaries that pose risks to US national security. Some key points:

• It defines “covered transactions” broadly to include any transactions with foreign adversaries that could pose national security risks. This
includes China, Russia, Iran, North Korea, Cuba, and Venezuela.

- The Secretary of Commerce can prohibit or impose mitigation measures on covered transactions that pose undue risks. This includes risks of sabotage, effects on critical infrastructure, election interference, or other national security risks.
- The Secretary can also identify “covered holdings”—controlling holdings in ICT companies by foreign adversaries—that pose risks and refer them to the President for potential divestment or other mitigation measures.
- The bill establishes procedures for reviews, enforcement, and judicial oversight of the Secretary’s prohibitions or mitigation measures. However, the scope of judicial review is limited.
- It aims to address national security risks from foreign ownership and control of ICT and critical infrastructure companies. The goal is to authorize stricter prohibitions and divestment requirements for covered transactions and holdings.

In summary, The Restrict Act would significantly expand the government’s ability to block or mitigate foreign investment in US ICT companies that is deemed to pose national security risks. It reflects broader concerns about foreign influence in critical technology sectors.

3) Observations About CoCounsel’s and Claude’s Summary Functions

Both CoCounsel and Claude summarized the provisions of The RESTRICT Act, underscoring salient points applicable to proposed prohibitions on certain transactions. Each model reported results with efficiency. The speed of results from the Claude model was quicker than that of CoCounsel. The difference may be attributed to the selection of the CoCounsel Comprehensive Summary skill that reports an extensive page-by-page summary of the document for a comprehensive overview. Regardless of the speed of output, both generative AI models produced
results that would inform neutrals and enhance their specialized expertise, where stakeholders identify that “specialized/expert decision-making” is a top benefit of arbitration.\(^9\)

The CoCounsel report outlined in more specific detail the terms, requirements, and sanctions of The RESTRICT Act as those sections relate to information and communications technology products and services transactions. The proposed sanctions are relevant to the efficacy of arbitral processes. “Increasingly, US sanctions are giving rise to commercial disputes (many of which are subject to mandatory arbitration agreements) and even beginning to interfere with the smooth functioning of ongoing arbitration proceedings.”\(^10\)

ii. CoCounsel vs. ChatGPT-4: Summarizing and Analyzing

Here, we compare the abilities of CoCounsel and ChatGPT-4 when prompted to summarize and analyze a complex 15-page document, “Intellectual Property Cross-License Agreement,”\(^11\) dated June 30, 2023, which was selected at random for the test from the Edgar Archives.

The upload process for CoCounsel was simple and straightforward, unlike the upload process for ChatGPT-4, which was difficult and complex. OpenAI is working on that, but as of October 2023, they still have a long way to go. Here is a screenshot of the CoCounsel upload page. As you can see, they make it very easy.


We started by asking both CoCounsel and ChatGPT-4 to prepare a detailed summary of the License Agreement. As described above, the CoCounsel software offers a choice between a brief, detailed, or comprehensive summary of a document. ChatGPT-4 does not have such guidance, or limitation, depending how you look at it. You can ask anything about a document, once you finally get it uploaded.

Both AIs provided a good, detailed summary, but, in actuality, that was not too helpful for this document. We could skim the standard terms and conditions of the document manually in the same time and learn as much. It was mostly familiar boilerplate that we had seen many times before.

A shorter summary of a document would be more helpful for a busy attorney or arbitrator. So, next we asked CoCounsel for a Brief Summary. Here is the result:

This document is an Intellectual Property Cross-License Agreement between four companies. It defines key terms such as “Intellectual Property,” “Licensed IP,” “Licensee,” “SpinCo Field,” and “SpinCo Licensed IP.” The agreement outlines the license grants to SpinCo Licensee and Parent Licensee, as well as the rights and restrictions related to sublicensing, reservation of rights, and assignment of licensed IP. It also addresses intellectual property ownership, the prohibition against challenging ownership,
and the prosecution, maintenance, and enforcement of intellectual property rights. The agreement covers confidentiality, disclaimers of warranties, limitations of liability, and indemnification. It also outlines the term and termination of the agreement, and contains miscellaneous provisions such as the entire agreement clause, third-party beneficiaries, and notices.

We also prompted ChatGPT-4 for a brief summary. Here is the result:

The document is an “Intellectual Property Cross-License Agreement” dated June 30, 2023, involving multiple parties: BORGWARNER INC., DELPHI TECHNOLOGIES IP LIMITED, PHINIA TECHNOLOGIES, INC., and BORGWARNER LUXEMBOURG OPERATIONS S.A.R.L.

Key highlights:

1. **Definitions**: The agreement meticulously defines key terms such as “Affiliate,” “Confidential Information,” “Intellectual Property,” “Licensee,” and “Licensor,” among others.
2. **License Grants**: Both Parent Licensors and SpinCo Licensors grant nonexclusive, perpetual, nontransferable, sublicensable, worldwide, royalty-free licenses to operate in specific fields. The licenses are also bound by certain limitations.
3. **Sublicensing**: The agreement permits sublicensing under stringent conditions, including the protection of Confidential Information.
4. **Indemnification**: Both Parent and SpinCo parties are obligated to indemnify each other against losses arising from breaches of the agreement.
5. **Miscellaneous Provisions**: This section serves as a catch-all for various legal and procedural elements, including the entire agreement clause, third-party beneficiaries, and notices.
6. **Interlocking with Separation Agreement**: The document also refers to a separate “Separation Agreement,” and in the event of any conflict, the terms of this IP License Agreement will control.

The document is a comprehensive legal framework that outlines the scope, limitations, and responsibilities associated with intellectual property licensing between the involved parties. It also integrates terms from a separate “Separation Agreement,” making it a complex, interlocking legal document.

Would you like to delve into any other aspects?

The summary by ChatGPT-4 provided more information, but was still concise. We would give the edge this time to ChatGPT-4 over CoCounsel. Still, we do not think short summaries like this have much value for experienced practitioners, except perhaps for client consumption. Anyone with expertise in license agreements could dispense with this summary and jump right into the analysis—in the form of Q&A—about terms of the agreement of interest. Here, the AI summary and analysis abilities can be of real help.

To ask good questions, we needed to know more about the overall deal. We saw the license agreement was part of a larger corporate spin-off by BorgWarner.12 A quick Google search led to a business article with practical insights into the deal,13 which is the kind of information a lawyer and client would probably already have as a background to begin asking questions about

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12 The license agreement was part of SEC Form 10-12B, Filing Date: May 18, 2023, found at http://pdf.secdatabase.com/536/0001628280-23-018828.pdf. This Intellectual Property Cross-License Agreement is Exhibit 10.4 to the 10-12B Registration disclosure, and is found at http://pdf.secdatabase.com/536/0001628280-23-018828.pdf#%5B%7B%22num%22%3A307%2C%22gen%22%3A0%7D%2C%22name%22%3A%22XYZ%7D%2C%2C%751%2C%7D.

a document. We wanted our Q&A to be as realistic as possible. The article on the Phinia deal stated:

**BorgWarner (BWA)** will spin-off [sic] **PHINIA (PHIN)**, its Fuel Systems and Aftermarket segments, by the end of the day on July 3, 2023. To put it simply, the rationale for the spin-off is to shed exposure to internal combustion engines and increase exposure to electric vehicles. Borgwarner is on track to meet or exceed its will spin-off goal of 25% of revenue from EV by 2025. PHINIA end markets are perceived to be in secular decline.

With that background information, we could ask CoCounsel a useful test question, one that a practitioner might want to know in a transaction like this: “What information is specifically excluded from this assignment?” Here is the response.

**Trademarks, power electronics, improvements**

The document specifically excludes trademarks, service marks, trade dress, trade names, domain names, social media accounts or usernames, or other indicia of source or origin from the definition of “Intellectual Property” (pgs. 5,7), as well as power electronics applications for any electrified stationary applications or electrified mobility applications (pgs. 5,7). Additionally, improvements to the Licensed Parent IP or the Licensed SpinCo IP are not granted as part of this agreement (pg. 11), and any prior agreements or undertakings are superseded by this agreement (pg. 16).

We asked the same question of ChatGPT and received the following response.

The document contains several provisions that specify what is explicitly excluded or limited within the scope of the agreement. Here are some key points:

1. Third-Party Rights: The terms and conditions of the IP License Agreement, including the licenses granted,
are subject to any and all rights of and obligations owed to any third parties with respect to the Licensed IP under any contracts (Page 10-11).

2. No Other Rights or Obligations: Except as expressly set forth in the agreement, no right or license is granted, whether by implication, estoppel, or otherwise, under any intellectual property rights that any party or any of their affiliates may have (Page 11).

3. Limitation of Liability: Neither party nor any of its affiliates will be liable for any consequential, incidental, indirect, exemplary, special, punitive, or enhanced damages, or for any loss of actual or anticipated profits (Page 13-14).

4. Provision of Information: The agreement specifies that no licensor or its affiliates are required to provide any written, electronic, computerized, digital, or other tangible or intangible media that has already been provided to, or is in the possession of, the licensee or its affiliates (Page 10-11).

5. Assignment of Licensed IP: Any assignment of Licensed IP will include a transfer of any applicable license and similar contractual rights or permissions granted to the applicable licensee in this IP License Agreement (Page 10).

6. Relationship of the Parties: The agreement states that nothing contained creates any agency, partnership, joint venture, or other forms of joint enterprise, employment, or fiduciary relationship between the parties (Page 17-18).

These exclusions and limitations are crucial for understanding the scope and boundaries of the agreement, as they delineate the responsibilities and liabilities of each party involved. Would you like to delve into any other aspects?

Again, although both responses were good, and both provided references to the agreement page numbers, we thought ChatGPT-4’s response was more useful.
Finally, we asked what we thought was a key question for this deal, “Are hybrid vehicle parts covered by this agreement?” CoCounsel’s response:

No.

Hybrid vehicle parts are likely not covered by the agreement, as the agreement specifically excludes power electronics applications for any electrified mobility applications, which would include hybrid vehicles (pg. 7).

ChatGPT’s response to the same question:

The document explicitly states that power electronics applications for any electrified stationary applications or electrified mobility applications, including any hybrid vehicles, are excluded from the SpinCo Field (Page 7).

In essence, hybrid vehicle parts are not covered by this Intellectual Property Cross-License Agreement. This exclusion is significant as it delineates the scope of the agreement and clarifies that the licensing does not extend to hybrid vehicle technologies.

Would you like to explore further?

Again, we preferred ChatGPT-4’s answer, as it was more complete. Moreover, it did not qualify its answer to this straightforward question with the phrase “likely not covered.”

Overall, both CoCounsel and ChatGPT-4 perform admirably well in summarizing documents and providing analysis.

iii. A Note About Privacy

As using the document summary and analysis function of any of these tools involves uploading information, we want to address concerns about privacy. All three systems purport to protect the confidentiality of all documents submitted for analysis.

We are aware of many misconceptions that the paid version of ChatGPT offers no privacy protections, and we suspect those stem in part from conflating the free version of ChatGPT-3.5 and ChatGPT-4. Even in ChatGPT-4, however, the data control settings are off by default and must be turned on manually. Once
enabled, the privacy settings purport to provide for the auto-destruction of all information after 30 days and allow OpenAI to use the information only “when needed to monitor for abuse.” When history is turned off, as it should be for any legal work, you will see this notice in the upper left corner of your browser screen.

CoCounsel has privacy automatically engaged. According to Casetext, data input into CoCounsel is “never used to train the AI model. The model is accessed through dedicated, secure servers. Data is encrypted in transit and at rest, and never stored by our AI partner. Clients retain all rights to their data. Your data is only used by Casetext to serve the product to your users.”

Anthropic reports that Claude will only “use your prompts and conversations” if you give explicit permission, if they are “flagged for trust and safety review,” or “to improve [Claude’s] ability to detect and enforce Acceptable Use Policy violations, including to train Trust and Safety classifiers in order to make our services safer.” Anthropic also “retains your personal data

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15 CoCounsel, the First Legal Assistant: Security Overview, provided directly to the authors on May 9, 2023.

for as long as reasonably necessary for the purposes and criteria outlined in our Privacy Policy.”

Before uploading confidential data, we urge users to look into the privacy protections of the platform. We would not use any of these programs to summarize and ask questions about classified documents. But, for more standard confidential case documents, there are generative AI tools available that can satisfy many arbitrators’ and mediators’ privacy needs, especially when appropriate disclosures are made in advance.

2. Research

a. Research Applications

LLMs excel in combing and analyzing large quantities of data quickly—which, in the internet age, is the very essence of legal and factual research. Often, independent research is not a significant part of a neutral’s work, including because it is often not economical. When used prudently, AI helps solve that problem.

Although computerized legal research tools have assisted with legal research for years, generative AI is indeed a game changer. For example, AI’s concept-based search produces more thorough and often more targeted results than platforms that do only a search for specified keywords. The user can ask an initial question and follow-up questions, allowing her to engage in a conversation with the bot in the same way she would a law firm associate, honing the query as the thinking progresses.

For example, neutrals can use AI’s research function to explore the law on a particular topic in preparation for a mediation, as the parties’ mediation memoranda often do not brief all legal issues in detail. Where appropriate, arbitrators can review the legal contentions made in arbitration filings. And, though likely precluded in arbitrations, mediators can also use

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18 For purposes of this paper, the authors take no position on whether an arbitrator should or may conduct independent legal research.

19 See, e.g., American Arbitration Association Commercial Rule 36.
generative AI to verify the accuracy of claims or facts presented when publicly available information can be used to do so.

b. Platform Comparison: Legal Research

LLMs started off with something of a bad name in the context of legal research. Not only has there been prolific news coverage of the *Roberto Mata v. Avianca Inc.* lawyer’s reliance on fake cases, judges and others have expressed skepticism about the careless use of AI in litigation, while in general still encouraging its use. However, different AI platforms offer different guardrails relevant to legal research, including to reduce hallucinations. This section compares ChatGPT-4’s, Claude’s, and CoCounsel’s legal research functions.

i. ChatGPT-4’s Legal Research

As the *Avianca* filing exemplifies, ChatGPT-3’s answers to legal research questions, in these authors’ experience, often contained citations to and quotes from cases that the software had fabricated (hallucinated).

ChatGPT-4 has been updated to disclose its own limitations. For example, in response to the prompt “Which First Circuit cases address circulation of religious images in public schools?,” ChatGPT-4 responded:

> As of my last training data in January 2022, I cannot provide an exhaustive or up-to-date list of all First Circuit cases specifically addressing the circulation of religious images in public schools. The First Circuit, like other federal appellate

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20 Brandon Kimura, ChatGPT Ethics Case Summary, Blawg 401, August 11, 2023, https://blawg401.com/chatgpt-ethics-case-summary/#:~:text=One%20of%20the%20first%20cases,The%20plaintiff%20Mr.


courts, has certainly addressed First Amendment issues in the public school context.

If you are specifically interested in cases from the First Circuit on this topic, it would be best to consult a legal database like Westlaw or LexisNexis. These databases provide up-to-date and specific case law on such nuanced topics. Alternatively, reaching out to a legal professional or scholar familiar with First Amendment issues in the First Circuit might provide more detailed insights.

Remember, case law evolves, and new decisions can impact interpretations and precedents. Always ensure that the information you’re using is current and relevant to your specific context.

When we framed the question differently, however, ChatGPT-4 did perform legal research. In response to the prompt “Can New Hampshire public schools circulate religious imagery?,” GPT-4 offered a substantive response:

Public schools in the United States, including those in New Hampshire, are subject to the Establishment Clause of the First Amendment, which has been interpreted to

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23 If AI tools are adopted, training on how to properly construct prompts/queries and how to evaluate any results is necessary. Akin to Boolean searches that require some knowledge of how to construct a “good” search, AI tools require “good” prompts. One advantage of generative AI prompts and responses is that the tool has “thread” conversations. A person can ask clarifying questions. Users can ask the AI tool to clarify previous responses or ask the AI tool to customize the tone or persona of the response. Training on compliance with confidentiality concerns, as well as considerations involving bias is recommended. See Hon. Xavier Rodriguez, Artificial Intelligence (AI) and the Practice of Law, 24 Sedona Conf. 783 at 817-18 (Sept. 2023), https://thesedonaconference.org/sites/default/files/announcements/Artificial-Intelligence-and-the-Practice-of-Law-Xavier-Rodriguez_1.pdf. Jus Mundi offers training to arbitrators to educate themselves on how the tool works and its features, including Jus-AI. Part of the training includes the limitations of the tool and its benefits. See AI in Arbitration: Insights from Jus-AI’s Creators, Daily Jus, July 20, 2023, daily.jusconnect.com/in-conversation-with/2023/07/ai-in-arbitration-insights-from-jus-ais-creators.
mean that schools may not promote or endorse any particular religion. The Supreme Court has ruled that public schools cannot sponsor religious activities or symbolism because they are government institutions.

Circulating religious imagery, if it is part of a curriculum that is educational and not devotional in nature, such as in a world religions or art history class, might be permissible as long as it is presented in an objective, non-proselytizing manner. However, using religious imagery in a way that could be seen as promoting or endorsing a particular religion would likely be unconstitutional.

The precise legal boundaries can sometimes be complex and subject to interpretation, and local school policies may also provide additional guidance on these matters. It’s often best for school administrators to consult with legal counsel to ensure that they comply with the relevant constitutional and statutory requirements.

When we asked for the cases that informed ChatGPT-4’s answer, it identified and very cursorily described six of the United States Supreme Court’s Establishment Clause cases24 but then wrote, “If you need details or have a specific situation in mind, consulting legal experts or reviewing recent court decisions would be valuable.”

ii. Claude’s Legal Research

*User Prompt:* “Can New Hampshire public schools circulate religious imagery?”

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Response:

I do not have enough context to definitively answer whether public schools in New Hampshire can circulate religious imagery. However, I can provide some general information about the legality of religious imagery in U.S. public schools:

- The First Amendment of the U.S. Constitution prohibits the government from establishing an official religion. This is generally interpreted to mean that public schools cannot promote or endorse any particular religion.
- At the same time, the First Amendment protects private religious expression, including by students in public schools. So students are typically allowed to express their religious beliefs through things like clothing, jewelry, etc.
- Whether or not a public school can display religious imagery like crosses or nativity scenes is a complex issue that depends on the specific context and how the display is handled. Courts have ruled both for and against certain types of religious displays.
- In general, religious displays are more likely to be upheld if they have a clear secular purpose (like displaying art or celebrating a holiday), are initiated by students rather than school officials, and do not dominate the school setting. Displays that seem to endorse a particular religion are more vulnerable to legal challenge.

So in summary, while some religious expression is allowed in public schools, there are legal limits. Whether any particular religious image or display would be permissible in New Hampshire public schools would depend on the specific details of the situation. The school would need to be careful not to appear to be endorsing or promoting religion in a way that violates the First Amendment.
Definitive judgments require looking at the totality of the circumstances around the display.

When asked to cite its sources, Claude, like GPT-4, identified and briefly summarized United States Supreme Court cases.\textsuperscript{25}

iii. CoCounsel’s Legal Research

CoCounsel’s built-in database of case opinions includes all 50 states, the United States Supreme Court, Federal Circuit Courts, District Courts, Bankruptcy Courts, the Tax Court, administrative materials, and legal articles published by JD Supra.\textsuperscript{26}

When you click on the Legal Research Memo button, CoCounsel will ask you to “Explain your legal research request—using normal sentences like you would when talking to a colleague. Include as much relevant information for the search such as jurisdiction, background facts, and anything else that you feel is relevant to the query.” To ensure that it understands your query, CoCounsel will “interpret” your question and will in a few seconds give you its understanding of your legal research question. If CoCounsel has correctly understood your query, clicking the “Submit” button will cause CoCounsel to start processing your request. If there is an error or miscommunication between you and CoCounsel, you may return to your original question to add or subtract to it for clarity. CoCounsel will then re-interpret your request. There are filters by jurisdiction, date, and unpublished cases to narrow or expand the focus of your search.

Once your question has been submitted to CoCounsel, a progress window and completion appear. This function allows you to run another legal research request while the first one is processing or tend to other work, and when the first legal research memo is


\textsuperscript{26} Valerie McConnell, Which sources does CoCounsel search and review when generating a legal research memo?, Casetext, help.casetext.com/en/articles/7207127-which-sources-does-cocounsel-search-and-review-when-generating-a-legal-research-memo.
finished (usually) in two to three minutes or less, it will send you an email telling you that your legal research memo is complete. The output from CoCounsel will be a Microsoft Word document with hyperlinks to the actual case, statute, regulation, or court rule that is relevant to your query. Those hyperlinks allow the neutral to conduct all necessary diligence using primary authority rather than AI-generated text.

*User Prompt:* “Can New Hampshire public schools circulate religious imagery?”

*Response:*

*Answer*

There is no clear answer to whether public schools in New Hampshire can distribute materials containing religious imagery. However, several authorities suggest that such distribution may be permissible if it does not advance or inhibit religion, does not foster excessive entanglement between the school and religion, and is not calculated to favor any particular religious sect.

*Analysis*

Several cases and statutes provide guidance on the question of whether public schools in New Hampshire can distribute materials containing religious imagery. The most relevant authorities are the New Hampshire Revised Statutes sections 189:26 and 194-B:7, and the cases Opinion of the Justices, 307 A.2d 558 (N.H. 1973) and State v. Mack, 173 N.H. 793 (N.H. 2020).

Section 189:26 of the New Hampshire Revised Statutes prohibits public schools from introducing any book that favors a particular religious sect. This statute suggests that the distribution of religious imagery would be permissible as long as it does not favor one particular sect over another. Section 194-B:7 sets out the criteria for determining whether a chartered public school is secular or nonsecular, and prohibits schools from advancing or prohibiting religion, or fostering excessive entanglement...
between the school and religion. This statute also suggests that the distribution of religious imagery would be permissible as long as it does not violate these criteria.

The case Opinion of the Justices, 307 A.2d 558 (N.H. 1973) discusses the constitutionality of religious activities in public schools in New Hampshire. The court held that a law does not offend the First Amendment’s prohibition on enactments respecting an establishment of religion if it has a secular legislative purpose, does not principally advance or inhibit religion, and does not foster an excessive governmental entanglement with religion. This case suggests that the distribution of religious imagery in public schools would be permissible if it meets these criteria.

Finally, the case State v. Mack, 173 N.H. 793 (N.H. 2020) discusses the free exercise of religion under the New Hampshire Constitution. The court held that when religious practices violate a generally applicable law, the state constitution requires a balancing of competing interests. This case suggests that if the distribution of religious imagery in public schools is challenged, the court will need to balance the interests of the school against the interests of those challenging the distribution.

CoCounsel then summarized and linked directly to seven New Hampshire cases, two New Hampshire statutes, and an article, and CoCounsel described how each of these sources are relevant to the research inquiry. In this instance, CoCounsel did not ask whether we wanted to include federal as well as state law in our research. When we added “under federal law,” to the beginning

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of the prompt, CoCounsel provided a different answer, citing 11 First Circuit and 3 District of New Hampshire cases.\textsuperscript{28} It also identified with a red flag graphic that one of the cited cases had been reversed.

iv. Analysis of the Platform’s Legal Research Skill

Like ChatGPT and Claude themselves, we recognize the shortcomings of conducting legal research using a general-purpose AI tool that does not include current source material in its training. Not only did those platforms deliver much more generalized answers to legal research questions, but they also acknowledged that their information is out of date. CoCounsel, which specializes in legal research specifically, surpasses the other platforms in terms of the breadth and currentness of its legal databases, as well as its ability to parse legal questions more like a lawyer would, acknowledging, for example, the differences in jurisdictions and the hierarchy of courts. CoCounsel also Shepardizes its citations and links directly to the source material, thereby guarding against inaccuracies and hallucinations. We caution readers, however, that, when we specified a jurisdiction in the prompt rather than using the filters, CoCounsel myopically focused on opinions from that jurisdiction’s courts without acknowledging the relevance, for instance, of United States Supreme Court opinions.

\textsuperscript{28} In the order they appeared on CoCounsel: Freedom v. Hanover Sch. Dist., 626 F.3d 1 (1st Cir. 2010); Freedom from Religion Found. v. Hanover School, 665 F. Supp. 2d 58 (D.N.H. 2009); Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990); Local 8027 v. Frank Edelblut, Comm’r, 21-cv-1077-PB (D.N.H. Jan. 12, 2023); Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008); Carson v. Makin, 979 F.3d 21 (1st Cir. 2020); Asociación v. García, 490 F.3d 1 (1st Cir. 2007); Knights of Columbus, # 94 v. Town of Lexington, 272 F.3d 25 (1st Cir. 2001); Rojas v. Fitch, 127 F.3d 184 (1st Cir. 1997); Governor Wentworth Reg. School v. Hendrickson, 421 F. Supp. 2d 410 (D.N.H. 2006); Gary S. v. Manchester Sch. Dist., 374 F.3d 15 (1st Cir. 2004); Shurtleff v. City of Boston, 928 F.3d 166 (1st Cir. 2019); Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12 (1st Cir. 2020); Members of Jamestown Sch. Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983).
3. Document Generation

a. Document Generation Applications

In addition to analyzing complex texts for the purpose of summarization, analysis, or research, today’s generative AI platforms can assist professionals, including arbitrators and mediators, in creating and editing documents. ChatGPT and Claude are two notable examples of LLMs designed to aid in drafting legal content. They can generate human-like text in response to user queries, sometimes incorporating information provided by the user. Moreover, these tools can refine their outputs based on user feedback.

ChatGPT and Claude can generate text in response to a prompt or a question by a user, sometimes based on documents, images, or other information provided by the user. ChatGPT and Claude can also iterate on the content they have generated based on feedback from the user.

Using LLMs such as ChatGPT and Claude for drafting legal documents presents several advantages, including:

- Time and Resource Efficiency: LLMs can swiftly generate text that resembles human-written content. This can substantially reduce the time spent on research, writing, editing, and proofreading of legal documents.
- Enhanced Creativity and Innovation: LLMs can generate diverse, relevant, and novel text, which can foster fresh ideas, perspectives, and arguments that might otherwise remain unexplored.
- Improved Quality and Consistency: LLMs produce coherent, fluent, and grammatically correct text, mitigating errors, inconsistencies, and ambiguities in legal documents.

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29 As of the date of this article, CoCounsel did not offer a drafting function.
However, employing LLMs for legal drafting also comes with specific challenges, which include:

- **Ensuring Accuracy and Reliability:** LLMs, while powerful, are not infallible. They can generate inaccuracies, outdated information, invent facts or cases, or misinterpret user input. Therefore, users must cross-verify content generated by LLMs with credible sources and seek expert input.
- **Maintaining Ethical Standards and Professional Responsibility:** LLMs are not bound by ethical codes or professional regulations, and they lack moral or legal obligations. Users must exercise their judgment and discretion when using LLMs, ensuring compliance with data protection, confidentiality, intellectual property rights, plagiarism, and disclosure laws and regulations.
- **Managing Expectations and Limitations:** LLMs are tools that augment human capabilities, not substitutes for human lawyers. Users should not solely rely on LLMs for drafting legal documents and should employ their own knowledge, skills, experience, and intuition. Users must also be aware of LLM limitations, including data sources, training methods, time constraints, and domain specificity.

As applied to arbitration and mediation, the potential use cases for generative AI as a drafting tool are practically unlimited. They include:

- **Drafting arbitration agreements and mediation clauses in contracts.** AI tools can help generate customized language based on industry standards and best practices.
- **Preparing mediation statements and arbitration pleadings.** AI tools can analyze case facts and legal issues, and produce draft documents outlining each party’s positions and arguments serving as a starting point for lawyers to refine.
- **Drafting procedural orders and case management plans.** LLMs can generate standard formats for
procedural orders based on prompts about the number of parties, issues in dispute, deadlines, etc.

- Drafting settlement agreements and arbitration awards. LLMs can facilitate the creation of initial drafts of straightforward settlements or uncontested arbitration awards based on terms provided.
- Automating parts of mediation briefs and letters. LLMs can generate standard sections in mediation briefs, such as recitals and reservations of rights.
- Producing first drafts of form documents. When standard contracts, agreements, or correspondence are needed, LLMs can produce a draft using templates and key case details.

b. Platform Comparison: Document Generation

Here are examples of drafting exercises we explored using ChatGPT-4 and Claude:

**User Prompt:** You are an attorney asked to draft an arbitration clause to be included in a contract between a Massachusetts software company and a New York investment bank. The parties wish the clause to invoke the Commercial Rules of the American Arbitration Association, and to cover the issues of the venue for the arbitration, a pre-arbitration mediation requirement, a reasonable time limit for completion of the arbitration, and reasonable discovery limitations. Please draft the arbitration clause.

**ChatGPT 4 Response:**

Here is a possible arbitration clause that meets the requirements of the parties:

**Arbitration Clause**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of
the American Arbitration Association (the “AAA Rules”) in effect on the date of this contract, except as modified herein.

The place of arbitration shall be Boston, Massachusetts, unless the parties agree otherwise in writing.

Before initiating arbitration, the parties shall attempt to resolve their dispute amicably through mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. Either party may commence mediation by providing to the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with the American Arbitration Association and with one another in selecting a mediator from the American Arbitration Association’s panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.

If the dispute is not resolved within 60 days after the request for mediation, either party may initiate arbitration by filing a notice of arbitration with the American Arbitration Association and serving a copy on the other party. The notice of arbitration shall include a statement of the claim, the relief sought, and the names and contact information of the parties.

The arbitration shall be conducted by one arbitrator, unless the amount in dispute exceeds $1,000,000, in which case three arbitrators shall be appointed. If one arbitrator is to be appointed, the parties shall endeavor to agree on the arbitrator within 15 days after receipt of the notice of arbitration. If three arbitrators are to be appointed, each party shall appoint one arbitrator within 15 days after receipt of the notice of arbitration, and the two party-appointed arbitrators shall appoint the third arbitrator within 15 days thereafter. If a party fails to appoint an arbitrator within the specified time limit, or if the two party-appointed arbitrators fail to appoint the third arbitrator within the specified time limit, the American Arbitration Association shall appoint the arbitrator.
The arbitrator(s) shall decide the dispute in accordance with the substantive law of New York, without regard to its conflict of laws rules.

The arbitration shall be completed within six months after the appointment of the arbitrator(s), unless otherwise agreed by the parties or extended by the arbitrator(s) for good cause.

The discovery in the arbitration shall be limited to document production and depositions of no more than three witnesses per party, unless otherwise agreed by the parties or ordered by the arbitrator(s) for good cause.

The award of the arbitrator(s) shall be final and binding on the parties, and may be entered and enforced in any court having jurisdiction. The award shall state the reasons for the decision and apportion the costs of arbitration between the parties. The prevailing party in any arbitration or judicial proceeding arising out of or relating to this contract shall be entitled to recover its reasonable attorneys’ fees and expenses from the other party.

*Claude Response:*

Here is a draft arbitration clause for the Massachusetts software company and New York investment bank:

Arbitration. Any dispute arising out of or relating to this Agreement shall be submitted to binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties agree to first attempt mediation prior to initiating arbitration. The mediation shall take place in Boston, Massachusetts and shall conclude within 30 days of initiation unless extended by mutual written agreement. If mediation does not resolve the dispute, the arbitration shall take place in New York, New York. Discovery shall be limited to the request and production of documents directly relevant to the dispute, along with no more than two depositions per party, each lasting no more than four hours. The arbitrator shall issue a final award within 120 days of the initiation of arbitration unless this time is extended by mutual written agreement. The arbitrator shall have
authority to award compensatory damages only and shall not award punitive or exemplary damages. The arbitrator shall have no authority to award provisional remedies of any nature including, but not limited to, injunctive relief. Any award rendered shall be final and binding upon the parties. Judgment upon the award may be entered in any court having jurisdiction.

A second example:

*User Prompt:* You are a mediator who has been asked to provide the parties with an opinion on the merits of a dispute between a copywriter and her employer over ownership of an article written by the copywriter. The article was written at 10:00 p.m., after work hours, on her work computer. The article has some relevance to the business of the employer, but would never be published by the employer. Please advise the parties of your view on ownership of the article.

*ChatGPT-4 Response:*

Thank you for choosing me as your mediator. I have reviewed the facts of your dispute and searched the web for relevant information on the topic of work made for hire. Based on my research, I have formed an opinion on the merits of your case, which I will share with you below.

The main issue in your dispute is whether the article written by the copywriter is a work made for hire or not. If it is, then the employer owns the copyright in the article. If it is not, then the copywriter owns it.

According to the definition of work made for hire in the U.S. Copyright Act, a work is a work made for hire in two situations:

- When it is created by an employee as part of the employee’s regular duties
- When a certain type of work is created as a result of an express written agreement between the creator and a party specially ordering or commissioning it
In your case, the second situation does not apply, as there is no evidence of any written agreement between the copywriter and the employer regarding the article. Therefore, the only question is whether the article was created by the employee as part of her regular duties.

This question is not easy to answer, as it depends on various factors, such as the nature of the employment relationship, the scope of the employee’s duties, the level of control and direction exercised by the employer over the employee’s work, and the intent of the parties. [Links omitted]

Based on the information you provided, I think that there are arguments for both sides. On one hand, the employer could argue that the article was created by the employee within the scope of her employment, because:

- The article was written on her work computer, which implies that she used the employer’s resources and equipment to create it
- The article has some relevance to the business of the employer, which implies that she used her skills and knowledge acquired from her employment to create it
- The article was written during a time period that could be considered part of her regular work hours, depending on her schedule and expectations

On the other hand, the copywriter could argue that the article was not created by her within the scope of her employment, because:

- The article was written after her normal work hours, which implies that she did not create it as part of her assigned tasks or projects
- The article would never be published by the employer, which implies that she did not create it for the benefit or use of the employer
- The article was written for her own personal interest and expression, which implies that she did not create it under the control or direction of the employer
In my opinion, based on these arguments and facts, I think that the copywriter has a stronger case than the employer. I think that the article is not a work made for hire, because it does not meet the criteria of being created by an employee as part of her regular duties. Therefore, I think that the copywriter owns the copyright in the article.

However, this is only my opinion and not a legal advice. You should consult with a qualified attorney if you want to pursue this matter further. I hope that this opinion helps you resolve your dispute amicably and fairly. Thank you for your cooperation and trust.

Claude Response:

Dear Parties,

As the mediator in this dispute over ownership of the article written by the copywriter, here is my opinion on the merits based on the facts provided:

While the article was written after work hours, it was done so on the employer’s computer with resources provided by the employer. However, the article has little relevance to the employer’s business and would likely never be published by the employer.

The general rule is that works created by an employee within the scope of employment belong to the employer. But here, since the article was written after hours on a matter unrelated to the employer’s business, there is a stronger argument that the copywriter herself owns the copyright to the article, not the employer.

My recommendation would be to consider a compromise—the copywriter maintains copyright ownership of the article, but grants the employer a limited license to use portions of the article for internal purposes only. This allows both parties to benefit from the work product to some degree.

I hope this assessment of the merits provides a reasonable middle ground to resolve this dispute. Please let
me know if you have any other questions as we continue the mediation process.

In both examples, ChatGPT-4 excels in providing nuanced and in-depth responses, offering users a comprehensive understanding of the legal issues with links to sources. Claude, on the other hand, provides more concise responses, focusing on practical solutions. The choice between the two depends on the user’s specific needs and preferences.

**Future Uses**

As new generative AI tools are developed and the existing ones learn and grow, we foresee additional uses in arbitration and mediation. While possibilities abound, we identify a few here.

1. Judicial and Arbitral Decision Making

The hot topic in the arbitration world is whether generative AI will replace arbitrators as decision-makers. For years, companies like eBay have used learning computer systems to resolve disputes online. But, with the proliferation of LLMs, computers can digest large quantities of information rapidly and either suggest or predict the outcome of a dispute. Although we are not aware of a court or ADR institution that designates AI as the final decision maker, the technology is evolving rapidly.

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31 Automated Justice: Use of AI in the Resolution of Disputes, Tilleke & Gibbons, July 11, 2023, https://www.tilleke.com/insights/automated-justice-use-of-ai-in-the-resolution-of-disputes/ (“For now, there are few, if any, courts that use automated decision making. However, the use of AI to assist judges is not uncommon. In the US, many courts use the COMPAS system to help determine criminal sentences, a practice that has been upheld by the Wisconsin Supreme Court. Malaysian courts have experimented with similar AI systems. More recently, judges in Colombia and Pakistan have used ChatGPT to assist with preparing judgments. By far the most advanced case
For example, certain AI tools predict what a particular judge would decide or propose a decision for the arbitrator. Pre/Dicta, which launched in 2022, is a predictive litigation analytics tool “that looks for patterns in a judge’s past decisions and potential areas of bias, using around 120 data points.” According to Pre/Dicta’s CEO, the tool can predict how a judge will rule with 86% accuracy. Bridget McCormick, president and CEO of the American Arbitration Association, has commented that information tools like Pre/Dicta’s are most useful to parties “trying to decide whether to litigate at all, as opposed to arbitrate or mediate.”

Other AI tools are tailored for arbitration but are currently targeted at advocates rather than neutrals. In June 2023, Jus Mundi launched a beta version of “Jus-AI,” its AI-powered arbitration intelligence tool. The tool “is aimed at providing concise summaries from arbitral awards and court judgments,” and “interpret[s] specific provisions of arbitration rules by verifying the legal reasoning of thousands of arbitrators, counsel, and experts.” “The International Centre for Dispute Resolution, the international division of the American Arbitration Association, and Jus Mundi united to make non-confidential ICDR international arbitration awards freely available to the global legal and business community,” which could invite their use as training materials for Jus-AI and other arbitration-focused AI tools.

study is China, where AI is used in a number of ‘smart courts’ to automate transcription, analyze evidence, recommend decisions, and monitor the consistency of judgments with past case law.”

33 Id.
34 Id.
36 Legal Intelligence Powered by AI Technology, Jus Mundi, jusmundi.com/en.
The available data is more limited for commercial arbitrations, which are generally confidential. Arbitration practitioners, nevertheless, still expect the use of AI tools to rise in the coming years, depending on more “initiatives to publish a greater number of commercial arbitration awards and related materials (with or without redaction/anonymization).”

While predictive analysis tools are generally directed at advocates, they may “enable arbitrators to predict the possible factual outcomes of their awards, based on historical cases and jurisprudential data. Simply put, ChatGPT can predict the chances of an award being annulled, denied enforcement or voluntarily complied with, which, in turn can allow arbitrators to draft their awards in such a way, so as to ensure their longevity.”

The same tools that currently review large quantities of past judicial and arbitral decisions to evaluate or predict decisions could eventually become the deciders. While that reality may seem far off, we anticipate that automated decision makers will be available shortly to provide first-cut, appealable resolutions in disputes with lower amounts in controversy.

2. Augmenting Information Provided to the Neutral

ChatGPT-4 suggests that, as generative AI technology evolves, it can assist arbitrators and mediators by providing the following types of information that might not be otherwise available:

- Emotion Analysis: By analyzing voice tones, word choices, or facial expressions during hearings or sessions, AI could provide insights into parties’ emotional

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38 Bizikova, supra note 35.

states, aiding neutrals in navigating discussions more effectively.

- Automated Fact-Checking: In real time, AI could verify claims or facts presented during proceedings against a vast database of information, ensuring the accuracy of presented data.
- Predictive Behavior Analysis: Based on historical data and behavioral patterns, AI could predict the likely responses of parties to certain resolutions or decisions, allowing arbitrators and mediators to strategize their approaches.40

Conclusion

Machines are not ready to assume sole responsibility for legal analysis, decision-making, or dispute resolution functions. However, they can adroitly support arbitrators and mediators who are well informed about the technology’s strengths and potential pitfalls. As we look to the future, we see the potential for even more transformative and disruptive applications. These advancements, while promising, should be approached with judicious balance, ensuring that the essence of human judgment, empathy, and ethics remain paramount in arbitration and mediation. As we stride into this AI-augmented future, the arbitrator or mediator is not diminished but rather enhanced, equipped with a richer toolkit to better serve the evolving needs of parties in dispute.

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40 ChatGPT-4’s excerpted response to the October 30, 2023, prompt: “As generative AI evolves, what are some of the future, cutting-edge ways arbitrators and mediators could use it?”
Top 10 Issues in Arbitration Clauses in Singapore and Hong Kong

Paul Tan, Alex Wong, Jonathan T.R. Lai, and Viraen Vaswani

In this article, the authors consider the top 10 issues regarding arbitration clauses that arise nowadays, and the extent to which the courts of Singapore or Hong Kong have dealt with them.

International transactions with Asian parties using arbitration as their preferred mode of dispute resolution continue to rise. In recent years, U.S. and European counterparties feature among the most frequent users of Singapore and Hong Kong as seats of arbitration.

Singapore and Hong Kong are regarded as two leading, pro-arbitration seats for international arbitration. As commercial transactions become more complex, parties have been seeking variations to the standard model arbitration clause to fit the specifics of their transactional requirements. No longer “midnight clauses,” arbitration agreements deserve attention and scrutiny by parties because they can greatly influence how a dispute could unfold.

This article considers the top 10 issues regarding arbitration clauses that arise nowadays, and the extent to which the courts of Singapore or Hong Kong have dealt with them.

1 The authors, attorneys with Gibson, Dunn & Crutcher LLP, may be contacted at ptan@gibsondunn.com, awong@gibsondunn.com, jlai@gibson dunn.com, and vvaswani@gibsondunn.com, respectively.
Issue 1: Are Optional or Asymmetrical Clauses Enforceable?

Summary: Yes.

Both Singapore and Hong Kong have confirmed that optional arbitration clauses (giving parties the option, not obligation, to arbitrate their disputes), and asymmetrical arbitration clauses (entitling only one party the right to refer the dispute to arbitration) are enforceable. A lack of mutuality in obligations per se does not render the clause unenforceable.

In an optional clause, it is advisable to stipulate whether the other party is bound by the other party’s choice (i.e., whether the first mover dictates the forum).

In an asymmetrical clause, it is advisable to stipulate a process (e.g., written notice of a dispute arising) that would trigger a longstop date by which the party holding the right to refer the dispute to arbitration has to exercise or forfeit it.

Issue 2: Are Pre-Arbitration Requirements (a) Enforceable, and (b) Treated as a Question of Admissibility or Jurisdiction?

Summary: Yes, pre-arbitration requirements are enforceable. Singapore and Hong Kong take different positions on whether such questions are treated as going to admissibility or jurisdiction.

Pre-arbitration requirements or arb-med-arb protocols or multi-tiered dispute resolution clauses are enforceable. The stringency with which such clauses will be enforced depends on the language used. Where clear obligations are imposed and expressed as mandatory, the court will require full and not merely substantial compliance.

A party’s failure to adhere to conditions precedent to the arbitration is currently viewed as a matter going to admissibility under Hong Kong law such that it is only for the tribunal to decide
if the preconditions are met, and if not, to decide whether to stay proceedings pending satisfaction of those conditions.

Singapore law is not settled on this but there is authority suggesting that the tribunal lacks jurisdiction to proceed if the preconditions are not met. A party that disagrees whether the preconditions are satisfied may challenge jurisdiction before the tribunal and ultimately in court.

**Issue 3: Can Parties Mix and Match Institutions and Arbitral Rules?**

*Summary*: Possible; not advisable.

Only Singapore law has confirmed that a clause mixing institutions (e.g., ICC rules administered by the SIAC) and their arbitral rules can be enforced. However, this is not advisable and institutions like the ICC have now stipulated in their rules that only they can administer their own rules.

**Issue 4: Are There Presumptions Relating to Parties’ Choice of the Law Governing the Arbitration Agreement?**

*Summary*: Yes; recommend stating the law governing the arbitration agreement.

The law governing the main contractual obligations of the parties is, in principle, distinct from the law governing the arbitration, which in turn need not follow the law of the seat (i.e., the procedural law).

Most contracts will at least stipulate the law governing the contract, and by the choice of the seat, they will have chosen the procedural law.

However, many contracts remain silent on the law governing the arbitration agreement itself (possibly on the assumption that the law governing the contract governs the arbitration agreement
as well). This has spawned a series of cases. It is advisable to specifically stipulate the law that parties desire to govern the arbitration agreement (which affects validity and interpretation).

In the absence of an express choice, the court will examine whether there is an implied choice of law. There is a presumption that the law governing the main contract governs the arbitration agreement. That presumption can be displaced by (1) the terms of the arbitration agreement, or (2) whether the effectiveness and validity of the arbitration agreement would be impacted by applying the presumption.

In the absence of an express or implied choice, the system of law that has the closest and most real connection to the arbitration agreement will govern.

It should be noted that this test follows the English position, which is about to be changed by statutory reform such that the law of the arbitration agreement will be presumed to follow the law of the seat. It remains to be seen whether the Singapore or Hong Kong courts adopt the new English position.

**Issue 5: Can the Allocation of Costs and Interest Be Dealt with by Agreement, Including the Costs of Third-Party Funding?**

*Summary:* Yes.

The allocation of costs and interest is a matter for the tribunal and the courts would not generally interfere in their award. The default rule in both jurisdictions is that costs follow the event. Parties may agree for each party to bear their own costs. Unlike in England, there is no statutory prohibition in Singapore and Hong Kong against allocating all the costs to one party regardless the outcome.

Tribunals tend to award pre-award interest on a compounded basis to compensate the claimant for being out of the money, and post-award interest based on the prevailing statutory rate. Parties may also wish to stipulate whether and at what rate interest should apply.
Third-party funding is permitted in Singapore and Hong Kong for international arbitrations. There is no reason in principle why the costs of third-party funding cannot be awarded to the successful claimant and tribunals have allowed this. To avoid any dispute, parties may stipulate the tribunal may award such costs.


*Summary:* Yes, parties can carve out issues for judicial determination, but no, parties may not appeal questions of law.

The scope of the arbitration clause is a matter for agreement by parties, and it can be as wide or narrow as parties deem appropriate. This means it is possible to carve out certain issues for judicial determination. This could be useful to obtain a ruling on a certain definition or clause that parties might be using across multiple contracts, or a standard term.

However, neither Hong Kong nor Singapore permits appeals on issues of law if otherwise those questions are referable to arbitration.

It is unclear whether parties can agree to refer certain issues to an “appellate tribunal,” which some industry arbitration rules provide for. How such agreements square with the legislation in Singapore and Hong Kong remains untested.

**Issue 7: Can Parties Address Multiparty or Consolidation Issues by Agreement?**

*Summary:* With great caution.

Depending on the arbitral rules adopted, there may be default provisions as to the process to be undertaken in a multiparty or consolidated arbitration. The most important of which is that the original parties may not be able to appoint their own arbitrators.
It could be possible for parties to stipulate that the “anchor” parties get their choice of arbitrator. But this could raise issues of due process and equality. This explains why most institutional rules provide, e.g., that where a party is joined, the tribunal is then appointed only by the institution and not the parties, or that if there are multiple claimants or respondents, they have to agree on their arbitrator or the institution will appoint the arbitrators.

What can be useful is an express provision stipulating that parties agree that disputes arising out of a defined group of contracts are to be capable of consolidation and/or that parties to the defined group of contracts agree to be joined in any such proceedings.

**Issue 8: Can Parties Agree on Expedition?**

*Summary:* Yes.

It is possible for parties to stipulate that their arbitration should be conducted in accordance with the expedited rules of the institution, or simply that the arbitration is conducted and completed within a defined period of time.

Conversely, parties may stipulate that their arbitration will not be expedited even if it may qualify for expedition under the relevant rules.

**Issue 9: Should Parties Pay Attention to Questions of Arbitrability?**

*Summary:* Yes; ensure the disputed subject matter is arbitrable under laws of the arbitration agreement and the seat.

Typically, the law governing the arbitration agreement determines whether the dispute is arbitrable. This could be a trap for the unwary, and makes the choice of the law governing the arbitration agreement important (see above).

The Singapore courts have recently ruled that at the pre-award stage, a dispute cannot be referred to arbitration if it is
not arbitrable by both the law of the arbitration agreement and the law of the seat. Thus, while the choice of a “safe” seat like Singapore or Hong Kong should avoid most arbitrability issues, advice should be taken in relation to whether the governing law of the contract would regard any potential dispute as not being arbitrable.

In the commercial context, the question of arbitrability often arises when the dispute involves the validity of intellectual property rights and minority oppression claims.

**Issue 10: Can Parties Choose Their Supervisory Court?**

*Summary:* Yes, in Singapore.

In Singapore, the default supervisory court is the General Division of the High Court. However, parties may choose the Singapore International Commercial Court as their supervisory court.

In Hong Kong–seated arbitrations, the Hong Kong courts (specifically the Court of First Instance) will be the court of supervisory jurisdiction.

**Conclusion**

Notwithstanding the permutations open to parties to create bespoke arbitration agreements, one must be careful not to add unnecessary complexity. While some variations can be useful (e.g., provisions on costs and interest), one counterpoint to balance is that the further an agreement deviates from the standard model clause, the more opportunities a recalcitrant respondent may have to raise arguments challenging jurisdiction or admissibility.
Honest Abe and ADR

Dennis J. Curran and Emma Kingdon

Abraham Lincoln’s 25-year legal career dwarfed his four years as president. Many of the talents he exhibited as president—his strong sense of moral duty and a commitment to conciliation, whenever possible—were cultivated as a lawyer. Lincoln may not have known the term “ADR,” but he certainly understood and captured its essence. He had a deep and intuitive understanding that lawsuits can stir up the worst in people, pit neighbor against neighbor, divide families, and splinter whole communities. He discerned the advantages of a negotiated settlement. His legal career is replete with intriguing examples of creative dispute resolution.

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.2

Abraham Lincoln assumed the presidency on the eve of this nation’s darkest hour, earning much renown—bestowed

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posthumously and enhanced over time—for his courage and strong sense of moral duty during that tumultuous period. It was his commitment to unity and a lasting peace that landed Lincoln in the pantheon and cemented his legacy as, perhaps, our greatest President.

Lincoln’s commitment to conciliation while President—whenever possible—was a characteristic he largely cultivated as a formidable trial attorney, a span that dwarfed his time as President. In total, Lincoln spent 40 percent of his life as a lawyer, but only 10 percent in elected political office. It was during the former that he honed his skills at compromise and developed a keen ability to forge alliances among individuals and factions of competing egos, interests, and agendas.³

Lincoln would be repulsed by today’s legal landscape: “scorched earth” litigation tactics, a win-at-all-costs attitude, and a lack of civility masquerading as the practice of law. Instead, we would do well to remember Lincoln’s life—particularly his career as a lawyer—as an enduring lesson in decency and civility, as well as his deep and intuitive understanding that lawsuits can stir up the worst in people, pit neighbor against neighbor, divide families, and splinter whole communities.

Lincoln’s Legal Career

Four significant points emerge when examining Lincoln’s legal career. First, Lincoln employed and advocated for alternative dispute resolution (ADR) more than 150 years ago. Second, as a lawyer, Lincoln encouraged the peaceful resolution of disputes by not charging his clients for cases that settled on the courthouse steps. Third, Lincoln was such a proponent of non-adversarial settlement that he wrote a speech intended for

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³ Team of Rivals: The Political Genius of Abraham Lincoln, by Doris Kearns Goodwin, brilliantly illustrates Lincoln’s capacity to forge alliances among the unlikeliest of allies—disgruntled presidential candidates—in a single-minded determination to marshal their talents to preserve the Union and win the war.
lawyers that actually *discouraged* litigation.4 Lastly, Lincoln’s personal and professional life demonstrated a profound sense of morality and justice, evidenced not only by his significant acts as President, but also by his commitment to resolve disputes through non-adversarial means as a lawyer.

Although the acronym “ADR” came about over a century after Lincoln’s death, the practice among civil litigators of resorting to ADR, through such tools as mediation or arbitration, was well established among the American Bar before the Civil War. In fact, Abraham Lincoln’s law practice appears to have embraced a non-adversarial strategy.

Guy C. Fraker’s detailed study of Lincoln’s legal career in *Lincoln’s Ladder to the Presidency: The Eighth Judicial Circuit*5 reveals that Lincoln, a respected trial lawyer, actively assumed the role of peacemaker, mediator, and settler of lawsuits according to his caseload demands. Between 1836 (when Lincoln began to practice law) and 1860 (when Lincoln ceased his practice to assume the presidency), he was involved in over 5,000 legal matters in Illinois’ state and federal courts.6 Nearly half of those cases involved suits for debt, while the remainder dealt predominantly with slander; title to land; minor tort claims; and, most lucratively, railroad litigation.7 About 33 percent of Lincoln’s cases were dismissed, most of them because they settled.8 Thus,

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4 Historians cannot confirm whether this speech was ever given, but do confirm that these were Lincoln’s words. Michelle A. Krowl, Civil War and Reconstruction Specialist, Lecture at the 18th Annual Lincoln Forum: Lincoln Treasures at the Library of Congress: A Virtual Tour (Nov. 17, 2013).


6 Frank J. Williams, *Judging Lincoln* 100 (S. Ill. Univ. Press 2007). Supreme Court Chief Justice Williams (ret.), perhaps inspired by Lincoln’s lead, established the highly successful Rhode Island Supreme Court Appellate Mediation Program in Providence, Rhode Island. Nine retired judges serve at no cost to the public.


8 Billings, supra note 7, at 257.
Lincoln settled over 1,600 cases in the course of his career and plainly championed compromise as an alternative to trial.

**Lincoln as Judge**

Less known about Lincoln is that he served as a judge. In frontier Illinois, when the Circuit Court Judge was unavailable, he would appoint a lawyer to serve in his stead. Judge David Davis, serving as the Circuit Court Judge during Lincoln’s time, chose Lincoln to attend to his judicial duties whenever he could not—a privilege that never extended to any of the other 20 available attorneys. As judge, Lincoln presided over 256 cases. That breadth of experience and perspective undoubtedly shaped Lincoln’s understanding of the human condition, complicated by all its imperfections, frailties, and vulnerabilities.

**Lincoln as Peacemaker**

The Illinois of Lincoln’s day was a gritty frontier, having only achieved statehood in 1818. Lincoln lived in the state capital, Springfield, in central Illinois “where the state’s talented and aggressive entrepreneurs and developers lived, as well as its most influential politicians, presenting at once a place of opportunity and possibility.” Chicago, by comparison, was but a glint at the

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9 An analysis of the Illinois Eighth Circuit judges’ dockets discloses that Lincoln sat for at least 256 cases in Judge Davis’ stead. In 1854, Lincoln’s handwriting appeared on the docket for three cases. In 1856, Lincoln sat for 46 cases. By 1857, Lincoln took Judge Davis’ place on the bench for 138 cases. In 1858 and 1859, Lincoln sat for 35 and 34 cases, respectively. John J. Duff, A. Lincoln Prairie Lawyer, 298–99. See also Frank J. Williams, Chief Justice (ret.), R.I. Supreme Court, Address to Massachusetts’ Worcester County Judges and Bar Association (Feb. 18, 2011) and to Middlesex County Superior Court Judges and staff. (May 17, 2013).

10 Fraker, supra note 5, at 10-11. For example, as Fraker’s meticulous research discloses, the Eighth Judicial Circuit (in which Springfield was located and Lincoln practiced law) “covered fifteen, then fourteen, counties. The population of these counties in 1840 was 69,100 (Cook County, which
time. Central Illinois was an environment in which there was extensive interaction between lawyers and their clients before, during, and even after a legal transaction. In his milieu, Lincoln understood both the social and economic costs of a lawsuit as well as the turmoil it could foment. The identification of these costs likely led him to embrace mediation as a way to settle disputes in a manner agreeable to all parties involved and, in so doing, maintain community harmony.\footnote{11} Lincoln “was in his element while handling lawsuits based on local disputes; the locality of these disputes favored mediation and compromise.”\footnote{12} His profound awareness and understanding of social needs allowed him to advance his strong commitment to peaceful settlement, for he recognized that non-adversarial dispute resolution led to the best outcome for all affected by the conflict.

Lincoln’s first case as a lawyer, in particular, reflected this critical awareness as well as Lincoln’s willingness, even early in his career, to mediate.\footnote{13} Lincoln and John T. Stuart, his mentor at the time (Lincoln was not yet licensed as a lawyer), represented David Wooldridge, the defendant in a series of cases brought by James P. Hawthorn.\footnote{14} Wooldridge and Hawthorn were both farmers, but by the summer of 1836, their relationship had deteriorated to the point that Hawthorn sued Wooldridge for trespass, personal injuries, and trespass \textit{vi et armis}. Hawthorn also filed a replevin action against Wooldridge, asking for the return of one yoke of steers and a prairie plough that he claimed Wooldridge had wrongfully detained. This raised the total value of the claims against Wooldridge to $700.00. A jury found Wooldridge liable in Hawthorn’s personal injury lawsuit, but limited damages to $36.00. Five months later, Hawthorn and Wooldridge agreed to dismiss all three remaining lawsuits and split the court costs:


\footnote{12} Id. at 102.

\footnote{13} Id. at 75.

\footnote{14} Id.
Wooldridge paying court costs in one case, Hawthorn in the other, and each party splitting the costs in the last suit. The settlement and division of costs in Lincoln’s first case marks the starting point of his community-oriented practice.\textsuperscript{15}

Formative to Lincoln’s disposition was his own hardscrabble existence as a farmer, Mississippi River flat-boatman, and manager of a general store. These roles endowed him with insight into human nature and argumentation. “He learned the important lesson that there are at least two sides to every controversy, that there is usually some merit on each side of every dispute . . . He had acquired a knowledge of men by means of which he understood the motives of the [human condition].”\textsuperscript{16} Contemporaries described Lincoln as follows:

[S]omeone who felt too much; historians would attribute this to a difficult childhood and his innate ability to empathize with other people. He possessed an extraordinary empathy, the gift or curse of putting himself in the place of another to experience what they were feeling, to understand their motives and desires.\textsuperscript{17}

Engrained in Lincoln, therefore, was a faith in the worth and fundamental goodness of people as well as a profound respect for a nation where ordinary people might control their own destiny.\textsuperscript{18}

The futility of anger, which he ascertained at a young age, imbued Lincoln with this faith. Having lost his mother as a child, Lincoln taught himself to resist antagonistic feelings, to steer clear of quarrels, and to scarcely harbor resentment.\textsuperscript{19} In his Second Inaugural Address, Lincoln outlined his own personal

\begin{footnotes}
\item[15] Id. at 76.
\item[16] John T. Richards, Abraham Lincoln, the Lawyer-Statesman 88 (Houghton-Mifflin Co. 1916).
\item[19] Williams, supra note 6, at 28.
\end{footnotes}
code of conduct: “I shall do nothing in malice. What I deal with is too vast for malicious dealing.”20 He consistently embodied this code of conduct, as a lawyer and as President, one example of which was Lincoln’s relationship with Secretary of the Treasury, Salmon P. Chase. He schemed (behind Lincoln’s back, or so Chase thought) to eliminate Lincoln as a candidate for the 1864 Republican re-nomination. Despite Chase’s disloyalty and chicanery, Lincoln made a conciliatory overture by later nominating Chase for Chief Justice of the United States Supreme Court.21 In short, Lincoln possessed the rare quality to rise above petty political bickering and bitter factionalism.

Lincoln was also fiercely scrupulous and expected his fellow attorneys to comport themselves equivalently. By 1850, Lincoln had been a member of the Illinois Bar for 14 years. He had amassed an impressive résumé through representing both plaintiffs and defendants as well as serving as formal and informal partner to a lawyer of record, agent, executor, mediator, and administrator in over 2,000 cases.22 Lincoln exhorted his fellow lawyers to “resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do, in advance, consent to be a knave.”23

Lincoln felt similarly passionate about another important truth: some things, though legally right, are not morally right.24 In one instance, after conferring with a potential client on a collection case he believed could wreak untold havoc, Lincoln flatly refused to take the case. In doing so, he reportedly said:

Yes, there is no reasonable doubt that I can gain your case for you. I can set a whole neighborhood at loggerheads; I can distress a widowed mother and her six fatherless

20 Id.
21 Id. Of course, such a nomination also ensured the end of Chase’s political career.
22 Brian Dirck, Lincoln the Lawyer 2 (Univ. of Ill. Press 2009).
23 Id.
24 Steiner, supra note 11, at 19.
children, and thereby get for you six hundred dollars which you seem to have a legal claim to; but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember some things that are legally right and not morally right. I shall not take your case—but I will give you a little advice for which I will charge you nothing. You seem to be a sprightly, energetic man, I would advise you to try your hand at making six hundred dollars in some other way.\textsuperscript{25}

Preference for Settlement

Lincoln arguably best displayed his skill of reaching and predilection for settlement in slander lawsuits. In Mark Steiner’s study of Lincoln’s law practice, he observed that Lincoln often acted as a peacemaker in these emotionally charged cases. Lincoln, in effect, “helped to restore peace to the ‘neighborhood’ through his efforts to mediate and settle slander lawsuits.”\textsuperscript{26} In a frontier society, men sued for slander when accused of theft because such an accusation could irreparably damage a man’s reputation. So trials for slander focused more so on compelling the slanderer to retract the allegation publicly than obtaining a  

\textsuperscript{25} Frank J. Williams, Lincoln’s Lessons for Lawyers, 36 N. Ky. L. Rev. 295 (2009) reprinted in Roger Billings & Frank J. Williams, Abraham Lincoln, Esq.: The Legal Career of America’s Greatest President (U. Press of Ky., 2012) (citing Ward H. Lamon, The Life of Abraham Lincoln: From His Birth to His Inauguration as President 317 (James R. Osgood & Co., 1872)). However, this account has been disputed by other Lincoln scholars. See Don E. Fehrenbacher & Virginia Fehrenbacher, Recollected Words of Abraham Lincoln 305 (1996). Whether this account iscredible or not, it is entirely consistent with Lincoln’s “Whiggish attitude toward law and the role of law in American society…. That such lawyers believed they were guardians of community values.” Steiner, supra note 11, at 177 (quoting Robert W. Gordon, Lawyers as the “American Aristocracy,” 20 Stan. Law. 1, 2 (1985), http://stanfordlawyer.law.stanford.edu/issues/archive/Stanford_Lawyer_issue-34_1985-FALL-VOL20-NO1_front.pdf.

\textsuperscript{26} Dirck, supra note 22, at 113.
liability verdict and jury award against the defendant.\textsuperscript{27} In 92 cases, on behalf of both plaintiffs and defendants, it was not unusual for Lincoln and his partners to resolve the case by compromise. For example, in at least nine cases, Lincoln negotiated a settlement with the plaintiff after the court found the defendant guilty, issued a large award, and ordered that the verdict be remitted once the defendant provided a public retraction.\textsuperscript{28}

Another example of Lincoln's settlement strategy in slander cases occurs is \textit{Frost v. Gillenwaters}. In that case, Lincoln represented the defendant in a slander suit in which his client allegedly accused the plaintiff of being a thief. Lincoln transcribed his client's retraction of the slander, and the trial was averted because the plaintiff found the apology sufficient.\textsuperscript{29}

In contrast, women sued for slander because of salacious allegations regarding their sexual reputation. Allegations, trivial and deleterious, drastically affected a woman's standing in the community, which in turn could determine to whom she might marry as well as her future economic well-being. Thus, when a woman was accused of promiscuity, she often had to defend her reputation by suing for slander. As was the case for men, if an apology was granted, the suit was typically dismissed.\textsuperscript{30}

One of the most prominent examples of Lincoln's commitment to compromise was a slander case recalled by Urbana lawyer Henry Clay Whitney. As one of the defendant's lawyers, Lincoln “made most strenuous and earnest efforts to compromise the case, which was accomplished by reason, solely, of his

\begin{footnotes}
\item[27] Steiner, supra note 11, at 85-100.
\item[28] Id.
\end{footnotes}
exertions.”31 A French Catholic priest, who accused another such priest of perjury, defended the suit. Once the suit was filed, both sides remained intransigent, and indeed, each priest’s respective neighborhood became embroiled in the legal battle. The case was tried but resulted in two mistrials, at which point Lincoln intervened, for he “abhorred that class of litigation, in which [there] was no utility, and he used his utmost influence with all parties, and finally effected a compromise.”32 Lincoln prepared an agreement of dismissal, through which the defendant recanted his accusation and the parties agreed to divide court costs. This case best exemplifies Lincoln’s approach to mediating these types of cases: “truth is generally the best vindication against slander.”33

Likewise, in commercial disputes, Lincoln has been praised for his discouragement of dubious litigation and his penchant for peacemaking. In an 1850 case in which Lincoln represented Abram Bale in a dispute for $1,000 worth of wheat, Lincoln wrote the following to his client: “I sincerely hope you will settle it. I think you can if you will, for I have always found [the plaintiff] a fair man in his dealings.”34 As to his legal fees, Lincoln said, “I will charge nothing for what I have done, and thank you to boot.”35 He advised his client that “by settling, [he] will most likely get [his] money sooner and with much less trouble and expense.”36 Bale’s case settled. This letter confirms Lincoln’s mindfulness of the enduring advantages of ADR—speed, economy, and stress avoidance—that have gone unchanged to this day. Although commercial disputes offered less latitude to be a peacemaker, Lincoln may well have taken to heart the maxim in his childhood Noah Webster’s American Spelling book: “Somebody is always the worse for lawsuits, and of course society is less happy.”

The chief aspect of Lincoln’s law practice was debt litigation. Money was scarce in frontier Illinois; about 700 of his 2,100 debt

31 Steiner, supra note 11, at 96.
32 Id. at 97.
33 Id.
34 Billings, supra note 7, at 257.
35 Id.
36 Id.
collection cases settled. His standard compromise was to accept partial payment with a year’s forbearance to pay the remainder. This was an exceedingly challenging resolution to the case, as the dominant moral and legal position of the day disdained persons who did not fully pay their debts. In these cases, Lincoln frequently counseled his clients to attempt an arrangement out of court to satisfy all parties.\textsuperscript{37} In one case, Lincoln revealed his commitment to amicable settlement by sacrificing his own fee. “The payee of the note did write me that he had written Allard on the subject of the note in your hands,” he wrote his client in 1854, and “if the letter does ... agree to take $110 and my fee, settle the matter that way.”\textsuperscript{38}

In fact, when clients did not pursue what Lincoln thought to be a reasonable settlement, he could be unyielding.\textsuperscript{39} In 1859, he took a case for Peter Ambos, the treasurer of the Columbus Machine Manufacturing Company, who wanted to collect on five promissory notes, totaling more than $10,000 owed by James Barret. Lincoln tried to work with Barret, who he felt was “an honest and honorable man,” to sell some assets and satisfy Ambos by making payments on the debt while avoiding trial. He felt that the total amount of the debt could not be collected soon, but that it would be paid eventually and faster than “trying to force it through by the law in a lump.”\textsuperscript{40} Ambos, however, refused to settle for anything less than the entire amount. Lincoln finally suggested that Ambos get a different lawyer, writing that he would “very gladly surrender the charge of the case to anyone [Ambos] would designate, without charging anything for the much trouble [Lincoln had] already had.”\textsuperscript{41}

Lincoln also showcased his ability to resolve disputes outside of the courtroom in numerous assault cases.\textsuperscript{42} In October 1856, he persuaded Edward Barrett to accept a five-year prison

\textsuperscript{37} Dirck, supra note 22, at 67.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. at 68.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 113.
sentence at hard labor for stabbing a man to death.\textsuperscript{43} Further, in an 1842 case, \textit{People v. Patterson}, Lincoln successfully argued that his client was subject to “mental alienation” when he attacked another man with an axe.\textsuperscript{44}

**Lincoln’s Fee Dispute with the Railroad**

The most striking example of Lincoln’s rather unconventional use of ADR was his own fee-related dispute with the Illinois Central Railroad. Senator Stephen Douglas charged Lincoln with soliciting $5,000 from the railroad to finance Lincoln’s political campaign against him. Lincoln described the dispute:

[T]he Railroad Company employed me as one of their lawyers in the case . . . . I was not on salary and no agreement was made as to the amount of the fee. The railroad company finally [won] the case. The decision, I thought, and still think, was worth half a million dollars\textsuperscript{45} to them. I wanted them to pay me $5,000, and they wanted to pay me about $500. I sued them and got the $5,000.\textsuperscript{46}

Although there are varying accounts about how Lincoln secured this fee, the accepted version is that he had sued the railroad company for payment of the work he had done on their behalf in a lawsuit. Lincoln was prepared to take the depositions of several high-powered lawyers in Illinois who would affirm that Lincoln’s efforts on behalf of the railroad company produced


\textsuperscript{44} Id.; see also People v. Patterson—#L00745, L. Prac. of Abraham Lincoln 2d, http://www.lawpracticeofabrahamlincoln.org/Search.aspx (search “People v. Patterson” under “Case Name”; click “Search”).

\textsuperscript{45} Lincoln’s nineteenth-century sum of $500,000 translates to over $14.88 million in today’s dollars. See http://www.wolframalpha.com/input/?i=%24500%2C000+from+1858.

\textsuperscript{46} Abraham Lincoln, Speech at Carthage, Illinois, October 22, 1858.
an extraordinary result and merited a sizable fee. The railroad, presumably not desiring a hostile enemy in Lincoln if he were to become a United States Senator, would not defend the suit. Therefore, this lawsuit became a friendly suit, although it had to be tried before two juries. In an extraordinary concession, the railroad company’s counsel allowed Lincoln to put into evidence a statement signed by several eminent lawyers in which they concurred that the fee sought was not unfair. A jury ultimately found for Lincoln in the amount of $4,800—the highest fee he ever received. By strategically using the courts in what was essentially a pro forma trial, Lincoln disproved Douglas’ allegation and obtained his largest fee as an attorney.47

Lincoln’s many years representing the Illinois Central Railroad confirmed his versatility that he could capably negotiate settlements beyond the scope of his immediate community. The railroad faced considerable hostility from citizen-jurors, evinced by the fact that, of the 14 cases brought by landowners to trial, Lincoln secured only two victories.48 Lincoln tried to mediate these disputes, cautioning the secretary of the Illinois Central that “a stitch in time may save nine,” though the railroad often failed to heed his advice. And so Lincoln ended up representing the railroad in court over its failure to build or maintain fences along its line.49 On yet another occasion, the railroad ceded to Lincoln’s counsel, and Lincoln was able to successfully negotiate a settlement in Dye v. Illinois Central.50 Dye had sued the railroad for trespass and claimed damages amounting to $500. Lincoln artfully crafted a resolution in which Dye agreed to “waive all damages for the want of making and maintaining the fence” and to “accept as sufficient” the “already made” fence; the railroad agreed to pay Dye one hundred dollars and costs.51

47 Steiner, supra note 11, at 170-77.
48 Id. at 144-45.
49 Id. at 143.
51 Id. at 144.
Lincoln Transcending Politics

Lincoln’s laudable mettle was inextricably linked with his aptitude at transcending petty politics, for he was a man who, over the course of his life, proclaimed that compromise should be the sole recourse, anything short of which was a morass. Doris Kearns Goodwin put it best: “So, in the end, the feuding cabinet members, with the exception of Chase, remained loyal to their President, who met rivalry and irritability with kindness and defused their tensions with humor.”52 And “while working to sustain the spirits of his cabinet, Lincoln also tried to soothe the incessant bickering and occasional resentment among his generals.”53

As former President of the American Bar Association Jerome J. Shestack concluded, “Lincoln’s place in history derives not from his abilities as a lawyer but from his qualities as [a] human being and his seminal achievements as president. Still, he was a lawyer of whom the bar could be proud of.”54

Abraham Lincoln may not have known the term “ADR,” but he certainly understood and captured its essence as an early and dedicated practitioner. Unlike his contemporaries, he discerned the advantages of a negotiated settlement—speed, efficiency, and risk avoidance—and would even encourage his clients to avoid litigation by surrendering his own legal fee. This moral sensibility, manifest not only throughout his legal career but also during his presidency, to do what is best for his clients and for society is what we enduringly admire.55 By promoting compromise, avoiding the uncertainty and expense of full-blown litigation, as well as inspiring and elevating societal expectations, Lincoln’s

52 Goodwin, supra note 17, at 526.
53 Id. at 527.
54 Steiner, supra note 11, at 19.
alternative methods for peaceful settlement presaged today’s use of ADR.

In doing so, Lincoln appealed to “the better angels of our nature.”\textsuperscript{56}

\textsuperscript{56} Abraham Lincoln, First Inaugural Address, March 4, 1861.
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