A federal agency issued a specialty policy of insurance not available on the open market. After the premiums were paid and the policy delivered, the agency modified the terms of the insurance contract, publishing them in the Federal Register but not serving direct notice on the insured. The published notice also gave policyholders the right to cancel their policies within thirty days with pro-rata refunds based on the remaining policy period.

After suffering a loss covered by the original contract, the insured filed a claim for insurance coverage. The agency denied the claim as the modifications published in the Federal Register clearly stated the type of loss suffered by the insured would no longer be covered.

The insured filed a claim which proceeded to arbitration. The insured/claimant’s theory was the right to rely on the original contract that was issued and paid for in advance. The respondent agency’s defense was that an insurer has the right to modify a policy and publication in the Federal Register provides notice as a matter of law. There was no unfairness as the agency would have paid for the loss if it had occurred prior to the notice being published and the insured/claimant had the right to cancel the contract with a pro rata refund.

Just before closing arguments, the arbitrator muttered, “Hmm, there could be some due process issues here.” Respondent’s counsel replied, “Yes, there could be, yes there are.”

As counsel did not raise the due process issues, should the arbitrator:

A. Ignore them?
B. Ask the parties to brief them?
C. Rely on his own research and expertise and consider them in the award if they are applicable?

**Answers and Discussion by: Daniel Yamshon**

Although it is well established that courts cannot review arbitration awards for errors of law, Wilko v. Swan, 346 U. S. 427 (1953), Hall StreetAssociates, L. L. C. v. Mattel, Inc., 552 U.S. 576 (2008), the author does not believe that allows an arbitrator to ignore important legal precepts, even when not raised by the parties. Although Hall Street makes it clear that arbitral awards will not be overturned under the Federal Arbitration Act even when an arbitrator manifestly disregards the law, the premise of this response is that fairness is among an arbitrator’s ethical duties. Neutral application of the law is an integral component of fairness; a corollary requires
the neutral to acknowledge fundamental rights, particularly when the issue is recognized by the parties. The response to the due process ethical dilemma was quite interesting.

Eleven percent of respondents believed it would be proper for the arbitrator to ignore the issue as it was not raised by a party. Eighty-nine percent believed it was improper.

The most cogent reply on the “no” side was:

“The parties define the process for an arbitration by the arbitration agreement or subsequent agreement. Since neither party raised any procedural issues, those issues were not before the arbitrator for decision. To raise this new issue is beyond the scope of what the parties presented to the arbitrator for decision and the arbitrator thus does not have jurisdiction to decide that issue.”

Generally speaking, the arbitration clause defines the arbitrator’s jurisdiction and one of the few grounds for vacatur under the Federal Arbitration Act is an arbitrator exceeding the jurisdiction defined in the arbitration clause. On the other hand, 9 USC section 10 reads in part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Among the answers asserting it was proper for the arbitrator to address this issue was: “The arbitrator is duty bound ‘in the interest of justice’ to consider all relevant issues in reaching a decision, raised by counsel or not. In the context of private dispute resolution, an arbitrator sits in the same position as a judge--and judges are discharged with the responsibility of raising relevant legal issues even if the parties do not do so. Indeed, with the increasing privatization of dispute resolution, this aspect takes on more importance.”

The author believes it was proper to address the issue once it was raised and acknowledged by counsel, in the context of fundamental fairness. Additionally, not addressing the issue could be “any other misbehavior by which the rights of any party have been prejudiced” under 9 USC section 10 (a) (3).
Eighty-five percent of respondents believed it was proper for the arbitrator to request briefs on the issue, with fifteen percent believing it was not. Negative responses were based on the idea that the arbitrator raised an issue the parties did not. Most respondents were of the opinion that fairness and balance required the parties to be given an opportunity to brief the issue.

The question of whether the arbitrator should rely on his/her own research was almost evenly divided with forty eight percent voting yes, and fifty two percent voting no. Reasons ranged from “Not new research, but an arbitrator cannot divorce himself from what he knows” to “The attorneys need to make their own case, the arbitrators job is to decide the case based on the evidence presented.”

The author’s solution:

Once the cat was let out of the bag by the arbitrator’s spontaneous muttering “Hmmm…there could be a due process issue here” and acknowledgement of the issue by counsel, the author believes it needed to be addressed both on ethical and statutory grounds under 9 USC section 10 (a) (3). Best practice would have the arbitrator request briefing on the issue. Once the issue was briefed, there is no reason the arbitrator could not do additional research on the issue if it seems necessary. Arbitrators are generally selected for their expertise, although it might be questioned if an individual arbitrator was chosen for knowing the fine points of constitutional law, it is expected that the neutral is as expert in process as in the substantive issues.