Focus ALTERNATIVE DISPUTE RESOLUTION

To achieve equity, apply the law

William Horton

At the recent annual meeting of the CPR Institute for Dispute Resolution, a perennial topic arose in the arbitration ethics segment: should arbitrators make their decisions strictly in accordance with the law, or should they apply principles of fairness? The discussion grew surprisingly fractious as some arbitrators proudly proclaimed that they only apply the law regardless of fairness, while others (a distinct minority) proclaimed that they feel free to ignore the law if the result is clearly unjust. The elevated feelings around this subject are understandable, yet ultimately I would suggest the differences are easily reconciled.

In international arbitration there is no possibility of any appeal or review of an arbitral award based on errors of law. The same is true in the United States (since the demise of the "manifest disregard of the law" doctrine under the federal *Arbitration Act*) and in some parts of Canada (e.g. Quebec, and the federal *Commercial Arbitration Act*). Arbitration blossoms as a true alternative to litigation when it is freed from a review of the merits by judges in the state system. But arbitrators are anxious to assert that they are not dispensing a "lesser form of justice" by virtue of being free from judicial supervision. This leads many of them to abjure any notion that fairness is a factor. But in doing so, do they protest too much?

One good friend at the CPR conference (a firm adherent of the "fairness is not a factor" school) explained to me that an arbitration tribunal on which he sat enforced a put option at a price of well over $100 million for shares in a company that had become worthless, and never considered whether or not it was fair to do so.

"But did you think that was an unfair result?" was my question. "I would have thought you found that the defendant received consideration for giving the promise and in exchange assumed the risk that the asset would decline in value."

"Well, that is exactly what we said," was the reply.

Although arbitrators are not required to be lawyers, when parties appoint lawyers to be arbitrators and agree that their dispute will be governed by a particular system of law (as opposed to a standard of business fairness, as they are also free to elect) they have a right to expect that the dispute will be decided on a legally sound basis. By choosing to arbitrate in regimes that permit no merits review, the parties also agree to accept the judgment of the tribunal as to the content and application of the law — and they pick their arbitrators accordingly. But this choice does not imply that the parties wish to have their dispute resolved by some particularly strict version of the law, devoid of all principles of fairness. For that matter, they are not choosing a lax version of the law.

In my experience, the law rarely stands in the way of a fair result.

It must be said that the magma of legal argument flows hottest when one party is relying on the law to argue against what it fears the tribunal may be attracted to as a fair result. Quite often, this happens on both sides of the dispute simultaneously. But the law is made up of the hardening, over time, of fluid perceptions of fairness into dicta, maxims, tests, rules and legal principles. In turn, as lawyers, our sense of what is fair in the context of legal disputes is shaped by the law.

When the law "develops," it changes along the fault lines where legal principles and fair results are misaligned. The process that brings the two back into alignment is legal analysis and argument based on existing legal authority and informed by the values already present in the law. Often, where law and equity appear to be at odds, the cause is an incomplete or defective application of available legal principles.

Recent decisions of the Supreme Court of Canada reinforce these ideas. By emphasizing the notion of "extricable" principles of law in *Sattva*, the court is emphasizing that legal principles are the tools by which just results are to be reached and should not be confused with the results themselves. By describing good faith as an "organizing principle of the law" in *Bhasin*, the court is warning against a literal interpretation of the law without regard to its animating spirit.

Ultimately, the law is like a musical score which only comes to life each time it is performed. The best performances are those which are loyal to the notes. But all participants in the musical ensemble need to bring their own expertise, judgment and values to the performance to make it a truly satisfying and harmonious experience.

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> **William Horton**
> Arbitrator and mediator

William Horton practises as a barrister, arbitrator and mediator in commercial and complex disputes. He is resident at ADR Chambers in Toronto.