Arbitration and the Development of the Law[1]

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It is sometimes said that the increasing use of arbitration to settle business disputes hampers the development of the law. This is usually a reference to judge made law as expressed in Court decisions, as opposed to law developed through legislation, regulation, international codes and industry standards.

Any resolution of a dispute that does not result in a binding court decision by definition does not contribute to the development of judge made law. This applies not only to disputes that are resolved by arbitration but also to disputes that are resolved by other consensual processes such as negotiation, conciliation and mediation, including judicial mediation. One might argue that the fact that the parties are able to resolve disputes without resort to the courts suggests that existing law is adequate for that purpose. Alternatively, it may mean that the benefits of obtaining a judicially sanctioned outcome are outweighed by the benefits of resolving disputes by other means.

The notion that the law develops, i.e. changes, as a result of decisions in specific cases, is fundamental to the common law system and has important implications. Sometimes the result is a new rule or principle. More often the development is in the form of a tweak, gloss or qualification on an existing rule – but with outcome altering effects. In one sense judge made law is constantly being clarified and, partly as a result of that, is in constant need of clarification.

Like certain forms of sub-atomic energy, the law has the characteristics of both particles (pithy maxims and quotable dicta) and waves (general and often countervailing policies, values and sentiments) which can occasionally make the particles behave in unexpected ways. The strong contextual basis of the law is increasing emphasized in the way in which legal principles are articulated by the courts themselves. It might therefore be said that judge made law really exists, or is perfectly expressed, only for the particular case in which it is found.

This dynamic explains a number of things about litigation, for example why good lawyers on both sides of a case can find encouragement in the same case law in most if not all disputes. The idea that a "full factual record" is necessary to support changes to the law and the reluctance to trim a "fruitful bough" in litigation even in the face of adverse case law, stretch the boundaries of factual relevance in any given case. Thus, the fact that the law can develop while a case is being decided contributes to the complexity, cost and unpredictability of litigation. This is true even though the vast majority of cases (over 95%) that are conducted in the courts on this basis do not actually result in a decision by a judge after trial.

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The development of the law is supported by the "correctness standard" on appeal. Of course the application of this standard does not lead to formulations of the law that are "correct" in any objectively verifiable manner. The correctness standard just permits a particular judge or panel of judges to freely substitute his, her or their opinion of the law and how it should be applied in the case at hand for those of the lower court or inferior tribunal being reviewed.

All of the foregoing plays an important role where the parties have no contractual relationship or where fundamental rights and liberties are involved. In those circumstances the parties to the dispute and society as a whole rely on the courts for the vital task of developing, articulating and giving effect to legally enforceable standards of behaviour. However in contract cases, the parties have an opportunity to define their own rights and the manner in which they will be interpreted and enforced. When new and pervasive commercial issues arise they are likely to be first addressed by the drafters of commercial contracts. "Developments in the law", are just as likely to be drafted around rather than adopted by contracting parties. Often developments in commercial law are followed by the advice that if you want the result that the court just refused you need clearer language.

Much of the development of the law is really a dialogue among different levels of court over time about how particular types of cases should be decided. Arbitration is not part of the court system and arbitrators are not part of that dialogue. Their sole focus is to decide the particular dispute between the parties and, when necessary, to apply the broad principles of the law as they find them. Like toy assembly instructions read on Christmas Eve, those principles can sometimes be challenging to apply to the parts that come in the box. But by choosing arbitration, the parties and their lawyers are giving priority to the decision of the specific case under existing law over the refinement of legal principles over time. Freedom of contract and the consensual basis of arbitration allows them to make that choice.

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