Law, Equity and Arbitration

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Vancouver, British Columbia
August 30, 2021

Introduction

As a private dispute resolution mechanism aimed at allowing parties the means of avoiding the publicity, cost, time and appeals involved in the court process, one would have thought that whether and how arbitrators were to adjudicate based on "law" would have been settled long ago. Parties likely expect that the whole range of judicial considerations and relief available under the law will be adopted by arbitrators.

But questions exist about that part of the law that in England and Commonwealth countries falls under what the Chancery Courts administered as "equity." Similar questions arise in relation to civil law jurisdictions. In part, the question arises from parties choosing to empower arbitrators in some cases with the right to decide disputes based not upon law per se, but rather on grounds described as *ex aequo et bono* or with the arbitrator acting as *amiable compositeur*. Whether the law of equity, including equitable rights, obligations and defences, form part of the law and the extent to which any of those are analogous to deciding *ex aequo et bono* is a matter for debate and even confusion.

Arbitrators and legal counsel have mostly worked towards rendering broader and simpler the answer to the question "what law is to be applied?"[1] At the same time, some arbitrators and academics have argued that deciding *ex aequo et bono* or as *amiable compositeur* still requires that the arbitrator use the parties' contract as a starting point, the legal framework that they understood and at least some aspects of the law of the place of the arbitration and where any award may be enforced as more or less a guide.

The foregoing is illustrated by how the law has changed and adapted to arbitrators making awards based on equitable considerations. In this article, I will address provisions of the former BC *Arbitration Act*,[2] those of the new one passed in 2020,[3] as well as the BC *International Commercial Arbitration Act*.[4] I will also discuss certain cases arising out of British Columbia that have touched on those and on the arbitration's role and jurisdiction. In the end, my conclusion is that progress has been made in recent years, partly through legislative change and more through judicial development of the law. The result is that recognition and enforcement of arbitration awards made on equitable grounds or providing for equitable relief now is more likely to be achieved.

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[1] See the article by John E. C. Brierley, Equity and Good Conscience and Amiable Composition in Canadian Arbitration Law, 19 CAN. Bus. L.J. 461 (1991) in which a survey of Canadian arbitration statutes is provided and the extent to which they permit or recognize arbitration by other that a legal standard is considered.

[2] RSBC 1996, c. 55.

[3] SBC 2020, c 2.

[4] RSBC 1996, c 233.

The Former BC Arbitration Act

The former B.C. *Arbitration Act*,[5] section 23(1) provided that:

> An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

That seems clear enough. A distinction is drawn between adjudication based on "law" and "equitable grounds, grounds of conscience or some other basis."

But does "law" in this section include equity as administered by courts of equity? With the superior courts, the answer should be clearly yes. The equivalent in the Canadian common law provinces and territories to the English *Judicature Acts* has made it so. The concept is commonly referred to as the "fusion" of law and equity, with both being dealt with in a single court system.

Teal Cedar Products

Yet in *British Columbia v. Teal Cedar Products*,[6] the Supreme Court of Canada held thus:

> [40] *Morriss* is also inapplicable to the case at bar because it concerned the jurisdiction of a *court* that was relying *on equity* to award compound interest. In reaching the conclusion that compound interest could be awarded by the court in that case, the B.C. Court of Appeal relied on the equitable jurisdiction of the court, which permitted the award despite the provisions of the *COIA*. The arbitrator in this case did not have jurisdiction to consider equity. Under the *CAA*, arbitrators can only consider equitable grounds where the parties specifically agree (s. 23). In this case, the agreement between Teal and the Province did not permit the arbitrator to deal with equitable grounds.

The point in issue in *Morriss* was what interest rate should apply to an arbitration award for an expropriation of mineral claims that, for technical reasons, the *Expropriation Act* did not apply to. That statute, which had full compensation of a property owner as its premise, provided for compound interest. The B.C. Court of Appeal found that compound interest should apply in this case as well. It was referred to as "equitable interest" as the court held that it was not covered by the *Court Order Interest Act* as it was part of the compensation, not an add-on to a pecuniary judgment that awarded compensation. Two prior Supreme Court of Canada cases were relied upon to justify that approach.

The issue in *Teal Cedar Products* was whether government taking of certain timber licences that had led to an arbitration as to the appropriate compensation, should be dealt with similarly. The B.C. courts answered yes. The Supreme Court of Canada answered no. In so doing, the Supreme Court did not deal with its own two precedents relied upon in *Morriss*. It found that if interest formed part of the compensatory award, then Court Order Interest would have to be

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[5] RSBC 1996, c. 55.

[6] 2013 SCC 51, [2013] 3 SCR 301

added and that could result in over-compensation. It held that the *Court Order Interest Act* was governing law applicable to the award and that the arbitrator and courts could not come up with something else just because it was obvious that the result would under-compensate.

If the court had stopped there, the case would have been an innocuous (although perhaps odd) interpretation of statute law and not overly controversial. But it went on to add the passage quoted above about arbitrators lacking equitable jurisdiction. That was ill-considered, to say the least, and wrong as a matter of law.

Section 23 of what was the *Commercial Arbitration Act of B.C.* provided that arbitrators could only decide a case on "equitable grounds" if the parties had expressly agreed in writing. Since there was no such express, written agreement, then there was no jurisdiction for the arbitrator to decide on "equitable grounds."

But the point upon which the Supreme Court's reasoning fails is that it did not take into account what the legislature intended by the phrase "equitable grounds." In brief, those involved the concept of deciding *ex aequo et bono* or as *amiable compositeur*. Section 23 did not intend to eliminate all equitable rights, obligations, remedies or principles from what an arbitrator could do. That would be remarkably impractical, would deny party autonomy in choosing arbitration and the governing law (including its legal and equitable aspects) and would do damage to the law of recognition and enforcement of arbitrations awards. Notwithstanding all that, in making such an overbroad comment, the Supreme Court appeared to say that that is what the proper approach to arbitrations should be.

Ex Aequo Et Bono versus Equity

Dean Trakman explains the distinction between deciding a case on grounds that are *ex aequo et bono* and on grounds that are part of the law of equity:[7]

> A feature of both international and domestic law is the distinction that is sometimes drawn between decisions based on the law of equity and decisions *ex aequo et bono.* Whereas decisions in equity are deemed to be *praeter legem,* that is, part of the law, decisions *ex aequo et bono* are imputed to an extra-legal realm. The rationale behind this distinction is that adjudicators may "fill gaps" in the law based on principles of equity, but not based on notions of fairness that are not reduced to legal principles and rules of law. Whereas equity is part of an applicable legal system, notions of equality associated with *ex aequo et bono* are deemed to reside in a moral, social, or political realm that is external to the law.

The 1982 Law Reform Commission of British Columbia Report recommended against allowing arbitrators a general authority to make awards based on *ex aequo et bono* grounds. Instead, they recommended that arbitrators have to apply the law. But in framing what legislation should be enacted, they used the phrase "equitable grounds, grounds of conscience or on some other basis"

[7] Leon Trakman, "Ex Aequo et Bono: Demystifying an Ancient Concept" (2008) 8:2 Chi J Int'l L 621 at p. 627.

and equated that with "ex aequo et bono." Thus, their intent was not to remove the law of equity from consideration as it was part of the law:[8]

> The duty of an arbitrator to apply the law appears to be peculiar to England and those jurisdictions, including British Columbia, which enacted legislation based on the Arbitration Act, 1889. In other jurisdictions, notably the United States, an arbitrator, in the absence of agreement to the contrary, need not determine matters by reference only to law, but may also act in accordance with equity and good conscience (*ex aequo et bono*).

Part of the rationale for this was to protect party autonomy. If the parties to a contract containing an arbitration clause provided for a particular jurisdiction's laws to govern their dispute, then, absent some public policy or other serious basis for overriding that choice, it should be respected. Similarly, if they chose a basis for resolving their dispute based in something other than law, they were free to do so. But they had to be clear, if that was the case.

Another part of the rationale for this was to ensure that any review by a court of whatever award an arbitrator made was carried out by reference to legal standards. Courts are established to decide cases based on the law, not on a particular judge's sense of what might be fair in the circumstances. Adhering to that concept is fundamental to the concept of the rule of law. If a review of an award is to proceed, it must be based upon the same legal framework that the arbitrator was supposed to apply. Otherwise, there were no reference points for determining error.

A large challenge, of course, has been the increasing trend in modern jurisprudence, to move away from black letter law and apply instead discretionary guidelines, concepts concerning "good conscience" and the like as tools used to develop the law and achieve greater fairness in more cases. In part this has arisen from an increasing sense of complexity, both to the relationships that people develop and how to resolve them.

Lon Fuller and Winston wrote about this in a classic article in 1978 that addressed what they termed the "Forms and Limits of Adjudication."[9]

> We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pat- tern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" - each crossing of strands is a distinct center for distributing tensions

So, for example, in *Soulos v. Korkontzilas,* McLachlin, J., (as she then was), found that a constructive trust could be imposed on an errant fiduciary even where the property wrongfully

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[8] Law Reform Commission of British Columbia, Report on Arbitration (1982), Part VI, Conduct of the Arbitration, Section A, found at http://www.bcli.org/sites/default/files/LRC55-Arbitration.pdf.

[9] Fuller, Lon and Winston, Kenneth, *The Forms and Limits of Adjudication,* Harvard Law Review , Dec., 1978, Vol. 92, No. 2 (Dec., 1978), pp. 353-409 at p. 395.

acquired had gone down in value. The beneficiary still wanted the property and the resistance by the fiduciary was seen as being against "good conscience".

The premise usually articulated for requiring a constructive trust was to ensure that a fiduciary accounted for property wrongfully appropriated at the expense of the beneficiary. In *Soulos*, however, the "at the expense of" concept fell apart. The beneficiary would be demonstrably poorer as a result of what he sought. Yet the court developed the equitable principle by abstracting it to a more general level and made the order sought. That more general level was the concept of "good conscience."[10]

> 27 McClean, among others, regards the most satisfactory underpinning for unjust enrichment to be the concept of "good conscience" which lies at "the very foundation of equitable jurisdiction" (p. 169):
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> > "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. MacFerlan* (1760), 2 Burr. 1005, 97 E.R. 676 (K.B.) in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

To those who argued that "good conscience" did not sound like "law" or provide any certainty or guidance for adjudicators, she answered thus:

> 34 It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.
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> 35 Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

[10] *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217.

Keep in mind that this is a judicial decision made by a court operating within the framework of the rule of law. That rule of law included both legal and equitable principles. And while perhaps at the outer edge, the court found that it was still within its jurisdiction and was not a variant of "palm-tree justice." If that is so for a court of law, then arguably it must be so for an arbitration that finds as applicable law the same set of legal and equitable principles.

Assuming that is all well and good as a development of the law when elaborating on how trial judges in courts are to deal with equitable rights, obligations, defences and remedies, what of the difference between the law of equity and *ex aequo et bono*. But it is worth considering whether the distinction has lost something in the process.

Dean Brierley considered the direction of the law relating to arbitration awards based *on ex aequo et bono/amiable compositeur* approaches (under what he terms as "equity clauses") versus ones based upon the law. He concluded that even with an equity clause, there was likely to be a strong incentive to fashion awards that met legal standards. His explanation is helpful. Arbitrators make awards in a private dispute resolution setting established by contract. So the parties' contract must, as a matter of first principle, be adhered to by the arbitrator. Brierley says bluntly that "the existence of an equity clause in the arbitration agreement in the Civil law tradition and in the Model Law does not authorize the arbitrators to abandon the terms of the contract in relation to which the dispute has arisen."[11]

Next, if an arbitration award is disputed or not obeyed, the parties will likely resort to the courts. That can take the form of an appeal (which may be more or less limited, depending whether it is an international or domestic arbitration) or an application for an order enforcing the award. But will the courts uphold or enforce it?

Brierly argues that the courts will not engage in a review process that abandons legal principles. So to get an award upheld and enforced, the arbitrator must make it so that it is intelligible to the court that is asked to order its enforcement.[12]

> It is abundantly clear, first of all, that *any* award, even one rendered under an equity clause, must respect public policy/ordre *public.* How can it be otherwise? In other words, how can it be admitted that state courts might be expected to lend their authority to enforce awards that violate fundamental conceptions of what is in the public interest as designated by these terms? Rules of law that have that character, whether judicially or legislatively created, and which are variously described as mandatory, imperative or peremptory in a given jurisdiction, must be observed by any arbitrator. This adjudicator, even when designated as an *amiable compositeur,* will inevitably be drawn therefore to applying his or her mind to positive law at least to that extent. That positive law might be the law of the place where the award is rendered in so far as that law requires the award to be confirmed by a judicial procedure before being executed elsewhere or, and most

[11] John E C Brierley, "Equity and Good Conscience and Amiable Composition in Canadian Arbitration Law" (1991) 19 Can Bus LJ 461 at page 471.

[12] John E C Brierley, "Equity and Good Conscience and Amiable Composition in Canadian Arbitration Law" (1991) 19 Can Bus LJ 461 at page 478.

> certainly in addition, it will be the law of the place where such forced execution is to be sought. The arbitrator, in other words, will not readily abandon all law even when, upon the terms of the equity clause itself, there is no constraint to observe it. In this respect, as the late Ren6 David has pointed out, *amiable composition* does not signify the application of "non-law". 51

The relationship between arbitrator and enforcing court is thus one that leads arbitrators, regardless what adjudicative standard they are told to apply, to hew to one that will be cognizably "lawful" and reasonable to the court.

To that end, Brierly concludes thus:[13]

> The burden of this comment has been to show that the equity clause in the context of the Model Law, as in that of the modern franco-Civilian tradition, is not a licence to the arbitrator to indulge in purely subjective decision-making or to proceed in disregard of any law whatsoever, as its designation might seem to imply. The arbitrator functioning as *amiable compositeur,* just as much as the ordinary arbitrator, is constrained as a matter of necessary principle to apply fundamental law by virtue of the possibility that judicial control, in the light of considerations of public policy or public order, may be exercised. The two forms of arbitration are not to be distinguished therefore on the basis of the remedies lying against the awards because, in either case, the public *policy/ordre public* defence will lie.

I agree that courts are unlikely to enforce awards that they regard as unfair and unreasonable from either the perspective of procedural natural justice or substantive outcome. But also, the discussion illustrates that the dividing line between equity as law and *ex aequo et bono* is perhaps not as bright a line as might otherwise be thought or argued.

That, of course, makes the Supreme Court of Canada's admonition in the *Teal* case about arbitrators lacking equitable jurisdiction all the more curious and even more inappropriate.

There is another point that ought to be considered here. In 2006, in *Pro Swing Inc. v. Elta Golf Inc.*,[14] Deschamps, for the Supreme Court of Canada, held that the law relating to recognition and enforcement of foreign court orders ought to be developed. Previously, it was only money judgments that were recognized. Even then, judgments for fines, penalties or taxes owing a foreign government or its entities were not. That was all done under the rubric of comity of nations.

In *Pro-Swing,* the court had to consider whether to enforce an equitable order of a foreign court. In the background, the order had been made in relation to contempt proceedings. But in any

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[13] John E C Brierley, "Equity and Good Conscience and Amiable Composition in Canadian Arbitration Law" (1991) 19 Can Bus LJ 461 at page 483.

[14] 2006 SCC 52, [2006] 2 SCR 612

event, it was made and enforcement was sought in the courts in Ontario. Doing so did not fit within the bounds of previous jurisprudence. But the court majority decided that in an appropriate case, enforcement should occur. The bounds of when to do so were not delineated precisely:

> For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.

So interim and interlocutory orders would not likely qualify. The nature of the order must be one that the local court would potentially make concerning a case that was brought before it. And the previous exclusions about not enforcing penal or taxation laws and orders and not enforcing orders contrary to public policy continued to apply.

I mention this decision because it seems that if such recognition is to be afforded to foreign court orders there is no good reason not to do so for arbitration awards. The court's reasoning about recognizing and enforcing foreign equitable orders was said to be grounded in the equitable jurisdiction of the courts here. Finally, assuming that the comment in the Supreme Court of Canada in *Teal* is wrong about arbitrators lacking equitable jurisdiction, the application of the ruling in *Pro-Swing* for recognition and enforcement of equitable orders of arbitrators seems clear.

Law and Equity -- Fusion

In *Canson Enterprises Ltd. v. Boughton & Co.,* the Supreme Court of Canada quotes[15] from Lord Diplock, as follows:

> Your Lordships have been referred to the vivid phrase traceable to the first edition of Ashburner, *Principles of Equity* where, in speaking in 1902 of the effect of the *Supreme Court of Judicature Act* he says (p. 23) "the two streams of jurisdiction" (sc. law and equity) - "though they run in the same channel, run side by side and do not mingle their waters." My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the *Supreme Court of Judicature Act 1873* the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came,

[15]v[1991] 3 S.C.R. 534 at para. 79, quoting from United Scientific Holdings Ltd. v. Burnley Borough Council, [1978] A.C. 904.

> but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

In reaching that conclusion, the Supreme Court quoted from earlier decisions of Lambert, J.A., of the BC Court of Appeal. In *Oasis Hotels v. Zurich Insurance*,[16] he quoted section 3 of the *Supreme Court Act*,[17] which provided that the justices of the court had "all the powers, rights, incidents, privileges and immunities of a judge of a superior court of record, and all other powers, rights, incidents, privileges and immunities that on March 29, 1870". He reasoned thus:

> The superior courts of the Colonies of British Columbia and Vancouver Island were merged on 29 March 1870. They were superior courts of record. In the administration of justice by those courts the applicable civil and criminal laws were the laws of England, as they existed on 19 November 1858. (See now the *Law and Equity Act*, R.S.B.C. 1979, Chapter 224, s. 2). The rules of practice, pleading and procedure for actions and proceedings at law were those established by *The Common Law Procedure Acts of 1852, 1854 and 1860*, and for proceedings in equity, the several Statutory Enactments regulating the practice, pleadings and proceedings of the High Court of Chancery in force on 14 February 1860. (See *The Civil Procedure Ordinance*, 1869, 9 March 1869, R.L. No. 120, s. 2 and s. 4).
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> In short, the powers of the Supreme Court of British Columbia flow from several sources. The court has all the inherent powers of the High Court of Chancery and of the common law courts of record. It has the specific statutory and common law powers of those courts as they existed on 19 November 1858. And, in matters of practice and procedure, it has the powers found in the enactments referred to in the 1869 Ordinance.

To confirm the jurisdiction of arbitrators to issue orders that sound in the equitable jurisdiction of the courts, the B.C. Legislature included in the former B.C. *Arbitration Act*,[18] express provisions like:

(a) Section 9 of the former B.C. *Arbitration Act*[19], which appears to provide for the equivalent of interim injunctive relief: "During an arbitration, an arbitrator may make an interim award respecting any matter on which the arbitrator may make a final award." And

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[16] *Oasis Hotels v. Zurich Insurance Co.* (1981), 124 D.L.R. (3d) 455, (B.C.C.A.), at paras. 6-7.

[17] RSBC 1996, c 443. See also section 2 through 8 of the *Law and Equity Act* RSBC 1996 c. 253.

[18] RSBC 1996, c. 55.

[19] RSBC 1996, c. 55.

(b) Section 10 of the former B.C. *Arbitration Act*[20], which expressly states that "An arbitrator has the same power as the court to make an order for specific performance of an agreement between the parties for the sale of goods."

The concept of law (writ large) in England and the common law provinces of Canada has usually included all forms of legal process, whether in the law courts or the courts of equity. Courts of equity deal with matters affecting the conscience of the parties before them. So mandatory and prohibitory injunctions, specific performance, orders rectifying or setting aside, rescinding and finding void deeds, contracts and instruments, enforcement of trusts and fiduciary obligations, protection of minors and those acting under disability, all are the stuff of equity's jurisdiction. Since the fusion of courts of equity and courts of law, often the distinction in court cases between whether a legal or equitable remedy is being sought disappears. But holdover concepts still affect much of the argument and the judicial considerations about appropriate relief.

The Supreme Court of Canada recently commented on the fusion of equitable and legal jurisdiction in the Canadian common law provinces' and territories' superior courts in *Uber Technologies v. Heller:*[21]

> **58** Courts have never been required to take the ideal assumptions of contract theory as "infallible empirical proposition[s]". Equitable doctrines have long allowed judges to "respond to the individual requirements of particular circumstances ... . humaniz[ing] and contextualiz[ing] the law's otherwise antiseptic nature" (Leonard I. Rotman, "*The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters"* (2016), 2 *C.J.C.C.L.* 497, at pp. 503-4). Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests. The elderly person with cognitive impairment who sells assets for a fraction of their value (*Ayres v. Hazelgrove*, Q.B. England, February 9, 1984); the ship captain stranded at sea who pays an extortionate price for rescue (*The Mark Lane* (1890), 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (*Commercial Bank of Australia Ltd. v. Amadio*, [1983] HCA 14, 151 C.L.R. 447) -- these and similar scenarios bear little resemblance to the operative assumptions on which the classic contract model is constructed.

By attaching adjectives to the word "equity', courts maintain that it is part of the law. Leaving off adjectives may connote something that is not moored to the law. So equitable doctrines, principles, rules and similar adjectival constructs tame equity so that it is recognized as part of the province of the judiciary. This is illustrated, in part, by the use in the Supreme Court of Canada of the phrase "ex aequo et bono." If placed in the context of the law of equity, courts use it. If not, it becomes merely someone's personal view of what is fair.

Thus, in *Storthoaks v. Mobil Oil Canada*,[22] the court clarified the law of restitution such that "change of position" was recognized as a defence against repaying money paid under a mistaken

[20] RSBC 1996, c. 55.

[21] 2020 SCC 16, para.

assumption it was owing. The court's explanation, however, included this quotation from Lord Mansfield:

> The significance of the issue discussed in these cases is that if a claim for the return of money paid under mistake of fact is founded on the basis defined by Lord Mansfield in *Moses v. Macferlan,* then, as he said in that case, at p. 1010, the recipient may "plead every equitable defence upon the general issue" and "may defend himself by everything which shows that the plaintiff *ex aequo et bono* is not entitled to the whole of his demand, or to any part of it." If, however, the obligation to repay is contractual, it does not depend upon whether the requirement to repay is just and equitable. To meet a claim falling within the definition in *Kelly v. Solari* it would be necessary to prove a legal estoppel.

Similarly, in *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.,*[23] a quantum meruit claim for change orders and extra work was rejected with the court noting that the parties' own contract excluded such a claim. Had there not been such a contractual prohibition, it may have been open for the court to apply quasi-contract or restitutionary principles:

> There is, therefore, no room for the application of any theory of quasi-contractual recovery whether by way of the legal fiction of an implied contract or the decision of the Court in the particular case to impose an obligation *ex aequo et bono.* The facts upon which such a theory of recovery can be based do not exist in this case, where the parties have made an express contract covering the very facts in litigation and that contract still remains open and unrescinded. Their relations on matters covered by the contract are governed by it and the Court has no power to substitute another form of obligation.

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[22] 1975 CanLII 156 (SCC), [1976] 2 SCR 147 at 162. See also *Nepean Hydro Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347 are 403 per Estey, J., where repayment of money paid under mistake was refused. Estey, J., quotes from Lord Mansfield as above. More recently, the same quotation and "ex aequo et bono" principle at the root of restitutionary claims for money paid by mistake was discussed in *BNSF Railway Company v. Teck Metals Ltd*., 2016 BCCA 350 at paras. 31-35.

[23] [1960] SCR 361 at 369. The roots of quasi-contract (including quantum meruit and quantum valebat claims) are in the common law courts, albeit motivated by concerns that smack of equity. Restitution and unjust enrichment as concepts encompass that and a broader equitable jurisdiction. See P. Birks and G. McGregor, *The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone*, Oxford Jo. of Legal Studies, 1986, Vol. 6, No. 1, at page 50, where they trace civil law roots of the doctrine (Grotius refers to it as founded on "natural equity") and quote Blackstone as justifying such implied contracts on the footing that "though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires." See also *Canadian Bank of Commerce v. T. McAvity & Sons Ltd.*, [1959] SCR 478 at 481, where the court notes that part of builder lien protection is "to provide a security for them on that value to which, *ex aequo et bono,* they are entitled."

Yet in *Jacobi v. Griffiths*,[24] Binnie, J., found that an extension of the "principles" or "policy" involving vicarious liability was not warranted in that case. Doing so, would amount to taking from one person to give to another with nothing to commend it, save that the latter appeared more needy:

> Much as the Court may wish to take advantage of the deeper pockets of the respondent to see the appellants compensated, we have no jurisdiction *ex aequo et bono* to practise distributive justice.

What we can glean from this is that the phrase *ex aequo et bono* is not unknown to the law or principles of equity that form part thereof. Instead, it takes its meaning from context. Where placed in the context of a court's adjudication of a dispute where legal and equitable principles are being applied, it is part of the "law." Where it is chosen as a term that empowers an adjudicator to go beyond those, it takes on a somewhat different (and usually, in the eyes of a court at least, pejorative) meaning.

Before leaving this topic, I think it useful to refer to the thoughtful comments of Lambert, J.A., on appellate review of an exercise of discretion.[25] He starts by saying that having a discretion "does not mean that the trial judge may do as he pleases. All questions of discretion must be resolved judicially and not capriciously." He then differentiates between two kinds of discretion. The first is a "true discretion", where there is "no right answer and no wrong answer." The second is a "principled discretion." That arises where "there is a right answer and a wrong answer, although the right answer is not dictated by positive and settled law." He explains how "right" is determined:

> Nonetheless, the administration of justice would be brought into disrepute if one judge could decide such a question one way and another judge, faced with exactly the same situation, could decide it another way. Judicial comity, common sense, and a regard for the seemly administration of justice, require that the same question should be decided in the same way each time it arises. That way, the matter becomes predictable. Guidelines for the consistent exercise of the discretion flow from the mode of exercise of the discretion by one's predecessors. In the end, a failure to exercise such a discretion in accordance with its consistent past exercise becomes a failure to exercise the discretion judicially. The discretion has become a principled discretion, as opposed to a true discretion.

There is an analogy between the different types of discretion that Lambert, J.A., explains here and the different characterizations of equity that I am reviewing here in the context of arbitration law.

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[24] [1999] 2 SCR 570 at para. 29.

[25] *British Columbia v. Worthington (Canada) Inc*., 29 B.C.L.R. (2d) 145

In a posthumously published short essay on discretion, H.L.A. Hart captured the sense of what the word, properly understood, involved:[26]

> Discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious.

As similar situations arise, one can reasonably expect that the discretion of judges or other adjudicators will follow examples of previous cases which resonated as being sound exercises of judgment.[27]

> Pending the evolution of rules, discretion must take its place because the area is really one where reasonable and honest men may differ, however well informed of the facts in particular cases.

Hart concludes with the admonition that the evolution of rules is something that has the mark of progress as we learn what works better or achieve a more just result.

> It seems to me clear that just because there is a point at which we can no longer be guided by principles and at the best can only ask for the confirmation of our judgment by persons who have submitted themselves to a similar discipline before deciding, that we have in discretion the sphere where arguments in favour of one decision or another may be rational without being conclusive. No doubt we learn through successive exercises of discretion in a similar field and discovering what in the sense explained above appears to be vindicated to identify factors attention to which will be necessary if further decisions are to be justified.

Equity as Fairness and Other Adjudicative Approaches

"Equity as fairness" thus appears to be distinct from equity as law. That the lines can be blurred has been known for centuries. Part of the reason for that is that criticizing equity as part of the law is often done by asserting that it is based on subjective perceptions of fairness, rather than anything orderly, regular, consistent and predictable. Thus, the famous phrase coined by the 17th century English legal scholar, John Selden, was that equity was "a Roguish thing" and varied according to the length of each Chancellor's foot. He was, of course, criticizing what was done in the courts of equity. But his point was that without a standard measure to apply there was nothing law-like or law-ful about what they did.

Most nowadays would agree that that criticism is erroneous, particularly as courts of equity have developed and applied firmer and more regular principles. Indeed, by the time of Lord Eldon in the 18th century, some would argue that equity had calcified much of its former flexibility and itself needed reform. Over time, that has been recognized and the law of equity further developed. But strains of the same refrain, that increasing flexibility makes for subjectivity instead of legal certainty, return over and again.

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[26] H.L.A. Hart, Discretion, (2013) 127 Harv. L.R. 652 at 658.

[27] H.L.A. Hart, Discretion, (2013) 127 Harv. L.R. 652 at 664.

The criticism of the concept of equity that Selden identifies is in many ways quite distinct from what courts of equity did and what courts exercising equitable jurisdiction now actually do. To illustrate that distinction, reference to what the 20th century English law historian, William Holdsworth, wrote about the 18th century legal commentator, William Blackstone, may assist.

Holdsworth notes that Blackstone's *Commentaries on the Laws of England* has been criticized for lack of familiarity with much of equity and for treating it as, at root, not a system of rules and law:

> It has been said by Sir Duncan Kerly, in his valuable history of equity, that Blackstone makes contradictory statements about equity; ' and this criticism has been cited with approval by myself and others.' At first sight the criticism appears to be obviously just. In his first volume, Blackstone says that "there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to positive law ***";*** and, in his third volume, he says that **"** equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may be liable to objection."[28]

Holdsworth allows that the criticism (even his own) may have been exaggerated, however, and says of Blackstone that:

> When he is speaking of equity in his first volume he is not thinking of equity as a body of rules administered by the court of Chancery. He is thinking of equity in the very different sense of a method of interpreting laws in accordance with their reason and spirit.[29]

That is the point of distinction to take note of here. Equity in the sense of "good conscience" alone overlaps, to some extent, with equity in the sense of what courts of equity mete out. But the business of the courts of equity and of the exercise of equitable jurisdiction developed over the centuries have rules and principles that make for a contrast with "good conscience" alone.

The New B.C. Arbitration Act of 2020

The new B.C. *Arbitration Act*, passed in 2020, provides in section 25(3) and (4) as follows:

> 25. (3) An arbitral tribunal must decide the substance of a dispute <u>in accordance with the applicable law, including any equitable rights or defences available under that law</u>.
>
> (4) An arbitral tribunal may grant relief or remedies under the applicable law, including orders of specific performance, injunctions, declarations or other equitable remedies available under that law.

So instead of just saying arbitrators had to decide disputes "by reference to law", the new act clears up that that "law" includes "any equitable rights or defences available under that law."

What then of the provision in the former *Arbitration Act* that, if the parties agreed, arbitrators could decide based upon "equitable grounds, grounds of conscience or some other basis"?

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[28] W. Holdsworth, *Blackstone's Treatment of Equity* (1929) 43 Harv. L.R. 1 at p. 3.

[29] W. Holdsworth, *Blackstone's bbTreatment of Equity* (1929) 43 Harv. L.R. 1 at p. 3.

Section 27 of the new act provides for that, albeit in slightly different language: "… if all parties agree, an arbitral tribunal may resolve a dispute *ex aequo et bono*, as *amiable compositeur* or by applying some other standard."

So, under the new arbitration statute, BC has made clear that deciding in accordance with law includes applying equitable rights and defences available under that law. Further, it delineates that to decide an arbitration on non-legal grounds, the parties must have agreed to that and then "equity" in the sense of "ex aequo et bono" or with the arbitrator as *amiable compositeur* may be applied. It is apparent, though, that both of the latter approaches are distinct from the kind of legal principles applied and remedies granted by courts of equity (before or after fusion) and neither of the latter approaches are considered to be law-based.

The BC *International Commercial Arbitration Act*

The *International Commercial Arbitration Act* was not repealed and replaced along with the changes made to the domestic arbitration statute in 2000 in B.C. Presumably, in large measure at least, that is because it tracks the UNCITRAL model that is rooted in international treaties and adjusting it would have repercussions with regard to B.C.'s place in the international commercial arbitration world.

The international arbitration statute says this in section 28 about the basis for adjudication:[30]

> **28** (1) The arbitral tribunal must decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.
> (2) Any designation by the parties of the law or legal system of a given state must be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.
> (3) Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal must apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
> (4) The arbitral tribunal may decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.
> (5) In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction.

So the law applicable in international commercial arbitrations held in B.C. is "the rules of law designated by the parties" or those considered "appropriate given all the circumstances surrounding the dispute." That does not, on its face, tell us whether that "law" includes equitable rights and defences. Whether it should likely depends upon:

(a) whether those equitable rights and defences are considered part of the system of law of the jurisdictions whose laws are being applied; or
(b) whether what is proposed is to apply an approach that is "ex aequo et bono or as amiable compositeur."

[30] *International Commercial Arbitration Act*, RSBC 1996, c 233.

Note how different legislative draftspersons have framed this. Under the former domestic arbitration act in B.C., it was "equitable grounds, grounds of conscience or some other basis." Under the new one, it is law, including equitable rights and defences. Under the *International Commercial Arbitration Act*, it is the "rules of law" designated or found to be appropriate.

The Octaform Case

In *Johnston and Lozan v. Octaform* (the "Octaform" case),[31] Mr. Justice Kent of the B.C. Supreme Court, addressed the validity of an interim award made by an arbitrator in B.C. The underlying dispute involved claims made by two Nevada residents who were employees of Octaform and worked there. Their employment agreements provided for arbitration to be held at the BC International Commercial Arbitration Center (now renamed the Vancouver International Arbitration Center).

Octaform's claim included alleged breaches of fiduciary duty, confidence, and contract, as well as tort claims. The employees defended on the merits and filed a counterclaim. They argued that the employment agreements were void and restrictive covenants in them were unenforceable. They also claimed for unpaid commissions, bonus payments, damages for loss of income and unjust enrichment, as well as damages for emotional distress. Finally, their pleadings invoked the "equitable doctrine of set-off".

The employees applied to the arbitrator for an order that he had no jurisdiction to deal with any of Octaform's claims in equity or award any equitable relief.[32] This was anomalous as section 16(2) of the *International Commercial Arbitration Act* provides that "A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence."

The arbitrator, Mr. Maerov, ruled against the employees. He found that Nevada law governed most issues, while the law of BC applied, as the seat of the arbitration, to "matters internal to the arbitration proceed, including any statutory limitations on the scope of the arbitral jurisdiction."

The employees then petitioned the B.C. Supreme Court to set aside the arbitrator's ruling on jurisdiction about equitable claims and relief. It appears that they did not specifically invoke section 16(6) of the *International Commercial Arbitration Act*. Instead, the parties disputed whether the BC domestic or international arbitration statute applied to their dispute. The employees contended that the former *Arbitration Act* applied, not the *International Commercial Arbitration Act.*

The arbitrator had found that the international one did. Kent, J., upheld that decision.[33] Presumably the court's decision was made as an appeal from the arbitrator's decision on his own jurisdiction under section 16(6) of the *International Commercial Arbitration Act*. That provides that the court's decision is "final" and not subject to appeal. In passing, note that the concept of B.C. provincial legislation attempting to limit a right of appeal can really only apply to an appeal to the B.C. Court of Appeal.

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[31] 2021 BCSC 536.

[32] 2021 BCSC 536, para. 9.

[33] *Johnston v. Octaform Inc*., 2021 BCSC 536

The employees' court filings, however, rely upon the former *Arbitration Act*. They had not sought leave to appeal under section 31 of that act, however.

Since the arbitration commenced earlier than the transition date in the new *Arbitration Act*, the latter had no application on how the matter got into court. So it was either the former *Arbitration* Act as if this was a domestic arbitration or the *International Commercial Arbitration Act* that applied. In the circumstances, the "international" nature of this dispute and the arbitration were clear.

Key factors were that the parties were all "residents of Nevada", the "impugned conduct occurred in Nevada", the law governing their relationship, their duties and their obligations was Nevada law, yet they had chosen by contract to arbitrate in B.C. As such, from the B.C. law perspective, their arbitration here was an international one. As section 1(3) of the International Commercial Arbitration Act provides (in part):

> An arbitration is international if
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states,
>
> (b) one of the following places is located outside the state in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

Kent, J., found that to be so, regardless whether the scope for court review of the arbitrator's decision was the deferential "reasonableness" standard, or one of "correctness." He noted the law appeared unsettled in the application of that administrative law approach to review of arbitration decisions. He then sidestepped which standard should properly apply as he found that under either approach the arbitrator's decision was the right one.

That led on to consideration of the main issue before Kent, J.: "Does the Arbitrator Have Equitable Jurisdiction?" At para. 69, the learned judge noted that under the old *Arbitration Act* "whether an arbitrator had equitable jurisdiction has been a confused and convoluted issue for many years." The reason was that section 23 of the former act required arbitrators to decide "by reference to law" and later said that could be ousted only on written agreement to have the dispute "decided on equitable grounds, grounds of conscience or some other basis." At para. 70, the judge noted that the act provided that the BCICAC rules for domestic commercial arbitrations applied unless the parties otherwise agreed. Those rules included express provision permitting awards of specific performance, rectification, injunctions and other equitable remedies. So either the rules went too far or the interpretation of "by reference to law" had to include equitable rights, defences and remedies.

In para. 71, Kent, J., notes that some court decisions had denied that arbitrators could grant equitable remedies. But in *Hayes Forest Services Limited v. Teal Cedar Products Ltd.,*[34] the B.C. Court of Appeal held that "the purpose of section 23 …. is not to exclude equitable remedies." That was followed in certain later cases.

[34] 2008 BCCA 283.

In the *Octaform* case, however, the petitioner employees argued that the B.C. Court of Appeal had it wrong. The Supreme Court of Canada decision in *British Columbia (Forest) v. Teal Cedar Products Ltd.* was relied upon, including the passage noted earlier where the court said that arbitrators did not have an equitable jurisdiction.

The employees also referred to the fact that the legislature in passing the new *Arbitration Act* had expressly provided that arbitrators had equitable jurisdiction (section 25). By negative inference, they argued that meant that the legislature must have regarded the previous law as providing otherwise. The employees also referred to numerous other places in legislation where law or equity were used and taken to mean different things.

Kent, J., reviewed the arbitrator's decision on these arguments. The arbitrator rejected the use of the new legislation as an interpretative aid to the former one. The change could have been intended simply to clarify things. The Supreme Court of Canada's *Teal* decision was primarily about whether the *Court Order Interest Act* applied or whether an equitable measure of interest could be awarded as compensation instead. As such that made the court's comments about arbitrator's lacking equitable jurisdiction obiter dicta.

The B.C. Court of Appeal in *Clayworth v. Octaform Systems Inc.*[35] had held that the issue was "not definitively resolved." The arbitrator's next point was that attempting to excise equitable rights, defences and remedies from arbitration would render the arbitration process stilted and ineffective. Even though parties may have expressly agreed to arbitrate dispute relating to or arising from a contractual or other relationship, interpreting the former *Arbitration Act* as the employees sought would mean that only rights and remedies at law could be addressed and equitable ones could not. That would undercut party autonomy in choosing a dispute resolution mechanism and lead to confusion about parties having to go to court for part of their dispute. Finally, the arbitrator noted that the parties had, on each side, pleaded equitable rights, defences and remedies. Presumably this was intended as a form of estoppel argument – which in and of itself is an equitable concept.

At para. 79 and following, Kent, J., endorses the arbitrator's reasoning and conclusions. He found that the references in both the former *Arbitration Act* and the *International Commercial Arbitration Act* to deciding "by reference to law" included "the substantive principles of law and equity" and thus the arbitrator had equitable jurisdiction.

In what some judges and lawyers might regard as a bold move,[36] Kent, J., went beyond the B.C. Court of Appeal finding in *Clayworth* that the issue concerning the equitable jurisdiction of

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[35] 2020 BCCA 177 at para. 54.

[36] In *Sellars v. The Queen* [1980] 1 SCR 527, Chouinard, J., held that lower courts should treat Supreme Court of Canada obiter dicta as binding. In *R. v. Henry* [2005] 3 SCR 609, at paras. 55-57, however, Binnie, J., held that would straitjacket lower courts and stultify the development of the law. He reverted to the formula that such dicta should be taken to be of persuasive authority, but that diverging from it was acceptable where a lower court thought, for good reason, that should occur: "The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience."

arbitrators was "not definitively resolved." He found that the 2008 B.C. Court of Appeal decision was correctly decided and found that there was such a jurisdiction. He asserted that was what he was 'bound to apply". What the Supreme Court of Canada had said did not "expressly overrule" that and was *obiter dicta*.

Finally, Kent, J., at para. 84, held that the *International Commercial Arbitration Act* language "makes it clear" that the designation of the governing law meant the whole of the "substantive law" of whatever jurisdiction the parties had chosen (here, Nevada). That included both legal and equitable rights, defences and remedies.

It does not appear that an appeal was taken from the decision of Kent, J. The upshot of his decision is that the jurisdiction of arbitrators in B.C. to make awards based upon equitable rights, defences and remedies has been confirmed. That applies to the former *Arbitration Act* and new *Arbitration Act* for domestic arbitrations and to the *International Commercial Arbitration Act* for international commercial arbitrations.

Conclusions

Recognizing that the jurisdiction of an arbitrator applying "the law" of a given jurisdiction includes, as a default position, both the legal and equitable principles of that jurisdiction regularizes arbitration process. It respects party autonomy in choosing both to arbitrate and to select the law that the parties want applied. Absent a serious public policy reason for not doing so, that choice should be respected.

Further, it reinforces the solidity of the relations between the private and public adjudicative processes. While private processes like arbitration work well if the parties accept the process and outcome, where they do not, inevitably one or another will resort to the courts. There, in a public forum, the issues of whether and what the parties committed to arbitration, what law and process was agreed upon, how and what the arbitrator decided the case and whether the arbitrator's decision should be enforced will all be argued. By showing respect for the parties' choice and for the arbitrator's role, courts uphold substantive principles of our legal system.

With specific reference to equity as a feature of the law, by recognizing that arbitrators have such jurisdiction, courts are doing no more than recognizing that arbitrators have the same array of law to apply that a court would. There may well be a dose of practicality involved in a judge considering first what courts have held to be accepted exercises of equitable jurisdiction and the principles on which that is based. To the extent that those resonate in a similar manner with what an arbitrator has done in an award, there are not likely to be proper grounds for refusing recognition and enforcement.

In the case of parties opting to utilize an "equity clause" and choose to have their dispute arbitrated *ex aequo et bono* or on an *amiable compositeur* or other basis, courts may well find, as Dean Brierley suggested, that the process and decisions made by arbitrators generally fall in line with what the parties' contract provides and what the law of the place of the arbitration or where an award is sought to be enforced may provide. If it does not, then there may well be grounds for refusing to recognize or enforce the award. But to the extent that the arbitrator's decision falls within a range of reasonable decisions, once again it will usually be entitled to respect and recognized for enforcement purposes.

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August 30, 2021