IN SEARCH OF JUSTICE by C.H.Spurin

Introduction. In the commercial context, both the courts and arbitral tribunals are tasked with resolving private disputes, by delivering a ruling on the respective rights and duties of the parties. The ruling will be based on the relevant legal principles that the tribunal finds apply to the disputed issue and in the light of the facts, as determined by the tribunal. The outcome will be a ruling that one party account to the other either for the consequences of the wrong as identified by the tribunal (including the costs of the process), or alternatively for the costs of the action, in the event that the tribunal finds that no wrong has taken place. In essence the tribunal determines the allocation, between the parties, of risk and responsibility for events that have resulted in loss.

In the minds of the parties they may be seeking a decision that gives them what they consider they are "***legally entitled to"***, that is to say the enforcement of their respective rights or "***just deserts***". Alternatively they may assert that they are looking for "***justice to be done"*** and anticipate that the outcome will be "***fair and just***".

To what extent will courts and tribunals fulfil these expectations, enforce legal entitlement and deliver justice as between the parties? Are they one and the same or are they different? If different, can both objectives be fulfilled or might they be mutually exclusive, some, if not all of the time?

The traditional justifications for resorting to private processes in preference to commercial litigation centre on potential cost savings, informality, speed, privacy, international enforceability, industry expertise and the autonomy of the parties. Much attention has been paid by commentators to the ability of negotiated ADR processes to provide "***fairer***" outcomes not based on an allocation of fault and responsibility, but rather on wider mutual interests, predicated on continuing relationships between the parties, drawing on the experience of mediators in the field of social dispute resolution.[1] The rescheduling of debts, joint ventures and new contracts that seek to redress imbalances in previous arrangements are prime examples. Such discussions often involve a re-evaluation of what amounts to justice, though the rationale for ADR may be alternatively reduced to pragmatism, without recourse to jurisprudential discourse. Be that as it may, little attention has been paid to the impact of judicial policy making on justice within the litigation process and the alternate role of the private adjudicator. Should and do judges and private adjudicators seek to achieve justice? In what ways, if at all, do the objectives of the public and private processes differ?

The facility exists for third party determination of disputes without recourse to legal rules and norms:-

a) An expert may be engaged by the parties to settle disputed facts that involve no questions of law.[2] Whilst the expert should be impartial and a decision may be impeached on the grounds of bad faith, in other respects all that is required of the expert is the delivery of an honestly held opinion.
b) The Model Law[3] and the Arbitration Act 1996[4] provide that an arbitrator may be engaged to settle a dispute without recourse to law.

The following discussion however, targets the judicial and the quasi-judicial processes, where the decision is the outcome of the application of relevant law to the facts, as established by the tribunal. Furthermore, since it is anticipated that the outcome of both judicial and arbitral processes is likely to be broadly similar in simple, straightforward cases, attention will be directed towards the so called "***Hard Cases***" which run the risk of making of "***Bad Law***" since general principle often[5] does not satisfy the needs of specific cases.

Justice – what is it? The problem with searching for justice lies in defining what amounts to justice in the first place. Unhelpfully, justice means different things to different people, and even different things to the same person depending upon the circumstances. Whilst it is common for the individual to have a sense of injustice at a particular outcome, providing a uniform account of justice that applies both to that particular situation and to all others is somewhat like the search for the end of the proverbial rainbow. Justice is

1 See for example ***Getting to Yes*** : R.Fisher & W.Ury
2 This is the traditional role of the construction contract administrator. Expert valuation is widely used to establish independent objective pricing of realty, art and antiques.
3 Article 28(3) UNCITRAL Model Law.
4 S46(1)(b) Arbitration Act 1996
5 Though the overriding principles established by the CPR 1999 suggest that this should no longer be the case.

personal and related to where the evaluator is standing at the time. Are there then any objective criteria at all that could form the basis of a usable test? To whom must the law be fair and just?
The rule of law appears at first sight to provide the answer. It states that everyone is equal under the law and that everyone is subject to the law. So far so good! Furthermore, it mandates a regular system of law, an absence of arbitrary rules, a requirement that the law be known to all, not rules made up on the hoof to deal with situations as they arise at the whim of the tribunal. But, is the law fair and just? The law is what the law is. The rule of law is tempered by concepts of due process and natural justice, which it is deemed are inherent within it and reinforced by lofty ideals in human rights conventions, but whilst these constrain the way that the authorities treat the individual, outside the realms of procedure, they provide no guide as to what is or is not fair and just in respect of the substantive law.

Whilst principles play some part in litigation, the primary aim of commercial dispute resolution is accountability - the allocation of responsibility and liability for the adverse consequences of actions. The price for being held to account frequently impacts not only on the individual but also on unsuspecting third parties, drawn from the immediate or even the wider community and can have an impact of society in general, particularly where the judgement leads to bankruptcy, destroying jobs and the prospects of those that rely upon the industry. All this ensues despite the fact that judgments often involve close calls drawn upon fine distinctions, where there is no clearly evident case of right or wrong. Millions may turn on the interpretation of a word that no-one really had in mind when first they forged their legal relationship. What then for justice, when the winner takes all? But then, winning may well protect the interests of another equally needing community.

Often there are no winners and losers in the litigation game. The personal costs of litigation, both financial and emotional, may weigh heavily on both parties. The destruction of working relationships may well carry a heavy cost for both parties. For reasons such as these the parties may chose to abandon any quest for strict or legal justice and look rather for accommodations and compromise and a way forward that both can live with.

Assuming the law is fair and just, how then does one determine the law? Whilst statute may lay down much of the law, the meaning of statutory provisions and their application is for the judiciary to determine. In common law jurisdictions the judicial law discovering role provides further scope for judicial discretion.

Justice and the Judicial Process. The power of the judge is significant in that in him resides the authority of the state. In as much as the authority of the court is used to support the arbitral process, from one perspective there is little in the practical sense to distinguish between the processes, apart from convenience.[6] The major distinction rather lies in the extent to which a judge may apply policy to the legal decision making process. In common law jurisdictions, such policy is wont to establish binding precedent, which will have an impact far beyond the instant case, be it by establishing common law rules or by attributing specific meanings to statutory provisions and turning common terminology in standard form contracts into terms of art. The latter can equally be highly persuasive in civil law jurisdictions. Statutory interpretation is vital to the effective application of statutory codes and the ongoing development of the common law enables the law to evolve to address novel situations and to adapt to changes in society. Both introduce a level of uncertainty and unpredictability into the law since it would be naïve to imagine that such determinations are made on a purely objective basis relying on the mechanical application of logic, given that law owes as much to art as to science.

Great faith is vested in the judiciary to deliver justice. They are often viewed as a veritable Solomon who can fathom questions of fact, such as who is the true mother of a child.[7] They possess great guile *(a second Daniel no less*) as exhibited by Shakespeare's Portia in the Merchant of Venice, who whilst upholding the strict legal rights of Shylock to his pound of flesh, was able to prevent "***injustice***" by limiting the creditor's rights to flesh alone, by requiring that not one drop of blood be shed.[8] The issues at stake in commercial trials may not be so dramatic and lurid or the need for justice so clearly evident, but frequently the financial lifeblood

6 S42-45 Arbitration Act 1996
7 ***The Holy Bible***, 1 Kings verses 16-28
8 ***The Merchant of Venice***, William Shakespeare, Act IV Scene 1

of litigants is at stake and perceptions of justice are no less relevant to the parties.

The exercise of judicial policy may be critical to the outcome of a trial. Whilst statute today constitutes the principal source of law in the UK, the common law continues to develop apace. The modern tort landscape has been shaped almost entirely by the common law.[9] Seizure and discovery, whilst now put on a statutory basis by the Civil Procedure Rules 1998, was brought about by the judiciary.[10] Lord Denning virtually single-handedly reinvigorated the role of equity in the guise of estoppel.[11] The 1966 practice declaration by the House of Lords reinforced judicial policy making, enabling the court, in exceptional circumstances, to further overturn outdated precedent. Precedent itself has developed by analogy and by distinguishing between cases on the basis of fact. Even the adoption of an analogy and the decision to create a distinction are governed by the prevalent judicial policies of the day or at the very least those of the presiding judge.

How the courts exercise policy depends very much on the leanings of the tribunal seized with the matter. In previous times the higher courts exhibited strongly conservative tendencies.[12] Today liberal tendencies are in the ascendancy[13] both in the UK and the USA where the composition of the Supreme Court is under the microscope. The composition of the courts is a consequence of political decisions made at the time of the appointment, of individuals who frequently outlive the appointing administration. With between 2-4 appointments to the US Supreme Court pending, the current administration may influence U.S. judicial policy making for the next 20 or more years.[14] The liberal regime[15] that has reigned since the 1960's, impervious to the Nixon, Regan and Bush administrations, it would appear is about to end.

The prevalent tendencies do not necessarily lead to certainty. There are exceptions. Currently decisions of a broadly conservative leaning High Court bench are frequently overturned on appeal, by a predominantly liberal Court of Appeal.[16]

Policy motivated decisions are frequently dressed up as measures designed to deliver justice. Yet at the same time we are given to believe that the courts are ***courts of law***, not ***courts of justice***.[17] Conservative judgments that maintain the status quo are on times delivered with expressions of regret and wistful hopes that the matter might be addressed by Parliament. The court appeals to the notion that Parliament is the sovereign law maker and that it is not the place of the courts to resort to judicial legislation. Principled rules of law and the predictability of the law should not be sacrificed for a ***wagon-load of hay***, even though misfortune may be visited upon the hapless litigant who does not deserve to be so harshly treated.[18] Thus, it is not for the courts to reshape a bad bargain. Caveat emptor applies.[19] The parties should take care when forming relationships. That events have turned sour for a party is not the business of the courts.

Yet, on the other hand, the courts have not been slow to develop rules to protect the interests of the consumer and to right perceived imbalances in power between commerce and the general public.[20] Many a ***wagon-load of hay*** has resulted in the reckless overturning of prior legal understanding or in the drawing of

9 eg the Law of Tort, ranging from Lord Atkin's neighbour principle enunciated in ***Donoughue v Stevenson*** *[1932] AC 502,* public policy decisions on pure economic loss – ***Spartan Steel v Martin*** *[1973] 2 QB 27* - through to the tort of nuisance – ***Cambridge Water*** *v ECCL [1994] 2 AC 264* and allied strict liability torts – ***Rylands v Fletcher*** *(1868) LR 3 HL 330.*

10 ***Anton Pillar*** *Orders [1976] Ch. 55* and the **Mareva** Injunction *[1975] 2 Lloyd's Rep. 509.*

11 ***High Trees House*** *[1947] KB 130* Equitable estoppel; ***Williams v Williams*** *[1957] 1 WLR 148* Proprietary estoppel.

12 See e.g. Atkins, Megary & Wilberforce. Denning could perhaps be put in a class of his own, being both a visionary yet highly conservative at the same time as demonstrated by **Gouriet v Post Office** [1978] AC 435 & his vacillations over the supremacy or otherwise of European Law.

13 Lords Scarman, Woolfe, Irvine and Faulkner to name but a few are/were clearly liberal leaning judges.

14 There are nine justices. However Chief Justice Rehnquist is 80 and in ill health. Sandra Day O'Connor is 74. Justice John Paul Stevens, is 84. Favourites to succeed include Justices Antonin Scalia and Clarence Thomas

15 Without the support of the Supreme Court, bussing, the key weapon in the armoury of desegregation which brought about the end of segregation in the US education system, would not have been possible.

16 See the spate of cases on housing and social security rights for asylum seekers, illegal entrants and the High Court to House of Lords decisions on the legality of detention at Belmarsh Prison. ***A v S.S. for the Home Office*** *[2004] UKHL 56*

17 "*The Common Law*" Oliver Wendell Holmes

18 Compare ***British Columbia v Loach*** *[1916] 1 AC 719*

19 Eg ***Photo-productions v Securicor*** *[1980] 1 All.E.R 556*

20 ***Donoughue v Stevenson*** *[1932] AC* heralded the start of judicial consumer protectionisms.

fine distinctions which subsequently prove difficult[21] or even impractical[22] to apply thereafter.

What then are the rules that govern the judicial decision making process? S1 Civil Procedure Rules 1999 sets out over-riding principles to guide the judiciary in respect of practice and procedure.

1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

1.1(2) Dealing with a case justly includes, so far as practicable
(a) ensuring that the parties are on an equal footing
(b) saving expense
(c) dealing with the case in ways which are proportionate
(i) to the amount of money involved
(ii) to the importance of the case
(iii) to the complexities of the issues and
(iv) to the financial position of each party
(d) ensuring that it is dealt with expeditiously & fairly &
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 the court must seek to give effect to the overrriding objective when it
(a) exercises any power given to it by the Rules or
(b) interprets any rule.

These rules are about dealing with cases justly, not with just outcomes. The development of the common law is left entirely to the discretion of the judiciary. Regarding statutory interpretation, the guidelines are the contextual Literal, Golden and Mischief Rules, now supported by recent European imports, proportionality and the teleological approach. To what extent do these rules proscribe the interpretive process or alternatively afford a wide range of latitude to the judiciary in search of the intentions of Parliament?

Judicial Policy and European Law. The scope for judicial policy making has increased in recent times. The European Court of Justice at Luxembourg has, since 1964, firmly established its judicial policy making role in respect of the creation and consolidation of European Union principles under a court proclaiming a limited sovereign European Union power[23] and as harmonising interpreter of all European Union Law.[24] Rather than risk potential challenges before the ECJ the UK courts tend in their interpretations of UK statutes and rules of court, to err on the side of conformity with EU norms.[25]

The European Court of Human Rights, Strasbourg, has interpreted the text of the Convention to embrace issues that were clearly not in the minds of the founding draftsmen. Even before the Human Rights Act 1999 came into force, the U.K. courts had already started to take judgments of the ECHR into account. Since the Act came into force in 2000 they are obliged to do so. Clear language to the contrary in an Act of Parliament is needed for the U.K. court to deliver a statement of non-compatibility. Most Acts will be interpreted in conformity with the Convention, even if this requires the straining of the ordinary meaning of the text.

Whether or not the laws emanating out of Luxembourg and Strasbourg are closer to or further removed from one's concept of justice is another matter. All rights come at a price. One man's right is another's burden. There is no authoritative universal statement of rights and burdens. Local law tends to reflect local values. These can often find themselves in conflict with so called "shared" values between nations, or at least the representatives of nations.

Judicial Policy and Arbitration. The impact of judicial policy on arbitration has been considerable. Following the Arbitration Acts of 1970 and 1975 the UK courts adopted a policy of intervention in the

[21] ***Re Polemis*** *[1921] All ER 40* ***: The Wagonmound No1 [1961] AC 388****.*
[22] ***Midland Silicones v Scrutton*** *[1962] AC 446 :* ***Elder Dempster v Pattison Zarchonis*** *[1924] AC 522:* ***Pyrene v Scindia*** *[1954] 2 AB 402*
[23] ***Costa v E.N.E.L*** *[1964] ECJ*
[24] ***Van Gend en Loos****.Case 26/22 [1963] E.C.R. 1, 13*
[25] ***McCarthys v Smith*** *:* ***Garland v BRB : Factortame***

arbitral process. By 1985,[26] the adverse effects of this intervention became apparent and London started to lose its previously unassailable hold on international arbitration. It took the passage of the Arbitration Act 1996 to reverse the trend. Today the courts deal at hands length with the arbitration process, primarily taking a supportive role where needed.[27] The new policy accords with government strategies to encourage arbitration in order to reduce court lists with consequent savings for the justice system. The courts[28] have also actively encouraged mediation ostensibly to promote a less confrontational attitude in commerce but equally with cost saving implications for the courts, encouraged and fortified by the Civil Procedure Rules 1998.[29]

Implementation of Part II HGCRA 1996 has relied heavily on policy developments by the courts to fill in the blanks left by this extremely succinct piece of legislation. In excess of 250 cases have refined and shaped the adjudication process. In the U.S., federal and state precedents have resulted in a continuous ebb and flow in the fortunes of arbitration and mediation, again fortified by a vast range of state and federal legislation.

The law, justice & the arbitral process. Arbitration is often referred to as private judging and even by the derogatory slogan "***rent a judge***." Albeit a useful shorthand analogy, it is in many ways far too simplistic, since the arbitrator's relationship with the law differs from that of the judge.

It is oft times asserted that the arbitrator's hands are not tied by precedent – a partial truth seldom borne out by circumstances and the applicable procedure[30]. Whereas early arbitration practice was based primarily on merchant practice,[31] conducted under the auspices of lay arbitrators with little or no grounding in the law, the modern arbitrator is required to apply the law, where applicable, to the established facts. Accordingly, whilst it is not necessary for an arbitrator to be a qualified lawyer, an arbitrator needs to have a thorough understanding of the law (both substantive[32] & procedural[33]) applicable to the dispute at hand.
Nonetheless, the arbitrator plays no role in establishing binding precedent, a privilege reserved to the judiciary.[34] Even if this were not so, whilst a limited range of arbitration cases are reported, particularly by specialist international tribunals, apart from any details of an arbitral decision that are set out in subsequent appeals[35], or at judicial review hearings, arbitration remains a private process : that being the case, the rationale underpinning most arbitral awards is not public knowledge and thus not available (*a pre-requisite to any concept of binding precedent)* to future litigants,.

Procedural law & justice. Even before the adjudicator or arbitrator can turn to the central dispute, he is likely to have to settle matters of jurisdiction[36] – including whether he has jurisdiction and further whether there is a dispute, and if so, the scope of the dispute before him.[37]

The latter issue is central to perceptions of justice, in particular regarding the extent to which a judge, arbitrator or adjudicator should seek to limit the scope of a dispute to disputed matters and materials that have been canvassed between the parties prior to submission of the dispute. On the one hand, allowing new disputes and new material is open to allegations of ambush and a loss of control of the process by the adjudicator, whereby in order to enable a party to adequately address the new material the process grows

26 Times Article 1985 by Lord Mustil on the need for reform.

27 S42-45 Arbitration Act 1996 Powers and Duties of the Court in support of arbitration.

28 See ***Cowl v Plymouth CC*** *[2001] EWCA 1935;* ***Dunnet v Railtrack*** *[2002] EWCA 303;* ***Hurst v Leeming*** *[2001] EWHC 1051;* ***Halsey Milton Keynes NHS Trust*** *[2004] EWCA 576.*

29 Sections 1, 28, 44 Civil Procedure Rules 1998.

30 S46(1)(a) Arbitration Act 1996 requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. S46(1)(b) Arbitration Act 1996 : Art 28(3) Model Law provides the exception.

31 Keynote Introduction, Prof Geoffrey M. Beresford Hartwell. Volume 5 Special "ADR DAY" Issue 29th April 2005 p3.

32 See below regarding impact of s69 Arbitration Act 1996 in respect of appeal on a point of law.

33 See ***Wicketts v Brine Builders & Siederer [2001] APP.L.R. 06/08*** regarding removal of an arbitrator pursuant to s24 Arbitration Act 1996.

34 In public international law, arbitral decisions have contributed to international common law. Furthermore, the decisions of state controlled alternative processes such as the employment appeals tribunals (EAT) are authoritative.

35 During the appeal process the court will, if requested by a party, respect the privacy of private information unnecessary to the appeal, unless disclosure is in the public interest. ***Dept. Economic Policy & Dev. City of Moscow v Bankers Trust*** *[2004] EWCA Civ 314* ***: Glidepath BV v Thompson*** *[2005] EWHC 818 (Comm).*

36 See further section 30-33 Arbitration Act 1996.

37 See *Annie McCartney.* ***What is a Dispute?*** ADR News Vol 5 No1 p7 et seq

like Topsy. On the other, a refusal to widen out the scope of the process can lead to allegations that the ***"real dispute"*** has not been addressed and that justice has not been served.

The law in this regard, be it for the courts[38], for arbitrators[39] or for construction adjudicators[40], is far from straightforward. It is hardly surprising that both the parties and decisions makers have been deemed from time to time to have got the answer to such questions (be it the factual issue of crystallisation or the legal aspect) wrong. [41]

Furthermore, there is a duty imposed upon the decision maker to manage the process. This involves the exercise of discretion, which in turn is governed by the overriding objectives of the relevant process.[42] For the arbitrator, management powers are set out in sections 34-40 Arbitration Act 1996. Without such powers, it would be impossible to control the process and reach outcomes in a fair, speedy and cost effective manner, but whilst the parties retain autonomy over the process, such autonomy is largely restricted to the protocols established prior to the process. Perceptions of injustice are quite common when a party is deprived of the opportunity to present yet one more witness, one more expert report, to dig even deeper into an issue or open up a novel (*related?*) issue.[43]

Substantive Law & Justice. The arbitrator must apply the law but in order to do so he has to satisfy himself as to the law. As with the judge he will be assisted in this task by counsel who will direct him to their asserted view of the applicable law. Unlike the judge who is deemed to know the law, the legal expertise of the arbitrator is not a "***known***" quantity.[44] Consequently, unless the parties have agreed to dispense with reasons, *"a party may apply to the court to determine any question of law arising in the course of proceedings which the court is satisfied substantially affects the rights"* of a party.[45] That which an arbitrator cannot do, is to disregard the views of the parties and apply his own version of the law (or indeed of facts), rather than to determine which of the versions posited by the parties is correct.

In the event that a party seeks to challenge that considered view, as expressed in an award, appeal lies, by virtue of s69 Arbitration Act 1996 to the courts unless the parties have otherwise agreed to dispense with reasons.[46] To dispense with reasons is a commercial decision that ensures more rapid closure, minimises costs and ensures privacy, but it is not without risk. The dilemma for commercial partners when choosing a dispute resolution process in advance is that the desirability or otherwise of a facility to question the current state of the law on a particular matter will not be apparent at that time, assuming that either party would be prepared to fund such legal creativity in the first place, which given their primary objective, the pursuit of profit, is unlikely. However, once a dispute materialises, attitudes may well have changed, but by that stage it is far too late to alter the pre-arranged process.

Conclusion. There is unlikely to be much difference today between the final outcome in arbitration or litigation, though the road to travel, and the costs and time involved in the journey might differ. The days of the amateur arbitrator are nearing the end. Is there still scope for common sense? Common sense is neither common nor, in the absence of objective criteria, amenable to definition and objective criteria. In the criminal sphere we still retain the concept of lay justice, but for not much longer it would seem in the civil sphere. Whether or not the primacy of a common law concept of judicial justice is universally embraced is another matter. The Civil Law inquisitor for one might not do so.

38 See the Preaction Protocols and the CPR in general.

39 See ***Halki Shipping Corporation v Sopex Oils Ltd [1997] EWCA Civ 3062***

40 See ***Adjudication – The changed model***. T.Bingham. ADR News Vol 4 Special Ed. p34

41 See ***Decision making – can it be judicial?*** D.Atkinson. ADR News Vol 4 Special Ed. p42

42 See s1 CPR 1998 in respect of the court, s1 & s33 Arbitration Act in respect of arbitration and s108 HGCRA 1996 / The Scheme in respect of adjudication.

43 Appeal to the courts in respect of jurisdictional issues is governed by sections 67, 72 & 73 Arbitration Act 1996. Appeal to the courts on grounds of serious irregularity in the arbitral process is governed by s68 Arbitration Act 1996.

44 Today, many adjudicators, in addition to their professional expertise are extremely learned at least in respect of the law pertaining to their special area of practice.

45 S45 Arbitration Act 1996.

46 In adjudication the procedure is quite different. The adjudicator's decision is subject to temporary finality. Even if the adjudicator gets a point of law wrong, the decision is immediately enforceable. The safeguard is a de nouvo process or arbitration or litigation. ***Bouygues UK Ltd v Dahl-Jensen UK Ltd*** *[2000] EWCA 2/2000/0181 : [2000] BLR 522*