

# AMIABLE COMPOSITION IN THE INTERNATIONAL COMMERCIAL ARBITRATION

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The concept of *amiable compositeur* has its historical origins in French law.

Amiable composition is very often defined synonymously with arbitration in equity or *ex aequo et bono*. It is difficult to specify differences between these two forms of arbitration, the literature identifies the differences as follows:

An arbitrator acting as *amiable compositeur* is deciding the dispute before him according to law and legal principles, nevertheless is authorized to modify the effect of certain non-mandatory legal provisions.

Ex aequo et bono is a dispute settlement out of law, according to moral principles. An arbitrator deciding as ex aequo et bono is allowed to disregard not only the non-mandatory rules, but also the mandatory provisions of law, as long as they respect international public policy.

Traditionally, amiable composition provided an equity correction to strict rules of law applicable to a dispute. Today an amiable compositeur has a power to depart from the strict application of rules of law and decide the dispute according to justice and fairness. This concept is usually chosen by the parties as a substitute for, rather than an addition to, national law.

All of the arbitration rules allow the arbitrator to decide a dispute as amiable compositeur if duly authorized by the parties prior to or during the arbitration.

In some cases, the parties choose a law applicable to their dispute, and at the same time provide for the arbitrator to decide as amiable compositeur. The applicable law in fact determines the limits of arbitrator's decision-making according to equity.

Parties' authorization of the arbitrator to act as amiable compositeur is usually regarded to include the authorization to apply the *lex mercatoria*. But the concept of use of *lex mercatoria* and deciding as amiable compositeur cannot be equated. Although a clause permitting amiable composition might be seen as implying a reference to *lex mercatoria*, an arbitrator does not need to have powers of amiable compositeur in order to apply *lex mercatoria*.

Although the amiable compositeur is obliged to apply neither any national law nor the *lex mercatoria*, in practice, "the amiable compositeurs regard the law as *ratio scripta* and do not find any good reason for departing from its application in particular cases. Nevertheless the arbitrator would not apply national law or *lex mercatoria* if the result contravened his idea of an equitable solution of the dispute. However, even in these cases the arbitrator has to abide by those principles which form part of the international public order or morals.

The arbitrator's powers to decide as amiable compositeur finds its limits in the will of the parties and, as mentioned above, the *ordre public*.

The parties express their will in the directions that they give to the arbitrator as to how to use the equity, and also in the arbitration clause itself. The question is whether the arbitrator acting as amiable compositeur can deviate from or modify the contractual agreement of the parties. The ICC Arbitral Tribunal in one of its awards held that it is generally accepted principle in international arbitration that the paramount duty of the arbitrator, even the amiable compositeur, is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy. The Tribunal in this award goes further by stating that "the arbitrator sitting as amiable compositeur is entitled to disregard legal or contractual rights of a party when the insistence on such right amounts to an abuse thereof.

Limits of the amiable compositeur powers also lie in the international public order of the applicable law and possible enforcement jurisdictions. The arbitrators have a general procedural obligation to render an enforceable award. Even when acting as amiable compositeur, the arbitrator must ensure enforceability of the award in the state which has a connection with a given case. It depends on the law of the state of enforcement whether it recognizes arbitration conducted under the amiable compositeur concept or not.

Why should the parties provide for such kind of dispute settlement? Literature<sup>1</sup> states four reasons: First, the differences between businessmen and lawyers from different legal environments as regards application of national law might lead them to agree on a less strict

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<sup>1</sup> *Equity in International Arbitration: How fair is „fair“? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 234-135

standards provided for in equity applied by the amiable compositeur. Second, this system can be particularly suitable in the context of a continuing, long-term relationship, where a degree of flexibility is desirable. Third, deciding as amiable compositeur might make the dispute settlement simpler and thus perhaps less costly. Finally, equity-type clauses can help to “soften” the situation for the losing party. Such adaptability is necessary in international commercial relations, since laws are generally adopted to deal with domestic situations and do not reflect the specifics of international trade.

Although the concept of amiable compositeur has many advocates, there are maybe even more opponents, who criticize lack of predictability, uncertainty and subjectivity of the arbitrator.

The concept of amiable composition is still generally seen with much skepticism. On the other hand it is used by prestigious international arbitration institutions such as ICC Arbitral Tribunal and modern legal systems allow for this concept as well. It remains for the future development of this system of decision-making to determine the scope of powers and limitations of the amiable compositeur and to clarify disputed questions.

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