AMIABLE COMPOSITION IN THE INTERNATIONAL COMMERCIAL ARBITRATION

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Abstrakt

Tento příspěvek analyzuje rozhodování jako amiable compositeur v mezinárodním rozhodčím řízení. Rozhodování jako amiable compositeur je v rozhodčím řízení sice častým, nicméně poněkud kontroverzím jevem. Samotná definice tohoto institutu není jasná, stejně tak jako rozsah pravomocí rozhodce jednajícího jako amiable compositeur. V příspěvku se snažím postihnout výhody a nevýhody tohoto typu rozhodování, jak takovýto rozhodce používá hmotné právo a čím a do jaké míry je ve svých pravomocech limitován.

Klíčová slova

Amiable compositeur, rozhodčí řízení, pravomoc, ekvita

Abstract

This contribution analyzes decision-making as amiable compositeur in the international commercial arbitration. Such decision-making within the international arbitration is frequent but quite controversial. The definition of this institute itself is not clear, as well as the scope of powers of the arbitrator acting as amiable compositeur. In this contribution I am endeavouring to analyze the advantages and disadvantages of this concept, how the arbitrator uses the statutory law and to what extend is he limited in his powers.

Keywords

Amiable compositeur, arbitration proceedings, powers, equity

The concept of *amiable compositeur* has its historical origins in French law, namely in amicabilis compositor of canon law, who acted rather as conciliator than decision-maker in a dispute, and in dispute settlement through the arbitrator which developed in the second half of the 17th century and who was not bound to apply strict rules of civil procedure and substantive law (ex aequo et bono). The concept was first enacted in the Code Napoleon and the French Code of Civil Procedure of 1806.

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, as national legal systems accept the possibility of use of both of them, or either of them[1], but define them differently. Generally 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[2].

In this contribution I will try to analyze the scope and limitations of powers of the *amiable compositeur* and other questions connected therewith.

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**. It is therefore sometimes regarded as a "negative choice of law" as the arbitrator is appointed to apply "equity and fairness" instead of a specific 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. Article 13(4) of the ICC Arbitration Rules and Articles 28(3) and 33(2) of the UNCITRAL Model Law allow the arbitrators to act as amiable compositeurs, but only if the parties confer such powers upon them. Contrary to this "express authorization", Dutch and Swiss law permit an "implied

[1] Some national legal systems do not accept amiable composition or arbitration in equity at all, come acccept only decision-making as amiable compositeur (France, Quebec) or only on the basis of equity (Czech Republic, Switzerland, Italy) or some legal system accept both of these concepts (legal systems, which have fully adopted UNCITRAL Arbitration Rules). Rozehnalová, N.: *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*, Praha: ASPI Publishing, s.r.o., 2002, p. 138-139
[2] Bühring-Uhle, Ch.: *Arbitration and Mediation in International Business*, The Netherlands: Kluwer Law Internaitonal, 2006, p. 40

authorization[3]" by the parties[4]. In this case, the tribunal will always reassure itself of the basis of its decision-making power, because lack of authorization to act as amiable compositeur may result in the arbitration award being set aside before the court of the seat of 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**. Such clauses are not exceptional and were also dealt with by the ICC Arbitral Tribunal in its award No. 2216 of 1974. Here the arbitral tribunal stated that by such clause the parties authorize the arbitrator to decide the case on the basis of equity, but the scope of the arbitrator's leeway is limited by the law chosen by the parties. This means that the arbitrator may disregard only non-mandatory rules of the chosen law, but is bound by its mandatory rules. The applicable law in fact determines the limits of arbitrator's decision-making according to equity.

The concept of amiable composition is criticized by its opponents for unpredictability, uncertainty and subjective imposition of equity by the arbitrator. Nevertheless, to avoid subjectivity of the arbitrator in the application of equity, the parties may make use of their right to **provide the arbitrators with specific criteria for their decision** – either by reference to amiable composition developed in a particular legal system, or by referring to some broad notion of fairness, or by including a set of concrete standards to guide the arbitrators in reaching their decisions. This way the arbitrator is guided by what the parties consider to be fair and equitable.

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. The arbitrator applying the lex mercatoria acts as a judge and applies a legal rule, despite the fact that this rule has a transnational origin. Application of such rule does not reflect the arbitrator's notion of justice and equity. The arbitrator acting as amiable compositeur may focus solely on the circumstances of the case without having to apply a legal rule or principle. Although a clause permitting amiable composition might be seen as implying a reference to lex mercatoria (in

[3] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 565

[4] e.g. German doctrine regards the appointment of a non-lawyer as an implied authorization to decide as amiable compositeur

this context application of lex mercatoria would not be based on conflict-of-laws principles but solely on the persuasion of the arbitrator of what he deems to be fair and reasonable), an arbitrator does not need to have powers of amiable compositeur in order to apply lex mercatoria.

In practice, the distinction between these two concepts is blurred. The arbitrators, regardless of the law or principles they apply, try to reach an award which they consider just and appropriate. Many legal systems have incorporated equitable principles into their substantive law, within which an arbitrator bound to apply the law can manouvre to reach equitable solution. As a matter of principle, the authority to **apply notions of equity secundum legem or praeter legem** contained in substantive law is always linked to the underlying purpose of the law which it is intended to perfect or supplement. Those arbitrators who apply the law are therefore not granted full discretion to reach an equitable solution for the case. The similar applies to the application of lex mercatoria. The arbitrator applying equity in the context of lex mercatoria always has to take into account the underlying rationale of the general principle of law. Contrary to this fact, amiable compositeur while deciding a particular dispute may be guided merely by what he deems just and equitable.

Some commentators contend that an amiable compositeur must apply the law, because there is a presumption that what is in the law is fair and equitable[5]. Some other scholars suggest transferring this reasoning to the transnational sphere and assume that the amiable compositeur should base his decision not on the particular national legal system, but on general principles of law and trade practices. 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. The amiable compositeur is in fact a judge, but one who enjoys greater flexibility in adopting the solution which he regards as best"[6]. Nevertheless the arbitrator would not apply national law or lex mercatoria if the result contravened his idea of an equitable solution of the dispute.

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[5] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 570

[6] Kühn, W.: *Choice of Substantive Law in the Practice of International Arbitration*, International Business Lawyer, 4/1997, p. 148

Literature gives several examples of the deviation from the strict rules of law by amiable compositeur: e.g. awarding of fair and economically adequate damages[7] or distribution of the burden of proof according to the particular circumstances of the case[8].
In its award No. 3344 as of 1982 the ICC Arbitral Tribunal stated that "if the application of the law would lead to an inequitable result, the arbitrator may **decide not to apply the rule or at least to mitigate its effects** in the case before him to reach an equitable result. In its award No. 1677 as of 1975 the ICC Arbitral Tribunal stated that "even in these cases, however, the arbitrator has to abide by those principles which form part of the international public order or morals". Following this reasoning as regards lex mercatoria, amiable compositeur while modifying the law may apply those rules and principles of lex mercatoria which do not yet belong to the list of principles acknowledged as international public order.

Repetition of the decisions based on equity can eventually generate new rules that will be binding even upon arbitrators who apply the transnational law. The fact is that many principles and rules of lex mercatoria have first been developed by arbitrators acting as amiable compositeurs[9].

As studies show[10], even the arbitrator authorized to act as amiable compositeur, who applies general principles of law, very often refers to and relies on concordant national laws of the jurisdiction of the parties involved in the dispute, to assure himself that the transnational laws have been correctly stated.

The arbitrator acting as amiable compositeur may decide the case outside the law, except for principles of international public order, or **may apply a particular national law in the absence of an express choice by the parties**. In its award No. 3742 of 1983 the ICC Arbitral Tribunal acting as amiable compositeur used its powers to find a law applicable to the merits of the case. It did not search for the applicable law on the basis of choice-of-law rules, but used the concept of voie directe and chose the national law which had the closest connection with both parties concerned in a given case. The Arbitral Tribunal proceeded this way because within its powers of amiable compositeur such solution seemed equitable to him.

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[7] Redfern, A., Hunter, M.: *Law nad Praktice of International Commercial Arbitration*. Sweet and Maxwell, 2004, p. 36
[8] ICC Award No. 1977 (1978), No. 2502 (1978)
[9] ICC Awaed No. 2216 (1974)
[10] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 572

Moreover, the powers of an arbitrator acting as amiable compositeur extend to the **arbitral procedure**. The powers of amiable compositeur in this field are, however, not that significant given the fact that modern arbitration laws provide the arbitrator with enough leeway to shape the arbitration procedure according to particularities of an individual case. Such powers nevertheless allow the arbitrator to flexibly handle the deadlines for submission of written pleadings or evidence.

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. Generally, the arbitrator is bound by the contractual stipulations of the parties. Article 28(4) of the UNCITRAL Model law expressly requires the arbitral tribunal to "decide in accordance with the terms of the contract in all cases", including the ex aequo et bono decisions, "provided that these contractual terms do indeed reflect the true intent of the parties and are not in conflict with mandatory provisions of law". The question is **whether the arbitrator acting as amiable compositeur can deviate from or modify the contractual agreement of the parties**. A thinkable exception from this general rule is an express authorization by the parties of the arbitral tribunal to deviate from their agreement or where the circumstances of the conclusion of the contract show that, at the time of its conclusion, the parties were not able to foresee all instances which might occur during the course of the contract. In these cases, continental doctrine allows the arbitrator to deviate from the express stipulations of the contract and to adapt it to the changed circumstances[11].

A possible modification of the parties´ agreement by the amiable compositeur has been decided on several occasions by the ICC Arbitral Tribunal. In its award No. 3267 of 1979 Tribunal held that "although some legal writers have expressed the opinion that the arbitrators sitting as amiable compositeurs may disregard the provisions of the agreement between the parties, this view has not been accepted in international arbitration. On the contrary, 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

[11] Berger, K.P.: *International Economic Arbitration*, Boston: Kluwer Law and Taxation Publisher Deventel, 1993, p. 573

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. In the view of the Arbitral Tribunal, this principle is a basic requirement for the security of international trade. It is furthermore binding in ICC arbitrations, in view of Article 13 (5) of ICC Rules that makes clearly a duty to ICC arbitrators to apply the provisions of the contract in any case, even if they have the powers of amiable compositeurs". Nevertheless 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".
This opinion was similarly repeated in an ICC award No. 3267 of 1984 where an ICC Tribunal held that an arbitrator acting as amiable compositeur may to certain extend modify the provisions of the parties´ contract, but such modification may not lead to abuse of the law and may not exceed the powers conferred upon the arbitrator. The term "to certain extend" is quite disputable, but it would correspond to the concept of amiable compositeur that the extend of modifications will be determined by the arbitrator himself according to what he deems to be equitable[12].

As mentioned above, the limits of the amiable compositeur powers 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[13]. It depends on the law of the state of enforcement whether it recognizes arbitration conducted under the amiable compositeur concept or not.
I have chosen three examples to demonstrate various attitudes that the national legal systems have towards the amiable composition: English, French and the US legal system.
Traditionally, in England the powers of amiable compositeur were viewed with great skepticism. Equity clauses were not given a legal effect[14] and therefore foreign awards based on amiable composition were not enforceable. The attitude of the English courts has been changed in the 70´s by the court decision in *Eagle Star Insurance Co. v Yuval Insurance Co.*[15]

[12] Another ICC award dealing with question of possible modification of the parties´ contract by the amiable compositeur is award No. 3938 as of 1982).
[13] If the arbitrators are not able to foresee the possible enforcement at the time when they render their award they need only apply the international public order of the lex causae.
[14] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 236
[15] 1978 1 Lloyd´s Rep. 357

and by the adoption of the Arbitration Act of 1979. Consequently, although were carefully, English legal system is moving towards acceptance of equity-type clauses.

On the other hand, French legal system is very liberal towards amiable compositeurs, whose powers were used for he first time in 1956[16]. In 1981 a Decree of May 12[17] was adopted and permitted almost unlimited freedom in the choice of law to be applied in international commercial arbitration[18]. The Decree provides that "the arbitrator shall decide the dispute in conformity with the rules of law chosen by the parties; in the absence of a party choice, he shall decide according to the rules that he deems appropriate"[19]. This document allows amiable composition when expressly provided for by the parties. At the same time, the Decree provides specifically that there is no right of appeal where the arbitrator was given amiable compositeur authority unless otherwise agreed by the parties. Restricted re-examination of the substance of the award opens the door to unrestricted enforcement of foreign award based on amiable composition.

In the United States of America amiable composition is not expressly recognized in statutory or case law, but is very frequent in practice. Here, amiable composition is not regarded as a different form of decision-making by an arbitrator. Equity is an integral part of the law, so every arbitrator ought to make equitable considerations, even without express authorization by the parties[20]. In the US the arbitral awards rendered under the concept of amiable composition are sheltered form judicial review. The court in *International Standard* case[21] stated that even if an arbitrator were to act as amiable compositeur without authority, the New York Convention[22] would not allow a court to refuse enforcement of the arbitral award.

What are the **advantages** of amiable composition? Why should the parties provide for such kind of dispute settlement? Denationalization[23] of the procedure is a big advantage, but the one inherent to the arbitration as such. There must be more reasons to resort to amiable

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[16] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 238

[17] Decree of May 12, 1981, 1 J.O. 1492, translated in 20 I.L.M. 878, 917 (1981)

[18] Crook, J. R.: *Applicable Law in International Arbitration: The Iran – US Claims Tribunal Experience*, 83 A.J.I.L., 1989, p. 278, 285-286.

[19] Nouveau Cede de procedure civile, Art. 1496 („L´arbitre tranch le litige confomément aux règles de droit que les parties ont choisies; à défaut d´un tel choix, conformément à cellem qu´il estime appropriées")

[20] *Equity in International Arbitration: How fair is „fair"? A Study of Lex Mercatoria and Amiable Composition*, Boston University International Law Journal, 12, 1994, p. 241

[21] International Standard Electric Corp. v Bridas Sociedad Anonima Petrolera, Industrial Y Commercial, 745 F. Supp. 172 (S.D.N.Y. 1990)

[22] The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

[23] i.e. Decision making out of any national law

composititon, especially as this system is more uncertain and unpredictable. Literature[24] states four reasons: First, the differences between businessmen and layers from different legal environments as regards application of national law might lead them to agree on a less strict 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 loosing 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. Truth is that the purpose of a written agreement is to give the contracting parties a certain degree of predictability as to their rights and obligations both in performance and in the event of dispute[25]. It is very natural, especially in international business transactions, that the parties seek more certainty, predictability and stability in the result of possible dispute. That this also a reason why they very carefully negotiate on the applicable law. First problem with amiable composition is that there is no precise definition of what amiable compositeur is. The definition varies among particular jurisdictions, in some the concept is equated with ex aequo et bono decision-making, in some it is more restricted by the mandatory provisions of the applicable law. The amiable composition includes the application of certain equitable principles. The second problem is that it is not always obvious what those principles are. Moreover, where a particular jurisdiction allows an amiable compositeur to derogate from the parties´ contract itself, the thin line of predictability is eliminated. In the opponents´ view the result of amiable compositeur arbitration is just an ad hoc justice. The arbitrators are permitted to apply the principles either in accordance with their comparative law interpretation of general principles and trade customs or they may refer to their favourite school of thought and its corresponding published arbitral awards. In such a situation, the arbitrator is more an inventor, rather than legal authority, applying its own notion on what is fair and equitable, and thus implicates his personal creativity and subjective values. Such

[24] *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

[25] Park, W. W.: *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in: Lex Mercatoria and Arbitration. Thomas E. Carbonneau ed., 1990

subjectivity may be dangerous, especially to the loosing party. In my opinion, however, the parties, while negotiating on the arbitration clause, could have considered risks connected with the amiable composition and thus voluntarily agreed to such a system of decision-making and the person holding a position of their amiable compositeur.

The advocates of amiable composititon see the most valuable advantages in flexibility of this system, especially (i) in long-term contracts where the rights and obligations of the parties cannot always be determined from the beginning, (ii) where unforeseen circumstances may occur throughout the duration of the contract, and (iii) where the parties involved may be more like joint ventures than adversaries with conflicting interests. Professor Highet[26], an opponent of this system, argues that if an increased flexibility is what the parties seek, why they should stop halfway. They should rather seek to settle their dispute in mediation, especially since within mediation they have a sufficient space to impose their own notion of fairness and equity, and to avoid the imposition of the arbitrator's personal views.

The opponents also argue that an ad hoc justice, as the amiable composition in their view certainly is, leads to conflicting decisions and thus loss of confidence in the system. Uncertainty involved in this system helps the discrimination and bias to flourish. They also criticize a lack of precedential value of the amiable compositeur awards. But, in my opinion, the goal of the amiable composition and the aim of the parties is to find a solution appropriate for particular circumstances of their case. The parties have an opportunity to asses the risks connected with this concept during the negotiations and those choosing amiable composition to settle their dispute are certainly not concerned with the consequences of the award on the evolution of law.

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.

Literature:

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[26] Highet, K.: *The Enigma of the Lex Mercatoria*, 63 Tul. L. Rev. 1989, p. 628

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