

Unauthorized *Amiable Compositeur*?

Kiev Arbitration Days – Think Big!

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JUSTICE

AMIABLE COMPOSITION

Overview

- 1. Deciding as *amiabile compositeur* or *ex aequo et bono*: preliminaries**
- 2. Unauthorized by the parties?**
- 3. Unauthorized by national legislation?**
- 4. Consequences of an unauthorized *ex aequo et bono* decision**

1. Deciding as *Amiable Compositeur* or *ex aequo et bono*: preliminaries

- Definition: nowhere to be found
- Key Elements:
 - deciding according to the arbitral tribunal's own idea of equity, fairness or justice, considering the specificities of the case
 - not being bound by the applicable law
 - according to some arbitration rules and legal systems, not being bound by contractual provisions and trade usages
 - decision *ex aequo et bono* as opposed to decision at law
 - resolving the issue on the basis of non-state law (*lex mercatoria* / UNCITRAL Principles of International Commercial Contracts)

1. Deciding as *Amiable Compositeur* or *ex aequo et bono*: preliminaries

Amiable composition clause

- Based on party autonomy / contractual freedom
- Legal nature: waiver

To the same extent as the arbitration agreement is a waiver to the submission of the dispute to a state court, the amiable composition clause is a waiver of the right of having the conflict resolved according to the law

2. Unauthorized by the parties?

The powers of the arbitral tribunal are exclusively those granted by the parties



Essential requirement of an *ex aequo et bono* decision is the express authorization of the parties

Arbitration Rules:

- **ICC (International Chamber of Commerce)**

Section 21.3: The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* **only if the parties have agreed to give it such powers.**

- **LCIA (London Court of International Arbitration)**

Section 22.4: The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" **where the parties have so agreed expressly in writing.**

Arbitration Rules:

- **ICDR (International Centre for Dispute Resolution)**

Section 28.3: The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the **parties have expressly authorized it to do so.**

- **HKIAC (Hong Kong International Arbitration Center)**

Section 31.2: The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* **only if the parties have expressly authorised the arbitral tribunal to do so.**

Arbitration Rules:

- **ICDR (International Centre for Settlement of Investment Disputes)**

Section 42: (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* **if the parties so agree.**

Arbitration Rules:

- **DIS (Deutsche Institution für Schiedsgerichtsbarkeit)**

Section 23.3: The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur **only if the parties have expressly authorized it to do so**. The parties may so authorize the arbitral tribunal up to the time of its decision.

Section 23.4: In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.

3. Unauthorized by national legislation?

- **UNCITRAL Model Law:**

Section 28.3: The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur **only if the parties have expressly authorized it to do so.**

Section 28.4: In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

National legislations

- Germany

German Civil Procedure Code:

Section 1051 para. 3: The arbitral tribunal is to take its decision based on considerations of what is fair and equitable **only if the parties to the dispute have expressly authorised it to do so**. The authorisation may be granted up until the time the arbitral tribunal takes such decision.

Section 1051 para. 4: In all cases, the arbitral tribunal is to decide in accordance with the provisions of the agreement and is to take account of any commercial practices that may exist.

National legislations

- France

French Civil Procedure Code:

Section 1478 [domestic arbitration]: The arbitral tribunal decides the dispute according to the rules of law, **unless the parties have entrusted it with the mission to decide as *amiable compositeur*.**

Section 1512 [international arbitration]: The arbitral tribunal decides as *amiable compositeur* **if the parties have entrusted it with this mission.**

National legislations

- England, Wales and Northern Ireland

Arbitration Act 1996:

Section 46: Rules applicable to substance of dispute.

1. The arbitral tribunal shall decide the dispute—

a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

b) if the parties so agree, **in accordance with such other considerations as are agreed by them or determined by the tribunal;**

Limit to the power of the amiable compositeur

- Substantive and procedural public policy
 - public policy of the substantive or procedural law applicable to the dispute
 - public policy of the place of arbitration
 - public policy of the place where the award might be enforced

4. Consequences of an unauthorized *ex aequo et bono* decision

- Foreign arbitral awards:

Art. V New York Convention. **Recognition or enforcement of the award may be refused**, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

1. (...)

(d) the composition of the arbitral authority or **the arbitral procedure was not in accordance with the agreement of the parties** or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

➡ 149 countries are Contracting States of the New York Convention

4. Consequences of an unauthorized *ex aequo et bono* decision

- Domestic arbitral awards:

UNCITRAL Model Law:

Art. 34 (2): **An arbitral award may be set aside** by the court specified in article 6 only if:

(a) (...)

(iv) the composition of the arbitral tribunal or **the arbitral procedure was not in accordance with the agreement of the parties**, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.

4. Consequences of an unauthorized *ex aequo et bono* decision

- National legislation:
- **Germany**

German Civil Procedure Code:

Section 1059 (2): **An arbitration award may be reversed only if:**

(...)

d) **The formation of the arbitral tribunal or the arbitration proceedings did not correspond to a provision of this Book or to an admissible agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award;**

4. Consequences of an unauthorized *ex aequo et bono* decision

- France

French Civil Procedure Code:

Section 1520: **The award can be set aside only if:**

(...)

3° **the arbitral tribunal has not complied with the mission with which it was entrusted.**

4. Consequences of an unauthorized *ex aequo et bono* decision

- England, Wales and Northern Ireland

Arbitration Act 1996:

Section 68: **Challenging the award**: serious irregularity.

(...)

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(...)

(b) **the tribunal exceeding its powers** (otherwise than by exceeding its substantive jurisdiction: see section 67);

Conclusions

- The first essential requirement to the validity of a decision in amiable composition is the parties' authorization
- Whereas all relevant arbitration rules, the UNCITRAL Model Law and the legal systems of Germany, France and England allow *amiabile compositeur* decisions, arbitration rules and national legislations vary as to the extent of this power – i. e. if the decision must be in accordance with contractual provisions and take into account trade usages
- Public policy is the only universally recognized limit to *ex aequo et bono* decisions
- An amiable composition decision granted without the parties' authorization can be set aside according to national legislation, and its recognition and enforcement can be refused on the basis of the New York Convention