

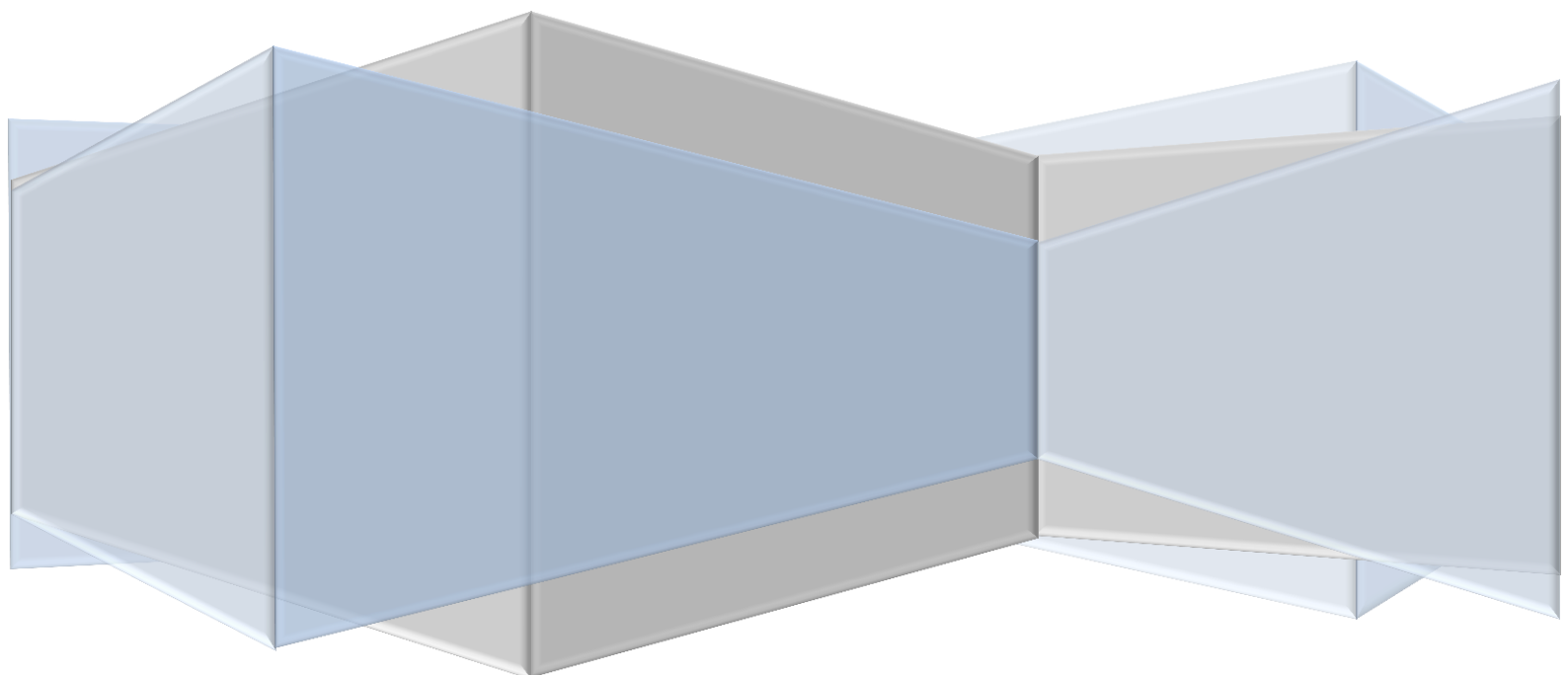


INTERNATIONAL
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SCHOOL OF ECONOMICS AND BUSINESS ADMINISTRATION
LLM In Transnational and European Commercial Law and Alternative
Dispute Resolution
Intake 2012-2013

Dissertation Study of the Student Theodora-Maria Ioannidou on the
topic: "Arbitrators ex aequo et bono(amiable compositeur) under
international commercial arbitration schemes "

Supervisor: Professor Dr. Peter Gottwald



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Preface

Now that this wonderful trip to the magic world of commercial law and arbitration has come to its end , I want to mention the persons that I think with special gratitude . Firstly , I wanted to thank Professor Kaisis, who I met at the first steps of my legal studies and who proposed me to study this LLM .He keeps me all these years motivated with his excellence and his great academic distinctions. I want also to express my gratitude for Professor Peter Gottwald who undertook the supervision of the present dissertation and gave me valuable guidance for its fulfillment.I feel really honored that one of the leading figures world-wide in the field of international commercial arbitration and procedural law undertook the supervision of my dissertation. His contribution to the outcome of this dissertation has been valuable .

Finally, thanks to my family and friends , and especially my sister Penelope who supported me with patience all the time and helped me to keep my devotion to those studies.

Better is to come .

Theodora –Maria Ioannidou

Abstract

A very limited number of international commercial arbitration agreements provide for *ex aequo et bono* (amiable composition) arbitration. As a method of dispute settlement it is the exception, not the rule. The essential meaning of this concept is that arbitrators are going to decide the dispute not bound by strict rules of law, rather they are expected to decide according to their subjective sense of what is fair and just. For an *ex aequo et bono* clause to be valid, it is required that the parties have expressly authorized arbitrators to act as such and the concept of the amiable composition to be incorporated in the national arbitration law of the arbitral seat. It applies mainly for the adjudication of the substantive matters of the dispute, but if the parties want it to be applied for procedural matters, they may do so by explicitly declaring it in their arbitration agreement. The nature of amiable composition has opened a debate concerning the limits of the arbitrators' powers, their possibility to alter the terms of the contract, whether they are bound by mandatory rules of law and finally. It has been answered that arbitrators acting *ex aequo et bono* cannot alter the terms of the contract and should also respect the rules of international public policy. This is consistent with their obligation to issue a reasoned and enforceable award under the provisions of the New York Convention. The latest tendency for the majority of the national legal orders is to grant enforcement to *ex aequo et bono* awards following the pro-enforcement bias approach adopted by the New York Convention. Only for cases of manifest violation of international public policy or excess of authority of the tribunal an *ex aequo et bono* award can be set aside. Moreover, most legal orders by incorporating into their national law the UNCITRAL Model Law on International Commercial Arbitration (which provides for *ex aequo et bono* arbitration in article 28(3)) have accepted the concept of amiable composition, a fact which eliminates the possibilities for setting aside of the award (for contravention to the public policy of the enforcing state). Lately, it has become the modern method for dispute settlement with parties taking advantage of its inherent flexibility and prestigious international institutions (such as ICC) to include it in the series of their legal services. It is for the future to prove that it is a kind of dispute

settlement valuable for the parties and to answer the disputed matters surrounding amiable composition.

Introduction

In the context of globalization¹ international commercial arbitration ,as a means of resolving disputes definitively ,pursuant to the parties' agreement by independent non-governmental decision-makers applying neutral judicial proceedings² ,is becoming more and more attractive to private parties , due to the plethora of advantages it offers , in comparison to state-court litigation .

Besides the neutrality of the dispute resolution forum ,the confidentiality of the procedure , the expertise of the arbitral tribunal, the finality and enforceability of the issued award , special impetus to the parties' choice of dispute resolution methods gives the perceived party autonomy and procedural flexibility that international commercial arbitration offers .

Under the principle of party autonomy , the parties are accorded broad discretion in deciding the substantive law and the procedure applicable to the dispute to be resolved . As we may ascertain, procedural and substantive law autonomy enables the parties to dispense with technical formalities and fashion procedures tailored to the particularities of the dispute at stake , ensuring in that way procedural predictability ,efficiency and security³ .

For the purposes of the present paper we will focus on the substantive law perspective of the principle of party autonomy ,and especially when the parties instruct arbitrators to act ‘ex aequo et bono ‘ or as ‘amiable compositeurs ‘.

As this paper unfolds we will analyze the following issues:

¹ Feasibility study on the choice of law in international contracts ,special focus on international arbitration , Preliminary document no 22C of March 2007,Note by Ivana Radic , Hague Conference on Private International Law

² Overview of International Commercial Arbitration –B. Objectives of International Commercial Arbitration in Gary B.Born ,International Commercial Arbitration , Kluwer Law International ,2009 , p.64

³ Overview of International Commercial Arbitration –B.Objectives of International Commercial Arbitration in Gary B.Born ,International Commercial Arbitration , Kluwer Law International 2009, p.82

- 1.The concept ex aequo et bono arbitration and the major questions surrounding this subject-matter,as evidenced by empirical research and commentary
- 2.The ex aequo et bono approach adopted by the UNCITRAL Model Law on International Commercial Arbitration
- 3.Possible enforcement problems of ex aequo et bono awards under the New York Convention
4. Confrontation of enforcement problems stemming from the ex aequo et bono awards by the various legal orders .

Chapter 1 : .The concept ex aequo et bono arbitration and the major questions surrounding this subject-matter,as evidenced by empirical research and commentary

While drafting their arbitration agreement the parties can grant the arbitral tribunal the power to decide the vexed dispute either as ‘amiables compositeurs’ or ‘ex aequo et bono’⁴.

The concept of these clauses is open to debate as far as the arbitrators’ authorities are concerned , and to which extent they can alter the content of the applicable law. It is thought that arbitration under amiable composition or ex aequo et bono ,essentially allows a decision other than strict application of law⁵ .Unless otherwise indicated ,amiable composition applies only to the substance of the dispute and not to procedural matters. However , they have been recorded cases in which amiable composition empowerment covered ,as well, procedural matters. It would be thus more wise, for the better organization of the procedure , that the parties clearly indicate whether an amiable composition clause extends to procedural as well as substantive matters. Particular care should be taken by the parties and the arbitral tribunal , for the avoidance of possible enforcement problems, to confirm in writing any discussion to this effect and to make sure that sufficient evidentiary record has been kept⁶.

The essential meaning of this concept is that arbitrators are required to reach a decision in light of general notions of fairness , equity and justice.

The power to decide ex aequo et bono was adopted initially by the Permanent Court of International Justice ,as an exception to the other sources of law that the court was relied upon , in order to settle a dispute . Subsequently ,it was included in the Statute of the International Court of Justice . The expression has its roots back to roman law meaning ‘in justice and fairness’, ‘according what is just and good’ or ‘equitable and conscionable’’. A judgment made ex aequo et bono is based on

⁴ Drafting International Arbitration Agreements in Gary B.Born , International Arbitration and Forum selection agreement , drafting and enforcing , 4th Edition , Kluwer Law International 2013, pp37 -1329

⁵ The process of an arbitration , Chapter 13:Procedure and Evidence in choice of law and interpretation in Jeff, Waincymer , Procedure and Evidence in International Arbitration ,p.1044

⁶ Id,pp1045-1046

consideration of equity , not of law . Such decisions are mainly made praeter legem or contra legem ,not intra legem⁷ .

Historically , a form of arbitration ex aequo et bono can be found in some jurisdictions , particularly in the United States , where arbitrators were not obliged to give reasoned awards ,nor to apply statutory provisions and their decisions were not reviewable for errors of law or fact ⁸

Nowadays , the validity of ex aequo et bono or amiable composition it is highly recognized : The European Convention in article VII par.2 provides that : ‘ ‘ the arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration’ ’, while the ICSID Convention expressly states in article 42(3) that the tribunal’s obligation to apply the law selected by the parties ‘ ‘shall not prejudice the power of the tribunal to decide ex aequo et bono if the parties so agree’ ’⁹. Similar statutory provisions can be found in 2012 ICC Rules (Article 21(3)), 2010 UNCITRAL Model Law on International Commercial Arbitration (Article 33(2)) , 1996 English Arbitration Act.

The common point of the above –mentioned provisions is that the concept of amiable composition or ex aequo et bono arbitration is valid only if the parties have expressly stated their common intention to resort to that particular method of dispute resolution ¹⁰.The tribunal itself cannot undertake that kind of powers without express authorization. Such powers depend on the entitlement under the relevant arbitration statutes and the selection to that effect by the parties¹¹. Such empowerment may be given to the arbitral tribunal even verbally , but always explicitly , e.g. during an oral hearing ¹². A verbal instruction to arbitrate ex aequo et bono is

⁷ Amiable Composition and ex aequo et bono , Chapter 18 Applicable and Substantive Law in Julian Lew, Loukas Mistelis et al, Comparative International Commercial Arbitration , Kluwer Law International 2003,pp470

⁸ Amiable composition and ex aequo et bono in Gary B.Born , International Commercial Arbitration ,p.2237

⁹ Id,pp2237-2238

¹⁰ Applicable Law chosen by the parties in Emmanuel Gaillard and John Savage , Fouchard Gaillard Goldman on International Commercial Arbitration ,Kluwer Law International ,pp834-835

¹¹ The process of an arbitration , Chapter 13 , procedure and evidence in choice of law and interpretation in Jeff Waincymer , Procedure and Evidence in International Arbitration, Volume,Kluwer Law International 2012,p1044.

¹² Application of law in arbitration , Ex aequo et bono and amiable compositeur , Alexander J.Belohlarek , Czech (and Central European) Yearbook of Arbitration , p.26

considered to be valid when it is recorded in the minutes of the oral hearing . However , implicit authorization is recognized in certain jurisdictions (e.g. Switzerland , Netherlands etc.) requiring simultaneously arbitrators to create full belief-conviction of their mandate , based on the parties ‘ intentions and the existence of sufficient authority ¹³ . In case that national arbitration law has deleted reference to amiable composition and the parties , nevertheless, empower arbitrators to act ex aequo et bono , the will of the parties prevails. This position could be rejected on the ground that the erase of the amiable composition from the lex arbitri constitutes a mandatory procedural norm which cannot be overridden .This is debatable , but it is supported in the legal review that everything depends on the parties’ consent¹⁴ .

Nevertheless , considerable controversy remains as to the exact meaning of amiable composition and the need to distinguish it from the concept of deciding ex aequo et bono, as far as the idea of interchangeability of the ex aequo et bono and amiable compositeur approaches is not universally accepted .

Amiable composition ,which has its origins in France , is viewed as a ‘‘quasi-settlement’’ procedure, where the arbitrator rules in law moderating the effects of the application of that law¹⁵ . In that sense ,an arbitrator acting as amiable compositeur is viewed as a person responsible for settling the dispute , than deciding for it . Under that perspective , arbitration has lost its adversary character and it is confronted as an amicable settlement procedure .

On the other hand , an arbitrator ruling in equity is considered to decide detached from legal rules , even if they are mandatory ¹⁶ . However , the prevailing view is that the distinction between amiable composition and arbitration ex aequo et bono (ruling in equity) seems artificial and both terms have been used in the awards interchangeably ¹⁷ .

¹³ Id, pp26-27

¹⁴ The process of an arbitration ,Chapter 13 Procedure and Evidence in Choice of law and Interpretation in Jeff Waincymer , Procedure and Evidence in International Arbitration , Volume Kluwer Law International pp1044-1045.

¹⁵ Applicable law chosen by the parties in Emmanuel Gaillard and John Savage , Fouchard Gaillard Goldman on International Commercial Arbitration , Kluwer Law International p.835

¹⁶ Id, p.835

¹⁷ Id,p.835

The quintessence of *ex aequo et bono* arbitration is that arbitrators are free to depart from the application of a national law and to apply directly the solution which seems to them as most equitable .

The ICC case No3327 gives a very clarifying view of amiable composition /*ex aequo et bono* arbitration “Arbitration in this perspective aims different from those of conventional court proceedings. It is characterized by less emphasis on the legal nature of the dispute and more on its technical ,psychological and commercial aspects. An amiable composition clause provides arbitrators with a means to limit the bearing of law on the dispute and to give precedence to other factors and it enables factual situations , which under a healthy commercial policy warrant different treatment to be removed from the application of rigid rules “.

The concept of amiable composition is simple when the parties authorize arbitrators to act as amiables compositeurs-*ex aequo et bono* , while applying specific rules of law . In that case , arbitrators normally apply the selected law (according to the principle of party autonomy) and depart from it when the solution which provides seems to them inequitable ¹⁸.However , it is highly controversial whether in that case mandatory provisions of the selected law apply .Some have argued that the concept of amiable composition would make no sense if it had always to defer to national law . Others have argued that that mandatory provisions should be respected ,as would happen in the case that no applicable law was selected and the arbitrator was only asked to decide in equity. The better view is that in the absence of clear guidance by the parties , the dual empowerment should be looked at on a case by case basis in order to decide whether it would be reasonable to depart from national law¹⁹ .

In general , civil law jurisdictions have no problem in accepting arbitration *ex aequo et bono* in conjunction with a set of law rules. The concept of amiable composition is highly doubted in countries adopting the common law concept. Thus the choice of some common law

¹⁸ Id,p.836

¹⁹ The process of an arbitration , Chapter 13 :Procedure and Evidence in Choice of law and Interpretation in Jeff Waincymer , procedure and Evidence in International Arbitration , Volume Kluwer Law International 2013,pp1046-1047.

countries, by enacting the UNCITRAL Model Law on International Commercial Arbitration to maintain the possibility of amiable composition, could not be characterized otherwise, but historical. This applies to Australia, Bermuda, Canada, Common Law provinces and territories, Hong Kong, England, and Scotland. A similar possibility also exists for States of the US that have adopted the UNCITRAL Model Law²⁰.

The situation becomes more complicated when the parties have just included in their arbitration agreement an amiable composition clause and making no reference as to the applicable law. In that case, the legal opinions have been divided into two groups²¹. The first group argues that in absence of parties' choice of law rules, arbitrators are not obliged to apply a particular national law or transnational rules, but instead equitable and transnational principles or general principles of law should be considered. Interpreted in that way it has been argued that an amiable composition clause can be considered as referring implicitly to *lex mercatoria*. The second group, adopts the position that arbitrators should find the law that would otherwise be applicable, and then decide whether the principle of equity would lead to another result.

The former approach, which tends to assimilate arbitration *ex aequo et bono* with the application of general principles of law according to the majority of legal commentators should be avoided²². Arbitrators do not need special empowerment from the parties to apply general principles of law or transnational rules. Furthermore, *lex mercatoria* "as a system of law akin to a national legal system or a set of expectations and usages that inform the application of law in international commercial contexts is not just equity or non-legal fairness, but is instead a particular set of legal

²⁰ Amiable Composition and *Ex aequo et bono* Chapter 18, Applicable Substantive Law in Julian Lew, Loukas Mistelis et al Comparative International Commercial Arbitration Kluwer Law International 2003, p.472

²¹ The process of an arbitration, Chapter 13: Procedure and Evidence in Choice of Law and Interpretation in Jeff Waincymer, Procedure and Evidence in International Arbitration, Kluwer Law International, p.1048

²² The process of an arbitration, procedure and evidence in Jeff Waincymer, Procedure and Evidence in International Arbitration, p.1040

Applicable law chosen by the parties in Emmanuel Gaillard and John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, p.837
Amiable composition and *ex aequo et bono* in Gary B. Born, International Commercial Arbitration, Kluwer Law International, pp2239-2240

rules”²³. As we may remark at this point , a distinction needs to be made between arbitration *ex aequo et bono* and *lex mercatoria* :in case of the former an express authorization on behalf of the parties is needed , while on the latter there is no need for special empowerment ;*lex mercatoria* is applicable as an autonomous set of legal rules .

Another crucial matter that was posed by the legal literature concerning arbitration *ex aequo et bono* was whether arbitrators have the inherent power to alter the terms of the contract , which was signed between the parties .There is uncertainty whether arbitrators when acting *ex aequo et bono* may alter the bargain of the parties , without breaching their mandate. However , arbitrators have attempted to mitigate the effects of the contractual provisions that they considered to be unfair and even ignored contractual provisions that ,according to their point of view ,would lead to inequitable results(*abus de droit*) ²⁴.The position followed by the majority of commentators (Berger , Jarvin , Born) is that arbitrators should not alter the terms of the contract ; they must remain”within its four walls” but they should not decide in accordance with strict legal principles ²⁵. They have the right to correct the distortion which would lead to an inequitable result in case of strict application of law. This interpretation is also consistent with the provisions of the UNCITRAL Model Law in International Commercial Arbitration which states that : ‘ 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 the transaction’.

The main conclusion which can be derived from this discussion is that arbitrators under their mandate are not allowed to alter the structure of the terms of contract between the parties , however it is within the limits of their authority to reach an equitable and fair result departing from strict application of law of the contract²⁶.Arbitrators ,when handing down an award in which they alter the parties’ bargain ,should also take into

²³ Amiable composition and *ex aequo et bono* , Gary B.Born , International Commercial Arbitration , Kluwer Law International 2013, p.2240

²⁴ Amiable Composition and *ex aequo et bono* ,Chapter 18 ,Applicable and Substantive law in Julian Lew, Loukas Mistelis et al., Comparative International Commercial Arbitration , Kluwer Law International 2003,p.471

²⁵ The process of an arbitration : Chapter 13 Procedure and Evidence in Jeff Waincymer , Procedure and Evidence in Intenrational Commercial Arbitration ,pp1050-1051

²⁶ Amiable composition and *ex aequo et bono* , in Gary B.Born , International Commercial Arbitration , Kluwer Law International ,p.2241

account the difference of view between civil and common law jurisdictions. Amiable composition and ‘abus de droit’ may be rooted well in the continental tradition, however this does not happen in common law jurisdictions, in which these terms are foreign²⁷.

Another important question is the degree of subjectivity inherent in the concept of amiable composition. The content of the term equity is pretty vague with different adjudicators taking different views about its nature and the way it ought to apply in each case. As a result, there can be significant variations, after rendering an award, on issues such as modifications of the contract application of limitation periods and exempting clauses, and who should bear the loss in case of hardship. Thus the challenge is great for an arbitrator acting *ex aequo et bono* taking also into account that equitable principles take a different meaning civil and common law jurisdictions. Although there is no clear jurisprudence which would give arbitrators a clear guidance on the matter, it is advisable to search for the parties’ common intent and reasonable expectation and not to rely solely on their individual notions of commercial fairness²⁸.

Our research in the concept of amiable composition –arbitration *ex aequo et bono* would not be comprehensive if we did not make a reference to the relevance of mandatory laws while rendering an *ex aequo et bono* award. Although the essence of *ex aequo et bono* arbitration is to disregard the choice of law rules made by the parties and issue an award according to arbitrators’ subjective sense of equity, in some situations this power is highly doubted. This is the case when mandatory rules, including public policy rules may be applicable²⁹. The compliance of the award with the mandatory laws of a State is ensuring the enforceability of the award among the various legal orders and guarantees also the trustworthiness of arbitration as a private method of dispute settlement.

²⁷ Guillermo Aguilar Alvarez, To what Extent do arbitrators in International Cases disregard the Bag and Baggage of national systems ?in Albert Jan Van den Berg ,International Dispute Resolution Towards an International Arbitration Culture,ICCA Congress Series ,1996 ,Seoul Volume 8 Kluwer Law International 1998,pp141-142

²⁸ The process of an arbitration : Procedure and Evidence in Choice of law and Interpretation in Jeff Waincymer ,Procedure and Evidence in International Arbitration , Kluwer Law International ,pp1053

²⁹ Feasibility study on the choice of law in international contract , special focus on international arbitration , note prepared by Ivana Radic , preliminary document 22C of March 2007 on General Affairs and Policy of the Conference , p.5

Initially , arbitrators have to respect the mandatory rules of the law chosen by the parties ,by virtue of respecting the fundamental principle of party autonomy . In addition ,some argue³⁰ that although ‘renvoi’ is excluded (as far as the parties have made their choice on the law applicable) arbitrators may also take into consideration foreign mandatory rules relevant to the dispute . Inherent in the mandate undertaken by the arbitrators is also their obligation to respect certain mandatory rules that have a transnational nature or the so-called ‘rules of international public policy’ . Although the term ‘ international public policy’ has a very broad notion , we may restrict its meaning by including in it the non-violation and respect of human rights , and universally legally protected interests such as the protection of cultural heritage ,the protection of endangered species and labor protection ³¹ . It is worthy to note that the importance of mandatory laws and international public policy is highlighted mostly at the enforcement stage ,when the impact of not respecting them may lead to challenge for invalidity or procedural irregularity , under the grounds provided for in the United Nations Convention of 10th June 1958 on the Recognition and Enforcement of foreign Arbitral Awards (New York Convention) . This is a matter that will be extensively discussed in the third chapter of this study.

Based on the bove-mentioned analysis we would suggest the following approach:

- In our opinion , the arbitrator shall first examine the will of the parties in order to ascertain the extent of the powers conferred upon him by the amiable composition clause.
- Where parties refer to both amiable composition and a national law in their arbitration agreement , they may depart from the provisions of the applicable law ,if its application would produce an unfair result. When the parties did not provide for an applicable law in their arbitration agreement,granting them solely the power to decide in equity , arbitrators are free to decide the dispute in an autonomous

³⁰ G.Cordero Moss , “Can an arbitral tribunal disregard the choice of law made by the parties ? ” , Stockholm International Arbitration Review , Vol.1 , 2005 ,pp8-11

³¹ Feasibility study on the choice of law in international contracts ,special focus on international arbitration , note prepared by Ivana Radic , preliminary document No 22C of March 2007 for the attention of Council of April 2007 on General Affairs and Policy on the Conference , p.6

way ,according to principles of fairness and justice tailored to the needs of the individual case

- In any event , the arbitrator shall always be careful that his award does not violate the rules of international public policy of the State where the arbitration has its seat.As it known , ignorance of rules of international public policy may lead to the setting aside of the award under the New York Convention. His obligation to respect the rules of due process also remains intact. Unless otherwise agreed , arbitration ex aequo et bono refers to the substance of the dispute and not the procedure ,and as a result the amiable compositeur remains a’’ judge’’ bound to respect the fundamental principles for the good administration of justice³².

At this point , we may proceed to the ex aequo et bono provisions of the Uncitral Model Law on International Commercial Arbitration .

³² Applicable Law chosen by the parties in Emmanuel Gaillard and John Savage , Fouchard Gaillard Goldman

Chapter 2: The ex aequo et bono approach adopted by the UNCITRAL the Model Law on International Commercial Arbitration

The essential contribution of the United Nations and especially its Commission on International Trade Law (UNCITRAL) , to the creation of an international arbitration culture ,has been widely recognized among legal commentators³³ .

In particular UNCITRAL has posed the foundations for the development of arbitration culture by creating an adequate legal infrastructure composing of : the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (concluded 1958, currently adhered to by 110 States and various additional territories) , the UNCITRAL Model Law on International Commercial Arbitration (concluded 1985 and currently shaping the arbitration laws of one quarter of the world's territory) , and the UNCITRAL Arbitration Rules (Formulated 1976, and widely used in ad hoc and administered arbitrations) ³⁴ . For the needs of this study , however , we will focus on the provisions of the UNCITRAL Model Law on International Commercial Arbitration and more specifically its provisions closely related to ex aequo et bono (amiable composition) arbitration.

Before analyzing them in order to get a better perception of them , it would be more considerate , to make some preliminary remarks³⁵ :

-The main goal of the drafters of the UNCITRAL Model Law was to create an instrument which would facilitate the arbitral proceedings in a way that results in a positive cost/benefit analysis and enhances the advantages of the chosen dispute settlement method .

-Moreover , the provisions of the UNCITRAL Model Law reflect the international consensus on the particular subject matter concerning the arbitral procedure .This may be very useful in case of absence of a specific national norm .

³³ Gerold Herman , UNCITRAL's Basic Contribution to the International Arbitration Culture in Albert Jan Van den Berg ,International Dispute Resolution :Towards an Integration of arbitration culture , ICCA Congress Series 1996 Seoul Volume 8 ,Kluwer Law International 1998, p49

³⁴ Id, p.49

³⁵ Gerold Hermann , Power of arbitrators to determine procedure under the UNCITRAL Model Law in Albert Jan Van der Berg , Planning Efficient arbitration proceedings :the law applicable in international arbitration , ICCA Congress Series 1994 , Vienna Volume 7 (Kluwer Law International 1996),pp39-41

-Finally , the Model Law is not a theoretical creation but actually the national arbitration law in many jurisdictions or legal orders either with deviations by the national legislators or not .

Under the provision of article 28(1) of the UNCITRAL Model Law “the tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute “. This provision is significant in two respects : firstly , it grants the parties the freedom to choose the applicable law to the substance of the dispute and secondly referring to “the choice of rules of law “ broadens the options available to the parties , making it possible for the m to apply not only national laws but also international rules not incorporated into a national legal system ³⁶.

Paragraph (2) of the same article continues stating :”in the absence of designation of the applicable law by the parties the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable” .

Article 28(3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiable compositeur*. According to the minutes of the travaux preparatoires of the UNCITRAL Model Law , arbitration *ex aequo et bono* or *amiable composition*, as a method of determination of a dispute on the basis of the principles that arbitrators believe to be fair and just ,and not referring to any particular body of law, it is not very common in all legal systems . The Model Law as far as it formulates general rules on the conduct of arbitration does not aim to regulate this type of dispute settlement . It leaves it instead to the discretion of the national legislator ;he will decide the dispute whether to incorporate it or not into the national arbitration law . It simply poses as a prerequisite the express authorization of the tribunal by the parties to determine the dispute in that way. The authorization to arbitration *ex aequo et bono* needs to be “doubtless and crystal clear”³⁷. The need of explicit authorization by the parties indicates that arbitration *ex aequo et bono* is the exception and not the rule, and

³⁶ UNCITRAL , 2012 digest of Case Law on the Model law On international Commercial Arbitration , chapter VI making of an award and termination of proceedings , pp121-122

³⁷ Karl-Heinz Bockstiegel ,Stephan Michael Kroll,Patricia Nacimientto, Arbitration in Germany the Model Law in practice ,Kluwer Law International 2008, pp.359-360

that the parties should have absolute in the specific knowledge ,judgment of the tribunal³⁸. Express authorization to decide ex aequo et bono should be given prior to the decision of the arbitral tribunal. It can be given also in the course of the arbitral proceedings , when the parties want for example to limit the decision in equity as to costs ,estimates or collateral decisions³⁹.

Paragraph 4 of the same article makes it clear that in all cases (including arbitration ex aequo et bono) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction .To take trade usages into account corresponds to established practice in international arbitration, however, stipulation according to trade usages are applicable to the extent they do not contravene mandatory law at the place of arbitration⁴⁰. According to a Canadian court , an arbitrator acting as amiable compositeur-ex aequo et bono should reconcile the terms of contract with good faith in its performance . Moreover , an arbitrator acting ex aequo et bono is obliged to apply the terms of the contract even in the case In which an applicable law has been designated⁴¹ . Article 28(4) establishes the primacy of the terms of contract over applicable trade usages⁴² which have a supplementary role when the terms of contract are unclear . The effect of this provision is consistent with the universally recognized principle of pacta sunt servanda.

After this brief overview of the UNCITRAL Model law provisions on the ex aequo provisions, we can conclude to the point that the main prerequisites considered as crucial for the application of this dispute settlement method, was the express authorization of the tribunal by the parties to act as such ,and the existence of a relevant provision on the national arbitration law . Under their mandate, arbitrators are obliged to

³⁸ Id,p.360

³⁹ Id,p.360

⁴⁰ Id,pp.361-362

⁴¹ Jacomijn J.Van Haersolte Van Hof , UNCITRAL Arbitration Rules , applicable law –amiable compositeur,Section IV ,art.33 (4)

⁴² According to the definition given by the UNCITRAL ,2012 digest of Case law on the Model law on International Commercial Arbitration , chapter VI making of an award and termination of proceedings , as trade usages “has been held to include norms contained in published instruments representing best practices and accepted norms of industry or trade .

determine the dispute according to their subjective notion of justice and fairness , taking also into account the terms of the contract. A balanced application of both of them will provide the ideal outcome . In case of existence of nuances in the terms of contract , arbitrators *ex aequo et bono* apply trade usages in a supplementary manner .

Chapter 3. Possible enforcement problems of ex aequo et bono awards under the New York Convention

Arbitration, by its nature, is not a free-standing procedure independent of the apparatus of the state⁴³. On the opposite, international commercial arbitration is a legal creation whose operation is inextricably linked to actions by the respective national courts⁴⁴.

Arbitrators' binding and final awards in order to have universal effect (thus, not only in the territory where they were rendered) should be recognized as part of a national legal system (creating in that way res iudicata and thus bar the re-litigation in court of issues that have been resolved in arbitration⁴⁵). Arbitral awards should also be equipped with enforceability, thus the possibility of the prevailing party in case of non-compliance of the losing party with the award, to seek court assistance to force compliance⁴⁶.

The 1958 New York Convention on the Recognition and Enforcement of foreign arbitral awards is the transnational commercial law instrument⁴⁷, which contains provisions for the recognition and enforcement of arbitral awards and creates a harmonized regime internationally, after an award has been rendered.

The purpose of the New York Convention, as an international instrument, is to promote international commerce and settlement of disputes through arbitration. Thus, the whole text of the Convention is governed by a pro-enforcement bias approach, in the sense that setting aside of the award should be avoided and only on specific grounds provided in for exhaustively in article V of the New York Convention, recognition and enforcement should be denied. Additionally with the pro-enforcement bias in the context of the interpretation of the New York Convention the principle of maximum efficiency is also applicable: if more treaties

⁴³ Michael Reisman and Brian Richardson, *The present Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An interpretation of the architecture of International Commercial Arbitration* in Albert Van Jan den Berg, *Arbitration the next fifty years*, ICCA Congress Series, Volume 16, Kluwer Law International 2012, p.17

⁴⁴ *Id.*, p.17

⁴⁵ International Council for Commercial Arbitration, *ICCA's guide to the interpretation of the New York Convention: A Handbook for Judges*, p.9

⁴⁶ *Id.*, p.9

⁴⁷ *Recognition and Enforcement of Foreign Arbitral Awards: A global commentary on the New York Convention* Herbert Kronke, Patricia Nascimento, Dirk Otto and Nicola-Christine Port, p.2

could be applicable the courts should apply the treaty under which the award is enforceable .This is reflected in Article VII of the New York Convention ⁴⁸ .

Parties by stipulating to amiable composition (ex aequo et bono) choose a different sort of dispute settlement than submitting their dispute under normal arbitration adjudication . They choose their dispute to be decided according to general notions of justice and fairness coming sometimes in tension with court decisions statutes or strict contract terms ⁴⁹ .

The fact that arbitrators ex aequo et bono may decide the dispute without resorting to legal rules but by relying on non-legal standards ⁵⁰,leaves unaffected their obligation to give all parties a fair hearing and their decision will be a genuine arbitral award .Likewise , it is under the scope of their mandate to issue a reasoned award ,as it would happen with an arbitrator not acting as amiable compositeur ⁵¹ .

As far as we may remark, reasoning of arbitral awards is a very important aspect of international commercial arbitration as it ensures the effectiveness and trustworthiness of the whole arbitral procedure . In case the reasoning of an award is truncated, problems at the enforcement stage may be created ,for alleged violations of article V of the New York Convention. However , it should be noted that there is a tendency to eliminate the scope of court review of substantive reasoning of the arbitral awards , in order to ensure one-stop adjudication regarding substantive reasoning ⁵². It is considered proper that the factual and legal positions of the parties should be evaluated by the arbitral tribunal ,while jurisdictional and procedural issues should be reviewed by national courts .

⁴⁸ International Council for Commercial Arbitration , ICCA's guide to the interpretation of the 1958 New York Convention :A Handbook for judges , ,pp12-15

⁴⁹ William W.Park :Rectitude in International Arbitration , Arbitration International ,Kluwer Law International ,2011Volume 27, Issue 3 ,P.521

⁵⁰ T.Diederik de Groot ,Chapter 16 :The ex Officio application of European Competition law by arbitrators in Gordon Blake and Phillip Landolt , EU and US Antitrust Arbitration:A Handbook for Practitioners ,Kluwer Law International 2011,p.567-625

⁵¹ Definition of International Commercial Arbitration in Emmanuel Gaillard and John Savage ,Fouchard ,Gaillard ,Goldman on International Commercial Arbitration (Kluwer Law International 1999),p.22

⁵² Thomas H.Webster ,Review of Substantive reasoning of International Arbitral Awards by national courts :Ensuring one –stop adjudication ,Arbitration International ,Kluwer Law International 2006,Volume 22,Issue 3 p.431

These considerations are under the context of the discussion that the speed and effectiveness of international arbitration should not be undermined by subsequent court litigation ⁵³. Even errors of law of the tribunal are excused and the concept of appeal against errors of law is actually being rejected by national judges.

This policy was followed by the drafters of the New York Convention, in order to avoid dilatory attempts from the losing party to be avoided. "Revision au fond" under the grounds of the New York Convention is prohibited, with the exception of the public policy reservation, which requires strict interpretation ⁵⁴.

However, the prohibition of "revision au fond" should not disregard the vital role played by the courts in controlling the validity of the arbitral awards. This is why international conventions along with international arbitration statutes and among them article IV of the New York Convention imposed the attachment of the arbitration agreement as a prerequisite to grant leave for enforcement of the arbitral award. Arbitration agreement is the fundamental document in which the parties substantiated their will to resort to arbitration to settle their dispute. Through the content of the arbitration agreement it is controlled the capacity of the parties to submit their dispute to arbitration, the validity of what was agreed upon concerning the arbitral procedure and consequently possible violation of fundamental and binding procedures in the country of issue of the award ⁵⁵.

As a result, possible annulment grounds of *ex aequo et bono* awards may be the following :

-overriding of international mandatory ⁵⁶ rules under article V(2)(B) of the New York Convention : As it has already been stated, arbitrators ruling

⁵³ Id, p.43

⁵⁴ Wolfgang Kuhn, Current Issues on the application of the New York Convention, Journal of International Arbitration, Kluwer Law International 2008, Volume 25, Issue 6, p.750

⁵⁵ Ahmad Haddad, Note: Damascus First Civil Court of Appeal case No 21 January 2010 in Jalal El Ahdab, International Journal of Arab Arbitration 2011, Volume 3, Issue 1, pp113-114

⁵⁶ As international public policy otherwise known as international mandatory rules may be defined "as the set of rules which affects the essential principles governing the administration of justice in that country and is essential to moral, political or economic order of that country. As a concept, it is narrower than that of domestic public policy and it is decided on a case by case basis by the national judge. "Violation of Public policy in article V(2)", Otto, Elwan, Recognition and Enforcement of foreign arbitral awards : a global commentary on the New York Convention, pp365-366

ex aequo et bono decide a case without resorting to legal rules but by relying on non-legal standards and their subjective notion of justice and fairness . In the absence of an applicable system of law the discourse to the private international law ,as a mechanism ensuring the respect internationally mandatory rules , no longer applies. However , arbitrators are still bound to respect the international mandatory rules of law that would be applicable , in the absence of the ex aequo et bono clause in the arbitration agreement . Similarly , international mandatory rules of the lex fori and the lex loci solutionis (law of the place where relevant performance occurs) should also be respected⁵⁷ .

It seems that the issue of the otherwise applicable law and the extent of the power of an arbitrator acting ex aequo et bono have given rise to a strong academic debate with the following theories prevailing:

(1)The classical approach adopted by Eriq Loquin who shows that within the framework of international arbitration more than one public orders may enter into consideration in relation to the dispute : the public policy of the seat of arbitration , of the lex contractus ,of the law of the country where enforcement is sought. He argues that such a plurality of public orders creates great confusion among arbitration practitioners as well as for legal writers. Finally , he adopts the position that an arbitrator acting ex aequo et bono has to take into account the mandatory rules of the lex contractus (the law chosen by the parties), or in case the parties have not made a choice of law rules , the law that would otherwise be applicable after using the conflict of law rules method. As a consequence, in case of violation of the public policy of the state where enforcement is sought the award should be set aside by local courts.

(2)A more liberal approach adopted by Lalive ,Poudret , Reymond and Berger considers that arbitrator acting ex aequo et bono is only bound by the international public policy . It should be noted at

⁵⁷ T.Diederik de Groot : Chapter 16 :The ex officio application of European Competition Law by Arbitrators in Gordon Blanke and Phillip Landolt , EU and US Antitrust Arbitration :A handbook for practitioners Kluwer Law International 2011, pp567-625

this point that according to Robert Briner ⁵⁸, the majority of arbitrators followed the classical approach and found that arbitrators acting *ex aequo et bono* are bound by the mandatory rules of the applicable substantive law. In other instances, the arbitrator found to be bound by rules on international public policy, including *lex mercatoria*. Finally, the majority of legal commentators ⁵⁹ agree that ignorance of international public policy rules (at least of the seat of arbitration) may lead to setting aside of the award under the New York Convention.

-annulment of the *ex aequo et bono* award based on ground V(1)(d) of the New York Convention: When the arbitral tribunal, while adjudicating the dispute, applies to the merits of the case, a law different than that stipulated by the parties in the arbitration agreement, that constitutes a ground for vacating the award under article V(1)(d) 'because the parties' choice of law is part of their agreement on procedure';⁶⁰. Similarly, if the parties in their arbitration agreement made an explicit choice of substantive law applicable to the dispute and the arbitrators exceeding their authority, decided the dispute *ex aequo et bono*, the decision is considered to be based on incorrect procedure. In this case, Gary B. Born ⁶¹ argues that it would be desirable to reserve a possibility of substantive judicial review, as far as arbitrators exceeded their

⁵⁸ Robert Briner, Special Considerations which may affect the procedure (Interim measures, amiable composition, adoption of contracts, agreed settlement) in Albert Jan Van den Berg, Planning efficient arbitration proceedings, the law applicable in international arbitration, ICCA Congress Series 1994 Vienna Volume 7, Kluwer Law International 1996, pp.366-367

⁵⁹ 1. Amiable composition and *ex aequo et bono*: Chapter 18 Applicable and Substantive law in Julian Lew, Loukas Mistelis et al. Comparative International Commercial Arbitration, Kluwer Law International 2003, p.471

2. Guillemor Aguilar Alvarez: to what extent do arbitrators in international cases disregard the bag and baggage of national systems? In Albert Jan Van Den Berg, International Dispute Resolution: Towards an International Arbitration Culture, ICCA Congress Series 1996, Seoul Volume 8, Kluwer Law International 1998, p.141

Robert Briner, Special Considerations which may affect the procedure (interim measures, amiable composition, adoption of contracts, agreed settlement) in Albert Jan Van Den Berg, Planning efficient arbitration proceedings: The law applicable in International Arbitration, ICCA Congress Series 1994, Vienna Volume 7 Kluwer Law International, pp367-368

⁶⁰ Recognition, Patricia Nascimento, Article V(1)(d), in Herbert Kronke, Patricia Nascimento et al (eds): Recognition and Enforcement of Foreign Arbitral Awards: a global commentary on the New York Convention, Kluwer Law International 2010, pp281-283

⁶¹ Annulment of international arbitral awards: B) grounds for annulling international arbitral awards in Gary B. Born, International Commercial Arbitration, Kluwer Law International 2009, pp2599-2560

authority and decided the dispute according to their own subjective preferences. According to Professor Kaisis⁶², annulment of the award is possible, under article 897par.4 of the Greek Civil Code Procedure, when the arbitrators although they were obliged to decide the dispute according to material law, they decided *ex aequo et bono*. This is also the opinion of Professor Gottwald⁶³, under the condition that this mistake is for the end result casual.

Other commentators argue that deciding *ex aequo et bono* is part of the applicable procedural rules. Thus, in case the arbitral tribunal issues an *ex aequo et bono* award without explicit consent by the parties, the award should be annulled on the basis of article V(1)(c) of the New York Convention (tribunal which overrode its jurisdiction). In those cases, a competing defense would arise in respect of Art.V(1)(d)⁶⁴.

These cases should be distinguished from the cases in which a tribunal applies incorrect law to the merits or applies incorrect conflict of law rules. Such conflict of law rules do not at all fall under the scope of the New York Convention which prohibits, at it is widely known the ‘revision au fond’. The misinterpretations or misapplications of law do not fall under the scope of the Convention, and as a result, they cannot be considered as procedural defects under article V(1)(d). Issues of erroneous application of substantive law cannot trigger part of national judicial review during the enforcement stage. The only exception to those cases is when the arbitrator perverts justice and acts in an arbitrary way, instances which may lead to setting aside of the award due to public policy considerations⁶⁵.

The above-mentioned cases are grounds for annulment stemming from the particularities that *ex aequo et bono* arbitration has by its own nature. In general, the losing party may invoke every annulment ground set out in Article V of the New York

⁶² Athanasios Kaisis, Annulment of Arbitral Awards Fundamentals of annulment grounds of arbitration agreement and arbitral procedure, Contribution to the interpretation of articles 872-875, 877-879, 883-885 και 897 αρθ. 1-4 Greek Code of Civil Procedure, Editions Sakkoula 1989, p.214

⁶³ Die Sachliche Kontrolle Internationaler Schiedsspruche durch Staatliche Gerichte, Beitrage zum Internatnaionalen Vertahrensrecht und zur Schiedgerichtsbarkeit, FS H.Nagel zum 75 Geburtstag, 1987, 54-69

⁶⁴ Weigand, Haas “Practitioner’s Handbook on International Arbitration”, Oxford University Press, Edition 2002, marginal note 48

⁶⁵ Id, marginal note 50

Convention(lack of valid arbitration agreement , violation of due process, excess of arbitral tribunal's authority , irregularity in the composition of the tribunal , non-binding award , non-arbitrability of the subject –matter submitted to arbitration) .

Chapter 4: Confrontation of enforcement problems stemming from the ex aequo et bono awards by the various legal orders .

The desirable extent of judicial control of arbitral awards at the enforcement stage has been the subject of spirited academic discussion .One of the great intellectual protagonists was professor Berthold Goldman who argues that judicial control should be restricted to the point that arbitration starts losing its autonomous character and becoming national. On the other hand , Dr.Francis Mann has argued that judicial control of arbitral awards is crucial not only for the development of law but also for the good administration of justice and the avoidance of arbitrariness. A more mitigating approach seems to be that of Professor Arthur Von Mehren who proposed arbitrations to be subjected to national law only to the extent that public authorities intervene in connection with the conduct of the arbitration or the enforcement of the award.

The grounds for challenging an arbitral award differ among the various legal orders ,while some of them have inherent subjectivity and vagueness.

In the United States , federal courts can vacate awards for a type of excess of authority labeled “manifest disregard of law ” ,while in England an award can be set aside for arbitrator misconduct. In France , arbitral awards should be annulled when they are contrary to the international public policy(“ordre public internationale”) and in Switzerland for “a clear violation of law or equity”.⁶⁶

At the present section of this study, we will examine how ex aequo et bono awards have been confronted by the various legal orders at the enforcement stage .

As a general comment it can be noted that common-law jurisdictions have been very reluctant in recognizing the validity of those types of awards , while civil law jurisdictions (France , Switzerland) follow a more liberal approach and recognize them as valid .

More precisely the position adopted by the various states in the issue of ex aequo et bono awards has been the following :

⁶⁶ William W.Park :Judicial Controls in the arbitral process ,Arbitration International,Kluwer Law International 1989,Volume 5,Issue 3 ,pp.234-235

United Kingdom

Traditionally , the powers of an arbitrator acting *ex aequo et bono* (*amiable compositeur*) have been faced with great skepticism. Equity clauses were considered to be invalid and as a result the awards stemming from such an arbitration were declared unenforceable⁶⁷.

Indicatively , we can mention ,at this point , the view shared by Singleton L.J. :”the duty of an arbitrator is to decide issues which are referred to him according to the legal rights of the parties and not depending on what he considers to be just and fair in the circumstances” (quoted by Loquin “L ‘*amiable composition en droit compare et international* ,Librairies Techniques ,Paris 1980, p.99)⁶⁸.

Similarly , in *Orion Compania Espanola de Seguros v. Belfort Maatshappy Voor Algemene Verzekeringer* “arbitrators cannot be allowed to apply some different criterion, such as the view of the individual arbitrator or umpire on abstract justice or equitable principles”. This dogmatic and absolute approach followed by the English courts against *ex aequo et bono* awards was based on the ground that English court had control over legal issues arising from arbitration , and such jurisdiction could not be ousted⁶⁹.Mustill and Boyd ,as well as Redfern and Hunter ,after came to the point that the whole procedure amounted to a normal arbitration ,and as result “*amiable composition* may come to be established in England”⁷⁰.

The breakthrough decision for the reversal of the previous status quo was *Eagle Star Insurance Co. Ltd v. Yuval Insurance Co Ltd* ,in which it was held that “this (*amiable composition*) clause is wholly reasonable and does not oust the court’s control, but only technical rules and strict construction “ . After the outcome of this decision followed the adoption

⁶⁷ 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

⁶⁸ Mauro Rubino-Sammartano”*Amiable Compositeur* (Joint Mandate to settle) and *ex aequo et bono* (discretionary authority to mitigate strict law) :apparent synonyms revisited ,pp4-5

⁶⁹ Id,pp.4-5

⁷⁰ Id,p5

of the Arbitration Act of 1979 which opened a more tolerant path to equity-type clauses ⁷¹.

United States of America

Review of the case law on annulment of international arbitral awards in the United States could be characterized as a cumbersome procedure for the legal researcher, because of the lack of uniformity of the annulment grounds among the US Circuit Courts.

Regarding the applicable legal provision as a basis for vacating an international arbitral award relevant is section 10 of the Federal Arbitration Act. However, there is a split between the American circuit courts' jurisprudence on which legal instrument is applicable for vacating international arbitral awards: the Federal Arbitration Act or the New York Convention? The eleventh circuit has held that New York Convention is exclusively applied, while the second circuit has held that applicable is the Federal Arbitration Act to the extent that it is not inconsistent with the New York Convention. ⁷²

Problems at the annulment of an award has created the doctrine "of manifest disregard of law". It is introduced as a defense to enforcement under the Federal Arbitration Act, but it has been recognized as an invalid defense under the New York Convention and that it does not fall within the scope of article V(2)(b) ⁷³. No matter that it has been recognized by the federal courts as an invalid ground for annulling an award, the Court of Appeals for the Second Circuit held that manifest disregard of law does apply to non-domestic awards rendered in the US. It is interpreted as something beyond and different from a mere error of law which must be readily perceived by the average person qualified to serve as arbitrator. Moreover, the term "disregard" means that the arbitrator recognized the

⁷¹ Amiable Composition in the International Commercial Arbitration, Jana Herboczova, Law faculty of the Masaryk University, pp7-8, in "Laureate of the academy prize: Is arbitration the equal of state justice? Jorge Vargas Neto, arbitration academy.

⁷² Thomas H. Webster, Review of Substantive reasoning of International Arbitral Awards by National Courts: Ensuring one-stop adjudication, Arbitration International, Kluwer Law International 2006, Volume 22, Issue 3, pp445-446.

⁷³ Audley Sheppard, Interim ILA Report on Public Policy as a bar to enforcement of international arbitral awards, Arbitration International, Kluwer Law International 2003, Volume 19, Issue 2, pp239-240.

predominance of a legal principle , but decides to ignore or pay no attention to it⁷⁴.

In United States amiable composition /ex aequo et bono arbitration is neither expressly recognized in case-law nor included in any statutory provision. It is considered as a procedure amounting to a normal arbitration . This the reason why in United States , arbitral awards decided ex aequo et bono are protected from judicial review ⁷⁵.

According to *Fudichar v. Gardioni Mutual Life Insurance Co* case “ arbitrators may , unless restricted by the parties’ submission , disregard strict rules of law or evidence and decide according to their sense of equity “. The freedom of the parties to have their dispute decided according to principles of equity was also confirmed in *Spectrum Fabrics Corp. v. Main Street Fashion* “ the fact is that an agreement to arbitrate as authorized by statute is a contractual method for settling disputes , in which the parties create their own forum ,pick their own judges , waive all but limited rights of review or appeal, dispense with the rules of evidence and leave the issues to be determined in accordance with their sense of justice and equity that they may believe , reposes in the breasts and minds of their self-chosen judges ⁷⁶”. Similarly , in *International Standard Electric Corp. v. Bidas Acronima Petrolera* ⁷⁷, the Court held that even when the arbitrator decided ex aequo et bono without express authorization by the parties , the New York Convention would not allow a court to refuse enforcement of the award .

In conclusion , the US approach can be also conceived by making the following assumption : arbitration ex aequo et bono ,as a method of dispute settlement not bound by strict rules of law ,hypothetically, could be considered as manifest disregard of law ,as ground for vacating the award . Even in that case, it should be remembered that the United States Supreme Court has held that “ courts must be generally differential

⁷⁴ Id,p.240

⁷⁵ Amiable Composition in the International Commercial Arbitration , Jana Herbozkova, Law Faculty of the Masaryk University , p.8 , in “Is arbitration the equal of State Justice ? ” ,Jorge Vargas Neto , Arbitration Academy

⁷⁶ Mauro Rubino Sammartano “Amiable Compositeur(Joint Mandate to settle) and ex aequo et bono (Discretionary Authority to mitigate strict law) :apparent synonyms revisited ,p.6

⁷⁷ International Standard Electric Corporation v. Bidas Sociedad Anonima Petrolera Industrial Y commercial ,745F. Supp.172 (S.D.N.Y1990.)

towards arbitral awards’’⁷⁸ rejecting impliedly in way annulment of ex aequo et bono award ,even on the ground of manifest disregard of law .

France

As we may assume , France, being the country of origin of the amiable composition concept (decision en equite) , is very liberal towards ex aequo et bono arbitration. With the Decree of May 12th of 1981 it was granted absolute freedom to the parties in choosing the applicable law in international commercial arbitration . Under this decree, amiable composition is admitted only when the parties have expressly authorized arbitrators to act as such . Moreover , no right of appeal exists in case the parties have authorized arbitrators to act ex aequo et bono . The non-existence of the right of appeal against ex aequo et bono awards ,seems to connote that the majority of those type of awards are granted leave for enforcement , except cases of manifest violation of international public order⁷⁹ .

Particularly , in a case which arbitrators were authorized to act as amiables compositeurs and decided the dispute without explicitly making reference to equity ,the Paris Court of Appeal refused to set-aside the award on ground of non-compliance of arbitrators with their terms of brief , stating that they had decided according to their subjective sense of equity⁸⁰ . The same approach also adopted in *Najer V.Synthelabo* where it was that ‘’granting to the arbitral tribunal the amiable composition authority the parties have expressed their intention that the dispute will be decided not just by applying statutory provisions ,but to also to obtain an equitable solution by adjusting the law , if needed, to the factual circumstances existing in the relationships between the parties’’. Similarly, in *Phocenne des depots v. Depots Petroliers de Fos* it was

⁷⁸ Hernando Diaz –Candra ‘’Issue Conflict in arbitration as apparently (un)seen in 2011 by a US Court in *STMicroelectronics vs Credit Suisse Securities in Evelion Verdera y Tuells and Jose Carlos Ferandez Rozas: Arbitraje Revista de Arbitraje Comercial y de Inversiores (Ipro Lex 2012, Volume ,Issue 1 pp.287-297.*

⁷⁹ Amiable Composition in the International Commercial Arbitratio , Jana Herboczkova , Law Faculty of the Mesaryk University ,pp6-7 , in ‘’Is arbitration the equal of State-Justice ? ‘’ ,Jorge Vargas Neto , Arbitration Academy

⁸⁰ Applicable law chosen by the parties in Emmanuel Gaillard and John Savage , Fouchard ,Gaillard ,Goldman on International Commercial Arbitration , Kluwer Law International 1999,p.838

held that “in principle, the amiable compositeur may decide without having to strictly follow the law”⁸¹.

Finally, as a last example of the position adopted by the French legal order we quote the “*Interab Investment Guarantee Corporation v. BAI-Banque Arabe Internationale d’Investissement SA*” case which was brought before the Paris Court of Appeal (Cour D’Appel) for setting aside. The appellant among the other grounds for setting aside of the award (non-binding award, lack of valid arbitration agreement, violation of due process) invoked that “the arbitrators only gave contradictory or incomplete reasons, which aimed at justifying the ex aequo et bono result they had reached. In so doing, they failed to fulfill their mission and rendered a decision which is contrary to international public policy”. The Court of Appeal granted enforcement finding “a logical connection between the decision and the coherent and non-contradictory reasons given and discussed at length by arbitrators”, characterizing the appellant’s argument “as unfounded as the first”⁸².

Austria

Austria is also a tolerant legal order to ex aequo adjudication of disputes. The Austrian Supreme Court refused to set-aside an award (November 18, 1988, Ob520/89) solely on the basis that the amount of damages had been decided ex aequo et bono without the parties’ authorization. Particularly, the claimant argued that the award should be annulled as far as it was decided ex aequo et bono (“billigem Ermessen”) and, as a result, the tribunal had breached procedural provisions. The Austrian Supreme Court held that the tribunal had not breached its mandate by deciding the amount of damages ex aequo et bono. The tribunal’s jurisdiction would have been exceeded, if the decision did not cover at all the content of the arbitration agreement⁸³.

⁸¹ Mauro Rubino Sammartano: Amiable Compositeur (Joint Mandate to Settle) and ex aequo et bono (discretionary authority to mitigate strict laws): Apparent synonyms revisited, p.9

⁸² France No 28 IAI GC-Inter-Arab Investment Guarantee Corporation v. BAI –Banque Arabe et Internationale D’investissements SA, Cour d’Appel, Paris, Not Indicated, 23 October 1997 in Albert Van Jan den Berg, Yearbook Commercial Arbitration 1998, Volume XXIII, Kluwer Law International 1998, pp644-653

⁸³ Nikolaus Pitkowitz, Chapter V: The courts-Digest of Austrian Case Law on Setting Aside Arbitral Awards, 1985-2007 in Christian Klausegger, Peter Klein et al, Austrian Yearbook 2008 (C.H. Bech Stampfli and Manz 2008), pp439-440.

Australia

Although it has not been recorded case-law of execution of ex aequo et bono arbitral awards into the Australian legal order , we may confirm that it is about a legal order hospitable to that kind of dispute settlement. The heading to section 22 of the New South Wales Common Arbitration Act(applicable for domestic arbitral awards) reads as follows: ‘ It would thus appear that it would be inimical to the wording and intent of the CAA to strike down an arbitration agreement that entitles a tribunal to refer to and apply principals of general justice and fairness , when such was agreed by the parties as a means of resolving the merits of their dispute ‘. ⁸⁴ Certainly then , thinking pro rata , it would seem very rational for an Australian court to enforce as valid an arbitration agreement , that empowered the tribunal to determine the substantive dispute ex aequo et bono ,being also compatible with the public policy in New South Wales.

Germany

Germany ,which has also incorporated the UNCITRAL Model Law into its national legal order , has treated ex aequo et bono awards as genuine arbitral awards. If the arbitral tribunal has fulfilled its mandate and according to the will of the parties issues an award ex aequo et bono , that can be set aside only on exceptional cases. Even in case the award contravenes mandatory provisions of the law ,or has failed to observe such provisions ,or applies erroneous conflict of law rules to the merits of the dispute those do not constitute sufficient grounds for setting aside of the award⁸⁵. Errors in the procedure ,according to para.1059(4) ZPO,are considered to be curable and the matter can be referred back to the arbitral tribunal ,as it happened in the case handed down by the OLG Munchen(22.06.2005,Schieds VZ 2005,308)⁸⁶ .

An award should be vacated only in case that the arbitral tribunal decided the dispute without express authorization by the parties.

⁸⁴ Duncan Miller , Public Policy in International Commercial Arbitration in Australia ,Arbitration International , Kluwer Law International 1993,Volume 9,Issue 2 ,pp.185-186

⁸⁵ Arbitration in Germany , The Model Law in Practice edited by Karl-Heinz Bockstiegel , Stefan Michael Kroll,Patricia Nacimiento, Kluwer Law International 2007, p361.

⁸⁶ Id,p.361

As far as we may remark , the majority of the national legal orders has confronted with lenience *ex aequo et bono* awards. Even common law Jurisdictions (mainly England) ,which were hostile towards the recognition and enforcement of *ex aequo et bono* awards ,as time was passing by became more liberal in that matter. The most common grounds for setting aside an award *ex aequo et bono* are considered to be the following: contravention of the award to the rules of international public policy and excess of authority by the arbitrators ,which decided *ex aequo e tbono* whilst they were not authorized to act as such. Those breaches cannot be excused by anyone legal order.

We should not underestimate the flexibility of amiable composition ,which may be proved valuable, especially in cases of unforeseen circumstances which may occur throughout the duration of the contract ,and where the parties involved are more like joint ventures with common interests than adversaries.

Furthermore ,concerning the so-alleged untrustworthiness of amiable composition ,as it may lead to conflicting results ,the answer is that, amiable composition award has exactly the same legal effects with all the other awards (*res iudicata* , final and binding award) . It is otherwise a kind of dispute settlement equipped with the guarantees of due process . Finally, the fact that prestigious international arbitration institutions ,such as ICC Arbitral Tribunal and modern legal systems allow for this concept as well , prove that it is the modern method of decision-making assimilating in a way to mediation⁸⁷ .

It remains for the future to decide the scope of powers and limitations of the amiable compositeur and to clarify highly-debated questions. It is sure that liberal societies should become more open to that kind of dispute settlement and to stick on mere formalities.

⁸⁷ Schwab/Walter ,*Sclueds gericht's barkeit* ,Kommentar , 7.Auflage , Verlag C.H.Beck Helbing and Lichtenhahn,pp183-184

Conclusion

But why should the parties choose *ex aequo et bono* adjudication of their dispute ? Which are the advantages of arbitration *ex aequo et bono* ? Denationalization of the procedure (thus , decision making out of any national law) is a big advantage also inherent to the arbitration as such. There must be other reason for a private party to choose its dispute to be decided in equity. First , arbitrators acting *ex aequo et bono* decide the dispute departing from the application of strict rules of law . Decision in equity is much more flexible than a decision based on strict law; the award issued is tailored to the needs of the individual party and not just based on commercial usages. Moreover, arbitration *ex aequo et bono* is an ideal method of dispute settlement , especially when the law gives answer to the vexed subject-matter ‘with yes or no’⁸⁸. By deciding in equity it is achieved a mitigating result . Additionally , deciding *ex aequo et bono* is a more flexible procedure ,not based on formalities and thus it can be proved less costly and time-efficient . Finally , the inherent degree of flexibility of *ex aequo et bono* arbitration helps the parties to avoid strict litigation tactics and to reach to a more amicable solution . Thus , the possibilities for the losing party to comply with the terms of an *ex aequo et bono* award are higher than in case of other arbitral awards where the losing party defends by every means its compliance.

This is just the one side of the coin of amiable composition. Although it may have strong advocates , there are more opponents accusing *ex aequo et bono* arbitration for lack of predictability and uncertainty as well as for subjectivity of the arbitrator. It is true that international commercial arbitration, as private method of dispute adjudication equal to State justice, should be based on predictability and stability. This is why , before the commencement of the arbitral proceedings , it is drafted the arbitration agreement , including all these elements which are important for the successful conduct of arbitral proceedings and of course for a reliable outcome. According to its opponents arbitration *ex aequo et bono* lacks all these elements and the decision reached with that kind of adjudication is based on arbitrary appreciations. However , this is not

⁸⁸ Lanchman ,Handbuch fur Die Schiedsgerichtspraxi , 3.Auflage, Verlag Dr.Ottoschidmt ,Koln , p.114

true. It is right that arbitrators deciding *ex aequo et bono* reach their decision based on their subjective notion of what is fair and just , but under their mandate they have to issue an award which does not contravene with the rules of the international public policy. Moreover, if the parties , during the course of the arbitral proceedings ,decide that amiable composition does not fit to the needs of their dispute may limit *ex aequo et bono* adjudication to some parts of the awards(e.g.costs). We should take also into account that the parties while deciding to submit their dispute to amiable composition , they have full sense of their choice ,they have estimated all the risks connected to that kind of dispute settlement and voluntarily agree to it .

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