Unauthorised Amiable Compositeur?

Mark Hilgard and Ana Elisa Bruder*

'Ob das, was [die Gesetze] wollten, auch recht sei, (…)
bleibt [dem Rechtsgelehrten] wohl verborgen,
wenn er nicht eine Zeitlang jene empirischen Prinzipien verläßt,
die Quellen jener Urteile in der bloßen Vernunft sucht (…)'.[1]

Introduction

Amiable composition is one of those legal concepts that every practitioner has heard of but that few are likely able to define.[2]

The many expressions used to designate the concept under different legal traditions – amiable composition or *amiable compositeur*, *Billigkeit*, honourable engagement, *ex aequo et bono*, equity principles – merely complicate the effort. On their face, the words 'amiable' and 'composition' suggest a process of amicable settlement; this, however, does not in fact reflect either the nature of the process or the mission of the person or persons appointed to serve as *amiable compositeur(s)*.[3]

* Dr Mark C Hilgard, Rechtsanwalt in Frankfurt am Main, is a partner of Mayer Brown and head of Mayer Brown's German litigation and arbitration practice. He acts both as party counsel and as arbitrator. Ana Elisa Bruder is an Advogada admitted in Brazil who studied in France and, supported by the Stiftung der Hessischen Rechtsanwaltschaft, in Germany. Presently, she works as a foreign associate in the litigation and arbitration practice of Mayer Brown in Germany.

1 Kant, *Metaphysische Anfangsgründe der Rechtslehre* (Hamburg 1998) n 230, 37–38. English translation: 'Whether that which [the laws] mean be also just, (…) remains entirely hidden from [the lawyer], if he does not quit for a while those empirical principles, and seek the sources of those judgments in mere reason (…)': Kant, *The metaphysic of morals, divided into metaphysical elements of law and of ethics*, from the German by the translator of Kant's Essays and treatises, Vol I (London 1799) XXIV-XXV.

2 Loquin, *L'amiable composition en droit comparé et international* (Paris 1980) 5.

3 Reidberg, *Der Amiable Compositeur im internationalen privaten Schiedsgerichtsverfahren* (Frankfurt/Berlin 1962) 16.

Notwithstanding these differences, the essence of the concept is the same the world over: resolving a dispute on the basis of equity and fairness.[4]

The notion and practice of amiable composition originated and evolved in France and other civil law countries,[5] and tends to be less well-established in common law jurisdictions. Nevertheless, amiable composition is generally accepted as a valid means of arbitrating disputes under the arbitration laws of virtually all jurisdictions.[6]

This article seeks to analyse the content and limits of an arbitral tribunal's power to act as *amiable compositeur*, as well as the consequences of an unauthorised *ex aequo et bono* decision, from an international and comparative point of view.

Deciding as *amiable compositeur* or *ex aequo et bono*: preliminaries

Amiable composition, or the authority of a tribunal to decide a dispute *ex aequo et bono* where so authorised by the parties, is a standard feature of many institutional arbitration rules and national laws. Surprisingly, however, the definition of amiable composition is nowhere to be found in such rules or legislation.

According to literature and jurisprudence, deciding *ex aequo et bono* may mean, among other things:

- deciding according to the arbitral tribunal's own idea of justice, considering the specificities of the case;[7]
- not being bound by the applicable law;[8]
- under certain arbitration rules and national legal systems, not being bound by contractual provisions and trade usages;[9] and
- deciding on a basis other than at law.[10]

4 Kiffer, 'Nature and Content of amiable composition' [2008] International Business Law Journal 626.

5 Yu, 'Section 46 (1) (b) of the English Arbitration Act 1996: its past and future' [1999] International Arbitration Law Review 43.

6 ICC Task Force on Amiable Composition and *ex aequo et bono* arbitration, draft of interim report no 4422992, 5. The English version dated December 2007 is available at www.iccmex.mx. It does not seem to have been published.

7 Berger, *Integration mediativer Elemente in das Schiedsverfahren*, Recht der internationalen Wirtschaft (2001) 881, 886.

8 Davidson, 'The new Arbitration Act – a model law?' [1997] Journal of Business Law 120; Loquin, see n 4 above at 237; Schwab and Walter, *Schiedsgerichtsbarkeit* (7th edn, Munich 2005) chapter 19, n 14.

9 For instance, under the ICC Rules. The provisions of the contract and the trade usages must nevertheless be taken into account according to section 21.2. That is, the arbitral tribunal shall address them and indicate to what extent it departs from them: Reiner and Aschauer, in Schütze (ed), *Institutional Arbitration* (München/Stuttgart 2012) ICC Rules n436. Under the DIS (German Institution of Arbitration) Rules, the arbitrator – also when deciding *ex aequo et bono* – must always decide in accordance with the contractual provisions and take into account the trade usages (section 23.4).

10 The French doctrine names them respectively amiable composition arbitration and arbitration at law; see n 2 above at n 276.

A few concrete examples may help to clarify the concept. As *amiable compositeurs*, arbitrators may rule on claims even if they are brought in violation of statutes of limitation, extend the evaluation of damages to indirect damages and award interest other than as provided by contractual terms.[11]

Furthermore, being released from the obligation to apply the law, arbitrators authorised to decide *ex aequo et bono* may resolve the case by recourse to general principles of law[12] or other non-state rules of law, such as the *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts.

For instance, in an ad hoc arbitration between an Argentinean and a Chilean company, even though the parties based their claims on Argentinean law the arbitral tribunal – acting *ex aequo et bono* – applied section 4.6 of the UNIDROIT Principles and decided that, because the contract had been drafted by the buyer, its provisions should be interpreted in a more favourable sense to the seller.[13]

In another case involving a distributorship agreement between a company from Panama and a company from Puerto Rico, the Arbitral Tribunal of the City of Panama acting as *amiable compositeur* effected an 'equitable' quantification of the loss suffered by the claimant on the basis of section 7.4.3 of the UNIDROIT Principles.[14]

Even though one of the main elements of amiable composition is the liberty conferred on arbitrators not to apply the law, an amiable composition clause is not incompatible with a choice of law clause.

An amiable composition clause confers upon the arbitral tribunal the authority not to apply the law, not the duty to decide *contra legem*.[15] It does not mean that the arbitrators may not or should not consider the law or even apply the law if doing so results in an equitable solution to the case. While deciding as *amiable compositeur*, the arbitral tribunal should thus consider the law as a starting point and then analyse whether the solution provided by such law is equitable.[16]

According to the ICC Task Force on Amiable Composition and *ex aequo et bono* Arbitration, this approach is one of the possible methods available to *amiable compositeurs*. The other is to decide exclusively on the basis of equity,

11 See n 4 above at 632, based on the ICC France Task Force on amiable composition.

12 Geimer, *Internationales Zivilprozessrecht* (6th edn, Cologne 2009) n 3872.

13 UNIDROIT, Uniform Law Review, 1998, 178–179, also available at www.unilex.info/case.cfm?pid=1&do=case&id=646&step=Abstract.

14 The abstract in English and the full text in Spanish are available at www.unilex.info/case.cfm?pid=1&do=case&id=677&step=Abstract.

15 See n 2 above at n 413.

16 Loquin speaks of an 'equity corrector' [*correctif d'équité*]: Loquin, see n 4 above at n 418.

irrespective of the content of the applicable law. While both are acceptable, a majority of countries have expressed themselves to be in favour of the first method.[17] This enables a more flexible and fair decision, particularly in cases in which applying the law would necessarily lead to a 'yes' or a 'no' and therefore to great hardship for a party.[18]

The admissibility of *ex aequo et bono* dispute resolution in different legal systems does not mean that the power of the *amiable compositeur* is unlimited. Just as a decision at law, the respect of substantive and procedural public policy is mandatory.[19] No matter the authority conferred on arbitrators, states cannot tolerate that the conduct or result of an arbitration violates public policy; party autonomy cannot prevail to the detriment of the public interest.[20]

Unlike a state judge, the arbitrator is not bound by the public policy of one particular country. Paradoxically, this does not make the job any easier, since three different public policies could influence the validity and enforceability of the award: that of the substantive law applicable to the dispute, of the place of arbitration and of the place where the award might be enforced.[21]

Despite differences in the definition of public policy among legal systems, the notion of public policy operates as a limit to the authority of the *amiable compositeur* and must be respected in nearly every jurisdiction,[22] lest the award be annulled or its recognition and enforcement refused.

Authorised by the parties

The amiable composition clause is founded upon the principles of party autonomy and contractual freedom.[23]

Its legal nature is that of a waiver. Just 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 to have the conflict resolved pursuant to the law.[24]

Since the powers of the arbitral tribunal are those granted by the parties,[25] the number one requirement of an *ex aequo et bono* decision is the existence

17 See n 6 above at 12.
18 Lachmann, *Handbuch für die Schiedsgerichtspraxis* (3rd edn, Cologne 2008) n 404.
19 See Davidson, n 8 above at 121; see n 4 above at 633.
20 See n 2 above at n 424.
21 *Ibid*, n 455.
22 See n 6 above at 10.
23 See n 12 above at n 3872; Schütze, *Schiedsgericht und Schiedsverfahren* (5th edn, Munich 2012) n 400.
24 See n 2 above at n 55.
25 *Ibid*, n 276.

of a valid clause expressing the parties' agreement authorising the tribunal to decide *ex aequo et bono*. This is expressly provided in most arbitration rules, such as:

- ICC (International Chamber of Commerce) 2012 Rules, section 21.3;
- DIS (German Institution of Arbitration) 1998 Rules, section 23.3;
- LCIA (London Court of International Arbitration), section 22.4;
- ICDR (International Centre for Dispute Resolution), section 28.3; and
- HKIAC (Hong Kong International Arbitration Center), section 31.2.

Amiable composition arbitration is accepted practice as well in the field of sport-related disputes. The procedural rules of the Court of Arbitration for Sport (CAS)[26] stipulate this expressly in section R45. The rules of the German Sports Court of Arbitration (*Deutsches Sportschiedsgericht*) also contain a similar provision in section 23 (4).

Authorised by national law

It is not only the parties that have a say in the matter, but national law as well. For an arbitral award rendered *ex aequo et bono* to be valid and enforceable, amiable composition must also be authorised by relevant national law.

At an international level, it is worthy to note that the first international convention to deal with the matter was the European Convention on International Commercial Arbitration signed in Geneva in 1961 (Convention).[27] Section 7 (2) allows amiable composition decisions provided that the parties have so agreed and that they may validly do so under the applicable law.

The Convention tactfully does not require countries whose national law does not already provide for amiable composition to modify their legal systems, but merely requires signatories to recognise and enforce *ex aequo et bono* awards validly rendered under the applicable law chosen by the parties.[28] The aim is thus to encourage as many countries as possible to sign the Convention, as well as to assure the widest possible enforceability of decisions.

Nevertheless, not all international texts are supportive of amiable composition. The Convention on the Contract for the International Carriage of Goods by Road (CMR), for instance, only allows an arbitration agreement in a contract of carriage if the clause provides that the tribunal

26 The CAS is recognised by the FIFA statutes as a privileged forum to resolve disputes between the FIFA, members, confederations, leagues, clubs, players, officials and licensed match agents and players' agents (section 66 (1)).

27 See n 2 above at n 295.

28 *Ibid*, n 297.

shall apply the CMR (section 33). If this requirement is not fulfilled, the clause will be deemed invalid. In several cases, this was precisely the fate of the amiable composition arbitration clause contained in the general terms and conditions of the Fenex, the Dutch organisation for shipping and logistics. Because the Fenex amiable composition clause is seen as potentially preventing the arbitral tribunal from applying the CMR, a few German jurisdictions have decided that the clause is invalid.[29]

At the national level, here as elsewhere the UNCITRAL Model Law (Model Law) plays an important role in the harmonisation and improvement of national laws and represents an internationally established standard for modern arbitration law.[30] In its section 28 (3), the Model Law provides for *ex aequo et bono* decisions where the parties have expressly authorised the arbitral tribunal to decide on that basis. Nevertheless, pursuant to section 28 (4), the arbitral tribunal shall in all cases decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

This standard has influenced a great number of countries. However, many legal systems still contain peculiar provisions in this regard.

Germany

In Germany, for example, provisions regarding arbitration are integrated in the German Civil Procedure Code (*Zivilprozessordnung* or *ZPO*).

Under German law, the rule is that the arbitral tribunal shall apply the law chosen by the parties (section 1051 (1) of the ZPO). The arbitrators are thus in principle bound by the substantive law.[31]

Section 1051 (3) of the ZPO is identical to section 28 (3) of the Model Law: the explicit authorisation of the parties is an essential requirement of an amiable composition decision. An implicit empowerment is not accepted; it must be unambiguous and absolutely certain.[32]

The granting of powers to the arbitral tribunal to decide *ex aequo et bono* is, therefore, an exception – or waiver – that releases the tribunal from the obligation to apply the law.[33]

Section 1051 (4) of the ZPO, just as section 28 (4) of the Model Law, provides a limit to the power of arbitral tribunals acting as *amiable compositeur*: in all cases, arbitrators should decide in accordance with the contractual

29 *OLG* Hamm, 29 June 1998 (18 U 19/98); *OLG* Cologne, 2 August 2005 (3 U 21/05); n 18 above at n 405.

30 UNCITRAL, Explanatory Note by the Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, Vienna 2008 n 2.

31 Schwab and Walter, n 8 above at chapter 19, n 14.

32 Schütze, n 23 above at n 401.

33 *Ibid*, n 400.

provisions and take account of the trade usages. They should always serve as guidelines to the arbitral award.[34]

Other limits to this power are the respect of morality (*die guten Sitten*) and public policy (die *öffentliche Ordnung* oder *ordre public*),[35] as well as of essential procedural principles[36] such as due process.

France

In France, amiable composition is allowed in both internal and international arbitration, as provided respectively in sections 1478 and 1512 of the French Civil Procedure Code (*Code de Procédure Civile*).[37]

French doctrine suggests that an amiable composition clause grants not only a power and a faculty to the arbitral tribunal, but also a mission and a duty to issue an equitable award.[38] In order to fulfill their mandate, *amiable compositeurs* should, therefore, always assess whether the resolution of the case is fair.

Arbitrators deciding *ex aequo et bono* are further required to state in their awards that they have taken equity and fairness into consideration, in addition to explaining the grounds or reasoning on which an award is based. Since a review on the merits of the case is not allowed, this is the only possible and objective way for state courts to verify that the *amiable compositeurs* correctly used their power.[39]

It is also generally accepted in French doctrine that *amiable compositeurs* may not only interpret contractual terms in an equitable manner, but also moderate such terms in order to restore contractual equilibrium, if necessary. They should, nevertheless, respect the economy of the contract according to the initial agreement of the parties.[40]

England, Wales and Northern Ireland

In England, Wales and Northern Ireland, the law was hesitant or even hostile toward amiable composition until the entry into force of the Arbitration Act 1996.[41] Previously, judges were quite tied to the idea that arbitrators must

34 See n 31 above.

35 Schütze, n 23 above at n 400; Schwab and Walter, n 8 above at chapter 19, n 14.

36 See n 7 above at 886.

37 Section 1478: 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: The arbitral tribunal decides as *amiable compositeur* if the parties have entrusted it with this mission (unofficial translation).

38 See n 2 above at n421.

39 See n 4 above at 630.

40 *Ibid*, 631.

41 See n 3 above at 11.

apply a 'recognizable system of law', as illustrated by a few key decisions.[42]

With the purpose of making England, Wales and Northern Ireland more attractive places for arbitration, the Arbitration Act 1996 was largely based on the Model Law.[43] As far as amiable composition is concerned, the objective was to go further than the Model Law.[44] Section 46 (1) (b) of the Arbitration Act 1996 thus provides that, if the parties so agree, the dispute shall be settled in accordance with such considerations as are agreed by them (which may include equity principles[45] or *lex mercatoria*)[46] or determined by the tribunal. That is, parties may grant the arbitral tribunal the power to decide *as the tribunal itself thinks best*, including in amiable composition, even if they haven't expressly agreed on an *ex aequo et bono* decision.

According to certain authors, section 46 (1) (b) does not expressly mention amiable composition or *ex aequo et bono* for the reason that these expressions were not part of English law or arbitration practice.[47] This unfamiliarity could thus create uncertainty, especially because they could have different meanings in different legal systems.[48]

This circumstance does not, however, change the substance of section 46 (1) (b), which effectively established the validity and enforceability of amiable composition in English law.

It should be noted that equity or fairness principles applied by arbitrators acting as *amiable compositeurs* do not mean 'equity' as a legal concept,[49] which has a precise content in English law.[50]

Consequences of an unauthorised *ex aequo et bono* decision

The following paragraphs seek to provide an overview of how different legal systems approach the matter of unauthorised amiable composition, and the legal consequences that arise therefrom. 'Unauthorised' amiable composition refers to a deficiency in one of the prerequisites of *ex aequo*

42 For instance, *Orion Cia. Española de Seguros v Belfort Maat etc* [1962] 2 Lloyd's List Law Reports 257, 264; Yu, n 5 above at 46.
43 Davidson, n 8 above at 101.
44 *Ibid*, 121.
45 Yu, n 5 above at 46.
46 Davidson, n 8 above at 121.
47 Yu, n 5 above at 46.
48 Davidson, n 8 above at 120.
49 Yu, n 5 above at 45.
50 In common law jurisdictions, equity 'constitutes a body of sophisticated maxims, doctrines and principles developed historically alongside the common law', whereas, in amiable composition, it is 'not a body of rules but a mission entrusted to the amiable compositeur charged with achieving fairness and justice', ICC Task Force on Amiable Composition (see n 6 above at 9).

et bono decision-making, as analysed above: the parties' authorisation, admissibility of such awards in national legal systems and respect of the limit to the amiable composition power by the arbitral tribunal (public policy). A defect in any of these areas renders an *ex aequo et bono* decision invalid and/or unenforceable.

Regarding domestic arbitral awards, pursuant to section 34 (2) (a) (iv) of the Model Law, an arbitral award may be set aside 'if 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'.

The first hypothesis falling under this provision is that in which the arbitrators decide as *amiable compositeurs*, even though they have not been empowered to do so. The arbitral procedure was in this case not in accordance with the agreement of the parties, which constitutes a ground for setting aside the award.

A second hypothesis is that of an arbitration agreement containing an amiable composition clause, but where the arbitrators conducted regular proceedings instead of acting *ex aequo et bono*. In such a case, the arbitral procedure would not be in accordance with the parties' agreement and the arbitral award might be set aside. However, this would only be so if the agreement in question – that is, the amiable composition clause – was not in conflict with a mandatory provision of law. Such would be the case if the applicable law did not provide for the admissibility of amiable composition (for instance, through a provision stating that arbitrators must apply rules of law). The non-respect of the procedure with the parties' (invalid) agreement would thus not constitute a ground for setting aside.

In addition, violation of public policy is a ground for challenge of an award under section 34 (2) (b) (ii) of the Model Law.

This approach taken in the Model Law has been adopted in various ways under different national legal systems.

Germany

In Germany, section 1059 (2) (1) (d) of the ZPO provides that an arbitration award may be reversed if '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'.

In the absence of an amiable composition clause, a decision *ex aequo et bono* would not correspond to the parties' agreement and could be

challenged on the basis of section 1059 (2) (1) (d) of the ZPO.[51]

The highest German court for civil matters (the Federal Surpreme Court, *Bundesgerichtshof* or *BGH*) stated expressly in a decision dated 26 September 1985 that the procedure in this case would not be in accordance with parties' agreement (*unzulässiges Verfahren*).[52]

Similarly, in another decision by the *Oberlandesgericht* (*OLG*) Munich, dated 22 June 2005, the arbitral award was set aside because the parties had not expressly given the arbitral tribunal the power to decide *ex aequo et bono* (*Billigkeitsentscheidung*).[53]

According to the German literature, if the arbitral tribunal applied exclusively the substantive law chosen by the parties in spite of an amiable composition clause, the award would still be valid.[54] This situation could not represent a ground for setting aside or refusing recognition and enforcement of the award, since by definition the application of the law can never[55] – or only exceptionally[56] – be considered unfair (*unbillig*).

Moreover, an amiable composition decision can be set aside if it is in contradiction with German public policy (section 1059 (2) (2) (b) of the ZPO). The fact that imperative provisions of law were not taken into consideration is not in itself a ground for challenging the award.[57]

France

In France, according to section 1520 (3) of the French Civil Procedure Code, the arbitral award can be set aside if the arbitral tribunal did not comply with the mission with which it was entrusted by the parties. This would be the case if the tribunal issued an amiable composition decision without having been granted the power to do so. French courts have also determined that this would be the case where, in spite of the parties' authorisation to act as *amiable compositeurs,* the arbitrators merely applied the law without assessing whether the solution to the particular case is fair.[58]

Breach of public policy is also a ground for setting aside of awards pursuant to section 1520 (5) of the French Civil Procedure Code.

51 Schwab and Walter, n 8 above at chapter 19, n 15.

52 *BGH* Neue Juristische Wochenschrift 1986, 1436, 1437.

53 *OLG* Munich, Zeitschrift für Schiedsverfahren (SchiedsVZ) 2005, 308.

54 Reiner and Aschauer, n 9 above, DIS Rules, n 199.

55 Schwab and Walter, n 8 above at chapter 24, n 22.

56 See n 12 above at n 3876.

57 *Ibid*, n 3877.

58 That is, Cour de Cassation, 2nd Civil Chamber, decisions of 18 February 2001 (Bullet II, No 26) and 18 October 2001 (Appeal No 0012880); Cour d'Appel de Paris, 15 January 2004, Revue de l'arbitrage 2004, 907.

England, Wales and Northern Ireland

In England, Wales and Northern Ireland, if amiable composition is not authorised by the parties, the arbitral tribunal acting as *amiable compositeur* would have exceeded its powers.[59] This would constitute a serious irregularity and a potential ground for setting aside the award under section 68 (2) (b) of the Arbitration Act 1996, if the court considers that this circumstance has caused or will cause substantial injustice to the applicant.

Of course, violation of public policy is also a serious irregularity that may justify setting aside the award pursuant to section 68 (2) (d) of the Arbitration Act 1996.

As far as foreign arbitral awards are concerned, an unauthorised amiable composition decision can be refused recognition and enforcement on the basis of section 5 (1) (d) of the New York Convention, that is, where the arbitral procedure was not in accordance with the agreement of the parties. Pursuant to section 5 (2) (b), violation of public policy of the jurisdiction where recognition and execution is requested is also a ground for refusal in the 149 countries[60] that have signed or ratified the New York Convention.

Very similar terms to section 5 (1) (a) to (d) of the New York Convention have been adopted in section IX (1) (a) to (d) of the European Convention. According to these provisions, arbitral awards that have been set aside in another contracting state based on any of these grounds shall not be recognised and enforced.[61] An unauthorised amiable composition decision that has been set aside at the place of arbitration would therefore also be refused recognition and enforcement on the basis of the European Convention in another of the 32[62] contracting countries.

Conclusion

The validity, enforceability and use of amiable composition arbitration under different legal systems have increased significantly over the last three decades. The adoption of the Model Law in 1985 in particular constitutes a crucial milestone in the development and spread of the law and practice of *ex aequo et bono* arbitration.

The principal conclusion to be drawn from the foregoing is that while certain questions remain a matter of controversy as between legal systems and institutional rules – for instance, whether an *ex aequo et bono* award must be in accordance with the parties' contractual agreements – virtually all

59 Davidson, n 8 above at 122.
60 On 11 November 2013.
61 See n 2 above at n 291.
62 On 11 November 2013.

systems recognise that valid and enforceable amiable composition rests on two essential requirements: (i) the authorisation of the parties; and (ii) the respect of substantive and procedural public policy. The absence of one of these elements renders an *ex aequo et bono* arbitral award susceptible to its setting aside or to the refusal of its recognition and enforcement.