

**ADVANTAGES OF AMICABLE INTERNATIONAL
ARBITRATION: CHARACTERISTICS AND SCOPE OF
ARBITRATOR POWERS**

« Justitia est constans et perpetua voluntas jus suum cuique tribuendi »

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1 Introduction

The internationalization of trade has led to increasing numbers of international contracts, and indirectly, to a rapid growth of international legal disputes. The rise in plurality of new economic and legal strategies and the wish to reduce the legal risk has led to numerous systems of dispute resolution and reconciliation. Usually, legal disputes are resolved before national courts (litigation) and governed by state law, but there are some exceptions when it comes to trade law. Most jurisdictions give an opportunity to the commercial parties in an international contract to resolve their dispute out of national courts.

The last decades of 20th and the first decade of 21st centuries have been called “the golden age” of international private dispute resolution such as commercial arbitration. International commercial arbitration is a system created by experts of commerce to fill the gap between national jurisdictions and is not in competition with national litigation¹. This remedy is often faster and less expensive and is frequently recommended to the commercial parties in an international contract. Mainly, because arbitrators have specific expertise that national judges often do not have. The parties can also feel more secure knowing that their contractual rights and obligations are governed and interpreted by a neutral tribunal not linked to one of parties’ home countries. International arbitral awards are recognized and easily enforceable as a result of broad international cooperation, such as “United Nations Commission on International Trade Law” (UNCITRAL); and as a result of wide acceptance of the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)²”.

¹ Philippe De Bournonville, *Droit Judiciaire*, (Larcier, 2000) , p.57.

² Ratified by 144 states.

The freedom of contract gives the parties great leeway when it comes to choosing the form of arbitration, judges or norms that are going to govern the contract. This freedom has led to plurality and broad spectrum of arbitration forms. There are institutional and ad hoc arbitrations, some are specialized for specific kinds of cases, depending on geographic region or type of trade, and some can be applied to all commercial cases in general.

Even though most arbitral awards are rendered according to law or institutional rules, the evolution in this area of law has brought awards that are not only grounded by strict application of law but also by equity, fairness, trade usages etc..

This kind of arbitration is also known as amicable arbitration, amiable composition or ex aequo et bono arbitration. Acceptance of amicable arbitration in international trade is result of the influence the large national legal systems on international trade law. In this case, the French legal system.

The object of the present work is to clarify and explain the last mentioned types of arbitration also called “non ex lege arbitration”, and particularly, the limits on arbitrator’s power. I chose this theme because of its status as “terra incognita” for Norwegian international law students and lawyers.

Amicable arbitration is a particular resolution remedy. It is in contradiction with many ideas when it comes to legal dispute resolution. This resolution remedy is controversial because it accepts fairness as “*lex superior*”, even above the written rules. This is not totally in accordance with principle of “*Lex superior derogate legi inferiori*”, as we have learned at law school.

I have chosen to write about amicable arbitration because it is a dispute resolution remedy with great latent potential that could have a great impact on international commercial law.

The goal of this work is to clarify the concept of amicable arbitration and to show that it could become a useful and more widely used tool for dispute resolution.

The global financial crisis that struck the world in the beginning of 21st century shows that our society is still in need of change. It demonstrates, as well, that many legal systems need

to change and that it is the time to introduce some unconventional resolution remedies to the broad public in order to make this change happen.

Scope of the work

The main theme of the work is *de lege lata* scope and contents of powers of *non ex lege* arbitrator. It is limited to observation of several forms of amicable arbitrations, such as , amiable composition, arbitration *ex aequo et bono* and honorable engagement. These terms are more precise than amicable arbitration, but they are of the same content and have the same meaning in practice.

A split of the main question in several sub questions and sub themes is necessary in order to give an adequate vision of the problem. Defining and description of powers and limits is inescapable in order to make a final conclusion of the work.

An arbitrator's powers are limited by *rationae materiae* of the case, the procedural rules, material rules, contract stipulations, parties' intentions, public order and of course equity. All these will be clarified in order to give the best view on the substance of the powers.

I will be obliged to use jurisprudence, theoretical views and examples from different legal systems in order to answer on the main question. I will however, focus on jurisprudence from ICC International Court of Arbitration since it is the most influential commercial arbitral tribunal.³ The French theory and jurisprudence are also of great interest because this country is the cradle of amiable composition.

This transnational approach is necessary because international dispute resolution is a mosaic of different legal institutions and is a result of commercial pragmatism and cooperation.

³ ICC International Chamber of Commerce web site. www.iccwbo.org

2 Amicable arbitration

Arbitration not based on law is a dispute resolution remedy which is accepted in international trade by international arbitral tribunals and most important, in national legislation. This arbitration can result from wishes of the parties. It is still quite controversial among many authors even though many international contracts contain a clause of amicable arbitration. This controversy results in lack of knowledge of the concept. One aim of this work is to introduce this concept to a broader public.

The ICC court of arbitration's jurisprudence and international literature usually use the terms, amiable composition or *ex aequo et bono* arbitration when referring to amicable arbitration (or *non ex lege* arbitration).

The International Chamber of Commerce arbitration rules of 1998 Article 17. 3 provide that:

"The arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give such powers."

UNCITRAL model law of 1985 in Article 28(3) stipulates that:

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

These articles determine rules applicable to substance of dispute.

A majority of authors and lawyers agree that the choice of the mentioned terms is generally a question of “language preference”⁴ and historical and national approach to the theme. However, some national legal systems accept either amiable composition or *ex aequo et bono* while others accept both types of arbitration⁵. Many countries have transformed and imported UNCITRAL model law but have chosen not to use the same terms. For example: Article 31(3) of Norwegian Act on Arbitration⁶ stipulates that :

*“The arbitral tribunal shall decide on the basis of **fairness** only if the parties have expressly authorized it to do so.”*⁷

The common factor for all forms of amicable arbitration is the fact that they result or can result in an award not founded in law or its strict application and that amiable composition and *ex aequo et bono* are just two of many names for amicable arbitration.

2.1 Distinction between Amiable Composition and Ex Aequo et Bono

It is important to distinguish amiable composition from arbitration *ex aequo et bono* even though many authors find that the two terms are substantially equal and are more than often used synonymously.

Generally, the international doctrine defines amiable composition as a mission where an arbitrator decides a dispute before him according to law and legal principles, but nevertheless may modify the effect of certain non-mandatory legal provisions.⁸

⁴ Michael Bühler and Sigvard Jarvin, *Can the question if the law applicable to the merits be left undetermined by the amiable compositeur ?*, (2008), p.4. Annex 5 of the ICC Interim Report on Amiable Composition and Ex Aequo et Bono arbitration (2008).

⁵ Legal systems that have accepted the UNCITRAL rules in his totality

⁶ Lov om Voldgift av 14. 05. 2004

⁷ NOU, 2001: 33, p.157.

⁸ Jana Herbockova, *“Amiable Composition in International Commercial Arbitration”*, (Faculty of Law, Masaryk University 2008) ; p.1.-3.

It is important to mention that authors do not agree about the obligation for an arbitrator to consider the law before modification of its non-equitable outcome.⁹

Ex aequo et bono arbitration is dispute resolution not based on law but according to moral principles and principles of equity. An arbitrator *ex aequo et bono* can disregard the mandatory provisions beside the non-mandatory ones. The arbitrator must, however, respect the international public policy which cannot be disregarded.¹⁰

The theoretical difference between the two expressions is made in countries where the both terms are used, such as Switzerland, France, Belgium and Italy. Other legal systems, such as Brazilian, English or the German refer to more general terms such as “equity arbitration” or “Billigkeitsentscheidung” and usually do not have any distinction.¹¹

The most important difference is the question of obligation for an arbitrator to apply the rules of law before making the final equitable decision or the freedom of considering what is equitable without passing by a possible legal outcome. As seen in the definitions above, an arbitrator *ex aequo et bono* is not obliged to consider legally based outcomes, while the answer is not clear when it comes to amiable composition. This is one of the cardinal questions in order to describe the scope of arbitrators’ powers.

⁹ See *Infra*.

¹⁰ Bühring-Uhle, *Arbitration and Mediation in International Business*, (Kluwer Law International 2006); p.40 .

¹¹ Task force on Amiable composition and *ex aequo et bono* arbitration, Interim Report March 2008, ICC, p.7.

The distinction between amiable composition and deciding *ex aequo et bono* is not clearly made in France, even though it was one of the first countries in the world to recognize amiable composition as a dispute resolution remedy.¹²

French and Italian authors differ on some elements of distinction. For example, the question whether amiable composition is a decision or a settlement.

This can indirectly result in a question whether only amiable compositeur can modify some stipulations of a contract. However, it is clear that an arbitrator *ex aequo et bono* does not have authority to modify contracts.

Italian authors Vecchione and Schizzerotto refer to amiable composition as settlement and no decision making¹³, while French professor Rippert defines amiable composition as a contractual situation and not real proceeding.¹⁴ This means that the authors understand *ex aequo et bono* as decision making and not settlement.

In case Durevnit¹⁵ the French Court of Cassation has held that the arbitrators with task to settle the rights of the parties are amiable compositeurs.¹⁶ According to this case, arbitrators with the mission to settle the rights can only be amiable compositeurs. This might mean that arbitrators *ex aequo et bono* only have a mission to make decisions on specific facts of the case.

This point of view has been expressed by professor Goldman¹⁷ who sees the difference in the fact that an” *amiable compositeur may decide what the parties may agree when settling their dispute.*”¹⁸

¹² Mauro Rubino- Sammartano, *International Arbitration Law in Practice* (Kluwer Law International 2001), p.472.

¹³ Mauro Rubino-Sammartano, op. cit., p. 473.

¹⁴ Rippert, *Annuaire de l’institut du droit International*, (1957), p. 42.

¹⁵ Cour de Cassation : Durevrenit vs. Roulet, rep Dalloz, Vol. 5, section 1025.

¹⁶ Mauro Rubino-Sammartano, op. cit., p. 473.

¹⁷ French comparatist and renown professor

¹⁸ Mauro Rubino-Sammartano, op. cit., p. 472.

Several other authors share Goldman's idea. They indicate that only the amiable compositeur can settle a dispute with different result than the result prescribed by law.¹⁹

This disagreement poses only a theoretical problem because such distinction is not generally made in practice.

In practice, the parties instruct the amiable compositeur to decide a dispute. The resulting award is an enforceable decision even though it theoretically can be a settlement.

However, UNCITRAL model law text which provides that an arbitral tribunal shall "decide *ex aequo et bono* or as amiable compositeur" makes a distinction between them by putting the word "or" instead of "and".

This can be a result of theoretical discussion and respect for national historical views and is probably not meant to make the difference between the two terms.

This view is also supported by a final conclusion of French Task force report which shows almost unified positive response on the question whether those two expressions are the same.²⁰

Like the opinion of a majority of authors and lawyers, this paper treats *ex aequo et bono* arbitration and amiable composition as the same concept because of its substantial equality and largely indistinguishable practical meaning.

The idea that two concepts are the same thing is also supported by legal practice and the principle of pragmatism in international commercial law.

Finally, rules and ideas have to meet the needs of international commercial community in order to be relevant, and it seems like there is no practical need to maintain the distinction between amiable composition and *ex aequo et bono* arbitration.

¹⁹ Ibid., p.472.

²⁰ ICC Interim report march 2008, annex 2. Only one negative response; (From majority of Brazilian expert-team).

2.2 Amiable Composition

Definition of Amiable Composition is not uniform even though it is broadly accepted as a unique method of arbitration. The notion of amiable composition is mentioned in many legal texts²¹ but the legislator does not want to define it and gives this job to jurisprudence and doctrine. The definition varies from country to country and is result of different approaches. Some authors or arbitral associations define the person “arbitrator amiable compositeur” instead of the concept itself.

2.2.1 Definition

Most notable authors define amiable composition as a mission where an arbitrator decides a dispute before him according to law and legal principles, but nevertheless is authorized to modify the effect of certain non-mandatory legal provisions.²²

This definition is short but covers the most of the concept. A decision of an arbitrator amiable compositeur must, in all cases, to be consistent with equity.²³ It means that the parties instruct an arbitrator to correct a non fair outcome that has resulted in strict legalistic approach.

The main object of amiable composition is to render a just and equitable award. On the other hand, this means that an amiable composition cannot, in any way, result in an award

²¹ For exemple: article 1497 of French Civil Procedure Code : "l'arbitre statue comme amiable compositeur si convention des parties lui a conféré cette mission. "

²² Jana Herboczkova, op.cit., p.2.

²³ ICC, “*Note to national Committees, Groups and Members*”, (2005) p.2. Annex 1 in the 2008 ICC Interim Report op.cit.

based on strict interpretation of law if the result is inequitable. This interpretation was given by French Court of Cassation.²⁴

Some authors mean that an amiable compositeur is not bound by legal formalities and that he or she has to resolve the dispute according to his knowledge or understanding.²⁵

American Arbitration Association²⁶ defines the arbitrator amiable compositeur as a “*conciliator, arbitrator de facto, or in the most extreme sense, an arbitrator under no obligation to observe the rule of law*”. This definition is not as liberal as the first and second one when it comes to an arbitrator’s choice to discretionarily render an award without considering the law. The American association of arbitration recognizes such power only in extreme situations.

Judge Beetz of Supreme Court of Canada expresses, indirectly, that an amiable compositeur is *bonus pater familias* in matters of international commercial arbitration.²⁷

All definitions are pretty much equal but are describing the concept from different points of view.

2.2.2 Origins of amiable composition

It is easier to understand the concept looking at its origins and evolution from a bird-eye perspective. Amiable composition is a French expression which has partially denaturalized from its original meaning. Word “amiable” means kind or friendly and originally referred

²⁴ Cour de Cassation 2e chamber Civile. 10.july 2003. See: Uwe Blaurock , *Gerichtsverfahren zwischen Gerechtigkeit und Ökonomie*, (Mohr Siebeck 2005), p.179

²⁵Etienne Van Bladel, “ *Arbitration in the building industry in the Netherlands*”, (Dispute Resolution Journal 1999), [<http://findarticles.com/>]

²⁶ Law Reform Committee Report; Sub-Committee on review of Arbitration Laws. 1993, p. 29.

²⁷ Case Sport Maska vs. Zittre (judge Beetz) , Supreme Court of Canada. See: Mercedes Glockseisen, “*L’amiable Composition: instrument fragile ou assise de renouveau juridique* “, (Canadian Forum on Civil Justice 2000), [<http://cfcj-fcjc.org/>].

to conciliation or settlement.²⁸ This concept has been pared with arbitration, a remedy that results in an enforceable award, in order to make it more practical, imposing and enforceable. That is why amiable composition can be described as a composite of mediation which is not enforceable and international arbitration which *is* a final decision. However, the expression “amiable” has lost its original meaning as it is not conciliation but a decision.

The word “composition” refers to an accord or an agreement between the parties in a contract.

The association of the two expressions, amiable composition, is a wish to show an arrangement, between two entities, to resolve their dispute amicably in interest of their contract and international commerce.²⁹

2.2.3 History of amiable composition

Logically, one could think that this institute originates from common law jurisdictions and not French (civil) law. It is common law³⁰ jurisdictions that contain the notion of equity and that accept it as a supplemental source of law. However, common law jurisdictions understand equity as an addition to black letter law. Equity is used when we have a lacuna of rules. A common law judgment cannot be rendered only according to equity. It is always given according to the law but may be justified by equity.³¹

Some authors share the opinion that historically, amiable composition referred to Roman law’s *aequitas*.³² It is why it penetrated civil law jurisdictions earlier than common law ones.

²⁸ Mercedes Glockseisen, op.cit.

²⁹ Ibid.

³⁰ Law of most Anglophone countries which is known for being developed by decisions of courts.

³¹ Mercedes Glockseisen Op. Cit

³² Ibid.

Definition of *aequitas* was not unified, but as given by Aristotle (J.Barnes. Complete Works of Aristotle.):

What creates the problem is that the equitable is just, but not the legally just, but a correction of legal justice. The reason is that all law is universal, but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error.

When the law speaks universally, then, a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence, the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality³³

An author of a work on amiable composition state that this concept has its origin in canonical law.³⁴ More precisely, 17th century institute of *amicabilis compositor* who acted as conciliator and was not bound to apply the strict rules of procedure and material laws.³⁵

The concept of amiable composition was codified for the first time in the Napoleonic Code Civil and the French Code of Civil Procedure of 1806.

Today, most countries recognize the concept, although not always under the same name.³⁶

³³ J. Barnes, *Complete Works of Aristotle*, (Princeton 1984) 1136a- 1138. (My italics).

³⁴ Jana Herboczkova, op.cit., p.1.

³⁵ Ibid., p.1.

³⁶ See chapter 3.

2.2.4 Description of the substance and essential characteristics of amiable composition

The object of amiable composition is already mentioned above. However there are many reasons to clarify it further. Numerous critics of the institution have been an obstacle to an exact knowledge of the substance of amiable composition.³⁷ On the other hand, the nature of the institute is of that kind that it can barely be described in a short work.

Amiable composition is a mission imposed on an arbitrator.³⁸ It is a judicial process where an arbitrator, empowered to resolve the dispute in an equitable way, is obliged to render a decision just like an arbitrator in *ex lege* arbitration or a national judge.³⁹ Indirectly, this means that he or she is obliged to follow the rules of procedure in order to render a decision. The fact that an arbitrator is empowered with such mission does not make any difference when it comes to procedural aspects. This principle has some exceptions which will be discussed later.

The main characteristic of amiable composition is that an arbitrator dealing with it is not obliged to resolve a problem only according to law. He or she has a much larger spectrum of norms to draw on in order to render his decision. Notably, equity and his understanding of it.

This is a mission where an arbitrator is instructed to put the interest of the contract first, and where he has a utilitarian approach to the problem. He or she should strive to make a decision that is as equitable as possible for all parties and for the contract itself.

Another characteristic of the mission is the fact that an arbitrator has power and flexibility, if the contrary is not instructed, to choose the rules of law that he finds appropriate for the dispute. Normally, the parties choose the system of law that is applicable to their contract and the amiable compositeur has the possibility of choosing the appropriate rules for the dispute resolution.

³⁷ ICC, “*Note to national Committees, Groups and Members*”, (2005) p.2.

³⁸ *Ibid.*, p.2.

³⁹ Abdulhayd Sayed, *Corruption in International Trade and Commercial Arbitration*, (Kluwer Law International 2004) , p.259.

Some authors describe the concept as a “negative choice of law”⁴⁰ since an arbitrator is instructed to apply “fairness and equity” instead of specific law and in this way is not obliged to follow a specifically chosen law. It is also accepted that an amiable compositeur can choose rules which coincide with an equitable solution.⁴¹ An amiable compositeur can make a decision based on law which at the same time is compliant with equity.

All this is conditioned with the fact that the parties did not choose the rules that will govern the dispute. If that is done, he or she is obliged to follow their instructions. He or she will, however, rest an arbitrator amiable compositeur but the scope of his power will be limited to the law that is chosen to govern the contract which means that he can only disregard the rules of law that were chosen by the parties.⁴² This was the final statement of ICC award No 2216 of 1974 in a case where parties chose the law and at the same time expressed a wish for an equitable solution in case of a dispute.

Another characteristic of amiable composition is the liberty to interpret the rules in such a way that the rendered decision can be seen as compliant with equity, even though it is presented as being based on law. However, an amiable compositeur must then make a link between equity and the solution of the dispute in order to make a valuable decision. He must state the reasons of the rendered decision in such a way that it is clear for national judge that he has considered equity as a source when he made the judgment. This was stated by French Court of Cassation in case of 15th of February 2001 no. 192⁴³ The main question of the case was whether an arbitral decision on annulment of a cession, rendered by an amiable compositeur, was valid when it was only based on rules of law, without any link to equity and with no stating reasons⁴⁴ for the equitable result nor justifying with equity.

⁴⁰ K.H. Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen*, (Athenäum Verlag 1971), p. 249.

⁴¹ ICC “Note to national Committees, Groups and Members “ 2005 p.3.

⁴² Jana Herboczkova op.cit., p.3.

⁴³ Web site of Juritel (a French bureau of legal information).

⁴⁴ The original expression in French is “motivation”.

This legal institution is often characterized as a non predictable remedy. The parties do not know which of them will be the “loser” in a hypothetical dispute. Often, parties to an international contract try to measure legal risk before signing the contract. Choice of law is a means to decrease this risk. However, amiable composition is an institution made for the parties who want to continue their economic relation even after a legal dispute and can be seen as an object of stability of the contract. If the contract is not functioning as it should, an amiable compositeur can use the powers in order to reregulate the contractual equilibrium. This is one of the main arguments for amicable arbitrations.

When it comes to procedure, an amiable compositeur is obliged to follow the most important principles but may have a much greater flexibility to disregard procedural rules if they do not have the status of rules of procedural public order.

2.2.5 Legal regime of the amiable composition arbitration clause

The legal regime of the clause of amiable composition (and *ex aequo et bono* arbitration) is not a part of the theme of the present work. It is, however, important to mention some of the main problems when it comes to validity of such clauses. Validity of the clause or its nullity can determine or extinguish some of amiable compositeur’s powers.

The most important question is whether such clause has autonomy from the principal contract. Normally, an arbitration clause is autonomous from the principal contract. It means that if the contract is characterized as null and void, the clause is still valid and must be followed. This rule might be a bit ambiguous when it comes to clauses of amiable composition because this is at the same time a clause of choice of rules or as already mentioned clause of negative choice of rules. This mixture of two different roles can have possible consequences if the contract is declared null and void.

Ideally, the arbitration clause should be autonomous and that only the arbitrator amiable compositeur should decide whether the contract is valid or not.

Other important principles worth mentioning are *pacta sunt servanda*, *locus regit actum* and *mutus concensus*.

Pacta sunt servanda stipulates that if the parties have chosen to resolve their dispute according to equity, they must respect the agreement. Such an agreement must be followed.

Locus regit actum stipulates that if the parties did not choose an expressed law the rules that will govern the contract or interpretation of an arbitration clause will be the law of the place of signature of the contract. This principle has not the same strength when it comes to amiable composition because, as already mentioned, an amiable compositeur has the possibility to choose the rules that will govern the contract as long as he or she finds them appropriate for the dispute.

The last principle, *mutus concensus*, means that the parties must mutually agree all changes to the clause of amiable composition. This is a consequence of their freedom to contract which is the foundation of power of the arbitrator amiable compositeur. It is also a negative consequence of *pacta sunt servanda* which obliges the arbitrator to consider the parties intentions in all parts of the process. It means that already started arbitral process must continue even though one of the parties does not agree with that. They must mutually agree in order to stop it.

All other important principles of international commercial arbitration are of interest also for amiable composition such as concept of “*competence competence*” and others.

2.2.6 Object of amiable composition

This is an important question when it comes to international commercial arbitration in general and is of special interest when it comes to amiable composition. An object of amiable composition is normally the same as the object *ex lege* international commercial arbitration. Most national legal systems impose some clear restrictions on access to the

arbitral justice. The conditions vary, but in general, arbitration is created for certain types of persons (*rationae personae*) and for certain types of disputes (*rationae materiae*). It can also depend on whether the procedure has already started or not.

Those conditions are also known as arbitrability. It is the possibility for a dispute to be resolved by arbitration.

We can see that arbitrability of the case is closely connected with autonomy of the parties to make a contract on one hand, and public order on the other. Provisions of a contract that touch public order and which cannot be derogated cannot be a subject to amiable composition. This is a negative consequence of the principle of free availability of rights and a consequence of the principle of *nemo plus juris ad alium transferre potest quam ipse habet*.

So, if the parties have no right to make a contractual arrangement or a provision why should an arbitrator have it? One has to start from the principle that parties' instructions are source of arbitrators' powers.

Public order of protection is a typical limit for arbitrability. For example, parties cannot bring a dispute before an arbitral tribunal when one of the parties is a consumer. There are other limits, such as, competition law, criminal law etc. The interest of the state is very important in such cases and must be decided by national jurisdictions.⁴⁵

An amiable compositeur can have larger flexibility to disregard non mandatory rules but has no possibility to disregard rules that are classified as rules of public order.⁴⁶

Actually, there are no limits for what can be subject to amiable composition or other amicable arbitrations. As long as the claims are arbitrable they can be an object of an arbitration.

⁴⁵ See chapter 3.2.2

⁴⁶ See chapter 3.2.2

French ICC Work Group lists some examples of what amiable compositeur might do when following his mission and an example of cases that are well suited for amiable composition:”

- *Protect a party whose consent may have been imperfect but not completely vitiated;*
- *Penalize the parity which, although not negligent, appears careless, or which although bad faith appears to inflexible or legalistic;*
- *Extend indemnification to indirect or unforeseen loss;*
- *Accept a difficulty in performance as a force majeure even though it does not fulfill the required conditions;*
- *Recognize a limitation of responsibility even when the action in hidden effects would not recognize such limitation;*
- *Liberal accept the circumstances that suspend or interrupt prescription or even rejects exceptions to prescription where such prescription would be acquired in law;*
- *Revise the rate of default stipulated in the contract;*
- *Give effect to a condition that is entirely within the control of one party.*⁴⁷

An interesting view on amiable composition (and *ex aequo et bono* arbitration) comes from some religious groups who find that the best solution to resolve a legal dispute is to submit it to religious rules and religious equity. The Jewish organization, Kehillas Shitvei Yeshurum⁴⁸, advises Jews to insert a clause of amiable composition when forming a contract. This in order to deviate from secular laws and rules in disputes where both of the parties are Jews. This is possible as long as the contractual clauses are compliant with parties’ contractual freedom and do not infringe rules of international public order.

The concept of amiable composition might also be useful when it comes to Islamic banking which may be accepted in Europe in the near future.⁴⁹

⁴⁷ ICC, “*Note to national Committees, Groups and Members*“, (2005), p. 9.-10.

⁴⁸ Rav Yacov Haber . *Secular Court and Arbitration*. (Kehillas Shivtei Yeshurun 2005), [www.ksy.org.il].

⁴⁹ French finance minister, Christine Lagarde has announced France’s intention to make Paris the capital of Islamic finance; *Le Parisien*, 22. 11. 2008., [www.leparisien.fr].

The conclusion is that the field of amiable composition is pretty large and that almost all contractual disputes can be resolved with this form of arbitration, of course with exception of the international public order.

2.2.7 The amiable compositeur

The choice of an arbitrator can be the most important decision in the case and can determinate the entire outcome.⁵⁰ This is why parties should be very careful when choosing an amiable compositeur and other amicable arbitrators. He or she has more power than arbitrator in *ex lege* arbitrations and his own understanding of fairness can be crucial for the outcome.

An amiable compositeur is an arbitrator in international commercial arbitration (or national arbitration where it is admitted) who has wide powers when rendering an award. Usually, it is a lawyer or a person who has legal education and extensive legal training. An amiable compositeur is often an expert in resolution of certain kinds of disputes.

However, amiable compositeurs are sometimes chosen for their technical expertise in a certain areas and do not have to be lawyers.⁵¹ Sometimes an amiable compositeur does not use legal method when resolving disputes. In this case it means that he or she does not start with law and legal result before comparing it with his own views on the case in order to make a final equitable decision. He or she can go straight to a solution that is justified by mathematical or other technical arguments. For example, an amiable compositeur who is an accounting expert might start with a calculation of the contractual outcome in order to

⁵⁰ Lawrence D. Newman and David A. Zaslowsky, "Role of Chairman in International Arbitration", (2009) Baker & McKenzie Newsletter march 2009.

⁵¹ ICC Interim Report, op.cit., p.13.

decide whether the contract is equitable or not⁵², and then make a decision that is compliant with the equilibrium of the contract.

Even though an amiable compositeur is an expert in a special economic or technical area he or she is still an arbitrator and renders an enforceable decision and not just an expert opinion (mediation). Of course, this is the rule when the parties in a contract expressly submit their dispute to an amiable composition and not mediation. This was held by Canadian Supreme Court in case Sport Maska INC vs. Zittre (1987).

Indirectly, this shows that an arbitrator amiable compositeur has an obligation to follow the procedural rules classified as public order of procedure. They have this obligation even though they are not jurists or do not have any legal training..

Amiable compositeur shall be an impartial person. Impartiality is the founding principle of international arbitration. This principle is reinforced when an arbitrator can render a judgment according to own interpretations of equity. This obligation is crucial in order to comply with procedural laws and is codified in ICC Rules Article 15 (2).

Knowledge of arbitral procedure is basic and minimal requirement for an arbitrator amiable compositeur. Compliance with main rules of procedure is cardinal to make a valid decision accepted by a national judge and in order to maintain the minimum of legal security for the parties in the contract. The parties can, however, agree about all other qualifications for a person that will be an amiable composition.

2.3 *Ex aequo et bono* arbitrations

After describing the notion and characteristics of amiable composition it is important to mention some specific differences from *ex aequo et bono* arbitrations.

⁵² This idea was presented to me by professor Benoit Le Bars. Mr Le Bars is professor of law at Université de Cergy-Pontoise.

In fact the two concepts have similar characteristics and material content. As already mentioned in chapter 2.1 it is an idiomatic preference to call those arbitrations by one name or the other.

The description of amiable composition in chapter 2.2 is also valid for *ex aequo et bono* arbitration.

The only difference is that an arbitrator acting *ex aequo et bono* is not obliged to consider the legal outcome before making decision in equity. This can be concluded from the definitions mentioned in chapter 2.

Professor Leon Trakman of University of New South Wales concludes in his article ⁵³that *ex aequo et bono arbitration*, just like amiable composition, can be quite useful in resolving a dispute stemming from a long term contractual relationship or in an unknown or emerging legal field in which the law is not adequately developed or where the law is not suited to resolve disputes of complex character. This can be seen as a parallel to Swiss Civil Code's 1st article⁵⁴ which gives an obligation to a judge to make a decision when there is a lacuna of legal provisions that govern the case.

Ex aequo et bono arbitration can be very useful in contracts that have had unpredictable consequences and at the same time do not fill strict conditions of force majeure. Amiable composition and other kind of amicable arbitrations also have great usefulness in such cases.

Even though an arbitrator *ex aequo et bono* does not have to be a jurist he or she should have some legal experience. He needs to know a minimum of arbitral procedural law in order to comply with rules characterized as rules of international public order and procedural public order.

⁵³ Leon Trakman, “ *Ex aequo et bono; De-Mystifying an ancient Concept* » (University of New South Wales 2007), [www.asutlii.edu.au].

⁵⁴ Link to the 1st article of Swiss Civil Code [http://www.admin.ch/ch/f/rs/2/210.fr.pdf]

Even though arbitrators *ex aequo et bono* are not obliged to consider legal provisions they often do it in order to strengthen their argumentation.⁵⁵ Such arbitrators use to interpret the law in a way that the decision is compliant with equity.

There are not so many other specific differences between amiable composition and *ex aequo et bono* arbitration except the fact that arbitrators deciding according to *ex aequo et bono* might come from different legal systems than arbitrators operating with amiable composition (see chapter 2.1). This can result in a different approach to a legal dispute and perhaps different procedural habits. However, international commercial law is pretty much transnational, so this difference should not be glaring.

The scope of *ex aequo et bono* arbitration and qualifications of arbitrators are equal to those of amiable composition that already are described in chapters 2.2.1 to 2.2.5

The clause of *ex aequo et bono* arbitration is autonomous as clauses of arbitration usually are. On contrary, there is a "problem of the laws of autonomy" which has to be resolved with the normal method for conflict of laws. In this case, the law of the merits will be the law that is most connected to the case and not rules of equity. As mentioned above, the parties must, specify in the clause whether a possible dispute will be resolved according to equity (*ex aequo et bono* or amiable composition).⁵⁶

2.4 Amicable arbitration in England

English law is very important in international commerce and is highly respected among international lawyers and authors.

This legal system is often characterized as very conservative and less open for influences from other, and specially civil law, jurisdictions.

⁵⁵ Jana Herbočzkova, op.cit., p.5.

⁵⁶UNCITRAL Model Law art 28(3) and the ICC rules.

All forms of arbitration based on equity as the only legal source were rejected for a long time. This was a consequence of differences between common law and civil law.

A decision of the Court of Appeal in *Czarnikow v Roth Schmidt & Co* from 1922 presents a typical historical approach to arbitration on equity in England.

In this case, judge Bankes remarked that: *“the courts must retain sufficient hold over arbitrators to secure that the law that is administered is in substance is the law of the land and not some home-made law of the particular arbitrator.”*⁵⁷ English lawyers were very critical when it came to an arbitrator’s (amiable compositeur’s) discretion because of the numerous bad experiences and uncertainty with Chancery in England which was a judicial organ that made decisions according to equity. Equity was understood as an additional source of law and has been well described and documented in English system and it was not necessary to have another “private judge” to give a content of it.

An interesting and remarkable argument against equity clauses was made by lawyer Megaw J. in *Orion Compania v Belfort Maatschappij* in 1962. It is as follows: *“if that provision (clause of arbitration on equity) has any effect at all, its effect would be that there would be no contract, because the parties did not intend the contract to have legal effect. If there were no contract, there would be no legally binding arbitration clause, and an “award” would not be an award which the law would recognize.”*⁵⁸

The criticism and hostility have radically changed with the Arbitration Act of 1996. Section 46(1) (b) of the act is inspired by article 28 (3) of the UNCITRAL Model Law and provides that an arbitral tribunal shall have the possibility to decide the dispute in accordance with other considerations than legal ones. Of course, parties have to agree about it. Expression “other considerations” includes also equity clauses and similar.⁵⁹

⁵⁷ Ronnie King and Jo-Anne Powell, *“A brief encounter with the development of Amiable Composition in English law”*, p. 2. Annex 6 in 2008 ICC Interim Report.

⁵⁸ *Ibid.*, p.3.

⁵⁹ *Ibid.*, p. 6.

An *obiter* statement from Court of Appeal in Sunrock Aircraft Corporation Ltd v Scandinavian Airlines System Denmark-Norway-Sweden (2007) is an example of support for equity clauses⁶⁰ and opens the way for amicable arbitrations from then on.

All rules have an exception, so English hostility toward equity clauses had one too.

One specific form of amicable arbitration was allowed and is well known in the English legal system and is accepted in the American system as well.

It is a form of amicable arbitration that is called Honorable engagement. As the title of this work is not limited only to amiable composition and *ex aequo et bono* it is important to describe this kind of amicable arbitration too.

Honorable engagement is a legal institution that was developed in England and is specifically used in reinsurance contracts. It is also known as Gentlemen's agreement.

A reinsurance arbitrator (arbitrator according to honorable engagement) is empowered with broad discretion in dispute resolution. Arbitrator's commercial experience, fairness, customs and practice are the sources of law when it comes to honorable engagement. An arbitrator shall not decide according to law in this kind of amicable arbitration. This is similar to *ex aequo et bono* and other forms of amicable arbitrations. The honorable engagement clause is also characterized as an example of good faith of the contracting parties and their wish to work pragmatically and mutually for the best result of the contract. A reinsurance arbitrator can have slightly larger powers of interpretation and modification of contract than an amiable compositeur. It means that in this way, the parties agree to resolve the dispute according to their intentions and not according to strict interpretation of the contract⁶¹. However, just like amiable compositeur, he or she cannot disregard clear contract provisions unless the arbitration agreement allows him to do so. A California court has stated, in *Garamendi vs. California Comp Ins. Co.* (2005), that "*although the arbitrator (acting according to honorable engagement) is not bound to follow the legal procedures*

⁶⁰ Ibid., p.7.

⁶¹ Larry P. Shiffer, "*Honorable Engagement Clause-But I thought that I had legal contract*", (2007), [www.deweyleboeuf.com], p.1.

*strictly, he is not because of such freedom released from obligation to be guided by the basic agreement of the litigants.”*⁶²

This is an example of the clause of honorable engagement which is proposed by The Brokers and Reinsurance Market Association USA (BRMA):⁶³

BRMA 6B

The arbitrators shall interpret this Contract as an honorable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law.

The association proposes the following text too:

BRMA 6E

All arbitrators shall interpret this Contract as an honorable engagement rather than as merely a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They shall make their award with a view to affecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language.

Arbitrator’s powers are almost equivalent to the powers of arbitrators in other amicable arbitrations.

An arbitrator has procedural flexibility when acting as a reinsurance arbitrator. This flexibility has its limits in procedural public order.

⁶² Ibid., p.3.

⁶³ Ibid., p.2.

He or she has also the possibility to ignore well known court decisions in the field that might be helpful and seen as jurisprudence for the case. This has been criticized by many lawyers and described as an element of incertitude.⁶⁴

This non legalistic arbitration has been less used in past decades as a result of incertitude and a need of more legalistic resolving of reinsurance disputes.⁶⁵ However, there are still some older reinsurance contracts that have a clause of honorable engagement and it was worth mentioning it.

2.5 Fairness in Norwegian legal system

Amicable arbitrations are quite unknown in the Norwegian legal community.⁶⁶ One of the reasons is the fact that Norway is a rather small country which has rarely been chosen as a place of international commercial arbitration and dispute resolution.

However, there are some parallels that can be mentioned when it comes to application of fairness.

Norwegian law is renowned for being very pragmatic. One of consequences of legal pragmatism is the fact that a judge can interpret a legal provision in a way that the final decision is as correct and just as possible.

There are some clear examples of it in Norwegian and Scandinavian jurisprudence.

One could compare this with use of equity in common law jurisdictions since the fairness is used as a supplement to law in order to make a correct decision. In this case the fairness is seen as a source of law which is known as “reele hensyn” (“real considerations” or “circumstances of the case”)⁶⁷. Real considerations have been characterized by professor

⁶⁴ Ibid., p.3.

⁶⁵ Ibid., p.3.

⁶⁶ Professor Cordero Moss’ answer to my question. Professor Cordero Moss is a law professor at University of Oslo.

⁶⁷ My translation.

Fleischer⁶⁸ as “mother of all sources of law” because of its connection with goodness and equity.⁶⁹ This citation enters in Aristotle’s definition of equity. (See above).

Real considerations are a heterogenic group of legal arguments that are characterized as relevant when dealing with a legal question and that are not directly connected with law, trade usages or jurisprudence.⁷⁰ We can see that they have almost the same function as equity in international commercial arbitration.

Norwegian authors are not totally unified when it comes to contents of this legal source but fairness clearly is a large part of it.

Norwegian Supreme Court (Høyesterett) has made several decisions that are not given according to strict following of law or contractual stipulations but that are supported by “real considerations”.⁷¹

This source of law is certainly more imposing in private law and cases not concerning the rules of Public order or principle of legality.

Often, the judges use “real considerations” in order to argument for the decision that they have already made and that is not totally compliant with strict interpretation of legal text.

Real considerations are not the only example of penetration of fairness in Norwegian legal system.

Equity and fairness are also introduced by acceptance of UNCITRAL model law. The Norwegian act on arbitration of 14. 05. 2004 mentions arbitration on equity in article 31.⁷²

The Norwegian Supreme Court has, in award Rt. 1987 s 1449, accepted an arbitral decision which was given according to generally recognized legal principles. This is not the same as decision based on equity but might be analogically used as an argument for general

⁶⁸ Professor of law at University of Oslo.

⁶⁹ Asbjørn Kjøenstad, ” *Reelle hensyn som rettskilde*” , University of Oslo, www.uio.no.

⁷⁰ Ibid.

⁷¹ For example Retts tidende 1970 s. 67; Retts tidende 1975 s. 220 etc.

⁷² Lov om Voldgift av 14. 05. 2004 nr. 25 § 31.

acceptance of amicable arbitration even before introduction of UNCITRAL model law in 2004 to the national legal system.

All the judges⁷³ in the above mentioned 1987-judgement have emphasized the importance of pragmatic interpretation of international arbitral decisions in order to make them more effective.

2.6 Advantages, disadvantages and critics of amicable arbitrations

International Commercial Law is a branch of private law that is often guided by efficiency and where legal institutions are usually a result of need for practical solutions. This leads to the idea that amicable arbitrations wouldn't even exist if there were no need for them. These arbitrations give a possibility to soften the strict rules of law. They are also examples of more friendly dispute resolutions which are lead by the principle of good faith. However some critics must be heard as well.

The advantages:

There are many advantages and many reasons for choosing this kind of arbitration. Some scholars are of the opinion that amicable arbitrations denationalize the legal procedure in international commercial law, and that it is a great advantage.⁷⁴ However, this can be concluded for all arbitrations and not just the amicable ones, because the parties can choose transnational law as well as the national one to govern the contract.

Arbitrators in international commercial ex lege arbitration have all kinds of national and cultural origins and come from different legal environments. This can result in non uniform interpretation of contracts and national or international rules and the fact that some of them

⁷³ Judge Endresen, Judge Hellesylt, Judge Halvorsen, Judge Smith and Judge Røstad.

⁷⁴ Jana Herboczkova, op.cit., p.9.

might apply the strict and formal interpretation of the law with no possibility of setting an equitable result. This scenario is not possible when an arbitrator acts as amiable compositeur or according to equity. The aim is to render a fair decision and it is a great advantage for the parties in long-term contractual engagements. When the parties choose an amiable compositeur they must be sure that that this person has enough knowledge about the case and that can act as *bonus pater familias* for the contract.

An arbitration process can be a very expensive affair. For example arbitration in front of an ICC Tribunal is not advised for parties whose dispute is less worth than tens of millions of dollars.⁷⁵

Sometimes, a victory in an arbitral dispute can be characterized as Pyrrhic with devastating costs for the winning side. This can be avoided with amicable arbitrations. Amicable arbitrations should in general be less formal than those based on law and especially arbitrations at arbitral institutions.⁷⁶ This can result in reduced costs for both parties.

Amicable arbitrations are not a legal battlefields with “be or not to be”-philosophy or great stake like arbitrations according to law. So, the costs for legal advisers can be dramatically reduced as we know that the arbitrator has a presumption of equity and that he will seek a most fair result for both parties. This is a great advantage for the losing party as an arbitrator will try to “soften” his situation.⁷⁷

All kinds of amicable arbitrations are positive for international commercial law because of the fact that an arbitrator can disregard a legal provision that normally should be applied but that is adopted to deal with domestic situations and not for specific situation of the international contract that parties have signed.⁷⁸

An award given by an amiable compositeur should not be unfair and totally negative for one of the parties. This can be seen as method of decreasing of legal risk. It is certain that

⁷⁵ Eugene Lenhan, “A comparison of ICC arbitration rules and UNCITRAL Arbitration rules part 2” ,(Always Associates 2007), [www.alway-associates.co.uk].

⁷⁶ Jana Herboczkova, op.cit., p.9.

⁷⁷ Ibid., p.9.

⁷⁸ Ibid., p.9.

even the contracts that are governed by a law still have a portion of uncertainty in them, and, that one can never know all the possible outcomes of a legal act how much one tries . An interesting opinion is that amiable composition or other amicable arbitrations can be suitable for contracts of art or with artists. Often, such contracts have an obligation of result but with great discretion for an artist to decide the result himself. Amicable arbitrations could be advantageous in cases where conditions of force majeure are not fulfilled or where there are some other reasons for breach of contract such as financial crisis etc. Such arbitration may be appropriate also when the parties are joint ventures and not the parties with conflicting interests.⁷⁹

Even though there are some authors who are quite positive about amicable arbitration, many advocate against this method of dispute resolution.

They focus on lack of predictability, uncertainty and subjectivity of the arbitrator when not acting according to strict positive rules of law.

Some authors invoke the fact that the true object of a written agreement is to give the contractual parties a certain degree of predictability when it comes to their rights and obligations and especially in a case of possible dispute.⁸⁰ This argumentation is presented with an idea of parties' needs for stability and predictability in international business.

Other critics say that the parties use to negotiate the clause of applicable law very carefully in order to know their legal situation. Amicable arbitrations are not of great interest because of that.

However, it is not always true that a contract is negotiated with constant supervision by parties' lawyers. This means that the parties do not know the real legal consequences of the agreement.

⁷⁹ Ibid., p.10.

⁸⁰ Ibid., p.10.

Other critics are based on the fact that there is not a precise definition of amiable composition or *ex aequo et bono* and that it varies from country to country. Another problem is that lack of uniformity when describing arbitrator's limits when making a decision. Theoretically, some jurisdictions are more liberal and some more strict when it comes to arbiter's powers and limits.

Further, authors do not always agree when it comes to application of certain principles of equity and the fact that those principles are not always clear and obvious.⁸¹

There are many critics of arbitrator amiable compositeur's possibility to modify a contract which results in elimination of the little predictability that a party to a contract already has.⁸²

English jurists have been the most critical and have called it an ad hoc justice. A scholar has compared an arbitrator *ex aequo et bono* with an inventor of the law rather than legal authority since such an arbitrator applies personal creativity and values.⁸³ However, this argument can be countered with the fact that the parties choose their own arbitrator and that they should know what they are entering into when signing a contract with a clause of amiable composition. This is an advice from French members of ICC task force on amiable composition.

Some authors are of the opinion that if the parties want to be flexible, they should draw up mediation clause rather than a clause of an enforceable resolution remedy based on equity.⁸⁴ One does not have a real security for having a just decision since a decision of a mediator neither is final nor enforceable. It could be better than to make a "hardship clause" which could permit the parties to be more flexible and decrease their legal risk, especially in long term contracts such as contracts on construction etc.

⁸¹ Ibid., p.10.

⁸² Ibid., p.10.

⁸³ Ibid., p.10.

⁸⁴ K. Highet, "The Enigma of *Lex Mercatoria*", 63 *Tulane Law Review* (1989), p 613-628. See also: Jana Herboczkova, *op.cit.*, p.9.-10.

There are many opposed views when it comes to amicable arbitrations. It is very important for parties to study their needs and risks before entering any kind of contractual engagement, to be aware of what they are doing, and not to open Pandora's box and have many unforeseen troubles when a dispute already is a fact. This idea is also maintained for parties who have the intention to resolve their dispute according to equity as well.

3 Arbitrator's powers

The essence of amicable arbitrations is clarified and described and it is time to go specifically to the essence of arbitrator's powers, rights and obligations.

Many of the powers are already mentioned in previous chapters but only on general basis.

3.1 Liberties and limits

*“Cui finis est licitius, etiam media sunt licita.”*⁸⁵

This proverb covers the situation when it comes to amicable arbitrator's powers. However, there are some exceptions to this rule.

All liberties have some kind of limit. For example, if we see it from extreme point of view we can say that liberty of expression, which is human right and one of founding principles of our western civilization, has a limit in hateful, racist and aggressive expressions. If we bring this reasoning into the sphere of amicable arbitration we can conclude that an arbitrator's powers have some limits as well.

Liberty inside the limits can be called “the scope of arbitrator's powers” or “arbitrator's flexibility”. His powers stretch until certain boundaries of the mission that is given to him by contracting parties.

⁸⁵ The end justifies the means.

On the other hand, all awards that do not comply with those powers can be seen as invalid and non enforceable. Arbitrator's non-compliance with the mission is the best argument to attack an arbitral award.

Parties' stipulations are not the only limits for an arbitrator's powers. Some limits are imposed by legislature or other public organs. Examples of such limits are public order, mandatory legal provisions, content of equity etc.

It is not very easy and it is almost impossible to make a clear and exhaustive picture of material limitations for an arbitrator in amicable arbitrations. Clauses of amiable composition and other amicable arbitration do not contain exhaustive list of the arbitrator's scope of the powers.

For example, it is enough to make of amiable composition to automatically empower an arbitrator with great flexibility.

When the existence of limits and their patterns are known one can make a vision of an arbitrator's powers and make the concept of amicable arbitration more transparent and accepted.

French ICC Task Force on amiable composition is of the opinion that limits must exist to strengthen the credibility of arbitration, and especially amicable arbitration. On the other side this means that the parties can trust to the arbitrator when they know that he has an obligation to comply with minimum of procedural and other rules even when acting according to equity.

The limits exist to ensure that the arbitrator's flexibility is not going against the exceptions of the parties.⁸⁶

Finally, it is known that a liberty or a right to do something indicates a corresponding obligation or limit. So, when an arbitrator has right to disregard a law or modify a contract, it means that the parties or a national judge has an obligation to accept the decision.

⁸⁶ ICC "Note to national Committees, Groups and Members", op.cit., p.4.

3.1.1 Arbitrator's obligations

An arbitrator has many obligations and responsibilities. The enumeration of obligations helps to see the scope of arbitrator's powers. An obligation is contrary to a right. When arbitrators have complied with them they have the right to proceed however they find it suitable.

The central obligation for all arbitrators is to render an award. An arbitrator amiable compositeur and *ex aequo et bono* is obliged to do that too. The mission is not accomplished if this is not done. This is the consequence of the fact that amicable arbitration obeys procedural rules since it is a judicial process. Lack of the final decision means inexistence of an enforceable award and the fact that the dispute is not resolved.

An arbitrator *ex aequo* is obliged to resolve the dispute that the parties have between them. He or she has no power to introduce new claims to the process or other questions than those that are asked by the parties.⁸⁷

When parties have agreed that an arbitrator shall act as amiable compositeur they have, at the same time, obliged him to make a decision that is in accordance with the principles of equity. Historically, this was seen as a power given to an arbitrator amiable compositeur. However, this idea has changed by recent French jurisprudence. French Court of Cassation in February the 15th 2001 and October the 18th 2001 has provided that an amiable compositeur has a *specific obligation* to eliminate the inequity when rendering an award.⁸⁸ Following this jurisprudence, we can conclude that award's compliance with equity is another fundamental obligation for an amicable arbitrator and not only a power that is given to him. He cannot render an award only according to law or to other sources of law without making at least some kind of link with equity.

⁸⁷ Philippe De Bournonville, *Droit Judiciaire*, (Larcier, 2000) , p.162.

⁸⁸ The theme of the judgments was internal arbitration but they are of great interest since the Court of Cassation is expressing and defining the obligation of rendering an equitable award.

The parties draft the limits for an arbitrator (*amiable compositeur*) with their agreement. If the agreement and parties intentions are clear and instruct the arbitrator with mission of *amiable compositeur*, he has a duty to render an award that is compliant with equity even though he prefers to make an arbitral award according to law or other sources of law. If the arbitrator does not found his decision in equity, his mission remains unfulfilled and it means that the award is *ipso facto* voidable by an action for avoidance and annulment.⁸⁹

This is criticized by Professor Charles Jarrosson⁹⁰. He finds that making of the parallel between not fulfilling the mission and crossing the limits of powers is not very successful.

Crossing of limits of power is more serious and should more easily result in an annulment of an award. On the other side, he is of the opinion that one should not annul the entire arbitral award but only the parts where it is clear that the mission of *amiable composition* was not fulfilled.⁹¹ I agree with professor Jarrosson because the sanction of annulment of entire award seems to be too strict.

It is already accepted (in French law) that national judges perform minimal control of the arbitral award to check award's compliance with the public order and other mandatory provisions. So, a narrow control of content would be in contradiction with those principles. Why should a judge start with a narrow control of an arbitral award when he is not obliged to do that?

However, judges could perform a control of the superficial aspect of the award in order to verify that the arbitrator has used notion of equity in the motivation of the award. This could be a solution to the paradox.

This means that an arbitrator *amiable compositeur* has the possibility of justifying an award according to law, but the result must be the same as if it were given according to equity. He must state the reasons for this result.

⁸⁹ICC “*Note to national Committees, Groups and Members*“, op.cit., p.4.

⁹⁰ Professor at Université Paris II .

⁹¹ Charles Jarrosson , “L’arbitrage Interne, Le contrôle de sentence” , (Publications de la Cour de Cassation), [www.courdecassation.fr].

French Court of Cassation has held (in the above mentioned cases) that it is not enough to consider that the final solution would be equivalent to the solution on equity. Expressly linking the decision with principles of equity is necessary in order to fulfill the mission of the arbitrator and to obtain an acceptance of the award by national judges.⁹²

Professor Jarrosson is of the opinion that starting from beginning with new process is unlucky.

The resulting award should be the same as annulled one. It means that total annulment of an award results only in loss of time and resources.

He is of the opinion that it is not so serious that the arbitrator did not use all the powers he was instructed with. This is accepted in *ex lege* arbitrations, where an arbitrator has a possibility to afterwards complete a decision which is characterized as *infra petita*. He means that parties have to be responsible for their choices and should be obliged to be more prudent when putting a clause of amicable arbitration in a contract.

The professor proposes a solution with a total annulment only in a case where the arbitrator didn't know that he was acting as an amiable compositeur.

Professor Jarrosson seems to be right when it comes to annulment of the award and finds that the principle of pragmatism should wins over the formalism. This solution can be one of best ones from the economic point of view.

One could resolve this problem by imposing an obligation to the arbitrator to find out whether he is deciding as amiable compositeur or not. It is a simple idea, but could result in saving of lot of time and economic resources.

This is codified in article 18.1 (g) of the ICC Rules. The article stipulates that a *non ex lege* arbitrator is obliged to remind the parties that he is designated as such arbitrator.

We saw here, how the power of an arbitrator in amicable arbitration has evolved and became the principal obligation. This shows that the concept of amicable arbitrations is still quiet unexploited and has many possibilities for evolution.

⁹² Ibid.

As mentioned above, an obligation on one side creates a right on the other. Arbitrator's obligation to render an equitable decision gives him wide liberty in order to fulfill the duty that is imposed to him. An amicable arbitrator has flexibility when it comes to use of legal sources. He has power to disregard non-equitable legal provisions and the right to interpret them in a way that gives a just resolution to the dispute. However, with obligation to justify the decision and to link it to equity.

3.1.2 Amiable compositeur's powers connected to application of equity

An amiable compositeur has wide powers when it comes to application of equity. He can apply it in a way that is suitable for making a just award.

Even though he has this power, many authors do not agree about the role of equity in process of decision.

The primary role, also known as application *praeter legem*, involves direct application of principles of equity when making an award. Here, the arbitrator examines directly the contract in search to find a just solution of the dispute.

The secondary role, or application *secundum legem*, involves evaluation of the claims in accordance to applicable law before adapting the legal solution with the principles of equity.⁹³

The authors of the ICC report find that one can only see what is equitable first after the legal solution is determined.

The French ICC working group on amiable composition has enumerated several arguments for both approaches. They prefer the second approach for many reasons.

Firstly, they mean that the legal solution is often a most equitable solution. This coincides with the ideas of professor Jarrosson, mentioned above. The legal solution is often judged

⁹³ ICC "Note to national Committees, Groups and Members", op.cit., p.4.

to be in accordance with equity. The working group is of the opinion that a solution in law is presumed to be consistent with equity in the absence of testimony or ruling to contrary.⁹⁴

Another reason for the second approach is the fact that it could be unreasonable to apply equitable solution to all claims if only some of them should be affected. One should use the solution based in equity only in the parts of the contract where it is necessary.

The role of equity is more general than the role of law. It determines if a party receives too much or too little, for example, if a selling party is *de facto* a buyer because of an unlucky clause in a contract. An arbitrator should start by analyzing the organization of contractual relations before drawing the consequences of the breach of those relations. The ICC working group is of the opinion that it is difficult to accomplish such analysis without referring to the rule of the law applicable to the dispute.⁹⁵

Finally, the secondary approach to equity is ensuring the parties that amiable composition is not arbitrary and of a subjective character.

The argument for a direct approach to equity is the fact that many amicable arbitrators are not lawyers and start directly with mathematical or other approaches to the dispute. If the calculation shows that a contract is unbalanced, why should he oblige the parties to continue with it especially when the result of the contract has totally denaturalized compared to the parties' intentions?

If the applicable law is not expressed, it could be very difficult and may be burdensome for the arbitrator to determine the law applicable to the merits, especially if the arbitrator is not a jurist.

The primary approach to equity could be positive when the parties do not want their dispute to be resolved by a set of laws.

⁹⁴ Ibid.,p.4.

⁹⁵ Ibid., p.5.

The ICC working group did not give advice as to whether the first or the second method is the best. However, they advised arbitrators to make a statement before the process about the method that they want to use.

Transparency is the best way to eliminate the doubts of the parties.

3.1.3 Power to determine applicable law

Often, clauses of amiable composition (or other amicable arbitration clauses) do not mention which law is chosen to govern the contract.

It is not always possible to know if this absence is the result of a compromise, disagreement or inattention.⁹⁶

Parties' intentions are the source of an arbitrator's powers. This principle must be applied also when it comes to the choosing of the law applicable to the merits. An arbitrator must find the actual intentions of the parties to answer their expectations.⁹⁷

There is no ambiguity if the parties have intended to empower the arbitrator to choose the law applicable to the merits.

But, is more difficult when the intentions are not very clear or the parties disagree about the primary intentions.

ICC arbitral tribunal has stated in award ICC No 12070 that:

“the arbitrators, when deciding ex aequo et bono, may refer to substantive law, but they are not bound to apply it” with exception for public policy. Further, the tribunal provides that *“Using the power according to article 17.3 the tribunal does not have to determine*

⁹⁶ Michael Buhler and Sigvard Jarvin, op.cit., p.1.

⁹⁷ Ibid., p.1.

any specific applicable law. However, it may refer to the applicable law without being bounded to apply it.”⁹⁸

This award is an example of an idea where an arbitrator does not have to determine the law applicable to the merits in order to mitigate strict interpretation. This result corresponds with the primary method of (straight) approach to equity that is mentioned in chapter 3.1.2. This has been criticized by Michael Buhler and Sigvard Jarvin.⁹⁹ They state that an amiable compositeur can only mitigate the effects of a law when he or she has determinate the applicable law to the merits.

The ICC arbitral tribunal has decided to determine the law applicable to the merits in case No. 5118.

The tribunal held that the tribunal’s power of amiable composition did not exclude an assessment of the rights of the parties with respect to determined legal system. In this case, the parties had not explicitly rejected the application of national law. This means that the tribunal respected the wish of the parties.

Amiable composition clause is not a waiver by the parties of the application of the law, but a waiver of strict application of the law.¹⁰⁰ This means that an arbitrator should start with a law that is most connected with the case and mitigate a possible inequitable result. This idea coincides with the idea of Michael Buhler and Sigvard Jarvin.

It is easier to resolve a dispute if an arbitrator determine a law applicable to the merits. It helps him to see the problem from different perspectives and to see if the result based on

⁹⁸ The arbitration clause was as following: “In case of disagreement or interpretation on this contract the parties agree to apply to an arbitration panel composed of 3 members, nominated according to rules of the ICC, having seat in Paris and deciding pro bono et aequo according to said rules.”

⁹⁹ Michael Buhler and Sigvard Jarvin, op.cit., p.3.

¹⁰⁰ Ibid., p.8.

law is equitable or not. This is justified by principle of transparency. Finally, the result based on law uses often to be the most equitable one.

So, we can conclude that an arbitrator has an obligation to choose the law applicable to the merits if the parties want this to be done. However, if this is not the case, he has the power and faculty to apply it under the condition of making an award that is compliant with the principles of equity.

3.2 Possible limits of the powers

Compliance with the mission is the condition of validity of an arbitral award. This chapter will describe some possible limits of an arbitrator's powers. Some of them are crossable, while others cannot be crossed by an arbitrator.

3.2.1 Parties' instructions (contractual provisions)

The contract of the parties is fundamental in international commercial arbitration.¹⁰¹ It is the source of the arbitrator's power to resolve the dispute.

The principle of freedom of contract is defined as freedom between individuals to bargain the terms of their own contract without interference of the government. Amicable arbitrations are direct consequence of the principle.

The arbitrator's power is equivalent to the power that the parties give her. This rule has some small exceptions.

The question here is, whether an arbitrator (amicable, amiable compositeur) can overrule or modify contractual provisions. This question is controversial and the answer is not unified.

¹⁰¹Fouchard, Gaillard, Goldman, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Kluwer Law International 1999), p.31.

An arbitrator has the mission to render an equitable decision to the dispute which originates from the contract. The mission contains an obligation to mitigate unfortunate effects of legal provisions, not contractual ones.

However, obligation of respect of the terms of contract needs to be interpreted with enough flexibility in order to permit the arbitrator to achieve his mandate and fulfill his mission.¹⁰²

The majority of French authors are of the opinion that amiable composition implies the power of revision of the contract for the future.¹⁰³ The same authors mean that this solution is according to the will of the parties or is presumption of their will.¹⁰⁴

This idea is characterized as a paradox. It seems illogical that parties make a contract and then confer the power of modification to a third party.¹⁰⁵ The authors of Comparative Law in International Arbitration find that it is unrealistic that the parties deviate “*not only the law but the contract itself*”.¹⁰⁶ This idea is in accordance with the article 28(4) of UNCITRAL Model Law which stipulates that *the tribunal shall, in all cases, decide in accordance with the terms of the contract*.

The ICC Work Group has more nuanced view when it comes to the problem. The authors of the report are of the opinion that construction of article 17 of ICC Rules is made on purpose to enlarge the power of an arbitrator when it comes to revision of a contract.

¹⁰² S. Grégoire & J. Brault, “*Court of Appeal Examines Powers of Arbitrators as Amiable Compositeur*”, (International Law Office 2008), [www.internationallawoffice.com].

¹⁰³ Poudret J-F, Besson S., Berthi S., A. Ponti , *Comparative Law of International Arbitration*, (Sweet & Maxwell 2007), p.623.-624.

¹⁰⁴ *Ibid.*, p.623.-624.

¹⁰⁵ *Ibid.*, p.623.-624.

¹⁰⁶ *Ibid.*, p.623.-624.

Article 17 (Applicable rules of law)

1) The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

2) In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.

3) The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.

The Working group is of the opinion that the interposing of the obligation to consider the contractual provisions in § 2 could signify that this obligation is only concerning *ex lege* arbitrations not the amicable ones.¹⁰⁷

It seems that UNCITRAL Model Law article 28 and ICC Rules article 17 do not coincide when it comes to the obligation to consider terms of the contract.

ICC Working Group finds that an amiable compositeur should have some powers, just like national judge, when it comes to revision of contractual provisions. A strong argument for the group's opinion is that the "sanctity" of contractual provisions has some limitations in classic contract law as well.

ICC Report¹⁰⁸ mentions numerous rules which allow a judge to ignore, modify or sanction contractual dispositions for reasons founded in equity. I cite some examples listed in the Report: "*vice de consentement*", *the right to amend the penalty clauses*, "*théorie du vil prix*", "*the théorie de la lésion*" etc.

¹⁰⁷ ICC "Note to National Committees, Groups and Members", op.cit., p. 6.-8.

¹⁰⁸ Ibid., p. 6.-8.

One of the reasons of contradiction between the two sets of rules is of theoretical origin. UNCITRAL model law is mostly made for *ad hoc* arbitration where the parties always remain the “masters” of their dispute. This is the reason of amicable arbitrator’s obligation to consider the contract and trade usages. On the other side ICC rules are of an institutional origin and empower an arbitrator in a different way, and with greater powers.

Arbitrator’s power, regarding terms of contract, varies with his mission and the claims of the parties. He might have larger flexibility when it comes to interpretation of the contract than modifying or readjustment of it.

3.2.1.1 Power of interpretation

An amiable compositeur (amicable arbitrator) has power to interpret the contract in a way to comply the parties’ expectations and intentions. They instruct an arbitrator to act *ex aequo et bono* and want him to be *bonus pater familias* when it comes to the dispute.

Arbitrator’s primary obligation is to render an equitable award. This obligation cannot be totally fulfilled if he has not enough flexibility to interpret the terms of the contract. Sometimes, the contracts are written in a way open for many possible interpretations, which is often the essence of the dispute. National judges and *ex lege* arbitrators have the power to interpret terms of contract. Analogically, this power should be attached to amiable compositeur and other amicable arbitrator. This is a fundamental power that needs to be used in order to render a fair award.

3.2.1.2 Readjustment

Revision or readjustment of a contract is more serious than interpretation and is more controversial. It seems like an invitation to a third party to modify the contractual provisions according to his own views of equity. This is an extreme point of view.

Some authors mean that the power of revision seems to be useful with respect to risk management.¹⁰⁹ The idea is that a contract is an instrument which effects an allocation of risks.¹¹⁰ It happens that the stipulations of a contract do not correspond with parties' expectations and intentions. This can result in unexpected change of the contractual balance. ICC Work Group is of opinion that an amiable compositeur should have right and power to avoid the letter of contract in a way that risk is allocated in a more balanced way.¹¹¹ This is a simple correction of contract in order to make it as it *should* be.

Another possibility to recognize the power of revision is when it comes to effects of contractual provisions that appear to be abusive, harsh or unfair.¹¹² This is accepted in France¹¹³ and in several awards at ICC Arbitral Tribunal.¹¹⁴

It is important to notice that the power of revision of contract is not absolute. An amicable arbitrator cannot rewrite, transform or amend the most important or essential characteristics of a contract.¹¹⁵ This idea is interposed by the *pacta sunt servanda* principle. An arbitrator has no mission to denaturalize the contract.

Anyway, the greater power of revision can be a positive remedy in order to oblige the parties to properly negotiate an international contract and to measure the possible legal risk of its stipulations.

¹⁰⁹ Ibid., p. 6.-8.

¹¹⁰ Ibid., p. 6.-8

¹¹¹ Ibid., p. 6.-8

¹¹² Poudret, Besson, Berti, Ponti, op.cit., p. 624.

¹¹³ Paris Rev. Arb. (1977), p. 281.

¹¹⁴ ICC Awards (Collection I), 3237 and 3344, p. 433-440. ICC 4972, (Collection II), p. 380.

¹¹⁵ ICC "Note to National Committees, Groups and Members", op.cit., p. 8.

3.2.2 Legal provisions (Law) ¹¹⁶

The power to cross limits imposed by law depends of the law itself, its purpose and the will of the parties. Equity is the final result and law can be a good starting point and remedy in order to reach it.¹¹⁷

Amiable composition clause is not a waiver by the parties of the application of the law but, its strict application.¹¹⁸

By law rules are laid down by national authorities. It is accepted that the only limit to an arbitrator's (amiable compositeur. etc) flexibility is the limit of public order, also known as public policy.¹¹⁹

International public order is the public order that must be followed in international commercial arbitration.¹²⁰

Some authors find that, even though, international public order is reserved for international arbitration, it occurs that domestic public order is a limit for an amicable arbitrator's powers. This is the case if the parties have "*cumulated law and amiable composition*"¹²¹ in order to resolve a dispute.

Many authors have tried to describe the concept of international public order but have failed to give a unified definition. Loussouarn, Bourel and de Vareilles-Sommières describe it as an exceptional remedy that allows infringing of a foreign law that normally is

¹¹⁶ There are some small differences between the powers of amiable compositeur and an arbitrator ex aequo et bono when it comes to legal limits. They are described in chapter 2.1.

¹¹⁷ See chapter 3.1.3

¹¹⁸ Michael Bühler and Sigvard Jarvin, op.cit., p.6.

¹¹⁹ ICC "*Note to National Committees, Groups and Members*"; op.cit., p.5.

¹²⁰ Ibid., p.5.

¹²¹ Poudret, Besson, Berti, Ponti, op.cit., p.624.

competent but not acceptable for the tribunal because of its nature and/or content.¹²² International public order is not as used in contract law as in “personal status law”, an example of a clear limit for an arbitrator in amicable arbitration is competition law. It enters into definition of public order and a national judge can annul an arbitral award that infringes competition law.¹²³ Other examples are, breach of interdiction of child labor, racial discrimination etc.

Another possible limit concerns **protective public order**. This is the concept of protection of the weak party or a non professional party in a contract. ICC Work Group mentions this as a possible limit.¹²⁴ However, national laws reserves authority to resolve disputes involving non professional parties. The borderline between the rules of public order of protection and rules of international public order is not very clear and, there are many “gray zones”.

The ICC report mentions that “*a waiver of protective public order cannot take effect unless the signature of the compromise takes place following the event triggering the protective public order*”¹²⁵ This means that the main question is whether the parties have made a compromise to ignore public order after “birth” of the dispute. If this is done, protective public order is not a limit for arbitrator’s power.

If the contract is submitted to the ICC rules arbitrator’s power to infringe the public order of protection can be confirmed when the parties have signed the terms of reference that confirm arbitrators powers to act according to equity.¹²⁶ This is conditioned by the fact that both parties had knowledge of protective rules when they signed the terms of reference.¹²⁷

¹²² Y. Loussarn, P. Bourrel, P. de Vareilles-Sommières, *Droit international privé*,. (Daloz 2004), p.338.

¹²³ ICC “Note to National Committees, Groups and Members”, op.cit.,p.5.-6.

¹²⁴ Ibid.,p.5.-6.

¹²⁵ Ibid.,p.5.-6.

¹²⁶ Ibid.,p.5.-6.

¹²⁷ Ibid.,p.5.-6.

The working group mentions a controversial idea of presumption of waiving of protective rules when submitting the dispute to amiable composition.

I find that this might be a good argument to recognize the power of disregarding of protective public order.

Brazilian professor and a member of the ICC Task Force Mr. Martin Della Valle has written his PhD on amiable composition and has made a list of possible questions that are suited to for amiable composition (and ex aequo et bono). Those are the situations where, according to Mr. Della Valle, an amiable compositeur's interpretation of fairness should override strict application of law when there is an obvious contradiction between them¹²⁸

Here are some of them¹²⁹:

1. *Changing the price when there is relevant alteration in the contract's economic balance.*
2. *Changing the conditions of performance when there is a relevant alteration in the contract's economic balance.*
3. *Proportionally reducing contract fines for lack of performances*
4. *Proportionally reducing the amount of liquidation damages*
5. *Asserting contractual damages when not previously provided for in the contract*
6. *Augmenting/decreasing contract figures in case of inflation or exchange rate modifications*
7. *Setting an interest rate when not provided for (or not adequately provided for) in the contract or law*
8. *Authorizing offset of amounts due by the parties without formal requirements*
9. *Extending statutes of limitation*
10. *Extending payment terms provided for in the contract or law*
11. *Disregarding a deadline in arbitration proceeding*
12. *Modifying the burden of proof*

¹²⁸ ICC Task Force 2008 Report on Amiable Composition and Ex aequo et bono, op.cit., Annex 7.

¹²⁹ Citation ICC Force Report Annex 7.

13. *Relieving obligations of an economically weaker party*

14. *Requiring higher disclosure standards between the parties than ordinarily provided by law”*

Finally, an arbitrator in amicable arbitrations has the power to interpret the law in such way to escape a direct collision between equity and law. It is also called a **harmonious interpretation** of law.

This might be the best method in order to improve the reliability of the rendered award and amicable arbitration.

3.2.3 Lex mercatoria

Lex mercatoria is set of rules and trading principles “*universally recognized and as such suited to regulate international commerce.*”¹³⁰ These are transnational rules have been accepted by a majority of authors and international arbitral tribunals.

As lex mercatoria is a set of rules and amicable arbitration is a specific mission, they should not be confused.

An arbitrator might apply lex mercatoria when rendering an award just as he might apply a national law. However, if he does so he needs to show that the final result is consistent with equity and that the decision is just.

Some authors are of the opinion that an amiable compositeur should find an equitable solution when applying lex mercatoria because those rules are equitable *per se*.

Professor Goldman is of opinion that a clause of Amiable Composition can be considered as “*referring implicitly to lex mercatoria.*”¹³¹

¹³⁰ ICC “*Note to National Committees, Groups and Members*”, op.cit., p 6

However, *lex mercatoria* is not a result of will of the parties but will and acceptance of international commercial community. This is an argument to make a clear distinction between them and to accept that *lex mercatoria* as the set of rules that can be disregarded by an arbitrator with the mission of amicable arbitration.

We can conclude that an arbitrator in arbitrations according to equity has an obligation to apply and interpret *lex mercatoria* only if the parties have instructed him to do so.

However, if *lex mercatoria* is chosen as the only law that will govern the contract, this means that an arbitrator cannot derogate it and that an arbitrator has, *de facto*, a mission *ex lege* and not a mission of amicable arbitration.

It is important to note that if a result from an arbitral (amicable composition etc) award is followed numerous authors and lawyers, for a certain time, it can then obtain a status of *lex mercatoria* and become a material rule and not just a principle of equity.

3.2.4 Trade Usages

*“Trade usages are rules that might be applied to persons in a specific economic sector.”*¹³²

An interesting question is whether an arbitrator *ex aequo* has an obligation to take into account the relevant trade usages when rendering an award.

UNCITRAL model law article 28 (4) seems to interpose this obligation, while ICC rules article 17 (2) does not.

We have the same dilemma as when it comes to an arbitrator’s powers to disregard some contractual provisions, in chapter 3.2.1

¹³¹ Goldman, *La Lex Mercatoria dans les contrats et l’arbitrage internationaux : réalités et perspectives* (Journal du Droit International 1979) , p. 480.-481.

¹³² ICC “Note to National Committees, Groups and Members”,*op.cit.*, p. 8.

ICC work group on amiable composition finds that an amiable compositeur has not such an obligation¹³³ and that he is free to disregard trade usages if so instructed by the parties.

I share their opinion and suppose that arbitrators' powers should be the same as when it comes to legal provisions and *lex mercatoria*.

Trade usages are the customs that are usually taken into account by judges and arbitrators. However, the parties can agree not to apply trade usages in their contract in the same way as law¹³⁴. This can be done with a simple clause of amiable composition.

If a result found with trade usages is in contradiction with an equitable result, then it shall be ignored and replaced with the equitable one. Principles of equity prevail in amicable arbitrations, and this principle must be followed in order to comply with parties' intentions to a contract with a clause of an amicable arbitration.

Even though a result according to trade usages could be equitable, an arbitrator amiable compositeur is obliged to ensure that it is consistent with equity.¹³⁵ We can see here a clear parallel to arbitrator's power of disregarding of national laws.

An award founded only on trade usages can be subject to an annulment if an arbitrator does not fulfill the obligation of justifying of award on equity.

Professor Philippe Fouchard¹³⁶ meant that an arbitrator who only applies trade usages does not act as an amiable compositeur.¹³⁷ This means that, if it is done, the arbitrator's principal obligation is not fulfilled and the mission has failed.

¹³³ Task Force on "Amiable Composition and Ex aequo et bono" Arbitration, Interim Report 2008, p. 9.

¹³⁴ See chapter 3.2.2

¹³⁵ ICC "Note to National Committees, Groups and Members", op.cit., p.7.

¹³⁶ French professor of law

¹³⁷ Mercedes Glockstein, op.cit.

Finally, The ICC 2008 Report on amiable composition mentions that some jurisdictions accept that a judge can take into account “good usages” and “good morals”.

So, trade usages are a limit to an arbitrator’s powers only when the parties to a contract decide so or when this idea coincides with the will of the parties.

3.2.5 Procedural limits

Powers of an arbitrator in amicable arbitration extend also to arbitral procedure and can only be limited by certain procedural rules.¹³⁸ Amicable arbitration is a judicial process and an arbitrator is bound to comply with fundamental rules and principles of litigation procedure.

International authors are of the opinion that, in case of amicable arbitrations, the procedural rules “*can be more freely modified than the rules relating to the merits of the case.*”^{139 140}

However, procedural powers of an arbitrator acting as amiable compositeur, or similar, are not significantly larger than the powers of an arbitrator ex lege.¹⁴¹ Contemporary arbitration laws provide all arbitrators with enough power to shape the arbitration procedure in order to fit in the pattern of a particular case.¹⁴²

¹³⁸ Jana Herboczkova, op.cit.,p. 6.

¹³⁹ Julian D.M. Lew , *Contemporary Problems of International Arbitration* , (Njihoff 1985), p.72.

¹⁴⁰ ICC “*Note to National Committees, Groups and Members*”, op.cit., p.11.

¹⁴¹ Jana Herboczkova, op.cit., p.6

¹⁴² Ibid., p.6.

Some authors find that the arbitrator should be empowered with some larger flexibility to evaluate the evidence by “*using less strict norms than those applicable in national procedural rules*”¹⁴³

The only obvious limit to an arbitrator’s powers is the rules of **procedural public order**.

If an arbitrator does not comply with these rules, the award will be null and void.

The rules of procedural public order are the fundamental rules that are the guarantees for a fair process as described in, for example, article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴⁴ We find here the basic rules of defense, “fair hearing”, and principle of contradiction.¹⁴⁵

There are some other possible limits for an arbitrator that are of great interest and that could be the reason for annulment of a decision.

For example, obligation of reasoning of the award. Even though an arbitrator has a large leeway he must render an award that is sufficiently reasoned.¹⁴⁶

The arbitrator is not a mediator and is obliged to settle a dispute by an award.¹⁴⁷ The final decision must, however, be compliant with the principles of equity.

Further, the arbitrator has no power to impose different claims than the claims that have been laid by the parties. This is the consequence of principle of *res iudicata*.¹⁴⁸ The ICC

¹⁴³ Julian D. M Lew, *op.cit.*, p.72.

¹⁴⁴ Béguin, Menjucq, Le Bars, Couret, Mainguy, Ruiz Fabri, Sorel and Seraglini, *Droit du commerce international*, (LexisNexis Litec 2005) , p.738.

¹⁴⁵ Link to the Convention for The Protection of Human Rights and Fundamental Freedoms
URL:<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

¹⁴⁶ ICC “*Note to National Committees, Groups and Members*”; *op.cit.*, p.11.

¹⁴⁷ *Ibid.* p.11.

¹⁴⁸ Benoit Le Bars, “*How to Improve the Reliability of the process of equitable arbitration? The French Committee proposals*”, (Thomson Reuters Ltd and Contributors 2008), p.635.-642.

Work Group Note mentions that an arbitrator amiable compositeur should only rule “*on submissions made to him*”¹⁴⁹.

An arbitrator in amicable arbitration should be concerned about the transparency of the procedure. This is the best way to defend an award against possible actions in nullity or against accusations of being arbitrary.

The authors of the ICC Work report¹⁵⁰ have created some practical suggestions for arbitral procedure for arbitrations subject to ICC Rules. These suggestions are of great interest in order to avoid actions in nullity.

They mention the obligation interposed in article 18.1 (g) of the ICC Rules to remind the parties, in terms of reference, about the arbitrator’s mission of amiable compositeur or ex aequo et bono.

The arbitrator should specify the scope of his mission and indicate which approach he would take when it comes to equity.^{151 152}

An arbitrator in amicable arbitrations should make an indication of all the claims and parties’ reasoning in equity.¹⁵³ I find this very important in order to strengthen the principle of contradiction. An arbitrator in commercial arbitration should listen to parties’ argumentations and render an award according to these.

He should always invite the parties to give their vision of equity and to give them the possibility to plead “*that their position in law is consistent with equity*”.¹⁵⁴ The parties should not be surprised by the fact that an arbitrator has rendered an equitable award. They

¹⁴⁹ ICC “*Note to National Committees, Groups and Members*”, op.cit., p.11.

¹⁵⁰ Ibid., p.11.

¹⁵¹ Ibid., p. 12.

¹⁵² See chapter 3.1.2

¹⁵³ ICC “*Note to National Committees, Groups and Members*”, op.cit., p.11.

¹⁵⁴ Ibid., p.12.

have the right to be part of the whole process. This right might impose, to arbitrator, an obligation of information about his mission.

On the other hand, if the parties did not invoke or mention the notion of equity in whole procedure it might mean that they have decided to revise the arbitrator's mandate and to resolve the dispute according to rules of law. This is might be possible according to "mutus consensus" principle.

In any case, the arbitrator in amicable arbitration should always "*clarify the parties' mutual intentions in relation to his mission*".¹⁵⁵

Finally, open discussion and transparency are the best answers to critics made on amiable composition and other amicable arbitrations.

3.2.6 Equity

Equity is not a means but a goal. The principles of equity and fairness are most relevant in the context of what is known as *distributive justice*.¹⁵⁶

The ICC working group finds that equity in amiable composition: "*is restricted to the evaluation of a contractual situation*".¹⁵⁷ It concerns the situations where a lack of performance of a contractual obligation has led to a non-equilibrium in the contract.¹⁵⁸

The working group's idea was to show that equity and its role must be appreciated specifically for each contractual situation, and that equity in amicable arbitration can be called "contractual equity".

¹⁵⁵ Task Force on Amiable Composition and "ex aequo et bono" Arbitration, 2008 Interim Report, op.cit., p.18.

¹⁵⁶ Michelle Maise, "*Principle of Justice and Fairness*", (Beyond Intractability 2003) [www.beyondintractability.org].

¹⁵⁷ Task Force on Amiable Composition and "ex aequo et bono" Arbitration, 2008 Interim Report, op.cit, p.8.

¹⁵⁸ Ibid., p.8.

Equity is also referred to as “*the guardian of the balance of the contractual relationship*”¹⁵⁹, or the guardian of natural justice of the contract.

The ideas mentioned above show that equity is not a means but the final result. This idea obliges an arbitrator to have a utilitarian approach to resolution of the dispute which originates from the contract. So, equity of an arbitrator in amicable arbitration is not one that elaborates or produces new rules but one that makes flexible the application of existing rules and adapts the contract to new and unexpected situations.¹⁶⁰

Authors of the ICC report on amiable composition mention that equity can manifest itself in different stages of the life of a contract. Firstly, equity can manifest itself at the stage of the formation of a contract where it can redress the abuses of *dol, fraud, violence, error* etc.¹⁶¹

Equity can also manifest itself during the performance of an international contract “*with respect to rules that require good faith and doctrine of estoppel.*”¹⁶²

Finally, equity can manifest itself, as already mentioned, in cases of failure to perform a contract.¹⁶³ The idea is to share the risk, make it proportional, and not to impose all the consequences of a contract to one party.

All these ideas show that it is difficult to describe contractual equity. What is equitable depends to the situation in the contract and the contractual relationship. What is equitable should relate to arbitrator’s rational understanding of parties intentions with the contract but also on different criteria, such as: politics, economics, environment etc.¹⁶⁴

¹⁵⁹ Ibid., p.8.

¹⁶⁰ Ibid., p.9.

¹⁶¹ Ibid., p.8.

¹⁶² Ibid., p.8.

¹⁶³ Ibid., p.8.

¹⁶⁴ Benoit Le Bars, op.cit., p. 635.-642.

The complexity of international commerce craves for the possibility of loosening the strict conditions of the rule of law. This is possible when the parties to a contract draw up a clause of amicable arbitration which empowers an arbitrator to make a balance in the contract.

4 Result of non compliance with the mission

If an arbitrator in amicable arbitrations did not respect the limits which are interposed and that are described in this paper, he or she risks rendering an award that can be null and void.

The recognition and enforcement of such an award can be refused because the arbitrator did not comply with the given mission.¹⁶⁵ Non enforcement of an award is conditioned on the request of the party “*against whom it is invoked*”.¹⁶⁶

New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards of 1958 lists the reasons of non recognition of an arbitral award. The convention contains the obligation for an arbitrator to comply with the scope of the submission to arbitration. The same rules and obligations are written in the Geneva Convention on Execution of Foreign Arbitral Awards of 1927.

The two conventions contain some other principal conditions for recognition of a foreign arbitral award. These include compliance with the international public order of the state of execution, fair hearing, no fraudulent evasion of law normally applicable etc.

It is important to mention that the conditions of recognition and enforcement can vary from country to country but they should be as unified as possible.

¹⁶⁵ New York Convention on Recognition and Enforcement of Arbitral Awards 1958 article 5 (1).

¹⁶⁶ Ibid.

Non compliance with the mission of amicable arbitration (amicable composition, *ex aequo et bono* etc) can also result in an annulment of the arbitral award and renewed procedure¹⁶⁷ which might be an expensive affaire.

It can also happen that the national appellate judge acts as an amiable compositeur when the arbitrator had the same mission in the first procedure.¹⁶⁸ This was stated in a French judgment on December the 17th 2008¹⁶⁹

Finally, an arbitrator acting according to equity should strive to comply with his or her mission and not to act outside of the scope of the powers conferred.

Complying with the mission is important in order to avoid increasing costs, to save the time and of course to preserve own reputation as international arbitrator.

¹⁶⁷ See chapter 3.1.1

¹⁶⁸ Benoit Le Bars , ”*L’arbitrage en amiable composition au secours de garantis de passif : mode d’emploi devant vos juges*”, (Hammonds & Hausmann Revue 2009), [www.hammonds.fr].

¹⁶⁹ French Cour de Cassation 1ere chambre Civile 17. 12. 2008. See: Benoit Le Bars, ”*L’arbitrage en amiable composition au secours de garantis de passif : mode d’emploi devant vos juges*”, (Hammonds & Hausmann Revue 2009), [www.hammonds.fr].

5 Conclusion

International commercial law is renowned for being in constant change. However, contemporary jurists are afraid of repeating the same errors that our predecessors made in the past. They are right to be concerned. As great roman jurist Cicero said: “*Historia est magistra vitae*”.

Amicable arbitration might be a victim of enmity toward legal institutions of the past. Most French jurists know the expression” *Dieu nous préserve de l’équité des parlements*”¹⁷⁰ which explains the fear of arbitrary and subjective justice.

However, contemporary society is different. One could call it a paragraph-society with thousands of strict rules and conditions that must be followed. There is nothing wrong with resolving problems in an amicable way. It helps the parties to maintain the good relationship they had before the dispute. One should start from this point of view when thinking about amicable arbitration and accept its positive attributes.

Amicable arbitration has a great potential impact in all the disputes where the parties need a rational reasoning and not only a black letter law. It can improve the institution of arbitration and promote equitable results to international commercial disputes.

Finally, if an arbitrator with mission of amicable arbitration complies with the obligations attached to the mission one could be sure that it is one of the best ways to resolve dispute in international commercial law.

¹⁷⁰ *Preserve us God from equity of the parliaments.* (My translation). The fear of abusing of powers under pretence of equity was one of the reasons for hate toward the jurists during and after the French Revolution.

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Annex

Glossary:

Canonical Law: internal ecclesiastical law governing Catholic Church.

Common Law: law and responding legal system developed through decisions of courts rather than legislative statutes. It is in use in England and former colonies of the British Empire.

Contractual justice: concerns fair exchange, honest dealing and keeping an agreement in a good faith.

Distributive justice: is concerned with the fair allocation of resources among diverse members of a community.¹⁷¹

Doctrine of Estoppel: English legal doctrine that may be used in certain situations to prevent a person from relying from certain rights or upon set of facts which is different from an earlier set of facts.

Islamic Banking: system of banking that is consistent with the principles of Islamic law

Natural justice: a legal philosophy used in some legal systems in the determination of just or fair.

Private law: part of legal system that involves relationship between individuals, also known as civil law.

¹⁷¹ M. Maiese, “*Principles of Justice and fairness* “, Beyond Intractability, (2003),
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