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AWARDS ACCORDING TO THE LENGTH OF AN
ARBITRATOR'S FOOT? EQUITY CLAUSES,
AMIALE COMPOSITION AND AWARDS MADE
EX AEQUO ET BONO

LLM RESEARCH PAPER
LAWS 521 INTERNATIONAL COMMERCIAL CONTRACT

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2005

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ABSTRACT

This paper seeks to shed some light on the meaning of the terms *amiable compositeur* and *ex aequo et bono*, as contained in Article 28(3) of the UNCITRAL Model Law on International Commercial Arbitration. The common derivative of both terms is that an arbitrator will be empowered to depart from the law to find an equitable solution to a dispute. Such an approach requires an arbitrator to seek out the fairest solution and, in the case of amiable composition, arguably attempt to thereby restore commercial harmony between the parties. To this end, they are especially suited to long term and evolving commercial relationships. Parties and practitioners must be conscious of the discretion and subjectivity inherent in the task of an arbitrator charged with deciding a case according to his or her own notions of what is fair and just – hence, the title of this paper. But ultimately, there is nothing problematic about allowing an arbitrator to decide by reference to extra-legal considerations. If parties are prepared to forego certainty for the sake of their ongoing business relationships, party autonomy dictates that their choices will be put into effect.

I. INTRODUCTION

*"Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience."*¹

This was how seventeenth Century jurist John Selden famously rebuked the concept of equity, as it was then administered by the Chancellors in England. As "keeper of the King's conscience", the Chancellor of the time was empowered to give discretionary relief from the common law where the law failed to provide a fair or just result.² This practice provides one example of the "continual movement in legal history back and forth between wide discretion and strict detailed rules, between justice without law, as it were, and justice according to law."³ This paper explores another example of that movement in the context of the mode of arbitration known as amiable composition.

Forty-five countries,⁴ including New Zealand, have embraced the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law').⁵ For many countries, this has entailed taking on terms and procedures unknown to them. This was necessary to achieve the "worldwide consensus on the principles and important issues of international arbitration practice",⁶ which

¹ F Pollock (ed), *Table Talk of John Selden* (1927).

² Spiller, Finn and Boast, *A New Zealand Legal History* (Brookers, Wellington, 1995), at pp. 19-20.

³ Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1954).

⁴ Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe. See Status of Texts, Status of Conventions and Model Laws, UNCITRAL <<http://www.uncitral.org>> (last accessed 1 June 2005).

⁵ Adopted on 21 June 1985 by the United Nations Commission on International Trade Law ('UNCITRAL'). United Nations document A/40/17, Annex I.

⁶ See the Explanatory Note by the UNCITRAL Secretariat: United Nations document A/40/17, Annex I.

is the Model Law's principal strength. In particular, Article 28(3) of the Model Law provides:

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

This paper seeks to shed some light on the meaning of the terms *amiable compositeur* and *ex aequo et bono*, and will show that they are each context specific. Practitioners must be especially careful when considering including these terms within their contracts as their precise meaning can be affected by surrounding clauses and the place of arbitration. The common derivative of both terms is that an arbitrator will be empowered to depart from the law to find an equitable solution to a dispute. As will be discussed in Part III, such an approach requires an arbitrator to seek out the fairest solution and arguably attempt to thereby restore commercial harmony between the parties. To this end, they are especially suited to long term and evolving commercial relationships. However, arbitrators are not given an absolute discretion. As for all arbitrators, they are subject to the principles of procedural fairness, and mandatory rules having a public policy character. The procedural law or rules under which the arbitration is conducted will also have a bearing on the scope of an *amiable compositeur's* powers – in particular, regarding whether the arbitrator can modify or depart from the terms of the contract.

Part IV of the paper will examine the legal efficacy of clauses purporting to confer such powers on arbitrators, which has recently been confirmed in England and New Zealand, and will consider why it has never really been in doubt in many other countries. Part V will conclude by examining the perceived advantages and disadvantages of this mode of arbitration.

II. THE AMBIGUITIES

A. Amiable Composition, Decisions Ex Aequo Et Bono and Equity Clauses – Synonyms?

The power to rule *ex aequo et bono* is frequently treated as the synonym for the power of an arbitrator to decide as *amiable compositeur*.⁷ As suggested briefly above, the common derivative of both terms is that an arbitrator will be empowered to depart from strict law, or legally recognisable criteria, to find a fair and equitable solution to a dispute. Provisions purporting to confer such a power have, particularly in England, been labelled equity clauses.⁸ However, while these terms have been roughly assimilated in the arbitral context, it is far from certain that they are coextensive and amiable composition arguably contemplates a conciliatory element that the power to decide *ex aequo et bono* does not. Indeed, both terms are used in the Model Law because it was thought that some systems might distinguish between them.⁹ Furthermore, strong resistance to extra-legal decision-making in arbitration by the English judiciary has resulted in a narrow interpretation of equity clauses that is no longer justifiable in light of the recent developments canvassed below.

1. *Amiable composition*

The French term *amiable compositeur* translates literally to “friendly settlor”, or “author of friendly compromise”. The amiable compositeur is generally thought to be the product of French legal thinking.¹⁰ However, deriving from the Latin term *amicabilis compositor*, the incipient stages of this procedure can be traced to 13th century Rome.¹¹ According to René David, the generalisation of this institution was the work of canonist lawyers:

⁷ This assimilation is the prevailing opinion of French writers. For example, see Eric Loquin, *L'Amiable Composition en Droit Comparé et International* (Librairies Techniques, Paris, 1980), at p.25 *et seq*; and J. Robert, *L'arbitrage, droit interne, droit international privé* (Dalloz, 1983) at p. 161. Cf Mauro Rubino-Sammartano, “Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited” (1992) 9(1) *J. Int'l Arb.* 5, at p.13.

⁸ Mustill and Boyd, *Commercial Arbitration* (2ed, Butterworths, London and Edinburgh, 1989) 75.

⁹ See Second Working Group Report, A/CN.9/232, para. 169; Seventh Secretariat Note, A/CN.9/264, para. 7. Set out in Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, Deventer, The Netherlands, 1989) at pp.780 and 790, respectively.

¹⁰ See for example, Craig, Park and Paulsson *International Chamber of Commerce Arbitration* (3 ed, Oceana Publications Inc, Dobbs Ferry, New York, 2000) at p.110.

"For them [the canonists] all promises had to be kept (*Pacta sunt servanda*) and all contracts were equally governed by the paramount principle of good faith (*fides*). The narrow mould in which the function of an arbitrator was confined was therefore broken [besides arbitration *ex compromisso* discussed below, and certain privileged types of arbitration such as arbitration by a bishop, recourse to an arbitrator was previously limited to contracts including a particular duty of good faith, in which the parties remitted certain clauses for determination by the arbitrator]. An attempt was made on the other hand to imbue the law with ideas of conciliation and of charity advocated by the Church. Parties to a contract, who submitted a dispute arising between them to an arbitrator, readily accepted in advance that their relation would have a new basis; the arbitrator probably considered at the outset what were the rights and duties of each of the parties at law, but he would not regard such an enquiry as final, but would also on this basis take into consideration the requirements of equity and especially [sic] endeavour to reestablish harmony between the litigants.

The importance attributed by canonists to the principle of good faith and the predilection of the Church for conciliation led to a transformation of the role of the arbitrator, as it had been conceived in Rome."¹²

The emphasis on conciliation and re-establishing harmony between the litigants is evinced by the fact the original role of the *amicabilis compositor* was not to adjudicate, but to bring the parties together and promote understanding between them in order to bring about a sort of compromise.¹³ Thus, Bouteiller refers to the *amicabilis compositor* as *tractator concordiae*, or he who negotiates the peace.¹⁴ However, the *amicabilis compositor* was gradually recognised as having the power to impose a decision. This blurred the line between the *amicabilis compositor* and the *arbiter ex compromisso*, who had the power to make a binding award.¹⁵ There is no compelling evidence that an *arbiter* was required to

¹¹ See Bartolo da Sassoferrato, *De receptis arbitris*, Fol. 146; Baldo degli Ubaldi, D. 4, 8, 14 Fol. 258; Durand, *Speculum judiciale*, I, Fol. 95, p.1. Cited in Rubino-Sammartano, above fn 7, at p.13.

¹² René David, *Arbitration in International Trade* (Kluwer Law and Taxation Publishers, Deventer, The Netherlands, 1985), p.86.

¹³ In his *Somme rural*, Bouteiller writes that the *amicabilis compositor* "ne peut sentencier, mais peut seulement traicter acord entre les parties" (cannot adjudicate, but can only promote some understanding between the parties): Bouteiller, *Somme rural*, II, III, at 693. Cited in David, above fn 12, at p.87, fn 10; and Rubino-Sammartano, above fn 7, at p.13, fn 67.

¹⁴ Cited in Loquin, above fn 7 at p.14.

¹⁵ Roman law never recognised the principle of freedom of contract. Very few contracts were recognised by the law and an arbitration agreement was not one of them. However, parties were able to enforce their agreements by way of a double promise (*com-promissum*), which stipulated that one party would pay the other a penalty in the event that he or she did not submit to arbitration or honour the award. While the law did not recognise the arbitration agreement, it did enforce the mutual promise: See David, above fn 12, at pp.84-85.

decide according to law.¹⁶ Indeed, the law was in a state of flux and what legal rules existed often had to evolve with a changing society.¹⁷ In 17th and 18th century France, some jurists professed that all arbitrators had some power to decide in accordance with equity.¹⁸ However, it is clear that the amiable compositeur was not bound to decide in law, since the role was traditionally regarded as conciliatory in nature and was therefore permeated with the canonist emphasis on equity. In 1806, in order to remove any confusion, the French Code of Civil Procedure upheld amiable composition as a form of arbitration, which permitted the arbitrator to decide in accordance with equity, rather than strict law.¹⁹ Thus, the transformation from conciliation to arbitration was complete, and it is for this reason that amiable composition has come to be assimilated with a decision in equity, or *ex aequo et bono*.²⁰ Fouchard, Gaillard and Goldman have stated that any distinction is artificial "given that, in either case, the arbitrators could choose to have their sense of what justice requires prevail over any other consideration."²¹ However, as will be discussed separately below,²² the conciliatory origins of the amiable compositeur retain significance.

2. *Ex aequo et bono*

¹⁶ David refers to Y. Jeanclos, *L'arbitrage en Bourgogne et en Champagne au XVe siècle* (1977) as authority for the proposition that lists were compiled by "notaires" in 15th century Burgundy and Champagne as to where parties might find "legally qualified arbitrators". However, David also states that any requirement for an *arbiter ex compromisso* to decide as a Judge does not find support in the texts of Roman law and was far from firmly established: See David, above fn 12, at p.87 fn 9.

¹⁷ See David, above fn 12, at p.87.

¹⁸ Equity is used in the broad sense here, and should not be taken as a reference to the technical body of rules described as equity in the common law. The distinction will be drawn out in relation to the definition of *ex aequo et bono* below. The jurists in question were Domat and Jousse: See David, at fn 12, p.89, citing W. Wenger, *Zum obligationenrechtlichen Sciedsverfahren im schweizerischen Recht* (1968), at p.128 (note), and G. Marani, *Aspetti negoziali e aspetti processuali dell'arbitrato* (1966), at p.80. Whether anything of the ancient conception that equity goes hand in hand with arbitration, even where the parties have not conferred the powers of an *amiable compositeur*, is the subject of a very useful discussion by Pierre Mayer in "Reflections on the International Arbitrator's Duty to Apply the Law – The 2000 Freshfields Lecture" (2001) 17(3) *Arb. Int'l* 235.

¹⁹ See Hong-lin Yu, "Amiable Composition – A Learning Curve" (2000) 17(1) *J. Int'l Arb.* 79, at p.86.

²⁰ Discussed in the next section.

²¹ Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) at p.836.

²² See Part II D "The Conciliation Element".

The Latin term *ex aequo et bono* refers to the power to decide under *aequitas*, a Roman notion first set out by Aristotle in *Nichomachean Ethics*.²³ Mauro Rubino-Sammartano describes the power as a “discretionary [sic] power to mitigate strict law” and likens it to *Billigkeitrecht* (the law of equity) in Germany, and the former prerogative of the Norman Kings in England to grant discretionary equitable relief from the law “as fountains of justice”, subsequently vested in the Court of Chancery and the above-mentioned Chancellors.²⁴ On this interpretation, the power of the arbitrator would be to mollify the harsh effects of the law where it would produce unjust results, subject to mandatory provisions. This can be contrasted with arbitration “in equity” as it exists in Switzerland, which some suggest is detached from even mandatory legal rules.²⁵ The term can be interpreted to mean “in justice and fairness”, “according to equity and good conscience” or “according to what is good and just”.²⁶ What is clear is that this term must not be interpreted to mean equity in the limited technical sense given to it in most common law countries. In England and New Zealand, equity is now firmly part of the law. But precedent has tied its hands and compartmentalised it into specific doctrines, remedies and defences. In *Didymi Corporation v Atlantic Lines and Navigation Co Ltd*,²⁷ Hobhouse J distinguished between clauses referring to the technical body of law described as equity and clauses requiring the arbitrator to decide other than according to legally recognisable criteria. This paper is only concerned with the latter, since in England (and New Zealand) both law and equity are administered concurrently in all divisions of the High Court and the Court of Appeal.²⁸ Accordingly, if either English or New Zealand law were to apply, an arbitrator would be entitled to decide in accordance with technical equity in any event – a clause stating that would add nothing. Indeed, where the rules of equity and the rules of the common law conflict, the former prevail.²⁹ A decision made according to

²³ See Rubino-Sammartano, above fn 7 at p.6.

²⁴ See fn 23 above.

²⁵ Pierre Lalive, Jean-Francois Poudret, Claude Reymond, *Le Droit de L'Arbitrage Interne et International en Suisse* (1989) 401 and the references cited therein.

²⁶ Black's Law Dictionary (6 ed, West, 1990), at p. 557.

²⁷ [1987] 2 Lloyd's Rep 166 at 170.

²⁸ See the Judicature Act 1873 (UK) and the Judicature Act 1925 (UK), s.36.

²⁹ In New Zealand, see s.99 of the Judicature Act 1908. Also see Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications Inc, Dobbs Ferry, New York, 1978) 170, fn 142.2.

technical equity is thus made *intra legem* (within the law), but a decision *ex aequo et bono* is made *contra legem* (outside the law).

3. Equity clauses

In *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering*³⁰, Megaw J held that:

“...it is the policy of this country[England] that (...) arbitrators must in general apply a fixed and recognisable system of law (...) and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles...”.

Thus, a contractual provision that purported to relieve an arbitrator from following the strict rules of law was not a valid arbitration agreement.³¹ In England, such provisions have been labelled “equity clauses” and are common only in reinsurance treaties.³² The Courts’ approach to these clauses was justified on the basis of their supervisory jurisdiction over arbitration. That jurisdiction would effectively be ousted if the parties could agree that the dispute be decided other than in accordance with the law, since there would be no question of law for the Court to review.³³ But in *Eagle Star Insurance Co v Yuval Insurance Co Ltd*,³⁴ Lord Denning MR was unable to agree with Megaw J’s approach in *Orion*. In *Eagle Star*, the clause in question provided:

³⁰ [1962] 1 Lloyd’s Rep 257, at p.264. Hereafter *Orion*.

³¹ The clause in question provided: “The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of law. They will settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal.”

³² See Mustill and Boyd, above fn 8, at pp. 74-75. At note 8, the authors state that they do not know of any other field of English Commercial law in which clauses of these type are regularly used. The authors also state that the use of such clauses has been attributable more to a desire to avoid certain provisions of the now repealed Stamp Acts, than to an appeal to abstract justice. However, the importance of good faith in insurance treaties may also provide a link with amiable composition, as will be discussed below.

³³ Megaw J relied heavily on *Czarnikow v Roth, Schmidt & Co.* [1922] 2 K.B. 478; (1922) 12 Ll.L.Rep. 195, where the Court of Appeal held that a purported ouster of the Court’s jurisdiction to require the arbitrators to state a special case was contrary to public policy and void.

³⁴ [1978] 1 Lloyd’s Rep 357. Hereafter *Eagle Star*.

*"The Arbitrators and Umpire shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this Agreement..."*³⁵

Lord Denning MR did not consider this clause to be problematic, stating:

"I must say that I cannot see anything in public policy to make this clause void. On the contrary the clause seems to me to be entirely reasonable. It does not oust the jurisdiction of the Courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under a clause such as this.

(...)

*So I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation. I realise, of course, that this lessens the points on which one party or the other can ask for a case stated. But that is no bad thing. Cases stated have been carried too far. It would be to the advantage of the commercial community that they should be reduced; and a claim of this kind would go far to ensure this."*³⁶

Later cases have essentially come to distinguish *Eagle Star* from *Orion* on the basis that the former only involves ousting strict constructions of contractual terms, whereas the *Orion* clause sought to oust principles of law.³⁷ In *Home and Overseas Insurance Co Ltd v Mentor Insurance (UK) Ltd*³⁸ the English Court of Appeal was asked to consider an arbitration clause that provided:

"The arbitrators and the umpire shall interpret this insurance as an honourable engagement and they shall make their award with a view to effecting the general

³⁵ See fn 34 above, at p. 357.

³⁶ See fn 34 above, at p. 362.

³⁷ Merkin, *Arbitration Law* (LLP, London, Singapore, 2004) at para 7.54. See *Home Insurance Co v Administratia Asegurarilor de Stat* [1983] 2 Lloyd's Rep. 674; and *Home and Overseas Insurance Co Ltd v Mentor Insurance (UK) Ltd* [1989] 3 All ER 74. Cf *Overseas Union Inc v AA Mutual Insurance Ltd* [1988] 1 FTLR 421, where Evans J criticised the *Eagle Star* and *Home Insurance* decisions on the basis that they did not clarify what an equity clause allowed. For His Honour, the clause did not allow any rules of law to be disregarded (including rules of construction), but merely allowed an arbitrator to utilise his or her own knowledge of the insurance business in interpreting the contract.

³⁸ [1989] 3 All ER 74.

purpose of this reinsurance in a reasonable manner rather than in accordance with a literal interpretation of the language."

The Court of Appeal held that this was a valid arbitration clause and directed the parties to go to arbitration. However, Parker LJ echoed Megaw J's statement from *Orion* when His Lordship stated:

*"I have no hesitation in accepting the submission ... that a clause which purported to free arbitrators to decide without regard to the law and accordingly, for example, to their own notions of what would be fair would not be a valid arbitration clause."*³⁹

This was so, despite the then extant Arbitration Act 1979 (UK) allowing the contractual exclusion of appeals and undermining the original justification for the Courts' stance proffered by Megaw J. For the Court of Appeal, the clause in question did little more than allow the arbitrators to depart from the plain meaning of the words. In this respect, Parker LJ cited with approval Lord Diplock's statement in *The Antaios* that:

*"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*⁴⁰

Lord Diplock's statement is now an accepted part of the principles for the construction of contractual documents, as set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.⁴¹ Thus, an arbitrator would not be empowered to do anything special under the clause in question. However, it is arguable that Lord Denning MR's reference in *Eagle Star* to the ousting of "technicalities and strict constructions" contemplates much more. This is particularly so in light of the wider clause under consideration in that case and His Lordship's reference to what "equity did in the old days", which evokes thoughts of the Lord Chancellor's former power to come to the rescue of a petitioner by limiting the application of a common law rule that

³⁹ Above fn 38, at p. 80.

⁴⁰ *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191 at p.200.

⁴¹ [1998] 1 All ER 98 (HL), at pp. 114-115. Adopted by the New Zealand Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at pp. 81-82.

operated harshly in the circumstances. The debate has largely been superseded by the legislative amendments discussed below, which place a premium on party autonomy and a correlating limitation of judicial intervention. But as will be seen, these cases may have continuing relevance to the relationship between amiable composition and a right to appeal on a question of law.

4. Terminology

To avoid adding to the ambiguities being discussed, the terms amiable composition or amiable compositeur will be used from this point forward unless the context requires otherwise. Amiable composition arguably contemplates more than the other terms already discussed, so that an evaluation of its constituent powers will necessarily cover those of the other terms.

B. Contrast with *Lex Mercatoria*⁴²

Some authors have argued that an amiable compositeur ought to take into account general principles of law. This has led to some confusion about the relationship between amiable composition and the new *lex mercatoria*. For example, Goldman has stated:

*"...a reference to equity or, in a different form, the instruction given to him or her to rule ex aequo et bono, should lead the arbitrator acting as amiable compositeur to take into account general principles of law and international trade practices. Interpreted in this way, an amiable composition clause can be considered as referring implicitly to lex mercatoria."*⁴³

As Mustill and Boyd have noted, the attraction of this argument is that it avoids the "awkwardness of accepting the parties have agreed to subject their

⁴² Literally "law merchant".

⁴³ Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, cited in Fouchard, Gaillard, Goldman, above fn 21 at p. 838.

relationship to the personal views of an arbitrator as to the justice of the case, largely unfettered by objective norms...⁴⁴ Awkward or not, that is exactly what amiable composition mandates – a common sense approach that is not bound by legal technicalities.⁴⁵ Amiable composition and the new *lex mercatoria*, insofar as it exists, may (in some cases)⁴⁶ share the common thread of being divorced from any national system of law and can therefore be described as “a-national”. However, the fundamental distinction is that the former is a variety of arbitration that vests an arbitrator with the power to decide by reference to extra-legal criteria, while the latter comprises a body of transnational rules that might be applied in any arbitration. Apparently eroding Megaw J’s requirement in *Orion* for arbitrators to decide by reference to a “fixed and recognisable system of law”,⁴⁷ two English cases have signalled acceptance of the latter.

In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v R’As Al Khaimah National Oil Co and Shell International Petroleum Co Ltd (No’s 1 & 2)*,⁴⁸ the Court of Appeal upheld a Swiss arbitral award where, under the ICC Rules then in force,⁴⁹ the arbitrators had applied “internationally accepted principles of law governing contractual relations” in the absence of a choice of law by the parties. Later, the House of Lords upheld the parties’ choice of a-national principles in *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd*.⁵⁰ In that case, the parties to the Channel Tunnel construction consortium agreed that the contract should:

“...in all respects be governed by and interpreted in accordance with the principles common to both English and French law, and in the absence of such principles, by such general principles of international law as have been applied by national and international tribunals.”⁵¹

⁴⁴ Mustill and Boyd, above fn 8, at p.80.

⁴⁵ Leo D’Arcy, Carole Murray and Barbara Cleave, *Schmitthoff’s Export Trade: The Law and Practice of International Trade* (10 ed, Sweet & Maxwell, London, 2000) at p. 479.

⁴⁶ As will be discussed below, it is possible for amiable composition to be used in combination with a choice of law clause. In such a case, the arbitrator will be required to start with the applicable law and mollify its effects where he or she considers it fair to do so.

⁴⁷ See “Equity clauses” above, Part II A 3.

⁴⁸ [1988] 2 Lloyd’s Rep. 293. Hereafter *Deutsche Schachtbau*.

⁴⁹ Article 13.3 of the ICC Rules of Conciliation and Arbitration 1975: “The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.”

⁵⁰ [1993] AC 334.

⁵¹ Above fn 64, at p. 347.

As for amiable composition, the legislative amendments canvassed below should remove any doubt about the efficacy of such a choice. But as *Deutsche Schachtbau* and other cases show, in the case of *lex mercatoria* it appears that an arbitrator may apply it in the absence of such a choice.⁵²

An amiable compositeur may seek guidance from the *lex*, but is not bound to apply it should it conflict with his or her sense of equity and fairness.⁵³ For example, in ICC Case No. 3267⁵⁴ the arbitral tribunal professed that their award was in accordance with "widely accepted general principles governing international commercial law".⁵⁵ Those principles were stated to be totally consistent with the principles of fairness and equity. However, the tribunal also stated:

*"As a matter of principle, the arbitral tribunal does not reject the view that an amiable compositeur may go beyond certain solutions deriving from the normally applicable legal rules, be they those of a municipal legal system or those of lex mercatoria."*⁵⁶

Nevertheless, in an apparent attempt to avoid being seen as arbitrary some tribunals seem to have subordinated their powers of amiable composition to the *lex mercatoria*. For example, in an ICC arbitration regarding the sale and purchase of livestock, the arbitral tribunal held that the essence of an amiable composition clause was to obviate the need for a specific set of legal rules. But rather than being arbitrary, a decision in such cases was to be based on general principles of responsibility for failure to perform contractual obligations.⁵⁷ Also,

⁵² See *Compania Valenciana de Cementos S.A. v Primary Coal Inc.* (22 October 1991, Judgment No. 1534 PRF, *Cour de Cassation*) [1991] *Mealey's Int'l Arb. Rep.* 7; *Palbalk Ticaret Ltd Sirketi v Norsolor S.A.*, ICC Case No. 3131, [1984] IX *YBCA* 109, upheld by both the *Cour de Cassation* in France (*Norsolor S.A. v Palbalk Ticaret Ltd Sirketi* (1985) XXIV I.L.M. 360) and the Austrian Supreme Court (*Norsolor S.A. v Palbalk Ticaret Ltd Sirketi* (1984) IX *YBCA* 159); and *Fougerolle (France) v Banque du Proch Orient (Lebanon)* (1982) J.D.I. 931; (1983) *REV. ARB.* 183. Also see Ole Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 *ICLQ* 747, at p.757; and De Ly, *International Business Law and the Lex Mercatoria* (TMC Asser Institute, The Hague, 1992) at p.222.

⁵³ See Fouchard, Gaillard, Goldman, above fn 21 at p. 838.

⁵⁴ *Mexican Construction Company v Belgian Company (Member of a Consortium)*, Final Award of 28 March 1984 in ICC Case No. 3267; (1987) XII *YBCA* 87. See also *French Company v African State* ICC Case No. 3327 (1981), (1982) J.D.I. 971.

⁵⁵ Above fn 54, (1987) XII *YBCA* 87 at p.95.

⁵⁶ Above fn 54, (1987) XII *YBCA* 87 at p.88.

⁵⁷ *Seller (Yugoslavia) v Buyer (France)*, ICC Case No. 2879 (1978), (1979) J.D.I. 989.

in *Mechema Ltd v S.A. Mines, Minerais et Métaux*⁵⁸, a case regarding the termination of an exclusive world distributorship agreement, the tribunal stated:

*"Having established that the character of the contract, and the place where it has its effect, necessarily exclude an obligatory application of either Belgian or English law, it is for the above-mentioned reasons that the arbitrators will abide by the 'lex mercatoria' in the exercise of their powers as amiable compositeurs."*⁵⁹

According to Fouchard, Gaillard and Goldman, any confusion is down to the fact that amiable composition was once (during the 1950's and 1960's) considered a conduit through which the *lex mercatoria* could be applied and developed.⁶⁰ In their opinion, and as stated above, the *lex* now has sufficient substance that it may be applied even in the absence of any choice by the parties, much less an amiable composition clause.⁶¹ However, an ordinary arbitrator deciding according to law must first ascertain the existence and applicability of such general principles.⁶² Nevertheless, amiable composition may remain a source of the *lex* where a decision is based upon a comparative analysis of the legal systems involved.⁶³

What is apparent is that many arbitrators are not comfortable basing their decisions upon their subjective appraisal of the equities of a case. Instead, they seek out objective criteria. Whether any such criteria are compatible with the role of an amiable compositeur is discussed below.⁶⁴

C. *Other Clauses Affecting the Meaning*

Context is central to resolving any ambiguities surrounding the nature and scope of an amiable compositeur's powers. For example, an unqualified reference to amiable composition may be regarded as enabling an arbitrator to completely disregard the law, and straight away seek out what he or she

⁵⁸ (ad hoc award of 3 November 1977) 1980 *REV. ARB.* 560; (1982) VII YBCA 77.

⁵⁹ (1982) VII YBCA 77, at p.78.

⁶⁰ Above fn 21 at p. 838, citing Phillippe Kahn, *La Vente Commerciale Internationale* 38 (1961).

⁶¹ See above fn 60.

⁶² See Craig, Park and Paulsson, above fn 10 at p.111.

⁶³ See Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer, The Hague, 1999) at p. 59.

⁶⁴ See Part III C "Duty to Seek the Fairest Solution".

considers to be the fairest solution.⁶⁵ In other circumstances, the arbitrator may be required to start with the applicable law and limit its effects where considered equitable to do so. An express choice of law gives a signal that the latter approach is to be preferred, since the former would render the choice of law meaningless, and this corresponds with the approach of arbitrators in practice.⁶⁶ A more difficult question concerns the compatibility of an amiable composition clause with a right of appeal.

Nowadays, the grounds for the judicial review of arbitral awards are very limited. An arbitrator's findings of fact are basically untouchable.⁶⁷ In the limited instances that an appeal on a question of law is available, parties are generally able to exclude the prospect.⁶⁸ The DAC Report in support of what is now the Arbitration Act 1996 (UK) stated that an equity clause would effectively serve as an exclusion agreement, since there is no point of law involved.⁶⁹ An appellate Court cannot review a decision arrived at without any reference to a legal standard and, in any event, is in no better position to judge the equities of a case than the tribunal below. Thus, in *The State of Senegal v Express-Navigation*,⁷⁰ the Supreme Court of Senegal held that a review of the merits of an award was not compatible with a valid reference to amiable composition. But the DAC's statement may be an oversimplification. As will be discussed below,

⁶⁵ See *Three European Companies v Four Tunisian Companies*, ICC Case No. 5103 (1988), (1988) 115 J.D.I. 1206.

⁶⁶ For example, see ICC Case No. 2139 (1974), (1975) 102 J.D.I. 929; and *State-owned Company, Seller v Norwegian Purchaser*, ICC Case No. 2216 (1974), (1975) 102 J.D.I. 917, and observations by Y. Derains at p.920.

⁶⁷ See *Pupeke Service Station Ltd v Caltex Oil (NZ) Ltd* (Unreported, Privy Council, Appeal No. 63/1994, 16 November 1995), where Lord Mustill stated "Where the criticism is that the arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, not relevant here, the findings of fact by the arbitrator are impregnable, however flawed they may appear. On occasion, losing parties find this hard to accept, or even understand." The Privy Council's decision is annexed to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318, at p 338.

⁶⁸ Appeals on questions of law are governed in New Zealand by clause 5 of the Second Schedule to the Arbitration Act 1996. By virtue of s.6(2) of the Arbitration Act 1996, the Second Schedule of the Act applies to domestic arbitrations, unless the parties agree otherwise, but only applies to international arbitrations (as defined) if the parties so agree. In England, Wales and Northern Ireland, s.69(1) of the Arbitration Act 1996 (UK) provides: "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings..." (This author's emphasis).

⁶⁹ The Report of the Advisory Committee of the Department of Industry ('the DAC') on the Arbitration Bill of February 1996, para 223. Hereafter "The DAC Report". See also V.V. Veeder, *England* in ICCA Handbook 53 (Arb. Supp. 23, March 1997).

⁷⁰ 3 July 1985, No.46; Supreme Court of Senegal; 3 *ICSID Review*, (1988) 2 *Foreign Investment Law Journal* 356, with note by B. Diokhane at pp. 352-355; (1989) 2 *ASA Bulletin* 230.

more often than not an arbitrator acting as *amiable compositeur* will base his or her decision on the law, since in the majority of cases the law provides the equitable result.⁷¹ Suppose an arbitrator was to find that the equities of a case are in equilibrium, but the law favours one party. Accordingly, the arbitrator bases his or her decision upon a dry proposition of law. This is an application of the equitable maxim that where the equities are equal the law prevails. In *Pearson v Clark*⁷², the former Supreme Court of New Zealand held that in such circumstances an appeal could lie against a decision made by a Magistrate empowered to decide according to equity and good conscience. This was despite the fact that, like *amiable composition*, a decision in equity and good conscience did not require absolute adherence to the law.⁷³ In such a case, the losing party could be heard to say, "If the arbitrator had got the law right, I would have won!" Therefore, instead of considering an *amiable composition* clause to be an exclusion agreement, and simply incompatible with a right of appeal, a Court asked for leave to appeal could simply enquire whether there are any discernible questions of law for it to determine (i.e. has the arbitrator based his or her decision in law?).⁷⁴ The difficulty with this approach is illustrated by a number of French decisions regarding the duties of an *amiable compositeur*.

In *Soubaigne v Limmeareds Skogar*,⁷⁵ the Paris Court of Appeals stated that an *amiable compositeur* was required to "seek the fairest solution."⁷⁶ Notwithstanding this, the Court refused to set the award aside for an alleged failure by the arbitrators to comply with that mission (the award contained no reference to equity), as they "had necessarily been guided equally by rules of law and by their sense of equity." However, in *Halbout et société Matenec Hg v*

⁷¹ As René David puts it, "...they see the law as a kind of *ratio scripta* and do not find any good reason for departing from its application in particular cases." Above, fn 12, at p. 335.

⁷² (1864) Mac 136, at p.143.

⁷³ In relation to the same power under the later Magistrates' Courts Act 1908 (s.92), the Court was held not to be able to disregard the directions of a Statute: see *Karori Borough v Buxton* [1918] NZLR 730; [1918] GLR 472.

⁷⁴ In England and New Zealand, leave to appeal will be required from the Court in the absence of the consent of both parties: see s. 69(2) of the Arbitration Act 1996 (UK) and clause 5(1) of the Second Schedule to the Arbitration Act 1996 (NZ).

⁷⁵ CA Paris, 15 March 1984, 1985 REV. ARB. 285; also see the commentary by Eric Loquin, *Pouvoirs et devoirs de l'amiable compositeur. A propos de trois arrêts de la Cour d'appel de Paris*, at 199.

⁷⁶ See also *Unijet S.A. v S.A.R.L. International Business Relations Ltd (I.B.R.)*, CA Paris, 6 May 1988, 1989 REV. ARB. 83, and Eric Loquin's note.

Epoux Henin,⁷⁷ the *Cour de Cassation* held that an amiable compositeur deciding by reference to rules of law must justify the conformity of equity with those rules. Similarly, an arbitrator was held to have disregarded his powers of amiable composition where he simply multiplied the number of days delay attributable to a company by the highest daily penalty set under the relevant contract without any reference to the equitable considerations that led him to that result.⁷⁸ Also illustrating the predominance of equitable considerations, the French Code of Civil Procedure requires an amiable compositeur to give reasons for an award as an element of due process, but that obligation does not necessitate the tribunal to set out any basis at law.⁷⁹ These decisions indicate that an amiable composition clause should indeed be considered to exclude an appeal on a question of law. In order to comply with his or her brief, an amiable compositeur must give primacy to equitable considerations. If the law is relied upon, such reliance must be justified in terms of those considerations. Therefore, even if the arbitrator gets the law wrong, the result can be said to be based on what the arbitrator considers to be fair – something that is not amenable to review. This fact still does not entirely overcome the example above where the equities are equal.⁸⁰ Also, the exclusionary interpretation requires the Courts to give precedence to the parties' choice of amiable composition, as opposed to the appeal right. Party autonomy should dictate that an express choice prevails over an excludable right that applies only by virtue of Statute.⁸¹ However, as the following decision will illustrate, if the parties wish to avoid their amiable composition clause being read down in order to fit with a pre-existing right of appeal, they should exclude the right expressly.⁸²

⁷⁷ 15 February 2001, 2 Ch. civ.; (2001) *Revue D'Arbitrage* 135.

⁷⁸ *SARL Société grenobloise d'investissement v Eurovia et al.* (18 October 2001, 2e Ch. civ., *Cour de Cassation*); (2001) *Revue D'Arbitrage* 922.

⁷⁹ See Articles 1471, 1480, 1502 and 1504, and *Stapem S.A. v Boccard S.A.* (Unreported, 19 November 1991, *Cour de Cassation, Première chambre civile*, Appeal No. 90-12.666 – no obligation to set out the legal grounds on which a party was held responsible for a breach of contract). Cited in Craig, Park and Paulsson, above fn 10, at p.354, note 24.

⁸⁰ But presumably, the law relied upon will have some justification in terms of fairness. If not, an amiable compositeur should not follow it blindly.

⁸¹ See above, fn 68.

⁸² But in England, the parties to a domestic arbitration agreement can only agree to exclude the Courts' jurisdiction to hear an appeal on a question of law if the exclusion agreement is made after the commencement of the arbitral proceedings: s. 87(1) Arbitration Act 1996 (UK).

In *A's Company Ltd v Dagger*,⁸³ the plaintiff sought to challenge the awards of an engineer arbitrator in favour of the defendants, who had performed earthworks under contract with the plaintiff. The plaintiff sought leave to appeal under clause 5 of the Second Schedule to the Arbitration Act 1996, and in the alternative sought to have the awards set aside under Article 34 of the First Schedule. The principal complaints were that the arbitrator had committed procedural errors, including the investigation of issues outside the scope of the reference to arbitration and the late admission of prejudicial evidence, and had wrongly interpreted the earthworks contract. The parties had expressly agreed pursuant to Article 28(3) of the First Schedule that the arbitrator would be empowered to act as amiable compositeur. However, it is clear that the parties did not comprehend the significance of their election.⁸⁴ The evidence tendered to the High Court established that the parties had both contemplated a right of appeal. Because the arbitration was a domestic one, the Second Schedule to the Act (including the right of appeal) applied in the absence of an agreement to the contrary.⁸⁵ The parties therefore chose not to exclude the prospect, but according to Baragwanath J, did not go so far as to allow for an appeal without leave.⁸⁶ Ultimately, Baragwanath J set the awards aside. The procedural errors were such that the principles of natural justice were breached. In that sense, the ultimate result is uncontroversial. Like any arbitrator, an amiable compositeur is bound by the fundamental rules of procedural fairness.⁸⁷ Failure to adhere to those rules will provide grounds for setting an award aside or refusing enforcement and recognition, separately from any right of appeal.⁸⁸

⁸³ Unreported, High Court, Auckland, M1482-SD00, 7 March 2003.

⁸⁴ See the statement of Baragwanath J to this effect at para [125].

⁸⁵ Section 6(2)(b) of the Arbitration Act 1996.

⁸⁶ Pursuant to clause 5(1)(a) and (b) of the Second Schedule the parties may agree to a right of appeal on a question of law before or after the award is rendered. In such a case, the leave of the Court is not required.

⁸⁷ See Article 18 of the UNCITRAL Model Law (virtually replicated in Article 18 of the First Schedule to the Arbitration Act 1996). For the applicability of the rules of due process to an amiable compositeur, see *Saline d'Einville v Compagnie des Salins du Midi*, (CA Paris, 11 July 1991); 1991 REV. ARB. 671, and observations by E. Loquin.

⁸⁸ In New Zealand, the Arbitration Act 1996 expressly deems a breach of the rules of natural justice to be contrary to the public policy of New Zealand, and hence a ground for setting aside an award under Art 34(2)(b)(ii) of the First Schedule to the Act, or for refusing recognition or enforcement of an award under Article 36(1)(b)(ii) of that Schedule – see Articles 34 (6)(b) and 36 (3)(b) of the same Schedule. Articles 34 and 36 of the UNCITRAL Model Law have much the same effect, as do various other domestic provisions.

That His Honour granted leave to appeal in the face of an amiable composition clause and proceeded to determine the proper legal construction of various clauses in the earthworks contract is more controversial. As discussed above, a true reference to amiable composition should have the effect of excluding an appeal on a question of law, since the arbitrator in such a case has the mission of seeking out the most equitable solution. But after surveying the various meanings attributed to amiable composition clauses, His Honour stated in *obiter*:

"Here, where the parties have agreed on a right of appeal to the Court, the extreme interpretation of amiable composition as excluding legal rights cannot be adopted.

(...)

*In my view the Art 28(3) 'amiable compositeur' approach must result in modification of the strict language of the written contract to the extent of any inconsistency with a fair and equitable result. Had the procedure been fair, the Court would have been slow to interfere with the assessment of the chosen expert, even if a lawyer's strict construction might lead to another result."*⁸⁹

This restricted interpretation appears to correlate with the treatment of equity clauses by the English Courts prior to the Arbitration Act 1996 (UK). As discussed above, the effect of those cases was to uphold a clause that could be construed as merely enabling an arbitrator to disregard technicalities and strict constructions, but not one that sought to permit an arbitrator to decide extra-legally. Like *A's Company Ltd v Dagger*, those decisions were driven by concerns about the compatibility of an amiable composition clause with the supervisory role of the Appellate Courts. What exactly the limited approach would enable an arbitrator to do is a matter of some controversy. This is particularly so given the requirement for all arbitrators under Article 28(4) of the First Schedule (replicating the UNCITRAL Model Law) to "decide in accordance with the terms of any contract".⁹⁰ (The implications of Article 28(4) for amiable composition are discussed separately below).⁹¹

⁸⁹ Above fn 83, at paras [142] and [146].

⁹⁰ Compare Article 17(2) of the ICC Rules of Conciliation and Arbitration 1998, which provides that: "In all cases the Arbitral Tribunal shall *take account* of the provisions of the contract and the relevant trade usages." (Author's emphasis).

⁹¹ See Part III B "Duty to Decide in Accordance with the Terms of the Contract and to Have Regard to Trade Usages".

Baragwanath J clearly placed reliance on what His Honour expressed as "...the parties' stipulation for the right to seek leave to appeal to the Court..." describing this as "a powerful pointer towards a conclusion that the parties intended legal rights to result from the award."⁹² But if a right to seek leave was all that was contemplated, that is available in any domestic arbitration unless excluded.⁹³ One interpretation of this case is that an amiable composition clause will be read down to conform with a right of appeal in any case where the parties do not expressly exclude the right. That interpretation would not sit well with the DAC's view that a reference to amiable composition would serve as an exclusion per se. However, this case can also be viewed as involving the clash of two express and conflicting intentions. According to the evidence, the parties did wish to allow for the right of appeal, which is not compatible with the full meaning of amiable composition. Viewed in this way, *A's Company Ltd v Dagger* can be understood as a case involving an express stipulation for an appeal. Since amiable composition can be attributed a more restricted meaning, then it will necessarily yield. With respect to Baragwanath J, the real confusion surrounds His Honour's finding that leave to appeal was required. If the parties did in fact agree on a right of appeal, then leave is not required.⁹⁴ The requirement for leave under clause 5(1)(c) of the Second Schedule is invoked only where the parties have either failed to turn their minds to the question of an appeal, or have agreed not to exclude the prospect. In this author's view, a mere agreement not to exclude the prospect of an appeal should not take precedence over an express stipulation for amiable composition. If a party seeks leave in such circumstances, the Court should simply refuse leave on the basis that on a proper interpretation of amiable composition, no question of law arises. Should a party take issue with the procedure or scope of the arbitration, for example, Articles 34 and 36 of the First Schedule will enable a Court to set an award aside, or refuse recognition or enforcement. However, reiterating what was stated above, practitioners wishing to avoid these types of arguments should expressly exclude the prospect of an appeal on a point of law. If New Zealand is the arbitral situs, an exclusion will only be necessary in a domestic case, since the

⁹² Above fn 83, at para [144].

⁹³ Section 6(2)(b) of the Arbitration Act 1996.

⁹⁴ See clause 5(1)(a) of the Second Schedule to the Arbitration Act 1996.

right of appeal contained in the Second Schedule to the Arbitration Act 1996 only applies to international arbitrations if the parties agree.⁹⁵ Because amiable composition is much more prevalent in civil law countries (and, as will be discussed below, apparently the United States), it is more likely to be used in international arbitrations. In fact, *A's Company Ltd v Dagger* illustrates how little New Zealand parties understand the concept. But if the seat of arbitration is England, for example, the right of appeal is not dependent upon whether the parties are domestic or international. Thus, despite the DAC's assertion that an amiable composition clause would exclude the right of appeal, practitioners would be well advised to do so specifically. This is especially so given the English Courts' previous treatment of equity clauses.

D. The Conciliation Element

1. Distinction between amiable composition and mediation in the arbitral context

As mentioned above, amiable composition originally contemplated a conciliation process and it is important to recognise that the modern meaning of the term is context driven.⁹⁶ Take the term out of an arbitral or adjudicative context and it may assume its original meaning. Remove the need for a decision, and a definition corresponding to mediation is possible. While the goal of arbitration is the handing down of an enforceable award, the goal of mediation can be described as "a voluntary and responsible agreement between the parties, reached and facilitated with the help of an independent third party via a clear

⁹⁵ Section 6(2)(a). Article 1(3) of the First Schedule provides:

"(3) An arbitration is international if—

(a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States, or

(b) One of the following places is situated outside the State in which the parties have their places of business:

(i) The place of arbitration if determined in, or pursuant to, the arbitration agreement:

(ii) Any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected, or

(c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

negotiation structure ('principled negotiation')".⁹⁷ The latter goal correlates with the literal translation of the term as "friendly settlor" or "author of friendly compromise", as well as the canonist aim of re-establishing harmony between the parties by engendering understanding between them. In fact, a simple search of the Internet reveals the term referring to a mediation process. For example, the Office of the Amiable compositeur (*Bureau de l'Amiable compositeur*) established in 1995 by the Government of the Republic and canton of Geneva provides a mediation service for labour conflicts regarding persons who hold diplomatic privileges and immunities. If the mediation fails, the parties are free to address the competent Courts.⁹⁸ Another example of the term being used to refer to a mediation process is contract No. II (international) of the International Council of Hide and Skin Sellers' Association and of the International Council of Tanners, which contemplates arbitration "failing amiable composition".⁹⁹ Of course, such an interpretation is perfectly open upon reference to the term's literal translation, and serves to reiterate the importance of context.

However, the latter example also serves to illustrate the limited meaning attributed to the term by English lawyers. For them, an arbitrator empowered to *decide* as an amiable compositeur was a contradiction in terms. The reasons for this limited interpretation are apparent in the following quote from Sir Michael Kerr in 1993:

*"If the function of an amiable compositeur is merely to mediate and conciliate, then he is not an arbitrator. If his function includes the power to impose a compromise settlement upon the parties as a binding decision which disregards the legal position, then he would equally not be acting as an arbitrator according to law, and his 'award' would risk being set aside."*¹⁰⁰

⁹⁶ Rubino-Sammartano states that the assimilation "lives under the rule *magis valeat quam pereat*, i.e. merely to avoid the collapse of the parties intention, and is not the pure and full meaning of this expression": See above fn 7, at p.15.

⁹⁷ Klaus Peter Berger, "Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators" (2003) 19(3) *Arb. Int'l* 387, at p.390, citing the description of the 13-day peace negotiations between President Sadat and Prime Minister Begin at Camp David in September 1978 in J. Carter, *Keeping the Faith* (1978), p.15 *et seq.*

⁹⁸ See the website of the Permanent Mission of Switzerland to the United Nations Office and to other international organisations in Geneva: <http://www.eda.admin.ch/geneva_miss/e/home> (last accessed 22 September 2005). Information on the Office of the Amiable compositeur is to be located by following the links entitled "Privileges, immunities (Manual)" and "Labour (law)".

⁹⁹ See David, above, fn 12, at p.112, fn 60.

¹⁰⁰ Kerr, "Equity Arbitration in England" (1993) 2(4) *Am. Rev. Int'l Arb.* 377, at pp. 383-384.

The second sentence reflects the former English requirement that an arbitrator “apply a fixed and recognisable system of law” and the apparent policy of English law that an arbitrator could not “be allowed to apply some different [extra-legal] criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles...”¹⁰¹ Section 46(1)(b) of the Arbitration Act 1996 (UK) now allows the parties to an arbitration to confer on an arbitral tribunal the power to decide “in accordance with such other considerations as are agreed by them or determined by the tribunal.” Through this provision, the parties to an arbitration agreement can now free an arbitrator to decide according to his or her own notions of equity, without regard to any particular system of law.¹⁰² Consequently, there is no longer any English impediment to amiable composition being given the broader meaning attributed to it in France. However, prior to 1996 that was not the case, and it is arguable that Kerr was searching for a definition that could be given effect under English law when he stated that the only “natural” interpretation of amiable composition was a staged process “whereby mediation/conciliation are tried first and are followed by an arbitration if they fail.”¹⁰³ That is a reference to the hybrid technique known as “med-arb”, which is apparently gaining popularity in the United States particularly.¹⁰⁴

2. *Distinction between amiable composition and med-arb*

Med-arb is a combination of mediation and arbitration, which seeks to utilise the advantages of both procedures. In its original format, the same person would act as mediator, and if necessary, arbitrator. Where a mediated agreement is not possible, this approach may produce efficiencies, since the parties do not need to edify a separate arbitrator regarding the issues in dispute.¹⁰⁵ However, there are a number of well-trammelled procedural and practical concerns

¹⁰¹ Per Megaw J in *Orion Compania Espanola de Seguros v Belfort Maatschappij Voor Algemene Verzekering*, above fn 30 at p. 264 and confirmed in that respect by *Eagle Star Insurance Co. Ltd. v Yuval Insurance Co. Ltd.*, above fn 34.

¹⁰² The DAC Report confirms this broad effect at para 223.

¹⁰³ Kerr, above fn 100, at p.384.

¹⁰⁴ See James T. Peter, “Med-Arb in International Arbitration” (1997) 8 *Am. Rev. Int'l Arb.* 83, at p. 83.

regarding this technique.¹⁰⁶ In *Acorn Farms Ltd v Schnuriger*¹⁰⁷, those apprehensions led Fisher J to observe that the following five precautions would seem necessary:

- “(a) It must be made clear to the parties from the beginning that if there is no agreement the mediator/arbitrator will be imposing a binding solution.*
- (b) The mediator/arbitrator may not receive information without the knowledge of both parties (...). For all practical purposes this rules out the possibility of caucusing at any stage of the process.*
- (c) The parties must be warned at the outset that anything said to the mediator/arbitrator could be used against that party as the basis for an award, this includes offers and confidential information disclosed for negotiating purposes. [This avoids the med-arbitrator being put in the impossible position of having to compartmentalise or “build a Chinese wall” in his or her mind, but may also discourage candour at the mediation stage].¹⁰⁸*
- (d) The mediator/arbitrator must avoid the expression of final views until all evidence and argument is complete (...).*
- (e) If the process moves into arbitration mode, both parties must be given full opportunity to present their cases (...). This includes a clear indication when the process switches from mediation to arbitration and the timing and process for presenting evidence and argument (...).¹⁰⁹*

The fundamental rules of procedural fairness that drive these precautions are applicable to all arbitrators alike. For example, while generally absolved from adhering to the law, an amiable compositeur will still be bound to treat the parties equally and give each the full opportunity of presenting their case.¹¹⁰

Amiable composition is not med-arb. Unlike amiable composition, med-arb does not include the power to decide other than according to law. As stated

¹⁰⁵ See Peter, above fn 104, at pp. 88-89.

¹⁰⁶ For a discussion of those concerns, see Peter, above fn 104 at pp.92-98; and Berger, above fn 97, at pp. 392-394.

¹⁰⁷ [2003] 3 NZLR 121. Although Fisher J referred to “co-med-arb”, that format actually involves different people acting as mediator and arbitrator. They conduct a joint fact-finding hearing, which is followed by mediation in the absence of the arbitrator. If no mediated agreement is possible, the arbitrator takes over and ultimately renders an award: Christian Bühring-Uhle, “Co-Med-Arb Technique Holds Promise for Getting Best of Both Worlds” (1992) 3(1) World Arb. & Mediation Rep. 21.

¹⁰⁸ See Bühring-Uhle, *Arbitration and Mediation in International Business* (1996), p. 367.

¹⁰⁹ *Acorn Farms*, above fn 107 at p. 131.

¹¹⁰ See Article 18 of the UNCITRAL Model Law. For the applicability of the rules of due process to an amiable compositeur, see *Saline d’Einville v Compagnie des Salins du Midi*, (CA Paris, 11 July 1991); 1991 REV. ARB. 671, and observations by E. Loquin.

above, Kerr's preferred definition probably suffers from the jaundiced view English law then took to such an approach. While parties are free to choose to resolve their dispute by med-arb, they must do so in an informed way. In ICC Case No. 3938, the arbitral tribunal held, inter alia, that an amiable compositeur may not act as mediator without the express authorisation of the parties.¹¹¹ A simple reference to amiable composition would seem insufficient to indicate assent to such a fundamental change in procedure, and as will be discussed below an amiable compositeur has no more freedom with regards to procedure than any other arbitrator does.¹¹²

3. *Joint mandate to settle?*

Mauro Rubino-Sammartano describes the amiable compositeur as having a joint mandate to settle, and refers to the Italian notion of *arbitrato irrituale*¹¹³ whereby an agent is jointly appointed to settle the parties' differences.¹¹⁴ The problem with such an interpretation in the current context, as the author acknowledges, is that like mediation it does not fit with a requirement on the part of the amiable compositeur to *decide*. To settle is not the same as making a judicial decision. In such cases, the Italian Courts have construed the role of an amiable compositeur as being to decide *ex aequo et bono*.¹¹⁵ Nevertheless, drafts-people should be aware of this interpretation, as a clause empowering a person to "act" as amiable compositeur (as opposed to decide) may be treated very differently in Italy and Spain.¹¹⁶ The notion of settlement may also have some bearing on the scope of an amiable compositeur's decision-making powers. As Goldman put it, "...the *amiable compositeur* may decide all what the parties may agree, when settling their dispute."¹¹⁷

¹¹¹ (1984) 111 *Clunet* 926.

¹¹² See Part III A "Must He or She Have Regard to the Law At All?"

¹¹³ Informal arbitration

¹¹⁴ Above, fn 7, at p. 13.

¹¹⁵ See *Parisi v Parisi* [1956] Rep. Foro. It. 1957, 174, 24.

¹¹⁶ Rubino-Sammartano states that the Spanish *arbitraje informal, impropio o libre* has a similar meaning and is valid as a contract: Above fn 7, at p.13.

¹¹⁷ B. Goldman, *Le droit applicable à la Convention BIRD*, in *Cours de droit du commerce international* (International Trade Lectures), *Les Cours du droit 1970, 1971*. Cited in Rubino-Sammartano, above fn 7, at p.14.

4. *Re-establishing harmony in commercial dealings*

Like mediation, this flexibility in decision-making enables “a move away from the typical forensic focus on legal positions towards a focus on the interests underlying the dispute and the necessity of a future-oriented solution.”¹¹⁸ This sort of flexibility can be particularly useful in long-term contracts, where an ongoing relationship may be important, and the law may be ill-equipped to deal with such complex agreements.¹¹⁹ During research for a thesis on the subject, Eric Loquin found 35 examples of amiable composition arbitration, of which the majority were in relation to long-term contracts – such as turnkey industrial plant contracts, raw materials purchase or production, economic development, or transfer of technology contracts.¹²⁰ Stressing the amiable compositeur’s duty to re-establish harmony in commercial dealings, Loquin states:

*“The parties in agreeing to submit themselves to an arbitration by amiable composition, give up certain of their rights accorded under law, in order to allow the arbitrator to provide for them the most reconciliatory solution.”*¹²¹

The duty to seek out the most conciliatory solution is examined separately below.¹²²

E. *Preliminary Conclusions as to Meaning*

At this stage, the following points about amiable composition can be deduced:

- The term has been corrupted from its original meaning, and is therefore context specific and highly contestable;
- Outside the arbitral context, the term may contemplate a procedure akin to mediation, or a joint mandate to settle;

¹¹⁸ See Berger, above fn 97, at p. 397.

¹¹⁹ See Craig, Park and Paulsson, above fn 10, at p.351.

¹²⁰ Loquin, above fn 7, at pp.145-154. Cited in Craig, Park and Paulsson, above fn 10, at p. 351.

¹²¹ Loquin, above fn 7, as translated in Lew (ed), *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies, Queen Mary College, University of London, 1986) pp.70-71, fn 66.

¹²² See Part III D “Duty to Seek the Most Conciliatory Solution?”

- A reference to amiable composition is not a reference to med-arb;
- In an arbitral context, the term has been equated with an ability to decide by reference to an arbitrator's conceptions of justice and fairness, and appears to require an arbitrator to seek out the fairest solution;
- The term does not require the application of transnational principles;
- When used together with an express choice of law, the term will require initial recourse to that law;
- The full meaning of the term is incompatible with a right of appeal;
- The term may contemplate a duty to seek out the most conciliatory solution where the parties have an ongoing relationship.

F. Consequences for Practitioners

The ambiguities highlighted to date should ring alarm bells for any practitioners considering an authorisation of the kind described in Article 28(3) of the Model Law. Section 46(1)(b) of the English Act deliberately avoided using the Latin and French terms contained in Article 28(3) in the interests of simplicity, as well as to avoid the historical baggage they carry.¹²³ While the New Zealand provision defines amiable composition as the power to decide "according to considerations of general justice and fairness",¹²⁴ the confusion in *A's Company Ltd v Dagger* suggests that parties should seek to further define the anticipated role of the arbitrator in plain language before proceeding.¹²⁵ An amiable compositeur's powers are no wider than the authority granted by the parties. For example, in *Himpurna California Energy Ltd (Bermuda) v PT. (Persero) Perusahaan Listrik Negara (Indonesia)*¹²⁶ the parties to an energy sales contract authorised the arbitrators to disregard strict rules of law only where they would be "inconsistent with the spirit of [the] Contract and the underlying intent of the parties." The parties should avoid confusing translations such as

¹²³ The DAC Report, above fn 59.

¹²⁴ Article 28(3) of the First Schedule to the Arbitration Act 1996 provides:

"The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur (*according to considerations of general justice and fairness*) only if the parties have expressly authorised it to do so." (This author's emphasis).

¹²⁵ See the recommendation of the UNCITRAL Secretariat to this effect at para 36 of the Explanatory Note to the Model Law: United Nations document A/40/17, Annex I.

¹²⁶ Ad Hoc Final Award of 4 May 1999, (2000) XXV *YBCA* 11.

“equitable mediator”.¹²⁷ Parties should be aware that the use of words with established meanings such as “in accordance with equity and good conscience” could be interpreted restrictively to require an arbitrator to comply with the directions of a Statute.¹²⁸ If the parties wish for the arbitrator to start with a legal foundation, they should say so, or make an express choice of law. If they wish to avoid their reference to amiable composition being heavily read down, they should expressly exclude any right of appeal.

In time, “amiable compositeur” may attract a settled meaning in the common law like the term *force majeure*.¹²⁹ *A’s Company Ltd v Dagger* illustrates that is not yet the case, although Baragwanath J’s reference to European jurisprudence is to be applauded.

III. WHAT IS AN AMIABLE COMPOSITEUR REQUIRED TO DO (AS OPPOSED TO PERMITTED TO DO)?

A. Must He or She Have Regard to the Law At All?

Assuming the parties confer the powers of amiable composition without setting any constraints of the type discussed above, all arbitrators nevertheless owe a paramount duty to the parties – to make every effort to ensure that the award is enforceable.¹³⁰ To fulfil this obligation, an amiable compositeur will be required to look to the law.

Firstly, the arbitrator will need to be satisfied that the law governing the arbitration (usually the law of the arbitral situs) allows for amiable composition, or at least does not preclude it.¹³¹ Most laws require the parties to expressly opt

¹²⁷ See Craig, Park and Paulsson, above fn 10 at pp.113.

¹²⁸ See fn 73 above.

¹²⁹ Craig, Park and Paulsson, above fn 10 at pp.113-114, suggest that the term is already the best way to make the authorisation.

¹³⁰ An explicit reference to this duty is found in Article 26 of the ICC Rules of Conciliation and Arbitration 1998, which provides that “In all matters not expressly provided for in these Rules, the International Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law.” See also Article 32.2 of the Arbitration Rules of the London Court of International Arbitration.

¹³¹ In fact, there is authority for the recognition of an amiable composition award rendered in a country (Sweden) that does not expressly recognise the practice: see *A.B. Carl Engström v N.V. Kunstmesthandel vorheen Hulshof* (1934) NYTT JURISDIKT ARKIV 491, cited in J. Paulsson, “The Role of Swedish Courts in Transnational Commercial Arbitration” (1981) 21 *Virginia Journal of International Law* 211, at pp. 228-229.

for amiable composition,¹³² as do the rules of most arbitral institutions.¹³³ In view of the criticisms of amiable composition discussed below, the concept is less defensible where the parties do not choose it. However, the rules of the Netherlands Arbitration Institute distinguish between domestic and international arbitrations. In the former, the parties can opt-out of amiable composition, but in the latter, they must expressly opt-in.¹³⁴ Article 53 of the Rules of the China International Economic Trade and Arbitration Commission (CIETAC) states that:

“...the arbitration tribunal shall independently and impartially make its arbitration award in accordance with the facts of the case, the law and the terms of the contracts, international practices and the principle of reasonableness and fairness.”

According to Lew, this provision continues the Chinese tradition of tribunals deciding as amiable compositeurs regardless of any election by the parties.¹³⁵ For this to be the case, the apparently concurrent requirement to decide in accordance with the law would have to be subordinated to the “principle of reasonableness and fairness.” Such a reading of the Article may reflect the fact that in China the law (or “fa”) has traditionally been viewed as an inferior and last recourse for the resolution of disputes.¹³⁶ Whether or not Article 53 could be modified by agreement is unclear.¹³⁷ But should an arbitrator act as amiable compositeur without authorisation, this will provide grounds for setting aside or

¹³² For example, see Art. 28(3) of the UNCITRAL Model Law (now adopted in 45 countries); Art. 1497 of the French New Code of Civil Procedure; Art. 1054(3) of the Netherlands Code of Civil Procedure; Art. 1700(1) of the Belgian Judicial Code (Law of 19 May 1998); Art. 187(2) of the Swiss Private International Law Act; Art. 1051(3) of the German ZPO (Law of 22 December 1997).

¹³³ See Art. 17(3) of the ICC Rules of 1998; Art. 22.4 of the LCIA Rules; Art. 28(3) of the American Arbitration Association Rules; Art. 24(3) of the Stockholm Chamber of Commerce Rules of 1999. Art. 42(3) of the International Convention on the Settlement of Investment Disputes 1961 similarly requires the parties to expressly agree on the Tribunal deciding *ex aequo et bono*.

¹³⁴ Article 45 of the Netherlands Arbitration Institute Rules.

¹³⁵ See Julian D M Lew QC, Loukas A Mistelis, Stefan M Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, The Netherlands, 2003), at p.473.

¹³⁶ See Tsao, “Equity in Chinese Customary Law” in A Newman (ed) *Essays in Jurisprudence in Honour of Roscoe Pound* (Bobbs-Merrill, 1962), at p. 32.

¹³⁷ See Yan, “The New Arbitration Rules of the China International Economic Trade and Arbitration Commission”, (1995) 11 *Arb. Int'l* 183; Houzhi, “Is There an Expanding Culture that favors Combining Arbitration with Conciliation or Other ADR Procedures?” (1998) *ICCA Congress series no. 8*, 101.

refusing enforcement,¹³⁸ although such grounds cannot be used in order to mask a challenge of the merits.¹³⁹

Provided the law governing the arbitration allows for amiable composition, and any necessary election has been made by the parties, whether or not the enforcing State allows for amiable composition should be irrelevant. The only ground for refusal open to a Court under the New York Convention in such circumstances is that enforcement would be contrary to the enforcing State's public policy under Article V(2)(b).¹⁴⁰ The widely held view is that this Article refers to the enforcing forum's international, rather than domestic public policy.¹⁴¹ Enforcement is only to be refused where it would "violate the forum State's most basic notions of morality and justice."¹⁴² In the *Deutsche Schachtbau* case, the English Court of Appeal upheld the Swiss award based on "internationally accepted principles of law governing contractual relations" on the basis that the choice was open to the arbitrators under the governing rules. Provided amiable composition is similarly open, no issues of public policy should conceivably arise.

¹³⁸ In France, such an action would constitute a failure by the arbitrator to comply with the terms of his or her brief, a ground for setting aside under Art. 1502(3) of the New Code of Civil Procedure; see also Art. 34(2)(a)(iv) of the Model Law, which provides:

"(2) An arbitral award may be set aside by [the relevant Court] only if:

(...)

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

As Article 28(3) is a provision of the Law from which the parties cannot derogate, failure to adhere to it will invoke Article 34(2)(a)(iv) regardless of any agreement to the contrary. In relation, to recognition and enforcement, see Art. 36(1)(a)(iv) of the Model Law, which replicates Art. V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the 'New York Convention').

¹³⁹ See *International Standard Electric Corporation (US) v Bidas Sociedad Anonima Petrolera, Industrial y Comercial* (1990) 745 Fed. Supp. 172; the same grounds also failed in *Inter-Arab Investment Guarantee Corporation v Banque Arabe et Internationale d'Investissements* (Belgium, Cour d'appel Brussels, 24 January 1997); (1997) XXII YBCA 643.

¹⁴⁰ Art. V(1)(d) of the New York Convention only allows recognition or enforcement to be refused where the composition of the arbitral tribunal or the arbitral procedure was either in breach of the parties' agreement, or failing such agreement, was not in accordance with the law of the arbitral situs.

¹⁴¹ Philippe Fouchard, *L'Arbitrage Commercial International* (1965), p.995-996 noting that international public policy should not be confused with transnational public policy; and Lew, above fn 135, at p.721 (especially see fn 175).

¹⁴² *Parsons & Whittemore Overseas Co, Inc v Societe generale de l'industrie du papier (RAKTA)*, 508 F 2d 969, 1 YBCA 205 (1976) (2d Cir, 1974). See also Resolution 2/2002 of the International Law Association, set out in A.A.P. Willy, *Arbitration in New Zealand* (2ed, LexisNexis, Wellington, 2003), at pp.141-142.

Once satisfied of his or her mandate as amiable compositeur, the arbitrator may or may not be required to determine the applicable law as a starting point. As discussed above, where the parties have made an express choice of law the arbitrator will generally start with the applicable law and attenuate its effects where considered equitable to do so.¹⁴³ Conversely, the parties may intend to exclude the application of any particular law. For example, a study by Sigvard Jarvin of 91 disputes in East-West relations referred to the ICC between 1980 and 1982, revealed that the parties "to a great extent" empowered the arbitrator to decide exclusively by reference to broad notions of fairness.¹⁴⁴ If the parties give no indication as to their preference, the arbitrator's first move should be to ask them. But what if they disagree?

In the majority of cases, an amiable compositeur derives his or her powers from the agreement of the parties. Therefore, if the disagreement occurs prior to the conferral of those powers, their scope will be restricted to the extent of any consensus. Should no consensus be possible, but the parties still make the authorisation, then the arbitrator should proceed to determine the applicable law (whether national or a-national) by reference to the relevant conflict of laws rules and use that law as the foundation. Why? Because this is the more restricted interpretation of amiable composition, and after all, had the parties not agreed on amiable composition, the arbitrator would have had to decide purely in accordance with that law. One party could have insisted on that, but one party could not have unilaterally required the arbitrator to exclude any law. However, if the disagreement occurs after the conferral of the powers, the parties' statements of subjective intent can be viewed sceptically by the arbitrator, who should proceed to look for any objective indicators of the approach to be preferred. At a practical level though, practice indicates that in the absence of a stipulation to the contrary, an amiable compositeur will be free to either start

¹⁴³ See fn 66 above.

¹⁴⁴ Sigvard Jarvin, "Commercial Arbitration in East-West Relations: The Experience of the ICC Arbitration Court with regard to Choice of Law, Number of Arbitrators and Seat of Arbitration" (1984) 10(1) *International Trade, Law and Practice* 117.

with a national law and exclude its effects if considered fair to do so,¹⁴⁵ or straight away seek out what he or she considers to be the fairest solution.¹⁴⁶

Practice also indicates that in the majority of cases arbitrators opt for the former option. After all, laws are generally designed to achieve justice so that the legal and equitable result will often converge. As David has put it:

*"In the vast majority of cases amiable compositeurs do not intend to work out a compromise, but they feel bound to decide as is prescribed by the law; they see in the law a kind of ratio scripta and do not find any good reason from departing from its application in particular cases. The amiable compositeur is in fact a judge, but one who enjoys greater flexibility in adopting the solution which he regards as best, even though from a strictly legal point of view it may not be absolutely correct."*¹⁴⁷ (References omitted).

Thus, in a number of cases arbitrators have decided that the application of the legal rule corresponds with the equitable result.¹⁴⁸ In fact, it is arguable that the law is an indispensable consideration in determining the fair outcome. But where the arbitrator decides to step outside the law, there are some boundaries that he or she cannot cross. The difficulty is establishing with any certainty where they lie, and this uncertainty is tied up with the nebulous concept of public policy.

A State may set aside or refuse to recognise or enforce an award that is contrary to that State's public policy.¹⁴⁹ Cognisant of his or her duty to endeavour to render an enforceable award, an arbitrator will therefore need to uphold those mandatory rules of law having a public policy character in both the forum State and the State where enforcement is likely to be sought. Of course, what is considered a matter of public policy will vary from country to country. For example, in ICC Case No. 4265, a sole arbitrator (empowered to act as

¹⁴⁵ See *Italian party v Two Tunisian parties*, ICC Case No. 5118, (1987) 114 J.D.I. 1027; and ICC Case No. 3755 (1990) 1(2) ICC Bulletin 25. Cited in Fouchard, Gaillard, Goldman, above fn 21 at p. 837, note 284.

¹⁴⁶ See *Three European Companies v Four Tunisian Companies*, above fn 65.

¹⁴⁷ David, above fn 12, at p. 335.

¹⁴⁸ See *Company X (Italy) v Consultant A (Ireland)* (16 February 1998, Final Award in Case No. 66/96, Italian Arbitration Association) (1999) XXIVa YBCA 183; *Trading Co (Switzerland) v Manufacturer (US)*, Final Award in ICC Case No. 6955 of 1993, (1999) XXIVa YBCA 107; *Company X (US) v Company Y (Italy)* (1 December 1996, Final Award in Case No. 1795, Chamber of National and International Arbitration of Milan), (1999) XXIVa YBCA 206.

amiable compositeur) held that while Dutch law required damages to be paid for the unlawful termination of an exclusive agency contract, the law also required damages to be claimed within one year of the purported termination. The arbitrator refused to derogate from the limitation period on the basis that it was part of the rules of public order for The Netherlands.¹⁵⁰ But in *Panalpina World Transports Holding AG (Switzerland) v la Société Transco (The Republic of Congo)*,¹⁵¹ the Paris Court of Appeals held that an arbitrator empowered as amiable compositeur was not bound to apply the Statute of Limitations. The Court of Appeals upheld the arbitrator's decision to allow a request for arbitration to be made 13 years late on the basis that the delay was attributable to the political situation in the Congo during the 1980's and 1990's. At the very least, an amiable compositeur is bound not "to take a decision contrary to an absolutely constraining law, particularly the rules concerning public order and morals."¹⁵² This reflects Goldman's understanding of the concept as being coextensive with the ability of the parties to settle a dispute by consent.¹⁵³ If the parties cannot legally agree something, then an amiable compositeur cannot impose it by decision.

The requirements of due process have often been considered a matter of public policy,¹⁵⁴ and as discussed above apply equally to all arbitrators.¹⁵⁵

¹⁴⁹ See Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law, and Art. V(2)(b) of the New York Convention.

¹⁵⁰ *Exclusive Agent (Egypt) v Principal (The Netherlands)*, ICC Case No. 4265, (1984) J.D.I. 922.

¹⁵¹ 28 November 2002, Cour d'appel de Paris, (2003) *REV. ARB.* 240.

¹⁵² See ICC Case No. 1677 in 1975, (1978) III *YBCA* 216; and M. Blessing, "The New International Arbitration Law in Switzerland" (1988) 5 *J. Int'l Arb.* 9, at p. 64.

¹⁵³ See Goldman, above fn 117.

¹⁵⁴ See *Firm P v Firm F (Oberlandesgericht of Hamburg, 3 April 1975)* (1977) II *YBCA* 241; and *Danish Buyer v German (FR) Seller (Oberlandesgericht of Cologne, 10 June 1976)* (1979) IV *YBCA* 258, which each rely on Art. V(2)(b) of the New York Convention. In Australia and New Zealand, a breach of the principles of procedural fairness (or "natural justice") is expressly deemed to be contrary to public policy: Australia, s.19 of the International Arbitration Act 1974 (Cth); New Zealand; Article 36(3)(b) of the First Schedule to the Arbitration Act 1996. However, see *Paklito Investment Ltd v Klockner East Asia Ltd*, Supreme Court of Hong Kong, 15 January 1993, (1994) XIX *YBCA* 664, where the Court held that public policy was irrelevant. The Court stated, "If the defendants do not establish that they were prevented from presenting their case [referring to Article V(1)(b)], the question of public policy does not enter the equation. If the defendants established this ground then public policy is irrelevant." The Moscow City Court also held, in relation to the same defence in Article 34(2)(b)(ii) of the UNCITRAL Model Law, that a procedural infringement in the arbitral proceedings had no relevance to the notion of public policy (Unreported, Moscow City Court, Russian Federation, 10 November 1994, reported on the CLOUT - Case Law on UNCITRAL Texts - database at <<http://www.uncitral.org>> (last accessed on 1 June 2005)).

¹⁵⁵ See fn 87 above.

Despite intimations to the contrary,¹⁵⁶ the powers of amiable composition are, in any event, concerned with the substantive rules of law, not procedure. Thus, Article 28(3) of the Model Law falls under the heading "Rules applicable to the substance of the dispute". Like any arbitrator, an amiable compositeur is bound to follow the procedure agreed by the parties, but has a discretion as to how to proceed failing any agreement.¹⁵⁷ That discretion, and the agreement of the parties, is subject to the fundamental procedural justice requirements known as the "Magna Carta of Arbitration".¹⁵⁸ The basic principle is that the parties should be treated with equality and given the full opportunity of presenting their respective cases.¹⁵⁹ Like a statutory tribunal, an amiable compositeur appointed under a specific Statute, or set of rules, is bound to adhere to the imperative provisions of that instrument, as it is that instrument from which he or she draws jurisdiction. Failure to do so will render any subsequent award in danger of setting aside, or non-recognition.

B. Duty to Decide in Accordance with the Terms of the Contract and to Have Regard to Trade Usages

One of the most controversial aspects of amiable composition regards whether or not it empowers arbitrators to disregard or moderate contractual provisions where they consider that their strict application would lead to inequity.¹⁶⁰ The orthodox view is that, as an expression of the parties' collective will, the contract must be given effect. For example, ICC Case No. 3938¹⁶¹ involved a long-term contract for the sale and delivery of chemicals under which the price was to be adjusted by reference to the market price of a reference

¹⁵⁶ In ICC Case No. 4095 (unpublished), the arbitrators held that since they were not amiable compositeurs they could not relieve a party alleging certain facts from his duty to prove them. Cited in Sigvard Jarvin, "The sources and limits of the arbitrator's powers" (1986) 2(2) *Arb. Int'l* 140, at p. 157.

¹⁵⁷ For example, see Art. 19 of the UNCITRAL Model Law, and s.34(1) of the Arbitration Act 1996 (UK).

¹⁵⁸ The 'Magna Carta of Arbitral Procedure' is comprised of Articles 18 and 19 of the Model Law. See Seventh Secretariat Note, A/CN.9/264, Art 19, para 1, at pp.582-583 of Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide To The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Comment* (Kluwer, Deventer, The Netherlands, 1989), and Summary Record, A/CN.9/SR.322, para 2 at pp.640-641.

¹⁵⁹ See Art. 18 of the Model Law.

¹⁶⁰ See the discussion in Fouchard, Gaillard, Goldman, above fn 21 at pp. 839-841.

¹⁶¹ *Buyer (France) v Supplier (The Netherlands)*, ICC Case No. 3938, (1984) J.D.I. 926.

product, as published in a recognised trade magazine. When the magazine was prohibited from publishing the reference prices, the parties were left without a price index. Although empowered to decide as amiable compositeurs, the arbitral tribunal refused to substitute a new index system, stating that:

"... the considerations which may lead the arbitrator to correct distortions which may result from a strict application of the provisions of the law to the particular circumstances of the case are not valid with regard to the contract, which is a special set of rules resulting from the parties' own intentions."

In ICC Case No. 3267, the arbitral tribunal held that the duty of an arbitrator to apply the contract, even as amiable compositeur, was "a basic requirement for the security of international trade."¹⁶² While stating that an amiable compositeur could disregard contractual rights for an abuse of such rights, the arbitral tribunal found that claimant's termination of a construction sub-contract was not arbitrary, and its calling under a risk exposure guarantee was not abusive. While the claimant stood to receive a large sum under the guarantee, the calling was just one of the remedies provided by the contract following a termination based on the default of the defendant.

Both of these cases were decided under the ICC Arbitration Rules 1975 and the arbitrators were accordingly constrained by the requirement of Article 13(5) to "take into account" the provisions of the contract and the relevant trade usages. However, a number of ICC awards have recognised that amiable compositeurs can indeed depart from the terms of the contract.¹⁶³ This reflects a growing recognition by the French Courts that, without going so far as to alter the structure of the agreement, or impose fresh obligations not agreed by the parties,¹⁶⁴ an amiable compositeur may "mitigate rights created by the contract, to exclude the consequences of the strict application of the terms of the

¹⁶² *Mexican Construction Company v Belgian Company (Member of a Consortium)*, Partial Award of 14 June 1979 in ICC Case No. 3267, (1982) VII YBCA 96, at p. 104.

¹⁶³ See *French Company v African State*, ICC Case No. 3327 (1981), above fn 58; ICC Case No. 3344 (1981), (1982) J.D.I. 978; *X & Y v Z & Mr W*, ICC Case No. 4972 (1989), (1989) 116 J.D.I. 1100, and observations by G. Aguilar Alvarez. Cited in Fouchard, Gaillard, Goldman, above fn 21 at p. 841, fn 304.

¹⁶⁴ See *Parfums Stern France v CFFD*, (19 April 1991, Court of Appeal, Paris), (1991) REV. ARB. 673, and observations by E. Loquin.

contract.”¹⁶⁵ Such an approach has been defended on the basis of the ability of an amiable compositeur to use his or her equitable powers to disregard the *pacta sunt servanda* principle, which holds that contracts are binding.¹⁶⁶ Ernest Metzger has suggested that this power is likely to be recognised in cases where, at the time the powers of amiable composition are conferred, the parties have signalled that their contract is subject to unforeseeable future events. In such a case, one can infer that the parties have placed their faith in the arbitrator to alleviate the harsh results of unexpected occurrences.¹⁶⁷

In New Zealand and other countries that have adopted the UNCITRAL Model Law, the debate has largely been put to rest by Article 28(4), which provides:

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

Stronger than its counterpart in the ICC rules, Sigvard Jarvin has described Article 28(4) as welcome clarification.¹⁶⁸ By requiring an arbitrator to decide “in accordance with the terms of the contract”, Article 28(4) confirms that an amiable compositeur is bound by the regulatory framework of the parties’ agreement. As mentioned briefly above, this also brings into question the interpretation of amiable composition in *A’s Company Ltd v Dagger*, where Baragwanath J stated that “the Art 28(3) ‘amiable compositeur’ approach must result in modification of the strict language of the written contract to the extent of any inconsistency with a fair and equitable result.”¹⁶⁹ Any modification of, or departure from, clear contractual provisions would appear to breach an amiable

¹⁶⁵ See *Unijet*, above fn 89, and the decisions cited in Fouchard, Gaillard, Goldman, above fn 21 at p. 841, fn 301.

¹⁶⁶ See Fouchard, Gaillard, Goldman, above fn 21 at p. 841-842. The authors also state that the change of circumstances doctrine could be utilised to come to the same outcome, citing Patrice Level, “L’amiable composition dans le décret du 14 mai 1980 relatif à l’arbitrage” (1980) *REV. ARB.* 651, at p. 656 *et seq.*

¹⁶⁷ See Ernest Metzger, case note, (1982) *REV. ARB.* 220, at p. 222, cited in Craig, Park and Paulsson, above fn 10 at p. 111, fn 12.

¹⁶⁸ Sigvard Jarvin, “The sources and limits of the arbitrator’s powers” (1986) 2(2) *Arb. Int’l* 140, at p. 158.

¹⁶⁹ Above fn 83, at para [146].

compositeur's mandate.¹⁷⁰ However, the cases on the construction of contractual documents illustrate that even apparently clear words "are susceptible to shades of meaning revealed by the surrounding circumstances."¹⁷¹ In the event that any ambiguity can be established, it is likely that an amiable compositeur will be free to adopt the meaning that accords with the most equitable result. The ordinary rules of construction, as rules of law, could potentially be departed from, or ignored by an amiable compositeur.

Nevertheless, the limit on the powers of an amiable compositeur imposed by Article 28(4) may be argued to impede the efficacy of this type of arbitration. This is particularly so if, as Metzger suggests, parties confer the powers for contingency purposes. However, the parties may still enable an arbitrator to modify their agreement to reflect changes in circumstances by including what is commonly known as a hardship, revision, or adjustment clause. The effectiveness of such a clause has been widely debated and is beyond the scope of this work.¹⁷² Conceivably though, the amiable compositeur will still be deciding "in accordance with the terms of the contract" if he or she applies the clause to effect any changes necessary to reach a fair solution.

C. *Duty to Seek the Fairest Solution*

¹⁷⁰ A breach of that mandate could conceivably lead to setting aside proceedings based on Article 34(2)(a)(iv) of the Model Law, which provides:

"(2) An arbitral award may be set aside by [the relevant Court] only if:

(...)

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

As Article 28(4) is a provision of the Law from which the parties cannot derogate, failure to adhere to it will invoke Article 34(2)(a)(iv) regardless of any agreement to the contrary.

¹⁷¹ Burrows, Finn, Todd, *Law of Contract in New Zealand* (2ed, LexisNexis Butterworths, Wellington, 2002) p. 173.

¹⁷² See Werner Melis, "Force Majeur and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration" (1984) 1 *J. Int'l Arb.* 213; Alain Prujiner, "L'adaptation forcée du contrat par arbitrage" (1992) 37 *McGill L. J.* 428; and Matthew de Boisséson, *Le Droit Français de L'arbitrage Interne et International* (2 ed, 1990) 185. Cited in Fouchard, Gaillard, Goldman, above fn 21 at para 41, fn 102. See also Berger, "Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense", in Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell, 2001), at p. 269. Cited in Julian D M Lew QC, Loukas A Mistelis, Stefan M Kröll *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, The Netherlands, 2003), at p. 652, fn 142.

*"From time to time ... lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not always easy to do, although fairness in practice has the elephantine quality of being easy to recognise."*¹⁷³

The quote of Lawton LJ above was made with regards to the principles of procedural fairness (or natural justice), but the point appears equally apposite in regards to substantive fairness. As discussed above, a number of French cases have stressed that the duty of an amiable compositeur is to "seek the fairest solution".¹⁷⁴ But how will he or she be guided in this search? The apparent subjectivity involved in making such a decision is a principal criticism of amiable composition.¹⁷⁵ As Craig, Park and Paulsson have put it:

*"To refer to intuition or legal 'culture' is to invite the application of subjective values, a dangerous thing in view of the fact that the international framework must fit a world where ethical values are not always shared."*¹⁷⁶

While Ole Lando has argued that most arbitrators have a similar understanding of what is commercially fair,¹⁷⁷ the application of subjective values would seem to open the door to divergent results. Thus, like John Selden's criticism of the Lord Chancellors in England, fairness may vary according to the length of the arbitrator's foot. This will obviously place an increased emphasis on the parties' choice of arbitrator(s). Parties to a commercial disagreement will want to select an arbitrator(s) who understands the field in question, as well as the often harsh, but commercially fair realities of business. A diverse tribunal composition may also be used to ameliorate cultural differences in ethical values by ensuring that the prevailing considerations of fairness are shared by at least a majority of arbitrators. Ultimately though, such concerns relate to whether or not parties should opt for amiable composition, rather than to how an amiable compositeur should make his or her decision once appointed. The pros and cons of amiable

¹⁷³ *Maxwell v Department of Trade and Industry and others* [1974] 2 All ER 122, at 131 per Lawton LJ.

¹⁷⁴ See fn 75 and 76 above.

¹⁷⁵ For example, see Karen S. Weinberg, "Equity in International Arbitration: How Fair is 'Fair'? A Study of Lex Mercatoria and Amiable Composition" (1994) 12 *B. U. Int'l L. J.* 227, at p.246-254.

¹⁷⁶ Craig, Park and Paulsson, above fn 10, at p. 111.

¹⁷⁷ Ole Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 *ICLQ* 747, at p.753.

composition are discussed separately below. But as mentioned in relation to *Lex Mercatoria*, the fear of making an arbitrary or capricious decision drives many arbitrators to resort to national laws or general principles. While such rules may provide valuable guidance, an amiable compositeur should not fetter his or her discretion. Any attempt to establish objective rules for the exercise of that discretion will do exactly that. Like equity in the common law, amiable composition would then become rigid, and be rendered just another system of law. While it is true to say that "the law is rarely an instrument of oppression",¹⁷⁸ arbitrators must also be cognisant that justice is not the exclusive domain of the law. Fairness is by nature an intuitive concept, and while the law may be designed to achieve fairness in given circumstances it is not omniscient. The concept does not exist in a vacuum, and what is fair in a given situation will depend upon all of the circumstances (including the law). Therefore, as Eric Loquin has stated:

*"Arbitration, in this perspective, responds differently than in a classic contentious procedure. It is characterised by a weakening of the juridical character of litigation and by the predominance of its technical, psychological and commercial aspects. The amiable composition clause gives to the arbitrator the means of reducing the influence of law over the case in favour of other factors and allows him to extract from the facts what, in a healthy commercial environment, merits different treatment from the application of strict rules."*¹⁷⁹

But even Loquin has apparently attempted to draw out some objective approaches. The first requires the application of broad considerations such as a presumed intention of equality in the parties' contractual rights and obligations, a presumed intention that the risk should be balanced between them, and the requirement of good faith.¹⁸⁰ Again, these considerations will provide valuable guidance. But it is antithetical to the nature of amiable composition that an arbitrator should be *required* to decide in accordance with such factors. In this

¹⁷⁸ F. A. Mann, *Lex Facit Arbitrum*, in Martinus Nijhoff, *International Arbitration: Liber Amicorum for Martin Domke* (The Hague, 1967). Quoted in Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements* (1986).

¹⁷⁹ Loquin, above fn 7, as translated in Lew (ed), *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies, Queen Mary College, University of London, 1986) pp.70-71, fn 66.

¹⁸⁰ Set out in Craig, Park and Paulsson, above fn 10, at p.111.

author's view, amiable composition appeals to the notions of justice vested in the individual arbitrator and he or she should not shirk that responsibility.

In retrospect, a party may well prefer an objective decision at law. Like an agreement that an arbitral award shall be final and binding without recourse to appeal, the choice of amiable composition may appear foolish in hindsight. But in different circumstances, the discretion may have been utilised in that party's favour. That is the prospect that the party has contracted for. Any complaint after the event can therefore be viewed sceptically. Given the parties' express choice, an amiable compositeur should not feel compelled to mask his or her decision with purportedly objective criteria. The duty of the amiable compositeur is not to make each party happy. Or is it?

D. Duty to Seek the Most Conciliatory Solution?

As discussed above,¹⁸¹ Eric Loquin has argued that the mission of an amiable compositeur is to work towards the most conciliatory solution. This approach is consistent with the origins of amiable composition and the Canonist aim of re-establishing harmony between the parties by working out a new legal relationship going forward. Where the parties are in a long-term or continuing relationship, this approach has clear merit. The value of the relationship will generally exceed the interests at stake in any particular dispute. However, there is a risk with such an approach that the arbitrator will, like Solomon, simply "split the baby" in an attempt to keep everyone happy. The method would also appear to have little application to short-term relationships (although the same might be said of amiable composition itself). Perhaps then, the value of any continuing relationship could instead be treated as a primary consideration in establishing what the fairest result is. After all, the fairest result should be the most conciliatory.

The existence of an amiable composition clause may even induce the parties to reconcile of their own volition. If the parties are aware that any dispute will be referred to an amiable compositeur, who will have the power to decide the fairest or most conciliatory solution, the parties would be sensible to save

¹⁸¹ See Part II D 4 "Re-establishing harmony in commercial dealings"

time and expense by negotiating that outcome themselves. Because neither party can rely on his or her legal position, constructive discussions are facilitated. Thus, Loquin has noted that the clause has a "preventive function" and is a "sign of good faith which should permeate their future relations."¹⁸²

IV. THE LEGAL EFFICACY OF AMIABLE COMPOSITION CLAUSES

A. Common Law Doubts Extinguished

Insofar as s.46(1)(b) of the Arbitration Act 1996 (UK) will enable amiable composition, this represents a back to the future shift for arbitration in England. An arbitrator's duty was not always to decide according to law, but like the amiable compositeur he or she was expected to settle a dispute equitably.¹⁸³ In 1791, the Lord Chancellor opined that "...the arbitrator has a greater latitude than the court in order to do complete justice between the parties", instancing the ability to "relieve against a right which bears hard upon one party..."¹⁸⁴ Later, *In re Badger* held that an arbitrator could ignore the common law rule regarding the circumstances in which a debtor must pay interest.¹⁸⁵ In 1888 the Privy Council upheld a Canadian clause of amiable composition in *Rolland v Cassidy*.¹⁸⁶ Their Lordships were not prepared to sanction a complete disregard for the law, but stated that the clause could "dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."¹⁸⁷ This more limited stance coincided with an increasing emphasis on substantive rules of law, which had previously been rendered uncertain by the civil law juries' "equitable appreciation" of the law.¹⁸⁸ As the rules became more certain, arbitrators were expected to apply them for the sake of uniformity.

¹⁸² Above fn 121.

¹⁸³ Lord Parker of Waddington, "The History and Development of Common Law Arbitration" (The Hebrew University of Jerusalem, Lionel Cohen Lectures, 1959). Cited in David, above fn 12, at p.111, fn 57.

¹⁸⁴ *Knox v Symmonds* (1791) 1 Ves. Jun. 369, at p. 370.

¹⁸⁵ (1819) 2 B & A. 691.

¹⁸⁶ (1888) 13 App Cas 770.

¹⁸⁷ Above fn 186, at p. 773.

¹⁸⁸ David, above fn 12, at p. 111.

For reasons of cost and time the mercantile community of the period preferred to avoid litigation in the Courts. In the words of one Judge:

*"They prefer even the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows about as much of law as he does of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease."*¹⁸⁹

Recourse to the Courts was only available where an error of law was apparent on the face of the award, or where a special case had been stated or ordered.¹⁹⁰ Understandably, parties grew dissatisfied with this situation and this prompted the establishment of commercial causes in the High Court.¹⁹¹ An attempt by the Refined Sugar Association to preclude arbitrators acting under its rules from stating a special case to the Court prompted the Court of Appeal decision of *Czarnikow v Roth, Schmidt and Company*.¹⁹²

Czarnikow famously held that the purported ouster of the Courts' statutory jurisdiction was contrary to public policy and ineffective. The decision was justified on the basis of the Courts' need to supervise arbitration and, in the words of Bankes LJ, "...to secure that the law that is administered by an arbitrator is the law of the land and not some home-made law of the particular arbitrator..."¹⁹³ Lord Justice Scrutton also emphasised "...the importance of administering settled principles of law in commercial disputes..."¹⁹⁴ In a subsequent case, Denning LJ stated "...there is not one law for arbitrators and another for the court. There is one law for all."¹⁹⁵ Relying heavily on the platform set by *Czarnikow*, Megaw J stated in *Orion* that an arbitrator was required to "apply a fixed and recognisable system of law".¹⁹⁶ If the parties could agree that the dispute be decided other than in accordance with the law, the Courts' jurisdiction would effectively be ousted, since there would be no

¹⁸⁹ Judge unknown, *The Times*, 10 August 1892. Cited in Anthony D. Colman, *The Practice and Procedure of the Commercial Court* (Lloyd's of London Press Ltd, London, 1983) at p. 5.

¹⁹⁰ Common Law Procedure Act 1854, sections 4 or 5; and later the Arbitration Act 1889, s.7.

¹⁹¹ See Colman, above fn 189, at p.5.

¹⁹² [1922] 2 K.B. 478. Hereafter *Czarnikow*.

¹⁹³ Above, fn 192 at p. 484.

¹⁹⁴ Above, fn 192 at p. 489.

¹⁹⁵ *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 W.L.R. 562, at p. 570.

¹⁹⁶ *Orion*, above fn 30.

question of law for the Court to review. As mentioned above, His Honour's sentiments have been echoed in much later cases, even after the Arbitration Act 1979 (UK) removed the case stated jurisdiction and gave recognition to agreements excluding any right to appeal on a question of law.¹⁹⁷ In this author's view, these amendments undermined the reasoning in *Czarnikow* by removing the primary means of supervision and placing a greater emphasis on party autonomy. In fact, arbitral practice may already have circumvented the strictures of these rulings and enabled equitable considerations to be applied even in the absence of a choice by the parties. Arbitrators frequently refused to give official reasons for their awards, instead delivering unsigned explanations, which could not be cited in a Court.¹⁹⁸ As Lord Tanglely stated:

*"No experienced arbitrator will perpetrate an error of law on the face of the award, and no sensible arbitrator, unless he is called upon to state a special case, will give his reasons. Observing this facade, I strongly suspect that English arbitration is as successful as it is because arbitrators do act ex aequo et bono and behave as good and reliable amiable compositeurs."*¹⁹⁹

Both the English and New Zealand Arbitration Acts of 1996 now require reasons to be given in the absence of an agreement to the contrary, or an agreed award.²⁰⁰ Nevertheless, the practice appeared to contradict the law.

Even leaving aside such covert methods, there are a number of examples of extra-legal decision-making that belie any unqualified aspiration for the uniform application of the law. For example, in New Zealand the equity and good conscience jurisdiction of the District Court,²⁰¹ and the Magistrate's Court before that, has enabled decision-makers to do justice in individual cases,

¹⁹⁷ See above, fn 38.

¹⁹⁸ See Craig, Park and Paulsson, above fn 10, at p.349, note 7.

¹⁹⁹ Lord Tanglely, "International Arbitration Today" (1966) 15 *International and Comparative Law Quarterly* 719, at p. 722.

²⁰⁰ Arbitration Act 1996 (UK), s. 52(4); Arbitration Act 1996 (NZ), First Schedule, Clause 31(2). The Arbitration Act 1979 (UK) allowed the High Court to order reasons to be given in certain circumstances to assist with the possible prosecution of an appeal (s.1(5)). Without the consent of all the parties to the reference (s.5(1)(a)), this could only occur with the leave of the Court and where the parties had either notified the arbitrator of the requirement for an award or had good reason for not giving such notification (s.1(6)). Where an exclusion agreement was in place, reasons could only be ordered with the consent of all the parties to the reference (ss.1(5) and 3(1)(b)).

²⁰¹ District Courts Act 1947, s. 59.

regardless of strict rules of law.²⁰² Local Courts of Requests formerly served the same role in England.²⁰³ But while the New Zealand Supreme Court in *Karori Borough v Buxton*²⁰⁴ held that a Magistrate's Court was bound to apply a Statute, no such limitation is placed on the Disputes Tribunals of this country. Section 18(6) of the Disputes Tribunals Act 1988 requires a referee to decide "according to the substantial merits and justice of the case". While bound to have regard to the law, a referee is not required to "give effect to strict legal rights or obligations or to legal forms or technicalities." Appeals are limited to matters of procedural fairness.²⁰⁵ Both the equity and good conscience jurisdiction of the District Court and that of the Disputes Tribunal are limited to relatively small amounts of money.²⁰⁶ Each jurisdiction represents a policy decision by Parliament that small disputes are best dealt with in an informal and final manner. Judge Willy has suggested that amiable composition could serve a similar purpose in arbitration, citing a common experience that the resolution of such disputes according to strict legal rights could be costly and time consuming, as well as "the danger of oppression by the financially stronger party of the weaker..."²⁰⁷ Furthermore, parties can be bound in each jurisdiction by decisions that are contrary to the law, regardless of any choice on their part. Surely then, two commercial parties should be free to choose to resolve their disputes in such a manner by reference to amiable composition. Those parties will be in the best position to assess whether the interests at stake should be protected by reference to strict legal rights, or according to broader considerations.

In *Orion*, Megaw J also suggested that an agreement for amiable composition would also render a contract void due to a lack of intention to create legal relations.²⁰⁸

But at the very least the parties have agreed to arbitration by way of amiable composition.²⁰⁹ Provided that agreement is enforceable, the parties have

²⁰² See *Pearson v Clark*, above fn 72; and *Karori Borough v Buxton*, above fn 73.

²⁰³ See *Scott v Bye* (2 Bing. 344), cited in *Pearson v Clark*, above fn 72.

²⁰⁴ Above fn 73.

²⁰⁵ See s.50(1) of the Disputes Tribunals Act 1988 and *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453.

²⁰⁶ \$3000.00 in the District Court (s. 59 District Courts Act 1947), and \$7,500.00 in the Disputes Tribunals (s.10(1A)(b) of the Disputes Tribunals Act 1988), or \$12,000.00 by consent (s.13(2) of the Disputes Tribunals Act 1988).

²⁰⁷ Willy, A.A.P. *Arbitration in New Zealand* (2ed, LexisNexis, Wellington, 2003), at p. 113-114.

²⁰⁸ *Orion*, above fn 30 at p. 264.

therefore entered into legal relations. The problem, of course, is that the scope of their respective rights and obligations is subject to an equitable override. This leads to the argument that the contract is void for uncertainty. As Mustill and Boyd have surmised:

*"Here we are faced with a circular problem. If the court decides that as a matter of commercial policy it should uphold the validity of the substantive contract and of the arbitration agreement, notwithstanding the presence of an equity clause, it will have to interpret the clause in a way which enables this result to conform with the law of contract and of arbitration. If, on the other hand, the Court decides that commercial policy requires the clause to be given the meaning which the parties themselves intended, it may be constrained to hold that the effectiveness of the substantive contract or the arbitration agreement, or both, must yield to this paramount intention."*²¹⁰

To date, the English Courts have signalled their preference for the former option, and clauses have been read down to comply with the law – the very thing that clauses of amiable composition seek to reduce the influence of. Yet, as Mustill and Boyd note, the same Catch-22 is not dealt with in the foreign literature. Why?

*"Many codes of procedure expressly recognise the power of the arbitrator ... to act as amiable compositeur if the contract so provides. The validity of an equity clause, and its compatibility with a binding contract, are therefore not in doubt, so that the Court and the jurists are under no pressure to force an artificial meaning on the clause in order to save the contract."*²¹¹

With the reception of Article 28(3) of the Model Law in New Zealand and the enactment of s.46(1)(b) of the Arbitration Act 1996 (UK) in England, the same can now be said for these countries. However, a very similar provision has been treated quite differently in Australia.

²⁰⁹ In *Deutsche Schachtbau*, above fn 48, at p. 779, Donaldson MR referred to the "vital distinction" between an agreement to agree in future and an agreement to accept terms determined by a third party, stating that the latter was enforceable, but the former was not. Cf Mustill and Boyd, above fn 8, at pp.83-84, who state that the role of a third party is to fill gaps in an executory contract, not one where the time for performance has already passed.

²¹⁰ Mustill and Boyd, above fn 8, at p. 76.

²¹¹ Mustill and Boyd, above fn 8, at p. 76, note 12.

In *Woodbud Pty Ltd v Warea Pty Ltd*²¹², Young J considered the meaning of s.22(2) of the Commercial Arbitration Act 1984 (NSW), which provided that where the parties so agree, an arbitrator “may determine any question that arises for determination in the course of proceedings under the agreement by reference to considerations of general justice and fairness.” This provision is therefore closely aligned with the New Zealand amendment to Article 28(3), which boldly attempts to define amiable composition as the power to decide “according to considerations of general justice and fairness”.²¹³ After referring to some of the English authorities, Young J stated that it was debatable whether the provision went any further than *Rowland v Cassidy* (supra). With respect, this ruling fails to recognise is that the cases relied upon were made at a time when English law did not contain a provision such as s.22(2). There was therefore no recognition of the validity of such a power, or of its compatibility with a binding contract. The supervisory jurisdiction of the Courts required arbitrators to decide according to law. On that basis, the English Courts strained and severely limited the meaning of equity clauses. Such forced meanings are no longer defensible in light of the prominence now given to party autonomy and the limitation of judicial intervention.²¹⁴

B. Civil Law Differences

While the English Courts have laboured with the concept of amiable composition, the civil law has had no such difficulty. Given that the common law is a system based largely on Judge-made law, as opposed to the codes of the Romano-Germanic tradition, one might have expected the reverse to be true. However, a code-based system is not reliant on cases to establish the law. Given that precedent is the foundation on which the development of the law depends, it is perhaps understandable that the common law has been reluctant to allow discretionary decisions based only on the circumstances of the case at hand.

²¹² Unreported, Supreme Court of New South Wales, Equity Division, BC9504818, 15 June 1995, Young J. Cited in *Hewitt v McKensy* [2003] NSWSC 1186.

²¹³ Article 28(3) of the First Schedule to the Arbitration Act 1996 provides:

“The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur (*according to considerations of general justice and fairness*) only if the parties have expressly authorised it to do so.” (This author’s emphasis).

Such recognition would decrease the pool of cases through which the law could grow.²¹⁵

Given the wide manner in which the civil-law codes are drafted, Judges are often required to apply general principles to fill gaps.²¹⁶ This approach is alien to common law Judges,²¹⁷ and places more discretion in the hands of their civil-law counterparts. From this platform, it may be easier for civil-law jurists to recognise the type of discretion granted to an amiable compositeur. Some of the codes recognise fundamental principles, which like amiable composition can be used to mitigate the harsh effects of the law.²¹⁸ In fact, some civil law jurisdictions recognise "super-eminent" principles outside the codes.²¹⁹ According to David:

*"...the law, which is no more than the endless quest for better justice, lies not wholly nor exclusively in the manner in which it may have been interpreted at a particular time, under the influence of various factors, by public authorities in different countries. We do not abandon the domain of law when we recognize, in some cases, that a law superior to state laws may exist, superior inasmuch as it affords a greater place to equity."*²²⁰

As McDowell and Webb note, such a view has probably been reinforced by the Nazi domination of civil-law countries during World War II.²²¹ However, while amiable composition may be linked to the recognition of super-eminent principles, the concept preceded any Nazi influences.

²¹⁴ For a useful discussion of these objects, see Lord Cooke of Thorndon, "Party autonomy" (1999) 30(1) *VUWLR* 257.

²¹⁵ See Weinberg, above fn 175, at p.250.

²¹⁶ For example, see Art. 12(2) of the Italian Civil Code, which provides that "if a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles of the legal order of the State." Cited in Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32(3) *VUWLR* 817, note 6.

²¹⁷ See John O Hannold, *Uniform Law for International Sales* (3ed, Kluwer, The Hague, 1999) at pp.104-105.

²¹⁸ Art. 7 of the Austrian Civil Code enables a Judge to refer to natural law; Art. 281 of the Greek Civil Code prohibits the exercise of a right that breaches good faith, good morals, or is not in accordance with the social and economic purpose of the right. See Morag McDowell and Duncan Webb, *The New Zealand legal system: structures, processes and legal theory* (3ed, Lexis-Nexis, Wellington, 2002) at p. 41.

²¹⁹ See McDowell and Webb, above fn 218.

²²⁰ David, above fn 12, at p.335.

²²¹ See McDowell and Webb, above fn 218.

Finally, it is arguable that the greater use of amiable composition on the Continent correlates with a wider recognition of good faith obligations in the civil law. As discussed above, Loquin has convincingly linked the two concepts.²²² This may also explain why the majority of English amiable composition cases relate to re-insurance treaties, which are based on utmost good faith.

C. *The United States*

In America, amiable composition is not expressly recognised.²²³ But arbitrators apparently assume the powers of an amiable compositeur as a matter of course. Some commentators have opined that this approach is attributable to the "wide awareness in Anglo-American development of 'equity' as an integral element of 'law'."²²⁴ An arbitrator is expected to "do justice as he sees it, applying his own sense of law and equity to the facts as he finds them."²²⁵ The Federal Arbitration Act 1925 contains very limited grounds for vacatur, and a misinterpretation of the law is not one of them.²²⁶ On the other hand, in *Wilko v Swan*²²⁷ the Supreme Court indicated that "manifest disregard" of the law could also lead to vacatur under the Act. This might occur where the arbitrator correctly cited the law, but proceeded to ignore it.²²⁸ However, a number of decisions have established that the doctrine is not available in international cases.²²⁹

V. *PERCEIVED ADVANTAGES AND DISADVANTAGES/RISKS*

²²² See Part III D "Duty to Seek the Most Conciliatory Solution?"

²²³ Stein, Steven J. and Wotman, Daniel R. "International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules" (1983) 38 *Bus. Law.* 1685, at p.1714.

²²⁴ See Craig, Park and Paulsson, above fn 10, at p. 110.

²²⁵ *In the Matter of the Arbitration between Silverman and Benmor Coats Inc* 61 N.Y.2d 299, 308; 473 N.Y.S.2d 774, 779; 461 N.E.2d 1261, 1266 (1984).

²²⁶ *San Martine Compania de Navegacion, S.A. v Saguenay Terminals Ltd* 293 F.2d 796 (1961).

²²⁷ (1953) 346 US 436-437.

²²⁸ See *Bell Aerospace Company Division of Textron Inc v Local* (1973) 516 F Supp 354, 356 (WD NY); *Siegel v Titan Industrial Corp* (1985) 779 F 2d 893 (2d Cir).

²²⁹ See *Brandeis Intsel Ltd v Calabrian Chemicals Corp.* 656 F. Supp. 160, 163-68 (J.D.N.Y. 1987); *Merrill Lynch v Bobker* 808 F.2d. 930, 933-34 (2d Cir, 1986); *Parsons v Whittemore*, above fn 142; and *International Standard Electric Corporation (US) v Bidas Sociedad Anonima Petrolera, Industrial y Comercial*, above fn 139.

A. *Perceived Advantages*

1. *Flexibility and efficiency*

The obvious advantage of amiable composition is the ability of the arbitrator to tailor a result to suit the circumstances. This flexibility may prove invaluable to a long-term relationship by enabling a resolution that lets both parties move forward amicably. According to Karen Weinberg, if the parties seek flexibility then they should opt for mediation. That way they can "ensure a focus on their own sense of justice rather than that of the arbitrator."²³⁰ But if the parties could agree on a resolution, then the matter would not have been referred to arbitration in the first place. The parties require a binding and enforceable award.

In other cases, amiable composition may enable the arbitrator to cut through the legalities and deliver a quick decision. As mentioned above,²³¹ this could prove very useful in determining disputes involving small amounts of money, or where a fast outcome is required.

In practice, arbitrators utilise these powers very circumspectly. They are most frequently used in assessing the consequences of non-performance, where they can free an arbitrator from the rules regarding the calculation of damages or interest.²³² For example, in ICC Case No. 9726 the defendant Dutch buyer was held to have breached an agreement for the sale and purchase of calf skins, having failed to collect and pay for the skins. Deciding as amiable compositeur the arbitral tribunal calculated the damage suffered by the French seller on the basis of the price difference between the initial contract price and the mean sale price of calf skins in October 2001.²³³

2. *A-nationality*

²³⁰ Weinberg, above fn 175 at p.252.

²³¹ See Part IV A "Common Law Doubts Extinguished"

²³² See Craig, Park and Paulsson, above fn 10, at p. 353.

²³³ *French seller v Dutch buyer*, ICC Case No. 9726, (2003) XXVIII YBCA 13, at p.18. See also *Purchaser from a West-African Country v U.S. Supplier*, Awards of June 1984 and May 1985 in ICC Case No. 4567, (1986) XI YBCA 143, at p. 146 (determination of amount of incidental

Perhaps the greatest perceived advantage of arbitration in the international arena is neutrality. Rightly or wrongly, most parties are reluctant to submit to the domestic law of their opponent. This often leads to the choice of an apparently neutral law, which can lead to problems in itself should it be inadequately researched. Furthermore, domestic laws are often ill equipped to deal with international matters. A reference to amiable composition may provide the a-nationality sought.

3. *New and technical areas of law*

The law is frequently inadequate to deal with new and emerging issues, particularly regarding technological developments. An amiable compositeur may use his or her powers to remedy any deficiency.

4. *Increased recognition of commercial and technical aspects*

As discussed above,²³⁴ amiable composition enables an increased recognition of the technical, psychological and commercial aspects of the case.

5. *Finality*

Probably the ultimate expression of party autonomy is the agreement of the parties to submit their dispute to arbitration, to the exclusion of the Courts, and to accept the result, for better or for worse. The consequence of the respect now accorded to agreements of this kind is that the parties are stuck with them – *pacta sunt servanda*. In *Pupeke Service Station Ltd v Caltex Oil (NZ) Ltd*²³⁵, Lord Mustill put it this way:

“In prospect, this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think better of it, and ask the Court to interfere because

damages claimed on account of technical assistance rendered by a French company in negotiating the purchase of a substitute High power Microwave Amplifier).

²³⁴ See Part III C “Duty to Seek the Fairest Solution” above.

the arbitrator has misunderstood the issues, believed an unconvincing witness, decided against the weight of the evidence, or otherwise arrived at a wrong conclusion. All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it."

This represents a major shift from the time when the Courts regarded an ouster of their power to require an arbitrator to state a special case as contrary to public policy, and void.²³⁶ Judicial workloads are now such that arbitrators are no longer jealously perceived as rivals²³⁷, and alternative dispute resolution ('ADR') mechanisms are now actively promoted to ease the burden.

The importance of finality, and the consequent limitation of judicial intervention, is that it fosters certainty in commercial decision-making. By opting for an arbitration clause in their agreement, the parties can avoid the delay, expense and uncertainty associated with the appeal process. Properly understood, amiable composition is incompatible with a right of appeal and therefore fosters finality.

B. Perceived Disadvantages and Risks

1. Ambiguities

In this author's view, one of the biggest risks of amiable composition stems from the uncertain meaning of the term. In *A's Company Ltd v Dagger*, the parties clearly failed to comprehend what their election contemplated.

2. Subjectivity and bias

²³⁵ Unreported, Privy Council, Appeal No. 63/1994, 16 November 1995. See [2000] 3 NZLR 318, at p 338.

²³⁶ In *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, Scrutton L J famously stated at p.488 that "[t]here must be no Alsatia [a haunt of thieves] in England where the King's writ does not run". *Czarnikow* was restrictively distinguished by the New Zealand Court of Appeal in *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669, on the basis that *Czarnikow* was concerned with unequal bargaining power, so that one of the parties was virtually forced to accept the ouster clause. The Arbitration Act 1996 (see below) has now clarified the limits of judicial review.

²³⁷ Lord Cooke of Thorndon "Party Autonomy" (1999) 30(1) VUWLR 257, 259.

The title of this paper was chosen to reflect the subjectivity inherent in the task of the amiable compositeur. As stated above, that subjectivity will place an emphasis on the selection of a wise and reliable arbitral tribunal. As for bias, like any arbitrator an amiable compositeur is required to treat the parties with equality, and failure to do so will place any award in danger of attack.

3. *Lack of predictability of outcome*

The outcome of a particular case may be more difficult to establish in advance, but an election for amiable composition signals that winning is less important than getting an outcome. Amiable composition is geared towards providing for the future. Nevertheless, an amiable compositeur will still be required to hear the parties' respective cases, so not all predictability will be lost.

4. *Lack of uniformity in the development of the law*

This argument is based on a misconception regarding the role of amiable composition. Because a decision is based upon subjective values, it will serve no precedent value (other than perhaps as to the extent of the constituent powers) and does not have an expository role.

5. *Loss of confidence in arbitration*

Provided amiable composition remains an expression of party autonomy, then it will not logically result in any loss of confidence in arbitration. If parties choose to provide an arbitrator with a subjective discretion, which is subsequently exercised to their dissatisfaction, the problem lies with the choice, not the system.

IV. CONCLUSIONS

While amiable composition may lead to uncertainty in some situations, so too may reference to a foreign law (which for the purposes of neutrality may be foreign to both parties). The flexibility offered enhances efficiency and this may

be more important to commercial parties. Certainty of resolution may have higher value than certainty of result for many such parties – particularly those in long term and evolving relationships that would prefer a focus on the future, rather than the past. While it may be right to say that amiable composition cannot provide the uniformity necessary to the integrity and viability of the international business community, who ever claimed it could? Amiable composition ultimately forms a very small part of arbitration and can generally only be conducted at the express direction of the parties. And because it represents the exercise of an arbitral discretion, it really has no precedent value at all, since cases turn on their own facts and the individual arbitrator's conceptions of justice. In that respect, amiable composition is often confused with *lex mercatoria*, which unlike the former, requires the application of trans-national rules and may have a more expository function.

Amiable composition is a discrete and exceptional mode of arbitration to be used only in special circumstances and with a full consensus among the parties as to what it will entail. Ultimately, however, there is nothing wrong with two parties deciding to grant their chosen arbitrator the discretion to decide between their competing claims based upon his or her individual conceptions of fairness. Those who fear it need not choose it. To the extent that it is chosen, amiable composition represents a back to the future type change for English law. After more than a century of jealous Court supervision, parties can once again choose to have their dispute finally decided by a commercial man or woman based on what he or she considers to be fair in the trade in question. Party autonomy dictates that such choices must now be put into effect.

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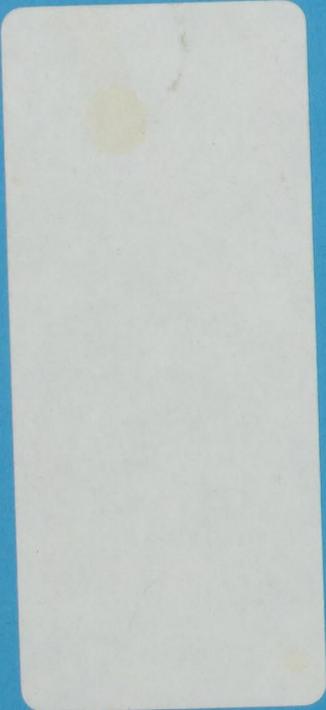
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