Kluwer Arbitration Blog

The Hidden Amiable Compositeur

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for YSIAC

An arbitrator who decides a case by reference to general notions of fairness and equity, rather than in accordance with a strict application of legal rules, is generally referred to as an *amiable compositeur* or as deciding *ex aequo et bono* (even though these notions are not completely synonymous, the terms will be used interchangeably here). In such cases, the arbitrator will, as a rule, be acting with the express authorisation of the parties.

However, there may be situations in which arbitrators, without being so empowered, take it upon themselves to depart from the terms of the contract or a rigorous application of the law and, in effect, act as hidden *amiables compositeurs*.

A recent post here on the Kluwer Blog reported the results of a survey of experienced U.S. arbitrators, which revealed a worrying statistic: It appears that one quarter of the respondents to the survey indicated that, “at least some of the time”, they felt free to follow their own sense of equity and fairness in rendering an award, even if the result would be contrary to applicable law.

Of course, one should be wary of drawing hasty conclusions from such statistics, or of extrapolating general trends for the international arbitration community as a whole. Indeed, the respondents to this particular survey appear to be predominantly active as arbitrators in domestic cases. Nearly half of them indicated that international disputes only made up 1-10% of their caseload in the past five years. It may also be useful to bear in mind that, historically, arbitration in the United States bore many resemblances to *amiable composition* and, in some domestic contexts, still does.

Nevertheless, this statistic could be seen as a manifestation – albeit a rather extreme one – of an underlying phenomenon that may also exist in international arbitration, whereby arbitrators depart from or temper the effect of applicable rules of law, or reach other forms of compromise results, without being expressly empowered to act as *amiable compositeur*. This issue is often dealt with under the misnomer "splitting the baby". To the extent that this refers to a purported tendency of arbitrators to thoughtlessly divide claims down the middle, i.e. award approximately 50% of the amount(s) claimed, the notion has, quite rightly, been challenged as a myth, supported by little or no empirical evidence.

However, "baby-splitting" is often used to denote a wider range of issues resulting in awards that are not justified by fact and/or law. For example, in some cases the losing party might be awarded what seems to be a consolation prize, or the amount of the winning party's claims might be reduced, with little or no legal justification. In others, the arbitral tribunal may appear to have taken a shortcut when determining the quantum of damages rather than fully coming to grips with complex rules of valuation.

The possible reasons for such "compromise awards" are manifold:

- In some cases, the compromise may be the result of the inability or, more rarely, the unwillingness of the arbitrator(s) to fully comprehend complex issues of fact or law. Unfamiliarity with the applicable law may play a part here. Indeed, it may be the case that not all, or even none, of the members of the arbitral tribunal have in-depth knowledge of the relevant legal framework.
- Members of an arbitral tribunal may engage in "horse-trading". This can stem from a genuine difference of opinion as to the facts or the law. It may also (again more rarely) occur where one arbitrator actively promotes the arguments of the party that appointed him, possibly in the hope of repeat appointments. This tactic can be more or less successful, depending on how attached the chairman of the tribunal is to having a unanimous decision.
- And to come back to the point raised at the start of this post, compromise awards may also come about where arbitrators, without being empowered to do so by the parties, decide the case by reference to general notions of fairness and equity, rather than in accordance with a strict application of legal rules. In such cases, the arbitrators' reliance on fairness and equity will not necessarily be directly apparent. They may seek to justify the result of the award by reference to the applicable legal rules, but without actually determining the effect of those rules. Hence the difficulty in identifying such cases of hidden *amiables composition*.

The last scenario distinguishes itself from the first two in that arbitrators who reach such "equitable" decisions most likely believe that what they are doing is right, even if it is not quite (procedurally) correct. They may also believe that, despite not having been expressly authorised to act as *amiables compositeurs*, they are entitled to do so pursuant to a general expectation of the parties that arbitral tribunals, unlike national courts, will temper the effect of strict legal rules with a dose of fairness.

There may be a grain of truth in this perception of the parties' *ex ante* expectations. Indeed, during an e-convention hosted in London in October 2014 in which approximately 150 delegates from over 20 countries took part, 54% of the delegates falling into the category of arbitration "users" indicated that they agreed with the following statement:

"In international disputes, arbitrators should always be empowered to make binding decisions based solely on what is fair and equitable (possibly ignoring applicable laws), unless the parties expressly agree otherwise".

The delegates in question therefore appear to have presumed that arbitrators were empowered to decide *ex aequo et bono* unless specifically prohibited from doing so. However, this presumption is not mirrored in national laws or any other sources of authority. On the contrary, most national laws (including those that have adopted Art. 28(3) of the UNCITRAL Model Law) and most institutional rules provide that the arbitral tribunal may decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

Given the above, it is surprising that both arbitrators and arbitration users, in two wholly independent surveys, have indicated a belief that there is an implicit power for arbitrators to decide according to principles of equity and fairness. Of course, "fairness" is, above all other considerations, what users look for in arbitration, or indeed in any dispute resolution mechanism. But "fairness" in this context means ensuring that the arbitrators are impartial and fair-minded and that the requirements of fair and due process are met. It cannot, by any stretch, be understood as a blanket authorisation allowing considerations of fairness and equity to trump the applicable rules of law. On this point, there is perhaps a need to educate users and practitioners, at least those less familiar with international commercial arbitration standards and practices.

It may be the case that a hidden *amiable compositeur* is acting with the best of intentions and even according to the expectations of some users. It may also be the case, however, that arbitrators rely on notions of fairness and equity to justify (to or amongst themselves) shortcuts in the decision-making process. Either way, if the misapprehension described above is allowed to persist, it could end up fuelling the myth that arbitrators do in fact engage in baby-splitting or that they lack intellectual integrity. There can therefore be no room for the hidden *amiable compositeur* in international arbitration.

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