ROLE OF THE AMIABLE COMPOSITEUR

by The Honourable B.S.J. O'KEEFE AM, QC,
Commissioner, Independent Commission Against Corruption,
New South Wales

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The title of tonight's talk was given to me, not chosen by me. It may be regarded by some as an indication of eccentricity, a characteristic which I confess to possessing to at least a minor degree. However, it is not idiosyncratic nor is it endogenous.

The title of the talk may be regarded either as a statement or a question. As a question, the short answer is: **Very small, perhaps none, at least in most states of Australia.**

The use in modem legislation in Australia of the description "amiable compositeur" and the accompanying phrase "ex aequo et bono" may properly be regarded as unusual. In an age in which plain English is advanced as the norm for legal documents, including statutes, the trend has been to eliminate Latin references from the legal lectionary. However, in the legislation introduced in Australia in 1984 in relation to commercial arbitration almost all the States of Australia included not merely a Latin phrase, "ex aequo et bono", but also a French phrase, "amiable compositeur".

Undoubtedly the incorporation into our statute law of these foreign words was a result of a desire on the part of the legislators to bring into our domestic law of arbitration a provision similar to that found in the Uncitral Arbitration Rules [*Article 33(2)*]. It may also be that the advent of the EEC in Europe with its inclusion of the United Kingdom and Ireland, suggested a need for some soupcon of internationality, a recognition of civil law – a sort of genuflection to the past and to another system of law. But whatever the reason, the inclusion of these two concepts in our commercial arbitration legislation made for academic argument and uncertainty.

What is an amiable compositeur? What does ex aequo et bono convey? Since they are used disjunctively in the 1984 legislation, are they different entities or notions are the terms used as an hendiadys? In the 1984 legislation, did the concepts conveyed by these words absolve the person making the decision or the situation in which the decision was made from the application of our system of law, a system of law, or some amalgam or composite system of various laws? Are the words intended to bring into municipal law the rules of international law or of the civil law as they apply to the concepts in question?

INTERNATIONAL LAW

It may be of use to look first at the rules relating to tribunals acting as amiables compositeurs or ex aequo et bono. The first thing to note is that it is unclear whether there is any difference when an arbitral tribunal acts as amiable compositeur from when it acts ex aequo et bono.

One authority, G Hermann, opines that there is no difference between the two suggesting that it is rather the terminology of different countries that calls up the verbal distinction rather than a distinction in essence. The only rule which he states to apply is:

> "the arbitral tribunal would seek a fair and equitable solution, bound merely by those norms which ensure the international public policy of a given state, ie ordre public relating to international transactions." [*The Uncitral Model Law – Its Background, Salient Features and Purposes. (1985)*]

This view seems to be supported in the analytical commentary on the draft text of the Uncitral Model Law which comments:

> "Article 28(3)... gives effect to an expressed authorisation by the parties that the arbitral tribunal shall decide ex aequo et bono, as this arbitration is labelled in some legal systems, or, as labelled in others, as amiable compositeur." [*Clause 7, A Guide to the Uncitral Model Law on International Commercial Arbitration (1989) at 170*].

On the other hand, Craig Park and Paulsson in their work International Chamber of Commerce Arbitration (2nd edition 1990) seem to be of the view that an arbitral tribunal is bound to apply the law more strictly when acting ex aequo et bono than would be the case if acting as amiable compositeur.

It has been suggested that where contracts have effect into the future and may involve factual situations and circumstances not foreseen at the time the agreement is entered into, the powers of an amiable compositeur would enable the tribunal to adjust the terms of the contract to meet with equitable notions [*Metzger (1982) Arbitration Review 220*].

There is some doubt as to the enforceability of results or outcomes, be they described as awards or otherwise, arrived at ex aequo et bono or when the tribunal acts as amiable compositeur. Clearly, if the concepts involved in these phrases permit a tribunal to decide a matter without regard to law, but rather by reference to their own notions of what is fair, there are problems under the common law in relation to the validity of such a clause. The judgment of Parker LJ in *Home and Overseas Insurance Co v Mentor Insurance Co* [1989 3 ALL ER 74] establishes this proposition. In that case a declaration was sought as to rights under a number of reinsurance contracts which were identical in form. Each of the contracts provided for a reference of any dispute to arbitrators, one chosen by each party, and an umpire chosen by the arbitrators. The contracts directed the arbitrators and the umpire:

> "To interpret this reinsurance in a reasonable manner rather than in accordance with a literal interpretation of the language. Said Arbitration shall take place in London and the cost thereof shall be in the discretion of the Court of Arbitration." (Clause 18)

In considering this clause Parker LJ said:

> "I have no hesitation in accepting the submission of counsel for Home that a clause which purported to free arbitrators to decide without regard to the law and accordingly, for example, according to their own notions of what would be fair would not be a valid arbitration clause." (at 80)

However, His Lordship did not construe the clause in such a manner.

> Such a clause permits arbitrators to depart from the literal or ordinary material meaning and give to the contract "a meaning that would make good commercial sense" [*The Miramar* (1984) AC 676 at 682]. However, such an approach probably does no more than adopt a construction which would not defeat the commercial purpose of the contract. Thus whether such a clause goes beyond the present state of our law or confers any further latitude on the tribunal is both impossible and undesirable to determine in the abstract (Parker LJ supra at 81)

Such a provision would apparently permit arbitrators to apply "internationally accepted principles of law governing contractual relation." [*Deutsche Schachtbau etc -v- R'as Al Khaimah National Oil Co* (1987) 3 WLR 1023)].

DOMESTIC LAW

Do these concepts carry over into the law of the several states of Australia or are the phrases ex aequo et bono and amiable compositeur to be taken as no more than an indication that proceedings may be decided by reference to considerations of general justice and fairness?

When the uniform commercial arbitration legislation was introduced into the several States of Australia, it was against a background of law that required an arbitrator to decide matters in accordance with law, not on a whim nor by application of some unstated principle whether described as a principle of equity, fairness or otherwise. In the past legislation has, from time to time, made provision for the determination of rights in accordance with equity and good conscience but when considered by the courts such provisions have been held not to enable the tribunal charged with so deciding to act other than in accordance with law.

Notwithstanding this Rogers CJ Com Div seemed to take a more expansive view and was critical of the limitations imposed by Parker LJ in *Home Insurance. [The Uncitral Model Law.- An Australian Perspective (1990) 6 Arbitration International 348)*].

Probably the most extensive examination of the rules which apply to the area of law presently under consideration is that undertaken by Megaw J in *Orion Cia. v Belfort Maatschappij* [(1962) 2 Lloyds List Law Reports 257]. That case arose out of an arbitration concerning a dispute relating to a quota share, non-marine reinsurance treaty in which there was a provision that:

> "The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of the law. They shall 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."

In the course of determining to remit the award to the umpire for further consideration, Megaw J set out a number of conclusions in relation to the clause which is reproduced above. These principles were:

i) The effect of such a clause cannot be to exclude the jurisdiction of the court. This is a matter of public policy. (at 262)
ii) It is also the policy of the law that in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law. (at 264)
iii) Arbitrators cannot be allowed to apply a criterion such as the individual view of a particular arbitrator based on abstract notions of justice or equitable principles (equity in this sense not meaning the same as equity in the sense in which lawyers use it here). (at 264)
iv) A contract may properly provide for the arbitral tribunal to determine the dispute in accordance with the rules of a foreign legal system or even, perhaps, on the basis of principles of international law. (at 264)
v) While ever the courts retain a statutory supervisory jurisdiction over arbitrators, it must remain a firm principle of the law governing arbitrations that that which is a question of law, should remain in all respects and for all purposes a question of law, and cannot be turned into something other than a question of law by any agreement of the parties in their agreement to arbitrate or otherwise. (at 264)
vi) If such a clause is to be taken as excluding the application of law it would normally be treated as an indication that the parties did not intend the arrangement to have legal effect and any award under it would not be recognised. (at 264)

Ivamay (Personal Accident and Insurance) accepts this as correct.

It appears that the law in Canada is along similar lines. [*Faubert and Watts v Temagami Mining Co Limited* (17DLR 246); *Re Ozark Farms Limited and Sarno Investments Limited* (39 DLR 360 at 363)].

However, in *Eagle Star Insurance v Yuval Insurance* (1978 1 Lloyds Law Reports 357) the Court of Appeal (Denning MR, Goff and Shaw LJ) disagreed with Megaw J and with the acceptance by Ivamay of the correctness of the approach of Megaw J when he said that the presence of such a clause would not make:

> "The whole contract void or a nullity" and that he could not "see anything wrong with the provision, it can only be on the ground that it is contrary to 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." (at 262)

Goff LJ agreed with the judgment of Denning MR and with his reasons. However he added reasons of his own and these all related to the fact that it was a summary judgment application and that there were some triable issues which should have been allowed to go to trial. In the course of his judgment he expressed the view that under the clause in question the arbitrators:

> "Would be able to view the matter more leniently and having regard more generally to commercial considerations than would be done if the matter were heard in court." (at 363-364)

Shaw LJ agreed with both judgments.

It should be noted from this decision that Denning MR regarded such a clause not as absolving arbitrators from applying the law but as ousting technicalities and strict constructions as equity did in the old days. This is a far cry from suggesting that the concepts of ex aequo et bono and amiable compositeur give to arbitrators carte blanche to decide matters other than in accordance with law, whatever the system of law to be applied may be. In addition it cannot be the view of the law taken by Goff LJ in view of his decision in *Deutsche Schachtbau etc v R 'as Al Khainah National Oil Co* (supra at 1035)

To a like effect is the decision of Parker J in *Home Insurance Co v Administratia Asigurarilor DeStat* [(1983) 2 Lloyds Reports 676]. The contract in that case included the provision that it should be interpreted as an honourable engagement rather than as a legal agreement and that the award should be made with a view to effecting the general purpose of the contract rather than in accordance with a strict literal interpretation of its language.

Parker J held that this clause was intended by the parties to lessen the effect of the strict rules which might otherwise apply rather than make it an arrangement which was not legally enforceable, and on that view held that the clause was valid in light of Eagle Star.

Finally, the decisions in *Home and Overseas Insurance v Mentor Insurance* [(1989) 3 All ER 74)] and *R'as Al Khaimah National Oil Co* (Supra) establish that clauses such as those in question, and concepts such as deciding a matter as amiable compositeur or deciding it ex aequo et bono, still require adherence to an acknowledged system of law, whether it be a single system or a composite or amalgam system.

No real assistance is obtained from the second reading speech made in relation to the 1984 Arbitration Act. The Attorney-General, the Hon Paul Landa, tabled a detailed explanation of the relevant Bill and sought its incorporation in Hansard. He then commended the Bill to the House (Legislative Assembly Debates 19 October 1984 page 2161). The note in relation to clause 22 of the Bill (which became Section 22 of the Act) merely sets out that "the Arbitrator or Umpire may determine any question as amiable compositeur or ex aequo et bono (ie by reference to considerations of general justice and fairness)". The note then refers to Article 33 of the Uncitral Arbitration Rules and quotes paragraph 2 of such Rules as follows:

> "The Arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration." *(Hansard 18 October 1984 page 2162)*