

My experience in arbitration¹

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Abstract

This paper deals with the nature of arbitration as one of the alternatives in dispute resolution processes different from mediation and conciliation, and obviously, from judicial adjudication. Unlike a mediator or a conciliator, an arbitrator is empowered to pass a judgement, like a court. In other words, the arbitrator will render a decision which is binding for the parties. The arbitrator has the jurisdiction, like a judge. Although the office of a judge and an arbitrator is the same, the source of their power is different. The judge's power originates from a State, whereas the power of the arbitrator results primarily from a contract. Unlike the court, the arbitrator lacks the imperium, i.e. the power to make the award enforceable. When a party refuses to enforce the award, enforceability can only be provided by the judge or an authority of the state where the award has to be enforced. In a certain sense the state thus provides the back up for the arbitration system. This paper presents personal thoughts drawn from the author's professional experience as an arbitrator in Franco-German disputes.

Key words

Arbitration; Dispute Resolution; International Commercial Arbitration; Reasoning in Arbitration; Deliberation of Arbitral Awards; Equity; Conciliation; Mitigation of Damages; Amiable Composition; French and German Arbitration

¹ We have deliberately maintained the informal style of the original speech which was aimed at a non-specialist public.

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Table of contents

1. The general characteristics of the way of reasoning of an arbitrator	3
1.1. The features of the deliberations of arbitral courts	3
1.2. The features of the arbitral awards	4
2. The particular characteristics of the reasoning of an arbitral tribunal applying the rules of equity.....	4
3. Concluding remarks	5
Bibliography	6

First of all, a few words about the nature of arbitration, which often gives rise to confusion. In spite of the fact that arbitration is one of the alternatives in dispute resolution processes it is neither mediation nor conciliation². Unlike a mediator or a conciliator, an arbitrator is empowered to pass a judgement, like a court. In other words, he will render a decision which is binding for the parties. The arbitrator has the *jurisdictio*, like a judge. Although the office of a judge and an arbitrator is the same, the source of their power is different. The judge's power originates from a State, whereas the power of the arbitrator results primarily from a contract. The second main difference between arbitration and court proceedings refers to the enforcement of the award. Unlike the court, the arbitrator has not the *imperium*, i.e. the power to make the award enforceable. When a party refuses to enforce the award, the enforceability can only be provided by the judge or an authority of the state where the award has to be enforced. In a certain sense the state thus provides the back up for the arbitration system.

Let us first examine the practical interest of arbitration. Arbitration is of paramount importance in international commercial relations, for many reasons. The main reason is that none of the parties wishes to have potential disputes between them resolved by courts in the country of the other party. This may be due to a mistrust of the impartiality and quality of foreign courts, the complications generated by the necessity to have recourse to a local lawyer, the traps of the international private law rules of the foreign court or the difficulties for this court to apply a foreign law system. For instance, if a dispute about a contract between a French company and a German company, governed by German law, has to be solved by a French court, the result is often not very satisfying. Another reason, common to domestic arbitration, is that the parties can neither expect courts to give priority to their case nor expect it to be resolved within a reasonable period of time.

I would like to highlight two aspects of my experience in arbitration³ which could be interesting when we compare state courts and arbitrators. The first aspect which has always struck me is the arbitral tribunal's way of reasoning compared with a state court. It appears that the reasoning of the arbitral tribunal is quite different from that of the state court. The second aspect only concerns a certain type of arbitration in which the parties require the arbitrator to reach his decision on the basis of equity. What are the characteristics of equity arbitration compared with classical arbitration?

1. The general characteristics of the way of reasoning of an arbitrator

The particular way of reasoning of an arbitrator appears especially during the deliberation and becomes also apparent in the arbitral award.

1.1. The features of the deliberations of arbitral courts

The deliberation of the arbitral court differs from that of a state court in many aspects.

a) First of all it seems to me that in general an arbitral court is more involved in the settlement of the litigation than a state court. Unlike a state court which is a permanent body made up of judges who have been working together for years, an arbitral court is specially appointed to resolve one dispute only. Consequently arbitrators are more aware of the interests at stake than a state judge.

² See for instance Christophe Seraglini (2005); Dominique Vidal (2004). The reader should be aware that a recent statute has revised arbitration law in several aspects, see: Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage; Emmanuel Gaillard, Pierre de Lapasse (2011).

³ The United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention), which is one of my research fields, regularly gives me the opportunity to advise advocates in arbitral litigation involving the Vienna Convention. Furthermore, in recent years, I have been an arbitrator in international commercial litigation or in French domestic affairs.

This is mainly due to the fact that in most cases at least two of the three arbitrators have been appointed by the parties in dispute. The fact that the arbitrators have been appointed by these parties carries even more weight in the decision process. Although an appointed judge is obliged to be impartial, he tends to have the interest of his party at heart. This empathy is perfectly admissible as long as it doesn't turn the arbitrators into advocates which can be disastrous for the proceedings. Due to this special context, the president of the arbitral court will try to obtain the unanimity of the court, in order to avoid procedural incidents or dissenting opinions.

b) In this context unanimity will not necessarily be based on the most legally justified or fairest solution but on the one which appears to best satisfy the three arbitrators. In other words the solution will be found in the compromise which should suit the three arbitrators (Bredin 2004, p. 43, 49). Consequently, it is unusual for an arbitral tribunal to dismiss one party completely and to accord the other party all the rights which often happens in state courts. Thus the mitigation of damages is a very precious tool. This feature characterizes the whole arbitral proceedings. It infiltrates the hearings and the arbitrator will be keener to achieve conciliation than a state judge.

1.2. *The features of the arbitral awards*

Arbitral awards differ in many ways from judgements. Generally they are written much more carefully, they are longer and better motivated - both factually and legally. There are many reasons for this: On the one hand the time devoted to the proceedings and the better environment - more hearings, more testimonies, more experts, better working conditions - improve the quality of the result. On the other hand the arbitral tribunal seeks to convince the parties of the merits of the outcome of the litigation. Having been appointed and paid by the parties the arbitral tribunal owes them a good result, just like a service provider.

Here then are a number of reasons which enable us to understand that litigation is better resolved by an arbitral tribunal than by a state court. We should of course avoid generalizations and make a distinction between the different state jurisdictions. For example German state courts generally render more thoroughly motivated decisions than French state courts. This was verified on the basis of judgements rendered in the two states in the field of international goods sales governed by the Vienna Convention.

The special quality of the awards compared with judgements is particularly obvious on two points: The close scrutiny of the facts by the arbitral tribunals and the more precise evaluation of the damages.

2. The particular characteristics of the reasoning of an arbitral tribunal applying the rules of equity

Many legal systems of arbitration, including international conventions on arbitration, authorize arbitration in equity or in *amiable composition*. This phenomenon is interesting from a sociological and a theoretical point of view. This kind of arbitration often denotes a certain apprehension for law or simply a wish to confer more power on the arbitrator. On a theoretical level, this kind of arbitration leads us to think about the relationship between law and equity. On a technical level, on which I will concentrate my observations, it should be noted that arbitration in equity or in *amiable composition* varies from one system to another.

As a French lawyer I am only familiar with the *amiable composition* in French law⁴. It is somewhat surprising that there is no fundamental difference between the *amiable composition* and normal arbitration. Even when the arbitral tribunal rules in

⁴ For further details, see Christophe Seraglini (2005, n° 2688 et 2689).

equity the role of law remains preponderant. There are many reasons for this. Firstly law is inescapable for the *amiable compositeur* for many issues. He is often required to deal with problems which can only be solved on a legal basis such as questions related to his competence, the capacity of the parties or the application of *lois de police*. Secondly law and equity are not mutually exclusive. On the one hand numerous legal rules reflect equity, for example the mitigation of damages or the revision of excessive penalty clauses. On the other hand the French legal system brings *amiable composition* close to normal arbitration. Indeed according to French case law, the *amiable compositeur* is not obliged to base his decision on mere equity. He is allowed to apply legal rules in so far as he verifies that the legal result is in conformity with equity and that he justifies his reasoning in the award (Betto 2003; Seraglini 2004; Clay 2003; Loquin 2001). Consequently, the arbitrator will in most cases first reason in legal terms which is all the more understandable as he is very often a lawyer and as law is less perilous than mere equity. It is only later that he will confront legal rules and their application to equity.

Let me give you an example: I was a member of an arbitral tribunal required to rule as *amiable compositeur*. The litigation involved the seller of a restaurant and the buyer who refused to pay the agreed price on the pretext the venture had failed for various reasons. He claimed to have been unaware that a nearby firm was planning to close with the result that custom would be lost. He argued that he was the victim of a mistake. The facts revealed that this was not the case. Therefore the contract was valid. Consequently the tribunal ordered the buyer to pay the agreed price applying the rule *pacta sunt servanda* embodied in article 1134 paragraph 1 of the *Code civil*: "Agreements lawfully entered into bind those who have made them as if they were the law"⁵. To justify this result in equity we simply added the following sentence in the award: "Considering that it is conform to equity that a bona fide contractor should be able to trust the word given by his contractual partner, it follows that the claim of the seller, deriving from law, also seems equitable".

One last observation: Let's imagine that the buyer asked the tribunal to lower the price of the restaurant, arguing that the price, being too high, infringes Equity. Would this be possible in the name of equity? The answer is no. According to French case law, the *amiable compositeur* is not allowed to rewrite the contract because he would violate the initial will of the contractors⁶.

When we compare arbitration with state justice, the question arises whether the state judge can decide in equity at the request of the parties. French law provides for this possibility in article 12 paragraph 4 of the *Code de procédure civile*, but only after the dispute has arisen⁷. Hence, *amiable composition* cannot be chosen *ab initio*. And in legal practice, once the trial has begun, article 12 paragraph 4 is never made use of. The reason for this is that a climate of mutual trust between the *amiable compositeur* and the parties is indispensable for a successful arbitration. So, this implies that the *amiable compositeur* has been chosen by the parties, which is not the case when a dispute has been brought to a state court.

3. Concluding remarks

From my point of view, it seems that justice is better served by the arbitrators, especially when it comes to international commerce. Should a massive recourse to arbitration be recommended? Due to its financial costs, arbitral litigation is not

⁵ « Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites » (art. 1134, alinéa 3 du Code civil).

⁶ See for example , Cour d'appel de Paris, 19 avril 1991, Revue de l'arbitrage 1991, 673, note Eric Loquin.

⁷ Art. 12, § 4 C.P.C. : « Le litige né, les parties peuvent aussi, dans les mêmes matières et sous la même condition, conférer au juge mission de statuer comme amiable compositeur, sous réserve d'appel si elles n'y ont pas spécialement renoncé ».

suitable for small and medium sized companies. Therefore, a run on arbitration is not the solution. Preferably, justice served by the state jurisdictions in international commerce disputes should be improved. If this proposal is utopian on a global scale, it is perfectly realistic in entities like the European Union. One could imagine a closer judicial cooperation within the European Union, or even national jurisdictions specialised in international commerce with a specific country, thanks notably to delegate judges from the concerned country. Hence, arbitration is also a source of inspiration and an impetus for a necessary reform of state justice.

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