



Marcus Schmitt

The Arbitrator's power to decide *ex aequo et bono* – A Sleeping Beauty?

Comments on Selected Topics



Topics

- The General Nature of Equity
- Authorization by the Parties: how to awaken the Sleeping Beauty?
- Implementation of Article 28 para. 4 UNCITRAL Model Law
- Reference to Canon Law: Canon 221 Code of Canon Law (CIC)



The General Nature of Equity

- *Ius aequum - ius strictum*: Aristotle, Nicomachean Ethics, 5th Book, Section 10. Aristotle defines equity as a kind of special right within his concept of justice.
- *Iudicia stricti iuris – bonae fidei iudicia* (Gaius, Inst. 4, 6, 28).
- “Equity” means “adequate in a particular/specific case”. Equity supplements codified law to avoid or soften hardship cases.
- A decision in equity means that the arbitral tribunal may decide the case detached from provisions of law and/or rules of law.
- The tribunal must consider, assess and evaluate all circumstances of the specific case based on its sense of fairness.
- A state court is bound by codified law in its decision-making process and may deviate from it only in cases of authorization by the law itself (Austrian law: e.g. certain cost decisions).

>> **There is no general idea of justice detached from the specific case.**

>> **Equity is an inherent element of justice.**



Authorization by the Parties: how to awaken the Sleeping Beauty?

- Present status: **opt-in** model: (explicit) authorization by the parties required.
- Proposal: implementation of an **opt-out** model: national arbitration acts and institutional rules provide for a possibility of the arbitrators to decide a case on principles of equity (if considered appropriate), unless the parties explicitly exclude such possibility.

>> Chance for arbitration to greatly distinguish itself from (state court) litigation.

>> Responsibility of the legal advisors when drafting the arbitration agreement.



Implementation of Article 28 Para 4 UNCITRAL Model Law

Article 28 para. 4 UNCITRAL Model Law:

(4) 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.

- Not implemented in section 603 Austrian Code of Civil Procedure.
- Implemented in section 1194 Polish Code of Civil Procedure.

>> Under Austrian law decisions in equity may deviate from the terms of the contract and/or trade usages.



Canon 221 Code of Canon Law (CIC)

Canon 221 CIC (emphasis added):

§1. The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law.

*§2. If they are summoned to a trial by a competent authority, the Christian faithful also **have the right** to be judged according to the prescripts of the law **applied with equity**.*

§3. The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law.

>> It is a fundamental right of the Christian faithful that judgments are rendered not only on the basis of (statutory) law but in equity as well.

>> Such fundamental right corresponds with a respective obligation of the ecclesiastical judges to apply equity.



Thank you very much for your attention!

Enjoy your meal!