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Amicable composition: An excellent institution for reshaping the contract in the face of changing economic circumstances

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Abstract
The parties to an agreement very often voluntarily omit to regulate any problem concerning the change of economic circumstances and prefer to place their contractual fate in the hands of a third party whose decision will have binding force. They will then play the passive role of observer of the work done by the said third party in the search for a settlement of the conflict between them. This delegation of power is done by virtue of an arbitration clause. The arbitrator is a private judge whose powers are derived solely from the will of the parties. His mission is therefore to settle any dispute arising from the performance of the contract. It is desirable, from the point of view of the moralization of the commercial relations, that he can rule in amicable composer. It is thus advisable to emphasize the practical and theoretical advantages of the insertion of a clause allowing the arbitrator to rule as amicable composer in the face of the upheaval of the contractual economy. It is in this that the amiable composition constitutes an original institution having well determined powers in the settlement of the conflicts between contracting parties.

Keywords: amicable composition, institution, upheaval of the contractual balance, arbitration, conflict

Introduction

The Covid 19 still called Coronavirus hits the world with full force. Its propagation started in December 2019 in China and its diffusion in all the continents has been fulgurating creating colossal damages which could not be imagined a few weeks, months or years before. The public authorities are trying to take exceptional measures that have impacts on economic activities consisting of production, transformation and distribution of goods and services (Pallusseau 2008: 1). This change in the economic situation due to Covid 19 also has serious consequences on the law (Nemeudeu 2020: 7) [22] and particularly on contracts concluded before the pandemic. Contracts are above all risky acts, and this is the case for contracts with staggered performance and contracts with successive performance (Sarr 2020 2020: 7). This raises the question of the legal means available to contractors to combat this form of contractual imbalance, which is essentially linked to the disruption of the initial economic data on which they were based (Fouchard 1979: 67) [9]. Indeed, in several countries, recognition of the theory of unforeseeability can only be contractual in the present state of affairs. However, the legislator is increasingly making exceptions to the principle of the immutability of agreements by expressly authorizing the intervention of the judiciary in the content of contracts, to such an extent that some authors have implicitly deduced the need to transform the current positive law governing the question (Viprey 1997: 918) [32]. This transformation is already effective in France with the Order of 10 February 2016 (JORF n°0035 of February 11, 2016: 26) but is still being considered in Cameroon (Art.1382 of the draft civil code) and in the OHADA area (Art. 162 of the draft Uniform Act Relating to the General Law of Obligations of OHADA) although it is important not to overlook the emergence of an implicit obligation in the vast movement of contemporary law to moralise the contractual bond, the aim of which is to combat excessive imbalances arising from changes in the economic situation (Aboubakar 2015: 148) [1]. The French reform (Art. 1195 of the Civil Code) and all the texts which recognize the unforeseeability theory of provide for precise and very restrictive conditions of unforeseeability. First, there must be an unforeseeable change at the time of formation of the contract. Second, the unforeseeable change must make the performance of the contract excessively onerous for one party. Finally, the parties must not have contractually excluded the application of this article, which is complementary (Issoufou 2020: 5) [13]. The same reform of the French Civil Code has clarified the conditions of force majeure (Fassassi 2020: 4) in article 1218 (Mekki 2020: 170) [21] and this case may be retained if and only if the event is external, unforeseeable and irresistible (Art. 1218 C. civ.).

Whether it is an unforeseen event or a case of force majeure, no matter how it is qualified, Covid 19 will be at the origin of an economic upheaval of the contracts which will generate conflicts which call, in one case as in the other, for the search for a solution to perpetuate the contract. A search for a solution that can be done by several institutions such as the judicial judge, or alternative dispute resolution methods such as mediation, conciliation or arbitration. With a view to the moralization of the contract, it is desirable that the parties have recourse to arbitration while granting the arbitrator the power to rule as an amicable composer (Level 1980: 651) [15]. Amiable composition can be understood as another way of deciding the merits of the dispute without referring to the legal rules of a pre-established structure or to the law of a State (Sossou Biadja 2006: 1) [31]. It is an excellent institution for reshaping contracts that are unbalanced as a result of a change in economic circumstances because of its originality (I) and its powers (II) in the settlement of disputes.

1. The use of amicable composition because of its originality

The originality of recourse to the amicable composer lies in two points. The first concerns the legal means used to resolve the dispute that is submitted to the arbitrator (A), while the second concerns the very objective sought by the contracting parties (B).

A. The originality of the amicable composition as to the legal means employed

From a theoretical point of view, the arbitrator who is given the power of amicable composer by the parties is distinct from the arbitrator of law since he rules in equity (1). However, this theoretical distinction has become blurred over time, so that it is possible to draw a connection between the arbitrator in law and, more broadly, the state judge, and the arbitrator ruling in amiable composition (2).

1. An apparent dissimilarity between the amicable composition and other institutions

The advantage of entrusting the mission of amicable composer to the arbitrator lies in the way the dispute is settled. According to article 15 of the OHADA Uniform Act on Arbitration, "the arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law chosen by the parties. In the absence of a choice by the parties, the arbitral tribunal shall apply the rules of law that it considers most appropriate, taking into account, where appropriate, the usages of international trade. It may also decide as amicable composer when the parties have given it this power"(Art. 1474 of the new Code of Civil Procedure). This article states *a contrario* that the function of the amicable composer is to exempt the arbitrators from observing the rules of law (Loquin 1986: 5.). He may also agree to certain sacrifices concerning the application of the contract.

With respect to the discretionary power to exclude the application of the rules of law, the parties release the arbitrator from his or her mission to decide their dispute according to the rules of law and invest him or her with a mission of trust different from traditional arbitration (Cornu 1980: 373) [4]. In the interest of fairness, the amicable composer will decide the dispute without concern for a strict application of the rules of law. This judgment in equity inevitably leads, in the case of a change in economic circumstances, to going beyond the strict application of the *"lex contractus"*, or rather the rigid framework of the contract as the only law governing the behaviour of the parties.

Moreover, the arbitrator ruling as amicable composer is not obliged to respect article 1134 paragraph 1 of the civil code applicable to Cameroon (Art. 1103 of the French Civil Code) which assimilates the contract to the law. As some have pointed out, *"as soon as the contractual operation is subject to hazards, the contractual content has less value for the parties than the intended result"* (Loquin 1986: 98). It is a question of restoring the contractual balance as intended by the parties; this amounts to giving their expression of will a lasting effectiveness. The parties thus consent to the abandonment of scrupulous respect for their contractual rights in order to give the contract a chance to survive. This abandonment of their contractual prerogatives and therefore of the interests that flow from them allows the arbitrator to be released from the letter of the agreement. However, it is important to emphasize that the parties only give up those rights that are freely available to them. As one author has stated, *"the amicable composition clause may therefore be interpreted as a waiver, in the event of a dispute brought before the arbitration, of the sanction of the rights that the contract gives rise to for the benefit of each of the parties" (*Loquin 1982: 283) [16].

From then on, the amicable composer ensures the protection of the original balance of the contract against external attacks. However, in practice, the distinction between the functions and powers of the amicable composer arbitrator and those of an arbitrator ruling in law or even of the State judge is blurred to such an extent that it is possible to speak of a real resemblance as regards the methods and the objectives pursued.

2. A real resemblance between the amicable composition and the neighbouring institutions

The first similarity between amicable composition and the other methods of dispute resolution lies in the very nature of the decision rendered by the amiable composer. The transactional appearance of amicable composition does not remove the jurisdictional character of the decision. This idea of settlement has its roots in the historical origin of the institution, which in the past required the assent of the parties to the solution reached (Loquin 1986: 362). For a long time now, the solution rendered by the amicable composer no longer requires the acquiescence of the parties, but it is imposed on them with the same force as any other judicial decision.

Amiable composition thus remains a true act of jurisdiction (Loquin 1986: 69), even if it must be recognized that *"amicable composition is on the borderline of the notion of jurisdiction because the confrontation between the parties is less marked"* (Loquin 1976: 223).

The second similarity between legal arbitration and amicable composition arbitration lies in the manner in which disputes are settled and in the means used. The eviction of the rules of law by amicable composition is not total since the amicable composer can apply them to the dispute if he considers it appropriate (Brouillaud 1995:16) [3].

However, this option between the application of legal rules and their abstractions includes a requirement: the amicable composer is obliged, on pain of violating public policy, to give reasons for all his decisions (Level 1980: 663) [15]. The failure to give reasons for a decision makes it appear to be an arbitrary act totally devoid of meaning and value. Thus, the strict application of the rules of law must be motivated by moral considerations based on equity. This confrontation between the application of the rule of law and equity must be reflected in the reasons for the award.

In addition to the possibility for the amicable composer to apply rules of law, there is another tendency which aims at the increasingly frequent use by arbitrators ruling in law and even by the State judge, of the general principles or usages resulting from international trade, more explicitly from the *lex mercatoria.*

Thus, the direct consequence of the recognition of the legal nature of the *lex mercatoria* is to allow third parties/institutions in charge of rendering a legal decision to base their decisions on these principles, usages or rules without contravening their mission. But this observation and this propagation of equitable solutions are not limited to the

field of arbitration. In fact, as one senior judge has admitted, "It should be noted that the judge first seeks an equitable solution and only then verifies whether it is compatible with the rules of law (Vassogne 1984: 273). This pragmatic approach is frequently used when judges are confronted with a problem of imbalance of benefits inherent in the life of the contract for which neither of the contracting parties is responsible and which compromises the durability of the contractual bond.

Judgments in equity are no longer the exclusive prerogative of the amicable composer. However, the assurance for the parties to obtain an equitable solution makes amicable composition a method of dispute resolution that still has many advantages today, which also lie in the solution rendered by the arbitrator invested with this mission.

B. The originality of the solution rendered by the amicable composer

In all likelihood, the amicable composer will render a decision whose main characteristic is its calming and conciliatory function (1), the authority of which will be imposed on the parties without them having the possibility of contesting its merits (2).

1. A fair solution because it is conciliatory

When the parties resort to amicable composition, they wish that an impartial third party settles the dispute or more generally, the difficulties inherent in the life of the contract and pronounces a fair decision, thus a decision which is satisfactory with regard to business ethics. The contracting parties make the amicable composer the armed arm to settle their dispute peacefully and to reinstate a climate of peace, allowing the resumption under serene conditions of their economic cooperation. The opinions of the authors are unambiguous on this point, since some of them have clearly stated that *"the search for equity is the raison d'être of amicable composition and the waiver by the parties of the strict sanction of the rights arising from the contract"* (Loquin 1985: 207). The amicable composer is led to seek in the solution of the dispute a return to the balance of benefits explicitly expressed at the time of the conclusion of the contract but which extraneous circumstances have caused to disappear (Level 1980: 659) [15].

The parties hope above all for a satisfactory reconciliation of their divergent interests and the restoration of the contractual balance. Whereas at the time of the formation of the contractual relationship the parties had achieved, often after long negotiations, a precarious balance between their interests, the change in the economic situation has led to the disruption of their contractual expectations. The contracting parties attach great importance to the durability of their contractual relationship. The arbitrator must take into account in his decision the underlying will of the parties to continue to collaborate, the ultimate goal being to prevent the rupture of their contractual relationship (Loquin 1986: 25). It is necessary to use conventional dispute resolution procedures that allow the judge to discover the most appropriate solution to *"dissolve the conflict, generate cooperation, maintain or restore harmony"* (David 1978:405.). By resorting to amicable composition, the contracting parties do not wish to renounce the application of the principle of *"pacta sunt servanda*" (Bredin 1984: 282.) but simply that this principle should not be applied when it leads to solutions that are unjustified on the economic and moral level. Amicable composition is the ideal form of arbitration in long-term commercial contracts, since the necessary stability and security that must prevail in such commercial relations no longer depend on the strict observance of the parties' contractual or legal obligations.

However, the very nature of arbitration evokes in the collective unconscious, and more particularly in commercial circles, *"an idea of conciliation and harmonization of interests quite different from that of the law which, rightly or wrongly, seems to call for more rigid solutions" (*David 1969: 510). The recourse to the amicable composer arbitrator is an opportune solution because it corresponds to the concern of the litigants to see their dispute settled peacefully. The amicable composition has a function of appeasing antagonisms born from the change of situation during the execution of the contract (Loquin 1986: 341). It is a lenient remedy for the ills that can affect contractual performance. Moreover, the desire to obtain an equitable solution and the confidence of the parties in the arbitrator are reflected in the implicit reconciliation of the parties to appeal the award made by the arbitration body.

2. An unquestionable solution

By stipulating an amicable composition clause, the parties are deemed to have waived the right to appeal the award made by the amicable composer (Loquin 1986: 54). This principle is set out in Article 1482 of the New Code of Civil Procedure, which provides that *"the arbitral award is not subject to appeal when the arbitrator has been appointed as amicable composer, unless the parties have expressly reserved this option in the arbitration agreement"*. This provision applies exclusively to the amicable composition of the arbitral tribunal, as the amicable composition of the court governed by article 12 of the New Code of Civil Procedure provides that the decision may be appealed, unless the parties have specifically waived this right. However, the tacit renunciation of the parties to the procedure of reversal of the award is not absolute since they can provide for this option when drafting their agreement. Article 1483 of the New Code of Civil Procedure provides in this respect that *"the appeal judge shall rule as amicable composer when the arbitrator had this mission"*. However, some authors fear the insecurity of the reformation because *"judicial equity may be profoundly different from that of the arbitrators"* (Rondeau-River, 1986: 7). It does not seem, however, that this argument can be used to criticize the combination of an amicable composition clause and an appeal clause, since it is true that contractual fairness is a notion common to arbitral tribunals and to the courts.

The incompatibility of appeal and amicable composition stems from the very nature of the clause. The waiver of the right to appeal a decision rendered in amiable composition is part of the very philosophy of the institution. As one author has put it, there is not *"an incompatibility in nature"* but *"a difficult coexistence"* (Loquin 1979: 480). The decision of the parties to entrust an arbitrator with the task of settling their dispute in accordance with equity and beyond the rules of law is an act of trust in the arbitral authority. If the amicable composer does not betray this trust and renders a solution that respects contractual fairness, the latter cannot be challenged. One author has rightly noted that *"if the legislator dispenses the judge from this rigorously rational argumentation and entrusts him with a synthetic and intuitive appreciation (or if the parties*

*entrust an appreciation of the same kind to an arbitrator), the decision is sheltered from any possibility of censure. This is the true content of a judgment in equity: a judgment that is unassailable in its conclusions" (*Rotondi 1975: 52) [29].

Moreover, it seems reasonable to consider that the decision rendered in equity is satisfactory to both parties because they belong to the same socio-professional milieu and share the same vision of contractual equity. There is therefore no reason to question the award made by the amicable composer. The fact that the amicable composer renders a solution whose objective is the reconciliation of the contracting parties is in itself sufficient to preclude the possibility of contesting it. Thus, the appeal of a decision rendered contributes to lengthening the duration of the procedure and, as a result, risks permanently compromising the commercial cooperation between the parties. The harmonious pursuit of cooperation between the parties must be the primary objective of the arbitral award and only amicable composition can achieve this goal. However, once the objective of the amicable composer has been clearly defined, it is normal to wonder about the effective powers he has to achieve this goal.

2. The use of the amicable composition because of its powers

It is certain that the objective of amicable composition is the adaptation of the contract, whereas moderation or revision are only means to achieve this (Jarrosson 1987: 305) *[14]*. If revision is more radical than moderation, it is because it has consequences for the future of the contract, whereas moderation concerns only rights that have already expired (Loquin 1986: 285). It is therefore appropriate to consider, first, the power of moderation (A) and, secondly, the power of revision of the amicable composer (B).

A. The power of moderation of the amicable composer

The main objective of amicable composition being to restore a certain balance between the benefits, it is appropriate to moderate certain contractual excesses that have arisen as a result of changed economic circumstances. As some authors have stated, *"the amicable composer has his own powers to deal with contractual stipulations which he considers excessive; more precisely, he is able to set aside or mitigate the consequences of a rigorous application of a particular clause, if these seem unacceptable from the point of view of equity" (*Fouchard 1979: 80). However, while a large part of the doctrine endorses this argument (Loquin 1986:285 ; Osman 1992: 171 ; Level 1980: 65) [15], some authors (Bredin 1984: 282) refuse to accept the attribution of such a prerogative to the amicable composer (1). Beyond the doctrinal controversies, the courts recognize, according to consistent case law, that the amicable composer has the power of moderation with respect to contractual rights (2).

1. The doctrinal consecration of the power of moderation

The admission of a power of moderation granted to the amicable composer has been the subject of a controversy, the main lines of which must be considered. This controversy is opposed to the case law, which is unambiguous on this point. Critics of giving the arbitrator a power of moderation invoke the obstacles of public policy, even though the function of the amicable composition clause requires such a prerogative.

Indeed, amicable composition is analyzed as a waiver by the parties of the protection of legal rules. The problem is to know what exactly is meant by the waiver of the application of rights. In reality, *"the discretionary powers of the amicable composer with respect to the law end where the parties who have invested in him no longer have control of their rights" (*Loquin 1986: 248). The only limit to this prerogative lies in public policy (Level 1980: 661) [15]. Generally speaking, according to article 1484-6 of the New Code of Civil Procedure, the arbitrator has a duty to make an award that does not undermine public policy. Moreover, the OHADA Uniform Act on Arbitration prohibits recognition and enforcement if the award is manifestly contrary to public policy (Art. 31 al 4 of the UA on arbitration). The amicable composition clause does not release the parties from their contractual obligations, but *only "expresses the renunciation of the latter to avail themselves of the rights that the contract creates in their favour"* (Loquin 1986: 282). Supplementary rules are opposed to rules of public order. These supplementary rules are at the free disposal of the parties. As some have written, *"there is an antinomy of principle between the private will of the parties and public policy"* (Bore 1976, D. 1976: 577).

However, some authors have argued that the principle of *"pacta sunt servanda"* - obliging compliance with contractual law - is a principle of natural law, of international public order. In other words, the principle of autonomy of the will and its consequence of the intangibility of the contract belong to the hard core of public policy. This excludes any power of moderation of the arbitrator (Bredin 1984: 226).

However, this assimilation between the principle of immutability of agreements and public policy is refuted by case law. The courts refuse to allow an action for annulment for violation of public policy when the arbitrator is accused of having distorted an act submitted to him. Thus, the Paris Court of Appeal, in a decision of June 8, 1984, held that *"the annulment of an award on the grounds of the arbitrator's violation of a rule of public policy does not extend to cases where it is only alleged that the documents submitted to the arbitrator have been distorted" (*Paris Court of Appeal 1984: 516). This case law of the Paris Court of Appeal is in line with that of the Court of Cassation (C. of Cass, Civ. 2 1976: 310). The argument that there is an identity between the principle of immutability of agreements and public policy becomes inoperative (Brouillaud 1995:89) [3]. There is therefore no longer any reason to challenge the moderating power of the amicable composer on this basis.

All the arguments considered do not allow one to deny the amicable composer a power to moderate unfair contractual stipulations. This power is all the more justified since it corresponds to the very philosophy of the amicable composition clause and to the spirit of the institution. Indeed, some scholars have written with relevance that *"if one accepts that, by the amicable composition clause, the parties renounce the strict sanction of the rights they have acquired at the time the dispute arises and of which they have free disposal, there is nothing to prevent amicable composers from moderating, in the name of equity, the rights created by the contract"* (Loquin 1985: 205). However, the renunciation by the parties of the benefit of the strict application of their contractual rights is not without

an ulterior motive. It is unanimously recognized that *"the stipulation of an amicable composition clause must be interpreted as a desire to authorize arbitrators to combat the effects of unforeseeability"* (Loquin 1986: 207).

The will of the parties arises from the very nature of the contracts. Contracts that have important economic stakes are not random contracts. Consequently, they must not, in principle, undergo any profound modification of their initial balance (Art. 1104 of the Civil Code). At the time of the conclusion of the contract, the contracting parties did not wish to subject their relationship to the vagaries of time. The unfortunate debtor, a victim of changing economic circumstances, did not enter into the contract with full knowledge of the facts; he is subject to chance, which surprises him in his contractual forecasts. Consequently, a person who, in entering into a contractual relationship, has had legitimate, well-founded and reasonable expectations, must not see his expectations reduced to nothing by external circumstances. However, any commercial transaction involves a risk by definition. Only, the parties have assumed the risk in a certain proportion. Small variations are not taken into account by the law, which is consistent with the adage *"De ninimis non curat praetor"* (Roland & Boyer 1992:154) [28]. It is inconceivable to say that the parties wished to nullify even the smallest effects of changing circumstances.

On a strictly conceptual level, the intrusion of the amicable composer into the contractual system is justified. Court decisions have long recognized the possibility of moderation by the amicable composer.

2. The jurisprudential consecration of the power of moderation

With regard to the powers of moderation of the amicable composer, the case law is unambiguous. Thus, a decision of the Paris Court of Appeal affirms that *"the amicable composition clause is a waiver of the effects and the benefit of the rule of law, the parties losing the prerogative to demand its strict application and the arbitrators receiving the correlative power to modify or moderate the consequences of the contractual stipulations when equity or the common interest of the parties so requires"* (Paris Court of Appeal 1996:381). This decision is in line with the case law inaugurated by a decision of this same court dated January 14, 1977, in which it decided that the arbitrator, by virtue of his power of amicable composer, was able to temper the strict application of the agreement and therefore was able to grant the creditor only part of the contractual claim (Paris Court of Appeal 1977: 281). The Paris Court of Appeal has consistently held over the last four decades that the amicable composer has *"the power to depart from the strict application (...) of the clauses of the contract, provided that they do not reproduce rules of public order (...) He may thus modify or moderate the consequences of certain contractual clauses in consideration of reasons of equity (...)" (*Paris Court of Appeal 1985). However, it must be noted that the courts as a whole consider that moderation should only affect the extent of the obligation laid down by the contract. As one author forcefully reminds us, *"to moderate the effects of the contract would only be to attenuate or enlarge the existing obligations" (*Loquin 1996: 381). Thus, the magistrates of the judicial order consider that the creation of a new obligation by the amicable composer constitutes an overstepping of his mission. Consequently, the moderation of contractual obligations has a limit whose content varies.

Indeed, the whole problem in this case is to know whether the arbitrator invested with the power of amicable composition can revise the contract. Between the revision of the contract and its moderation, there is a borderline whose limits remain blurred.

B. The review power of the amicable composer

The modification of the contractual economy seems to constitute the limit to any power of moderation. However, there does not seem to be any objection to granting such a power to this third party, either in terms of its jurisdictional function (1) or in terms of the philosophy of amicable composition (2).

1. The review power of the amicable composer and its jurisdictional function

The argument most often put forward to refute any power of review for the amicable composer is his jurisdictional mission. The amicable composer is an arbitrator whose mission is traditionally limited to deciding a dispute between two litigants. By granting the amicable composer a power of review, there is a confusion with the function of agent. However, if one considers that arbitration is an evolving institution (Oppetit 1976: 92) [23] covering a very electric range of situations, the distinction between the agent and the arbitrator based on the criterion of the will of the parties to entrust a third party with the mission of settling a dispute and not of fixing a new obligation becomes difficult to use (Oppetit 1976: 96) [23]. Indeed, in the context of long-term contracts, the missions entrusted to arbitrators go beyond the strict framework of their traditional jurisdictional functions. Arbitrators become regulators of contracts which they are charged with completing or adapting to new conditions, even outside of any litigation (Loquin 1976: 224). It is therefore undeniable that the strictly subjective criterion of probing the intention of the parties is difficult to apply (Loquin 1980: 9). This difficulty is reflected in the case law which qualifies as arbitration the settlement of a dispute in which a third party fixes a contractual element even though the parties have turned to this third party because of the disagreement that exists on the fixing of this element (C. of Cass. 2nd 1974: 302). Thus, the distinction between the arbitrator and the agent is, on a strictly theoretical level, difficult to make and can in no way constitute an argument for denying the amicable composer any power of review.

2. The power of review and the purpose of the mutual agreement clause

The spirit of amicable composition advocates the admission of a power of revision entrusted to the arbitrator. While the arbitrator's intrusion into the content of the agreement may be open to criticism when the parties have not foreseen a contractual situation arising from their attitudes, it is entirely justified when events not attributable to the parties upset the contractual balance.

In the event of a disruption of the initial contractual data as a result of COVID 19, there is no obstacle to entrusting third parties with such prerogatives. In fact, the power of revision is justified if it has a specific purpose: to remedy unforeseen circumstances (Loquin 1980: 24). Indeed, as some authors rightly state, *"the stipulation of an amicable composition*

clause must be interpreted as a desire to authorize arbitrators to combat the unforeseeable effects" (Loquin 1985: 207. The generality of the powers of the amicable composer corresponds to what the parties wanted, or rather, *"what the parties wanted" (*Loquin 1986: 297). Moreover, is it not said that *"the power of revision in the event of unforeseen circumstances is of the very essence of the amicable composer"?* (Loquin 1991: 2).

The question does not arise in terms of licit or illicit prerogatives but in terms of objectives. To contract is to agree on something (Ghestin 1990: 8) [10]. Since, to quote Doyen Ripert, *"to contract is to foresee" (*Ripert 1949:151) [26], *the* security of transactions and therefore the balance of services requires that the parties see their forecasts respected and that the amicable composer can revise the contractual link in the event of a disruption of the initial economic data. As some have pointed out, *"the amicable composition clause is a mechanism for making up for revision clauses that are too narrowly conceived. It is intended to compensate for the inadequacies of revision mechanisms which would prove incapable of dealing with new circumstances which upset the contractual balance"(*Loquin 1986: 292). Consequently, it is not shocking to give the arbitrator the power to readjust the contractual relationship to the circumstances surrounding its performance.

The pragmatic approach of the arbitrator will be to verify beforehand the alteration of the balance of benefits by a foreign cause. In concrete terms, one of the parties complains of the excessive onerousness of its performance or of the devaluation of its counter-performance, following a sudden change in the economic situation or, more generally, a foreign cause. Therefore, the arbitrator questions the legitimate expectation of the parties, i.e. the extent of the economic benefit that the parties wished to obtain from the contractual transaction in question. He compares the expected profits with the new contractual situation resulting from the radical change in the economic data. The arbitrator's task is to verify whether the alteration in performance is due to a cause not attributable to the parties and whether it causes an unfair imbalance in performance. Moreover, the judges of the French Court of Cassation, when they rule on the violation of the mission of the amicable composer, use a vocabulary specific to the definition of the unforeseeable theory of. It is only after this twofold finding that the amicable composer takes the measure most likely to restore the contractual balance. Therefore, if these conditions are met, the arbitrator has the possibility of interfering with the content of the agreement.

In short, in order to readjust the contract, it is important that the amicable composer does not stick to the letter of the contract but to the economic forecasts that the agreement is supposed to cover. He can detach himself from *the "instrumentum"* to make prevail a more economic reading of the contract based on the exchange of balanced value. He sacrifices the immutability of the agreement in the name of the moralization of the contract and its economic utility for the contracting parties (Ghestin 1982:13). However, even if the arbitrator ruling as an amicable composer is not bound by the immutability of the contract, as a state judge or an arbitrator ruling in law may be (Loussouarn 1996: 220), the revision of the contract must be the result of an express request by one of the contracting parties. The amicable composer cannot revise the contract on its own initiative. It is important that he be seized of a dispute or a problem relating to the execution of the contract. This seems to be one of the rare conditions for the intervention of the amicable composer in the content of the contract.

Conclusion

We have presented in the previous dichotomous developments the practical and theoretical advantages of inserting a clause allowing the arbitrator to rule as an amicable composer faced with the upheaval of the contractual economy since many authors recognize that *"the amicable composition is the ideal instrument of the theory of unpredictability"* (Mezger 1948: 617). In reality, the moralization of the contract condemns the execution under the initial conditions of an agreement whose economy is degraded following the change of economic situation. Didn't Demogue write that: "*By the contract, people join together for their common interest. In the face of new circumstances, it must be repeated, the contract which is a living thing cannot be absolutely rigid. To live is to transform oneself while remaining in a certain general direction. Revision is therefore necessary"* (Demogue 1924: 697). *Thus, as one author was able to rec*all, legal certainty no longer depends, as in the 19th century, on the stability of the contract, but on the contrary on its ability to follow the changes imposed on it by external circumstances" (Jarrosson 1987: 321) [14]. Is it not possible to state that "the unforeseen is no longer unpredictable"? Indeed, "any contract whose execution is deferred or staggered over time is exposed to more or less significant indirect alterations and the existence of which cannot be denied, the equivalence of the services which was realized at the birth of the contract will no longer be found during payment" (Delmas-Saint-Hilaire 1960: 190). Regardless of the care that the parties may have taken in drafting their agreement, economic relations are too unstable and precarious to guarantee the stability and equivalence of reciprocal benefits. The excellent way open for the remodeling of their agreement is therefore that expressly provided for by them and consisting in delegating the adaptation of the said agreement to a third party. In this case, the parties delegate the resolution of their dispute to a third party by a so-called amicable composition clause. This means that the amiable composer does not take up a case; it must be seized in accordance with the clause which provides for it. An altogether original clause in terms of the legal means employed and the conciliatory and rarely contestable solutions. And it is rightly that its practice is currently recommended in the business world gradually emerging from the COVID 19 crisis.

References

1. Aboubakar S. The moralisation of the law of contractual obligations, PhD dissertation, University of Yaounde II, 2015.
2. Bredin JD. "The amicable composition and contracts", The Arbitration Journal, 1984,
3. Brouillaud JP. The amicable composition judge, PhD dissertation, Paris I, 1995.
4. Cornu G. "The arbitrator-judge", The Arbitration Journal, 1980,
5. David R. - *Comparative law course,* Paris Faculty of Law, 1968-1969.
6. Arbitration in civil law, a technique For Regulating Contracts, In *Mélanges Marty*, 1978.

7. Fassassi Q. “Reflection on the legal qualification of the Covid-19 in Contract Law”,
8. Ersuma. bulletin of Professional practices, n°031, 2020.
9. Fouchard Ph. “The adaptation of contracts to the economic situation”, The Arbitration Journal, 1979.
10. Ghestin J. - “The useful and the just in contracts”, *D*, 1982.
11. “The notion of contract”, D. The Law Journal, n°12, The contract, PUF, 1990.
12. Hebraud P. “Arbitration in French Law”, Annals of the Toulouse Faculty of Law, 1954.
13. Issoufou A. “Covid 19, an opened door to the unforeseeable in French-speaking African States using codified civil law?”, *LGA* handbook, 2020.
14. Jarrosson Ch, The Notion Of Arbitration, Lgdj, Private Law Library, 1987.
15. Level P. “The Amiable composition in the decree on arbitration of 14 May 1980”, The Arbitration Journal, 1980.
16. Loquin E. - “Amiable composition in comparative and international law, (contribution to the study of non-law in commercial arbitration). In: International Journal of Comparative Law. 1982, 34(2).
17. “The application of national rules in international commercial arbitration”, in International Commercial Arbitration, The Contribution of Arbitral Jurisprudence, Seminar, 1986.
18. “The obligation of the arbitrator to back up the verdict, (on a decision of the Court of Paris of 5 February 1976)”, Arbitration journal, 1976.
19. “Powers and duties of the amiable composer. About three decisions of the Paris Court of Appeal”, Arbitration Journal, 1985.
20. Loussouarn N. Contribution to the study of judicial review of contracts in private law, PhD Dissertation, Renne, 1996.
21. Mekki M. “From the urgency to the unexpectedness of Covid-19: Which contractual toolbox?” in Covid 19 and the contract, *AJContrat*, 2020.
22. Nemeudeu R. Covid-19 and the Law, *The Nemro*, Quarterly Journal of Economic Law, 2020. available at www.lequotidienlejourinfo/pr-robert-nemeudeu-le-covid-19-et-le-droit ;
23. Oppetit B. Arbitration and long-term commercial contracts, The Arbitration Journal, 1976.
24. Osman F. The general principles of the lex mercatoria, Contribution to the study of an international legal order, PhD Dissertation, Dijon, 1992.
25. Paillusseau J. “The influence of globalisation on the law of economic activities”, *Ohadata*: D, 2008, 08-07.
26. Ripert G. The moral rule in civil obligations, LGDJ, 1949.
27. Robert J. “Denaturation by the arbitrator. Realities and perspectives”, The Arbitration Journal, 1982.
28. Roland H, Boyer L. *Adages of French law*, Litec, 1992.
29. Rotondi M. Considerations on the function of equity in a system of positive written law, in Studies in Private Law, Public Law and Comparative Law, I, Compendium of studies in honour of M. ANCEL, Pédone ed., 1975.
30. Sarr MP. “Plea for the consecration of the theory of unforeseeability in the future Uniform Act relating to the law of obligations of OHADA, available at www.village-justice.com;
31. Sossou Biadja J. Comparative study of international arbitration in OHADA and Switzerland, University of Geneva, Diploma of Advanced Studies, 2006, available on www.memoireonline.com
32. Viprey R. Towards a relative generalisation of the principle of unforeseeability in private law? D.A., 1997.