Why *ex aequo et bono* cannot be used without parties' express agreement: a comparative analysis

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INTRODUCTION

Many arbitration laws and institutional rules use notion of "*ex aequo et bono*" or amiable compositeur. But in practice 'a very limited number of international commercial arbitration agreements provides for arbitration 'ex aequo et bono' or for an arbitrator to act as 'amiable compositeur'.[1] A study shows that parties refer to such model only in 2 or 3 % of all arbitration agreements.[2]

The purpose of this essay is to analyse what could be the reasons for such vague use of the *ex aequo et bono* method. In this regard, two principal questions should be answered: why some arbitral rules prohibit using *ex aequo et bono* and amiable compositeur without express parties' agreement? And if the Arbitral Tribunal renders the award in the absence of such parties' will, what are the legal consequences for an award?

For this purpose, first of all, I will analyse some arbitration rules that impose a prohibition of amiable compositeur or ex aequo et bono method without parties' consent (**I**). Then, I will briefly explore origin and content of amiable compositeur and *ex aequo et bono* in UNCITRAL Model Law (**II**), and give reasons why the *ex aequo et bono* dispute resolution method is possible only by the parties' expressed consent (**III**). And then I will address second question what are the possible consequences for an award if a tribunal relies on *ex aequo et bono* basis in the absence of parties' agreement? (**IV**) and draw conclusions (**V**).

I. PROHIBITION OF AMIABLE COMPOSITEUR OR *EX AEQUO ET BONO*

If we randomly select arbitration rules, many of them prohibit the Arbitral Tribunal to decide the case on the basis of amiable compositeur or *ex aequo et bono*.

For instance, LCIA Arbitration Rules, effective 1 October 2020, provides in Article 22.3 that '[t]he Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "*ex aequo et bono*", "amiable composition" or "honourable engagement" where the parties have so agreed in writing'.

Article 21(3) of the ICC Arbitration rules also states that '[t]he arbitral tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers'.

Article 27(3) of the SCC Arbitration rules similarly stipulates that '[t]he Arbitral Tribunal shall decide the dispute ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so'.

UNCITRAL Arbitration rules also prescribes that '[t]he arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so'.[3]

In the same vein, Arbitration Rules of the Vilnius Court of Commercial Arbitration (2021) provide in Article 25(4) that '[t]he Arbitral Tribunal acts based on the principles *ex aequo et bono* (at equity) or *amiable compositeur* (ami-

[1] Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 2987.

cable mediation) only in cases where the parties expressly authorises it to do so'.

Although the examples above use slightly different terminology when to use the amiable compositeur or *ex aequo et bono,* e. g. to apply principles deriving therefrom,[4] or assume the powers to decide,[5] or right to decide,[6] all mentioned rules unanimously said that the parties' express permission or authorization is required.

And such a trend[7] is not surprising, at least from the legal arbitration framework perspective, as the same principle had been embodied in the UNCITRAL Model law[8] and then transposed into the level of domestic arbitration law and relevant arbitration rules.

Before moving to the legal effect of the prohibition to decide the dispute on the basis of amiable compositeur or *ex aequo et bono* without express parties' permission to do so, we need to look briefly into the reasons why the principle was included into UNCITRAL Model Law and its content.

II. ORIGIN AND CONTENT OF AMIABLE COMPOSITEUR OR *EX AEQUO ET BONO* IN UNCITRAL MODEL LAW

Looking at the history of drafting the UNCITRAL Model Law, both terms of amiable compositeur or *ex aequo et bono* were used because this notions may differ in some systems:

> [t]here was general agreement that this article[9] was acceptable even though many States do not provide for such arbitrations. The prevailing view was to retain both expressions ex aequo et bono and amiable compositeur in the model law because under some national laws there might be a difference in meaning between them.[10]

Teramura further explains that '[t]he origin of today's *ex aequo et bono* in the Model Law is *amiables compositeurs* found in Article VII.2 of European Convention on International Commercial Arbitration'[11] and used as interchangeable concepts and there is no longer a distinction between them.[12] Therefore, for the sake of clarity

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[2] Ibid p. 2987. For the occasions when the parties expressly allowed in the arbitration clauses to decide the case *ex aequo et bono*, see e. g. *ACME Holding et al. v. Distributor* (Final Award), ICC Case No. 19627; *IIG Capital LLC v. Republic Federal Bank, N.A.* (Final Award), ICC Case No. 16117/JRF, 2 September 2010; *Distributor X srl v Manufacturer Y SA*, Final Award, AIA Case No. 57/94, 24 November 1995; *French Enterprise v Yugoslav Subcontractor*, Award, ICC Case No. 3540, 3 October 1980.

[3] UNCITRAL Arbitration Rules, Article 35(2).

[4] LCIA Arbitration Rules, Article 22.3.

[5] ICC Arbitration Rules, Article 21(3).

[6] SCC Arbitration Rules, Article 27(3), UNCITRAL Arbitration Rules, Article 35(2).

[7] See also, e. g., 2016 SIAC Arbitration Rules, Article 31(2); 2014 ICDR Arbitration Rules, Article 31(3); 2018 HKIAC Arbitration Rules, Article 36(2). This principle is also settled on the domestic law level, see., e. g., Lithuanian Arbitration Act, Article 39(3); UNCITRAL Model Law, Article 28(3); French Code of Civil Procedure, Article 1512; Swiss Law on Private International Law, Article 187(2); Belgian Judicial Code, Article 1710(3); Netherlands Code of Civil Procedure, Article 1054(3).

[8] UNCITRAL Model Law, Article 28(3).

[9] Initial draft of the UNCITRAL Model Law prescribed in Article 32 that '[t]he arbitral tribunal shall decide ex aequo et bono [or as amiable compositeur] [only] if the parties have expressly authorized to do so'. It was explained that '[t]he prevailing view was to maintain the word "only" in the second square brackets in order to indicate that the procedure was an exceptional one"; see Report of the Working Group on International Contract Practices on the Work of its Fourth Session, A/CN.9/232, para. 170.

[10] Report of the Working Group on International Contract Practices on the Work of its Fourth Session, A/CN.9/232, para. 169. See also Howard M. Holzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Kluwer Law International 1989) p 770.

[11] Nobushimi Teramura, 'The strengths and Weaknesses of Arguments Pertaining to Ex Aequo Et Bono' (2019) 15 Asian International Arbitration Journal 63.

[12] Ibid pp 66-69. See also Laurence Kiffer, 'Amiable Composition and ICC Arbitration' (2007) 18(1) ICC Int'l Ct. Arb. Bull. 51; *ICC Case No. 10728 of 2001* (2007) 18(1) ICC Int'l Ct. Arb. Bull, 98; *ICC Case No. 7986 of 1999* (2007) 18(1) ICC Int'l Ct. Arb. Bull. 72. Although, some commentators explain that *ex aequo et bono* should be distinguished from the French concept of *amiable composition* which means that the arbitrators shall apply the applicable substantive law

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further only the notion '*ex aequo et bono*' will be used in this publication.

More important task is to confer the content of *ex aequo et bono*. Latin notion "*ex aequo et bono*" means "what is good and fair". Thus, the underlying principle is that when deciding the dispute, the Arbitral Tribunal should not follow strict application of legal rules. Rather, the arbitrator can apply general notions of fairness, equity and justice.[13] In such cases, 'the arbitral tribunal will not resolve the dispute by applying determinate rules of law to the facts, but rather will render a decision according to its perception of justice in the individual case'.[14] As *ex aequo et bono* is drafted in a negative way, it is easier to analyse it through the lenses of applicable restrictions.

Binder explains that in terms of UNCITRAL Model law, there are several restrictions for using *ex aequo et bono*:

- Such resolution is possible only through express parties' agreement;
- Arbitral Tribunal must to take into account the contractual provisions and applicable usages of the trade;[15]
- The Arbitral Tribunal shall not infringe fundamental principles of *audiatur et altera pars* and party equality;
- The Arbitral Tribunal shall not violate public policy[16] in the award.[17]

In my view, Arbitral Tribunal, even rendering the award on *ex aequo et bono* basis, shall not also decide on non-arbitrable disputes.[18] Also the Arbitral Tribunal must provide reasoned arbitral award even if the arbitrator(s) decide(s) on the basis of *ex aequo et bono*.[19]

In other words, even if the parties authorize the Arbitral Tribunal to decide on *ex aequo et bono*, the Tribunal should comply with the specific contractual parties' stipulations and mandatory provisions of applicable law (i. e. on the non-arbitrable disputes), observe public policy and fundamental principles such as *audiatur et altera pars*.

But why *ex aequo et bono* dispute adjudication method is possible only by the parties' expressed consent?

III. REASONS WHY THE *EX AEQUO ET BONO* DISPUTE RESOLUTION METHOD IS POSSIBLE ONLY BY THE PARTIES' EXPRESSED CONSENT

In my opinion, the following main reasons explains why *ex aequo et bono* is available only subject to the express parties' agreement:

- *Party autonomy* is one of the axioms on which the international arbitration is built.[20] Born goes even further stating that it is an objective of international commercial ar-

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but may correct the result if it appears unfair in the case at hand; see Peter Burckhardt and Philipp Groz, 'The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International 2013) p 170; Tobias Zuberbuehler, Christoph Mueller et al. (eds.) *Swiss Rules of International Arbitration: Commentary* (2nd edn. Schutlhess Juristische Medien AG 2013) p. 371.

[13] Garry B. Born, *International Commercial Arbitration* (2rd edn, Kluwer Law International 2014) p 2771.

[14] Peter Burckhardt and Philipp Groz, 'The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International 2013) p 169.

[15] UNCITRAL Model Law, Article 28(4).

[16] Ibid Articles 34(2)(b)(ii) and 36(1)(b)(ii).

[17] Dr. Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (3rd edn, Sweet & Maxwell 2010) para. 6.016.

[18] UNCITRAL Model Law, 34(2)(b)(i) and 36(1)(b)(i); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(a).

[19] Peter Burckhardt and Philipp Groz, 'The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International 2013) p 170.

[20] Klaus Peter Berger, 'Institutional arbitration: harmony, disharmony and the Party Autonomy Paradox' (2018) 34(4) Arbitration International 473.

bitration.[21] Party autonomy principle gives the parties liberty to set the legal and procedural framework of the arbitration they are involved.

- One of the aspects of this principle is a possibility for the parties to set the applicable substantive law.[22] If the parties agree on the applicable law, the Arbitral Tribunal shall follow such an agreement.[23] By deciding the dispute *ex aequo et bono*, the Arbitral Tribunal may apply his subjective set of rules or beliefs which may be not in line with the applicable law agreed by the parties, and, consequently, in breach of the party autonomy principle.
- *Legitimate expectations* principle follows from the party autonomy axiom: when the parties are free to agree on set of rules, any contrary course of the proceedings may differ from what the parties are expecting. The parties expect to render the award based on the agreed applicable substantive law or conflict of law rules, not on the *ex aequo et bono*. Therefore, the parties' agreement to decide the dispute *ex aequo et bono* is required.
- *Arbitral Tribunal's mandate* derives from the parties' agreement. The parties draw the scope of arbitration by entering into the arbitration clause. Entire arbitral proceedings are based on contractual stipulations.[24] And not only the proceedings, but also the Arbitral Tribunal's powers, including those of do decide the dispute *ex aequo et bono*.
- *Pacta sunt servanda* – this is a basic principle known and applied in international arbitration and in many arbitral awards.[25] If the parties agree on substantive law this agreement is obligatory for the arbitrators unless there are mandatory laws the parties cannot derogate from.[26] In the same vein, if the parties do not agree to decide the dispute on *ex aequo et bono* basis, the Arbitral Tribunal does not have the power to do it on its own.

And if the Arbitral Tribunal disrespect the parties' will and adjudicates the dispute on *ex aequo et bono* basis, it put in danger validity or recognition of the award in question.

IV. WHAT ARE THE POSSIBLE CONSEQUENCES FOR AN AWARD IF A TRIBUNAL RELIES ON EX AEQUO ET BONO BASIS IN THE ABSENCE OF PARTIES' AGREEMENT?

The principle has its value if it can be enforced. If the parties do not agree to decide their dispute *ex aequo et bono*, the Arbitral Tribunal should not ignore this. Otherwise, it may put in danger validity or enforceability of the award in question.

In terms of challenge of the award, for instance pursuant to the grounds established in the UNCITRAL Model law,[27] the following scenarios are possible:

- Absent to the parties' agreement, awards rendered *ex aequo et bono* might be subject to annulment as an excess of authority[28] on the basis of Article 34(2)(a)(iv) of the UNCIRAL Model Law; i. e. when arbitral procedure was not in accordance with the

[21] Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 81.

[22] Ibid p. 82.

[23] The parties' liberty to agree in writing upon the applicable law is embodied in many of the Arbitration Rules; see, e. g., LCIA Arbitration Rules, Article 16.4; ICC Arbitration Rules, Article 21(1); SCC Arbitration Rules, Article 27(1); UNCITRAL Arbitration Rules, Article 35(1); UNCITRAL Model Law, Article 28(1).

[24] Julian D M Lew, Loukas A Mistelis, Stefan M Kroell, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) p. 77.

[25] Daniel Cohen, 'Le contrat devant l'arbitre : Pacta sunt servanda et/ou adaptation ?' (2017) Revue de l'Arbitrage 2017(1) 87.

(2018) 34(4) Arbitration International 473.

[26] See, e. g. C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECLI:EU:C:1999:269.

[27] UNCITRAL Model Law, Article 34.

[28] Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 3592.

agreement of the parties.[29] For instance, Paris Cour d'Appel partially annulled an award where the Arbitral Tribunal decided amiable compositeur despite of the lack of parties' agreement to do so.[30]

- In Italy, for example, in such situation the arbitral award might be annulled triggering an *excès de pouvoir* by the arbitrators.[31]
- In Germany, 'should the arbitral tribunal render a decision *ex aequo et bono* in lieu of a strict legal decision absent explicit authorization by the parties, then the decision and award may be set aside in its entirety.[32]
- The same grounds for annulment of the award exists in Lithuania.[33]
- The State's courts could also annul the *loci arbitri* award based on public policy consideration[34] when the Arbitral Tribunal has disregarded applicable mandatory law the parties cannot deviate from.[35] In Austria, for example, 'the arbitrators when deciding *ex aequo et bono* are bound in particular by the procedural and substantive ordre public.[36] Swiss Federal Supreme Court, for instance, held that 'an award deciding the case *ex aequo et bono* instead of under the agreed applicable laws could not be set aside for breach of international public policy, unless the outcome of the dispute would have been clearly different if the applicable laws had been applied'.[37] In Switzerland, 'the authorization to decide *ex aequo et bono* does not allow the arbitral tribunal to depart from the provisions pertaining to international public policy.[38] Spanish courts, for example require the need for every award to be reasoned as reasoning is 'a basic foundation of the rule of law and of public policy'.[39]

If the party seeks to recognize and enforce the award abroad, the award could not be recognized or enforced based on the following grounds established in the New York Convention:

- As in fact UNCITRAL Model Law mirrors provisions of Article V of the New York Convention, the grounds for refusal to recognize and / or enforce the arbitral award rendered *ex aequo et bono* without express parties' authorisation are similar to those discussed when dealing with the annulment of the awards.
- In Born's words, '[a]n arbitral tribunal's exercise of *ex aequo et bono* <…> without the parties' agreement, is an excess of

[29] Howard M. Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) p. 932 fn. 28.

[30] *Riverstone Ins Ltd v Brouard & Daude-Brouard* (2009) 927. See also *Gothaer Finanzholding AG v Liquidators of ICD* (2010) Mealey's International Arbitration Report 25(3) 26; *Holding Tusculum BV v Louis Dreyfus SAS* [2008] QCCS 5904; Judgement of 8 January 2002, Case No. 72/117 Cairo Court of Appeal.

[31] Massimo Benedettelli, *International Arbitration in Italy* (Kluwer Law International 2020) p. 341.

[32] Patricia Nacimiento, Stefan M Kroell et al. (eds), *Arbitration in Germany: The Model Law in Practice* (2nd edn Kluwer Law International 2015) p. 316.

[33] Lithuanian Arbitration Act, Article 50(3)(4).

[34] UNCITRAL Model Law, Article 34(2)(b)(ii).

[35] Even if the parties authorize the Arbitral Tribunal to decide *ex aequo et bono*, '[t]he prevailing view is that mandatory legal rules applicable to the case may not, however, be disregarded by the tribunal', Annette Magnusson, Jakob Ragnawaldh, et al. (eds.) *International Arbitration in Sweden: A Practitioner's Guide* (2nd edn Kluwer Law International 2021) p. 205.

[36] Manfred eider, Michael Nueber, et al. *Dispute Resolution in Austria: An Introduction* (Kluwer Law International 2015) p. 44.

[37] Ibid p. 373; see also 4A_370/2007 of 21 February 2008, ASA Bull 2008(2) 334.

[38] Tobias Zuberbuehler, Christoph Mueller et al. (eds.) *Swiss Rules of International Arbitration: Commentary* (2nd edn. Schutlhess Juristische Medien AG 2013) p. 372.

[39] Carlos González-Bueno (ed) *The Spanish Arbitration Act: A Commentary* (Carlos González-Bueno Catalán de Ocón; Dykinson, S.L. 2016) p. 212. Interestingly, in Portugal the award based on *ex aequo et bono* cannot be appealed; see André Pereira da Fonseca, Dário manuel Lentz de Moura Vicente, et al. (eds.) *International Arbitration in Portugal* (Kluwer Law International 2020) p. 171.

authority under Article V(1)(c) [of the New York Convention]'.[40] Here, courts should distinguish awards 'where the arbitrators merely failed to accurately apply the applicable law or to provide a legal justification stringently based on that law' and defence should be based on causality.[41] Because error on law is usually not a ground to review the award in question in recognition and enforcement proceedings (*révision au fond*). Therefore, some commentators think that such case should not 'give rise to a possible defense under Article V(1)(c) of the New York Convention.[42] However, it should be sufficient to establish the lack of the parties' authorization and application of *ex aequo et bono* model for using Article V(1)(c) without further investigation of the Tribunal's reasoning in the Award in question. Thus, in my opinion, rendering the award on *ex aequo et bono* basis without the parties' authorization should be a ground to apply Article V(1)(c).

In light of the foregoing, dispute resolution using *ex aequo et bono* method without parties' authority to do so could be treated as excess of authority in terms of UNCITRAL Model Law, Article 34(2)(a)(iv) and New York Convention, Article V(1)(c).

In any event, the Arbitral Tribunal shall deliver reasoned award in line with mandatory law. Otherwise, there is also a risk to apply *ordre public* defence.[43]

CONCLUSIONS

UNCITRAL Model Law, many arbitration rules and statutory laws allows *ex aequo et bono* method only if the parties expressly allow the Arbitral Tribunal to do so. Such authorization is required by the following principles of party autonomy, legitimate expectations, and *pacta sunt servanda*.

Even if the parties authorize the Arbitral Tribunal to decide on *ex aequo et bono*, the Tribunal should comply with the specific contractual parties' stipulations and mandatory provisions of applicable law (i. e. on the non-arbitrable disputes), observe public policy and fundamental principles such as *audiatur et altera pars*.

Dispute resolution using *ex aequo et bono* method without parties' authority to do so could be treated as excess of authority in terms of UNCITRAL Model Law, Article 34(2)(a)(iv) and New York Convention, Article V(1)(c). In any event, the Arbitral Tribunal shall deliver reasoned award in line with mandatory law. Otherwise, there is also a risk to apply *ordre public* defence (UNCITRAL Model Law, Article 36(1)(b)(ii); New York Convention, Article V(2)(b)).

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[40] Garry B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) p 3897. See also Franco Ferrari and Friedrich Jakob Rosenfeld (eds) *Autonomous Versus Domestic Concepts under the New York Convention, International Arbitration Law Library* (Kluwer law International 2021) p. 268.

[41] Franco Ferrari and Friedrich Jakob Rosenfeld (eds) *Autonomous Versus Domestic Concepts under the New York Convention, International Arbitration Law Library* (Kluwer law International 2021) p. 269.

[42] Ibid. p. 269.

[43] UNCITRAL Model Law, Article 36(1)(b)(ii); New York Convention, Article V(2)(b).