Amiable Composition and Ex Aequo et Bono Arbitration

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**Amiable Composition and arbitration ex aequo et bono** are variations of commercial arbitration in which the parties expressly agree that the Arbitrator is not bound by strict rules of law and is free to give effect to general considerations of equity and fair-play on an award decided upon being equitable and bona fide.

Ex aequo et bono is a dispute settlement out of law and based on fair and just moral and commercially accepted principles. An arbitrator deciding upon such principles (an amiable compositer) is allowed to disregard the mandatory provisions of law as well as the non-mandatory rules so far as they remain within the general frame of acceptable national and international public policies.¹

The arbitrator’s freedom in such proceedings to disregard the law and make a purely “equitable” or “commercially viable” decision is argued by some, as distinguishing “True Arbitration” from these two forms and thus taking them out of the definition of Arbitration.

The argument is built upon that the essence of arbitration’s adjudicatory character is the application of law and that the deliberately attached amiable composition and its nature are fundamentally irreconcilable with the definition of Arbitration and its character. The argument also goes as far as suggesting that the concept of amiable composition and ex aequo et bono can be unpredictable and subjective.²

In opposition to this argument we should remember that Amiable Composition and ex Aequo et Bono are in the composition of the procedural conduct of arbitration and in the tribunal’s process of deciding on the final award. Nevertheless, parties can provide the arbitrator with specific amiable composition references developed in in particular precedents or legal systems or by referring to certain commercial or trade standards as a guide for what the parties consider to be equitable and fair in a specific dispute.

All (nearly all) arbitration rules allow the tribunal to decide a dispute in ex aequo et bono if duly authorised by the parties prior or during the arbitration process. *(UNCITRAL Model Law Artiles 28(3), 33(2))*

Historically arbitration was distinguished from other contemporary resolution for the very reason that the whole concept of arbitration is being “equitable” rather than built on laws which may not be fair and just when applying to specific arbitrable cases.³

However, it is the Tribunal with its procedural methods (Adjudication) and the Award (Final and Binding) that qualifies ex aequo et bono as “Arbitration”.

The fact that parties to arbitration chose to contract out of substantive national law, does not alter the fundamental fact of their agreement to arbitrate and if the parties choose a law to be applied to their dispute and at the same time elect for the arbitrator to decide in amiable ex aequo et bono, the parties in this case, authorise the tribunal to decide the case on the basis of equity but the arbitrator is limited by mandatory regulations of the chosen law.

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¹Legal systems such as in Civil Law countries (French Civil Code 1806) do not accept the concept of ruling outside the frame of the law but may accept decisions made in ”composition amiable” by the parties or on the basis of equity (Switzerland).


³ *ibid*; In Medieval Europe as in France, Italy, England and Germany, parties could choose to participate in Court proceedings (nach Recht) or a proceedings in equity “Arbitration” (nach Guel).
Amiable composition and ex aequo et bono are characterised as arbitration in conventions and national legislations and only substantive standards that alter from one national legislation to the other. In practice, the distinction is blurred and regardless of the law or applied principles, an Arbitrator in actual fact is a judge who enjoys certain flexibilities in not applying national law or lex mercatoria should the decision disregards the moral values of an equitable award.\(^4\)

The ICC stated that “the arbitrator has to abide by the principles which form the international public order”; however, the arbitrator while modifying the rules of lex mercatoria, may still apply rules and principles that are not yet included or acknowledged in the international public order.\(^5\)

New rules and equitable precedents can eventually be generated by the repetition of decisions based on ex aequo et bono and may become binding.\(^6\)

On the other hand, we have to remember that the arbitrator’s powers finds acquires its limitations from the will of the parties directly expressed in the arbitration clause in their agreement to arbitrate.\(^7\)

**The question is: While arbitrators try to reach an award which they may consider equitable, unbiased and just, can an arbitrator deviate from or modify the arbitration agreement of the parties?**

Generally the arbitrator is bound by the contractual provisions of the parties where the Model Law expressly requires the tribunal to “decide in accordance with the terms of the contract in all cases, provided that the terms of the contract reflect the true intent of the parties and do not conflict with the mandatory provisions of the law.”\(^8\)

A thinkable exception is whether the arbitrator can deviate from the express stipulations of the agreement if he finds that the circumstances of the conclusion of the contract show that the parties did not or were not able to foresee the dispute in hand. Certain doctrines may allow such deviation, but how far and how much flexibility is the arbitrator allowed into amiable composition or ex aequo et bono.\(^9\)

\(^4\) ICC award 3344(1982); “if the application of the law would lead to an inequitable result, the arbitrator may decide not to apply the rule of the law and may mitigate its effect to reach an equitable result.”

\(^5\) *Ibid*: ICC 1677(1975)

\(^6\) ICC award 2216 (1974); “many principles and rules in Lex Mercatoria were initially developed by awards in ex aequo et bono”.

\(^7\) UNCITRAL Model Law Article 28(4)


\(^9\) Mohamed Raffa, PhD Candidate, (Banking and Financial Disputes, How can you force a bank to an award)2012.