International arbitration is increasingly criticized for having become too inflexible, inefficient and overburdened with several debilitating civil courts’ interference predicated on the *lex causae* and the *lex arbitri* – the law governing only the mutual rights and obligations of the parties to the contract as agreed with respect to the material terms of the contract and the procedural law or rules guiding the arbitration itself as agreed by the parties or derived from the law of the seat of the arbitration. It is common phenomenon in international arbitration that the strict application of a particular national law of either of the parties may lead to arbitrary direction in proceedings and decisions in the final award. Often times, the intent of the parties to the contract containing the arbitration clause may be suppressed or defeated entirely because of the ever evolving national laws of the various states which in the resolution of commercial dispute may not be fair or commercially sound. This is more precarious as the business environment, situations, conditions and terms of commercial transactions are never certain but subject to constant changing factors which may not be contemplated by the parties at the time of the contract.

**DEFINITION**

One of the fundamental principles of arbitration is ‘party autonomy’ which is the right of the parties to a contract to elect the means of resolution of any dispute thereof. One of the application of this principle is the right of the parties to elect that any dispute may be decided ‘ex aequo et bono’ by the arbitral tribunal. *‘Ex aequo et bono’* which means "according to the right and good" or "from equity and conscience". This concept in the context of international arbitration requires that the parties grant arbitrator(s) power to dispense with the consideration of the law and consider solely what they consider to be fair and equitable in the case at hand. It is often described as arbitration and not arbitrary which may be the result of strict application and interpretation of the various applicable laws to the arbitration.

This ancient concept of ‘ex aequo et bono’ is now part of most modern public international arbitration law and is also expressly provided for in the UNCITRAL Model Law on International Commercial Arbitration 1985. Article 38(2) of the Statute of the International Court of Justice (ICJ) provides that the court may decide cases *ex aequo et bono*, but only where the parties agree thereto. Equally, Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976) provides that the arbitrators shall consider only the applicable law, unless the arbitration agreement allows the arbitrators to consider *ex aequo et bono*, or amiable compositeur, instead. Article 13(4) of the ICC Arbitration Rules and Articles 28(3) and 33(2) of the UNCITRAL Model Law 1985 with the amendments adopted in 2006 allow the arbitrators to act as amiable compositeur, but only if the parties confer such powers upon them.

**APPRAISAL**

The current trend in international arbitration where parties confer such powers upon the arbitrator to act as ‘amiable compositeur’ or to decide the dispute between the parties *ex aequo et bono*, such Arbitrator(s) have the power to depart from the strict application of rules of law and decide the dispute according to justice and fairness. The arbitrator is allowed to disregard not only the non-mandatory provisions of the national laws, but also the mandatory provisions of law, however the decision must respect international public policy. Arbitration *ex aequo et bono* is usually the substitution of the harshness and arbitrariness of national laws for a decision premised on equity and fair-play in accordance with commercially accepted international principles.
There are several advantages of arbitration *ex aequo et bono* or ‘amiable compositeur’. The major attraction is the flexibility of the procedure and the means of arriving at the final decision. This procedure is suitable especially (i) where the rights and obligations of the parties cannot always be determined from the beginning in long-term contracts (ii) where unforeseen circumstances are likely to occur in the life time of the contract, and (iii) where the parties involved may be more like joint venture partners than adversaries with conflicting interests.

Another advantage is the denationalization of the procedures of the international arbitration which ultimately promotes international and cross border commerce. The main concern of foreign investors and international commerce is the application of the principles of various national civil laws or the law of the seat of the arbitration which may not be favorable to the foreigner or international commerce. Just as equity came to ameliorate the pains and harshness of common law and the lex mercatoria during the medieval age to safeguard merchants and their goods.

Finally, because the various national laws differs by the day more and more because of the peculiarity of the various legal systems and commercial life, foreigners and investors justifiably believe that the national rules and laws are not appropriate for the resolution of dispute in international commerce. This coupled with the complicated rules on conflict of laws and the civil resolution procedures which takes too much time and resources makes the application of concept of *ex aequo et bono* a ready solution.

On the other hand the opponents of *ex aequo et bono* arbitration have argued that an ad hoc justice, as the amiable compositeur or *ex aequo et bono* arbitration leads to conflicting decisions and thus loss of confidence in the system. It is further argued that the uncertainty involved in this system encourages discrimination and bias unlike the more secure position and consistency of several national laws and rules applicable to arbitration. The lack of precedential value of the decisions in arbitration *ex aequo et bono* and that of the amiable compositeur awards is equally highly criticized.

Lastly and perhaps the most debilitating argument against the use of *ex aequo et bono* arbitration is the registration and enforceability of the amiable compositeur award. The ultimate purpose for resolving conflict via arbitration is the possibility of the registration and enforcement of the final award. It is equally the cardinal duty and obligation of arbitrators to render an enforceable award. Even in arbitration *ex aequo et bono* or when acting as amiable compositeur, the arbitrator must ensure enforceability of the award in the state which has a connection with a given case. The challenge here is that the possibility of enforcement of an award under *ex aequo et bono* arbitration depends on the law of the state of enforcement whether it recognizes arbitration conducted under the *ex aequo et bono* concept or not.

**APPLICABILITY**

However, most developed countries presently are moving towards acceptance of equity-type clauses and *ex aequo et bono* arbitration which makes such decisions or awards enforceable in these countries. Both the English legal system and the French legal system are now liberal towards amiable compositeur awards.

In the United States of America, under the New York Convention the civil court would not be able to refuse enforcement of the arbitral award just because the arbitrator acted as amiable compositeur. *Ex aequo et bono* is not expressly recognized in statutes or the case law in the US, but it is very frequent in practice. *Ex aequo et bono* arbitration and the amiable compositeur is not regarded as a different form of decision-making or award in the US because equity is an integral part of the law. The rationale of liberal approach of the United State is that every arbitrator ought to make equitable considerations, even without express authorization by the parties. Hence, the US arbitral awards rendered under the concept of amiable compositeur or *ex aequo et bono* are sheltered form judicial review.

In Nigeria, there is no direct reference to amiable compositeur or *ex aequo et bono* in the Arbitration and Conciliation Act LFN 2004. S.15 (1) provides that arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules. S.15 (2) however gives the arbitral tribunal the power to ‘conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing’. This power conferred on the tribunal by the provision of S. 15 (3) ‘*include the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it*’. This in my opinion coupled with the
express powers of the parties to arbitrate *ex aequo et bono* under their agreement (party autonomy) would give recognition to amiable compositur or *ex aequo et bono* arbitration in Nigeria.

The current trend with enforcement of arbitral award in Nigerian Courts is that the courts are more reluctant to meddle with arbitral award or set same aside for no just cause. The Court is bound to accept findings of fact and even of law which do not appear on the face of the record to have been irregular or manifestly wrong provided that the arbitrators did not act outside the agreement of parties. The rationale for this current trend in the words of Augie JCA is that ‘parties take their arbitrator for better or for worse both as to decision of fact and decision of law. The court must not be over-ready to set aside awards where parties have agreed to abide by the decision of the tribunal of their selection unless it is a radically wrong or vicious proceedings’. Both the ACA and the Courts recognized the fact that the arbitrator is at liberty to make findings of fact and act on such findings in line with the parties’ agreement.

One can then conclude that Courts in Nigeria would give recognition and enforce decisions of amiable compositur or *ex aequo et bono* arbitration if the parties confer such powers upon the arbitrator since equity is an integral part of Nigerian legal system.

**CONCLUSION**

Parties can breathe certainty into *ex aequo et bono* arbitration and award by providing the amiable compositur with specific references developed in particular precedents or legal systems or by referring to certain commercial or trade standards as guide for what is equitable and fair in any specific dispute. Equally, general principles of *lex mercatoria* and equity can also be sources of equitable discretion of the amiable compositur and *ex aequo et bono* arbitration.

*Disclaimer: This article does not constitute legal advice neither is it a substitute for obtaining legal advice from a legal practitioner.*

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