РОЗДІЛ XI. МІЖНАРОДНЕ ПРАВО

УДК 341.1
DOI https://doi.org/10.24144/2788-6018.2024.05.130

THE ESSENCE OF THE EX AEQUO ET BONO METHOD AND THE RULES OF ITS APPLICATION FOR THE RESOLUTION OF INTERNATIONAL DISPUTES

Ahmadov Etibar Mazahir oghlu,
Phd student
Department of Public International Law
Baku State University
ORCID: 0000-0002-1893-793X
e-mail: etibar.ahmedof@gmail.com

Ahmadov E.M. The Essence of the Ex aequo et bono Method and the Rules of its Application for the Resolution of International Disputes.

One of the most important functions of law is the resolution of disputes. However, legal means of dispute resolution, such as judicial settlement and arbitration, are often not chosen by the parties involved in international disputes. This can be explained by several reasons. In legal doctrine, it is a common view that parties avoid legal means due to the binding nature of the decisions rendered, yet this is far from the only reason why parties refuse these methods. In particular, one of the main reasons they avoid legal means is the uncertainty regarding whether the decision based on law will be equitable. There are many grounds for this, as legal norms contained in international legal documents, adopted several decades ago, may not correspond to modern realities. Therefore, the application of such norms can quite reasonably raise concerns among the parties about the potential for an inequitable decision based on them.

In such cases, the method of ex aequo et bono may prove to be a practical tool for excluding the possibility of an inequitable decision based on legal norms. Contrary to popular misconception, the use of the ex aequo et bono method does not imply a complete rejection of legal norms. When applying this method, basic legal norms are often used to provide a legal foundation for decisions and to enhance their overall objectivity. However, in the application of the method ex aequo et bono, those legal norms that may lead to an inequitable decision are not applied. In this case, an equitable decision is often determined based on an analysis of the goals and principles of legal documents regulating the relevant issues, including an analysis of the document containing the legal norm whose application could have led to an inequitable decision. Thus, the ex aequo et bono method is a rather flexible peaceful means, combining valuable features of both equity and law.

There is a deficit of information regarding the ex aequo et bono method in international legal documents. In particular, the lack of a clear definition, conditions, and rules for applying the ex aequo et bono method presents a significant obstacle to its extensive use in international practice. Therefore, appropriate lawmaking work should be undertaken in this area to fill legal gaps.

The goal of the scientific article is to study the legal aspects of the ex aequo et bono method and identify the main problems negatively affecting the practice of its application. The results of the research showed the high practical value of the ex aequo et bono method in dispute resolution, especially in modern conditions when the use of flexible means is becoming increasingly relevant. The article aimed to condense, specify and expand legal knowledge about the ex aequo et bono method and may present significant scientific value for lawyers interested in judicial and arbitration practices; legal scholars; practicing judges and arbitrators; parties with unresolved disputes; as well as philosophers researching the relationship between equity and law.

Key words: international courts, method, equity, ex aequo et bono, amiable compositeur, justice, arbitrators and judges, dispute resolution, procedural law, substantive law, arbitral award.

Ахмедов Е.М. Сутність методу ex aequo et bono і правила його застосування для вирішення міжнародних спорів.

Однією з найважливіших функцій права є вирішення спорів. Однак часто правові засоби ви-

рішення спорів, такі як судовий розгляд та арбітраж, не обираються сторонами міжнародних спорів. Пояснюється це декількома причинами. У юридичній доктрині поширена точка зору, що сторони не вибирають правові засоби у зв'язку з обов'язковістю для дотримання винесеного рішення, проте це далеко не єдина причина, через яку сторони відмовляються від цих коштів. Зокрема, однією з основних причин, по якій вони відмовляються від правових засобів, є невпевненість в тому, що винесене на основі права рішення буде справедливим. Для цього є чимало підстав, тому що правові норми, що містяться в міжнародно-правових документах, прийнятих кілька десятків років тому, можуть не відповідати сучасним реаліям. Тому застосування подібних норм вельми обґрунтовано може викликати побоювання сторін про винесення на їх основі потенційно несправедливого рішення.

У таких випадках метод ex aequo et bono може виявитися досить практичним інструментом для виключення можливості винесення несправедливого рішення на основі правових норм. Всупереч поширеній помилці, застосування методу ex aequo et bono зовсім не означає повну відмову від правових норм. При застосуванні даного методу часто застосовуються базові правові норми для забезпечення юридичної основи рішень і підвищення загальної об'єктивності винесених рішень. Однак при застосуванні методу ex aequo et bono не застосовуються ті правові норми, які можуть призвести до несправедливого рішення. При цьому справедливе рішення нерідко визначається на основі аналізу цілей і принципів юридичних документів, які регулюють відповідні питання, в тому числі на основі аналізу того документа, який містить правову норму, застосування якого могло б призвести до несправедливого рішення. Таким чином, метод ex aequo et bono є досить гнучким мирним засобом, що поєднує в собі цінні особливості як справедливості, так і права.

У міжнародно-правових документах спостерігається дефіцит інформації щодо методу ex aequo et bono. Зокрема, відсутність чіткого поняття, умов і правил застосування методу ex aequo et bono є значною перешкодою для його інтенсивного застосування в міжнародній практиці. Тому в цьому напрямку повинна здійснюватися відповідна нормотворча робота для заповнення правових прогалин.

Метою наукової статті є вивчення правових аспектів застосування методу ex aequo et bono та виявлення основних проблем, які негативно впливають на практику застосування даного методу. Результати дослідження показали високу практичну цінність методу ex aequo et bono у вирішенні спорів, особливо в сучасних умовах, коли застосування гнучких засобів набуває все більшої актуальності. Стаття була спрямована на конденсацію, конкретизацію та розширення юридичних знань про метод ex aequo et bono, і може представляти значну наукову цінність для юристів, які цікавляться судовою та арбітражною практикою; вчених-правознавців; практикуючих суддів і арбітрів; сторін, що мають неврегульовані суперечки; а також для філософів, які досліджують питання про співвідношення справедливості і права.

Ключові слова: міжнародні суди, метод, справедливість, ex aequo et bono, amiable compositeur, правосуддя, арбітри і судді, врегулювання спору, процесуальне право, матеріальне право, арбітражне рішення.

Problem statement. The close relationship between law and equity has been observed since ancient times. Law, as it was believed, is the expression of equity in the form of legal norms. However, contradictions and discrepancies between law and equity have often arisen, and these can still be observed today. This is due to the fact that the application of law can sometimes lead to an inequitable decision, while making a decision based on equity may be unlawful. Therefore, finding a balance between law and equity has always been one of the most important tasks of the academic community, especially among legal scholars.

The need to establish a balance between law and equity becomes particularly acute in legal practice when resolving disputes. One of the methods that allows establishing a balance between law and equity in dispute resolution is the method of ex aequo et bono (translated from Latin as "according to equity and good faith"). The possibility of applying the ex aequo et bono method is provided for in the foundational documents of most international courts and arbitration bodies. However, unfortunately, the procedure for resolving disputes using this method is not regulated in any of these documents.

In legal doctrine, there are relatively few academic works and studies dedicated to the study of the ex aequo et bono method. This is partly explained by the fact that decisions made using the ex aequo et bono method constitute a small portion of all decisions in judicial and arbitration practice. At the same time, it should be emphasized that this statistic is primarily due not to the inefficiency of the ex aequo et bono method but to reasons unrelated to the advantages or disadvantages of this method. Therefore, studying the ex aequo et bono method and identifying the reasons that negatively affect the revelation of its potential, with the aim of subsequently eliminating them, represent significant value in the theoretical and practical development of jurisprudence.

The purpose of the scientific article is to study the legal basis for the application of the ex aequo et bono method and to identify legal and other issues that hinder the effective use of this method in international practice.

The degree of elaboration of the problem. In legal doctrine, there is a significant body of scholarly work that studies and analyzes various complex aspects of the application of the ex aequo et bono method. It should be noted that this method is applied both to the resolution of interstate disputes and to disputes governed by private international law. However, the majority of scholarly works focus on the application of the ex aequo et bono method to the latter category of disputes. Despite this, legal knowledge about the ex aequo et bono method is generally universal in nature and can also be applied to public international law disputes. In this scholarly article, an attempt was made to unify legal knowledge about the ex aequo et bono method with the aim of facilitating the direct application of theoretical and practical knowledge of this method to public international law disputes as well. Therefore, this scholarly work can be considered one of the few that provides unified doctrinal knowledge on the ex aequo et bono method.

Main material. Ukrainian legal scholar Svitlana Zadorozhna highlights the fundamental role of equity in international law, emphasizing that equity serves as a bridge between the positive and the natural in international law. Moreover, equity is the central idea of all branches of jurisprudence, including international law.

Svitlana Zadorozhna adds that equity is the measure of the necessary balance in the "eternal struggle" between the positive and the natural in international law. The connection between law and equity can be traced in legal cultures of various regions, but the closest relationship between them has been observed primarily in the European legal culture, which for a long time was predominantly based on Roman law. In turn, Roman law was known for its ideas emphasizing the important role of equity in law. An example of this is the old Roman maxim "maxime in iure aequitas spectanda est," which can be translated as "the most important thing in law is to consider equity" [1, pp. 14-15].

Colombian professor and specialist in international arbitration J.P. Cárdenas Mejía notes that when developing each legal norm, consideration is given to specific cases in which it will be applied. Therefore, applying a legal norm to other cases, different from those for which the norm was designed, often involves significant difficulties. In such cases, it is reasonable, based on equity, to determine how the authors of the key legal documents in this field would have acted if they had foreseen the particular case. In this regard, equity can be identified with justice, as it serves as a means of adapting universal legal norms to various specific cases to avoid an inequitable decision, which is the ultimate goal of justice. Overall, the authors of legal norms aim to elicit a specific effect that aligns with the interests of justice when they develop these norms. However, if the application of a legal norm may lead to an effect that contradicts the purposes of its creation, then, naturally, applying such a norm would be inappropriate [2, p. 370].

Peruvian legal scholar Professor Fernando de Trazegnies Granda emphasizes that when discussing the differences between arbitration by law and arbitration by equity, one must exercise extreme caution. This is due to the complexity and multifaceted nature of the concept of equity. Of course, the main difference between arbitration by equity and arbitration by law lies in the fact that in the former, the principal method guiding the arbitrator is equity. This might lead to the notion of law and equity as two opposing and incompatible methods, which, of course, would be a serious mistake. In this context, it is appropriate to cite the ancient Roman law phrase "Jus est ars boni et aequi" – law is the art of goodness and equity. However, equating law with equity entirely is also incorrect, as this would risk arbitration ex aequo et bono losing its identity as a distinct method of dispute resolution.

Continuing the discussion on the relationship between law and equity, it should also be emphasized that the connection between law and equity can be understood more deeply by examining their relationship to justice. On the one hand, equity is a form of realizing justice; on the other hand, justice is the ultimate goal of law. Justice is usually carried out through law, but if the application of law could lead to an inequitable result, which, of course, does not align with the aims of justice, then the method of equity must be applied to achieve justice. Therefore, it can be asserted that law reflects formal equity, which exists in a static form, whereas equity in its pure form is a dynamic concept with a high potential for flexible and prompt responses to complex situations.

It should also be added that the advantages of the ex aequo et bono method should not serve as a basis for unjustified claims about the existence of an absolute, eternal, and perfect law, which can be determined solely through equity. This is dangerous and could lead to the complete denial of legal norms and legal nihilism. Moreover, the claim of the existence of absolute law with an indeterminate interpretation and content hardly appears adequate, because there are no universal, eternal, and absolute values, including

law, in nature. There are only the most possible and comparatively more objective values, but not absolute ones [3, p. 117].

As noted by Colombian professor J.P. Cárdenas Mejía, although decision-making based on equity is encouraged in legal doctrine, a necessary condition for applying this method in rendering a decision is the inclusion of an express intent by the parties to resolve the dispute through this method in the arbitration agreement. Otherwise, it is assumed that the parties have submitted their dispute to be resolved based on legal norms [2, pp. 353-354].

The possibility of rendering a decision based on the method of ex aequo et bono is provided for in the foundational documents of many international courts and arbitral bodies. A common feature of the provisions regarding the possibility of applying the ex aequo et bono method, as contained in all these documents, is the explicit indication that this method may only be applied when there is an agreement between the parties to the dispute. The following documents on judicial and arbitral settlement of international public law disputes can be cited as examples:

– Statute of the International Court of Justice of June 26, 1945 (Para. 2, Art. 38) [4];

– Arbitration Rules of the Permanent Court of Arbitration of December 17, 2012 (Para. 2, Art. 35) [5];

– Convention on Conciliation and Arbitration within the OSCE of December 15, 1992 (Art. 30) [6];

– Protocol on the Statute of the African Court of Justice and Human Rights of July 1, 2008 (Para. 2, Art. 31) [7].

Ecuadorian lawyers M.E. Flores Suasnavas and E.D. Orozco Herrera note that the ex aequo et bono method is especially advantageous in disputes arising from long-term relationships governed by agreements. This is because, over time, the relationships between the parties may extend beyond the original terms established in the agreement [8, p. 111].

In our view, it would be appropriate to also point out cases where new relations do not exceed the boundaries established by the provisions of the treaty, yet due to the more profound nature of these relations, a situation arises where the necessary specific treaty norms are lacking, which could be used as guidance for resolving emerging disputes. The method of ex aequo et bono is well-suited for solving this problem as well, allowing for an equitable decision based on the analysis of the main objectives of the treaty and the essence of some of its provisions. This eliminates the deficiency of legal norms associated with their formalism.

Czech professor of international law Alexander J. Bělohlávek also confirms that the method of ex aequo et bono can be of particular value in resolving disputes between parties engaged in continuous and long-term relations. In cases where the parties are highly likely to engage in intensive mutual cooperation, the method of ex aequo et bono can become an indispensable means for settling future disputes due to the parties' strong interest in the prompt resolution of disputes, taking into account all specific circumstances rather than relying solely on a normative evaluation based purely on legal norms.

Finally, the method of ex aequo et bono may serve as the only possible means for rendering a decision on certain issues that are not regulated by legal norms.

These issues are also known as praeter legem, meaning outside the scope of the law, on which the law is silent. In such cases, the ex aequo et bono method allows for a decision to be made on all contentious issues in the case under consideration, including those for which there are no necessary legal norms, as this method flexibly fills the gaps in the law. This is particularly relevant in international law due to significant legal gaps in various areas [9, pp. 38-39].

Peruvian legal scholar Professor Fernando de Trazegnies Granda identifies several instances in which the parties may choose arbitration based on equity: a) in strong friendly relations between the parties, based on good faith, there is less preference for resolving the dispute based on law due to distrust of formalism and literal interpretation of legal norms; b) when the disputed issues go beyond the scope of law, that is, when there are no necessary legal norms to resolve these issues; c) when the dispute involves too many complex technical issues, the resolution of which based on legal norms hardly seems feasible, i.e., when there are necessary legal norms, but due to the extreme complexity of the dispute, applying the law is not a pragmatic approach [3, p. 116].

As noted by Ecuadorian lawyer A.M. Larrea, the frequent preference for arbitration based on law over arbitration ex aequo et bono often stems from the parties' lack of awareness regarding equity or their mistaken belief that equity is a criterion incompatible with law. The inability to predict the outcome of arbitration ex aequo et bono may also lead parties to reject this form of arbitration. A.M. Larrea further adds that the concept of equity is undoubtedly difficult to grasp, and relying solely on legal knowledge does not allow one to fully understand this concept [10, p. 23].

Serbian jurist Marko Jovanović notes that while the ability of arbitrators and judges to make equitable decisions based on their subjective judgments contributes to the flexibility of proceedings, unfortunately, due to distorted information about the characteristics of the ex

aequo et bono method or a misunderstanding of its essence, parties to a dispute often cautiously approach the choice of this method and in most cases altogether refuse its application [11, p. 148].

In scholarly discussions on the ex aequo et bono method, the term amiable composition often appears, which also involves the application of equity in dispute resolution. Therefore, when studying the ex aequo et bono method, it is advisable to highlight the differences between it and the amiable composition method.

Colombian professor and international arbitration specialist H.P. Cárdenas Mejía notes that legal doctrine generally holds the position that ex aequo et bono and amiable composition are equivalent decision-making methods. However, distinctions between them are sometimes drawn. Given the minimal differences between these arbitration methods, legal doctrine tends to equate them, although, of course, complete identification of the two methods in the academic context would be inappropriate [2, pp. 350-351].

Czech professor of international law Alexander J. Bělohlávek notes that the ex aequo et bono and amiable composition decision-making methods have much in common and are therefore often considered and discussed in the same context. Despite this, international law and the national laws of various countries suggest that these methods are not identical and that differences between them do exist. It is worth noting that in the national laws of some countries, only the amiable composition method is recognized for the resolution of private law disputes, while in others, only the ex aequo et bono method is accepted. There is also a third group of countries that recognize both methods simultaneously [9, pp. 27-28].

Polish lawyer Łukasz Błaszczak and Belgian lawyer Joanna Kolber emphasize important differences between the methods of ex aequo et bono and amiable composition. Compared to amiable composition, ex aequo et bono grants the arbitrator much more authority and obligations in finding the fairest measure when making a decision. Typically, most of a specific decision applying the ex aequo et bono method is based on equity, and only a small part relies on legal norms. When making a decision as an amiable compositeur, on the contrary, there is no strict obligation to apply the principle of equity, and the arbitrator may render a decision based solely on legal norms if they deem such a decision to be in accordance with the principle of equity, the goals of justice, the interests of the parties, as well as other values important to the specific case. Consequently, in amiable composition, the arbitrator may forgo the opportunity to mitigate the adverse effects of legal norms. Therefore, considering the existing differences between ex aequo et bono and amiable composition, it can be concluded that the application of equity in decision-making ex aequo et bono is an obligation for the arbitrator, while in arbitration as an amiable compositeur it is merely a possibility, which the arbitrator can disregard for various reasons [12, pp. 202-203].

Indian lawyer Gautam Mohanty asserts the existence of a "fine line of difference" between the methods of ex aequo et bono and amiable composition, despite their frequent identification due to their similarity. The main distinction between them lies in the extent of legal norms application. According to the Indian author, when using the ex aequo et bono method, the consideration of contentious issues "starts and ends with the arbitrator's personal sense of equity," whereas with the amiable composition method, the case consideration usually begins and ends based on legal norms, and only if the application of a legal norm could lead to an inequitable decision, then equity is applied [13, p. 6].

German lawyers M.C. Hilgard and A.E. Bruder note that the possibility offered by the amiable composition method of not applying the law does not mean that legal norms cannot or should not be applied when making a decision by this method. On the contrary, when making a decision as an amiable compositeur, legal norms should serve as the starting point, and only in cases where making a decision based on a legal norm could lead to an inequitable outcome this method takes effect. Therefore, M.C. Hilgard and A.E. Bruder emphasize that decisions made as an amiable compositeur should not be mistaken for decisions contra legem, which are contrary to the law [14, p. 53].

American lawyer K.S. Weinberg notes that conciliation initially formed the basis of the amiable composition method, but over time the mandatory nature of decisions made by this method has made the differences between amiable composition and conciliation pronounced and quite distinct. Additionally, when applying the amiable composition method, the parties and arbitrators possess the same rights and obligations as participants in other judicial and arbitration proceedings [15, pp. 243-244].

Indian lawyer Gautam Mohanty also points out the element of conciliation as an important characteristic distinguishing the amiable composition method from the ex aequo et bono method, which does not have this element [13, p. 3].

Turkish legal scholar Ahmet Yildirim identifies several features that qualify the method of amiable composition as a legal means of dispute resolution. These features include: a) the presence of a claimant and a respondent; b) the mandatory

legal procedure; c) the presence of an arbitrator rendering a decision; and d) the binding nature of the decision for execution [16, p. 36]. The listed features are also characteristic of the decision-making process based on the ex aequo et bono method.

As noted by Ecuadorian lawyer A.M. Larrea, if arbitration based on equity merely meant rendering a decision in good faith and honesty, relying on one's own sense of equity, it would amount to arbitrariness in arbitration proceedings and create uncertainty regarding the objectivity of their outcomes. This, of course, would deter parties from choosing the ex aequo et bono method to settle their disputes. However, the application of equity must be closely linked to legal norms, as only this way can the potential negative consequences of this method's application be avoided [10, p. 36].

Czech international law expert Michaela Garajová notes that when applying the ex aequo et bono method, arbitrators, though they may deviate from legal norms and render decisions based on their subjective understanding of equity, are still required to issue the most objective and impartial decision possible. Moreover, paradoxically as it may sound, the ability to deviate from the law is a right of the arbitrators applying the ex aequo et bono method, not an obligation. M. Garajová adds that absolute freedom for arbitrators making decisions based on equity is unrealistic for at least two reasons: first, the arbitrators' powers are clearly defined based on lex voluntatis, i.e., by the will of the disputing parties as expressed in the arbitration agreement; and second, the arbitrator cannot refuse to adhere to procedural legal norms, known as lex arbitri [17, p. 231].

Ecuadorian lawyers M.E. Flores Suasnavas and E.D. Orozco Herrera emphasize that the ex aequo et bono method may be applied to the part of the case governed by substantive law, but the part of the case regulated by procedural norms cannot be governed by this method. However, the Ecuadorian authors add that in cases where there is an absence of necessary procedural legal norms, the ex aequo et bono method may be applied as an exception. In other words, the only instance when equity may be applied instead of procedural norms is when there is a legal vacuum in procedural law. Thus, the ex aequo et bono method is mainly applied instead of substantive law, and in relation to procedural law, it is applied only when necessary legal norms are absent [8, pp. 126-127].

Peruvian legal scholar Professor Fernando de Trazegnies Granda argues that arbitration based on equity should not be overly subjective, and arbitrators should not disregard objective criteria when rendering an equitable decision. He presents a rather striking analogy from a well-known Roman maxim: "It is not enough for Caesar's wife to be honest; she must also appear honest." This statement, which contains deep philosophical meaning, indeed explains the essence of the objective criterion to which arbitrators should adhere when making decisions ex aequo et bono. This means that when applying the ex aequo et bono method, arbitrators and judges must not only render an objective decision, but they must also appear objective to the parties, that is, they must create the impression of being impartial arbitrators or judges by presenting compelling arguments and irrefutable facts that serve as clear evidence of the objectivity of their decision. The parties to the dispute must feel that the decision is not the result of purely subjective evaluative criteria and irrational emotions on the part of the arbitrator or judge.

Peruvian Professor Fernando de Trazegnies Granda also critiques the common phrase in legal doctrine "honest knowledge and understanding" as a criterion based on which an arbitrator or judge should render a decision ex aequo et bono. In his opinion, this phrase does not reflect the requirement of objectivity and seems to encourage subjective elements in decision-making. According to the Peruvian scholar, to ensure the objectivity of an ex aequo et bono decision, taking legal criteria into account sometimes becomes necessary, and there is no obstacle to this. After all, the very application of equity serves the purpose of expanding the discretionary powers of arbitrators and judges by going beyond legal norms to find a more objective solution in a specific case, rather than narrowing the usual powers of arbitrators and judges. Therefore, applying some basic legal norms when making decisions ex aequo et bono can serve as a guarantee of the objectivity of the rendered decision [3, p. 116].

Ecuadorian jurist A.M. Larrea also points out the lack of clarity and some illogicality in the phrase "honest knowledge and understanding," which explains the way arbitrators determine and identify the "equity" on which they base their decision. She further notes that arbitrators, making decisions ex aequo et bono, act as creators of unique solutions for the specific case under consideration, while remaining free from legal argumentation of their decisions, they can also justify their decisions by legal norms. Ecuadorian author adds that, due to the fact that arbitrators, when making decisions ex aequo et bono, may not apply legal norms, as a consequence, arbitrators are usually not required to be qualified lawyers [10, p. 30]. Furthermore, A.M. Larrea notes that to make a decision based on equity, highly ranked judges and arbitrators with extensive professional experience are usually chosen, as their decision typically inspires the

greatest trust among the disputing parties [10, p. 36].

The absence of a requirement for arbitrators issuing decisions based on equity to be qualified lawyers can also be traced in the legislation of Colombia, although this requirement is retained in arbitration based on law. As noted by Colombian professor and specialist in international arbitration J.P. Cárdenas Mejía, the possibility of becoming an arbitrator without legal qualifications does not mean that arbitration based on equity may disregard procedural arbitration norms. In other words, equity serves as a replacement only for substantive law, while procedural law must be observed in all arbitration proceedings, including when rendering decisions based on equity. However, this raises a significant issue related to the correct application of procedural legal norms by arbitrators who lack legal knowledge and experience [2, p. 354].

In our opinion, arbitrators rendering decisions ex aequo et bono in international public law disputes must always be highly qualified lawyers. To support this point, the following arguments can be presented:

– The use of equity as a substitute for substantive legal norms does not mean that legal norms will not be used at all, moreover, objective decisions often require at least minimal support by legal arguments;

– Since decisions made ex aequo et bono replace only substantive legal sources, while procedural legal norms remain mandatory, the legal qualifications of arbitrators are extremely important to avoid issues related to the improper observance of the fundamental principles of arbitration proceedings;

– The legal qualifications of arbitrators in ex aequo et bono arbitration become particularly significant in international public law disputes, given the wide-ranging consequences of such decisions, especially in disputes that threaten international peace and security. Additionally, the fact that arbitrators deciding based on equity must necessarily apply whole procedural law and a certain part of substantive legal norms allows us to argue for the necessity of requiring legal qualifications not only for international public law disputes but also for private law disputes.

Colombian professor J.P. Cárdenas Mejía notes that in the application of the ex aequo et bono method, the parties to the dispute may specifically determine which of the controversial issues will be subject to this method, while the remaining issues may be referred to ordinary legal consideration. At the same time, the Colombian author also emphasizes that the parties to the dispute are entitled to submit for consideration only those parts of the disputed issues that fall under the subject matter of dispositve legal norms. However, those disputed issues regarding which there are corresponding peremptory norms, the parties do not have the right to submit for consideration by the method of ex aequo et bono [2, pp. 362-363]. A.M. Larrea also confirms that peremptory norms must be observed, even when making a decision based on equity [10, p. 37].

Peruvian professor Fernando de Trazegnies Granda notes that arbitration based on equity cannot be founded on intuition, emotions, or other vague criteria. In other words, when rendering decisions ex aequo et bono, arbitrators must be guided not by feelings, but by reason. At the same time, like any arbitration decision, the results of arbitration based on equity must stem from rigorous argumentation. After all, equity by its nature does not arise from feelings, but is the consequence of complex operations of the mind. In turn, the reason that determines the clear boundaries of equity in a particular case is not the opposite of legal reason. On the contrary, in both instances, reason fundamentally follows the same patterns in perceiving and processing information that allows appropriate conclusions to be drawn. The primary difference between the two types of reasoning lies in the fact that reason in arbitration based on equity is much broader than legal reason, which is limited by the letter of the law. Thus, when applying the ex aequo et bono method, arbitrators must clearly show and prove to the parties the justification of the decisions made, and considering the fact that the decisions are based on such an abstract category as equity, these decisions must be more substantiated than legal decisions, which are relatively easier to understand [3, p. 122].

This viewpoint is also supported by Ecuadorian lawyer A.M. Larrea, who emphasizes that a decision ex aequo et bono does not mean a decision based on feelings or emotions. Therefore, when applying this method, arbitrators and judges must present the parties with a logical sequence of reasons and arguments that formed the basis for the decision, in order to explain the reasons for the satisfaction or rejection of their claims [10, p. 38].

Professor J.P. Cárdenas Mejía asserts that rendering a decision based on equity does not absolve arbitrators and judges from the obligation to rely on evidence, as ensuring due process is a fundamental rule when rendering any decision. In other words, in decision-making, facts established through evidence cannot be replaced by emotion or sympathy for any party [2, p. 357]. A.M. Larrea also confirms that evidence must be the foundation when making decisions based on equity. Therefore, no statements by the parties or other factors can replace evidence [10, p. 38]. In our opinion, this statement is supported by the rule that the ex

aequo et bono method can only be used instead of substantive law, while procedural law norms take precedence over this method. Therefore, the consideration of evidence, which pertains to the procedural aspect of the case under review, remains mandatory even when applying the ex aequo et bono method. Although arbitrators and judges are generally required to observe procedural norms related to the evaluation of evidence, this does not prevent them from applying equity to those procedural matters that are praeter legem, that is, outside the legal regulation of procedural norms.

Ecuadorian lawyers M.E. Flores Suasnavas and E.D. Orozco Herrera draw attention to the mechanism of dépeçage as a way to exclude certain disputed issues from the application of the ex aequo et bono method. It should be emphasized that the application of this mechanism is possible only upon the will of the parties themselves, through the inclusion of a specific dépeçage clause in the relevant arbitration agreement. Consequently, the arbitrator cannot apply the mechanism of dépeçage at their own discretion or through interpretation of the parties' will, as this remains the exclusive authority of the parties, provided their consent to this mechanism is clearly and unequivocally expressed. A dépeçage clause can be a very useful tool in dispute resolution because it allows the parties to clearly identify the issues to which they wish to apply the ex aequo et bono method, while resolving other disputed issues based on legal norms. For example, a dépeçage clause may allow the issue of entitlement to compensation to be resolved using the ex aequo et bono method, while the amount of compensation is determined based on legal norms [8, p. 116].

In our opinion, the mechanism of dépeçage should become a common practice in the application of the ex aequo et bono method, as disputing parties often reject the use of equity due to the risks associated with excessively unpredictable decisions when using this method. In other words, through the use of a dépeçage clause, parties can control and minimize such risks, which, in turn, may significantly increase the frequency of resorting to the ex aequo et bono method due to its broad range of benefits and the absence of significant risks when choosing this method in combination with the dépeçage mechanism.

Peruvian legal scholar Professor Fernando de Trazegnies Granda points out an important outcome that all judges and arbitrators should aim for when making decisions ex aequo et bono. This outcome is peace, as strange as it may sound. Of course, any judicial or arbitration proceeding in the doctrine of international law is considered a peaceful means of dispute resolution, meaning that these legal means are already peaceful means. Nevertheless, the assertion that arbitrators and judges applying the ex aequo et bono method should strive to render a decision that promotes peace is also not without merit. One of the most important goals of justice is to establish peace, and therefore, if an equitable decision does not lead to peace, it can be considered that the goals of justice have not been fully achieved, and the decision cannot be deemed entirely effective. Thus, when applying the ex aequo et bono method, the final decision should be formulated in such a way that it is not only equitable but also leads to the conciliation of the parties. Through the clarity and reasoning of the decision, the losing party should at least gain an impression of the possible rightness of the other party, even if complete conciliation between the parties is not achieved [3, p. 124]. Only in this way can arbitrators and judges applying the ex aequo et bono method deliver not only an equitable decision but also one that can truly be called a "peaceful means of dispute resolution." The focus on peace is particularly relevant in contemporary international relations, where an equitable decision without sufficient balance may lead to unpeaceful outcomes and provoke even greater escalation of conflicting relations.

Conclusion. The results of the study demonstrated the high practical value of the ex aequo et bono method for dispute resolution, particularly when making decisions on complex issues underlying the disputes. In turn, the ex aequo et bono method does not grant absolute freedom to arbitrators and judges when making decisions, and they are obligated, at the very least, to comply with peremptory norms of international law. Moreover, a highly qualified arbitrator or judge, when applying this method, will take into account not only peremptory norms but also other norms of international law. The study further established that the authors of legal norms, when creating them, are generally guided by the principle of equity. However, formalism and a lack of flexibility in legal norms can sometimes lead to an inequitable decision. In such cases, turning to the ex aequo et bono method becomes relevant, allowing for decisions to be made not according to the letter of the law but in accordance with the true meaning and spirit of the legal norms as envisioned by the authors of international legal documents.

In modern international relations, disputing parties are increasingly opting for flexible peaceful means. In legal doctrine, there is a widespread view that judicial settlement and arbitration are not sufficiently flexible peaceful means. Of course, this point of view holds some truth, as the terms "judicial settlement" and "arbitration" typically imply that the dispute will be considered based on legal norms. This is due to the fact that the majority of decisions made by judges and

arbitrators are based solely on legal norms, which are not considered a flexible guide for addressing all complexities of a dispute. Judicial and arbitral decisions made on the basis of the ex aequo et bono method represent only a small fraction of all decisions. However, in our view, more frequent application of the ex aequo et bono method in international practice could create a completely different impression of judicial and arbitral decisions, as this method provides a unique opportunity to apply simultaneously equity, ensuring flexibility of the decision, and basic legal norms, which serve as the legal foundation of the decision

The choice of flexible peaceful procedures is particularly relevant within the framework of international organizations. If one looks at the dispute resolution practices of organizations such as the Organization for Security and Co-operation in Europe (OSCE), the African Union (AU), the League of Arab States (LAS), and others, it can be noted that most of the peaceful means used within these organizations are diplomatic peaceful means, such as negotiations, mediation, conciliation, and inquiry. Therefore, the application of the ex aequo et bono method, which in a certain sense stands at the intersection of diplomatic and legal means, can be considered quite promising within the OSCE, AU, LAS, and other international organizations.

However, there are numerous obstacles to the intensive application of the ex aequo et bono method within international organizations. In particular, many statutes of international courts and arbitration rules not only lack provisions for the application of the ex aequo et bono method, but also do not even include a definition of this method. The absence of necessary information about the ex aequo et bono method in the official documents of international courts and arbitration bodies is a reason for parties' hesitation in choosing this method. In other words, while the parties can obtain general information about the ex aequo et bono method from legal doctrine, the lack of basic information about this method in official legal documents creates doubts that the actual procedure may not fully correspond to doctrinal knowledge. Undoubtedly, this circumstance is a significant obstacle to the broader use of the ex aequo et bono method. Therefore, existing statutes and arbitration rules should be supplemented with provisions on the basic foundations for applying the ex aequo et bono method.

Various structures within international organizations could be involved in effectively implementing this task. For example, in the OSCE Convention on Conciliation and Arbitration, apart from mentioning the possibility of applying the ex aequo et bono method, no further clarifying information about this method is provided. The necessary legislative work to fill this gap could be carried out by members of the OSCE Parliamentary Assembly, of course, with the subsequent approval of the draft articles by the OSCE Decision-making bodies. The experience of parliamentarians in working with laws speaks in favor of their competence in such legal matters. Additionally, thanks to the participation of representatives from all OSCE member states in the OSCE PA, new normative provisions will be sufficiently objective in nature [18, p. 345]. Along with legislative work, parliamentarians could hold briefings and seminars on various aspects of applying the ex aequo et bono method for relevant diplomats involved in peaceful negotiations to settle disputes between the states they represent.

To increase interest in the ex aequo et bono method in international practice, it is necessary not only to explain its essence, the decision-making process, advantages, and disadvantages but also to apply it correctly. If any arbitrator or judge makes an ex aequo et bono decision without considering the nuances and specifics of a particular case, this method will not lead to positive outcomes; on the contrary, it will further deepen the contradictions between the parties.

In other words, the ex aequo et bono method, like any other advanced dispute resolution method, will not serve the true purposes of its application in unskilled hands. Improper application of the ex aequo et bono method, which subsequently leads to negative results, can create misleading perceptions about this method in general, and such cases should not occur in legal practice.

Considering all of the above, it can be argued that the ex aequo et bono method is one of the most promising methods for resolving disputes. However, to fully realize the potential of the ex aequo et bono method, active efforts are required to improve the legal framework for its application, ensure proper and undistorted awareness of the parties about the specifics and rules of this method, encourage legal research on this topic, and so on. In our opinion, it would be advisable to organize special international qualification courses to enhance the skills of judges and arbitrators in making ex aequo et bono decisions. These courses should be interdisciplinary, at the very least encompassing knowledge from law, sociology, philosophy, and political science, because legal knowledge alone is insufficient for the correct understanding and application of the concept of equity.

The proposed list of targeted work is, of course, not exhaustive. Nevertheless, the implementation of these proposals could play a significant role in turning the ex aequo et bono method into one of the most widely used methods for resolving contemporary disputes.

REFERENCES:

1. Zadorozhna S.M. International legal nature of the principle of ex aequo et bono. *International Law Almanac.* 2016. No. 14. P. 14–22.
2. Cárdenas Mejía, J.P. Arbitration in Equity. *Vniversitas.* 2003. Vol. 52. No. 105. P. 347–374.
3. De Trazegnies Granda, F. Arbitration of Law and Arbitration of Conscience. *IUS ET VERITAS*. 1996. Vol. 7. No. 12. P. 115–124.
4. Statute of the International Court of Justice of June 26, 1945. *The official website of the United Nations.* URL: https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice (accessed on September 10, 2024).
5. PCA Arbitration Rules of December 17, 2012. *The official website of the Permanent Court of Arbitration*. URL: https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf (accessed on September 10, 2024).
6. Court of Conciliation and Arbitration: Key Documents. Switzerland, Geneva: *Court of Conciliation and Arbitration within the OSCE*. 2022. 42 p. *The official website of the OSCE.* URL: https://www.osce.org/files/f/documents/ 7/d/482178_3.pdf (accessed on September 10, 2024).
7. Protocol on the Statute of the African Court of Justice and Human Rights, dated July 1, 2008. *The official website of the African Union.* URL: https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_ statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed on September 10, 2024).
8. Flores Suasnavas M.E., Orozco Herrera E.D. Scope and Opportunity of Equity and Ex aequo et bono Arbitrations within the Ecuadorian Legal System. *USFQ Law Review*. 2019. Vol. 6. No. 1. P. 27. DOI: 10.18272/lr.v6i1.1393.
9. Belohlavek A.J. Application of Law in Arbitration, Ex Aequo et Bono and Amiable Compositeur. *Czech (& Central European) Yearbook of Arbitration.* 2013. Vol. III. P. 25–51.
10. Larrea A.M. Scope and Limits of Arbitration in Equity. *Revista Jurídica Online.* 2011. No. 29. P. 21–41.
11. Jovanović M. The Role of Ex Aequo et Bono in ICSID Arbitration. *Review of the Kopaonik School of Natural Law*. 2021. No. 1. P. 147–164. DOI: 10.5937/RKSPP2101147J.
12. Błaszczak Ł., Kolber J. General Principles of Law and Equity as a Basis for Decision-Making in Arbitration. *Comparative Law Review.* 2013. No. 15. P. 189–208. http://dx.doi.org/10.12775/CLR.2013.010.
13. Mohanty G. Ex Aequo Et Bono: A Redundant Concept in a Modern Legislation? Some Reflections from Indian Arbitral Jurisprudence. *GNLU Student Law Review.* 2021. Vol II. P. 1–14. URL: https://papers.ssrn.com/sol3/Delivery.cfm/ SSRN_ID4116824_code2193114.pdf?abstractid=4116824&mirid=1 (accessed on September 10, 2024).
14. Hilgard M.C., Bruder A.E. Unauthorised Amiable Compositeur? *Dispute Resolution International*. 2014. Vol. 8. No. 1. P. 51–62.
15. Weinberg K.S. Equity in International Arbitration: How Fair is Fair – A Study of Lex Mercatoria and Amiable Composition. *Boston University International Law Journal*. 1994. Vol. 12. No. 227. P. 227–254.
16. Yildirim A.C. Amiable Composition in International Arbitration. *Journal of Arbitration Studies.* 2014. Vol. 24. No. 3. P. 33–46.
17. Garajová M. Decision-making according to Ex Aequo Et Bono in Cases Tainted by Corruption in the International Commercial Arbitration. *Journal of Jurisprudence and Legal Practice*. 2019. Vol. 27. No. 2. P. 227–242. https://doi.org/ 10.5817/CPVP2019-2-4.
18. Ahmadov E.M. The OSCE Parliamentary Assembly and peaceful conflict resolution: international legal and political analysis. *Uzhhorod National University Herald. Series: Law.* 2024. Vol. 3 No. 83. P. 340–346. DOI: https://doi.org/ 10.24144/2307-3322.2024.83.3.53.