



# Arbitrator's Authority to Decide *Ex Aequo et Bono*: A Juridical Review

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## Abstract

Arbitration is a dynamic practice. One of the issues to consider is the implementation of *ex aequo et bono* by arbitrators, which many parties see as requiring prior approval from the parties so that arbitrators can make decisions based on *ex aequo et bono*. This study concludes that the arbitrator's authority to decide *ex aequo et bono* is not derived from the parties' agreement but rather from the arbitrator's inherent authority. First, because this principle is consistent with the spirit of arbitration, the Arbitrator has the authority to decide *ex aequo et bono*. Second, Law Number 48 Year 2009 concerning Judicial Authority imposes an obligation to investigate, adhere to, and comprehend legal values and the sense of justice in society. Third, no provision in Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution requires the parties to agree in advance on the grant of *ex aequo et bono*.

**Keywords:** Arbitration; Arbitrator; *Ex Aequo et Bono*

## A. Introduction

Humans are constantly engaged in the activity of trying to resolve conflicts. Conflict resolution entails acknowledging the presence of a problem, acknowledging the existence of potential solutions, and actively participating in either implicit or explicit coordination.<sup>1</sup> Conflict may arise because every human being has an interest that may differ from one to another. As long as there are people and interests, there will always be contention between those people and interests.<sup>2</sup> Therefore, the existence of competing human interests is inherently inevitable.

Conflicts will arise due to these issues, and a few different approaches can be taken to resolve these conflicts. War and the spilling of blood are two other methods that can be used

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<sup>1</sup> Jacob Bercovitch and Richard Jackson, *Conflict Resolution in the Twenty-First Century: Principles, Methods, and Approaches* (Ann Arbor: University of Michigan Press, 2009), 1.

<sup>2</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Cahaya Atma Pustaka, 2010), 1.

to solve problems; however, in today's increasingly peaceful and civilized world, neither of these approaches should be considered a viable option. The Court of Justice emerged as the ideal venue to replace battles and slaughter.

Everyone who seeks justice in the courtroom must adhere to the institution's protocols, as these procedures are the means by which disputes are resolved. The court, or settlement through various litigation channels, presents a structural dispute resolution in its development. The legal system's use to resolve disagreements, on the other hand, is not without its detractors. The time necessary for the parties to resolve their differences through the judicial system is not short. The legal mechanisms that can be utilized to seek justice are sometimes abused, which causes cases to drag on longer than they should. Because of this, the costs that the parties involved in the litigation will ultimately pay will be high.

Complaints concerning the legal process also continue regarding the formalities involved.<sup>3</sup> Nevertheless, this is a separate criticism of litigation practices, particularly in Indonesia, regarding the substance of disputes and the expectations for a fair and appropriate resolution. While career judges presiding over dispute resolution cases bring diverse experiences to the table, a case may seek a specialist view instead of a generalist. Consequently, when a judge lacks such specialized expertise, their decisions may sometimes exhibit disparity. This happens, moreover, if the judge has to find the law outside the normative basis.<sup>4</sup> This creates uncertainty in the legal system. Arbitration, conversely, consists of specialist expertise with credibility so that the award they rule shall be respected.<sup>5</sup>

Commercial dispute requires legal certainty. Legal certainty is one factor that could discourage foreign direct investment from coming to Indonesia.<sup>6</sup> Therefore, the uncertainty of law poses a threat in the civil law field, particularly in business law. Legal certainty reduces commercial risk. Dispute resolution practice must foster this assurance. Businesspeople may invest and operate in Indonesia less if the judicial system fails to establish legal certainty. Such matters, however, have yet to become the forte of the court.

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<sup>3</sup> Nita Triana, *Alternative Dispute Resolution (Penyelesaian Sengketa Alternatif dengan Model Mediasi, Arbitrase, Negosiasi, dan Konsultasi)* (Yogyakarta: Kaizen Sarana Edukasi, 2019), 126.

<sup>4</sup> Tata Wijayanta and Sandra Dini Febri Aristya, "Disparitas Putusan Perkara Sengketa Tanah Terkait Penerapan Hukum Formil," *Jurnal Yudisial* 7, no. 2 (2014): 139, <http://dx.doi.org/10.29123/jy.v7i2.86>.

<sup>5</sup> Rahmadi Indra Tektona, "Arbitrase Sebagai Alternatif Solusi Penyelesaian Sengketa Bisnis di Luar Pengadilan," *Pandecta* 6, no. 1 (2011): 89, <https://doi.org/10.15294/pandecta.v6i1.2327>.

<sup>6</sup> Januari Nasya Ayu Taduri, "The Legal Certainty and Protection of Foreign Investment Againsts Investment Practices in Indonesia," *Lex Scientia Law Review* 5, no. 1 (2021): 133, <https://doi.org/10.15294/lesrev.v5i1.46286>.

Pursuing justice and establishing legal certainty has led to experimentation with various alternative methods.<sup>7</sup> Dispute resolution evolved from court-based adversary adjudication to include various domains i.e. science, physical, human, social, cultural, spiritual, artistic to promote peace and justice.<sup>8</sup> In addition to other well-known methods, there is also the possibility of mediating, conciliating, and negotiating.<sup>9</sup> Each has positive and negative aspects to consider. However, there still needs to be a solution with regard to the absoluteness of the law.

The parties' willingness to participate voluntarily in conflict resolution processes like mediation, conciliation, and negotiation is critical to the success of these strategies. Seekers of justice appear to be placed in a difficult position because, on the one hand, they can resolve their disputes through mediation, conciliation, and negotiation; on the other hand, they can take their cases to court. Therefore, there is a need for a compromise.

Refrain from overreliance on voluntarism while avoiding an overly formal approach. Arbitration is an unavoidable alternative with a particular allure since it possesses qualities that allow it to be a middle ground between the two extreme poles of dispute resolution. Although entrenched in tradition, the practice of arbitration continues to evolve over time.<sup>10</sup> However, arbitration is becoming more litigious.<sup>11</sup> Therefore, ensuring that the resolution of disputes through arbitration does not become entangled in formalities similar to those encountered in a litigation settlement framework requires ongoing vigilance and attention. One noticeable component of arbitration involves the application of the *ex aequo et bono*.

Wibisono found that even if the parties disagreed about granting the arbitrator authority to act *ex aequo et bono*, the arbitrator needed to make decisions based on the applicable material law.<sup>12</sup> Hertiawan, et al. observe that applying the *ex aequo et bono* principle deviates from the

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<sup>7</sup> Anthony Musson, "Arbitration and the Legal Profession in Late Medieval England," in *Law and Legal Process*, ed. Matthew Dyson and David Ibbetson, 1st ed. (Cambridge: Cambridge University Press, 2013), 56, <https://doi.org/10.1017/CBO9781139629140.005>.

<sup>8</sup> Carrie Menkel-Meadow, "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context," *Journal of Legal Education* 54, no. 1 (2004): 29, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1587&context=facpub>.

<sup>9</sup> Tania Sourdin, *Alternative Dispute Resolution*, 5th edition (Rozelle, N.S.W: Thomson Reuters (Professional) Australia Ltd, 2016), 3.

<sup>10</sup> Musson, "Arbitration and the Legal Profession in Late Medieval England," 56.

<sup>11</sup> Thomas J. Stipanowich, "Arbitration: The "New Litigation"," *University of Illinois Law Review* 2010, (2010): 6, <http://illinoislawreview.org/wp-content/ilr-content/articles/2010/1/Stipanowich.pdf>.

<sup>12</sup> Stanley Hariman Wibisono, "Analisis Yuridis Putusan Arbitrase Tentang Penentuan Eskalasi Harga Kontrak yang Tidak Diatur Sebelumnya" (Thesis, Universitas Islam Indonesia, Yogyakarta , 2007), 14.

provisions of Article 56 Paragraph (1) of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution (Indonesian Arbitration Law).<sup>13</sup> As a result, it is proposed that matters pertaining to the *ex aequo et bono* be strictly regulated in the Indonesian Arbitration Law.<sup>14</sup> Fitriyanti believes that it is necessary for the *ex aequo et bono* to be strictly regulated in the Indonesian Arbitration Law. This is due to the fact that the *ex aequo et bono* system's implementation was judged to be irregular not only at *Badan Arbitrase Nasional Indonesia* (BANI) but also at *Badan Arbitrase Syariah Nasional* (BASYARNAS).<sup>15</sup> Hasan argues that consensus plays a vital role in applying the *ex aequo et bono* principle. To apply *ex aequo et bono*, the disputing parties must first agree with one another.<sup>16</sup> According to Tan, applying the *ex aequo et bono* principle in resolving a particular dispute based on *ex aequo et bono* will only be implemented by the arbitrator if it is agreed upon by both parties involved in the dispute. Such an agreement must be met before the settlement can be implemented.<sup>17</sup>

This condition, however, is not the case in the litigation court. The litigation in the court does not require the consensus of the parties for the judge to grant the plea of *ex aequo et bono*. Subagyono, et al. found that in some cases, the judge even grants the petition that is not requested by the plaintiff. The principle of justice, legal certainty, benefit, and simple, fast, and low cost principle is being used as the basis to grant the *ultra petita*.<sup>18</sup> Saputra shows that the Supreme Court decision dated November 10, 1971 has become the basis to allow judges to grant more than what is demanded as long as it aligns with the material events and there is a subsidiary claim in the form of "*ex aequo et bono*." For judges to make decisions that go beyond what is needed as long as it serves justice for the parties shows as progressive law.<sup>19</sup>

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<sup>13</sup> Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolutions.

<sup>14</sup> Erie Hertawan, et al., "Ex Aequo et Bono: Applying Equity and Fairness under Indonesian Indonesian Arbitration Law," AHP, March 28, 2022, <https://www.ahp.id/ex-aequo-et-bono-applying-equity-and-fairness-under-indonesian-arbitration-law/>.

<sup>15</sup> Fadia Fitriyanti, "Harmonisasi Penerapan Asas Ex Aequo Et Bono dalam Sengketa Bisnis pada Arbitrase Nasional dan Arbitrase Syariah" (PhD diss., Universitas Gadjah Mada, Yogyakarta, 2017), xiv.

<sup>16</sup> Mohamad Toha Hasan, "Penyelesaian Sengketa Melalui Lembaga Arbitrase Di Indonesia," BP Lawyers, December 3, 2021, <https://bplawyers.co.id/2021/12/03/penerapan-ex-aequo-et-bono-dalam-penyelesaian-sengketa-melalui-lembaga-arbitrase-di-indonesia/>.

<sup>17</sup> David Tan, "Analisa Yuridis Pengesampingan Prinsip-Prinsip Keadilan dan Kepatutan dalam Proses Pengambilan Keputusan oleh Arbiter," *Humani (Hukum Dan Masyarakat Madani)* 11, no. 1 (2021): 43, <http://dx.doi.org/10.26623/humani.v11i1.2772>.

<sup>18</sup> Bambang Sugeng Ariadi Subagyono, Johan Wahyudi, and Razky Akbar, "Kajian Penerapan Asas Ultra Petita pada Petitem Ex Aequo et Bono," *Yuridika* 29, no. 1 (2014): 112, <https://doi.org/10.20473/ydk.v29i1.360>.

<sup>19</sup> Rian Saputra, "Pergeseran Prinsip Hakim Pasif Ke Aktif pada Praktek Peradilan Perdata Perspektif Hukum Progresif," *Wacana Hukum* 25, no. 1 (2019): 17, <https://doi.org/10.33061/1.jwh.2019.25.1.2750>.

Therefore, it is interesting to compare the judge and the arbitrator regarding the *ex aequo et bono* principle. While the judge and arbitrator serve the same purpose of deciding a case, there are disparities in the limit of applying the principle of *ex aequo et bono* by one to another.

In comparing the judge and the arbitrator regarding the *ex aequo et bono* principle, it is necessary to examine the *ex aequo et bono* principle not only by using the perspective of Indonesian Arbitration Law but also the Law Number 48 Year 2009 concerning Judicial Authority (Judicial Authority Law). As *ex aequo et bono* principle itself is not a principle that is exclusively applied in the arbitration but also in the litigation court as well.

By comparing the application of *ex aequo et bono* and taking into account Indonesian Arbitration Law and Judicial Authority Law, a broader context for understanding how the principle is applied in both arbitration and judicial settings. This holistic understanding helps identify similarities, differences, and potential interactions between judges and arbitrators in applying the principle.

The Judicial Authority Law should be seen as the *lex generalis* of the role of an arbitrator as the extension of the judicial authority in the out-of-court settlement dispute resolution mechanism. Therefore, arbitration practice needs to be looked at more than a mono focus of using the lens of the Indonesian Arbitration Law only. This approach, thus, shows that while arbitrators and judges operate within similar functions, there are distinct legal frameworks and have different roles and responsibilities. Therefore, to what extent the *ex aequo et bono* principle can be implemented, which allows decisions to be based on fairness and equity rather than strict legal rules, need to look at more than just one regulation.

It is necessary to examine the arbitrator's authority in deciding the case by taking into account the Indonesian Arbitration Law and Judicial Authority Law. This approach will help to promote legal harmonization and consistency, ensuring that the principle is interpreted and applied in a manner that aligns with both arbitration practices and judicial norms.

While previous research has primarily looked at the implementation of the *ex aequo et bono* principle in arbitration from the perspective of the Arbitration Law only, this research offers additional perspective. In light of this, the research that will be presented will compare the Indonesian Arbitration Law and the Judicial Authority Law on to what extent the arbitrator may decide using the principle of *ex aequo et bono* without the parties' agreement.

Legal research involves the systematic identification of the legal principles that govern a certain activity, as well as the discovery of authoritative sources that provide explanations or analyses of these principles.<sup>20</sup> Therefore, this research is legal research as it attempts to provide and analyse the legal principle i.e., the *ex aequo et bono* principle in the arbitration practice, by taking into account the Indonesian Arbitration Law and the Judicial Authority Law.

This research is doctrinal legal research since it does a comprehensive explanation of legal norms, analyses their interrelation, identifies challenges, and may forecast future developments.<sup>21</sup> The data used is secondary data.<sup>22</sup> The secondary data used in this research consist of primary and secondary legal materials. Primary legal materials are statutory regulations and court decisions, while secondary legal materials are books, articles, and doctrines related to the research focus that explains primary legal materials.<sup>23</sup> Based on the model approach and research materials, an analysis is carried out, namely ways to utilize the collected data to solve research problems.<sup>24</sup> Considering that normative legal research focuses on literature study, the presentation of data is carried out simultaneously with analysis and through qualitative methods, which produce descriptive-analytical insights that contribute to a comprehensive understanding of the legal framework under examination.<sup>25</sup>

In this research, the legality of applying the principle of *ex aequo et bono* by the arbitrator will be first look using the Indonesian Arbitration Law as the *lex specialis*. After identifying the legality of the *ex aequo et bono* in the specific context of the Indonesian Arbitration Law, it will be analyzed whether there are any aspect in the Indonesian Arbitration Law that is not clear enough and required further elaboration. Following that analysis, the Judicial Authority Law will be used to complete the explanation.

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<sup>20</sup> Morris L. Cohen and Kent C. Olson, *Legal Research in a Nutshell*, Thirteenth edition, West Nutshell Series (St. Paul, Minn: West Academic Publishing, 2018), 2.

<sup>21</sup> P. Ishwara Bhat, *Idea and Methods of Legal Research*, First edition (New Delhi: Oxford University Press, 2019), 11.

<sup>22</sup> Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Depok: Rajawali Press, 2020), 118.

<sup>23</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: Penerbit Universitas Indonesia, 2008), 51.

<sup>24</sup> *Ibid.*, 68.

<sup>25</sup> Soerjono Soekanto and Sri Marmudji, *Penelitian Hukum Normatif* (Jakarta: Penerbit Rajawali, 2001), 24.

## **B. Discussion**

### **B. 1. The Indonesian Arbitration Law in Indonesia**

Arbitration is a method for resolving civil disputes outside the traditional judicial system. An arbitration agreement, which must be in writing and signed by all parties involved, is the foundation for the arbitration process.<sup>26</sup> An arbitrator is a third party chosen by the parties involved in a dispute to mediate the issues brought before him in a setting designated for arbitration. An arbitrator is a private person because the arbitrator is not a government official.<sup>27</sup>

Arbitration originates from the Latin "*arbitrare*" which means solving a problem through discretion.<sup>28</sup> When carrying out their responsibilities, arbitrators apply the law like judges do in court.<sup>29</sup> As a result, the functions of an arbitrator and a judge are not all that dissimilar. When deciding the outcome of a case, arbitrators serve in the same capacity as judges.

Arbitration is based on the parties' agreement to have their disagreements, whether they call them disputes or differences, resolved by a private body under the rules or guidelines they create.<sup>30</sup> Thus, the main difference between an arbitrator and a judge is this difference between authority based on agreement and authority based on office.<sup>31</sup> Since the arbitrator also runs the same function as the judge, while it differs in the sense that judges are government officials and an arbitrator is a private person. The arbitrator is also the object of the Judicial Authority Law since the Indonesian Arbitration Law itself is an implementation of the Judicial Authority Law.<sup>32</sup> The Indonesian Arbitration Law puts Law No. 14 of 1970 concerning Basic Provisions on Judicial Authority in the "in view of" (*mengingat*) part. Law Number 14 of 1970 itself was later amended by Judicial Authority Law.

Furthermore, as Article 61 of the Judicial Authority Law mentioned specifically that further provisions relating to arbitration are regulated by Law (in this case, the Indonesian

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<sup>26</sup> Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolutions.

<sup>27</sup> Frank Baddack, "Lex Mercatoria: Scope and Application of the Law Merchant in Arbitration" (Thesis, University of the Western Cape, Cape Town, 2006), 1.

<sup>28</sup> Frans Hendra Winarta, *Hukum Penyelesaian Sengketa* (Jakarta: Sinar Grafika, 2012), 36.

<sup>29</sup> *Ibid.*

<sup>30</sup> Adrian Briggs, *Civil Jurisdiction and Judgments*, Sixth edition (New York: Informa Law from Routledge, 2015), 770.

<sup>31</sup> Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Singapore: Springer, 2019), 41.

<sup>32</sup> Law Number 48 Year 2009 concerning Judicial Authority.

Arbitration Law), it shows that the existence of Arbitrator cannot be separated from the Judicial Authority Law. Article 58 of the Judicial Authority Law stipulates that to resolve civil disputes can be made outside of the state court through arbitration or alternative dispute resolution.<sup>33</sup> Therefore, arbitration as a different approach to conflict resolution can be seen as an extension of judicial authority outside of a traditional courtroom setting.

Article 38 Paragraph (1) of the Judicial Authority Law stipulated that there are other institutions besides the Supreme Court and Constitutional Court that runs the function of the Judicial Authority. In Article 38 Paragraph (2) of the Judicial Authority Law, the law elaborates further about what function that is considered as the Judicial Authority, and the alternative dispute resolution is one of the functions mentioned in this law. Therefore, even if in the specific role of the arbitrator, one should refer to the Indonesian Arbitration Law, however, the essence (*hakekat*) of the role of arbitrator must not be separated from the context of the Judicial Authority Law itself.

The Judicial Authority Law also includes a chapter on alternative methods of conflict resolution at the very end of the legislation.<sup>34</sup> It is interesting to note that this chapter only discusses one form of alternative dispute resolution out of the many that are currently available, which is arbitration. Therefore, Judicial Authority Law must be considered as one of the legal bases for the arbitrator to conduct its function and to be used to explain the relationship between the tasks of arbitrators and judges.

In this context, the presence of the Indonesian Arbitration Law is referred to as a "specificity" or "*lex specialis*" of the Judicial Authority Law in this particular setting. Pursuant to Article 61 of the Judicial Authority Law, the arbitration intended in that law shall be governed more specifically by other laws.<sup>35</sup> Therefore, Indonesian Arbitration Law cannot be separated from Judicial Authority Law regarding the role of the arbitrator.

Law Number 12 Year 2011 concerning the Establishments of Laws and Legislations jo. Law Number 13 Year 2022 concerning the Second Amendment of Law Number 12 Year 2011 concerning the Establishments of Laws and Legislations (the Law of the Establishments of Laws and Legislations) has stipulated about the substance of the law that will be enacted.

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*



Article 10 of the Law of the Establishments of Laws and Legislations specifically regulates that a substance of Law that must be regulated by a Law includes an order of another law to be regulated in another law. Therefore, the Indonesian Arbitration Law is an organic implementation of the Judicial Authority Law.

As a point of comparison, in Article 3 paragraph (1) of Law No. 14 of 1970 concerning Main Provisions on Judicial Authority, it is regulated that all courts throughout the territory of the Republic of Indonesia are State courts and that their determinations are based on the law. This provision applies to all courts. Considering the construction built in Law No. 14 of 1970 concerning the Main Provisions of Judicial Authority, it is possible to interpret that any court capable of carrying out the role of the judiciary is a state court where the mandate of authority comes from the state. The same construction can be found in Judicial Authority Law passed in 2009. Article 2 Paragraph (3) of Judicial Authority Law still maintains the same formulation as Article 3 Paragraph (1) of Law Number 14 of 1970 concerning the Main Provisions of Judicial Authority.

In addition, although Article 2 Paragraph (3) of Judicial Authority Law still maintains the same formulation as Article 3 Paragraph (1) of Law Number 14 of 1970 concerning the Main Provisions of Judicial Authority, there is a different explanation of the Article. This is despite the fact that Article 2 Paragraph (3) of Judicial Authority Law was passed in 2009. In the elucidation of Article 2 paragraph (3) of Judicial Authority Law, the phrase "clear enough" is the only thing that is mentioned. This contrasts with the explanation found in Article 3 Paragraph (1) of Law Number 14 of 1970 concerning Main Provisions of Judicial Authority, which explains that arbitration is still permitted.

However, a separate chapter of Judicial Authority Law emphasizes arbitration as an alternative dispute resolution mechanism. This demonstrates that both Law Number 14 of 1970 and Judicial Authority Law included arbitration as a substantive component of their respective regulatory frameworks. In this context, arbitrators can be compared to private judges; more specifically, they are private judges whose services are contracted out in order to resolve disputes.

The connection of the arbitrator with the Judicial Authority does not necessarily make an arbitrator as a judge. The specificity of an arbitrator as regulated by the Indonesian Arbitration Law, must be respected. The Judicial Authority Law must be seen as a legal ground

for the existence of the Indonesian Arbitration Law and as the moral ground for the arbitrator to understand why it exists in the first place.

As an arbitrator is essential in settling disputes through arbitration, the arbitrator has to be understood as running the Judicial Authority function as stipulated in the Judicial Authority Law. The existence of the arbitrator is not merely as a “*Ginnie in the bottle*” that presented itself just because the parties agree to do so. The arbitrator has the general role of upholding the law and justice. Therefore, the principles of a judge must be distinct from those of an arbitrator, given that a judge must investigate, adhere to, and understand the societally prevalent legal values and sense of justice.

## **B. 2. *Ex Aequo et Bono***

The ancient principle of *ex aequo et bono* posits that adjudicators should resolve conflicts based on notions of fairness and moral integrity.<sup>36</sup> Therefore, making decisions that are fair and appropriate (*aequo et bono*) is not a right that judges have but rather an obligation that they must fulfill.

If this is analogous to an arbitrator, then the authority of the arbitrator to decide a case in an *aequo et bono* manner is not a right but rather an obligation with or without the consent of the parties if a request for this matter is submitted to him. In other words, an arbitrator has the authority to decide a case in an *aequo et bono* manner.

The concept of justice prompts judgments about how a person ought to behave, and there is a close connection between this and the successful accomplishment of a sense of justice as a legal judgment (*rechtsdoel*).<sup>37</sup> Therefore, limiting the arbitrator's ability to decide based on justice and decency is not only contrary to the nature of the role of the judge he is performing, but it is also contrary to the nature of the arbitrator as a human being who possesses the capacity to make judgments about the facts that have been presented to him.

Article 56 Paragraph (1) of the Indonesian Arbitration Law does not prohibit arbitrators from making decisions on an *ex aequo et bono* basis.<sup>38</sup> Therefore, the law does not limit the freedom of arbitrators to make decisions. Arbitrators make decisions based on legal provisions

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<sup>36</sup> Leon Trakman, “Ex Aequo et Bono: Demystifying an Ancient Concept,” *Chicago Journal of International Law* 8, no. 2 (2008): 641, <https://chicagounbound.uchicago.edu/cjil/vol8/iss2/11>.

<sup>37</sup> Bernard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum* (Bandung: Mandar Maju, 2009), 178.

<sup>38</sup> *Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolutions*.

or fairness and decency. Furthermore, Article 56 of the Indonesian Arbitration Law does not explain this article that strictly prohibits the arbitrator from making a decision on an *ex aequo* basis.<sup>39</sup>

By law, the arbitrator is granted the authority to decide based on what is morally and ethically acceptable, even disregarding a written law. The exception is only given regarding the coercive law (*dwingende regels*), which the arbitrator cannot deviate from.

Article 56 Paragraph (1) of the Indonesian Arbitration Law should be understood as limitations on parties' ability to set aside the statutory law. The parties must reach an agreement in advance if they wish to challenge statutory provisions by setting them aside. Therefore, the current legal constructions should be kept on their heads. In other words, if the parties don't agree to disregard the statutory regulations, the arbitrator will continue to have authority under the *ex aequo et bono* rule.

Furthermore, using the judge as the analogy, Judicial Authority Law stipulates that a judge must dig, follow, and understand the legal values and the sense of justice that lives in society.<sup>40</sup> The law, in contrast, does not stipulate strictly that a judge has to dig, follow, and understand the statutory law. However, it doesn't mean that the judge can ignore the statutory law. The obligation of the judge to find the living law in society is hand in hand with the obligation to uphold the statutory law.

Therefore, Article 56 Paragraph (1) of Indonesian Arbitration Law can be understood similarly: arbitrators must also dig, follow, and understand the legal values and the sense of justice that lives in a society formed in the *ex aequo et bono* principle. Suppose arbitrators, like judges, must be given the authority to make decisions based on fairness and decency. In that case, they can only make those based on material legal principles.

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<sup>39</sup> Elucidation of Article 56 Paragraph (1) of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolutions:

*"Pada dasarnya para pihak dapat mengadakan perjanjian untuk menentukan bahwa arbiter dalam memutus perkara wajib berdasarkan ketentuan hukum atau sesuai dengan rasa keadilan dan kepatutan (ex aequo et bono). Dalam hal arbiter diberi kebebasan untuk memberikan putusan berdasarkan keadilan dan kepatutan, maka peraturan perundang-undangan dapat dikesampingkan.*

*Akan tetapi dalam hal tertentu, hukum memaksa (dwingende regels) harus diterapkan dan tidak dapat disimpangi oleh arbiter. Dalam hal arbiter tidak diberi kewenangan untuk memberikan putusan berdasarkan keadilan dan kepatutan, maka arbiter hanya dapat memberi putusan berdasarkan kaidah hukum materiil sebagaimana dilakukan oleh hakim."*

<sup>40</sup> Article 5 Paragraph (1) of Law Number 48 Year 2009 concerning Judicial Authority:

*"Hakim dan hakim konstitusi wajib menggali, mengikuti, dan memahami nilai-nilai hukum dan rasa keadilan yang hidup dalam masyarakat."*

It is worth noting that the only time a judge has the authority to decide based on *ex aequo et bono* is if the parties ask them to do so. Even if the plaintiff requests for an *ex aequo et bono* and the respondent rejects such a plea, the judge still has the authority to grant such a petition. Nevertheless, even if such a request is pleaded to the judge, the judge has the liberty not to grant it. In point of fact, even though one of the parties requests a *petitum ex aequo et bono*, the judge is at liberty to dismiss such a *petitum*.<sup>41</sup> The application of the *ex aequo et bono* principle is not arbitrary. If the judge's decision is different from the *petitum* by claiming that it follows *ex aequo et bono*, then the judge's decision must still have to follow the decency and appropriateness principle within the framework of the primary *petitum* and the argument for the lawsuit.<sup>42</sup>

In addition, in connection with Article 178 paragraph (3) of the *Het Herziene Indonesisch Reglement* (HIR), it has become a guideline for judges that stipulates that a judge is prohibited from passing decisions on cases that are not being requested or passing more than what is required.<sup>43</sup> Therefore, the limitation of paragraph three of article 178 of the HIR is that the judge can only decide what is requested or if the parties demand it.<sup>44</sup>

Comparing the context of *ex aequo et bono* in the litigation court with *ex aequo et bono* in the arbitration will shed light on Article 56 Paragraph (1) of the Indonesian Arbitration Law. The arbitrator may retain the authority to grant the *ex aequo et bono* plea by the plaintiff regardless of whether or not parties in an agreement agree that an arbitrator may decide based on the rule of law only or exclusively based on equity.

Article 56 Paragraph (1) of the Indonesian Arbitration Law must be seen as the limitation for settling a dispute only by using prevailing laws. Meanwhile, it cannot be seen as a limitation to disregard equity because even if the parties agree to disregard *ex aequo et bono* in their agreement, the arbitrator shall always retain the authority to put into consideration the equity that exists in the society as mandated by Article 5 Paragraph (1) of the Judicial Authority Law.

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<sup>41</sup> M. Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2008), 802.

<sup>42</sup> *Ibid.*

<sup>43</sup> R. Tresna, *Komentar HIR* (Jakarta: PT Pradnya Paramita, 2001), 158.

<sup>44</sup> *Ibid.*

Meanwhile, it is a different situation with the rule of law. The parties in an agreement may agree to opt out of the rule of law because justice does not equal with law.<sup>45</sup> And in this situation lies the specificity of the arbitrator. While a judge cannot disregard the rule of law but instead be bound by it, an arbitrator can only if all the parties agrees.

It is, therefore, erroneous to conclude that the authority of the arbitrator to decide on an *ex aequo et bono* basis, which is based on the agreement of the parties, and even then, it must be in a prior written agreement, can be derived from the interpretation of Article 56 paragraph (1) of the Indonesian Arbitration Law. This interpretation is interpreted as the authority of the arbitrator to decide on an *ex aequo et bono* basis. As long as both parties request to decide *ex aequo et bono*, the arbitrator is always willing to take it into consideration. The authority of the arbitrator to decide *ex aequo et bono* is based on statutory provisions.

The provisions of Article 56 paragraph (1) of the Indonesian Arbitration Law need to be understood as a form of limitation for the parties involved in the dispute and not as a limitation for the arbitrators. That is, the parties need to agree before they can decide to disregard all the existing legal formalities and insist that only fairness and decency be used instead. In the meantime, the authority to decide on an *ex aequo et bono* basis is considered a living authority for arbitrators. This is due to the demands placed on the role of arbitrators, who must investigate, follow, and comprehend the legal values and a sense of justice in society.

It is not possible to consider *ex aequo et bono* to be a right that the parties to a dispute have the ability to grant to an arbitrator or arbitral tribunal. An arbitrator possesses the authority of *ex aequo et bono* by virtue of their position. The term arbitration originates from the Latin word "*arbitrare*," which means "to adjudicate," and the "freedom to adjudicate wisely" is considered to be "the soul of the practice of arbitration itself." It is precisely a denial of the nature of arbitration to remove or restrict the arbitrator's authority to apply fairness and decency in resolving disputes.

The practice of *ex aequo et bono* is a legal obligation of an arbitrator because the mandate of the Judicial Authority Law is analogous to that of a judge. This means that the practice of *ex aequo et bono* is a legal obligation of an arbitrator. It is not stated anywhere in the construction of the Judicial Authority Law that judges have the right to investigate, adhere

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<sup>45</sup> Shantaraj Debbarma, "The Justice: A Moral Virtue," *International Journal of Research and Review* 7, no. 1 (2020): 266, [https://www.ijrrjournal.com/IJRR\\_Vol.7\\_Issue.1\\_Jan2020/IJRR0038.pdf](https://www.ijrrjournal.com/IJRR_Vol.7_Issue.1_Jan2020/IJRR0038.pdf).

to, and comprehend the sense of justice that exists in society. In contrast, the Law on Judicial Authority imposes a requirement on its subjects. Because it is a requirement, there can be no deviation from it. This is also consistent with the explanation given in paragraph one of Article 56 of the Indonesian Arbitration Law, which states that coercive law must be applied and that the arbitrator may not deviate from it in any way.<sup>46</sup> Therefore, in the event that a party requests *ex aequo et bono* from an arbitrator, it is the arbitrator's responsibility to investigate, adhere to, and comprehend the legal values and sense of justice that are prevalent in a society so that he can then make a decision that is appropriate and fair.

The final sentence in the elucidation of Article 56 paragraph (1) of the Indonesian Arbitration Law should be interpreted to mean that if the arbitrator is not asked to give a decision based on fairness and propriety, then the arbitrator can only give a decision based on material legal principles, just like the judge did. If the arbitrator is asked to decide based on fairness and propriety, then the decision must be based on fairness and propriety. This is not only in accordance with the Judicial Authority Law but also does not introduce a new standard that was absent in the primary law article that it has been elucidating.

If the elucidation of Article 56 paragraph (1) of the Indonesian Arbitration Law is being insisted to be interpreted as the obligation of the parties to agree in advance to the granting of *ex aequo et bono* to the arbitrator, this cannot be accepted immediately. Appendix I of the Law of the Establishments of Laws and Legislations stipulated that examples may accompany explanatory explanations, function as official interpretations for the establishments of Legislations, and may not result in the ambiguity of the norm in question in the norm that it explained.<sup>47</sup>

Therefore, to udestod the Article 56 paragraph (1) of the Indonesian Arbitration Law explanation as putting it mandatory for parties in a dispute to be agreed first so that an arbitrator be able to decide based on *ex aequo et bono* may be understood as including something new other than a formulation that is stipulated in the main norm of Article 56 paragraph (1) of the Indonesian Arbitration Law itself. Meanwhile, an explanation or an elucidation of an article of law must not include new standards or new norms. That is if the clarification of Article 56

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<sup>46</sup> Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Resolutions.

<sup>47</sup> Law Number 13 Year 2022 concerning the Second Amendment to Law Number 12 Year 2011 concerning the Establishments of Laws and Legislations.

paragraph (1) of the Indonesian Arbitration Law is interpreted as the obligation of the parties to agree in advance to the provision of *ex aequo et bono*. At the same time, there is no formulation of provisions in the body of the arbitration which regulates this. The elucidation part of the Indonesian Arbitration Law has contradicted the Law of the Establishments of Laws and Legislations.

Therefore, the arbitrator possesses the authority to decide based on *ex aequo et bono* regardless of whether the parties have agreed beforehand or not, so long as there is a request in the *petitum* asking him to make such a decision. It is different with the judge, who cannot disregard the rule of law and use only *ex aequo et bono* to decide a case.<sup>48</sup>

This authority of the arbitrator to decide on *ex aequo et bono* exists regardless of whether the parties have agreed beforehand. The specificity relating to *ex aequo et bono* in arbitration and in litigation court lies on whether the parties can exclusively rely on *ex aequo et bono* principle to settle their case or not. Therefore, Article 56 Paragraph (1) of the Indonesian Arbitration Law is not about whether the arbitrator is given the right to judge based on *ex aequo et bono* if requested by the plaintiff. Instead, it must be understood in the context that the parties may agree that their dispute shall be settled by the *ex aequo et bono* principle exclusively and disregard the rule of law if such rule of law is not mandatory.

Therefore, the elucidation of Article 56 Paragraph (1) of Indonesian Arbitration Law needs to be understood as not to put arbitrators in a position where they are severely constrained in their ability to carry out responsibilities that should be central to their role. An essential demand that cannot be avoided against someone entrusted with the role of an arbiter is that they seek justice and dig for wisdom that lives in society. According to Roman legal theorists, jurisprudence is the art of determining what is just and appropriate (*ars boni et aequi*).<sup>49</sup> Therefore, if the arbitrator cannot decide what is just and appropriate, the arbitration process loses its very essence.

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<sup>48</sup> M. Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2008), 858.

<sup>49</sup> Sudikno Mertokusumo, *Teori Hukum* (Yogyakarta: Cahaya Atma Pustaka, 2012), 40.

### **C. Conclusion**

It is impossible to judge the arbitrator's authority to decide *ex aequo et bono* based solely on the Indonesian Arbitration Law. The functions and responsibilities of an arbitrator need to be understood in the context of his role as a private judge, which is an extension of the judicial sphere that is not managed by judges appointed by the state. It is impossible to dispute his responsibility to look for and locate justice despite serving as a private judge. It is insufficient for the parties to agree that the arbitrator has the authority to decide *ex aequo et bono*. Arbitrators have the authority to decide cases based on the *ex aequo et bono* principle because this principle is consistent with the letter and spirit of the arbitration process. In addition, the Law on Judicial Authority imposes responsibilities upon judges, requiring them to investigate, adhere to, and comprehend the legal values and a sense of justice in society. Therefore, it is reasonable and acceptable for arbitrators to carry out obligations comparable to those of judges. In addition, the body of the Indonesian Arbitration Law does not contain a single article that mandates that the parties reach an agreement in advance regarding the granting of *ex aequo et bono*.

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