Kluwer Law International

Journal of International Arbitration

Wolters Kluwer
Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by *Kluwer Law International*
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by *Aspen Publishers, Inc.*
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by *Turpin Distribution*
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0255-8106

This journal should be cited as (2008) 25 *J. Int. Arb.* 5

The *Journal of International Arbitration* is published six times per year.
Subscription prices for 2008 [Volume 25, Numbers 1 through 6] including postage and handling:
EUR662/USD874/GBP486 (print)

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.kluwerlaw.com.
For further information at please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For advertisement rates please contact our marketing department at +31 (0) 172 641525 (Marina Dordic) or at marketing@kluwerlaw.com.

The *Journal of International Arbitration* is indexed/abstracted in the *European Legal Journals Index*.

Printed on acid-free paper

All correspondence should be addressed to:
Dr. Michael J. Moser
Journal of International Arbitration
c/o Hong Kong International Arbitration Centre
38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China
Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com
For subscription queries please see copyright page overleaf.

ISSN 0255-8106
Mode of citation: 25 J.Int.Arb. 5

Journal of International Arbitration **25(5)**: 569–581, 2008.

Arbitration in Equity and *Amiable Composition* under Portuguese Law

António Sampaio Caramelo★

Under the Portuguese Arbitration Act, the parties may authorise the arbitrators to decide the dispute submitted to them according to equity, rather than according to the law. As there is debate among Portuguese commentators on arbitration law about the extent to which the arbitrators so empowered can depart from the law, this article seeks to contribute to the elucidation of that issue. Moreover, with respect to international arbitrations, the Arbitration Act allows the parties to authorise the arbitrators, instead of deciding the case according to the law, to settle it according to equity or by acting as "amiable compositors", which raises the question of whether "amiable composition" under Portuguese law should be understood as being the same as arbitration in equity or if it is a different institution (a tertium genus*).*

I. Arbitration in Law and Arbitration in Equity in the Portuguese Arbitration Act

Article 22 of the Portuguese statute which sets out the legal framework of "voluntary arbitrations"[1] located in Portugal (Law No. 31/86 of August 29, 1986, "Arbitration Act" or "the Act") provides that "the arbitrators shall decide in accordance with the law, unless the parties have authorized them to decide according to equity in the arbitration agreement or in a subsequent written document signed before the acceptance of the first-appointed member of the arbitral tribunal." Article 22 applies to all arbitrations held in Portugal,[2] but Article 33(1), which specifically contemplates "international arbitrations,"[3]

★ António Sampaio Caramelo is a partner of Morais Leitão Galvão Teles, Soares da Silva & Associados.

[1] In the Portuguese legal system, "voluntary arbitration" means the method of resolving disputes related to alienable rights (i.e., rights which can be disposed of by their holders) which is founded on the consent of the parties in conflict, such consent having being expressed either through an arbitration clause (*clause compromissoire*) or through a submission agreement (*compromis*). The rights in dispute which can be settled by means of "voluntary arbitration" may arise from contracts, quasi-contracts or torts and may pertain to matters of private law (civil or commercial law) or of administrative law (here with some restrictions). This kind of arbitration named as "voluntary" is opposed to "compulsory arbitration" which is a method of resolving disputes imposed by law, which one finds in some areas of administrative law, tenancy law and labour law.

[2] It should be noted that, pursuant to its art. 37, the Arbitration Act applies to "all arbitrations that take place in Portugal." This wording is interpreted by Portuguese legal commentators to mean arbitrations in which the parties have agreed that the seat of arbitration would be within the Portuguese territory (without prejudice to the fact that some acts of the arbitral proceedings might be carried out or the final award be rendered outside this territory), irrespective of the domestic or international nature of the interests involved, although the Act contains a few provisions applying specifically to "international arbitrations" (defined as per the provisions of art. 32 quoted *infra* n. 3).

[3] "International arbitrations" are defined by art. 32 of the Act as being those "which involve the interests of international trade." Thus, in order to distinguish between "international arbitrations" and "domestic arbitrations," the Arbitration Act did not use a conflict of laws criterion, following instead the economic criterion adopted for this purpose by French law, as was expressly acknowledged in the Statement of Motives accompanying the Draft Law submitted by the Government to the Parliament, which led to the approval of the Arbitration Act by the latter. In that Statement of Motives it was pointed out that, in draft art. 32, "international trade" should be understood in its widest sense, in order to encompass all legal relationships of international private life and not only the relationships between tradesmen or business operators.

provides further that the parties may chose the law to be applied by the arbitrators (Article 33(2) adds that, failing such choice, the arbitral tribunal shall select the law which is most appropriate to the dispute), unless the parties have authorized the arbitrators to decide according to equity.

The distinction between arbitrations according to the law ("arbitrations in law") and arbitrations according to equity ("arbitrations in equity") has been a feature of the Portuguese legal system for a long time.[4] Although prior to the Arbitration Act entering into effect, there was no unanimous agreement among Portuguese legal scholars and commentators regarding the freedom that the arbitrators (or the state courts' judges in cases in which they had been authorized to decide according to equity) actually had to make decisions at variance with the rules of law in force, when they have been vested with the power to decide *ex aequo et bono*,[5] there was a substantial common ground that the decision-maker was allowed to disregard some of the relevant rules of law[6] when they appeared to have harsh or unfair effects in the particular case under assessment.

However, such a clear-cut distinction between arbitration in law and arbitration in equity became fuzzier as a result of the Parliament (Assembly of the Republic) approving the insertion into the Arbitration Act[7] of Article 35 (applying only to "international arbitrations" as defined above) which, under the heading of *composição amigável*,[8] reads as follows: "If the parties have vested such power in it, the arbitral tribunal may decide the dispute by appealing to the composition of the parties on the basis of the balance of interests at stake."

Since Article 34 comes after Article 33(1) which envisages only the traditional dual alternatives of arbitration in law and arbitration in equity, a good justification then exists to question whether the Parliament, when it enacted Article 35 (*composição amigável*), had intended to create a *tertium genus* whereby arbitrators, so empowered by the parties in international arbitrations located in Portugal, should decide the dispute in a manner which is different not only from the duty imposed upon the arbitrator in law but also from the assignment given to the arbitrator in equity.

Although many arbitration practitioners take the view that arbitration in equity and *composição amigável* mean essentially the same thing, the majority of Portuguese commentators on arbitration law hold that, in order to give Article 35 of the Arbitration Act

---

[4] It is worth noting that, in accordance with Portuguese Civil Code art. 4 (1966), the state court judges are also permitted to decide according to equity, provided that: (i) there is a legal provision that allows them to do so; or (ii) there is an agreement of the parties to that effect and the legal relationship which is the object of the dispute is not inalienable; or (iii) the parties have previously agreed that the dispute should be decided according to equity on the same terms as applicable to the arbitration clause. Nevertheless, the author is not aware of any decision rendered by a Portuguese court vested with the power contemplated in Civil Code art. 4.

[5] In this article "arbitration in equity" and arbitration *ex aequo et bono* will be considered as perfect synonyms.

[6] For some commentators, this includes all rules of law except those constituting the core of public policy, while for others only the non-mandatory rules could be disregarded.

[7] Neither these provisions nor the concept of *amiable composition* existed in the Draft Law submitted by the Government to the Parliament. Its insertion as well as the inclusion of the few other provisions specifically aimed at "international arbitrations" was the result of amendments made to the Draft Law by the Parliament.

[8] This expression brings immediately to the interpreter's mind the notion of *amiable composition* which is a creation of French legal thinking.

a useful purpose, the meaning of *composição amigável* contemplated in that article should coincide with that of "arbitration according to equity" envisaged in Articles 22, 29 and 33(1) of the Act. The precise scope of the powers to be granted to the *compositor amigável* is, however, an issue which is the subject of debate in Portuguese scholarly writing related to arbitration.

Considering that the dualism "decision according to the law" and "decision according to equity" has been analyzed in more depth by Portuguese legal commentators, the author will first try to determine what are the powers of the arbitrator in equity (or *ex aequo et bono*) as opposed to the arbitrator in law and, after that, will seek to determine whether a *compositor amigável* appointed under Article 35 of the Arbitration Act has a greater latitude to depart from the law[9] in order to fashion his decision in the interest of fairness as he perceives it than the arbitrator in equity or if, conversely, the former has a narrower freedom to ignore the law;[10] or, alternatively, if the mission of the *compositor amigável*, independently of the greater or lesser extent of such freedom that he may enjoy, is somewhat different from that of the arbitrator in equity.

II. Meaning of Decision in Equity under Portuguese Law

Some Portuguese legal scholars, such as Professor Menezes Cordeiro[11] (following a similar distinction made by some influential German legal theoreticians, such as Karl Engish and Jeseph Esser), distinguish between:

- a "weaker" meaning of equity which, starting from the rules of law which are in force, allow the adjudicator to correct the injustices created by the rigid nature of the general and abstract rules when they are applied to a concrete situation; and
- a "stronger" meaning of equity which disregards the strict law and seeks a solution based on the so-called "justice of the concrete case" for the problem at hand.

After analyzing in detail the terms of the provisions of statutory law (especially those of the Civil Code) that allow or direct the courts to resort to equitable parameters in their decisions regarding some aspects of the situations envisaged by legal rules, the said scholars contend that in none of the previously analyzed situations were the judges given the freedom to decide arbitrarily or to disregard the law; they were rather directed to resort to equity in order to overcome the vagueness or lack of determination of some

[9] As, e.g., William W. Park, W. Laurence Craig & Jan Paulsson, International Chamber of Commerce Arbitration 113 (2000), suggest with respect to international arbitrations held under the scope of French law or the influence of French legal thinking or, more broadly, regarding arbitrations carried out under the ICC Arbitration Rules.

[10] This is the view held by the great majority of the Swiss commentators on arbitration law; *see*, e.g., P. Lalive, J.F. Poudret & Reymond, Le droit de l'arbitrage interne et international en Suisse 172–73 (1989); J.F. Poudret & S. Besson, Comparative Law of International Arbitration 618–28 (2007).

[11] *See* Menezes Cordeiro, O Direito: Decisão Segundo A Equidade 122°, II, 267 (1990).

aspects of the case *sub judice* (notably related to situations of compensation or indemnification or to the remuneration corresponding to certain goods or services) which could only be determined concretely, but without ignoring the regulatory standards and/or principles set by the law. Thus, equity would be an intra-systematic (i.e., playing its role within the legal system) model of decision.[12]

From their detailed analysis on the manner of how the reference to equity is made by the rules of statutory law that they have considered, the scholars conclude that the decision according to equity is a decision taken in light of the law and in accordance with the legal directions which emanate from the strict legal rules in force.[13] Thus, only the application of rules of a formal nature, the existence of which is justified only in state courts and administrative services, could be dispensed with by an in equity decision-maker. These scholars also point out emphatically that the determination of legal disputes in equity should not be equated with arbitrariness, since it should always start from the law in force, because "the latter, in a duly structured legal order, in tune with the aspirations of its time and with an adequate constitutional organization, expresses, in its highest degree of development, what in a given society is considered as just, ethical, adequate and convenient."[14] Based on this reasoning, such scholars decidedly adopt the aforesaid "weaker" meaning of equity.

III. Decision in Equity as a Real Alternative to Decision in Law

Other Portuguese legal scholars of no inferior academic standing adhere to the aforesaid "stronger" meaning of equity.[15]

For instance, Professor José de Oliveira Ascensão, starting from the very illuminating and surprisingly up-to-date comments made by Aristotle on the distinction between

---

[12] Nevertheless, these scholars, notably Prof. António Menezes Cordeiro, omit in their analysis the crucial difference between Civil Code art. 4, which envisages the possible adjudication of the dispute according to equity (instead of a decision according to the law) and the list of other articles of the same Code where the reference to equity by the legal rules is made in order to overcome the great difficulty felt by the legislator in pre-determining or pre-quantifying the relief that a party is entitled to (e.g., the compensation to be granted to the injured party in particular tort cases or the remuneration arising from particular contractual situations). In fact, in Civil Code art. 4, equity seems to be viewed as an autonomous dispute resolution criterion, i.e., as an alternative to the application of the rules of law, whilst in the list of other articles of the Code considered by those scholars, equity plays only an ancillary and/or complementary role vis-à-vis the legal rule that refers to it. Indeed, regarding the latter group of articles of the Civil Code, equity is only called to work *intra legem*, *infra legem* or *secundum legem*, whereas under art. 4 one finds no indication that it may not be applied *praeter legem* or even *contra legem*. Not only does one find no argument in the law that may support the view that the role to be played by equity in Civil Code art. 4 is fundamentally different from the one that is attributed thereto in the references to equity made in the articles of the same Code analyzed by the aforesaid scholars, but also the wording ("the court may decide according to equity") and the context of art. 4 point to the idea of equity being contemplated as a criterion which may substitute the one resulting from the rules of law in force. Furthermore, there are other articles in the Civil Code (e.g., arts. 339 and 2016(2)) where the *praeter legem* nature of reference to equity made by the legal rule is beyond doubt. Therefore, with due respect, the conclusions which the above-mentioned scholars draw from a number of articles of the Civil Code on the role that equity can play in the Portuguese legal system are partially begging the question.

[13] Menezes Cordeiro, *supra* note 11, at 270–72.

[14] *Id.* at 271–73.

[15] *See* J. Oliveira Ascensão, O Direito: Introdução e Teoria Geral 245–49, 261, 442 (13th ed., 2005).

equity and legal justice,[16] which are still widely considered as valid today, contends that the "decision according to equity" can only be correctly apprehended if it is viewed as an extra-systematic model of decision, i.e., a method of deciding disputes which operates outside the regulatory logic of the legal system and its rules. For this scholar, in the adjudication or arbitration according to equity, the decision-maker is authorized to depart from the legal solution and to decide according to the circumstances of the particular case. Contrary to the decisions pursuant to abstract norms, which by definition provide rigid decision criteria, because they disregard the circumstances that were not considered relevant, equity is a malleable decision criterion, since it is able to take into account the circumstances of the case and other perspectives that may be relevant to the decision of the dispute and which the abstract rule ignores, such as the strength or weakness of the parties, the effects on their wealth, etc., in order to reach a solution that is better adapted to the concrete case—even if, to do this, the decision-maker has to move away from the normal solution established by the law.[17]

In addition, Professor Luís Lima Pinheiro, author of the most comprehensive text-book on international arbitration published in Portugal,[18] clearly supports the "stronger" meaning of equity. In his opinion, a decision in equity, since it is based on the so-called justice of the concrete case, is not bound by the pre-existing general rules of law, which can therefore be disregarded in the concrete solution to be given to the case at hand, since such solution does not aim at giving rise to a general rule capable of being applied to other cases. However, for this commentator, the freedom of arbitrators in equity to

---

[16] In Aristotle's NICOMACHEAN ETHICS, Bk V, ch. X:

> For equity, though superior to one kind of justice (legal justice), is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: equity is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind. So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances. This is why equity, although just, and better than a kind of justice, is not better than absolute justice—only than the error due to generalization. This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality. This in fact is also the reason why everything is not regulated by law: it is because there are some cases that no law can be framed to cover, so that they require a special ordinance. An irregular object has a rule of irregular shape, like the leaden rule of Lesbian architecture: just as this rule is not rigid but is adapted to the shape of the stone, so the ordinance is framed to fit the circumstances. It is now clear what equity is, and that it is just, and superior to one kind of justice. This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has the law on his side. Such a disposition is equity; it is a kind of justice, and not a distinct state of character.

Referring to Aristotle's excerpt quoted above, one of the highest regarded Portuguese legal theoreticians, Prof. A. Castanheira Neves, wrote (in QUESTÃO DE FACTO: QUESTÃO DE DIREITO OU O PROBLEMA METODOLÓGICO DA JURIDICIDADE 318 (1976) that this "text could hardly be more exact and more elucidating, in its clarity—and, in addition, more flagrantly up-to-date."

[17] OLIVEIRA ASCENSÃO, *supra* note 15, at 245–46, 442.

[18] LUÍS LIMA PINHEIRO, ARBITRAGEM TRANSNACIONAL: A DETERMINAÇÃO DO ESTATUTO DA ARBITRAGEM 159–63 (2005).

ignore the law is not unlimited. Although they are free to assess all the juridical and extra-juridical arguments which have a minimum of objective social relevance, and to base their award rationally upon those arguments as well as on the legitimacy of the decision process and on its social consequences, the arbitrators in equity must always respect the general principles of law and the paramount values of the legal order.[19] According to Luís Lima Pinheiro, this is the meaning of "decision according to equity" contemplated in Articles 22 and 33(1) of the Portuguese Arbitration Act.

In the author's view as well, this is the correct understanding of the meaning and scope of arbitration in equity under Portuguese law. Those commentators who adhere to the so-called "weaker" meaning of equity are captive of a normativist conception about the way justice is to be achieved in organized societies and they fail to grasp that, as René David pointed out almost thirty years ago,[20] the true essence of international arbitration is more extra-juridical than juridical.

Indeed, as René David wrote,[21] in voluntary arbitration (as opposed to compulsory arbitration), the arbitrator has only the powers that the parties have vested in him; consequently, the first law that he must comply with is the private agreement (arbitration agreement) from which his powers arise and which can enjoin him to exercise them in this or that manner. Moreover, state law should not represent for the arbitrator the same thing as for the state judge. For the latter, given the source of his power and duties, there is no law beyond the one that the state prescribes him to apply. It is not the same for the arbitrator who was not vested with his powers by the state and who does not decide in the name of the state. Thus, the arbitrator, as he must take into consideration what the parties expect from him, should seek justice rather than stick rigidly to state law.[22] Indeed, one of the advantages that one aims to obtain by resorting to arbitration is the possibility that this dispute resolution method offers the individualized application of justice and its proper administration to the circumstances of the concrete case submitted to the arbitrator.

A similar opinion has been expressed by another highly regarded arbitration theoretician and practitioner, Pierre Lalive, who wrote[23] that a conception of arbitration in equity shaped as per the above-mentioned "stronger" meaning seems more in accordance with international arbitration practice, as there are good grounds to consider that, when the parties expressly give to the arbitrator the mission of deciding *ex aequo et bono*, they expect to obtain *something different* from a decision in law. This implies, according to Pierre Lalive, that arbitrators in equity have not only the power, but also the obligation, to accomplish their mission, in applying legal principles if they are deemed fit but not of necessity, of verifying whether such principles would lead to a solution in conformity with equity.

---

[19] *Id.* at 160.

[20] René David, L'arbitrage dans le commerce international 566–68 (1981).

[21] *Id.* at 567.

[22] This does not mean, as René David also stressed, that the arbitrators should, and could, neglect the laws of the relevant state or states, as there is a close relationship between those laws and justice. *Id.* at 567.

[23] Pierre Lalive, *Le droit applicable au fond par l'arbitre international, in* Droit international et droit communautaire 38 (1990).

The author fully agrees with the views held by the latter mentioned commentators, since the author thinks that the above-mentioned "stronger" meaning of arbitration in equity is the one that should be deemed as adopted in the Arbitration Act, which implies that when equity is chosen by the parties as the model of decision of the dispute, it is meant to work by disregarding the rules of law in force. Indeed, this conception seems to be the only one which is able to provide a really meaningful sense to the clear distinction between "arbitration according to the law" and "arbitration according to equity" that one finds in the Arbitration Act.

Arbitration in equity is, therefore, an extra-systematic (i.e., working outside the regulatory standards and/or criteria of the legal system) model of deciding disputes. This is true not only with respect to international but also to domestic arbitration, although in a much clearer way in the domain of the former, because of the weaker links that the arbitrator has then with one or several systems of law.

IV. Meaning of *Composição Amigável* Contemplated in the Arbitration Act

After having stated the author's adhesion to the above-mentioned "stronger" meaning of equity, we should now try to understand how and to what extent it differs from the model of decision called *composição amigável* contemplated in Article 35 of the Arbitration Act.

Some Portuguese commentators suggest that the distinction between the two concepts should be made by giving to the notion of *composição amigável* envisaged by Article 35 a broader scope than the one pertaining to arbitration in equity, since they hold that the former encompasses the possibility for the arbitrator to "force" the parties into reaching a settlement.[24]

This does not seem to be an adequate criterion to distinguish between the aforesaid notions. It has the effect of blurring the distinction between arbitration and mediation (or conciliation).[25] It is indeed the mediator or conciliator, not the arbitrator, who is given by the parties the assignment of endeavouring to induce them into reaching a settlement. The mediator carries out his mission by listening to the parties' grievances or claims, in order to be able to understand where their real interests lie, including by meeting with each party separately (so-called "caucusing"), and then trying to persuade them to moderate their respective positions with the aim of persuading them to reach a settlement, which, if achieved, will draw its binding force from the agreement entered into by the parties and not from any solution presented by the mediator. Conversely, in arbitration

[24] *See* Paula Costa de Silva, *Anulação e Recursos de Decisão Arbitral*, 52 Revista da Ordem dos Advogados, 940 (No. 3, 1992); Maria do Céu Rueff Negrão, A composição amigável na arbitragem voluntária (1987) (unpublished manuscript, on file with the Law School of the Classic University of Lisbon).

[25] In Portuguese and foreign legal Commentaries on international arbitration, the terms "mediation" and "conciliation" are generally used as if they are interchangeable; the same approach is taken in this article; in this regard, *see* A. Redfern & M. Hunter, Law and Practice of International Arbitration 37–39 (2004); Dário Moura Vicente, Arbitragem Comercial Internacional: Direito Aplicável ao Mérito da Causa 31 (1990).

the dispute is resolved through the decision of the arbitrator, which becomes, by itself, immediately binding upon the parties.[26]

Another Portuguese commentator, Professor Lima Pinheiro, perhaps influenced by the distinction very often made in Swiss scholarly writing between arbitration in equity and *amiable composition*, holds the opinion that the *composição amigável* contemplated in Article 35 of the Portuguese Arbitration Act corresponds to the above-mentioned "weaker" meaning of decision according to equity (see above).[27] However, he cannot pinpoint any indication in the wording of Article 35, or of any other provision of the Arbitration Act, to support such opinion.

In the author's view, the wording of Article 35 leads one to conclude that the *composição amigável de litígio* contemplated therein is not a decision in equity *minus*, but rather a decision in equity *plus*.

According to the wording of this provision, the arbitrator (if the parties have vested him with this mission) should "decide the dispute by appealing to the composition of the parties on the basis of balance of interests at stake."

In the author's opinion, two sorts of direction flow from this wording for the decision-maker. First, he is not bound to apply the rules of law in force (since this is what characterizes the arbitrator according to the law envisaged in Articles 22 and 33(1), one should assume that the legislator has used different terms to mean different things). Thus, the *compositor amigável*[28] may settle the dispute submitted to him on the basis of what is "fair and reasonable" in the specific circumstances of the concrete case at hand.

Secondly, according to Professor Eric Loquin who has studied in depth the meaning and scope of the *amiable composition*, the seeking of a solution for the dispute at hand according to equity, is the first ingredient of *amiable composition*. For this commentator, first and foremost, a clause of *amiable composition* is a deliberate waiver by the parties of the application of the rules of law to the strict sanctioning of the subjective rights they may hold at the time of dispute.[29] However, in order to dispel the idea that the arbitrator vested with powers of *amiable composition* is prone to decide the dispute "according to his intimate conviction," that is, pursuant to a psychological if not sentimental approach to justice which would create the danger of opening the door to subjectivism and, even worse, arbitrariness, Professor Eric Loquin suggests that the *amiable compositeur* should base himself on some principles which one could find to be widely shared by the

[26] One could add, in order to emphasize the difference between the functions of the mediator and of the arbitrator, that the same persons should not accumulate such functions, although the supporters of the dispute resolution method known as "Med./Arb." will certainly disagree with this statement; *see* REDFERN & HUNTER, *supra* note 25, at 40.

[27] PINHEIRO, *supra* note 18, at 165–66.

[28] ERIC LOQUIN, L'AMIABLE COMPOSITION EN DROIT COMPARE ET INTERNATIONAL: CONTRIBUTION A L'ETUDE DU NON-DROIT DANS L'ARBITRAGE COMMERCIAL (1980).

[29] Which waiver, in turn, entails another: the waiver of the right to appeal, i.e., of subsequently bringing the dispute before another (higher) jurisdiction which would be bound to assess it pursuant to the law, *id*. at 37–44.

members of the community of tradesmen or business operators to which the parties to the dispute belong.[30]

According to Eric Loquin, these principles are the following: (a) a presumption that the parties intended to establish an economic equality or balance regarding their contributions agreed in the contract entered into (which balance, if it has been broken, the *amiable compositeur*, deciding in equity, should try to restore);[31] (b) a presumption of intended equality of risk, as initially set out in the contract entered by the parties (which, if it has been later significantly disturbed,[32] the *amiable compositeur*, deciding in equity, should attempt to rebuild to the extent that it is possible, fair and reasonable); (c) applying the requirement of good faith in the execution of contracts (the resorting to equity should then allow the *amiable compositeur* to sanction certain behaviours of a bad-faith party to a contract which are not reproachable under the strict rules of law as well as to temper the responsibility of a defaulting party who acted in good faith).[33]

But for Eric Loquin there is more in *amiable composition* than the mere intervention of equity as described above. Indeed, the decision to be rendered by the *amiable compositeur* should also aim at reaching a solution for the dispute which may be most easily accepted by both parties. Such solution should constitute a compromise between the rights asserted by the parties to the dispute, by imposing on them reciprocal concessions or mutual sacrifices, so as to dissolve their conflict, rather than to resolve it, by setting upon a new basis the relationship between such parties which would be thereby preserved.[34] These powers of the *amiable compositeur*, of a quasi-settlement-making nature (*pouvoirs quasi-transactionnels*) allow this commentator to refer to the *appeasement solution* that it is expected to provide.[35]

The meaning to be given to *composição amigável* as it results from the text of Article 35 of the Portuguese Arbitration Act seems to be very much in tune with the conception of *amiable composition* defended by Eric Loquin. Since in this legal provision it is stated that "the arbitrator should decide the dispute by appealing to the composition of the parties on the basis of the balance of interests at stake," it seems reasonable to infer from such wording that the *compositor amigável*, like the *amiable compositeur* pursuant to the view held by Eric Loquin, should aim at achieving a solution which may present the best prospects of being accepted by both parties, without compromising their potential further dealings.

---

[30] As Eric Loquin pointed out, if the parties in conflict do not share some common values and vision about what is fair and reasonable in business relationships, then the settling of their dispute through *amiable composition* or through arbitration in equity does not seem possible and, therefore, it is not even conceivable that it might have been stipulated in the arbitration agreement.

[31] LOQUIN, *supra* note 28, at 350–53, did not fail to stress that the restabilizing of the initially agreed equilibrium of the contractual quid pro quo, which the *amiable compositeur* should seek to achieve, should not be confused with putting in question the objective balance of such quid pro quo as it was initially agreed by the parties, under the pretext that it was unfair; the mission of the *amiable compositeur* is not to correct or compensate a disequilibrium created by the parties at the moment of signing the contract.

[32] Particularly as a result of an event of *force majeure* having occurred, *id.* at 350–55.

[33] *Id.* at 343–60.

[34] *Id.* at 362–70.

[35] *Id.*

Since the dissertation of Professor Eric Loquin was likely to be known by the members of Parliament who were responsible for the introduction of Article 35 in the final text of the Arbitration Act, one may presume that the contents of such dissertation have significantly influenced the meaning that the members of Parliament intended to give to the provisions of the said article, particularly because its wording seems clearly to reflect the opinions held by that commentator about what *amiable composition* is or should be.[36]

Therefore, in the author's opinion, whenever the parties have empowered the arbitrator to decide the dispute as a *compositor amigável* in accordance with Article 35 of the Portuguese Arbitration Act or otherwise by using terms that can be subsumed to the concept of *composição amigável* envisaged in such article, one should conclude that the dispute is to be decided according to equity (understood in the aforesaid "stronger" meaning) with the arbitrator performing, *in addition*, the "appeasement function" referred to above, which seems to best characterize the *amiable composition* in French legal thinking.[37]

V. Arbitration in Equity and Respect for the Contractual Provisions

The issue of whether the arbitrator in equity (or the *amiable compositeur* in the legal systems that expressly contemplate this institution) is or is not allowed to modify the provisions of the contract, i.e., to temper the effects of the contract which would prove too stringent or inequitable, is the subject of much debate, even among the authors who adhere to a "stronger" meaning of arbitration in equity (or to a broader scope of *amiable composition*).

Some authors have indeed pointed out that "it is difficult to conceive that the draftsmen of the contract" who inserted therein an arbitration clause vesting the arbitrators with the power to decide future disputes according to equity or as *amiable compositeurs* "suffer from such doubts as to the appropriateness of the contractual rules they had deferred that they would—in the same breath as it were—expressly empower the arbitrators to disregard these rules."[38] Therefore, these authors have held that, under an arbitration agreement empowering the arbitrators to decide as *amiable compositeurs* or according to equity, it is unrealistic to presume that the parties intended to oust not only the law but also the contract itself. For those authors, this solution further contradicts the legal provisions (and those of the regulations of arbitral institutions) which at the same time provide that the

[36] This understanding of the meaning of *composição amigável* contemplated in art. 35 of the Arbitration Act, seems also to be adopted by Prof. Dário Moura Vicente, *supra* note 25, at 32.

[37] That is why the author's view is that the *composição amigável* of art. 35 of the Arbitration Act should be understood as meaning, not a decision in equity *minus*, but rather a decision in equity *plus*.

[38] Craig, Park & Paulsson, *supra* note 9, at 112. In the same sense, *see* Poudret & Besson, *supra* note 10, at 623–24, who put the question: "is it not indeed a paradox to believe that the parties could agree on contractual provisions and at the same time confer on a third party the power to alter them?"

arbitrator should conform at all events, and thus also in the context of *amiable composition* or of arbitration in equity, to the provisions of the contract.[39]

Be that as it may, the truth is that, as Jean-François Poudret and Sébastien Besson acknowledged, the dominant opinion in France (in the legal doctrine, in the state courts' jurisprudence and in the arbitration practice) recognizes that the power of an *amiable compositeur* can also be exercised with regard to the provisions of the contract or, more exactly, to the effects thereof which appear to be abusive, harsh or simply unfair.[40]

A detailed analysis of a number of ICC awards made by Laurence Kiffer[41] showed that such departure, to some extent, from the contract for the sake of equity occurred in cases where the *amiable compositeur* had to decide on the consequences of non-performance of the contract, for example, through the granting of compensatory damages or the awarding of interest, which was carried out by *amiable compositeurs* through the application of standards of commercial fairness, rather than by applying strictly the provisions of the contract which were thereby moderated or attenuated. The same analysis shows that a similar attitude was taken by *amiable compositeurs* in the tempering of the stringency of the rule *actor incumbit probatio* or of the time-barring of a claim because of the inaction of the party who submitted that claim.[42]

Although this matter is very perfunctorily dealt with in the Portuguese scholarly writings, one finds therein stated the opinion that the arbitrator in equity (even with this concept understood in its "stronger" meaning) must respect the provisions of the contract.[43]

With due respect for the opposing views, the author adheres to the opinion expressed in this regard by Eric Loquin. Like him, the author thinks that the insertion in a contract of a clause providing for *amiable composition* reveals the parties' intention of conferring on the arbitrator powers which are somewhat autonomous vis-à-vis that contract. As Eric Loquin wrote, the insertion of such a clause should be seen as the expression, at the moment of the signing of the contract, of the spirit of good faith and cooperation that the parties then shared. This clause then assures that one of the parties will not be able to entrench itself behind the letter of the contract, when this is affected by hazard or fortuitous events which entail clearly unfair advantage to that party, nor would

---

[39] *See* POUDRET & BESSON, *supra* note 10, at 624; these authors also state that the dominant opinion in Switzerland considers that an arbitrator in equity remains bound by the contract; however, these authors agree that

> this is primarily a question of interpretation of the intention of the parties: did they wish for an equitable application of their contract or for an equitable solution, which might derogate from their agreement? In the absence of any indication one way or another, we think that the first interpretation is to be preferred.

Id. at 627. This seems also to be the understanding of CRAIG, PARK & PAULSSON, *supra* note 9, at 113. Nevertheless, both CRAIG, PARK & PAULSSON, *supra* note 9, at 113 and POUDRET & BESSON, *supra* note 10, at 624, stress that, while one may accept that the *amiable compositeur* or the arbitrator in equity may disregard certain contractual clauses in order to restore a fair commercial balance to the parties' bargain, the arbitrators so empowered may not, at least without special authorization from the parties, rewrite the contract or revise it for the future (i.e., to adapt it to new circumstances which have meanwhile occurred or to create new rights or obligations for which the contract did not provide). "They may adjust or disregard, but not create." CRAIG, PARK & PAULSSON, *supra* note 9, at 113.

[40] POUDRET & BESSON, *supra* note 10, at 624.

[41] Laurence Kiffer, *Amiable Composition and ICC Arbitration*, 18 ICC BULL. 51–115 (No. 1, 2007).

[42] *Id.* at 60–61.

[43] *See* PINHEIRO, *supra* note 18, at 162.

one party be allowed to impose on the other party obligations which have become excessively rigorous.

In the same way that the insertion in the contract of a clause providing for *amiable composition* should be understood as a deliberate waiver by the parties of the strict sanctioning, through the application of the rules of law, of the subjective rights that they may hold at the time of the dispute, so that a more equitable solution is given to the case at hand, a similar waiver should be understood as made by the parties with respect to the strict application of the contractual provisions by virtue of the inclusion of the aforesaid clause in the contract.[44]

In this regard, following the suggestion of Eric Loquin, it seems appropriate to make a distinction between speculative (or aleatory) and non-speculative contracts.[45] Regarding the former category of contracts, even if the parties have inserted in their contract a clause providing for *amiable composition*, one should understand that such parties have agreed to bear all the risks, hazards and other consequences of aleatory events that might significantly affect their transaction, because the economic logic of the latter entails such conclusion. It is indeed unlikely that the parties would have then wanted the arbitrators, acting as *amiable compositeurs*, to modify the agreed splitting of the risks which was inherent in the nature of their bargain.

As far as non-speculative (or non-aleatory) contracts are concerned, however, one may presume that the parties have not intended to bear all the consequences of unforeseen events that may severely harden their obligations or cause their rights to be stringently reduced or forfeited. Therefore, in this respect the moderating power of the *amiable compositeur* should be admitted, whether the enhancement of the rights of the advantaged party or the hardening of the obligations of the afflicted counter-party derive from the strict application of the law or of the contractual provisions.

These considerations, which are generally followed by French legal commentators and are consistently upheld by French courts, seem to be well-founded and should apply, in the author's opinion, not only to *amiable composition* but, in general, to other forms of arbitration in equity.

In fact, the rectification function that Aristotle attributed to equity in order to remedy the defective nature of the general rules[46] should play its role whenever the application of such rules (due to their generality) are shown to generate unjust outcomes, irrespective of the fact that those general rules are contained, not in legal provisions, but rather in the contract entered into by the parties. Indeed, although having a lower degree of abstraction and generality than the rules of law, the contractual provisions which were agreed by the parties before the transaction started to be carried out are also general as compared with the specific circumstances in which that transaction came to be actually executed and, as a result of disparity between the generality of the initially agreed contractual provisions and the concrete nature of the conditions in which the execution

[44] LOQUIN, *supra* note 28, at 280–83.
[45] *Id.* at 283–84.
[46] MENEZES CORDEIRO, *supra* note 11.

of the contract actually took place, unjust situations may arise which need to be remedied by resorting to a decision according to equity.

Finally, the author expresses his agreement with the distinction made by the commentators referred to above[47] between, on the one hand, moderating or tempering some provisions of the contract for the sake of reaching a more equitable solution to the case under assessment and, on the other hand, rewriting or revising the contract for the future, by adapting it to new circumstances or by creating new rights and obligations for the parties thereto. The latter power should only be exercised by the arbitrator in equity or the *compositor amigável*, when the parties have vested them with it.

[47] *See* CRAIG, PARK & PAULSSON, *supra* note 9, at 113–15; POUDRET & BESSON, *supra* note 10, at 624.

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
5. Due to strict production schedules it is not possible to amend texts after acceptance or send proofs to authors for correction.
6. The submission of a text indicates that the author consents, in the event of publication, to the automatic transfer of all copyrights to the publisher of the Journal of International Arbitration.