Unofficial English Translation*

Coderre c. Coderre **2008 QCCA 888**

COURT OF APPEAL

2008 QCCA 888 (CanLII)

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-016295-065
(405-11-001387-057

DATE: May 13, 2008

CORAM: THE HONOURABLE JEAN-LOUIS BAUDOUIN J.A.
JACQUES CHAMBERLAND J.A.
MARIE-FRANCE BICH J.A.

ROGER CODERRE
RICHARD CODERRE
JOCELYN CODERRE
ÉRIC CODERRE
ST-GERMAIN TRANSPORT LTÉE
LES IMMEUBLES S.G.T. LTÉE
RELAIS ROUTIER PLAZA ST-GERMAIN INC.
2552-5536 QUÉBEC INC.
(hereinafter referred to as the "ROGER GROUP")
APPELLANTS / Mis en cause
v.
DENIS CODERRE
SUZANNE CODERRE
S.G.T. 2000 INC.
GESTION DENIS CODERRE INC.
GESTION SUZANNE CODERRE INC.
CANMEX TRANSPORT INC.
CODERRE INVESTMENTS INC.
SGT 2000 MOTOR FREIGHT INC.

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* [TRANSLATOR'S NOTE] The originals of the transcripts quoted in paragraphs 125, 126, 128, and 129 of this judgment contain both English and French text. The French text has been translated.

(hereinafter referred to as the "DENIS GROUP")
RESPONDENTS / Applicants
and

PIERRE A. MICHAUD, in his capacity as arbitrator
MIS EN CAUSE / Respondent

JUDGMENT

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[1] **THE COURT;** - On the appeal from a judgment of the Superior Court, district of Drummond (the Honourable André Roy), which, on November 24, 2005, granted the respondents' motion for annulment of the awards rendered on December 14, 2004 and January 17, 2005 by the mis en cause arbitrator and dismissed the appellants' motion for homologation of the said awards;

[2] After having examined the file, heard the parties, and on the whole deliberated;

[3] For the reasons of Bich J.A., with which Baudouin and Chamberland JJ.A. agree:

[4] **DISMISSES** the appeal, with costs.

JEAN-LOUIS BAUDOUIN J.A.

JACQUES CHAMBERLAND J.A.

MARIE-FRANCE BICH J.A.

Mtre Nathalie Tremblay
Mtre Robert Pancer
Phillips Friedman Kotler
Counsel for Roger Coderre et al. (the Roger Group)

Mtre Christian Trépanier
Mtre Pierre Lamontagne
Fasken, Martineau, DuMoulin
Counsel for Denis Coderre et al. (the Denis Group)

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Date of hearing: November 13, 2007

REASONS OF BICH J.A.

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[5] The Court has before it an appeal from a judgment rendered on November 24, 2005, in which the Superior Court, district of Drummond (the Honourable André Roy), granted the respondents' application for the annulment of two arbitral awards rendered by arbitrator Pierre A. Michaud and dismissed the appellants' motion to homologate the said awards.

[6] The matter raises the interesting—and rather thorny—question of the powers of the arbitrator to whom the parties have given a mandate to act as *amiable compositeur*.

I. FACTUAL AND PROCEDURAL BACKGROUND

[7] The appellants (the "Roger Group") and the respondents (the "Denis Group") operate in the field of road transport. In 1988, after two years of negotiations,[1] they reached a settlement, bringing a series of disputes between them to an end.[2] The Denis Group undertook to pay $2,562,500 to the Roger Group pursuant to a formula developed by accountants for the two parties. The Denis Group's undertaking reads as follows:

> [TRANSLATION]
>
> 2. S.G.T. 2000 inc. undertakes to pay St-Germain Transport Ltd. (or any other person that the latter may indicate) the amount of two million five hundred and sixty-two thousand, five hundred dollars ($2,562,500) (the "Capital"). The Capital and interest on the Capital, if applicable, shall be payable by S.G.T. 2000 Inc. solely in the manner set out in the formula (the "Formula") initialled by the parties and attached in Schedule A to this document so as to form an integral part of it, and on condition that the S.G.T. Group (as defined in Schedule A) meet the accounting test established in the said Formula.
>
> All of the other parties forming part of the S.G.T. Group are solidarily liable for any financial obligations incurred by S.G.T. 2000 Inc. toward the Roger Group, as described in this document and in Schedule A.

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1 The parties were represented by counsel and assisted by expert accountants during negotiations.

2 Settlement of July 13, 1998, Exhibit R-12.

[8] The formula at issue provides that the capital and interest on the amount due be paid from the available funds of the S.G.T. Group's member corporations, these "available funds" being defined as follows in Schedule A to the settlement as follows:

> [TRANSLATION]
>
> 1.3 The **available funds** for the payment of the amount agreed on by the parties shall be constituted by funds generated through operational activities, from which shall be deducted the following amounts as they appear in the cash flow statement, consolidated or cumulative as the case may be, for the financial year of the group's corporations, verified by the auditors of SGT 2000 Inc.:
>
> (a) capital payments on long-tem debts;
>
> (b) amounts allocated to acquiring fixed assets to be used in the operation of the SGT Group, less amounts obtained from new financing related to these acquisitions over the course of the financial year and from the profits of the sale of fixed assets;
>
> (c) amounts allocated to acquiring investments useful in carrying out the SGT Group's activities, less financing obtained and profits from the sale of such investments;
>
> (d) amounts demanded by the bankers of the SGT Group in repayment of the operational line of credit over the financial year that were not taken into account in the calculation of funds generated by operational activities (clause 1.2).
>
> The resulting amount shall be designated the **available funds**.

[9] The payments to the Roger Group are governed by the following clauses in the Schedule :

> [TRANSLATION]
>
> 2. 50% of the available funds shall be paid to the Roger Group annually, in the following order:
>
> …
>
> 3. Notwithstanding clause 2(b), for the period of June 1, 1998 to February 1, 1999 only, SGT 2000 Inc. undertakes to make a monthly payment of $10,000 on the principal to the Roger Group, in addition to the amount otherwise payable under the aforementioned subsection, if applicable.
>
> …

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8. The SGT Group undertakes to impose a yearly limit on the acquisition of vehicles in order to maintain the average age of the fleet at 3.5 years.

…

11. The obligations of the SGT Group under this Agreement shall be suspended if a financial institution or finance company entitled to demand the financial statements of an SGT Group corporation for the purposes of financing the SGT Group issues a written requirement prohibiting SGT 2000 Inc. from paying, in whole or in part, the amounts set out in this Schedule to the Roger Group. Such a requirement does not bring to an end this Settlement Agreement, which shall continue to bind the parties.

Payments shall resume once the lender grants the required authorization.

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[10] The settlement also includes the following stipulations, the source of the present dispute:

[TRANSLATION]

5. The parties undertake that, in the event of a dispute or legal conflict between a constituent party of the Roger Group and a constituent party of the Denis Group with respect to the interpretation, application, or enforcement of any clause of this Agreement and its Schedules, such dispute or legal conflict shall be submitted to the decision of André Saint-Michel, C.A. at Samson Bélair Deloitte & Touche, which shall be final, determinative, and without appeal, with the exclusion of the courts, the whole subject to section 6, below.

In the event of the failure or impossibility of André Saint-Michel to act, the parties agree that he shall be replaced in his capacity as sole arbitrator by an associate of the accounting firm Samson Bélair Deloitte & Touche, to be named by mutual agreement by the parties or, failing which, by a judge of the Superior Court.

…

7. The arbitration agreements in clauses 5 and 6 are distinct from the clauses of this Settlement Agreement, the whole as stipulated in art. 2642 of the *Civil Code of Québec*.

In addition, the designated arbitrator in each of these arbitration agreements:

(a) may act as *amiable compositeur*, and

> (b) shall have full discretion in determining the manner in which arbitration fees, including, if necessary, his own fees and all expert fees, shall be distributed among the parties.

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[11] It appears that the Denis Group (or more precisely S.G.T. 2000 Inc.) has made no payment to the Roger Group since the conclusion of the settlement, with the exception of the amounts referred to in clause 3 of Schedule A,[3] which have been paid. The application of the formula set out in the settlement to the years 1998, 1999, 2000, 2001, and 2003 did not free up any "available funds". In 2002, although there were some available funds, S.G.T. 2000 Inc.'s lender prohibited S.G.T. 2000 Inc. from making the payment it could have to the Roger Group.

[12] Dissatisfied with a situation it believed to be inconsistent with the spirit of the agreement entered into by and for the parties, the Roger Group submitted its first dispute to Arbitrator André Saint-Michel, pursuant to clause 5 of the settlement, seeking annulment of the settlement or amendment of the formula and terms of payment. The Denis Group filed a motion to dismiss, arguing that there was no actual dispute between the parties and that the Roger Group was in reality seeking to amend the settlement in its favour, apparently feeling that it did not benefit from the terms as it had hoped. According to the Denis Group, the arbitrator lacked the jurisdiction to amend the settlement because a ruling in favour of the Roger Group would not resolve a dispute arising from the interpretation, application, or enforcement of the settlement but rather an initial dispute that the settlement was intended to resolve.[4]

[13] When considering the motion to dismiss, Arbitrator Saint-Michel felt that, at first glance, dissatisfaction with the results of the application of the settlement was manifested by the Roger Group's motion and not by a dispute relating to the interpretation, application, or enforcement of the settlement. Agreeing to consider the notion of dispute more liberally, however, the arbitrator wondered whether he had the power to order the amendment or annulment of the settlement as sought by the Roger Group. Of the opinion that there had been no evidence adduced of a defect in the settlement or of the inability of the Denis Group to pay the amounts due in the future, he concluded that an amendment of the formula agreed upon by the Denis Group would undermine its consent to the settlement. He also found that the Denis Group's inability [TRANSLATION] "to generate [sufficient] liquid assets over the first four years to meet the test in the Agreement does not justify its annulment".[5] Finally, in his conclusions, he found that [TRANSLATION] "neither the Agreement nor the *Code of Civil Procedure* gave him the power to order the annulment of the Agreement on the basis of the allegations"[6] of the Roger Group, whose motion he dismissed.

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3 That is to say, $10,000 a month from June 1, 1998, to February 1, 1999, for a total of $90,000.

4 See the Denis Group's motion to dismiss, as expressed in the letter addressed to Arbitrator Saint-Michel on September 3, 2002, exhibit R-19 at 3-5.

5 Award rendered by Arbitrator Saint-Michel, 7 April 2003, Exhibit R-20 at 5.

6 *Ibid*.

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[14] The Roger Group applied to the Superior Court to have the award annulled. Jean-Guy Dubois J. granted the application on April 26, 2004,[7] citing a breach of the *audi alteram partem* rule. The judge found that Arbitrator Saint-Michel, who first had to rule on the Denis Group's motion to dismiss the request for arbitration filed by the Roger Group, could rule on that issue only; having decided that there was a dispute, he could not rule on the merits of the dispute without first hearing the parties, which he did not do. Dubois J. therefore referred the parties to arbitration before another arbitrator to be mutually determined by the parties. In the event of a failure to reach agreement, the arbitrator would be designated by the Court.

[15] After this judgment, Arbitrator Pierre A. Michaud, mis en cause, was selected by the parties to arbitrate the Roger Group's request. The Denis Group filed a new motion to dismiss, which was rejected by Arbitrator Michaud (award of October 7, 2004), who found that the judgment of Dubois J., which was not appealed, has the effect of *res judicata* with respect to the existence of a dispute and the need to rule on its merits.[8] The Denis Group did not seek the annulment of this award (although they would have had a legal interest to do so) and apparently no longer contests the existence *per se* of an arbitrable dispute (or legal conflict) within the meaning of the arbitration agreement. This appeal therefore assumes that this dispute exists and is arbitrable.

[16] After this interlocutory arbitral decision, a hearing on the merits was held on November 22, 2004. The witnesses were Archer Garbuz (accountant who counselled the Roger Group during settlement negotiations), Denis Coderre (main stakeholder in the Denis Group), Roger Coderre (main stakeholder in the Roger Group), and Yvan Morin, auditor of the Denis Group's companies.

[17] In a first award rendered on December 14, 2004, the arbitrator concluded that the situation created by the terms of the settlement [TRANSLATION] "is unfair and should be corrected" (at para. 57). He explained thus:

> [TRANSLATION]
>
> 52. What was their intent? The evidence reveals the following main points:
>
> 1) They needed to avoid a long and costly trial that would further divide the family, create anxiety, and waste time.
>
> 2) Although it acknowledges its debt towards the Roger Group, the Denis Group would like a term for the repayment of the debt that will not endanger its viability.
>
> 3) The Roger Group anticipated receiving payment of the entire debt within ten years at the most. According to the accountant Garbuz, if there

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7 Judgment of Dubois J., Exhibit R-21.

8 Award of the arbitrator Pierre A. Michaud, October 7, 2004, Exhibit R-24, denying the Denis Group's motion to dismiss.

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> were no available funds in the first two years, it would be because the Denis Group was no longer in business.
>
> 4) The accounting formula provides for a discount if 50% of the capital is paid by the end of the fifth year and another credit granted if the balance of the capital is paid by the end of the seventh year.

53. Six years later, the Denis Group had undergone spectacular growth, its acquisitions placing it in the top thirty transport companies in the country. Net profits in the last three years were more than $3 million. Although funds were available in 2002, the Denis Group's bankers refused to allow a payment to the Roger Group.

54. I am persuaded that neither of the parties ever anticipated that there would be no payment made in six years. According to the accountants, there is no expectation of available funds in the foreseeable future.

55. The formula created by the accountants underestimates the importance of future acquisitions. It provides that, once net profits are established, capital payments on long-term debts must also be deducted:

> [TRANSLATION]
>
> 3.1(b) amounts allocated to acquiring fixed assets to be used in the operation of the SGT Group, less amounts obtained from new financing related to these acquisitions over the course of the financial year and from the profits of the sale of fixed assets

56. This definition of available funds leads to a result neither of the parties had foreseen.

[18] How should this inequity be corrected? The arbitrator determined the following:

> [TRANSLATION]
>
> 60. I am persuaded that the formula may be amended to ensure that the intent of the parties is fulfilled.
>
> 61. Do the powers of *amiable compositeur* and arbitrator permit me to do so? Counsel for the Denis Group argue forcefully that I am prohibited by art. 944.10.
>
> 62. What is needed here is not an amendment of the settlement but compensation for the failure of the parties to anticipate the effect of acquisitions. As noted by Antaki in the text quoted above, this case involves [TRANSLATION] "correcting the effect of a change of circumstances that the parties could not have foreseen".
>
> …

> 65. With respect for the contrary opinion, I find in the above texts the authority to amend the formula devised by the accountants. The point is not to ignore the contract but to make it possible to fulfil the intent of the parties in concrete terms.

[19] The arbitrator concluded as follows:

> [TRANSLATION]
>
> 70. For these reasons:
>
> I would allow in part the claim of the Roger Group;
>
> I would grant the parties a time period, terminating on February 1, 2005, by which time they shall submit proposals to me for the amendment of Formula A in order to ensure that the Denis Group's debt toward the Roger Group is reimbursed over a reasonable period of time, but without putting the viability of the business in peril.
>
> After February 1, 2005, I shall issue the order I deem appropriate after having received the proposals of the parties or, if agreement cannot be reached, without the benefit of these proposals.

[20] On January 13, 2005, the Denis Group filed a motion in Superior Court for annulment of the award, alleging in essence that the arbitrator exceeded his jurisdiction by finding that he could amend the formula in the settlement and thereby contravened the fourth paragraph of art. 944.10 *C.C.P.* It argues that this provision obliges the *amiable compositeur* to comply with the stipulations of the contract. The Denis Group also alleges that the arbitrator violated the *audi alteram partem* rule.

[21] On January 17, 2005, finding that [TRANSLATION] "the application [for annulment] leaves no doubt as to the inability of the parties to arrive at an agreement"[9] and [TRANSLATION] "that it is in the interest of the parties that a final order be rendered, which would permit the Superior Court to completely dispose of the dispute",[10] the arbitrator determined that the remedial order announced in his previous award should be rendered immediately. Here are the relevant excerpts of this order:

> [TRANSLATION]
>
> 8. For all of the reasons set forth in my decision of December 14, 2004, I find that clause 1.3(*b*), which has been identified as the main obstacle preventing the parties from achieving their intent, shall be struck from the accounting formula (Schedule A).

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9 Award of Arbitrator Michaud, January 17, 2005, at para. 6.

10 *Ibid*. at para. 7.

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> 9. In addition, clause 11 shall also be struck from the formula because, under this clause, any payment toward the debt is a consequence of the good will of the financial institution.
>
> ACCORDINGLY:
>
> I declare that the balance of the debt owing by the Denis Group to the Roger Group shall be paid in accordance with the accounting formula identified as Schedule A, which has been amended by striking clauses 1.3(*b*) and 11, as of the 2004 financial year.

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[22] The Denis Group amended its motion for annulment to include the second award. The Roger Group vigorously contested this motion and filed its own motion to homologate the arbitral awards.

II. TRIAL JUDGMENT

[23] The trial judge found that the arbitrator exceeded his jurisdiction by striking out certain stipulations of the settlement. According to the trial judge, the third paragraph of art. 944.10 *C.C.P.* compels the *amiable compositeur* to comply with the terms of the contract unless the parties have exempted therefrom, as they are entitled to do under art. 940 *C.C.P.* They did not do so in the present case. The judge added:

> [TRANSLATION]
>
> [71] In the present case, it is clear that the solution resulting from a rigorous application of the Agreement is not necessarily fair and that the parties run the risk of remaining at an impasse. But is it better to risk creating insecurity in the contractual relationship by permitting the *amiable compositeur* to act contrary to the obligations set out in the contract? Although such an approach would undoubtedly have been possible under the former art. 948, the Quebec legislature clearly discarded this possibility when it enacted art. 944.10, para. 3, *C.C.P.*
>
> [72] The Court is therefore of the view that the arbitrator's awards, which amended the settlement by ordering that [TRANSLATION] "clause 1.3(b) … shall be struck from the accounting formula" and that [TRANSLATION] "clause 11 … shall also be struck from the formula", contained decisions that exceeded the terms of the arbitration agreement (art. 946.4 para. 1 (4) *C.C.P*.). Accordingly, the Court must intervene to annul them and refuse their homologation.
>
> [73] Moreover, in striking out clause 11 of the Schedule, the arbitrator affected the rights of a third party who was not a party before him.

[24] Having found thus, the judge felt it was not necessary to rule on the other ground for annulment raised by the Denis Group (violation of the *audi alteram partem* rule).

[25] He therefore granted the motion of the Denis Group, annulled the arbitral awards, and refused the application for homologation submitted by the Roger Group.

[26] The Roger Group appeals both the annulment and the ruling on homologation.[11]

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III. GROUNDS FOR APPEAL

[27] Put simply, the Roger Group alleges essentially that the trial judge's interpretation of art. 944.10 *C.C.P.* was incorrect. First, the Roger Group argues that the third paragraph of the provision contemplates only the terms of the arbitration agreement, not the contract of which the Agreement is part (pursuant to the principle of separateness in art. 2642 *C.C.Q.*). Second, it maintains that this paragraph in no way prevents the arbitrator with the power to act as *amiable compositeur* from amending the letter of the settlement to ensure that its spirit fulfils the intent of the parties. Any other interpretation unduly restricting the powers of the *amiable compositeur* would also allow an untenable, unfair, and unintended situation to persist.

[28] Not surprisingly, the Denis Group argues to the contrary, alleging that the arbitrator, in acting as he did, breached the third paragraph of art. 944.10 *C.C.P.* from which the parties did not wish to derogate in the Agreement. It argues that the arbitrator went against the intent of the parties when he struck two of the clauses from the settlement, thereby exceeding his jurisdiction under the arbitration agreement and as *amiable compositeur*. Moreover, the mere fact that the Roger Group today believes that it does not benefit from the settlement, the terms of which were the subject of lengthy negotiations and adjustments, does not mean that the situation is necessarily unfair and that the arbitrator-*amiable compositeur* is therefore authorized to strike out a part of the contract for the sake of the contracting parties' presumed intent.

[29] The Denis Group also argues that the arbitrator breached the rules of natural justice in the first award, thereby justifying its annulment and, consequently, the annulment of the second award.

IV. ANALYSIS

A. Preliminary Issues

[30] To begin, there are two issues that must be addressed: (1) the regularity or irregularity of the procedure in the appeal and (2) the new evidence the Denis Group wishes to adduce.

1. Requirement for leave to appeal

[31] Because the proceedings of the parties before the Superior Court aimed either to obtain or to contest the enforcement of the mis en cause arbitrator's awards, prior leave

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[11] See the conclusions in the inscription in appeal (confirmed in the factum of the Roger Group).

should have been sought for the Roger Group's appeal pursuant to subsection (3) of the second paragraph of art. 26 *C.C.P.* This has been found in prior decisions of this Court: see for example *Communications, Energy, and Paperworkers Union of Canada (CEPU), Local 145 v. Gazette (The), a Division of Southam Inc*;[12] *Reny v. 9001-8722 Québec inc.*[13] (implicitly); *Fraternité des policières et des policiers de la Sûreté régional des Riverains inc. v. Régie intermunicipale de police des Riverains*;[14] *Quebec v. Association des chirurgiens dentistes du Québec*;[15] *Viandes du Breton inc. v. Notre-Dame-du-Lac (Town).*[16]

[32] The Roger Group neither sought nor obtained leave to appeal the annulment of the arbitral awards or their homologation (which is always appealed), however, but simply filed a notice of appeal. Technically, then, the appeal is irregular. The Denis Group has not raised this ground, however, and given the nature of the case it seems appropriate to proceed with a consideration of the merits.

2. Motion to adduce fresh evidence

[33] The Denis Group filed a motion to adduce fresh documentary evidence to demonstrate that, contrary to the arbitrator's predictions,[17] the formula set out in the disputed settlement made it possible to free up available funds in 2006 and pay $250,000 to the Roger Group, a payment the Denis Group does not oppose.

[34] According to the Denis Group, this evidence is clearly new, as it did not exist at the time of the arbitral awards or the trial judgment. It should be received by the Court because it [TRANSLATION] "is obviously important to the outcome of the dispute, since the yearly results of the accounting test were the central issue of the arbitral awards rendered by the mis en cause."[18] The Denis Group adds that [TRANSLATION] "it is in the interests of justice for this Court to be informed of the circumstances that occurred during the appeal trial, [which] shed a different light on the facts than what was available to the mis en cause arbitrator".[19]

[35] The Denis Group also sought leave to adduce the results of the formula in 2005 in order to provide a complete picture of the situation.[20]

[36] The Denis Group's motion was dismissed at the appeal hearing. The reasons for this dismissal are outlined below.

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12 2006 QCCA 1522, J.E. 2006-2355 at para. 3.
13 2006 QCCA 1525, J.E. 2006-2357.
14 2006 QCCA 1524, J.E. 2006-2356 (*a contrario*).
15 J.E. 2002-703 (C.A.).
16 2006 QCCA 358, B.E. 2006BE-382 (concerning homologation).
17 The arbitrator found that the settlement was unfair because it would not free up available funds in the foreseeable future (see para. 54 of the award of December 14, 2004).
18 Para. 27 of the motion to adduce fresh evidence.
19 Para. 31 of the motion to adduce fresh evidence.
20 See paras. 33-34 of the motion to adduce fresh evidence.

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[37] Article 509 *C.C.P*. states the following:

> **509.** In appeal, a judge hears all incidental proceedings provided for in Title IV of Book II to the extent that they are applicable.
>
> In exceptional circumstances, the Court may, if the interests of justice so require, allow a party to adduce, in such manner as the Court directs, indispensible new evidence.
>
> Applications under this article are presented by motion, and the procedure is the same as in first instance, in the absence of rules of practice to the contrary.
>
> During the hearing of such an application, any party may submit relevant evidence, and the judge or the Court, as the case may be, may return the case to the court of first instance so that further proof relating to the application may be made.
>
> If, in the judge's opinion, the interests of justice so require, the judge may refer an application to the Court.
>
> [Emphasis added.]

[38] The case law relating to the second paragraph of that provision, the only one relevant here, is both abundant and consistent. In *Arthur v. Johnson*,[21] this Court recalled the conditions for a motion to adduce fresh evidence:

> [TRANSLATION]
>
> [14] The criteria to which the motion for leave to introduce fresh evidence in appeal is subject were set out in *Dimanche Matin Ltée v*. *Fabien* [citation omitted], where Bisson J. (not yet Chief Justice) wrote the following:
>
> > [TRANSLATION]
> >
> > The Court of Appeal will exercise its discretion to admit evidence that was not admitted in first instance only if it meets the following conditions:
> >
> > 1. It must be new;
> >
> > 2. It must be indispensable;
> >
> > 3. The circumstances must be exceptional; and

[21] J.E. 2004-408 (C.A.) at para. 14. To the same effect, see: *Dimanche Matin Ltée v. Fabien*, [1983] C.A. 553; *Coutu v. Human Rights Tribunal*, [1993] R.J.Q. 2793 (C.A.); *Poissant v. Monette*, J.E. 97-1926 (C.A.); *Droit de la famille – 3640*, J.E. 2000-1243 (C.A.); *Gestion Pirel Ltée v. Chouinard*, [2004] R.J.Q. 80 (C.A.); *Immeubles de l'Estuaire phase III inc. v. Syndicat des copropriétaires de l'Estuaire Condo phase III*, 2006 QCCA 781, J.E. 2006-1224; *Fillion v. Chiasson,* [2007] R.J.Q. 867 (C.A.).

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> 4. The interests of justice require that this evidence be adduced.
>
> In principle, the Court of Appeal must assess the facts as they were presented to the Court of first instance.
>
> There are cases where circumstances that occurred during the appeal may shed such a different light on the facts presented as evidence at trial that new evidence may be admitted.

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[39] Clearly, in the present case, the evidence is new.

[40] In the circumstances, however, it is not indispensable because it is not relevant to the issues raised in appeal, which are the following: given the third paragraph of art. 944.10 *C.C.P.*, did the arbitrator have the power as *amiable compositeur* to strike two clauses from the settlement agreed on by the parties, or did he, in so doing, go beyond the scope of the arbitration agreement within the meaning of art. 946.4 para. 1(4) *C.C.P.*? Did the arbitrator, in his award of December 14, 2005, comply with the rules of natural justice?

[41] To answer these questions, it is not necessary to know that, contrary to the arbitrator's predictions, the results of the formula in the settlement made a payment of $250,000 to the Roger Group possible in 2006. This information is related to the *merits* of the dispute between the parties and to whether the settlement is unfair (as the arbitrator decided) or not (as the Denis Group claims). When dealing with an application for homologation or annulment of an arbitral award, the Superior Court may not consider, let alone rule on, the merits of the dispute. Article 946.2 *C.C.P.* (applicable to the application for annulment under art. 947.2 *C.C.P.*[22]) states the following:

> **946.2** The court examining a motion for homologation cannot enquire into the merits of the dispute.

This prohibition also applies to a court seized of an appeal from a judgment on the homologation or annulment of an arbitral award.[23]

[42] In short, to the extent that the purpose of the evidence the Denis Group wishes to adduce is to demonstrate the inaccuracies of the arbitrator's findings of fact on the merits of the dispute, it is inadmissible because, under arts. 946.2 and 947.2 *C.C.P.*, it is not relevant to the resolution of the issues raised in appeal; indeed, it may not even be considered.

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22 The provision reads as follows:
947.2 Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitral award.

23 On the issue of an inquiry into the merits in the context of a homologation or annulment of an arbitral award, which inquiry is in principle prohibited, see *Desputeaux v. Éditions Chouette*, [2003] 1 S.C.R. 178 at para. 54 and, in particular paras. 65-69. See also: *Standard Life Insurance Company of Canada v. Lavigne*, 2008 QCCA 516 at paras. 46 to 52.

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B. Substantive issues

[43] Could the arbitrator, acting as *amiable compositeur* as empowered in the settlement, strike two of the clauses from the settlement and thereby amend the formula the parties had established? In doing so, did he both exceed the limits imposed on him by art. 944.10, para. 3 *C.C.P*. and go beyond the terms of the arbitration agreement within the meaning of art. 946.4 para. 1(4) *C.C.P.*? Did he also breach the rules of natural justice by violating the *audi alteram partem* rule within the meaning of para. 3 of this same provision?

1. Preliminary remarks

[44] As noted in see para. [15], above, due to the judgment of Dubois J. in April 2004[24] and the manner in which the case was initiated, the existence of an arbitrable dispute between the parties went uncontested at the hearing, whatever reservations on this issue one may have. An underlying difficulty in the present case resides in determining how to resolve a conflict that, in practice, must be considered a legal dispute when, according most of the case law and commentary, it is not a dispute at all.[25]

[45] On another note, the intervention of a court like the Superior Court falls under arts. 946.4 and 947.2 *C.C.P.* and is different from the intervention in a judicial review proceeding.[26] The issue here is not whether the reasons or conclusions of the disputed awards are appropriate, apt, correct, just, fair, or reasonable, since art. 946.2 *C.C.P.* prohibits the court examining a motion for homologation or annulment from enquiring into the merits of the dispute. Rather, the issue is solely to ensure that these awards or

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[24] With respect, to the extent that the arbitrator recognizes that the parties scrupulously adhered to the accounting formula set out in the settlement, with which the Roger Group is now dissatisfied, one may wonder whether there really is a disagreement (or dispute), within the meaning of clause 5 of the settlement, arising from the interpretation, application, or enforcement of the settlement. In the application before the arbitrator, the Roger Group asks for the formula to be amended or adapted; *in the absence of a clause providing for amendment or adaptation in the settlement or in the formula*, *however*, this application does not constitute a disagreement but a mere difference of opinion arising from the gaps in the settlement. See in this respect : Alain Prujiner, "L'adaptation forcée du contrat par arbitrage", (1992) 37 *McGill L. J.* 428 at 431-435, referring in particular to *Sport Maska Inc. v*. *Zittrer*, [1988] 1 S.C.R. 564; John E. C. Brierley, "La convention d'arbitrage en droit québécois interne", [1987] *C.P. du N.* 507 at 535-537, paras. 40-47.

[25] The judge at first instance was of the view that there is indeed a disagreement of the parties: see para. 48 of the judgment.

[26] See *Desputeaux v. Éditions Chouette*, *supra* note 22. In *Laurentienne-vie (La), compagnie d'assurance inc. v. Empire(L'), compagnie d'assurance-vie*, [2000] R.J.Q. 1708 (C.A.) at paras. 15 et seq., this Court applied the principle that had been set out earlier in *Commission des Écoles Catholiques de Montréal v. Cité Construction Cie Ltée*, C.A.M. 500-009-000896-753, 9 January 1978 (H. Reid, D. Ferland, *C.C.P. ANNOTÉ*, 1981, vol. 3 at 216) and recalled that the remedy governed by art. 846 *C.C.P.* does not apply to conventional arbitration, the only recourse against an award being the application for annulment governed by arts. 947.2 and 946.4 *C.C.P.*

the process leading to them contain none of the defects listed in art. 946.4 *C.C.P.* As we shall see, in the present case, subparagraphs 3 (breach of the rules of natural justice) and 4 (exceeding the scope of the arbitration agreement) of the first paragraph of this provision are in play. In the first case, only the arbitration process may be the subject of the ruling; in the second, we must [TRANSLATION] "ignore the interpretation that led to the result, in order to focus on the latter".[27]

[46] In this exercise, the arbitral award compels no particular deference. The rules of natural justice, like those governing compliance with the terms of the arbitration agreement, are of public order. Article 940 *C.C.P.* also prohibits any violation thereof. Their violation is a bar to homologation and justifies annulment. Given the manner in which the case was argued by the parties, we shall first consider whether the arbitrator could resolve the dispute as he did. We shall then go on to consider the rules of natural justice.

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2. Could the arbitrator, pursuant to his powers as *amiable compositeur* conferred upon him by the parties or the act, strike two of the provisions of the settlement?

(a) Introductory remarks

[47] To determine whether the arbitrator acting as *amiable compositeur* could strike two of the provisions of the settlement the parties had concluded, we must consider art. 944.10 *C.C.P.* and specifically the third paragraph of that provision, the interpretation and application of which are at the heart of the dispute.

[48] Article 944.10 was introduced into the *Code of Civil Procedure* in the 1986 reform, which substantially modernized Quebec civil and commercial arbitration law. Although it did not break all ties with French law, until then its inspiration,[28] in certain respects the reform brought this area of the law in line with broad international trends, particularly those enshrined in the *UNCITRAL Model Law on International Commercial Arbitration*[29] (the *Model Law*) and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.[30] Article 944.10 C.C.Q. reads as follows:

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27 *Laurentienne-vie (La), compagnie d'assurance inc. v. Empire(L'), compagnie d'assurance-vie*, *supra* note 26 at para. 44. To the same effect, see Gazette *(The), A Division of Southam Inc. v. Valiquette*, [2003] R.J.Q. 2090 (C.A.) at paras. 43-51.

28 See on this subject *Sport Maska Inc. v. Zittrer*, *supra* note 24, particularly at 579.

29 See the *Act modifying the Civil Code and Code of Civil Procedure in Arbitration Matters,* S.Q. 1986, c. 73, effective date 11 November 1986. The *Model Law* was enacted by the United Nations Commission on International Trade law (UNCITRAL) on June 21, 1985. It is a particular source of inspiration for Title I of Book VII of the *Code of Civil Procedure* (arts. 940-947.4 *C.C.P.*). It should be noted that during this same period, Federal Parliament also enacted a law governing arbitration,

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> **944.10** The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages.
>
> They cannot act as *amiables compositeurs* except with the prior concurrence of the parties.
>
> They shall in all cases decide according to he stipulations of the contract and take account of applicable usage.
>
> **944.10** Les arbitres tranchent le différend conformément aux règles de droit qu'ils estiment appropriées et, s'il y a lieu, déterminent les dommages-intérêts.
>
> Ils ne peuvent agir en qualité d'amiables compositeurs que si les parties en ont convenu.
>
> Dans tous les cas, ils décident conformément aux stipulations du contrat et tiennent compte des usages applicables.
>
> [Je souligne.]

[49] In comparison, the version of the provision before the 1986 amendment read as follows :

> **948.** The arbitrators must decide according to the rules of law, unless by the submission they have been exempted from doing so, or have been empowered to act as mediators.
>
> The award must be made by a majority of the arbitrators. It must in all cases give the reasons for the decision and be signed by each arbitrator; if one refuses to sign, the others must record such refusal and the award has the same effect as if it had been signed by all the arbitrators.
>
> **948.** Les arbitres doivent juger suivant les règles du droit, à moins qu'ils n'en soient dispensés par le compromis, ou qu'ils n'aient reçu pouvoir de statuer comme amiables compositeurs.
>
> La sentence arbitrale doit être rendue à la majorité des voix. Elle doit, dans tous les cas, être motivée, et signée par chacun des arbitres; si l'un refuse de signer, les autres doivent en faire mention, et la sentence a le même effet que si elle avait été signée par tous.
>
> [Emphasis added.]

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implementing the *Commercial Arbitration Act*, also inspired by the *Model Law*: see *Commercial Arbitration Act*, R.S.C. (1985), c. 17 (2d suppl.), sanctioned 17 June 1986. The other Canadian provinces have done the same thing, at least with respect to international commercial arbitration.

[30] Adopted in New York on June 10, 1958 by UNCITRAL. This convention is a particular source of inspiration for Title II of Book VII of the *Code of Civil Procedure* (arts. 948-951.2 *C.C.P.*), dealing with the recognition and implementation of arbitral awards rendered outside Quebec.

[50] What is the meaning to be given to the third paragraph of art. 944.10 *C.C.P.*?

[51] In the arbitrator's opinion as expressed in the December 14, 2004 award, the fact that the parties expressly conferred on him the powers of *amiable compositeur* gives him the authority to amend the formula established in the settlement. In his view, such an action on his part would not contravene the third paragraph of art. 944.10 *C.C.P.* because he would not be disregarding the stipulations of the contract; rather, he would be giving effect to the parties' common will and intent by allowing the spirit of the contract to prevail over the letter. Essentially, it would be an adaptation of the requirement in the third paragraph of art. 944.10 *C.C.P.* to the role and powers of the *amiable compositeur* and the specific nature of the problem. The arbitrator exercised this power of amendment in the January 17, 2005 award, striking two provisions from the formula that had been agreed on by the parties.

[52] This is a seductive point of view, especially in the present case because, as the arbitrator pointed out, at first glance it seems that amending the formula is the only way to resolve the dispute and break the parties out of their impasse. Otherwise, the dispute could remain unresolved. The practical and pragmatic advantages of the solution devised by the arbitrator, who also felt that annulling the settlement was not a viable solution, cannot be denied.[31]

[53] Moreover, the trial judge's reasoning is also interesting from another perspective. He found that art. 944.10, para. 3 *C.C.P.* does not empower the arbitrator to strike two of the clauses from the settlement. Doing so, he opined, would be tantamount to deciding without regard to the stipulations of the contract and taking the place of the parties in renegotiations. Unlike the former art. 948 *C.C.P.*, which does not contain this restriction, the current art. 944.10 *C.C.P.* actually obliges the arbitrator, even when acting as *amiable compositeur*, to "decide according to the stipulations of the contract", thereby privileging the stability of contractual relations. Article 944.10 para. 3 *C.C.P.*, however, is not imperative; the parties could therefore have deviated from it and given the arbitrator-*amiable compositeur* the power to amend the contract. They did not do so. Thus, art. 944.10 *C.C.P.*, including its third paragraph, supplements the silence in the arbitration agreement on this point and is implicitly integrated therein.[32] Consequently, by failing to comply with the stipulations of the contract and in fact striking two clauses from it, the arbitrator went beyond the scope of the agreement within the meaning of art. 946.4 para. 1(4) *C.C.P.*

[54] The question here is which of these points of view should prevail. This is not a simple issue, since each approach invokes the respective intents of the parties and the legislator which, as the following pages will demonstrate, are not always easy to determine. For the reasons that follow, however, I conclude that the trial judge's

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[31] See arbitral award of December 14, 2004, at para. 58.

[32] Although expressed in different terms, this reasoning is similar to that in *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Construction Méridien inc.*, [1996] R.J.Q. 1236 (Sup. Ct.) at 1239.

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approach must prevail. My reasons largely overlap with and in some cases expand on his. Nevertheless, my analysis is useful in that it responds directly to the concerns expressed by the parties in the appeal, as they are issues of principle.

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(b) Interpretation and scope of art. 944.10 C.C.P.

(i) The obligation of the *amiable compositeur* to comply with the terms of the contract

[55] Article 2643 C.C.Q. states the following:

> **2643.** Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure.

[56] Article 940 *C.C.P.* provides the following:

> **940.** The provisions of this Title apply to an arbitration where the parties have not made stipulations to the contrary. However, articles 940.2, 941.3, 942.7, 943.2, 945.8 and 946 to 947.4, as well as article 940.5 where the object of the service is a judicial proceeding, are peremptory.
>
> [Emphasis added.]

[57] Article 944.10 *C.C.P.* is not one of those provisions that permits no deviation. Clearly, we must conclude that its purpose is suppletive and that parties to arbitration are free to stipulate otherwise in this respect. For example, they can agree to exempt the arbitrator-*amiable compositeur* from the obligation to comply with the terms of the contract[33] and therefore with the third paragraph of art. 944.10 *C.C.P.* They can invest the arbitrator-*amiable compositeur* with all the remedial powers they wish, including the power to resolve the dispute by revising or reconfiguring the disputed contract as needed[34] or by filling in any gaps.[35] The authorization for arbitrators-*amiables*

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[33] This is what the parties did, more or less expressly but still clearly, in *Concrete Column Clamps, Ltd. v. Cie de Construction de Québec ltée*, (1939) 67 B.R. 537.

[34] In the context of a dispute, the arbitrator having made a final ruling after having heard the evidence of the parties and their arguments (the process bearing a similarity with the judicial process), the arbitration agreement preserved the adjudicative arbitral nature of the process, moving it away from being an expert assessment or contractual arbitration within the meaning of these terms in *Sport Maska Inc. v. Zittrer*, *supra* note 24 at 585-605 (a judgement on the law prior to the 1986 reform, however) and John E.C. Brierley, *loc. cit*., *supra* note 24 at 535-537, para. 40-47.

[35] On this subject, see Alain Prujiner, *supra* note 24 at 435 et seq., especially at 435-440. See also Louis Marquis, “La notion d'arbitrage commercial international en right québécois” (1992) 37 *McGill L.J.* 448 at 456-459, especially 458, footnote 50, where the author refers to the Code of Civil Procedure of the Netherlands, which allows the parties to the arbitration agreement to ask the arbitrator to fill in the gaps of a legal relationship or modify the legal relationship. Even though our own *Code of Civil Procedure* does not expressly provide this possibility, it may be borne in mind under the general provision in article 940 *C.C.P.*

compositeurs to act this way may be explicit or implicit. Implicit authorization may exist in cases where the arbitration agreement is incorporated into the contract, where it refers to a contract that requires or permits adaptation, adjustment, or amendment of its stipulations in the event of a change of circumstances, or where it refers to a contract that provides for its own revision in certain circumstances.

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[58] In the present case, the arbitration agreement in the 1998 settlement in no way refers to art. 944.10 *C.C.P.* It contains no provision expressly authorizing the arbitrator-*amiable compositeur* to depart from the contractual stipulations. It does not formally describe the remedial powers that the parties intended to confer on the arbitrator-*amiable compositeur*. It also does not specify that the arbitrator-*amiable compositeur* has the power to amend the settlement (that is to say, the contract) when its interpretation or application is disputed between the parties or to fill in gaps in the contract, for example by formulating a provision that would have the effect of a contractual stipulation.

[59] The settlement itself does not contain a revision or adaptation clause. Given this silence and the fact that our law does not recognize the doctrine of vagueness or, for that matter, the right to the unilateral revision of the terms of a contract, clause 8 of the settlement ([TRANSLATION] "The parties undertake to take any step and sign any document so as to give full effect to what is provided in this Agreement") cannot be seen as a stipulation implicitly permitting the revision or adaptation of the contract.

[60] Rather, the arbitration agreement indicates simply that the arbitrator [TRANSLATION] "may act as *amiable compositeur*"[36] and that his decision is final, conclusive, and without appeal.[37] Is this sufficient to confer on the arbitrator the power to amend the disputed contract by striking some of its main provisions, as he did here?

[61] The only provision in Quebec legislation to refer to the *amiable compositeur* is article 944.10 *C.C.P.*[38] The second paragraph of this provision states that the parties may agree to grant an arbitrator the power to act as such.[39] It does not define the

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36 Clause 7, para. 2, subpara. (a) of the settlement.

37 Clause 5 of the settlement.

38 There are also three regulations that use the expression, or something akin to it. See *Regulation respecting the conciliation and arbitration procedure for the accounts of members of the Ordre des comptables agrées du Québec*, R.S.Q. c. C-48, r.10.2, s. 21; *Code of ethics of the members of the Ordre des évaluateurs agréés du Québec*, R.S.Q., c. C-26, r.91.001, s. 20; *Order in council respecting the publication of the Agreement concerning a new Relationship between le Gouvernement du Québec and the Crees of Québec*, R.R.Q., c. M-35.1.2, r.1.
It is also worth noting that the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1, establishes an arbitration regime that, in s. 243.14, provides for a sort of *amiable compositeur* (without using the term), referring to the power, "where circumstance justify it, [to] call on equity". Arbitrators acting pursuant to this provision are, under s. 243.1, exempted from applying art. 944.10 *C.C.P.*

39 As noted by the Supreme Court in *Sport Maska inc. v. Zittrer*, *supra* note 24 at 615:
This does not mean that the word "mediators" or any other hallowed expression must be contained in an agreement to arbitrate. It will suffice that the parties clearly indicate their intent to exempt the

specific powers thus granted, however, except for the limitation in the third paragraph, which will be discussed below.

[62] Of course, amiable composition did not first see the light of day in article 944.10 *C.C.P.* It is an institution, recognized in the former art. 948 *C.C.P.* (see para. [49], above), which was inspired by French law. And although the legislature did not deem it appropriate to define it, case law and commentary have stepped in to fill the gap, at least in part. For instance, in *Sport Maska Inc. v. Zittrer*, L'Heureux-Dubé J. interpreted the former art. 948 *C.C.P.* and described the role and powers of the *amiable compositeur*, which is referred to as "mediator" in the English version of the judgment:

> The status of a mediator allows its holder to decide on the basis of equity, without being bound by substantive or procedural rules of law, except of course for rules of public order such as those of natural justice which provide for impartiality, opportunity for the parties to be heard, reasons to be given for the award, and so on.
>
> Mediation is not, as such, a legal concept distinct from that of arbitration. Rather, the mediator is an arbitrator who is exempted from compliance with the rules of law as provided in art. 948 *C.C.P.* (Antaki, "L'amiable composition", in Antaki and Prujiner, *Actes du 1er Colloque sur l'arbitrage commercial international* (1986), at 153). The mediator is in fact only the bon père de famille of the Civil Code transposed to arbitration matters
>
> …
>
> Mediation is only a simplified form of arbitration, and consequently must be the subject of a clear intent by the parties giving the arbitrators the status of mediators. Clause 2.01 and letter DP-1 make no mention of respondents' being exempted from compliance with the rules of law, acting on the basis of equity or their conscience, or more simply, being mediators. Though a mediator is not bound by the rules of law, the criteria for distinguishing between arbitration and expert opinion nonetheless apply to him *mutatis mutandis*, since he remains first and foremost an arbitrator.[40]

[63] For his part, Professor Antaki states the following:

> [TRANSLATION]
>
> … Acting as an *amiable compositeur* is more complex than delivering an expert opinion based on personal knowledge, mediating between two parties in control of their destiny, or applying known rules of law to established factual situations or as an arbitrator. *Amiables compositeurs* must have the knowledge and know-how of judges combined with the power to lift a requirement of a rule of law – a rule

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arbitrators from compliance with the rules of law (*Concrete Column Clamps Ltd. v. Cie de construction de Québec Ltée*, *supra*, at p. 546; Antaki, *loc. cit.*, at p.155; Ferland, *op.cit.*, at 84).

40 *Sport Maska Inc. v. Zittrer*, *supra* note 24**Erreur ! Signet non défini.** at 614-615.

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that was once just but now, because of specific circumstances, is inequitable – and replace it with a decision in keeping with the general principles of law they objectively consider to be the most equitable in the circumstances. It is not an easy task.[41]

[64] Professor Brierley explains:

[TRANSLATION]

105. A third application of the principle of autonomy of the will is the freedom of the parties to set the standards to be applied by an arbitrator to resolve their dispute – in other words, the standards applicable to the merits of the dispute. Again, under the Civil law they are traditionally granted a great deal of liberty, and the new law confirms the civilian tradition.

106. Thus, the parties may determine the law, either domestic or foreign, that will govern the merits of the dispute. They may also authorize the arbitrators to designate the applicable positive law or, through a directive empowering them to act as *amiables compositeurs*, exclude the positive law of the State. Of course, the latter possibility, which permits the arbitrators to decide *ex æquo et bono* – that is, pursuant to extra-legal standards – is not an innovation of the 1986 law. Amiable composition is part of a very old civilian tradition in arbitration matters.

…

108. Arbitrators must therefore decide pursuant to substantive rules of law unless they have been exempted from doing so by the parties themselves. It would be interesting to observe in the years to come whether the exception — that is, the appointment of arbitrators exempted from applying the law — will in fact prevail over the principle. At the moment, it is not clear, since practice varies from one context to another. The exemption from the strict application of the law probably makes the most sense in commercial arbitration. The parties may prefer that their dispute be governed exclusively by usages in their field. Even then, however, there are serious reasons to doubt that arbitrators who have in theory been freed from applying the law really do refrain from doing so in practice. It would appear that arbitrators acting under such exemptions are in fact inspired by solutions in the positive law, although they also take into account applicable trade usage.[42]

[65] And Professor Brierley notes the following, elsewhere:

The equity clause [*clause d'amiable composition*] in Civilian legal theory may thus be viewed as the device whereby the arbitrator is invited to exercise discretion in the selection and application of the rules of positive law. The zone in which this discretion may be exercised lies within the range of those rules that fall

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41 Nabil Antaki, *Le règlement amiable des litiges* (Cowansville, Qc.: Yvon Blais, 1998) at 110 (para. 192).

42 John E.C. Brierley, *supra* note 24 at 557-558.

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> short of being characterized as rules of public order at one end of the spectrum but which, at the other end, can go beyond the non-observance of mere "technicalities" or "formalities" of the rules of positive law. It can be exercised with regard to the rules governing the arbitral process (even those rules characterized *prima facie* as protective if the parties are found to have waived them) or rules of substantive character (when they are only suppletive). [43]
>
> …
>
> The burden of this comment has been to show that the equity clause in the context of the Model Law, as in that of the modern franco-Civilian tradition, is not a licence to the arbitrator to indulge in purely subjective decision-making or to proceed in disregard of any law whatsoever, as its designation might seem to imply. The arbitrator functioning as *amiable compositeur*, just as much as the ordinary arbitrator, is constrained as a matter of necessary principle to apply fundamental law by virtue of the possibility that judicial control, in the light of considerations of public policy or public order, may be exercised. The two forms of arbitration are not to be distinguished therefore on the basis of the remedies lying against the awards because, in either case, the public policy/*ordre public* defence will lie.
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> …
>
> A second concluding observation is that the concept of *amiable composition* has, in itself, no specific substantive content. It is not a short-hand designation for an existing body of norms. It is, rather, a device for investing an arbitrator with a measure of discretion about *which* rules of law to apply in the case where a legal system does not suppose that all legal rules are mandatory. Its presence in the Model Law is thus explained, in part at least, by the wish of its drafters that it be able to accommodate those legal systems deciding to adopt it in order to modernize their arbitration laws (such as Quebec) and in which, for historical reasons, *amiable composition* is known and assumes, in the modern era of enacted law, the specific role of a technique for distinguishing between imperative and suppletive law. …[44]
>
> [Emphasis added.]

[66] The difference between ordinary arbitrators and *amiables compositeurs* therefore resides primarily in the fact that the former are required to apply the rules of law, the foremost of these being the [TRANSLATION] "positive law of the State", to quote Professor Brierley, be they imperative or suppletive, whereas the latter, bound by rules of public order and natural justice, may modulate the application of suppletive rules or even set them aside in the name of equity and decide in a manner that [TRANSLATION] "complies with general principles of law", to quote Professor Antaki. Are they therefore exempt

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[43] John E. C. Brierley, "'Equity and Good Conscience' and Amiable Composition in Canadian Arbitration Law", (1991) 19 *Canadian Business L. J.* 461 at 480.

[44] *Ibid*. at 483-484.

from the obligation to comply with the contractual law, that is, the stipulations of the disputed contract?

[67] There are some who believe this is the case. In a passage cited by the arbitrator mis en cause[45] and referred to by the trial judge,[46] Professor Antaki expresses this opinion (although with some qualifications):

> [TRANSLATION]
>
> The amiable composition stipulation includes a release from the application of the law. We must consider whether it also constitutes a release from compliance with the contract.
>
> Two opposing arguments have been put forward. The first invokes autonomy of the will and *pacta sunt servanda* to maintain that compliance with undertakings is a rule of public order. The other champions the suppletive nature of the clauses of the contract and recognizes that the *amiable compositeur* has the power to moderate or amend them. The latter argument seems to be the preferred one.
>
> Autonomy of the will may also justify the power that *amiables compositeurs* assign to the contract. It was argued that by signing a non-aleatory contract — a term that describes most long-term contracts — the parties agree to exclude uncertainty from the contract. *Amiables compositeurs* are therefore bound to respect their intent and to use their discretion to attenuate the effects of an imbalance created by unforeseen events. Conversely, parties to an aleatory contract – such as a short-term contract in respect of fungible property — can be supposed to have taken into account and accepted uncertainty. In such cases, therefore, *amiables compositeurs* must comply with the terms of the contract.
>
> A more general argument in favour of the moderating power of *amiables compositeurs* may be made on the basis of the amiable composition clause, the natural purpose of which is to enable an equitable solution to the contractual dispute. Indeed, its very essence is to enable *amiables compositeurs* to set aside obligations that have become inequitable. It is the only means at their disposal to fulfil their duty to temper the unfair consequences of a strict application of the law. Arbitrators may refuse to bear in mind clauses of the contract that are no more binding on them than is the law under which the contract was created.[47]
>
> [Emphasis added.]

[68] A little later on, after referring to two judgments of the court of appeal of Paris, he adds:

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45 Arbitral award of December 14, 2004, at para. 63.

46 Judgment of first instance at para. 66.

47 Nabil Antaki, "L'amiable composition" in *Actes du 1er Colloque sur l'arbitrage commercial international*, under the direction of Nabil Antaki and Alain Prujiner (Montreal: Wilson & Lafleur, 1985) 151 at 165-166.

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[TRANSLATION]

> The powers wielded by *amiables compositeurs* over the contract are limited, however, by the adjudicative nature of the function. Without a clear mandate, they are prohibited from adapting the contract to future circumstances. They may do so only if they have a double mandate, are denied this power by arbitral practice, and the power does not affect rights of which the parties have the free exercise. This situation must nevertheless be distinguished from one in which the dispute centres on a right that has already arisen but whose effects are spread out over time, such as a conventional non-competition clause.[48]

[69] This opinion, based largely on French case law, did not reflect the positive law of Quebec at the time; indeed, it was essentially silent on this issue. Professor Antaki also expressed the following reservation.

[TRANSLATION]

> Despite the absence, to our knowledge, of direct authorities on the power of *amiables compositeurs* to amend contracts, it appears that in the current state of the law, Quebec courts would not follow French precedents on this issue. The arguments in favour of such powers are indirect and tend to flow from general principles such as *pacta sunt servanda* or the principle that [TRANSLATION] "the merits of the dispute are constituted by the interpretation of the contract upon which the outcome depends". Possibly, the most useful precedent is a case in which the Court of Appeal homologated an award concerning a supply agreement that contained a specific condition to govern the setting of prices. In our view, the condition accepted by the arbitrators was different from the one in the contract. The Court did not determine that they had exceeded their mandate.[49]

[70] This passage refers to a judgment of the Court of Appeal, identifying it as follows in footnote 84: "*St-Raymond Paper v. Campeau Corp.* (17 November 1976), Montreal, in H. Reid & D. Ferland*, supra* note 80 at 622". In reality, that citation refers to a judgment discussing the mandatory nature of an arbitration clause which, in the context of the dispute between the parties, governs the setting of sales prices of wood shavings to be supplied by the respondent to the appellant over the next 10 years because the parties themselves did not set the price beyond the first year. The case was referred to arbitration and an award was made. The respondent sought its homologation, and the appellant contests the application on the grounds that the arbitral award was rendered after the six month period in the former art. 941 *C.C.P.* had expired[50] The Superior Court rejected this argument and homologated the award:

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48 *Ibid*. at 167

49 *Ibid.* at 167 *in fine* and 168.

50 At the time, article 941 *C.C.P.* stated that:
941. The submission must be set forth in writing; it must contain the names and capacities of the parties, appoint one or three arbitrators and state the objects in dispute; if the submission does not fix

> … The reopening of the hearing on May 20th, in the view of this Court, probably constituted a new "seizing" of the board, within the meaning and intent of Art. 941 C.P., whatever being "seized" may mean in other connections. The board was, on May 20th, in the opinion of the Court, reseized, at least with respect to the new evidence, after the hearing had already been declared closed by Respondent on March 10th, 1977 … and that consequently either the award was in fact rendered within the six months provided in Art. 941 C.P., or, in any event, the six month delay did not expire prior to September 16th, 1977, in view of the tacit waiver and waiver by Respondent of said delay. The Court is also of the view that Respondent, by its own conduct, has been estopped from raising this objection in the present proceedings to homologate the arbitral award.[51]

[71] Seized of the appeal, this Court decided the following:

> [TRANSLATION]
>
> WHEREAS the time period set out in arts. 940 and following of the *Code of Civil Procedure* is not of public order;
>
> WHEREAS, in the circumstances of the present case, art. 944-2[52] does not apply;
>
> WHEREAS, accordingly, the trial judge was correct to grant the motion;
>
> FOR THESE REASONS: DISMISSES the appeal, with costs.

[72] The hearings before both the Superior Court and the Court of Appeal dealt only with the time period, however. Furthermore, with respect, the judgment rendered by this Court does not even implicitly enshrine the power of the arbitrators-*amiables compositeurs* to amend of the contract.

[73] Moreover, as the trial judge noted in para. 66 of his judgment, Professor Antaki's comments refer to the state of the law as it existed *before* 1986, that is, before the reform of the arbitration regime in Quebec. As we have seen, amiable composition was

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another delay, the award of the arbitrators must be rendered not later than six months after the arbitrators have been seized of the matter.

51 *St-Raymond Paper Ltd. v. Campeau Corporation* (4 October 1977), 500-05-7402-769 (Sup. Ct.) (Perry Meyer J.).

52 At the time, the provision read as follows:

944. The submission is inoperative:

1. in the case of death, refusal, withdrawal or inability to act of one of the arbitrators, unless some clause provides that it shall avail notwithstanding, or that such arbitrator shall be replaced by another chosen by the parties or by the remaining arbitrator or arbitrators, or otherwise;
2. in the case of the decision not being given before the expiration of the delay fixed;
3. by the loss of the thing or the extinction of the obligation which forms the subject of the submission.

[Emphasis added.]

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governed by art. 948 *C.C.P.* at the time. The first paragraph of that provision simply stated the following, which could indeed have lent itself to such an interpretation of the powers of the *amiable compositeur*:

> **948.** The arbitrators must decide according to the rules of law, unless by the submission they have been exempted from doing so, or have been empowered to act as mediators.
>
> …

[74] Article 944.10 *C.C.P.* did not repeat this wording; instead, it added a reservation to its third paragraph that was not in the former art. 948 *C.C.P.* Inspired by the *UNCITRAL Model Law*, this reservation cannot be considered when determining the powers of the *amiable compositeur* if these powers have not been defined by the parties.

[75] Speaking of the *Model Law*, it should be noted that its interpretive effect is not limited to art. 940.6 *C.C.P.*, which refers to it directly:

> **940.6** Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration:
>
> (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;
>
> (2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from the third to the twenty-first day of June 1985;
>
> (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

Thus, the provision expressly characterizes the *Model Law* as a suppletive source of law in cases where extraprovincial or international commercial interests are at issue. It should be remembered, however, that the 1986 reform as a whole was inspired by the *Model Law* (with some adaptations, of course), and its spirit infuses the provisions devoted to arbitration in the *Civil Code*[53] and the *Code of Civil Procedure* (arts. 940 to 947.4 *C.C.P.*), as a reading of these texts makes apparent. As the Minister of Justice of Quebec remarked:

> [TRANSLATION]

[53] See Chapter XVIII of Book V of the *Civil Code of Québec* (arts. 2638-2643 *C.C.Q.*).

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> The importance of arbitration is also apparent in the proceedings of the United Nations Commission on International Commercial Arbitration. On June 21, 1985, the Commission adopted the *Model Law on International Commercial Arbitration* and it was recommended to the world States on November 1, 1985 by the General Assembly of the United Nations. This law represents a global consensus on the principles that should be included in every arbitration law. They are general principles that apply to both domestic and international arbitration. …[54]
>
> Moreover, parties often agree to refer their problem to arbitration but make no further provisions, either because they did not feel it would be a good idea to create a special procedure or because they felt that our rules were sufficient. This state of affairs means that there needs to be a body of generally accepted suppletive rules adapted to modern arbitration. In this respect, the bill draws its inspiration from the model law prepared by the United Nations Commission on International Commercial Law and contains what I would call specific rules on the content of arbitration. …[55]
>
> Internationally, on June 21, 1985, this Commission adopted the *Model Law on International Commercial Arbitration* recommended to the world States on November 1, 1985 by the General Assembly of the United Nations. This law represents a global consensus on the principles that should be included in every arbitration law. They are general principles and apply to both domestic and international arbitration.
>
> Still internationally, a large number of States adhered to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the 1958 "New York" Convention.
>
> …
>
> These two international laws were the basis for Bill 91. The bill is inspired primarily by the UN *Model Law* and contains provisions to implement the New York Convention in Quebec. [56]

[76] Thus, there is no doubt that the *Model Law* can be used as a tool or guide to interpret the arbitration provisions of the *Code of Civil Procedure* in addition to the other ordinary interpretive tools or guides available.

[77] Reference to the *Model Law* seems particularly relevant in the case of art. 944.10 *C.C.P.*, which partially duplicates art. 28 of the *Model Law*. The first paragraph of art.

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54 Quebec, National Assembly, *Journal des débats*, Vol. 29, No. 46 (16 June 1986) at 2975 (Minister of Justice Herbert Marx).

55 *Ibid*. at 2976.

56 Quebec, National Assembly, *Journal des débats*, Vol. 29, No. 55 (30 October 1986) at 3672 (MInister of Justice Herbert Marx – enactment of bill). See also the remarks of MNA Claude Filion (for the Opposition) at 3675. On a similar note, see the *Journal des débats*, Parliamentary Commission, *Commission permanente des institution, etude détaillé du projet de loi 91*, *An Act to amend the Civil Code and Code of Civil Procedure in Arbitration Matters*, no. 17 (16 September 1986) at CI-549.

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944.10 is more or less inspired by the solution in French law[57] and the second by art. 28(3) of the *Model Law*. The third reproduces art.28(4) nearly verbatim:

Code of Civil Procedure	***Model Law***
944.10 The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine he amount of the damages.	**28. 1**. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
They cannot act as *amiables compositeurs* except with the prior concurrence of the parties.	2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
<u>They shall in all cases decide according to the stipulations of the contract and take account of applicable usage.</u>	3. The arbitral tribunal shall decide *ex æquo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
	4. <u>In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.</u>

[57] Article 1496 of the new French *Code de procédure civile* is the inspiration, although it should be noted that this provision is contained in the Title relating to international arbitration (Title V, art. 1492 to 1497). That is not the case in art. 944.10 *C.C.P.*, which concerns purely domestic arbitration as well. Article 1496 of the new French *Code of Civil Procedure* reads as follows:
[TRANSLATION] **1496.** The arbitrator decides the dispute in accordance with the rules of law chosen by the parties; in the absence of such a choice, the decision is made in accordance with those the arbitrator deems appropriate.
The arbitrator takes trade usages into account in all cases.

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[Emphasis added.]

[78] What is the interpretation commonly given to art. 28(4) of the *Model Law*?

[79] In *L'amiable composition en arbitrage commercial international*, Johanne Pelletier answers that question as follows:

> [TRANSLATION]
>
> In all cases, the arbitrator must decide the dispute in accordance with the rules of the contract and *take account* of applicable usages of the trade. Thus, UNCITRAL has imposed a stricter requirement to comply with the stipulations of the contract than with usages. This approach provides a solution to the hierarchy problem, referred to earlier, when there is a conflict between the clauses of the contract and trade usages or even with the content of the law applicable to the merits of the dispute, subject to public order provisions. If the contract is clear, trade usages cannot justify deviating from it. Since this rule applies to both the arbitrator-*amiable compositeur* and the arbitrator in law, we may wonder whether such rigid adherence to the contract actually removes the inherent flexibility necessary for arbitration in equity and risks making it more difficult for the *amiable compositeur* to exercise the power to moderate the effects of clauses deemed to be excessive. The provision reflects general arbitral practice, however, which places greater emphasis on the terms of the contract and the apparent and clear intent of the parties than on trade usages.[58]

[80] In my view, the same is true with respect to the third paragraph of art. 944.10 *C.C.P.*, which applies to both arbitrators *stricto sensu* and arbitrators-*amiables compositeurs*. The structure and wording of the provision clearly indicates the general purpose of the third paragraph:

- The first paragraph of art. 944.10 *C.C.P.* establishes the general principle: arbitrators decide according to the rules of law (or at least those they consider appropriate).

- The second paragraph sets out an exception to this principle or, more precisely, an extension of the decision-making standard established in the first paragraph: If the parties have so agreed, the arbitrator may act as *amiable compositeur*;

- Referring again to the general scheme, the third paragraph concludes that, “in all cases” — meaning those cases referred to in the first and second paragraphs — “they” — meaning the arbitrators referred

[58] Johanne Pelletier, *L'amiable composition en arbitrage commercial international* (Montreal: Thémis, 1998) at 22.

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> to in the first and second paragraphs — shall decide according to the stipulations of the contract and take account of usage.

[81] In other words, the legislature refers to so-called ordinary arbitrators in the first paragraph and arbitrators-*amiables compositeurs* in the second, then adds that "they shall in all cases decide according to" the contract (and usage, if applicable), making it clear that the use of "they" along with "in all cases" designates all arbitrators, whether they are acting under the first or second paragraph of the provision.

[82] This is also the conclusion of Johanne Pelletier when she writes the following about art. 944.10 *C.C.P.* and the *amiable compositeur*:

> [TRANSLATION]
>
> > The arbitrator must in all cases decide the dispute according to the terms of the contract and take account of applicable usage. In this respect, the *Model Law* exactly reproduces art. 33(3) of the *UNCITRAL Arbitration Rules*, discussed earlier. The *Code of Civil Procedure* substantially reproduces this provision, stating the following: "[Arbitrators] shall in all cases decide according to the stipulations of the contract and take account of applicable usages."[59]

[83] Merely conferring on the arbitrator the capacity of *amiable compositeur* as expressly permitted and contemplated in the second paragraph of art. 944.10 *C.C.P.* is not sufficient to exempt the arbitrator from the obligation to comply with the third paragraph of the provision. To conclude otherwise would be tantamount to partially neutralizing the third paragraph of art. 944.10 *C.C.P.*, which is not an option. In other words, to quote Nabil Antaki, while it may be true that [TRANSLATION] "the amiable composition clause is, for its part, an additional waiver of the advantages of applying legal rules to the merits of the dispute",[60] it does not include a waiver of the contractual rules. According to Alain Prujiner:

> [TRANSLATION]
>
> This case also raises the delicate issue of the relationship of the arbitrator to the very text of the contract. In principle, the *amiable compositeur*, like any arbitrator, is required to comply with the contract as a whole. In Quebec, art. 944.10 of the *Code of Civil Procedure* states that "[arbitrators] shall in all cases decide according to the stipulations of the contract and take account of applicable usage", immediately following a reference to the *amiable compositeur*. This provision is directly inspired by the *UNCITRAL Model Law* and corresponds to a fairly restrictive doctrinal approach to the issue.[61]

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59 Johanne Pelletier, *supra* note 58 at 29-30.

60 Nabil Antaki, *supra* note 47 at 153.

61 Alain Prujiner, "L'arbitre, le droit et l'amiable composition" in *Développements récents en arbitrage civil et commercial (1997)* (Cowansville: Yvon Blais, 1997) 27 at 38. This passage is followed by commentary that qualifies the scope of the provision, although without questioning the application of

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[84] In his article on arbitration and amiable composition, cited above, Professor Brierley adds the following, along the same lines:

> First of all, it must be observed that the existence of an equity clause in the arbitration agreement in the Civil law tradition and in the Model Law does not authorize the arbitrators to abandon the terms of the contract in relation to which the dispute has arisen. To paraphrase the language of s. 4 of art. 28 of the Model Law, the arbitrators, whether or not empowered to act as *amiables compositeurs*, always have the mission of deciding in accordance with the terms of the contract.[62]

[85] Author Raymond Tremblay shares the same point of view:

> [TRANSLATION]
>
> (2) Under the second proposition of this article, arbitrators act as *amiables compositeurs* only if the parties give them the mandate to do so. We must then consider what constitutes a mandate to act as *amiable compositeur*. Although nearly impossible to define precisely, generally speaking, *amiables compositeurs* are not bound to a strict application of the rules of law when determining the obligations of the parties. In such cases, arbitrators may decide the dispute and be flexible with regard to the evidence, but they cannot decide without it. They may mitigate the application of a rule of law chosen by the parties, but they cannot do the same with respect to a contractual clause because, under the third paragraph of art. 944.10, they too are bound by the stipulations of the contract. Similarly, if the parties have not authorized them to do so, it is out of the question for them either to revise the contract to adapt it to new circumstances arisen since its conclusion or to complete it. Like other arbitrators, they must be concerned with rendering an enforceable award that complies with public order.[63]

[86] This is the point of view adopted by the trial judge and myself.

[87] To summarize the preceding:

> - When the arbitration agreement is silent on the specific issue of the powers of the arbitrator or arbitrator-*amiable compositeur*, it contains an implicit reference to the relevant provisions of the *Code of Civil Procedure*, in the present case art. 944.10 *C.C.P.* This provision acts in a suppletive

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the third paragraph of art. 944.10 C.C.P. to *amiables compositeurs*. This shall be discussed below; see *infra* at para. [100].

62 John E. C. Brierley, *supra* note 4342 at 471.

63 Raymond Tremblay, "Commentaires des articles du *Code civil* et du *Code de procédure civile* en matière d'arbitrage" (1988) 90 R. du N. 394 at 427-428. Along the same lines, see also Louis Marquis, "L'arbitre et la détermination des dommages-intérêts en vertu de section 944.10 *C.C.P*." [1991] 22 R.D.U.S. 219 at 222-223, where it is mentioned that even the *amiable compositeur* must comply with the third paragraph of art. 944.10 *C.C.P.*

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> manner to define the arbitrator's terms of reference for deciding the dispute.
>
> - Thus, unless arbitrators-*amiables compositeurs* are clearly authorized by the parties to override or opt out of the third paragraph of art. 944.10 *C.C.P.*, they are subject to this provision and obligated to comply with the stipulations of the contract at issue.
>
> - If arbitrators-*amiables compositeur* fail to comply with the stipulations of the contract and thereby contravene the third paragraph of art. 944.10 *C.C.P.*, they infringe the arbitral agreement – more precisely, they go beyond its scope within the meaning of art. 946.4, para. 1(4) *C.C.P.* – because empowering arbitrators to act as *amiable compositeur* is not sufficient in itself to authorize them to disregard or amend the substance of contractual stipulations.

[88] What then is the exact scope of the duty of arbitrators, including those acting as *amiables compositeurs*, to "decide according to the stipulations of the contract"? That is the question I shall now address.

ii. Exact scope of the third paragraph of art. 944.10 *C.C.P.*

[89] First, the Roger Group maintains that the expression "stipulations of the contract" in art. 944.10 *C.C.P.* refers only to the terms of the arbitration agreement and not to the contract in dispute to which the agreement is appended. In my view, this argument cannot succeed, at least not entirely.

[90] The arbitrator, whether *amiable compositeur* or ordinary arbitrator, is of course bound by the stipulations of the arbitration agreement. Indeed, in art. 946.4 and 947.2 *C.C.*P., the legislator expressly sanctions going beyond the scope of the agreement by making it a cause for annulment or refusal to homologate. Under art. 940 *C.C.P.*, the parties may not derogate from these provisions:

> **946.4** The court cannot refuse homologation except on proof that:
>
> …
>
> (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; …
>
> …
>
> In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

> **947.2** Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitral award.

[91] The third paragraph of art. 944.10 *C.C.P.*, however, does not refer to the "arbitration agreement" but to the "contract". There is nothing to indicate that the legislator erred in using that term. Indeed, in art. 2642 *C.C.Q.*, the legislator stated the following:

> **2642.** An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.

Therefore, the legislator cannot be deemed to be referring to the arbitration agreement alone when referring to the "contract" in art. 944.10 *C.C.P.*, although the term may in fact include the arbitration agreement in a situation like the one before us.

[92] In addition, art. 944.10 *C.C.P.* concerns the decision of the arbitrators *on the merits.* Procedural issues are addressed elsewhere (particularly in 944.1 *C.C.P.*). In principle, under the first paragraph of art. 944.10 *C.C.P.*, arbitrators settle the dispute ("*tranchent le différend*") according to the appropriate rules of law unless authorized by the parties under the second paragraph to act as *amiables compositeurs*. In either case, the decision must be rendered according to the stipulations of the contract, with applicable usage taken into account. According to the logic underlying the provision, the decision is made on the merits, and the "contract" referred to does not designate the arbitration agreement alone but the disputed contract as a whole.

[93] That being said, the question is whether the duty of *amiables compositeurs* to decide according to the stipulations of the contract (also taking account of usage, which is not at issue here) prevents them from amending the contract to bring it in line with the spirit and not the letter of the stipulations at issue. I ask this question for a deliberate purpose: because of the way the dispute presents itself, I do not consider it prudent to attempt to draw up an exhaustive list of the powers of *amiables compositeurs*, an institution that remains somewhat ill-defined[64] and at time difficult to distinguish from that of the so-called ordinary arbitrator, despite the theoretical differences between the two. Indeed, this was noted by Professor Antaki in 1985, and his comments are no less accurate today.

> [TRANSLATION]
>
> Ultimately, the opposition between arbitration under the law and amiable composition is illusory. Aside from certain undeniably special cases, it is safe to

[64] A vagueness which remains, despite Professor Brierley's efforts at clarification in the article cited above (*supra* note 43). He himself was of the view that the ordinary arbitration regime and that of amiable composition are the same in the end, particularly because of the prohibition against courts to review the merits of arbitral decisions.

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> say that all arbitrators are in large part *amiables compositeurs* because their objective, which is in keeping with the intent of the parties, is to find a just solution to the dispute more than it is to rigorously apply a given law of the State. The similarity between the two types of arbitration is also heightened by the consideration that the only restriction on an arbitrator's freedom with respect to the rule of law or contract is imposed by the limits of public order and the prohibition against going beyond the terms of reference.[65]

[94] Returning to the issue before us, we must decide whether the arbitrator, in acting as he did and resolving the dispute by striking two provisions of the contract, exceeded the third paragraph of art. 944.10 *C.C.P.* and thereby went beyond the scope of the arbitration agreement within the meaning of art. 946.4, para. 1(4) *C.C.P.*, an imperative provision.

[95] The arbitration agreements and the powers of arbitrators must be interpreted broadly and generously.[66] This is even more so when the arbitrators are *amiables compositeurs.* I would go so far as to say that, with regard to *amiables compositeurs*, the interpretation of the obligation to comply with the clauses of the contract under the third paragraph of art. 944.10 *C.C.P.* must be flexible. Otherwise, arbitrators could find themselves back in the straitjacket the parties had wanted to release them from by giving them the power to act as *amiables compositeurs*. Tremblay explains it as follows:

> [TRANSLATION]
>
> (3) The third proposition in the article requires arbitrators to decide according to the clauses of the contract and urges them to take account of applicable usage. The contract is the law of the parties and arbitrators have an obligation to respect it. This requirement, however, does not go so far as to prevent arbitrators who have received a mandate to act as *amiables compositeurs* to alleviate the requirements of the rules of law the parties have chosen. Such an authorization would not make any sense. …[67]

[96] Therefore, the injunction against arbitrators in the third paragraph of art. 944.10 *C.C.P*. must be interpreted and applied with some latitude, particularly when the arbitrators are authorized to act as *amiables compositeurs*. They should not be limited to the letter of the contract alone. Thus, in some circumstances, the arbitrator-*amiable compositeur* would not infringe the third paragraph of art. 944.10 C.C.P. by interpreting the contract in a way that ignores one of its stipulations and thereby, for all practical purposes, strike it out. This could occur, for example, in cases involving contracts containing contradictory clauses. It would not be beyond the scope of the terms of reference for an arbitrator-*amiable compositeur* to identify which of the clauses must

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65 Nabil Antaki, *supra* note 47 at 168. To the same effect, see John E.C. Brierley, *supra* note 43 at 483 *in fine* and 484.

66 The Supreme Court recalls and applies this principle in *Desputeaux v. Éditions Chouette*, *supra* note 223. See also *Laurentienne-vie (La), compagnie d'assurance inc. v. Empire(L'), compagnie d'assurance-vie*, *supra* note 2624 and the case law cited on this subject.

67 Raymond Tremblay, *supra* note 63 at 428. Similarly, see Johanne Pelletier, *supra* note 58 at 7 *in fine*.

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prevail over others, under either law or equity, so as to give effect to the true intent of the parties. In fact, ordinary arbitrators and even courts can do the same under the usual rules of interpretation and, to a certain extent, equity (a source of implicit contractual obligations under art. 1434 *C.C.Q*.) and good faith (a cardinal principle in obligations pursuant to art. 1375 C*.C.Q*.). Professor Paul-André Crépeau wrote the following about art. 1024 *C.C.L.C.,* the precursor to art. 1434 *C.C.Q*.:

> [TRANSLATION]
>
> Very often, in fact, the agreement reached addresses only a few essential aspects of a matter. Perhaps the parties forgot or neglected to specify the obligations they intended to assume. Perhaps they failed to foresee the consequences, the natural after-effects of the agreement. Or, perhaps they did not take into account the setting in which the agreement was reached.
>
> In all of these cases, it is incumbent on the interpreter and the courts to comply with the order of the legislature and compensate for the silence or brevity of the parties by "unpacking" the contract, examining it thoroughly to determine the implicit obligations that arise from its very nature or that flow from equity, usage, or law. [68]

[97] Moreover, in the Civil law, the courts are in principle obliged to prefer the spirit of the contract over the letter. This fundamental principle of interpretation enshrined in art. 1425 *C.C.Q.* sometimes results in the letter of the contract being treated as relative. This is the rule of the primacy of the actual intent of the parties over their expressed intent.[69] Although not absolute, the rule is no less applicable in an arbitration context, whether the arbitrators are *amiables compositeurs* or not. Arbitrators in general may even be granted an additional measure of interpretive freedom with respect to the contract. Such freedom is even more justifiable in the case of *amiables compositeurs* because of the principle of equity that is inherent to their status and must underlie their decisions.

[98] I doubt, however, that their interpretive licence may go so far as to authorize arbitrators-*amiables compositeurs* to rework the contract in the name of the primacy of the intent of the parties and the spirit of the contract. In the absence of a clear agreement authorizing such action,[70] this would constitute a *pure and simple striking out* of essential provisions.

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68 P.A. Crépeau, "Le contenu obligationnel d'un contrat" (1965) 43 *Can. Bar Rev*. 1 at 6.

69 This rule is discussed in *Sobeys Québec inc. v. Coopérative des consommateurs de Ste-Foy*, [2006] R.J.Q. 100 (C.A.) at paras. 47 et seq.; *Bédard v. Quebec (Attorney General)*, [2005] R.J.Q. 1436 (C.A); *Toronto-Dominion Bank v. Banque Nationale de Paris (Canada) (BNP Paribas (Canada))*, 2005 QCCA 426, J.E. 2005-910, [2005] R.R.A. 334, at para. 35 in particular; *Caisse populaire St-Louis-de-France v. Productions Mark Blandford inc.*, [2000] R.J.Q. 1696 (C.A.); *Droit de la famille — 2831*, J.E. 97-2122 (C.A.).

70 Explicit or implicit authorization.

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[99] In my view, the flexibility and latitude inherent to the role of *amiables compositeurs* does not permit the contract to be substantially rewritten without authorization from the parties. Johanne Pelletier's comments on this subject, made in the context of international commercial arbitration, may also be applied to domestic arbitration:

> [TRANSLATION]
>
> The *pacta sunt servanda* principle, whereby the terms of contracts must be enforced, is based on the presumption that international traders negotiate their agreements with full knowledge of the facts. They must therefore do what they can to ensure, in a diligent, useful, and reasonable fashion, that their interests are safeguarded, in particular by including explicit provisions in their contracts to authorize their modification in the event of a change of external circumstances. It is in fact impossible to conclude that there is a general principle governing the review of contracts, since national laws differ with respect to the existence and scope of an obligation to renegotiate in the event of unforeseen changes in circumstances (*rebus sic stantibus*) in the absence of an express clause to this effect, even when the hardship invoked by one of the parties causes intolerable losses or a serious imbalance in the relationship between the parties. According to some, the latter should even be considered a principle of international public order. In departing from the law of the contract, *amiables compositeurs* violate a fundamental rule of international trade. But when the parties include a provision for review, arbitrators may accord it greater effect, [TRANSLATION] "since usage … positively reinforces and completes the expressed intent", subject to the difficulty of interpreting these clauses.
>
> If *amiables compositeurs* adhere too rigorously to the *pacta sunt servanda* principle, do they not run the risk of endorsing contractual imbalance, contrary to good faith and equity, and fail to exercise the increased flexibility the parties have granted them? Amiable composition is an invitation to expand the sources of law in order to find the most appropriate solutions for disputes. It permits the application of currently developing legal rules or those that form part of the *lex mercatoria*, such as the maintenance of the initial balance of the contract. That is why *amiables compositeurs* should exercise their power to mitigate the effect of certain events if there is a risk that the originally planned proportionality of prestations will be disturbed. After all, as a general rule, parties agree to contracts conditionally, on the understanding that there will be no major changes in circumstances during its performance. It can also be argued that, by authorizing the arbitrator to act as *amiable compositeur*, the parties waive not only the strict sanction of the law but also the rights that flow from the contract, if equity requires. According to Derains, the individual contractual clauses have no more force over the *amiable compositeur* than does the law by virtue of which the contract exists. In actual fact, the few awards that depart from the *pacta sunt servanda* principle are very cautious, often referring to the [TRANSLATION] "moderating" power of the *amiable compositeur* whereby [TRANSLATION] "it is not necessary to strictly apply contractual clauses when such an application would fall afoul of equity…" although without [TRANSLATION] "rewriting the contract, that

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> is to say, substituting the *amiable compositeur* for the parties in the renegotiation of the contract". *Amiables compositeurs* do not feel that they have been granted an exemption giving them the power to set aside a contractual clause that has become inexpedient and substitute another one better adapted to the circumstances. They insist on complying with the terms of the contract as initially expressed by the parties. [TRANSLATION] "Amiable composition does not set aside and, *a fortiori*, eliminate the rule of contracts; it merely grants the arbitrator the freedom to evaluate". Can *amiables compositeurs* do more than "moderate" without exceeding their terms of reference? They would in a way be "transforming" the contract, correcting the effects that have become negative, and adapting it to the developing circumstances without, however, amending the economy of the agreement. But where is the line drawn between being exempted from a contract solely in order to resolve a dispute equitably and rewriting the contract? Amiable composition cannot and should not undermine the fact that the arbitrator's primary duty is to decide a dispute, not to take the place of the parties in a renegotiation of the disputed clauses.
>
> *
> * * *

While it cannot be said that there is agreement on the subject, there is in practice a dominant trend in arbitral decisions towards a narrow and conservative understanding of the powers of the *amiable compositeur* in the application of the contract. It goes without saying that arbitrators – even *amiables compositeurs* – may not make, write, rewrite, or even refine a contract because they would be overstepping the limits of their adjudicative function. Because of the exceptional powers conferred by the parties, however, we would have expected less reluctance to adapt the award to new or changing circumstances that arise during the performance of the contract. Has it not be said that amiable composition is [TRANSLATION] "the ideal instrument of the doctrine of vagueness"? The entire issue of a change in circumstances raises an issue of equity. Simple remedies such as awards of damages, rescission of the contract, or specific performance are not always adequate and may permanently destroy a business relationship. It is better to find a real solution to the dispute by re-establishing the initial balance as intended by the parties. Some commentators have opined that this does not foreclose a revision of the contract because of unforeseen events solely in order to restore the lost effectiveness of the contract. If the planned prestations no longer serve the common objective of the intended commercial operation, the *amiable compositeur* should favour the continuation of the contract when resolving the problem. Any adaptation contrary to the binding force of the contract, however, risks creating insecurity in contractual relations. On the other hand, a mechanical application of the stipulations of the contract does not necessarily lead to a just solution. Therefore, the *amiable compositeur* should find a way to reconcile the letter of the contract (to comply with the autonomy of the will of the parties) with good faith in the performance of the contract (out of a concern for contractual fairness).[71]

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[71] Johanne Pelletier, *supra* note 58 at 85-94.

[Emphasis added.]

[100] As Professor Alain Prujiner explains, more briefly:

[TRANSLATION]

> Numerous authors admit that *amiables compositeurs* may [TRANSLATION] "depart from the application of the rights arising from the contract, ease the strictness of such application, or even mitigate their effects". This generally describes arbitral practice, as approved in the case law. In France, for example, the Court d'appel de Paris conceded that *amiables compositeurs* [TRANSLATION] "had the power to moderate the rights created by the contract [and] set aside the consequences of the strict application of the clauses of the contract…". The Superior Court is therefore in good company in this respect. The power to exempt oneself from the stipulations of the contract, however, is limited by the obligation to refrain from affecting the balance of contractual relations by establishing [TRANSLATION] "new obligations that do not correspond to the common intent of the parties".
>
> Although it is difficult to trace the boundary between a flexible interpretation of the contract and an actual rewrite to adapt to new circumstances, it should be noted that granting the power of *amiable compositeur* does not give rise, *ipso facto*, to the power to adapt. Also, the parties need to be clear regarding their intent to confer this function on the arbitrator. The power to adapt may also be conferred on an arbitrator in law, although that power seems more appropriate to the status of *amiable compositeur*.[72]
>
> [Emphasis added.]

[101] The first paragraph of this excerpt refers to an extremely interesting judgment of the Superior Court, *Beaudry v. 151444 Canada Inc.*,[73] which addressed the issue of whether to homologate or annul an arbitral award granting compensation for prejudice suffered to a plaintiff in a grievance for dismissal without good and sufficient cause. The employer and the mis en cause faulted the arbitrator, who was granted the powers of *amiable compositeur* in the arbitration agreement, for having disregarded the contract in awarding damages because the contract did not provide for them. The Superior Court rejected this claim and made the following comment about the first of the contested amounts:

[TRANSLATION]

> Since the contract did not provide for dismissal without cause, the arbitrators, who were mandated to decide all disputes arising from the Agreement, had to determine fair and equitable compensation in lieu of notice. Because they had the power to act as *amiables compositeurs*, they supplemented the silence of the contract. In this context, the Court does not see

[72] Alain Prujiner, *supra* note 61 at 38-39.
[73] J.E. 90-1257 (Sup. Ct.).

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> how it could validly intervene in this conclusion without considering the merits of the dispute.[74]

[102] As for the other amount (awarded for abuse of right), the Superior Court noted that because the first paragraph of art. 944.10 C.C.P. permits damages, the arbitrators, concluding that the dismissal involved abuse of right, neither erred nor exceeded their terms of reference in awarding the disputed amount, even though neither the employment contract nor the arbitration agreement stipulated therein mentioned the possibility:

> [TRANSLATION]
>
> The arbitrators therefore correctly identified the applicable rules of law. The Court recognizes that the evidence of moral damage is scant, but it fails to see how it can intervene without considering the merits of the issue. The arbitrators acted within their jurisdiction. They awarded $50,000 after finding that the employer was in bad faith. They may have made an error in setting the amount of damages, but a Court not sitting in appeal of the arbitrators' decision cannot intervene.[75]

[103] The above judgment demonstrates that the arbitrator-*amiable compositeur* may supplement the *silence* of a contract on a particular issue (finding the authority to do so in the rules of law applicable to notice and abuse of right). It does not, however, provide a basis for arguing that the arbitrator-*amiable compositeur* may rewrite the contract or delete certain explicit and non-contradictory stipulations without clear authorization to do so in the arbitration agreement or the contract.[76]

[104] In the present case, the arbitrator's striking of two of the clauses from the settlement goes beyond both the "contractual moderation" apparently inherent to amiable composition and any suppletive action he may have been authorized to carry out. Instead, he set aside the clauses of the contract he deemed to be inexpedient, thereby undoing the [TRANSLATION] "initial balance of the contract", disturbing the [TRANSLATION] "originally planned proportionality of the prestations", and modifying the economy of the contract, even though the parties had spent a great deal of effort developing each of its terms. The arbitrator, although stating that [TRANSLATION] "[t]his is

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74 *Ibid*. at 18.

75 *Ibid*. at 21.

76 Along the same lines, although in a slightly different context, see Alain Prujiner, supra note 24. The author writes the following at 435:
[TRANSLATION]
Amiable composition introduces equity into conflict resolution but not into the heart of the contractual relationship. In the absence of any other indication, it cannot be inferred that the mere presence of equity in the arbitration clause gives rise to a general, indeterminate obligation to adapt the contract to changes in circumstances. Thus, absence of such an obligation removes the legal possibility of a dispute, a condition necessary to the intervention of the arbitrator-*amiable compositeur*, unless the contract is subject to a law in which the doctrine of vagueness may be invoked. In such a case, however, the obligation flows from the law and not from amiable composition. …

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not a question of amending the settlement but of supplementing the failure of the parties to anticipate the effect of the acquisitions",[77] in actual fact did more than mitigate the strict enforcement of the rights flowing from the contract and chose instead to substantially rewrite the contract despite his lack of clear authorization.

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[105] In my view, amiable composition is not a way for one party to avoid the consequences of an ill-advised choice in a contract or a failure to consider the future effects of a contract. Although Professor Antaki favours a broad view of amiable composition, he nevertheless wrote the following:

> [TRANSLATION]
>
> **191.** Frequently, amiable composition arbitration is vigorously claimed by unlucky entrepreneurs who erred in calculating costs or commercial risk and hope that arbitrators can modify the effects of the initial, well-drafted contract. This reveals their misunderstanding of the institution. The arbitrator's task is not to transfer the risks of the contract or come to the rescue of parties who failed to sufficiently prepare their bid.[78]

[106] The arbitrator-*amiable compositeur* remains an arbitrator, exercising an adjudicative function. As Professor Antaki reminds us, [TRANSLATION] "[he] is not a mediator, a conciliator, or a common mandatary".[79]

[107] From this point of view, the situation of the Roger Group in respect of the settlement is not an unforeseen event in the proper sense of the term; that is, it is not a [TRANSLATION] "[c]hange in circumstances that one of the parties could not predict when the contract was formed and whose effect is to render the performance of the contract more onerous".[80] Rather, it would appear that when the contract was formed, the Roger Group incorrectly evaluated the potential (and logically foreseeable) effects of the terms agreed upon by the parties.

[108] Indeed, the evidence admitted by the arbitrator reveals that all of the parties discussed the terms of the settlement and deliberately chose not to set a specific time limit on the Denis Group's obligation to repay its debt to the Roger Group. The parties considered the terms of the accounting formula in depth; certainly, they are the terms the parties intended. The very specific objective they were pursuing (preserving the viability of the Denis Group[81]) is the reason they included clauses 1.3(b) and 11 of the settlement's accounting formula. The arbitrator stated that the result was not in keeping with the intent of the parties in that the accounting formula did not produce the expected

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77 Arbitral award of December 14, 2004 at para. 62.

78 Nabil Antaki, *supra* note 41 at 109.

79 *Ibid.* at 108, para. 187. Along the same lines, see John E. C. Brierley, *supra* note 43 at 472-473, where the author notes that "[m]ediation and *amiable composition* are thus distinct functions".

80 Centre de recherche en droit privé et comparé du Québec, *Les obligations*, *Dictionnaire de right privé et lexiques bilingues* (Cowansville: Yvon Blais, 2003) at 175: "imprévision".

81 See the arbitral award of December 14, 2004, at para. 52, point 2.

result (or at least the result expected by the Roger Group)[82] and that it gave rise to an unfair situation.[83] These are findings on the merits that are binding upon this Court. What, then, should or could the arbitrator have done to solve this problem? Whatever his options were, in light of the third paragraph of art. 944.10 *C.C.P.,* the circumstances, the terms of the contract, and the terms of the arbitration agreement in particular, he could not strike two of the provisions of the formula developed by the parties, especially since one of these provisions concerns a third party (the Denis Group's financial institution).

[109] At first glance, this does not appear to be a very satisfying answer, as it suggests that the dispute may be irresolvable (hence the appeal of the remedy proposed by the arbitrator). But is that really the case?

(iii) Other possible solutions

[110] At the outset, I would point out that I do not intend to take the arbitrator's place or tell the parties what the appropriate solution to the dispute brought before the arbitrator would have been. Indeed, I am not concerned with the merits of the case beyond deciding whether the arbitrator went beyond the scope of the arbitration agreement (specifically, by infringing the third paragraph of art. 944.10 *C.C.P.*). Nevertheless, it is not without interest to consider whether the arbitrator-*amiable compositeur* could have found other ways to exercise his remedial power and, if I may say so, avoid coming to a dead-end decision.

[111] In its factum, the Roger Group argues that the arbitrator's solution[84] was the only reasonable one, given the nature of the dispute. It should also be noted that the Denis Group merely contested the validity of the solution imposed by the arbitrator but failed to propose a remedy beyond dismissing the Roger Group's claim. Did the arbitrator have an alternative to the award he ultimately made?

[112] The arbitrator himself raised the possibility of annulling the transaction, although he did not consider this to be a valid solution so he set it aside. The fact that he did not select this option does not mean that it was not possible, however.

[113] Moreover, it does not appear that the parties asked the arbitrator to consider fixing a term to the Denis Group's undertaking under art. 1512 *C.C.Q.* The provision reads as follows:

> **1512.** Where the parties have agreed to delay the determination of the term or to leave it to one of them to make such determination and where, after a reasonable time, no term has been determined, the court may, upon the

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82 See in particluar paras. 54 to 56 of the arbitral award of December 14, 2004.

83 See the arbitral award of December 14, 2004, at para. 57.

84 For the most part, this corresponds to its own request, as a reading of para. 21 of the December 14, 2004, arbitral award reveals.

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> application of one of the parties, fix the term according to the nature of the obligation, the situation of the parties and the circumstances.
>
> The court may also fix the term where a term is required by the nature of the obligation and there is no agreement as to how it may be determined.

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[114] To the extent that the Court is bound by the arbitrator's determination that the parties did not intend for the debt to remain unpaid six years after the settlement was concluded,[85] could the arbitrator have found that the effect of the formula was to leave it up to the Denis Group to determine the term, within the meaning of the first paragraph of art. 1512 *C.C.Q.*, because it has partial control over the available funds (through the amounts it devotes to asset acquisition every year and its relationship with the financial institution with the veto rights set out in clause 11 of the accounting formula)? If so, it could have fixed a term to the obligation of the Denis Group "according to the nature of the obligation, the situation of the parties and the circumstances". If not, the arbitrator could have decided, pursuant to the second paragraph of art. 1512 *C.C.Q.*, that the nature of the obligation was such that it could only be an obligation with a term (which is what his decision implies[86]) and, because there was no agreement as to how it may be determined, he could have fixed it. This was a possible solution, at any rate, since the arbitrator-*amiable compositeur* may apply a rule of law to achieve an equitable solution.

[115] I am in no way saying that this would have been a perfect solution (particularly in light of clause 11 of Schedule A, which reserves the veto rights of the Denis Group's financial institution) or even a merely appropriate one, but it would at least have been consistent with the third paragraph of art. 944.10 *C.C.P.*

[116] Finally, we should not ignore the possibility that the dispute between the parties may have no solution at all to the Roger Group's liking because the parties did not give the arbitrator the tools permitting him to modify the contract. The only answer to the Roger Group's request in such a case would be to dismiss it.

[117] Whatever the case may be, I shall not pursue this line of thought any further. My task is not to compare the respective practical merits of the possible solutions or to dictate such solutions (which, it is worth noting, were not argued in appeal, even though the issue was raised by the Court) but merely to verify that they fall potentially within the ambit of the arbitration agreement. In the present case, the solution selected by the arbitrator went beyond the scope of the parties' arbitration agreement, the terms of which were insufficiently clear to circumvent the third paragraph of art. 944.10 *C.C.P.* Consequently, like the trial judge, I find that homologation should have been denied

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85 Arbitral award of December 14, 2004, especially at para. 54.

86 See para. 52 of the arbitral award of December 14, 2004, which refers to the fact that [TRANSLATION] "the accounting formula provides for a discount if 50% of the capital is paid by the end of the fifth year and the issuance of another credit if the balance of the capital is paid before the end of the seventh year" (which corresponds to arts. 5 and 6 of Schedule A of the settlement).

under art. 946.4 para. 1(4) *C.C.P.* and the application for annulment granted. For this reason, therefore, the appeal should be dismissed.

[118] In passing, it is worth noting that this ruling does not mean that the parties themselves cannot choose to accept the arbitrator's solution and come to a new settlement on that basis. Doing so could bring to an end a conflict that has been plaguing the parties for over a decade and that threatens to drag on for quite a bit longer, no doubt at considerable expense.

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3. Violation of the *audi alteram partem* rule

[119] The Denis Group also alleges that the arbitrator twice breached the *audi alteram partem* rule. First, they argue, he did not allow the Denis Group to bring evidence on the intent of the parties to the settlement. Second, he failed to take some crucial evidence into account. Because of these fundamental defects, the arbitral awards should not be homologated.

[120] This ground must fail.

(a) First alleged breach: The arbitrator did not allow the Denis Group to bring certain evidence regarding the intent of the parties

[121] The Denis Group claims that the arbitrator breached the *audi alteram partem* rule by telling the parties during a preparatory telephone conference on October 13, 2004 that he was not interested in the question of the intent of the parties, even though his first arbitral award was based precisely on that issue. On page 23 of the factum, they also allege that the arbitrator, for the same reason, [TRANSLATION] "refused to give the respondents the right to call … the legal representatives of the parties who had negotiated and drafted the Settlement Agreement".

[122] I understand that, given the nature of the dispute described by the Roger Group, the issue of intent appeared crucial to the resolution of the dispute in everyone's eyes. On October 6, 2006, counsel for the Denis Group informed counsel for the Roger Group that they intended to call them as witnesses along with their own lawyer.[87] Since counsel for the Roger Group refused to testify, the case was submitted to the arbitrator in a telephone conversation that took place on October 13, 2004. The Denis Group claims that the arbitrator declared during this conversation that he had no interest in the intent of the parties and therefore did not need to hear the lawyers who took part in settlement negotiations. He allegedly indicated that the only issues relevant to the dispute were the following:

> [TRANSLATION]

[87] See the letter from counsel for the Denis Group to counsel for the Roger Group, dated October 6, 2004, exhibit R-26.

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- Was the Accounting Formula described in Schedule A of the Agreement correctly applied by the SGT auditors after 1998?

- Can the Accounting Formula generate available funds?

- Is it possible for the Agreement to generate available funds over the next five years?

- What are the powers of an *amiable compositeur*?[88]

[123] While acknowledging that these questions were formulated during the abovementioned telephone conference, the Roger Group denies that the arbitrator said that he was not interested in hearing argument regarding the intent of the parties.[89]

[124] Whatever the case may be, a hearing took place on November 22, 2004, and the attorneys who had been involved in negotiating the settlement did not testify.

[125] On the other hand, Denis Coderre and Roger Coderre did testify, as did their accountants. A reading of the transcripts of their testimonies reveals that the issue of the intent of the parties was raised explicitly at the hearing. This is apparent in the following excerpt from the testimony of Asher Garbuz (accountant for the Roger Group, examined by counsel for the latter):

> Q. And going back to your submission, Mr. Garbuz, under GR-1, would you please, in your own words, just tell the Arbitrator about the spirit of the formula in terms of what it meant vis-à-vis the group of Roger, and vis-à-vis the group of Denis. What was the spirit at the time of its creation?
>
> A. The time of its creation, I believe, was in nineteen-ninety-seven (1997), this — the intent at that time was that the Roger Group would see a reasonable return on its debt, and that it would not harm the viability of the Denis Group. That was the intention at that time. But, obviously, it hasn't worked out in the last six, seven (6-7) years. But the intention was that Roger — the Roger Group would get a reasonable return on its money, or debt, and that it would not harm the viability of the Denis Group.
>
> Q. Okay, and when you say “It hasn't worked out,” has it worked out vis-à-vis the Denis Group, as far as you can see?
>
> A. As far as I can see, he has not — he has made one (1) payment in nineteen…
>
> THE ARBITRATOR

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88 Factum of the Denis Group at 23.

89 Regarding the content of the October 13, 2004, telephone conference, see the versions that counsels for the parties present in affidavits R-48 and M-16.

Nineteen…

A. …ninety-seven (1997), of ninety…

Q. The ten thousand — ninety thousand ($90,000) back in nineteen…

A. That was the only payment it made, right.

Me ROBERT PANCER

Okay.

Q. Okay, I have no further questions for this witness, thank you.[90]

[126] In cross-examination, the following exchange took place:

Q. Before the agreement was signed by your client, Roger Coderre, you had a chance to verify the accounting formula?

A. That's right.

Q. All right. It was consistent with your intent at that time?

A. That's right.

Q. All right. In your document GR-1…

A. Just a minute, I've got to find it.

THE CLERK

I'll lend you mine in the meantime.

A. Yes, okay.

Q. Is that okay?

A. No.

Q. I will give you mine in the meantime, you can give it back to me.

A. Yes, okay.

Me CHRISTIAN TRÉPANIER

Q. In point 1(b), you discuss the "Spirit and intent in relation to the preparation of the formula."

[90] Schedule to the factum of the Roger Group ("F.A.") at 297-298.

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A. 1(b), yes.

Q. Okay, 1(b):

“To provide for payment to the Roger Group over a reasonable period of time.”

A. That's correct.

Q. What did you mean by that, a reasonable period of time, was there a specific number of years?

A. I would think reasonable would be over a period of three to five (3-5) years. I would presume that would be a reasonable…

Q. It was …

THE ARBITRATOR

You mean three to five (3-5) years for the payment of the whole…

A. No, no, not for the whole debt. A reasonable amount each year. But...

Q. I don't understand your answer. You say…

A. To pay the whole debt over five (5) years?

Q. “To provide for payment over a reasonable period of time...”

A. Oh, I see what you mean. Yes, I understand.

Q. So you said three to five (3-5) years.

A. No, no, I take that back. What I — your — I said here to pay the full debt…

Q. Yes.

A. … two point five six — over a reasonable — I would say ten (10) years would be a reasonable time.

Q. You have — is that okay?

Mtre CHRISTIAN TRÉPANIER

It’s okay.

Q. Are you — and you can answer in English too.

A. Okay.

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Q. Are you aware that, in the Agreement, there is no maximum time period foreseen for the payment of the debt?

A. You're telling me there's no…

THE ARBITRATOR

Q. You know, of course, having participated to the formula itself, you know that there is no time…

A. Limit.

Q. … period foreseen in the formula?

A. That's right. It's based upon the yearly results.

Q. Yes.

Mtre CHRISTIAN TRÉPANIER

Q. Do you know why no time period was included in the agreement?

A. Why there was no set time put in? I believe so that it would let Denis be viable and not to hurt him if anything happens to the company, if it gets into very big difficulties. So that's the reason why that was put in, as far as I recall.

THE ARBITRATOR

That was not put in?

A. That's right, that there would be — have to be paid in five (5) years or some — because we didn't want to hurt the Denis company, and have — his company have problems, so that's why that was put in.[91]

[127] The issue is also raised in the (very spontaneous) testimony of Denis Coderre on the circumstances that led him to entering the settlement in 1998.[92]

[128] The testimony of Roger Coderre is also worth another look:

[TRANSLATION]

Q. To go back to ninety-eight, Mr. Coderre, what motivated you, what reason did you have, why did you sign the agreement? Why did you commit to the agreement?

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91 F.A. at 300 *in fine* to 304.

92 See F.A. at 375 et seq., especially 381-384.

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> A. We had already been negotiating for five (5) or six (6) years, and whenever we came near the end, something would block. And according to Mr. St-Michel's representations at the time, to keep the family together, family relations for the family and for the viability of its companies, it was better to make an arrangement and let Denis go at his own speed so that his company could run around and put sufficient funds on it without impediment.
>
> Q. There is no specific term, no specific time period for payment in the agreement. What were you expecting?
>
> A. Well, I was expecting, based on the representations of Mr. St-Michel, who first said that I was supposed to receive amounts of money regularly within two (2) years and if, in two (2) years, I had not received amounts of money, the company would be closed.
>
> And so on these recommendations, these representations, we signed the agreement. That was Mr. St-Michel's answer to a question asked by Robert Pancer, "What happens if, in two (2) years, he hasn't paid?" And that was Mr. St-Michel's answer.
>
> So I was expecting a reasonable time period without receiving it, a reasonable time period can mean maybe about ten years, y'know, five (5) years, ten (10) years. But I am not aware of any of his figures, any of his balance sheets, or any of his revenues.
>
> So I am not in a very good position to make decisions about whether he can pay or not. It is seems to me that if I was receiving a certain amount of money every two (2) months, that would be much better for my children who are around me.[93]

[129] Finally, let us consider the following excerpts from the testimony of Yvan Morin, accountant for the Denis Group (examined by counsel for the latter):

> [TRANSLATION]
>
> COUNSEL FOR GROUPE DENIS
>
> Q. So Mr. Morin, we know that you were involved in the parties' negotiations in ninety-six (96), ninety-seven (97), and ninety-eight (98), and in the determination of the formula set out in Schedule A of the Agreement. Can you explain your role to us, in your own words, and how you came to determine and choose this exact formula?
>
> A. We were in ninety-eight (98), five (5) years after ninety-three (93), when the Mr. Coderre Sr. brought the first proceedings against SGT. In ninety-eight (98), SGT acknowleged a debt entered in the explained financial statements of five hundred and twenty-four thousand (524,000.00), if I recall, please forgive me

[93] F.A. at 396-397. See also the last five lines of page 398. There was no cross-examination (F.A. at 399, l. 24 and 25).

if I can't be more precise, I have nothing in front of me, so it had a debt towards Mr. Coderre Sr. or his companies of five hundred and twenty four thousand (524,000.00).

The proceedings had already been going on and on for four (4) or five (5) years, as Denis explained earlier, Denis had already paid nearly seven hundred thousand bucks ($700,000) in fees for that case only, negotiations had started, and Mr. St-Michel was present at the time and we were still stuck with it, when I say we I always mean SGT, still stuck with this claim for ten million (10 million) and more.

Expert assessments were requested and were carried out to assess the value of Mr. Coderre's claims, and despite these expert assessments that gave results that, I mean, despite the expert assessments that cancelled out a very, very large part of the claim, we were still preparing to go to Court, with everything that involves, and with Mr. St-Michel we were looking for a formula that would have avoided the Court proceedings.

At the time, the company could not even offer to pay the five hundred and twenty-five thousand ($525,000) it recognized, it was already under artificial respiration at the National Bank. The account was already at head office for collection and account closing purposes at the time.

Negotiations led us at the time to accept what I think Mr. St-Michel had proposed in negotiations between the parties, some amount, two million (2,000,000), to add to the five hundred thousand (500,000.00), which the company could not pay either.

And I remember being the one who suggested to Denis that he accept the amount of two million (2,000,000) because we would find a formula that would give him breathing room and would let him settle what the two parties had accepted as an amount without affecting anyone.

That's when the formula, and in our terms, without going into the details of the composition, we said to ourselves, "If he has a hundred thousand (100,000), half will go to the payment of the debt". Now that profit was described at the time as generated funds, that's an accounting term that is different from profits in a company, generated funds are to serve the debt and others, to pay other long-term expenses, to buy equipment, taking into account the financing to be obtained on that equipment and the balance, if there is any, is split in two (2).

There is a very complicated formula to calculate generated funds. If it is necessary to go into details, I will. So that's how the formula was established and built. The payer was satisfied with it because he wouldn't pay if he didn't have the money at the end of the year.

If he didn't have money, too bad. If he had some, whatever the amount, it would be split in two (2). Whether a hundred thousand (100,000) or two million

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> (2,000,000), it would be split in two (2). It seemed very fair at the time, Denis had no source of funds other than his company, he had no nest egg.
>
> That's how the formula was built, taking into account the capacity to pay and also taking fairness into account. He could not pay if he made no profit, if he had no generated funds he would not pay, whatever contracts were made.
>
> Q. Did the formula make it possible, or, anyway, according to the concept that you had when you were working on creating the formula, did it make it possible or does it still make it possible to take into account economic changes in the Denis Group's financial situation, year after year, we're talking about over time?
>
> A. Well yes, to the extent that the generated funds were from the company's profits. Profits, no one knew, they could have gone up, but they went down. They were very uneven, as you have seen. What was the question?[94]

[130] It is also worth noting that at the end of the hearing, counsel for the Denis Group filed documents signed by counsel for the parties in 1998 declaring that the settlement accurately reflected the intent of the parties.[95]

[131] Counsel for the Denis Group were thus able to see that there was evidence of intent. They therefore should have objected, tried to submit contradictory evidence themselves, or asked for the hearing to be adjourned so they could supplement their evidence on intent. They should have at least asked the arbitrator about his earlier decision to exclude intent from his considerations (if this version can be accepted). But they did nothing. Can they then complain that their right to bring evidence on the issue of intent was infringed? The only possible answer is no.

(b) Second alleged breach: The arbitrator disregarded some of the evidence

[132] The Denis Group also alleges that the arbitrator disregarded large parts of the evidence put before him. Specifically, he allegedly ignored the documents filed by the Denis Group that describe the development and progress of the negotiations leading up to the settlement:

> [TRANSLATION]
>
> An examination of the December 14, 2004 arbitral award, however, reveals no trace of any of the highly relevant documentary evidence on the parties' negotiations prior to the signing of the Settlement Agreement. On the contrary, when the mis en cause indicated the content of the "***documentary evidence***" he was considering, **he mentioned only the evidence filed by the accountant for**

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94 F.A. at 418-422.

95 Excerpts from the transcript relating to the filing of this exhibit: F.A. at 443-444. See also the documents themselves, Exhibit R-43.

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> **the appellants during the hearing** (F.A., Vol. II at 135-136) **and omitted the evidence filed by the respondents.**[96]

[133] There are two observations to be made in this respect.

[134] First, this allegation throws a shadow on the Denis Group's preceding argument. If the Denis Group believed that it did not have to prove the intent of the parties or had understood that the issue would not be raised at the November 22, 2004, hearing, it is difficult to see why its attorneys thought it was a good idea to adduce documents relating to the settlement negotiations, which apparently serve no purpose other than demonstrating the true intent of the contracting parties.

[135] I also do not believe that the December 14, 2004, award reveals that the arbitrator ignored the evidence. He may not have referred to it explicitly, but that does not mean he failed to consider it. On the contrary, while a few of the documents filed by the Denis Group imply certain things about the parties' intent, other evidence suggests otherwise and supports the arbitrator's findings. His award provides sufficient reasons to conclude that he considered all the evidence, including that which the Denis Group alleges he ignored.

[136] Article 946.4 para. 1(4) *C.C.P.* (a provision applicable to both homologation and annulment of an arbitral award[97]) states that:

> **946.4** The Court cannot refuse homologation except on proof that:
>
> …
>
> (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> …
>
> (5) the mode of appointment of arbitrator or the applicable arbitration procedure was not observed.
>
> [Emphasis added.]

In the present case, to paraphrase the Supreme Court in *Desputeaux v. Éditions Chouette*,[98] I find that the record does not support a complaint of that sort.

V. CONCLUSION

[137] I would therefore dismiss the appeal, with costs.

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96 Factum of the Denis Group at 26.
97 See art. 947.2 *C.C.P.*, which refers to art. 946.4 *C.C.P.* in the event of an application for annulment.
98 *Supra* note 23 at para. 71.

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MARIE-FRANCE BICH J.A.

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