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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Party Impecuniosity and International Arbitration: The Interplay between Failure to Pay the Advance Costs and Validity of Arbitration Agreement in International Arbitration

Tarafların Ekonomik Müzayaka Hali ve Uluslararası Tahkim: Uluslararası Tahkimde Masraf Avanslarını Ödeyememe ve Tahkim Anlaşmasının Geçerliliği Arasındaki Etkileşim

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Abstract
The costs in international arbitration might be burdensome compared to the costs in litigation. The right to legal aid applies to almost none of the international arbitration proceedings. When an impecunious party fails to pay the advance on costs, it is very likely that the arbitrator(s) will suspend its work or even that may lead the relevant claims be considered as withdrawn. The problem emerges with the impecunious party which might be left without an arbitral forum and become deprived of its right to "access to justice" under Article 6 of the ECHR. The aim of this paper is to analyze how the balance between binding nature of arbitration agreement and impecunious party's right to "access to justice" should be maintained in case of party impecuniosity in international arbitration. As a result of this analysis, it is worthwhile noting that mere proof of financial incapacity of a party failing to pay the costs of arbitration should not be sufficient to set aside an arbitration agreement in an international context. Exceptionally, the courts may allow continuation of court proceedings if the challenging party submits convincing evidence that the counterparty's actions or behaviors have caused or largely contributed to its financial incapacity. The standard of proof to establish such link should be high, at least higher than prima facie standard exercised in review of enforceability of an arbitration agreement. The paper finally reviews alternative remedies that may promote access to arbitration.

Keywords
International Arbitration, Impecuniosity, Economic Distress, Right to Access to Justice, Validity of Arbitration Agreement, Third-Party Funding

Öz
Milletlerarası tahkime ilişkin masraflar, mahkemelerde görülen davalara nazaran taraflar bakımından önemli ölçüde külfetli olabilmektedir. Neredeyse hiçbir milletlerarası tahkim davası bakımından adli yardım kurumu bulunmamaktadır. Ekonomik bakımdan müzayaka halinde bulunan tarafın tahkimdeki avans ödemelerini ifa edememesi halinde, yüksek ihtimalle hakem(ler) çalışmalarını askıya alabilir ve hatta ilgili talepler geri çekilmiş sayılabilir. Bu durumda, müzayaka halinde olan tarafın, tahkime ve dolayısıyla AİHS m.6 uyarınca "adalete erişim" hakkından mahrum kalması gündeme gelecektir. Bu çalışmada, bağlayıcı nitelikteki tahkim sözleşmesinin tenfizi ile müzayaka halindeki tarafın "adalete erişim" hakkının temini arasındaki dengenin ne şekilde sağlanabileceği hususu incelenmiştir. Çalışmanın sonucunda, milletlerarası tahkimde müzayaka halindeki tarafın tahkim masraflarını ödeyememe hali bakımından müzayaka halini ispat etmesinin, tahkim şartının geçersiz sayılması için tek başına yeterli sayılmaması gerektiği ortaya konulmuştur. İstisnai olarak, tahkim şartına itiraz eden tarafın müzayaka haline düşmesine, başlıca veya büyük ölçüde karşı tarafın davranış ve eylemlerinin

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sebep olduğunun ispatı halinde devlet yargılamasına devam edilebilmelidir. Tahkim şartının geçerliliğine itiraz eden tarafça tesis edilecek bu ilişkinin ispatında uygulanacak ispat derecesi -hiç değilse tahkim anlaşmasının geçerliliğinin incelenmesinde uygulanan prima facie standardından yüksek olacak şekilde- yüksek tutulmalıdır. Çalışmada son olarak, tahkime erişim imkanını kolaylaştırabilecek alternatif çözümler incelenmiştir. .

Anahtar Kelimeler
Milletlerarası Tahkim, Müzayaka Hali, Ekonomik Güçlük, Adalete Erişim Hakkı, Tahkim Anlaşmasının Geçerliliği, Üçüncü Kişilerce Finansman

Introduction

Most of the time, parties to an arbitration agreement are merchants (especially in commercial arbitration) and they are considered to be aware of potential costs of arbitral proceedings. Even if the parties are financially stable at the time of concluding an arbitration agreement, one or both parties might become impecunious in time and therefore not be able to cover the advance on costs necessary to initiate or continue with arbitral proceedings. As opposed to the national court proceedings, the right to legal aid does apply to almost none of the international arbitration proceedings.[1] Impecunious party's failure to pay the advance on costs most likely results in suspension of proceedings or may lead relevant claims be considered as withdrawn.

"Party autonomy" and "pacta sund servanda" are two essential elements for arbitration. Due to the binding nature of arbitration agreements, parties waive their rights to resolve their disputes within the jurisdiction of national courts. However, when parties cannot pursue arbitration due to lack of financial resources, the problem arises as at which forum may impecunious parties adjudicate their claims. In this context, the impecunious party might have no arbitral forum and thus recourse to state courts to be able to "access to justice" despite the existence of an arbitration agreement.

The overarching aim of this paper is to analyze how the balance between "pacta sund servanda" and right to "access to justice"[2] should be maintained in case of impecuniosity a party who fails to pay the advance on costs in arbitration. This study will attempt to determine whether arbitration agreements should become "inoperative" or "incapable of being performed" and therefore the parties should be excused from their commitment to arbitrate when a party becomes impecunious and incapable of paying the advance payments in arbitration. This paper will not examine the effect of insolvency/bankruptcy proceedings on arbitration agreement. Instead, the paper will give an account of party impecuniosity in general and examine its effects on arbitration agreement and arbitral proceedings and revisit recent national court decisions from different jurisdictions related to this topic and finally attempt to provide solutions to the problem at hand.

I. Failure to Pay the Advance on Costs

It is common in both ad-hoc and institutional arbitration that parties are expected to pay advance on costs at an early stage of proceedings to safeguard covering of

1 Exceptionally, legal aid has been introduced in the CAS arbitration for athletes and been in force since 1 September 2013. 'The Guidelines on Legal Aid before the Court of Arbitration for Sport (in Force as from 1 September 2013; Amended on 1 January 2019)' <https://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Guidelines_2019__en_.pdf> accessed 1 December 2019.

2 Gerhard Wagner, 'Impecunious Parties and Arbitration Agreements' (2003) 1 SchiedsVZ | German Arbitration Journal 206. 206 -211; İpek Sarıöz Büyükalp, 'Uluslararası Tahkimde "Tahkim Anlaşmasının Hükümsüz, Tesirsiz Veya İcrasının İmkansız Olması" Kavramları' (2014) 16 Dokuz Eylul Universitesi Hukuk Fakultesi Dergisi 2015.2054-2055; Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II (3) of the New York Convention* (Emmanuel Gaillard and D Di Pietro eds, Cameron May Ltd 2008). 344; Juan Pablo Moyano, 'Impecuniosity and the Courts' Approach to the Validity of the Arbitration Agreement' (2017) 344 Journal of International Arbitration 631-638.

the fees and expenses of arbitration. The advance on costs is calculated at the outset of proceedings as an estimate of costs and expenses of arbitration (institution's administrative fees, arbitrator's fees and expenses and any other arbitration-related expenses) considering the complexity and/or amount of claims specific to each arbitration.[3] The amount of counterclaim (if exists) is also accounted for calculation of advance payments. While typical rule is for the parties to equally share payment of the advance on costs[4], most of the rules allow for fixing the advance on costs separately for the main claim and counterclaim if requested by a party or the institution.[5] In case of a counterclaim, either party may request for separate advance on costs when (i) requesting party is unsure whether the other party will or can pay its part or (ii) there exists an excessive difference between the amounts of main claim and counterclaim.[6]

In case one of the parties fail to deposit its share of payment, the other party is usually invited to substitute for the share of the party in failure. The sanction against parties' failure to pay the full advance on costs is suspension/termination[7] of arbitral proceedings or withdrawal of relevant claims for which advance payment is not made.[8] The chances are better for a claimant to substitute for the other party's share to continue with the proceedings. The respondent, on the other hand, will most likely have little cause to help the claimant funding its claims adjudicated against him.

Respondents might be driven not to "play by the rules" because of two factors: (i) their failure could work as a dilatory strategy[9] to impede continuation of the proceedings if claimant has no financial power to substitute for respondent's share or (ii) respondent has serious concerns about being reimbursed by the claimant for the costs at the end of proceedings if it were to succeed in the arbitration.[10] The claimant

3 e.g. Article 38 (1) of the ICC Rules (2018), Article 24 and "Schedule of LCIA Arbitration Costs" of the LCIA Rules (2014), Article 35 of the ICDR Rules etc.

4 e.g. Article 37(2) of the ICC Rules (2017), Article 36 of the ICDR Rules, Article 11 of the SCC Rules, Article 24 of the LCIA Rules, Article 41 of the HKIAC Rules etc.

5 e.g. Article 37(3) of the ICC Rules (2017), Article 51(3) of the SCC Rules and Article 41(2) of the HKIAC Rules etc.

6 Michael Bühler and Thomas H Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (2nd edn, Sweet & Maxwell 2008). ¶¶ 36-33; Christophe Imhoos, Erik Schäfer and Herman Verbist, *ICC Arbitration in Practice* (2nd edn, Wolters Kluwer, Stämpfli Verlag 2016). 202; Jan Heiner Nedden (ed), 'Praxiskommentar ICC-SchO / DIS-SchO: Praxiskommentar Zu Den Schiedsgerichtsordnungen' (Verlag Dr Otto Schmidt 2014).564; Manuel Arroyo, 'Chapter 17, Part II: Commentary on the ICC Rules, Article 37 [Advance to Cover the Costs of the Arbitration]' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide (Second Edition)* (2nd edn, Kluwer Law International 2018) 2470-2471.

7 In an ICC case, the claimant failed to deposit further advance payments required to continue with the proceedings and therefore the claims were considered to be withdrawn. Subsequently, that party was ordered to reimburse the respondent for the costs it had incurred as if it lost the claims on merits. 'Société M v T., Final Award, ICC Case No. 11670, 3 September 2003' (2004) 22 Association Suisse de l'Arbitrage 333-343.

8 e.g. Article 37(6) of the ICC Rules (2017), Article 36(4) of the AAA Rules, Article 24(6) of the LCIA Rules, Article 42(6) of the ISTAC Rules, Article 51(5) of the SCC Rules, Article 41(4) of the HKIAC Rules, Articles R-53 to R-58 of AAA Rules; Article 36(3) of the ICDR Rules, Article 43(4) of the UNCITRAL Arbitration Rules etc.

9 De Meulemeester Cederic and Dirk Veryser, 'Failing to Pay the Advance on Costs and the Risk of Inoperability of the Arbitration Clause – Remedy?' (*Kluwer Arbitration Blog*) <http://arbitrationblog.kluwerarbitration.com/2014/07/31/failing-to-pay-the-advance-on-costs-and-the-risk-of-inoperability-of-the-arbitration-clause-remedy/> accessed 6 December 2019.

10 Markus Altenkirch and Jan Frohloff, 'The Advance on Costs in Investment Arbitration' 33 ICSID Review - Foreign Investment Law Journal 723-726.

who covers the full advance on costs may request from the tribunal to issue an interim award to be reimbursed for the other party's share or render a decision for security for costs against the respondent.[11] For instance, Article 45(4) of the SCC Rules or 24(3) of the LCIA Rules expressly provide mechanisms to recover the advance payments substituted for the party in failure to deposit its share of advance.[12]

II. The Courts' Practice on Enfocability of Arbitration Agreement in Case of Impecuniosity and Failure to Make Advance Payments

Suspension of proceedings and/or withdrawal of claims due to failure to pay advance on costs in arbitration deprives parties of the opportunity to adjudicate claims before arbitration. Therefore, impecunious parties recourse to state courts on the premise that arbitration agreement has become "incapable of being performed" in accordance with Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**").

Van den Berg suggests that the term should be interpreted in narrow sense in compliance with the aim of the NYC to strengthen pro-enforcement approach and should only operate in manifest cases.[13] He further argues that it is relevant to circumstances where arbitration cannot be physically performed even though parties want to proceed with arbitration. According to Kröll, the notion of "incapable of being performed" provision should generally be understood in relation to situations in which the arbitration cannot effectively be set in motion.[14]

The question here is, should impecuniosity party's inability to continue with the arbitral proceedings render an arbitration agreement "incapable of being performed" and enable that party to submit its claims before state courts? In practice, the state courts had diverse approaches in terms of legal qualification of the impact of impecuniosity and failure to deposit advance payments on validity of arbitration agreement. Some of the state courts evaluated the issue within the framework of access to justice and public policy whereas the others approached to the same issue from a contractual perspective.

A. Germany

Germany has been known for its tendency to acknowledge the right of solvent party to terminate arbitration agreement for good cause in case parties lack financial means

11 Niklas Elofsson, 'Immediate Reimbursement of Substituted Advance on Costs in International Commercial Arbitration' (2017) 33 Arbitration International 415-425.

12 Creamdes and Mazuranic suggests that, as an alternative, the party substituting for the defaulting party may also request an injunction from a state court to oblige the defaulting party to pay its share of the advance on costs as a reimbursement. See Anne-Carole Cremades and Alexandre Mazuranic, 'Chapter 9: Costs in Arbitration' in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition)* (2nd edn, Kluwer Law International 2013) 187.

13 Van den Berg and Albert Jan, 'The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation' [1981] Kluwer Law International 155.

14 Kröll, *The 'Incapable of Being Performed' Exception in Article II (3) of the New York Convention* (n 2) 323-326.

to resort to arbitration.[15] The German Federal Supreme Court ("Bundesgerichtshof") once again confirmed the general approach adopted by German courts for years and released parties from their commitment to arbitrate due to party impecuniosity. In that case,[16] the proceedings were initiated before German courts despite presence of an arbitration agreement between two German parties. The Bundesgerichtshof reversed the decision of the Court of Appeals decision enforcing the arbitration agreement and held that impecuniosity of the claimant rendered the arbitration agreement "incapable of being performed" according to Sect. 1032(1) ZPO.

The Bundesgerichtshof relied on several grounds in its decision. First, the Bundesgerichtshof emphasized that the claimant was qualified for legal aid in Germany for state proceedings -contrary to the position in arbitration- so that it would be able to present its claims in litigation and access to justice.[17] Allowing parties to disregard arbitration agreement and recourse to state courts would be the only way for the impecunious party to adjudicate its claims which would otherwise be deprived of its right to recourse "altogether".[18] However, it should be noted that impecuniosity of a claimant would not be sufficient to disregard an arbitration agreement because claimant may not be able to cope with costs of litigation as well. Therefore, it would be unfeasible to set aside an arbitration agreement if it is not ensured that the rights of impecunious party are better protected in state court proceedings.[19] Second, the solvent respondent was not willing to cover the costs of arbitration as it was also insolvent at the time of the dispute and benefitting from employer's liability insurance to cover its legal costs.[20] The Bundesgerichtshof considered that the claimant had no opportunity to recourse to arbitration if the respondent was unwilling to cover for the claimant. Finally, invalidation of the arbitration agreement did not put the other party in a worse position given that both parties were German.

15 *BGH, 30011964 - VII ZR 5/63*.; *BGH, 21111968 - VII ZR 77/66*.; *BGH, 10041980 - III ZR 47/79*.; *BGH, 22021971 - VII ZR 110/69*.; *BGH, 10031994 - III ZR 60/93*.; see also Klaus Sachs, 'International Arbitration and State Sovereignty' (2007) 4 Revista Brasileira de Arbitragem 98. 103; Emmanuel Gaillard, 'Impecuniosity of Parties and Its Effects on Arbitration: A French View', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004) 79.

16 *BGH, 14092000 - III ZR 33/00*

17 Robert Hunter, 'Impecuniosity of Parties and Its Effects on Arbitration – An English Perspective', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004) 107.

18 Gerhard Wagner, 'Poor Parties in German Forums: Placing Arbitration under the Sword of Damocles?', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004). 11; Maximin De Fontmichel, 'Le Financement de L'Arbitrage Par Une Partie Insolvable' [2013] L'Argent Dans L'Arbitrage. 39-40; *BGH, 10.04.1980 - III ZR 47/79* (n 15)

19 Wagner (n 2) 211-212; Stefan Kröll, 'Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration – Effects of Party Insolvency on Arbitral Proceedings in Germany" in Patricia Nacimiento and Stefan Michael Kroll (eds), *Arbitration in Germany: The Model Law in Practice (Second Edition)* (Kluwer Law International 2015). 995; Patricia Živkovic, 'Impecunious Parties in Arbitration: An Overview of European National Courts' (2016) 23 Croatian Arbitration Yearbook 42.

20 In addition, respondents would usually have no interest in funding the claims of a claimant. See Süheyla Balkar Bozkurt, 'Milletlerarası Tahkimde Yargılama Masraflarının Hak Arama Özgürlüğüne Etkisi ve Sonuçları' (2015) 10 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 121. 204-205; Carine Dupeyron and Flore Poloni, *Procédure de Liquidation d'une Partie, Arbitrage et Droit d'accès à La Justice: L'impossible Équation?*, vol 30 (Kluwer Law International 2012).477; Fontmichel (n 18) 45.

The Bundesgerichtshof's decision in 2000 attracted criticism for various reasons.[21] First, it is argued that the German jurisprudence on the issue of impecuniosity have led Germany to be "a less attractive" place of arbitration in terms of international arbitration.[22] Second, some scholars were pleased with the outcome of the Bundesgerichtshof's decision allowing parties to abandon arbitration agreement in case of impecuniosity,[23] however it was subject to criticism on the premise that the Bundesgerichtshof changed its legal reasoning for releasing parties from their commitment to arbitration.[24] The former reasoning adopted by German courts was that party impecuniosity was evaluated to be an extraordinary circumstance which allowed each party to terminate arbitration agreement. According to Section 314 of the German Civil Code ("BGB"), "Each party may terminate a contract for the performance of a continuing obligation[25] for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period."[26]

Prior to the decision of 2000, Bundesgerichtshof had formulated a mechanism how unilateral termination should be implemented.[27] The party wishing to terminate the arbitration agreement notifies the other party - in the absence of any requirement to resort to a adjudicative organ-[28] and set a time limit to choose as to whether it accepts to cover the full costs of arbitration. Only after expiry of such time limit, impecunious party would be allowed to perform its right to terminate arbitration agreement unilaterally.[29]

According to the new approach adopted by the Bundesgerichtshof, the arbitration agreement becomes incapable of being performed as per Sect. 1032 (1) of the

21 Wagner (n 18) 10.

22 M Polkinghorne and D Lehmkuhl, *Dealing with an Impecunious Opponent* (Committee D News) 25.

23 Some scholars argue that lack of ability to afford arbitration should grant not only impecunious party but also the other party the right to terminate the arbitration agreement on the premise that economic capability should not bar parties to have access to justice. See HW Fasching, 'Kostenvorschüsse Zur Einleitung Schiedsgerichtlicher Verfahren' [1993] JBI. 554; Andreas Reiner, 'Impecuniosity of Parties and Its Effects on Arbitration – From the Perspectives of Austrian Law', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004). 41-45; Stefan Riegler, 'Schiedsverfahren Und Konkurs' (2004). 120; Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (2nd edn, Bern: Stämpfli 2010) 162.

24 Wagner (n 2) 216.

25 German courts acknowledged in various cases that commitment to arbitrate is an agreement that includes a continuing obligation and thus such fulfills the requirement mentioned in Section 314 (1) of the BGB. See *BGH, 30.01.1964 - VII ZR 5/63* (n 15).; *BGH, 21.11.1968 - VII ZR 77/66* (n 15).; *BGH, 10.04.1980 - III ZR 47/79* (n 15).; See also Thomas Granier, 'Unilateral Termination of an Arbitration Agreement by a Party After the Arbitration Has Commenced' (2015) 12 Revista Brasileira de Arbitragem 108-114.

26 'BGB's (German Civil Code) Translation' <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1150> accessed 18 November 2019

27 *BGH, 22.02.1971 - VII ZR 110/69* (n 15).; *BGH, 10.03.1994 - III ZR 60/93* (n 15)

28 Granier (n 25) 114.

29 Wagner (n 2) 217

German Code of Civil Procedure,[30] if established that a party lacks sufficient funds for arbitration. In this constellation, cessation of arbitration agreement comes into play "ex lege" that henceforth renders unilateral termination unnecessary.[31] This new approach adopted by the Bundesgerichtshof encountered criticism because it puts arbitration aside automatically without allowing solvent party to substitute for impecunious party and go to arbitration.[32] Still, the Bundesgerichtshof elucidated that it would not consider an arbitration agreement to be incapable of being performed if the counter-party had shown interest in covering the full costs of arbitration.[33] It is also argued that the new approach is less effective against strategic maneuvers threatening integrity of arbitral proceedings.[34] Nevertheless, the Bundesgerichtshof applied the principle of good faith in other cases and considered circumstances of the case when deciding on setting aside an arbitration agreement if a party enters into an arbitration agreement knowing but not caring enough that it would suffer from the costs of arbitration.[35] The last criticism to the Bundesgerichtshof's approach is that validity of an arbitration agreement is subjected to existence of financial incapacity of a party which inherently contains lack of certainty. Accordingly, financial inability of a party might be a temporary circumstance that may disappear in time. Therefore, it is argued that the Bundesgerichtshof's approach fails to explain how arbitration agreement can be considered valid again if impecunious party regain its financial capacity.[36]

Another aspect the Bundesgerichtshof pointed out in its decision was that setting aside the arbitration agreement would not put the other solvent party in a worse position.[37] Indeed, it would be less problematic to overthrow an arbitration agreement in a domestic setting where both parties would find themselves in litigation at the courts of their own state.[38] Especially in a constellation of international business, favoring "access to justice" over enforcing parties' commitment to arbitration would not be easy because the foreign solvent party would most probably desire more to adjudicate its claims before a neutral forum (via arbitration) and could be worse off if the proceedings were held at the courts located in the state of its counterparty.[39] Once

30 Relevant provision is adopted from Article 8(1) of the UNCITRAL Model Law.

31 Sachs (n 15) 103; Detlev Kühner, 'The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany' (2014) 31 Journal of International Arbitration 807- 815.

32 Moyano (n 2) 651-652; Wagner (n 2) 216-217.

33 *BGH, 14.09.2000 - III ZR 33/00* (n 16)

34 Wagner (n 2) 216.

35 *BGH, 10.04.1980 - III ZR 47/79* (n 15).; *Higher Regional Court of Hamburg (OLG Hamburg, 15 November 1995, (RIW 1996, 510, 511)*. In contrary, Reiner argues that it is irrelevant to discuss whether impecuniosity of a party was foreseeable or not. Even if it was foreseeable, that party cannot be deprived of access to justice. See Reiner (n 23) 41; Wagner (n 2) 213

36 Sachs (n 15). 103; See also Jörg Risse, 'Undurchführbarkeit Der Schiedsvereinbarung Bei Mittellosigkeit Des Klägers' (2001) 11 Betriebs-berater 11.

37 *BGH, 14.09.2000 - III ZR 33/00* (n 16)

38 Živkovic (n 19) 42-43; Kühner (n 31) 816-817.

39 Wagner (n 2) 213-214.

for all, it would be reasonable for the solvent counterparty to argue that they should be held to their original bargain to arbitrate because the very purpose of entering into an arbitration agreement place was to avoid national courts of either party in the first place.

The Bundesgerichtshof found it irrelevant to consider as to whether it would make any difference when impecuniosity was caused by own actions of the party seeking to beg off the arbitration. Impecuniosity might well occur arising out of negligence or fault of the party seeking to abandon its commitment to arbitration and still the arbitration agreement can be set aside.[40] The reason behind is that the court's invalidation of an arbitration agreement is considered "neither as grace nor act of grace"[41] by the courts, thus applied irrespective of whether fault lies with the indigent party or not.

The issue of impecuniosity was discussed in another case arising out of a shareholder's agreement that contained an arbitration clause. In that case, the Higher Regional Court of Berlin, held that the claimant was not required to unilaterally terminate the arbitration agreement as long as the fact that claimant's lack of necessary funds to cover arbitration costs is prima facie established which renders an arbitration agreement incapable of being performed. The Court was satisfied that the claimant was impecunious given that it obtained legal aid to pursue court proceedings.[42] The Court of Appeal of Cologne followed the same approach adopted by the Bundesgerichtshof that party impecuniosity rendered arbitration agreement incapable of being performed.[43]

The Court of Appeal of Munich also dealt with the same issue in relation to a dispute arising out of shareholder's agreement that contained an arbitration clause[44] In that case, the claimant initiated arbitral proceedings, however later submitted its dissatisfaction with the arbitral proceedings that no outcome could have been achieved during the procedure due to the alleged actions of the respondent and alleged that it was no longer financially capable to cover the costs of arbitration. The claimant declared unilateral termination of arbitration agreement and requested the tribunal to drop the case upon termination of the arbitration agreement. However, the tribunal declined the claimant's request and continued with the proceedings. Subsequent to the issuance of the award, the claimant requested annulment of the award relying that the tribunal had no jurisdiction to decide on the case. The Munich Court of Appeals held that the claimant could not establish its lack of financial means as it was established by evidence provided to the court that the claimant was in possession of a real estate valued approximately €1m. The Court further held that the claimant could not rely on

40 *BGH, 30.01.1964 - VII ZR 5/63* (n 15).; *BGH, 22.02.1971 - VII ZR 110/69* (n 15)

41 Wagner (n 18) 14-15.

42 *Kammergericht Berlin's decision dated 13 August 2001 (2 W 8057/99).*

43 *Higher Regional Court of Cologne (OLG Köln), 5 June 2013, (18 W 32/13).*

44 *Higher Regional Court of Munich (OLG München), 29 February 2012, (34 SchH 6/11).*

any defense that sale of the real estate was not possible as it could sell it for a better price in the future and thus upheld the award.[45]

The courts in several other jurisdictions embraced the German courts' approach to deal with party impecuniosity in arbitration as well. The Austrian Supreme Court's decision rendered in 1936 allowed impecunious party to unilaterally terminate arbitration agreement relying on that financial incapability of a party deprives it of access to justice.[46] Similarly, the Supreme Court of Liechtenstein in 2008 held that impecunious claimant who is entitled to legal aid for court proceedings cannot be held to arbitration agreement if counterparty does not cover the costs of arbitration. The Court further states that the parties are deemed to have waived their rights to arbitrate only with regard to their existing dispute which has no impact on the validity of arbitration agreement in relation to future disputes.[47] Again, the Szeged Court of Appeal allowed a party under bankruptcy to disregard arbitration agreement and pursue court proceedings which otherwise would deprive bankrupt party of enforcing its rights and that would be inconsistent with the aim of insolvency proceedings.[48]

Lastly, the Court of Appeal in Helsinki in 2017 rendered a decision setting aside the arbitration agreement between a franchisor and a franchisee due to the insolvency and weaker position of the franchisee.[49] The Court reasoned its decision that deciding otherwise would be unreasonable for the challenging party (franchisee) in accordance with Section 36 of the Finnish Contracts Act and that would deprive the franchisee of vindicating its rights due to its weak financial position. The Court also gave account of the fact that the franchisee could not start its business because of the franchisor's actions which deteriorated financials of the franchisee.[50] The Court of Appeal and then the Supreme Court of Finland in 2003 upheld the decision.[51]

After all, it should be noted that almost all court decisions rendered by state courts given above were in relation to disputes in domestic context. Therefore, it is still a matter of question whether given state courts would change their stand in

45 See for detailed analysis of the Munich Court of Appeal's decision: Granier (n 25) 108–124.

46 *OGH, 4 September 1936, (SZ 18/151)*.; See also Reiner (n 23) 40–41.

47 Jörg Risse and Guenter Pickrahn (eds), 'Fürstlicher Oberster Gerichtshof, Liechtenstein – 04 CG.2007.225, Kündigung Der Schiedsvereinbarung Bei Mittellosigkeit Einer Partei, Supreme Court of Justice of Liechtenstein, 04 CG.2007.225, 7 August 2008' (2008) 6 SchiedsVZ | German Arbitration Journal 54 306-307

48 *Szegedi Ítélőtábla, Gfl30014/2012*. For detailed review of the case, see András Dániel László, 'Restrictive Tendencies in Hungarian Arbitration Law – Arbitration Agreements Are Not Enforceable Against Companies under Involuntary Liquidation' (*Kluwer Arbitration Blog*) <http://arbitrationblog.kluwerarbitration.com/2015/05/04/restrictive-tendencies-in-hungarian-arbitration-law-arbitration-agreements-are-not-enforceable-against-companies-under-involuntary-liquidation/> accessed 26 November 2019.

49 Mika Savola and Anna-Maria Tamminen, 'Helsingin Pizzapalvelu Oy (Franchisor) v. Leena Hinkkanen, Slice Away (Franchisee), Court of Appeal of Helsinki, Judgment No. 24 in Case S 16/838, 11 January 2017' Kluwer Law International.

50 The Court of Appeal also considered that the arbitration agreement was unfair because the agreement granted only the franchisor the right to opt out from arbitration and bring a claim before state courts.

51 *The Finnish Supreme Court's Decision, 3 April 2003, (KKO 2003:60)*. See also Patrik Lindfors, 'Arbitration In Finland – Characteristic Features Currently Under Discussion' [2003] Nordic Journal of Commercial Law.

an international context where both parties are not of the same nationality. It can be argued that German court would apply a higher threshold for setting aside an arbitration agreement in an international context given that interests of solvent foreign party would be at stake.

B. France

French courts are known for their pro-arbitration approach that gives maximum effect to arbitration agreements.[52] This result comes from the negative effect of kompetenz-kompetenz principle entrenched in French law under Article 1448 of the French Civil Procedural Code ("FCPC") that the courts must decline jurisdiction when a party recourse to a court for a dispute being subject to arbitration, "except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable".[53] The threshold under French law for assuming jurisdiction in a dispute subject to arbitration agreement is higher than the standard embodied in Article 8 of the UNCITRAL Model Law and Article II (3) of the NYC. Therefore, it is almost sure to happen that a French court would decline jurisdiction and refer parties to arbitration in the mere existence of an arbitration agreement.[54] French courts have a similar "pro-enforcement" approach and only in exceptional circumstances the courts refuse to enforce or annul an award.

Gaillard argues that a party's assertion of invalidity of an arbitration agreement should be initially assessed by arbitral tribunals in accordance with kompetenz-kompetenz principle and conclude that financial incapacity could in no way bring any consequence to the detriment of arbitration agreement. Even if that kind of claim is ever brought before French courts, the French courts would turn down the contentions of impecuniosity in that case.[55] The general position of French courts justified Gaillard's arguments years -although with minor exceptions- after his comments on the issue of impecuniosity as a reaction to the Bundesgerichtshof's decision in 2000.

France has been one of the most attention-grabbing jurisdictions that witnessed the clash between parties' right to access to justice and enforcement of arbitration agreement in circumstances involving party impecuniosity. As opposed to the examples from German jurisdiction which took place in a domestic setting, French courts dealt

52 Kühner (n 31) 807.

53 Translated by Emmanuel Gaillard, Nanou Leleu-Knobil and Daniela Pellarini of Shearman & Sterling LLP; See also Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration (Sixth Edition)* (Oxford University Press 2015) 340-342.

54 Kühner (n 31) 808; Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, 'Traité de l'arbitrage Commercial International' [1996] Litec. 672 seq.

55 Gaillard (n 15). 79-83. Similar to the approach adopted in France, Swiss courts ruled that arbitration agreement cannot be set aside even in case none of the parties pay the advance on costs. See *Swiss Federal Tribunal, 21 March 2011, (4A_574/2010)*.; in another case, Swiss Federal Tribunal held that lack of funds during arbitration is not sufficient to stay arbitration proceedings. See *X. AS v. Bank Y, Bundesgericht, I. Zivilabteilung, 4P.64/2004, 2 June 2004*, vol 22 (Kluwer Law International 2004) 782–790.

with the issue of party impecuniosity within the context of international arbitration. Historically, applicability of the "right to access to justice" in arbitration was discussed in numerous cases and publications which paved the way for the most recent cases in relation to this topic.[56]

One of the surprising decisions in French jurisdiction was rendered by the Tribunal de Commerce de Paris in 2011 in a dispute between a French insolvent company against a foreign party that involved an arbitration clause in favor of a Danish arbitral tribunal. The court held that the arbitration agreement had become incapable of being performed due to the fact that the French company had no access to arbitration because of its insolvency.[57] The court further stated that arbitration agreement could be set aside if it was proved by concrete evidence that claimant was financially incapable and there existed disproportionality between existing financial status of that party and the potential costs of arbitration.[58] Still, it is noteworthy to mention that it is unknown whether an appeal was filed against this decision.

Another prominent case before the French courts was between SARL Lola Fleurs vs. Société Monceau Fleurs et Autres.[59] In this case, Lola Fleurs filed a lawsuit against Société Monceau before Paris Commercial Courts in relation to a dispute arising out of a franchise contract that contained an ad-hoc arbitration clause. Lola Fleurs brought its claim before state courts in the first place instead of filing an arbitration. It argued that the company's lack of funds to cover the costs of arbitration should render the arbitration agreement inapplicable. Otherwise, compelling Lola Fleurs to go to arbitration would deprive the company of its right to access to justice. The first instance court denied Lola Fleur's claim and referred parties to arbitration. Lola Fleurs appealed against the decision of the first instance court and argued that the court denied it to access to justice (déni de justice) by declining jurisdiction on the case. Paris Court of Appeal held that impecuniosity of the claimant would not render an arbitration agreement inapplicable. The Court of Appeal rejected Lola Fleur's argument, but still reaffirmed (as a principle) applicability of the right to access to justice in arbitration. It held that Lola Fleurs' financial inability to comply with its advance payment obligations did not render the arbitration agreement ineffective, but

56 *Cour de Cassation Civile, 1ere, 1 February 2005, Nioc v Etat d'Israel, Revue de L'Arbitrage, 2005, 693 et seq*.; *Cubic Defense Systems vs ICC, Cour de Cassation Civile, 1ere, 20 February 2001, Bull Civ 2001, no:39, pourvoi no: 99-12574*.; *Cour d'Appel de Paris, 1ere Chambre Civile, 29 June 2006, No: 04/22985*.; *Cour de Cassation Civile, 1ere, 16 March 1999, JDI, 1999, 794*.; Charles Jarrosson, 'L'Arbitrage et La Convention Europeenne Des Droits de L'Homme' [1989] Revue de L'Arbitrage. 601-602; Marc Henry, *Le Devoir d'independence de L'Arbitre* (LGDH 2001). 92; Philippe Fouchard, 'Les Institutions Permanantes d'Arbitrage Devant Le Juge Etatique (à Propos d'une Jurisprudence Récente)' [1987] Revue de L'Arbitrage 258.

57 'Tribunal de Commerce de Paris, 17 Mai 2011, (No. 2011003447)'.

58 Friedrich Niggemann, 'Vermögenslose Parteien Und Schiedsgerichtsbarkeit – Nun Auch Vor Den Französischen Gerichten' SchiedsVZ | German Arbitration Journal 173. fn. 14.; See for the review of this decision: Fontmichel (n 18) 40; Jaroslav Kudrna, 'Arbitration and Right of Access to Justice: Tips for a Successful Marriage' [2013] NYU Journal of International Law and Politics Online Forum 1. 11, fn. 43.

59 'S.A.R.L. LOLA FLEURS v. Société MONCEAU FLEURS, S.A.R.L. LA GENERALE DES VEGETAUX, Société GLOBAL EXPORT BV, Court of Appeal of Paris, N° 12/12953, 26 February 2013' 31 Association Suisse de l'Arbitrage 900-903.

also that arbitral tribunals are under duty to oversee that the rights of the parties to access to justice and equal treatment are respected.

Paris Court of Appeals' decision in Lola Fleurs case reaffirmed application of the negative effect of kompetenz-kompetenz principle entrenched under French law. The claimant's inability to cover the costs of arbitration does not render the arbitration agreement manifestly inapplicable. Although such circumstance might lead to denial of justice for the claimant, it should be the tribunal's duty to ensure parties' right to access to justice and lack of which might be sanctioned after the award has been rendered.[60]

The issue was again discussed in a case between Société Aéronautique et technologies embarquées SAS v. Société Airbus Helicopters and Airbus Helicopters Deutschland Gmbh.[61] The claimant initiated legal proceedings against its German counterparty before French courts despite the arbitration agreement. The French Court of Cassation held in 13 July 2016 that neither impecuniosity of a party nor failure to cover the expenses of arbitration had an impact on validity and applicability of an arbitration agreement. The French Court of Cassation reaffirmed the French court's position in Lola Fleurs case that while party impecuniosity had no relevance with the validity of an arbitration agreement, it should be the tribunal to deal with the issue of denial of justice.[62] Both Société Airbus and Lola Fleurs cases highlight the fact that French courts strictly applies the negative effect of the principle of "competence-competence" demonstrating no tendency to intervene in the process until the post-award stage.

The issue of party impecuniosity was also discussed in relation to respondent's right to access to justice with respect to its counterclaims. As common in most of the arbitration rules, failure to pay the advance on costs for counterclaims results in them being considered withdrawn in the existing proceedings. Unlike the scenario where impecunious respondent advances no counterclaim but only defences himself against claimant, it would be unlikely for claimant to cover the advance on costs corresponding to a counterclaim on behalf of the respondent. Therefore, compulsory withdrawal of counterclaims leaves the respondent with no option but to abandon its counterclaim for the time being, which pave the way for allegations that respondent is denied access to justice with respect to its counterclaims.

The issue of denial of justice in relation to counterclaims was discussed in a case before French courts between Pirelli & C. S.p.A. v. Licensing Project S.L.[63] In 2007,

60 ibid. 903.

61 João Bosco Lee and Daniel de Andrade Levy (eds), *Société Aéronautique et Technologies Embarqués (ATE) v. Companies Airbus Helicopters and Airbus Helicopters Deutschland, Court of Cassation of France, First Civil Law Chamber, Case No. 15-19389, 13 July 2016*, vol 14 (Kluwer Law International 2017) 146–149.

62 ibid. 146–149.

63 Bertrand Derains, 'Pirelli & Co. v. Licensing Projects and Other, Court of Cassation of France, First Civil Law Chamber, Pourvoi No. 11-27.770 Case Date 28 March 2013' Kluwer Law International. 1-6.

Pirelli filed an ICC arbitration in Paris against a Spanish company Licensing Project and Licensing Project submitted a counterclaim against Pirelli in the same arbitration. Later in 2007, liquidation proceedings were filed against Licensing Project after being declared insolvent by Barcelona courts. Pirelli asked ICC Court to fix the advance on costs separately as per article 30.2 of the ICC Rules (1998).[64] The ICC Court granted Pirelli's request, however, Licensing Project failed to make the advance payment corresponding to its counterclaim. In accordance with Article 30.4 of the ICC Rules (1998),[65] the tribunal treated Licensing Project's counterclaim as being withdrawn for the purpose of the existing arbitration and noted that Licensing Project was not prevented from advancing those claims in the future.[66]

Subsequent to the end of arbitral proceedings, Licensing Project filed for setting aside the ICC award before Paris Court of Appeal. Paris Court of Appeal annulled the award as per article 1502 (4) and (5) of the FCPC[67] on the premise that Licensing Project was denied equal treatment and access to justice in violation of international public policy.[68] The Court emphasized that no person can be denied of seeking justice before a judge. The Court further stated even though the right to court can be restricted, any restriction could only be exercised proportionately with safeguarding justice and access to fair trial and arbitral proceedings are not exempt from this understanding.[69] The Paris Court abstained from any declaration that the ICC Rules regulating the consequences of failure to pay the advance on costs are in contradiction with public policy or due process.[70] Still, it held that, the ICC's exercise of such amounted to an disproportionate measure and that obstructed impecunious party's access to justice.

The Court of Appeals in this case did not agree that exercise of Article 30 of the ICC Rules (1998)[71] had not deprived parties of their rights to advance their claims completely as they were allowed to introduce such claims in another proceeding.

64 Article 37(3) of the ICC Rules (2017) as applicable today.

65 Article 37(6) of the ICC Rules (2017) as applicable today.

66 Derains (n 63) 1.

67 The provisions of French Civil Procedural Code in relation to international arbitration was amended with Article 2 of the Decret no. 2011-48 dated 13 January 2011. New provisions came into force as of 1 May 2011. The article numbers of relevant provisions have changed to 1520 (4) and (5), however, the content remained the same.

68 *Cour d'appel de Paris, Pôle 1 – Chambre 1, Arrêt du 17 Novembre 2011, Société LICENSING PROJECTS SL contre Société PIRELLI & C SPA et al, l'affaire a été débattue le 18 octobre 2011, en audience publique, le rapport entendu, devant la Cour composée de* (2012) 30 Assoc Suisse l'Arbitrage 459. 459-466; Daniel Cohen, 'Non-Paiement de La Provision d'arbitrage, Droit d'Accès à La Justice et Egalité Des Parties Avancée Ou Menace Pour L'Arbitrage?' [2012] Les Cahiers de l'arbitrage. 164; Thomas Clay, 'Droit de l'arbitrage et Des Modes Alternatifs de Règlement Des Litiges'. 3023; it is acknowledged in French law that right to access to justice is a part of international public policy. See François-Xavier Train, 'Impécuniosité et Accès à La Justice Dans l'arbitrage International (à Propos de l'arrêt de La Cour d'appel de Paris Du 17 Novembre 2011 Dans l'affaire LP c/ Pirelli)' [2012] Revue de L'Arbitrage 267. 276.

69 Train (n 68) 390.

70 Kaplan argues that mere impecuniosity of a party who cannot adjudicate its claims in arbitration does not by itself lead to a public policy violation. The Court showed its intention not to question procedural rules chosen by parties however excluding that application of such procedural rules cause a disproportionate result and amount to a manifest violation of public policy. See Charles Kaplan, 'L'affaire Pirelli Restituée Dans Son Contexte: Propos d'audience de M. l'Avocat Général Pierre Chevalier' [2013] Paris Journal of International Arbitration. 585.

71 Article 37(6) of the ICC Rules (2017) as applicable today.

On the contrary, the Court of Appeals held that the status of financial hardship – as experienced by Licensing Project in Pirelli case- rendered such scenario (reintroduction of counterclaims in another proceeding) nothing but fictional and theoretical.[72]

Pirelli applied to the French Court of Cassation against the decision of Paris Court of Appeal. The French Court of Cassation reversed the decision of Paris Court of Appeal on the ground that while the tribunal's dismissal of counterclaims might qualify as denial of justice and equal treatment for the relevant party, such conclusion could only be reached if the counterclaims were "inseparable" ("indissociables") from the main claims.[73] The Court of Cassation held that the Court of Appeal failed to look into that aspect adequately. While preserving both the validity of the award in the case at hand, and effectiveness of the relevant provision of the ICC Rules, this ruling did not exclude a potential conflict between the institutional regime and the fundamental right of access to justice.[74]

Newly introduced concept of "inseperability" of counterclaims from the main claims stated in the Court of Cassation's decision led to new discussions due to lack of explanation in the decision.[75] It is notable that the arbitral tribunal in Pirelli case paid regard to all legal and factual evidence submitted by the respondent, including the ones submitted with respect to the counterclaims in the award when it decided for the main claims.[76] Some scholars argued that the Court of Cassation had no intention to institute a new mechanism for access to arbitration in relation to counterclaims, but to point out such conduct of the tribunal.[77]

Although the French Court of Appeal in Pirelli case had no statement as to the applicability of ICC rules, its decision put the relevant rules into question. The award was annulled as a result of the institution and the tribunal's exercise of Article 30 (4) of the ICC Rules (1998) that were chosen by the parties as the set of rules applicable to the procedure.[78] The decision of the Court of Appeal revealed that the consequences of applying the relevant ICC rule constituted violation of the right to equal treatment and fair trial as per Article 1502 (4) of the FCPC and violation of international public policy as per Article 1502 (5) of the ECPC. At this point, Kudrna made a salient analogy with respect to the Court of Appeals decision in Licensing Project v. Pirelli

72 Dupeyron and Poloni (n 20) 472; Balkar Bozkurt (n 20) 132; Kudrna (n 58) 4.

73 Derains (n 63) 2.

74 Carine Dupeyron and Flore Poloni, *Procédure de Liquidation d'une Partie, Arbitrage et Droit d'accès à La Justice: Vers Une Réconciliation?*, vol 31 (Kluwer Law International 2013) 904.

75 Pinna addresses that the criteria of "inseperability" requires more clarity. Andrea Pinna, 'La Confirmation de La Jurisprudence Pirelli Par La Cour de Cassation et Les Difficultés Pratiques de Garantir Au Plaideur Impécunieux L'Accès à La Justice Arbitrale' [2013] Les Cahiers de L'Arbitrage. 483. See also Denis Bensaude, 'Conséquence Du Non-Paiement de Provisions Séparées En Arbitrage CCI' (2013) Gazette du Chronique de la jurisprudence de droit de l'arbitrage. 16.

76 Kaplan (n 70)

77 Pierre Chevalier, 'L'Affaire Pirelli Resituée Dans Son Contexte', Note Tirée Des Propos d'Audience Par Charles Kaplan' [2013] Les Cahiers de L'Arbitrage. 16.

78 Fontmichel (n 18) 43; Dupeyron and Poloni (n 20) 468.

case. The author described the relationship between access to justice and arbitration as a "forced marriage" and underlined the fact that right to access to justice prevails over the procedural rules that were adopted by free will of the parties.[79]

Impecuniosity was discussed in a different context where the French courts put into question the liability of an arbitral institution impecuniosity in a dispute between Garoubé and the State of Cameroon in relation to termination of a concession agreement that contained an ICC arbitration seated in Paris. Garoubé initially filed an arbitration against the State of Cameroon before the ICC, however parties failed to deposit required advance on costs that resulted in withdrawal of Garoubé's claims. Different from Lola Fleurs case, Garoubé brought a case before the President of the Tribunal de Grande Instance of Paris. Another distinction was that the case was not filed against its counterparty in the underlying dispute, but the ICC who governed the process of arbitration. The State of Cameroon did not get involved in that proceedings. The President of the Tribunal de grande instance of Paris, who acts in support of the arbitration (juge d'appui), assumed jurisdiction on the ground that "one of the parties is exposed to a risk of a denial of justice"[80] as per Article 1505 of the FCPC. The juge d'appui held it was manifest that Garoubé was under financial incapacity and ICC's measure related to withdrawal of Garoubé's claims prevented it from access to justice. Accordingly, the juge d'appui ordered the ICC to restore the claims of Garoubé, remove suspension of the proceedings and invite the tribunal to render an award on the merits.[81]

The decision of the juge d'appui was shocking to the arbitration community as it was the first time that a court held such a measure against an arbitral institution.[82] The decision implied that the ICC should have ordered tribunals to run the proceedings without payment in case of party impecuniosity to avoid any liability.[83] The ICC appealed against the decision arguing that the juge d'appui violated due process by not hearing the State of Cameroon during the proceedings and also abused its powers by rendering an order outside the scope of its powers. The ICC argued that the juge d'appui's powers were limited to aid arbitration in circumstances such as failure in constitution of arbitral tribunal or a tribunal's failure to render an award in due time that may require juge d'appui's grant of extension of time.[84]

79 Kudrna (n 58) 3.

80 Translated by Emmanuel Gaillard, Nanou Leleu-Knobil and Daniela Pellarini of Shearman & Sterling LLP.

81 Nataliya Barysheva and Valentine Chessa, 'Chambre de Commerce Internationale v. SARL Projet Pilote Garoubé, Court of Appeal of Paris, No. 15/23553, 24 May 2016' (2016) 2016 Revue de L'Arbitrage 649.

82 Valentine Chessa and Nataliya Barysheva, 'Impecuniosity and Denial of Justice: Walking On Eggshells' (*Kluwer Arbitration Blog*) <http://arbitrationblog.kluwerarbitration.com/2016/11/15/impecuniosity-and-denial--of-justice-walking-on-eggshells/> accessed 24 October 2019.

83 Ana Coimbra Trigo and Mariana França Gouveia, 'Liability of Arbitral Institutions: A Case Law Overview' (2018) 15 Revista Brasileira de Arbitragem 59–79.

84 Chessa and Barysheva (n 82)

The Court of Appeal reversed juge d'appui's decision and held that the juge d'appui was not in a position to intervene in internal rules of ICC administering the procedure of arbitration due to the scope of its powers under French law. The Court of Appeal also upheld the ICC's argument that the juge d'appui should have heard the State of Cameroon before rendering its decision.[85] Garoubé's appeal to the Court of Cassation was also denied.[86] The Court of Cassation held that Article 1505 (4) of the FCPC does not give unlimited power to act upon in every circumstance of denial of justice.

Still, the Court of Cassation's decision is in procedural nature and only cleared jurisdictional aspect of the issue without touching upon the issue of impecuniosity and its relevance to the right to access to justice. Would the ICC be held liable and forced to order tribunals to continue with the proceedings if Garoubé filed a claim against the ICC before an ordinary French judge, instead of the juge d'appui?[87] The answer would most likely be negative in anticipation that the French courts would give precedence to application of procedural rules adopted by parties.

The French courts made an exception to upholding arbitration agreements in case of dilatory tactics employed by respondent to obstruct the proceedings. The dispute was between Société TRH Graphics v. Société Offset Aubin[88] arising out of an international commercial agreement that contained an ICC arbitration clause. In this case, the claimant refused to substitute for respondent's share of advance payments and filed a case before French courts. The French court denied respondent's request to be referred to arbitration holding that respondent obstructed the arbitral proceedings by not honoring its obligation to pay its share of costs for which claimant had no duty to substitute for. The French court underlined that the respondent failed to provide any explanation about its failure and that the respondent's action was therefore characterized as paralyzing the arbitral procedure.[89]

While there exists no common approach among French scholars,[90] the French courts have shown a tendency to apply kompetenz-kompetenz principle and uphold arbitration agreement in case of impecuniosity. However, the courts also put the burden on tribunals[91] to ensure parties' access to justice without providing any guidance as

85 ibid.

86 Nataliya Barysheva and Valentine Chessa, 'Société Projet Garoubé Pilot c. International Chamber of Commerce, Court of Cassation of France, First Civil Law Chamber, Judgment No. 1289 FS-P + B, Appeal No. M 16-22 131, 13 December 2017' Kluwer Law International.

87 Trigo and Gouveia (n 83) 59–79; Chessa and Barysheva (n 82)

88 'Société TRH Graphics v. Société Offset Aubin, Cour de Cassation (1Chambre Civile), 19 November 1991' (1992) 1992 Revue de L'Arbitrage 462–463.

89 ibid. 462–463

90 Some scholars advocated strict enforcement of arbitration agreement. See Xavier Boucobza and Yves-Marie Serinet, 'Les Principes Du Procès Equitable Dans L'Arbitrage International' [2012] Les Principes du Procès Equitable Dans L'Arbitrage International. 41-57; Pinna (n 75). 484. However, some scholars argue that exceptional circumstances may require invalidation of arbitration agreement: Train (n 68). 295; Fontmichel (n 18) 39-44.

91 Pinna (n 75). 484; Dupeyron and Poloni (n 74) 908.

to how this might be achieved when proceedings are terminated at very early stages of arbitration due to failure of performing advance payments.[92] Another issue is that it remains unresolved whether withdrawal of claims due to failure to deposit advance payments might amount to denial of justice and therefore be sanctioned during the post-award stage. While it can be inferred from Pirelli case that the French courts will not vacate arbitral awards easily, it is still questionable what should be inferred from the inseparability criteria put forward by the French Court of Cassation in relation to counterclaims.

C. Portugal

The relationship party impecuniosity and denial of justice in the context of arbitration is discussed in two prominent cases before the Portuguese Supreme Court of Justice in 2003 and the Portuguese Constitutional Court in 2008. Both cases acknowledged applicability of the right to access to justice in arbitration and the right to access to justice might prevail over arbitration agreement and/or party autonomy provided that certain conditions were fulfilled.

The dispute before the Portuguese Supreme Court involved a franchise and distribution contract with an arbitration clause under the rules of the Netherlands Arbitration Institute in the Netherlands. The respondent's counterclaims were withdrawn due to lack of funds to deposit corresponding advance payment. Subsequent to the end of proceedings, the claimant sought enforcement of the award in Portugal. The respondent asked the court to refuse enforcement of the award due to violation of public policy arising from its denial of justice.[93] However, the Portuguese Supreme Court of Justice enforced the award and held that parties were aware of the costs of arbitration when they agreed to arbitrate in the Netherlands. It was further noted that parties waived their certain rights (i.e. legal aid) provided under the state court system by signing an arbitration agreement. However, the Portuguese Supreme Court of Justice instituted an exception to the circumstance of impecuniosity in which a party finds itself without its fault. In that case, arbitration agreement would be deemed to have become incapable of being performed if performance of arbitration was no longer possible and no fault can be attribute to the party that claims invalidity of arbitration agreement for its impecuniosity. Yet, the request for appeal was rejected due to the fact that the appellant failed to prove that point.[94]

The issue of impecuniosity is discussed in another case that went up to the Portuguese Constitutional Court. The case was in relation to a commercial dispute

92 Fouchard, Gaillard and Goldman (n 54) 680; Wagner (n 2) 208-209; Balkar Bozkurt (n 20) 164-166.

93 Albert Jan Van den Berg (ed), 'Portugal No. 1, A (Netherlands) v. B & Cia. Ltda., C and Others, Supremo Tribunal de Justiça [Supreme Court of Justice], 1647/02, 9 November 2003' (2007) 32 Yearbook Commercial Arbitration 474.475-476.

94 ibid. 479.

between Wall Street Institute de Portugal v. Centro de Inglês Santa Bárbara, Lda. The claimant initiated court proceedings in Portugal despite existence of an arbitration agreement. The claimant contended that legal aid was not an option in arbitration and therefore it was unable to pursue arbitral proceedings given its financial status. However, it had access to state courts owing to its entitlement to legal aid provided under the Portuguese law. The First Instance Court of Braga and the Guimarães Court of Appeal held that the state court should assume jurisdiction and proceed with the case as the claimant's lack of financial means justified its non-performance of the arbitration agreement. The respondent applied to the Portuguese Constitutional Court. The Portuguese Constitutional Court held that the claimant's right to access to justice superseded the respondent's contractual right arising out of the arbitration agreement. It further stated that the state could not avoid its duty to safeguard the right to access to justice even if the constitution acknowledged arbitration as a legal mechanism for dispute resolution.[95] However, the new legal aid system in Portugal no longer allows companies to benefit from legal aid and that has weakened the significance of Portugal Constitution Court's decision.[96]

Overall, the Portuguese Supreme Court of Justice's approach appears to divert from the approach adopted by the French Court of Cassation in Pirelli case in the sense that withdrawal of counterclaims due to impecuniosity may lead to annulment or refusal of enforcement of the award as long as the respondent proves that impecuniosity occurred with no fault of its own.[97]

D. England

England's approach to the issue of impecuniosity in arbitration is purely contractual and the right to access to justice does almost take no part in discussions on this topic.[98] Payment of advance on costs is a part of the obligations that parties commit to undertake when they enter into an arbitration agreement. Parties' financial inability or voluntary failure to pay the advance on costs bring out the same consequence as they both constitute breach of arbitration agreement. The general principle under English law that parties cannot rely on their lack of financial means to be relieved from their contractual obligations and that applies to arbitration as well.[99]

95 José Miguel Júdice, 'Wall Street Institute de Portugal - Centro de Inglês S.A., WSI - Consultadoria Marketing and Others v. Centro de Inglês Santa Bárbara, Lda., Portuguese Constitutional Court, 311/2008, 30 May 2008' Kluwer Law International.

96 The existing scheme for legal aid was amended by the Law 47/2007 in Portugal. See José Miguel Júdice and Joaquim Shearman De Macedo, 'Right to Plead Case versus Enforcement of Arbitration Agreement' (*International Law Office*) <https://www.josemigueljudice-arbitration.com/xms/files/03_ARTIGOS_CONFERENCIAS_JMJ/04_ILO/Right_to_Plead_Case_versus_Enforcement_of_Arbitration_Agreement_Fevereiro_2009.pdf> accessed 11 November 2019.

97 Kudrna (n 58) 6-7, fn. 20.

98 In English jurisdiction, it is considered that the state meets its obligation to ensure access to justice as long as parties are not denied access to courts against their will and thus existence of an arbitration agreement manifests their will to waive from the right to access to courts. Kröll, *The 'Incapable of Being Performed' Exception in Article II (3) of the New York Convention* (n 2). 369.

99 Sachs (n 15) 102.

Why do English courts treat party impecuniosity and failure to deposit costs of arbitration as an ordinary breach of a contractual obligation? Arbitration agreement is a special type of contract that has close ties with the fundamental right of access to justice as it constitutes a waiver from the right to access to courts to vindicate substantive rights. Therefore, parties' inability of pursue justice may require states to exercise their role of being the "ultimate guarantor of justice"[100] as a reflection of a constitutional obligation.[101] Yet, to better understand the English approach, it would be sensible to evaluate what outcome parties commonly intended to achieve when they agreed to arbitration in the first place.

The intention of parties in concluding an arbitration agreement is to waive their rights to access to courts and change the venue for resolution of their potential disputes. If assumed that parties had contemplated potentially unpleasant occurrence of impecuniosity which would restrict impecunious party's access to arbitration at the time of signing the arbitration agreement, then how would parties have drafted the arbitration agreement? Would they allow an (fictional) impecunious party to abandon arbitration in favor of state court proceedings?[102] It would be unrealistic to expect parties at the time of drafting an arbitration agreement to specifically address the issue of impecuniosity.[103] There is no doubt that signing of an agreement demonstrates parties' intention to avoid court proceedings for resolving their disputes. Therefore, impecuniosity of a party should not cause invalidity of an arbitration agreement and thus pave the way for court proceedings.

While the general principle is to enforce arbitration agreement under English law, the courts may decline referral to arbitration under exceptional circumstances. Upon request from a party, the court stay court proceedings if the arbitration agreement is null and void, inoperative, or incapable of being performed according to the Section 9 (4) of the English Arbitration Act.[104] However, unlike German law, party impecuniosity does not render an arbitration agreement incapable of being performed.[105] Invalidity of an arbitration agreement may occur only in exceptional circumstances and party impecuniosity is not one of them.[106]

The issue is discussed in Paczy v. Haendler & Natermann case in 1981.[107] The dispute was between Paczy (an Englishman) and Haendler & Natermann GmbH (a

100 Moyano (n 2) 639.

101 Hunter (n 17) 108.

102 Niggemann argues that parties may consider incorporation of a termination right to the benefit of impecunious party. See Niggemann (n 58) 178.

103 Sachs (n 15) 101; Wagner (n 18) 10,12.

104 This article reflects the approach taken in Article II (3) of the NYC II(3) and Article 8(1) of the UNCITRAL Model Law.

105 Redfern and Hunter (n 53) 138; Julian Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Wolters Kluwer 2003). 343-344; Michael Pryles, 'The Kaplan Lecture 2009 - When Is an Arbitration Agreement Waived?' (2010) 27 Journal of International Arbitration 105-112.

106 Hunter (n 17) 107 et seq.

107 Pieter Sanders (ed), 'UK No. 12, Haendler & Natermann GmbH v. Mr. Janos Paczy, Court of Appeal, 3 December 1980' (1984) 9 Yearbook Commercial Arbitration 1984 445. 107.

German company) arising out of a license agreement that contained an ICC arbitration clause. Paczy initiated court proceedings before the High Court in London against Haendler and the Court granted stay of court proceedings in favor of arbitration upon Haendler's request. Paczy invited Haendler to initiate arbitration and stated that it cannot afford advance payments required under ICC arbitration. Upon Haendler's refusal to that request, Paczy argued that the arbitration agreement had become incapable of being performed and also contended that lack of legal aid in arbitration rendered it impossible for him to pursue arbitration. In contrary, legal aid was granted to him in state court proceedings.[108] The Court of Appeal held that "incapable of being performed" should be interpreted narrowly. The Court further stated that "if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it" and concluded that party impecuniosity was not one of them.[109] The court also reiterated that the claimant "cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement".[110] Releasing a party from its obligation to arbitrate in case of lack of funds would be unreasonable as it would be no different than releasing a party from a purchase agreement when that party cannot find money at the time payment becomes due.[111]

A similar approach was adopted in El Nasharty v J Sainsbury case where impecuniosity was one of the arguments among other issues presented by the claimant to establish that the arbitration agreement had become invalid. The High Court of Justice held in that case that claimant's impecuniosity to cover the costs of ICC arbitration should not render the arbitration agreement invalid as parties entered into agreement by their free will and the costs were apparent to them.[112]

The English courts, however, adopted a different approach in a setting similar to Paczy case, where the claimant obtained legal aid and filed a claim before the state court. This was a unique case that the court assessed the issue of impecuniosity in the perspective of the right to access to justice. The Court of Appeal held in Fakes v. Taylor Woodrow Ltd. case that the claimant received legal aid and filed before the court because it could not afford the advance on costs of arbitration.[113] At this point, the Court of Appeal decided to make an exception to the established approach towards party impecuniosity in the sense that there was convincing evidence that the claimant's insolvency was a result of the respondent's actions.[114]

108 ibid. 445-446.

109 ibid. 447.

110 ibid. 447.

111 ibid.447.

112 John Beechey, 'Amr Amin Hamza El Nasharty v. J Sainsbury Plc, High Court of Justice, Queen's Bench Division (Commercial Court), 2007 Folio 920, 13 November 2007' Kluwer Law International.

113 *Fakes v Taylor Woodrow Ltd [1973] 1 QB 436 (CA 1972)*

114 ibid 442 (per Lord Denning). See also Wagner (n 2). 210. See also Uganda Supreme Court's decision referring to Fakes case, Albert Jan Van den Berg (ed), *Uganda No. 1, Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central, Supreme Court of Uganda, Civil Appeal No. 18 of 2002, 16 January 2004*, vol 35 (ICCA, Kluwer Law International 2010). 458 - 459

Paczy decision had been referred to in cases from different jurisdictions as well.[115] Similar to Fakes case, the casual link between claimant's impecuniosity and respondent's actions was considered to be reason to disregard an arbitration agreement in a case before the Supreme Court of Uganda.[116] The Supreme Court of Uganda's decision embraced the approach adopted in Paczy case, whereas also held that the outcome would have been different if the claimant had proved that the respondent was the cause of his impecuniosity. Yet, this exception brings out questions as to what standard of proof the courts require to establish that respondent's actions caused claimant's impecuniosity.

Another case involved a respondent that was unwilling to cover its share of advance on costs in an ICC arbitration. In BDMS Ltd v. Rafael Advanced Defence Systems,[117] the respondent did not comply with the requirement to pay half of the advance on costs and asked the claimant to provide security on costs as a condition to payment of its share of advance. BDMS neither covered the respondent's share nor provided security on costs and therefore the ICC terminated the proceedings upon non-payment of the advance on costs in full. BDMS initiated court proceedings arguing that Rafael's non-payment of its share of advance on costs constituted a repudiatory breach[118] and that rendered the arbitration agreement inoperative. The court held that respondent's non-payment of its share was not a repudiatory breach because the respondent showed that it was ready to participate in proceedings except for payment of its share of costs. BDMS could have posted a bank guarantee or substituted for the respondent's share and then asked the tribunal to order an interim award for reimbursement of its payment from Rafael. The court also stated that parties could still recourse to arbitration as the ICC rules allowed them to reintroduce those claims in another proceeding. Therefore, the court upheld validity the arbitration agreement and declined jurisdiction in favor of respondent who did not pay for its share of advance payments. In a very similar case between Trunk Flooring Ltd. and HSBC Asset Finance (UK) Ltd & Costi Righi SPA, the Court of Appeal of Northern Ireland held that the ICC arbitration agreement had not become inoperative due to parties' failure to pay the advance on costs in ICC proceedings because there was no manifest evidence that parties abandoned arbitration.[119]

That is to say, the English courts systematically uphold arbitration agreement relying on that impecuniosity should not be an excuse to perform an agreement. The

115 Hunter (n 17) 114, fn 18.

116 Van den Berg, *Uganda No. 1, Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central, Supreme Court of Uganda, Civil Appeal No. 18 of 2002, 16 January 2004* (n 114) 458 – 459.

117 Nicholas Hugo Martin Fletcher, 'BDMS Ltd v. Rafael Advanced Defence Systems, High Court of England and Wales, Queen's Bench Division, Commercial Court, 2012-192, Case Date 26 February 2014' Kluwer Law International.

118 A breach can be classified as repudiatory breach if that breach is serious enough to lead to termination challenging the essence of the contract. In that case, the innocent party is expected to have lost "substantially the whole benefit of the contract". See Hugh G Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2015) 57(4).

119 *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and Costi Righi SPA [2015] NICA 68*. 'Trunk Flooring'.

courts approached to the issue from a contractual perspective no different than how impecuniosity would be treated in the context of a commercial contract. The English courts employed a strict approach and enforced arbitration agreement even in cases where respondents failed to deposit their share of advance payments and caused termination of arbitral proceedings. The English courts allowed for court proceedings only under very exceptional circumstances where it was established that impecuniosity occurred as a result of the other party's actions.

E. The United States

Party impecuniosity has been discussed in both domestic and international arbitration in the United States. Potential fees for counseling, arbitrator and institution fees sometimes deter parties from arbitration because of the usual requirement to make upfront payments to initiate or continue with arbitral proceedings.[120] Therefore, unwillingness or impecuniosity of a party to pay the advance on costs in arbitration sometimes open the doors for proceeding with court proceedings. In that case, the courts found it justifiable to proceed with court proceedings based on the fact that failure to deposit advance on costs constituted a default or sometimes a waiver depending on circumstances of a case.[121]

"Unconscionability of arbitration agreement" is often argued by seemingly weak parties to invalidate an arbitration agreement before the courts in the United States. Unconscionability[122] of an arbitration agreement is mostly relied on in consumer or labor arbitration[123] where consumers or employees are usually considered to have low bargaining power against their counterparties.[124] However, parties may also invoke "unconscionability" of an agreement to disregard arbitration relying on that the costs of arbitration are prohibitive which preclude parties to participate in arbitration.[125] The courts' approach to indigent parties differs depending on circumstances of a case.[126]

120 Wagner (n 2). 210.

121 Moyano (n 2). 640-641.

122 Gary B Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014). 856-866.

123 ibid. 864.

124 Donald Francis Donovan, 'John Bruce Bradford v. Rockwell Semiconductor Systems, Inc, U.S. Court of Appeals, Fourth Circuit, 238 F.3d 549, 22 November 2001' Kluwer Law International. The dispute in Bradford case arose from an employment contract that contained an arbitration clause. Even in employment cases in the US courts, financial hardship of the claimant may not render the arbitration agreement unenforceable. In this case the claimant failed to provide evidence to support his allegations of impecuniosity. Therefore, the threshold is high to set aside an arbitration agreement.

125 Born (n 122). 861-862.

126 In Olena Bulgakova v. Carnival Corporation case, the Court stated that Bulgakova failed to establish why arbitration in Monaco would be prohibitive against litigation in the US and referred parties to arbitration. See Albert Jan Van den Berg (ed), *US No. 680, Olena Bulgakova v. Carnival Corporation, United States District Court, Southern District of Florida, 22 June 2009 and 26 February 2010*, vol 35 (ICCA, Kluwer Law International 2010).. However, in Tillman v. Tillman case, the Court stated that the claimant would have no place to have its claims adjudicated if it was forced to arbitrate. See João Bosco Lee and Daniel de Andrade Levy (eds), 'Sean Tillman, Plaintiff, v. Renee Tillman, Aka Renee Chicino, Rheingold, Valet, Rheingold, Shkolnik & McCartney, United States Court of Appeals, Ninth Circuit, Case No. 1356624, 15 June 2016' (2017) 14 Revista Brasileira de Arbitragem 100. 100 – 107.

Parties usually invoke "prohibitive costs of arbitration" or "unconscionability of arbitration agreement" to invalidate an arbitration agreement as an excuse for their non-payment of advance on costs as they preclude parties from participating in arbitration. One of the landmark cases on prohibitive costs issue is Green Tree Fin. Corp. v. Randolph.[127] In that case, the Supreme Court ruled that the risk of facing prohibitive costs would not be sufficient to set aside an arbitration agreement.[128] However, the Court's decision also allowed for a possibility to disregard an arbitration agreement based on unconscionability if a party successfully establish that the costs of arbitration would be prohibitive and that party would very likely incur such costs.[129]

The courts' approach allowing prohibitive costs to invalidate an arbitration agreement might encourage especially respondents to obstruct proceedings in arbitration and take the case from arbitration to court proceedings. The courts in United States made a distinction between prohibitive costs of arbitration and bad faith attempts to obstruct proceedings.[130] Some courts allowed continuation of court proceedings if a respondent applied for stay of proceedings and subsequently failed to pay its share of advance on costs in arbitration.[131] On the other hand, some courts held that failure to pay advance on costs might constitute a waiver. Still, the threshold applied by the courts to find a waiver of arbitration agreement is high.[132] The courts shy away from finding a waiver if waiver of arbitration is to be "lightly inferred".[133] To establish a waiver, the courts seeks for clear intent of a party to no longer pursue arbitration and actions or intent of that party have prejudiced its counterparty.[134]

Apart from bad faith attempts from parties to obstruct proceedings, what would be the fate of "unconscionability" or "prohibitive costs of arbitration" claims if they are raised in an international commercial context before the courts in the United States? It

127 *Green Tree Financial Corp-Ala v Randolph, 531 US 79 (2000)*. ('Green Tree').

128 The Supreme Court stated that "…[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on this point."

129 *Green Tree Financial Corp-Ala. v. Randolph, 531 U.S. 79 (2000)* (n 127)

130 Thomas Rohner and Michael Lazopoulos, 'Respondent's Refusal to Pay Its Share of the Advance on Costs' (2011) 29 Association Suisse de l'Arbitrage 549-555.

131 *Sink v Aden Enterprises, Inc, 352 F3d 1197, 1201–1202 (9th Cir 2003)*.; *Pre-Paid Legal Services, Inc v Cahill, 786 F3d 1287, 1294 (10th Cir 2015)*.; *Garcia v Mason Contract Prods, LLC, 2010 WL 3259922 (SD Fla, 2010)*.. Similarly, in Industrial Service & Machine Inc. v. Resin Systems Inc case, the Court of Appeal of Alberta (Canada) held that the respondent of the ICC arbitral proceedings cannot rely on its own failure to pay its share of advance payments and request to be referred to arbitration. See Henri C Alvarez, 'Industrial Service & Machine Inc. Operating as McClean Anderson a Division of Industrial Service & Machine Inc. v. Resin Systems Inc. Operating as RS Technologies a Division of Resin Systems Inc., Alberta Court of Appeal, 0701-0343-AC, 10 March 2008' Kluwer Law International. Cf. Fletcher (n 117), *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and Costi Righi SPA [2015] NICA 68* (n 119)

132 Brian King, 'No Money, No Arbitration? The United States Perspective on Impecuniousness and Arbitration Agreements', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004). 142; Moyano (n 2) 641-642.

133 *Stowell v Toll Bros, 2007 WL 30316, 1 (ED Pa, 2007)*.; *Moses H Cone Memorial Hospital v Mercury Construction Corp, 460 US 1 (1983)*.; *Brandifino v CryptoMetrics, Inc, 896 NYS2d 623, 630 (NY SupCt, 2010)*.

134 *Sanderson Farms, Inc v Gatlin, 848 So 2d 828 (Miss, 2003)*.; *Norgren, Inc v Ningbo Prance Long, Inc, 2015 WL 5562183 (D Colo, 2015)*.

is noteworthy to state that the courts do not lean towards accepting unconscionability claims in a business to business context.[135] Indeed, the issue was raised in a dispute between Mitsui & Co., Ltd. ("Mitsui" a Japanese company) and Delta Brands, Inc. ("DBI" an American company)[136] in relation to an international and commercial contract that contained an ICC arbitration clause. The respondent contended that forcing DBI to go to an ICC arbitration in Switzerland would create "a financial hardship that DBI simply could not bear" and thus asked the court to invalidate the arbitration agreement as arbitration costs would be prohibitive. DBI further argued that arbitration in Switzerland would require additional counsel fees and arrangement of flights, lodging, meals etc. for witnesses and experts and most importantly would require key employees of the company to travel to Switzerland which would amount to shutting down the company for conducting arbitration. The court rejected DBI's arguments and referred the parties to ICC arbitration.[137] The Court stated that DBI failed to establish how the costs of ICC arbitration in Switzerland would be prohibitive. In this case, DBI only relied on Mitsui's submissions in relation to its failure to pay to its employees, which was not found sufficient in the eyes of the court to make their case.[138] This approach manifests that the standard of proof is high and burden of proof lies with the challenging party to establish how prohibitive costs would impede pursuing arbitration.

All in all, the courts in the United States adopts an approach allowing for court proceedings only if the challenging party establishes that the costs of arbitration is prohibitive to the extent that it does not allow access to arbitration. The challenging party should also establish that arbitration is costlier than litigation in court. Still, the courts employ a high threshold for disregarding an arbitration agreement especially in cases between two commercial entities which signals for a strong assumption that unconscionability claims would not be granted. With respect to respondents who fail to pay its share of advance payments, the courts allow continuation of court proceedings not to allow respondents to unduly paralyze the proceedings.

III. Possible Solutions for Payment of Arbitration Costs

While there is no consistent approach to the issue of party impecuniosity and failure to pay advance payments in arbitration, there are several options provided to users of

135 Born (n 122). 864; see also *China Resource Prods (USA), Ltd v Fayda Int'l, Inc, 747 FSupp 1101, 1107 (DDel1990)*. (The court stated that the defendant consciously chose to have arbitration and should have considered the costs of arbitration in China at the time of signing the arbitration agreement.

136 Albert Jan Van den Berg (ed), *US No. 524, Mitsui & Co., Ltd. (Japan) v. Delta Brands, Inc. (US) and Others, United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 3:04-CV-1070-L, 20 May 2005*, vol 30 (ICCA, Kluwer Law International 2005) 1165–1178.

137 The same issue was discussed in two different cases (No. A56-50929/2015 and No. A56-13914/2016) in Russia where the courts in St. Petersburg held that parties should have anticipated the cost risk when agreeing to (ICAC and SCC) arbitration. Andrey Panov, 'No Money: No Arbitration? Reflections on Recent Russian Cases' <http://arbitrationblog.practicallaw.com/no-money-no-arbitration-reflections-on-recent-russian-cases/> accessed 5 December 2019.

138 Van den Berg, *US No. 524, Mitsui & Co., Ltd. (Japan) v. Delta Brands, Inc. (US) and Others, United States District Court, Northern District of Texas, Dallas Division, Civil Action No. 3:04-CV-1070-L, 20 May 2005* (n 136) 1165–1178.

arbitration to avoid the discussion of validity/enforceability of an arbitration agreement in the face of the right to access to justice in the first place. In addition, there are several suggestions made by scholars to address the same issue by pointing out alternative mechanisms to enable indigent parties to access to arbitration.

A. Third-Party Funding

Private nature of arbitration necessitates private funding mechanisms such as bank-related financing instruments, liability insurance or third-party funding ("TPF") that may take over the burden of arbitration costs from parties. TPF is becoming popular and seen as a promising solution to finance costs of arbitration.[139] In a case where TPF used in arbitration, a third-party finance part or all costs of arbitration (such as institution fees, counsel and arbitrator fees and expenses) and in return for a remuneration dependent on the outcome of award.[140] The arrangement of remuneration is agreed between funder and client that is mostly formed in three different structures: remuneration is calculated by (i) multiplying the cost of investment with a coefficient, (ii) a certain percentage of the total amount recovered by the funded party after settlement or the award or (iii) a hybrid arrangement including both.[141]

TPF is mostly available in non-recourse form[142] where third-party funder bears the risk of receiving no return in case of an adverse award from the tribunal. In a non-recourse TPF, funded party has no undertaking to reimburse third-party funder if adjudicated claims are lost. Therefore, TPF enables parties to hedge the risk exposure[143] and renders TPF appealing to both impecunious and solvent parties. While TPF was initially thought as a mechanism to fund claims of individuals or entities in financial strain to enable them to access to justice,[144] this instrument has been more tempting for solvent parties hesitant to pursue a claim due to high costs of arbitration in the past couple of years.[145]

139 74% of the respondents reported that their company's use of TPF has increased over the past two years. See '2019 Managing Legal Risk Report: A Survey of CFOs and Finance Professionals' <https://burfordcapital.com/media/1266/managing-legal-risk-report-2019.pdf> accessed 10 November 2019. 37. See also Bernardo Sanz Pastor Cremades, 'Third-Party Funding in International Arbitration (ICC Dossier)' in Bernardo Sanz Pastor Cremades and Antonias Dimolitsa (eds), *Dossiers of the ICC Institute of World Business Law*, vol 10 (Kluwer Law International 2013). 153-154; Christopher P Bogart, 'Arbitration Academics Are Living in the Dark Ages' (*Financial Times*, 19 November 2017) <https://amp.ft.com/content/926355de-c941-11e7-ab18-7a9fb7d6163e> accessed 20 December 2019.; James Delaney, 'Mistakes to Avoid When Approaching Third-Party Funders', *Global Arbitration Review*, vol 9 (2014) <https://globalarbitrationreview.com/article/1033321/mistakes-to-avoid-when-approaching-third-party-funders>. 9.

140 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (2018) 4 ICCA Reports Series 1-50.

141 ibid. 25-27.

142 ibid. 18.

143 It is suggested that third-party funders are better capable of dealing with the risk of costs of arbitration given the "diversity" of claims in their portfolio. Khushboo Hashu Shahdadpuri, 'Third-Party Funding in International Arbitration: Regulating the Treacherous Trajectory' (2016) 12 Asian International Arbitration Journal 77 82-83.

144 Jonas Von Goeler, 'Third-Party Funding in International Arbitration and Its Impact on Procedure' (2016) 35 International Arbitration Law Library. 333; Thibault De Boulle, 'Third-Party Funding in International Commercial Arbitration' 25.

145 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 239-240.

The decision of funding a case is no different than any other investment decision for an investor who might end up with losing the capital invested or receive multiplied recovery as a win. To minimize such risk, third-party funders conduct a sophisticated and rigorous analysis before reaching to an investment decision. They look into the details of a case to determine whether the claims contained therein are meritorious and therefore the case is promising.[146] There are several other reasons that shape funder's decision on funding a claim or not such as potential jurisdictional challenges, creditworthiness of the potentially funded party and counterparty, type of agreement made with the counsel if exists (whether there exists a scheme of contingency fee that would have impact on the amount of initial investment made by funder) etc.[147] All these criteria stand for measuring the risk of investment for the third-party funder.

It is reported by leading third party funders in the market that requests for TPF are turned down in almost nine out of ten cases.[148] Apart from the criteria given above, the most common reason for a third-party funder to decline a request is not about how strong the merits of a case that is sought to be funded. The quantum aspect of a claim is a very significant in terms of obtaining TPF. The question is whether "realistic" quantum of claims that are expected to be recovered out of arbitration would make it feasible for the funder to invest in funding those claims.[149] From the perspective of economics of investment, no third-party funder would be interested in funding a claim that is likely to fail justifying the money to be spent for investment.[150] Third-party funders usually set an eligibility threshold for funding claims which are required to exceed $10m[151]. There exists no fixed ratio in practice, however funders expect a ratio of more than 10% between the amount of investment and realistic expectation of return out of adjudication of claims to consider funding a claim economically viable.[152] Therefore it is usually the case that investment for funding an international dispute usually requires millions of dollars and the funder expects to recover multiplied amount of what has been invested for funding those disputes.[153]

146 It is also suggested that cases funded by third parties are less likely based on vexatious or frivolous claims as they go through a detailed analysis by funders beforehand. Boulle (n 144) 36.

147 Cremades (n 139) 154.

148 Cento Veljanovski, 'Third Party Litigation Funding in Europe' (2012) 8 Journal of Law, Economics and Policy. 420; Kühner (n 31) 813.

149 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 25.

150 Von Goeler (n 144) 83.

151 'Bentham IMF' <https://www.benthamimf.com/what-we-do/arbitration-funding/international-arbitration-funding> accessed 1 December 2019.;'Harbour Litigation Funding' <https://www.harbourlitigationfunding.com/how-we-work/our-criteria/> accessed 30 August 2017.; cf. Woodsford Litigation Funding requires a claim to exceed $4m:'Woodsford Litigation Funding' <http://woodsfordlitigationfunding.com/arbitration-funding/is-your-case-right-for-arbitration-funding...> accessed 20 November 2019.; cf. Foris Litigation Funding sets a minimum threshold of €100,000:'Foris Litigation Funding' <https://www.foris.com/en/litigation-funding/?gclid=CjwKCAiA5o3vBRBUEiwA9PVzaoGO9sLqGQt7niPlTxnj4UZ_FMhVa3U71rYGK-AtSh3wJv6bbxjreBoC-nUQAvD_BwE> accessed 30 November 2019.

152 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 25-26; 'Woodsford Litigation Funding' (n 151)

153 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 26.

There exists no empirical data on whether impecunious or solvent parties benefit the most from TPF. However, it can be argued or at least can be inferred from the reports issued by third party funders and other publications that the target of third-party funders has shifted to financially sounding companies.[154] There are several reasons why third-party funders target solvent and big-sized companies.[155] The respondents of a survey conducted by one of the funding companies were the CFO's of companies with over USD 10b annual turnover. According to the survey, 73.3% of the participant reported that their companies choose to forgo claims only because of high costs.[156] Majority of participants also point out that financial recession in economy effects allocated budgets of their company for legal costs.[157] Moreover, unpredictability of cost and length of proceedings is another challenge that discourages companies to pursue claims irrespective of their financial capability.[158] From the solvent company's perspective, use of TPF is advantageous as it provides the opportunity to "hedge risk exposure" and allocate resources to other business operations[159] which would otherwise be spent on costs of arbitration.[160]

The right to access to justice is not a phenomenon specific to claimants. Even in the event that a claimant substitute for respondent's share of advance on costs, a respondent requires funds to cover, at least its own representation costs to be able to make effective defense to claims submitted against it. Exceptionally, funding a respondent might be feasible if assets of respondent is sufficient to cover expectations of a funder.[161] However, that would be very unlikely for a respondent in financial strain. Considering that TPF is not a legal aid mechanism but an investment instrument targeting for remuneration out of the capital invested, it is very unusual for respondents to obtain third party funding.[162] Therefore, it is argued that there exists claimant bias in TPF which postulates a tendency on third-party funder's side to favor funding applications from claimants is argued to be another barrier to access to justice.

As explained above, pursuing a claim valued several millions of dollars might not be sufficient to entice many third-party funders even if the claim seeking to be funded is meritorious. Although it is argued that value of disputes in international

154 ibid. 237-240; '2019 Managing Legal Risk Report: A Survey of CFOs and Finance Professionals' (n 139) 36-38.

155 Christopher P Bogart, 'Third-Party Financing of International Arbitration' (2017) 2017 Belgian Review of Arbitration 315.

156 '2019 Managing Legal Risk Report: A Survey of CFOs and Finance Professionals' (n 139) 10; cf. 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 239-240.

157 '2019 Managing Legal Risk Report: A Survey of CFOs and Finance Professionals' (n 139) 18-19.

158 ibid. 21; See also David S Abrams and Daniel L Chen, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (2013) 15 University of Pennsylvania Journal of Business Law 1074. 1–77.

159 Von Goeler (n 144) 82.

160 Bogart (n 155) 318; '2019 Managing Legal Risk Report: A Survey of CFOs and Finance Professionals' (n 139) 33; 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 239-240.

161 Von Goeler (n 144) 84.

162 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 23-24.

commercial arena should exceed the thresholds sought by funders for most of the cases,[163] recovery of an amount not sufficient to attract funders might still be vital for many small or mid-sized companies in financial strain for which TPF would not be a helpful instrument enabling access to justice. Rather than viewing TPF as a mechanism primarily achieving a policy objective to promote access to justice, it can be argued that the main drive of third-party funders is to maximize profit generated through funding. Nevertheless, TPF provides an opportunity to level the playing field[164] and bring a claim that could not otherwise be adjudicated before a court or tribunal due to lack of funds as long as a funder is satisfied from economic perspective. Impecunious parties might seek to obtain TPF because forgoing a certain portion of the claim to the benefit of third-party funder might be better than not pursuing a claim at all.[165] This should not mean that parties should surrender to all conditions imposed by funders which could take away substantial benefit of adjudicating claims at all.[166] Increasing growth in TPF and user's familiarity with the concept will bring more competition to the funder's market[167] which might increase access to this instrument by impecunious parties.

1. Bank-Related and Insurance-Related Instruments

There are several other options other than third-party funding that may help parties to cover arbitration costs such as bank-related instruments. Parties may obtain bank loans or guarantees to cover the costs of arbitration, which however requires availability of assets in return to cover for loans/guarantees provided by banks. Therefore, it is argued that bank-related instruments fail to address the issue of impecuniosity because it is only available for parties that are in good financial standing when contracted with the banks.[168]

Alternatively, insurance-related instruments might be available to parties which are provided in two forms: before-the-event ("BTE") or after-the-event ("ATE") insurance. BTE insurance stands for covering the risk of costs of a future dispute for that premiums are collected in advance. On the other hand, ATE insurance can be obtained after the occurrence of a dispute for which time of payment of premiums can be agreed to be made after recovery of payment out of an award or settlement.

163 Von Goeler (n 144) 84.

164 Caroline Dos Santos, 'Third-Party Funding in International Commercial Arbitration: A Wolf in Sheep's Clothing?' (2017) 35 Association Suisse de l'Arbitrage 918-936.

165 Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' <http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Jacksonfinalreport140110.pdf> accessed 20 November 2019. ch 11, 2.12; Lord David Neuberger, 'Maintenance and Champerty to Litigation Funding - Harbour Litigation Funding First Annual Lecture Gray's Inn'. 57.

166 It is reported that King & Spalding represented the claimant in ICSID Case Siag and Vecchi v. Egypt case on contingency fee basis which resulted in King & Spalding's entitlement of 80% of the share of proceeds. See Von Goeler (n 144) 129.

167 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 25.

168 Stefan Kröll, 'Bank-Related Instruments to Secure the Right to Arbitration despite the Impecuniousness of a Party', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004) 151-164.

In that sense, ATE insurance is very similarly structured with third-party funding. However, insurance instruments may not finance on "day-to-day" basis but instead pay the insured party any loss due to costs as an indemnity at the end of the dispute. In the face of this disadvantage, however, insurance premiums might cost less than the amount that will be out-of-pocket to the benefit of a third-party funder.[169]

2. Alternative Suggestions by Scholars

As an attempt to bring a solution to the issue of party impecuniosity in arbitration, it is argued that arbitral institutions may establish their own funds for impecunious parties fed by monetary contributions from parties in other arbitration cases.[170] However, it seems to be unrealistic because it is questionable whether any private party may ever would like to contribute funding another party's case without any expectation in return. In addition, this proposition comes along with increase of existing fees of arbitral institutions which would not be welcomed at all by users of arbitration. It is also questionable whether arbitration, especially voluntary arbitration in a commercial context, would require any form of a legal aid mechanism with public policy considerations.[171]Alternatively, it is also argued that arbitrators might work on pro bono basis depending on how frequently they are nominated for cases.[172] This proposition seems unlikely to succeed as it would not be favored by arbitrators.

IV. Analysis and Conclusion

The relationship between impecuniosity and validity of arbitration agreement is a sensitive issue which should be dealt with caution to the greatest extent possible as it might take away the benefit of arbitration from the solvent party.[173] Neither ex-lege termination of the arbitration agreement before courts nor unilateral termination by parties due to impecuniosity should be welcomed especially in international arbitration. It should be noted that both options undermine kompetenz-kompetenz principle and enforceability of arbitration agreement. Again, both options deprive the solvent party of benefitting out of its bargain.[174] Although unilateral termination gives the opportunity to the solvent party to substitute for insolvent party, arbitration agreement is again facing the threat of being set aside if the solvent party is unable or unwilling to pay the other party's share of costs. In this constellation, solvent party's inability/unwillingness to substitute for the other party is sanctioned by termination of arbitration agreement as

169 'ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (n 140) 33-35.

170 Pinna (n 75) 479-485.

171 Kudrna (n 58) 162-163.

172 Dupeyron and Poloni (n 74) 904, 908, 912.

173 Wagner (n 2) 214.

174 Moyano (n 2) 652.

if solvent party's non-action manifests its will to abandon the arbitration agreement. However, it should be noted that solvent party has no obligation to substitute for the other party. Therefore, solvent party's non-action to substitute for the insolvent party should not lead to termination of arbitration agreement.

There exists a longstanding legal tradition that lack of money cannot be relied on to be excused from performing an agreement.[175] This principle can also be applied to arbitration agreement even though arbitration agreement contains jurisdictional aspects intertwined with the right to access to justice.[176] In addition, lack of certainty in determination of impecuniosity might lead to deliberately created or false impecuniosity just to escape from arbitration.[177] Strategic maneuvers of impecunious parties to escape from arbitration can only be eliminated by setting a high threshold accompanied with heavy burden of proof in relation to challenge of arbitration agreement on impecuniosity ground.[178]

Releasing an impecunious party from its commitment to arbitrate might be less problematic where parties are of the same nationality. However, adopting the same level of threshold applied for setting aside an arbitration agreement in international context might motivate impecunious party to abuse its financial status or even create impecuniosity which might lead to unfair consequences requiring solvent party to appear before a supposedly disadvantageous (or even non-neutral) forum instead of arbitration (a neutral forum) to the detriment of its counterparty.[179] Therefore, the threshold for disregarding an arbitration agreement in relation to international arbitration should be higher. Any policy otherwise would conflict with the purpose of parties' agreement to adjudicate disputes before a neutral forum through arbitration in the first place.[180] In that respect, the approach adopted by French and English courts on the issue of impecuniosity is more suitable to the characteristics of international commercial arbitration[181] than the standard adopted in Germany.

It should be highlighted that allegations of impecuniosity should be dealt with tribunals in the first place rather than state courts,[182] which would also be compliant with kompetenz-kompetenz principle. This may allow solvent party to substitute advance payment for impecunious party. If no substitution takes place and proceedings are terminated due to non-payment of advance on costs, then insolvent party will

175 Sachs (n 15) 102.

176 ibid 102.

177 ibid 102.

178 March-Oliver Heidkamp and Jens Wenzel, 'The Discussion', *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements?* (Peter Lang 2004). 176; Moyano (n 2) 651-652.

179 Wagner (n 2) 213-215; Kröll, *The 'Incapable of Being Performed' Exception in Article II (3) of the New York Convention* (n 2) 349; Berg and Jan (n 13) 159-160.

180 Živkovic (n 19) 42-43; Kühner (n 31) 816-817.

181 Berg and Jan (n 13) 159-160.

182 Kühner (n 31) 816-817; Moyano (n 2) 652; Redfern and Hunter (n 53) 343.

probably apply to state courts to adjudicate its claims. In response, solvent party will ask the court to decline jurisdiction based on the existence of an arbitration agreement and therefore the court has to give a decision on enforceability of that arbitration agreement. The court should approach to this analysis with utmost care, especially in relation to disputes in international context to ensure the balance of interests of each party equally.

First, the courts should give account of bad faith attempts to obstruct arbitral proceedings and artificially created impecuniosity to avoid arbitration in its review with respect to performability of arbitration agreement. Therefore, the courts should not "reward" such actions or behavior of a party who failed to pay its share of costs by setting aside arbitration agreements.

Second, the courts should be mindful of how challenging party has become indigent during the performance of the underlying contract. Even if the challenging party successfully fulfills the high burden of proof and establishes the fact that its financial incapability does not allow it to access to arbitration, mere proof of financial incapacity of such party should not be sufficient to set aside an arbitration agreement as explained above. At that point, the court should only allow continuation of court proceedings if the challenging party submits convincing evidence that the counterparty's actions or behaviors have caused or largely contributed to its financial incapacity. Such a circumstance may justify to "temporarily"[183] disregard an arbitration agreement. The standard of proof for the challenging party to establish such link should be high, at least higher than prima facie standard during the review of enforceability of an arbitration agreement.

Lastly, the courts should also consider availability of legal aid for the challenging party.[184] However, there would be no straightforward answer to this question as state court proceedings might cost far less than costs of arbitration depending on the jurisdiction.[185] In addition, availability of legal aid for one party may still not justify setting aside an arbitration agreement in international context if the other party is also insolvent and not covered for its costs of litigation.[186]

Impecunious parties should also try to use instruments such as TPF to finance their claims/defenses. Increased availability of TPF instrument, existence of a competitive TPF market and effective use of TPF (not only for solvent companies but also for impecunious parties) might even contribute to resolve the problem by promoting access

183 Kröll, 'Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration – Effects of Party Insolvency on Arbitral Proceedings in Germany'' (n 19) 995.

184 Živkovic (n 19) 42. In the absence of legal aid, state court proceedings might not cost less than arbitration. See also Moyano (n 2) 651-652.

185 Wagner (n 2) 214.

186 ibid. 214. It should be also noted that companies are excluded from legal aid in most of the jurisdictions. See Moyano (n 2) 651-652.

to arbitration in the future. However, even if the chances of success to obtain or benefit from external financing instruments might be difficult or even impossible at all for the time being, impecunious party may submit documents (e.g. a letter from a funder that declines its funding request) to the court to prove that it (at least) attempted to have its claims financed and applied for external financing instruments in good-faith.[187]

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