Procedural issues of impecuniosity in international commercial arbitration

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This paper explores the implications of impecuniosity of a party in international commercial arbitration from a procedural perspective. It offers an analysis of the principal procedural issues that arise when one of the parties to an arbitration agreement lacks the financial capacity to participate effectively in the proceedings. In particular, the topics of the allocation of jurisdiction, the issue of parallel proceedings, the applicability of arbitration agreement to future dispute, the burden and standard of proof are the central topics of this paper.

INTRODUCTION

There is no "free lunch", to quote Milton Friedman, even where justice is concerned and even in international commercial arbitration. All the more, arbitration continues to be recognised as an expensive dispute resolution mechanism.[1] Coupled with COVID-19, Russia's aggression against Ukraine and Trump's policies, costs of arbitration, *pacta sunt servanda* and access to justice in international commercial arbitration have echoed since. Especially, in cases where a party to an arbitration agreement is impecunious – a party that has no financial means to meet the costs of arbitral proceedings. Before the question what is to be done with such a party – whether to oblige or to release the impecunious party from arbitration, procedural questions, above all where the issue should be decided, must first be resolved.

While I have previously touched upon the first (substantive) leg of this issue,[2] the aim of this article is to analyse the second – procedural – one. Accordingly, the article is further divided into three major sections, starting with a short outline of the issue of impecuniosity in international commercial arbitration and its *status quo*. The second part is dedicated to the central procedural issues such as allocation of jurisdiction, parallel proceedings, effect of impecuniosity to the arbitration agreement, the burden and standard of proof of impecuniosity, which is followed by conclusions. While this article takes 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as its point of departure, the issues addressed ultimately fall within the ambit of the law governing arbitral proceedings. Therefore, insights offered in this article are mere policy-oriented observations.

I. THE ISSUE OF IMPECUNIOSITY AND ITS CURRENT STATUS IN INTERNATIONAL COMMERCIAL ARBITRATION

Impecuniosity as an issue in arbitration arises where a party is genuinely unable to accommodate the costs related to arbitral proceedings to such extent that the arbitral tribunal cannot proceed to final determination of the dispute at hand. This situation creates the aforementioned friction between *pacta sunt servanda* and access

[1] Queen Mary University of London and White & Case, *2025 International Arbitration Survey: "The path forward: Realities and opportunities in arbitration"* (2025) 15 <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/White-Case-QMUL-2025-International-Arbitration-Survey-report.pdf> accessed 20 August 2025.

[2] Vytautas Vaicekauskas, 'Impecuniosity in international commercial arbitration' (2023) 9 *Arbitražas: teorija ir praktika* 8 <https://www.arbitrazas.lt/failai/_Zurnalas/2023/2023.2.Arbitrazas-Nr.9-Vytautas%20Vaicekauskas.pdf> accessed 20 August 2025.

to justice coded in the contractual and jurisdictional nature of the arbitration agreement. As a contract it obliges to resolve disputes by arbitration, while as a jurisdictional instrument it ensures access to a forum for effective defence of substantive rights. Therefore (non)enforcement of an arbitration agreement may equal to denial of either, requiring to strike a proper balance between the binding nature of contracts and right to access justice.

When deciding on the proper balance of these fundamental legal principles, i.e. on enforcing the duty to arbitrate disputes or on refusal to enforce an arbitral award, courts of different jurisdictions have considered a variety of circumstances including but not limited to: attempt of the impecunious party to arbitrate the dispute in good faith;[3] cause of the impecuniosity;[4] timing of the impecuniosity;[5] ability of the impecunious party to recourse to another forum than arbitration;[6] and, for counterclaiming defendant, the link between the counterclaim and the claim.[7]

The most recent case addressing impecuniosity in the context of international commercial arbitration was decided by the Supreme Court of Poland.[8] This case was initiated by a Polish shareholder, a natural person, who sought a payment of PLN 4,377,490 plus statutory interest against another shareholder, a Luxembourgish company, under a shareholders' agreement containing the relevant arbitration clause. The Luxembourgish company resisted state court proceedings by invoking the arbitration clause, while the Polish shareholder claimed financial inability to cover the costs of arbitration and, therefore, his inability to vindicate his rights in arbitration. Both the District Court of Warsaw and the Court of Appeal in Warsaw dismissed the claim on the ground that the arbitration agreement was binding and enforceable, obliging the claimant to pursue arbitration. Claimant challenged these decisions, with the Supreme Court of Poland ultimately overturning them and remanding the case. The Polish Supreme Court departed from a principle view that an arbitration agreement is not a total waiver of legal protection, but merely a selection of another, more convenient forum, which, with the subsequent participation of state courts, can provide a protection equivalent to that before a state court. The Court continued that if a party cannot bear the costs of arbitration, enforcement of the clause may not lead to depriving that party of any judicial (legal) protection. In terms of legal basis, that may fall under the ambit of "incapable of being performed" under Article II(3) of the New York Convention, UNCITRAL Model Law on International Commercial Arbitration and also Polish Civil Procedure Code. The Court stressed, however, that non-enforcement of the arbitration clause on such grounds should remain a measure of *ultima ratio*, available after exhausting all other means, e.g., institutional mechanisms for reducing or deferring costs, contribution of the opposing party to advance costs, and a comparative assessment of arbitration and litigation costs. In addition, circumstances like the neutrality of the arbitral forum or the importance of enforceability of the award abroad may weigh in favour of maintaining arbitration. The Court as well touched upon several principal points, including the timing of the assessment of impecuniosity, validity of the arbitration clause to future disputes and the relevance of the cause of impecuniosity. That being said, in the case at hand the Supreme Court of Poland released the claimant from his obligation to arbitrate the dispute brought to

[3] *Philippe Pottier and SARL CPP Le Mans Distribution v SAS Carrefour Proximité France and SAS CSF* (Cour de cassation (France), 28 September 2022) No 21-21.738.

[4] *Fakes v Taylor Woodrow Construction Ltd* (High Court, QBD (Comm), 1973) UKHL 30.

[5] *A (Netherlands) v B & Cia Ltda, C and Others* (Supreme Court of Justice (Portugal), 9 November 2003) No 1647/02.

[6] Bundesgerichtshof (Federal Court of Justice, Germany), 14 September 2000, III ZR 33/00.

[7] *Société Pirelli & C v Société Licensing Projects* (Paris Court of Appeal, 26 February 2013) No 12/12953.

[8] Sąd Najwyższy (Supreme Court of Poland), II CSKP 897/22 (2022).

the Polish courts considering claimant's poor financial situation, evidenced by repeated exemptions from court fees and finding that the arbitration costs would jeopardise his and his family's livelihood.

While this case exemplifies the careful approach of some courts in Europe in balancing fundamental rights (principles) such as access to justice and *pacta sunt servanda*, the landscape for accessing arbitration for parties suffering financial distress has not much altered. The Court of Arbitration for Sport remains a prominent example providing access to legal aid.[9] Major arbitral institutions such as ICC, LCIA, SCC, SIAC, VIAC and DIS do not offer explicit legal-aid schemes or general fee-waiver programs for impecunious parties. One may argue that cost control in these institutions is exercised by providing transparency on costs (e.g., cost calculators), expedited procedures or tighter case management. In a sense that is a relief for parties wishing to arbitrate disputes, however, concerns could be raised for *ex post* assessment where a party has only turned impecunious after entering an arbitration agreement. Especially, this situation could raise eyebrows for the stakeholders at least in the European Union given the trends of the supra-national legal order of the European Union, requiring heightened control for safeguarding its public policy[10] in cases *Eco Swiss*[11], *Mostaza Claro*[12] or *Achmea*[13]. If that alone was not enough, the Court of Justice of the European Union (CJEU), in the *RFC Seraing* case, quite extensively argued and ruled that access to justice forms a fundamental part of European Union legal order. CJEU explicitly ruled that "*irrespective of the rules which may apply to the arbitration body having jurisdiction under such an arbitration mechanism, the awards made by that body must be amenable to judicial review such as to guarantee the effective judicial protection to which the individuals concerned are entitled, pursuant to Article 47 of the Charter, and which the Member States are required to ensure in the fields covered by EU law, in accordance with the second subparagraph of Article 19(1) TEU*",[14] effectively granting even wider discretion to national courts in the European Union when reviewing the arbitral awards.

II. PROCEDURAL ISSUES ARISING FROM THE ISSUE OF IMPECUNIOSITY IN INTERNATIONAL COMMERCIAL ARBITRATION

While the impecuniosity of a party raises the fundamental substantive questions, it as well raises intricate procedural questions such as: who has the authority to decide on the issue first; who is to decide when both state court and arbitration proceedings are instigated; what is the effect of impecuniosity to the applicability of the arbitration agreement in the future; who bears the burden of proof; and what standard of proof should be applied. These points constitute the core procedural questions which typically emerge when a party to an arbitration agreement suffers from financial distress.

[9] Code of Sports-related Arbitration (Court of Arbitration for Sport, in force 1 February 2023) art S6(9) <https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2023__EN_.pdf> accessed 20 August 2025; International Council of Arbitration for Sport, *Guidelines on Legal Aid before the Court of Arbitration for Sport* (1 July 2025) <https://www.tas-cas.org/fileadmin/user_upload/Legal_Aid_Guidelines_EN_2025.pdf> accessed 20 August 2025.

[10] See as well Marcin Menkes, Alicja Zielińska-Eisen and Maria Paschou, 'Can the Inability to Bear Arbitration Costs Render the Arbitration Clause Unenforceable? According to the Polish Supreme Court, It Can' (Kluwer Arbitration Blog, 21 March 2024) <https://legalblogs.wolterskluwer.com/arbitration-blog/can-the-inability-to-bear-arbitration-costs-render-the-arbitration-clause-unenforceable-according-to-the-polish-supreme-court-it-can/> accessed 20 August 2025.

[11] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, ECLI:EU:C:1999:269.

[12] Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, ECLI:EU:C:2006:675.

[13] Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158.

[14] Case C-600/23 *Royal Football Club Seraing SA v Fédération Internationale de Football Association (FIFA) and Others* (Grand Chamber, 10 July 2025) ECLI:EU:C:2025:617, para 83.

2.1. ALLOCATION OF JURISDICTION

The allocation of jurisdiction between a court and an arbitral tribunal is matter of policy as it depends on *lex fori*.[15] The New York Convention does not provide any explicit rules on the competence-competence principle (i.e. on the authority of an arbitral tribunal to decide whether it has jurisdiction to resolve a dispute).[16] Despite that, there are theoretical and practical implications which have to be considered when allocating the authority to rule on the issue of impecuniosity.

Assuming that arbitral tribunal enjoys wide jurisdictional powers, these powers include the authority to rule over the validity of an arbitration agreement and costs of arbitration.[17] In this spirit, the issue of impecuniosity could fall under the authority of an arbitral tribunal, as in part it relates to the issue of costs. Such an approach has been adopted by French courts.[18] French courts had adopted an approach under which judicial intervention is only permitted in the post-award stage to control whether the arbitral tribunal has effectively settled the issue of impecuniosity. In *SARL Lola Fleurs v. société Monceau Fleurs et autres* case claimant SARL Lola Fleurs filed a claim to a court, despite an arbitration clause providing for *ad hoc* arbitration.[19] Claimant argued that it is unable to arbitrate the dispute due to lack of financial resources. Such financial incapacity, as claimant argued, renders the arbitration agreement inapplicable as enforcement of an arbitration agreement in such case would deprive claimant of the right to access justice. The court of first instance rejected the plea and referred parties to arbitration. Claimant appealed and the Paris Court of Appeal rejected claimant's arguments once again. The court held that impecuniosity of the claimant to commence arbitration does not render it inapplicable. In such case the arbitral tribunal is responsible to ensure that the impecunious party has the access to justice. The control of ensuring such access is given to the court *a posteriori*. Relying on competence-competence principle, the Paris Court of Appeal referred parties to arbitration. This approach was re-affirmed in *Société Aéronautique et technologies embarquées SAS v. Société Airbus Helicopters et Airbus Helicopters Deutschland Gmbh* case by both the Paris Court of Appeal and the Court of Cassation.[20] In this case, litigation was once again commenced, ignoring an arbitration clause. Claimant argued that inability to meet costs of arbitration makes the arbitration agreement manifestly inapplicable. The court ruled that impecuniosity does not render arbitration agreement unenforceable and the arbitral tribunal is responsible to ensure the access to justice where the court can only intervene *a posteriori* for the breach of this duty. Such an approach has been adopted by the Portuguese Supreme Court as well.[21] In this case claimant argued that it cannot arbitrate the dispute due to its financial situation. Claimant provided that it has legal aid for litigation. The court found that the arbitral tribunal is the first one to decide on effect of impecuniosity to the enforcement of the arbitration agreement and, subsequently, on its effect to tribunal's jurisdiction. Despite applying the doctrine of competence-competence

[15] M İpek, 'Interpretation of Article II(3) of the New York Convention' (2017) 23(3) *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 683 <https://dergipark.org.tr/tr/download/article-file/456989> accessed 20 August 2025, 695.

[16] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 1146.

[17] JP Moyano, 'Impecuniosity and Validity of Arbitration Agreements' (2017) 34(4) *Journal of International Arbitration* 631, 643 <https://doi.org/10.54648/joia2017030>.

[18] D Kühner, 'The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany' (2014) 31(6) *Journal of International Arbitration* 807, 808 <https://doi.org/10.54648/joia2014038>.

[19] *SARL Lola Fleurs v Société Monceau Fleurs et autres* (Paris Court of Appeal, 26 February 2013) No 12/12953.

[20] *Société Aéronautique et technologies embarquées SAS v Société Airbus Helicopters and Airbus Helicopters Deutschland GmbH* (Cour de cassation (France), 13 July 2016) No 15-19389.

[21] Supremo Tribunal de Justiça (Supreme Court of Portugal), 26 April 2016, No 1212/14.5T8LSB.L1.S1.

in favour of arbitral tribunal's jurisdiction, the court thoroughly analysed claimant's financial situation.[22] Such case law allows to speculate that the court may have foreseen a possible pitfall of such approach.

Indeed, such allocation of jurisdiction has been criticized as the authority of the arbitral tribunal to rule on this issue could be limited due to simple practical reasons.[23] Firstly, due to impecuniosity a party may never commence arbitration at all, but court proceeding under this approach would be impossible prior to arbitral ones. In such event, the party would be left without any forum to have its claim heard. However, there is nothing barring such a party to submits it request for arbitration. Such actions in itself should be possible and affordable even for an impecunious party. Secondly, even if arbitration is commenced, the arbitral tribunal faced with an impecunious party, which lacked funds to cover its part of advance costs, will most likely ask the other party to make a substitute payment. If the payment is made, the tribunal will proceed and ruling on jurisdiction will be simply unnecessary.[24] If the other party refuses to make a substitute payment for arbitration costs, arbitration proceedings will be terminated.[25] In such case one may ponder whether the arbitration tribunals or arbitral institutions should be the ones responsible for resolving or at least extend an inch of assistance to the impecunious party. Theoretically states have an obligation to ensure access to justice.[26] Accordingly, where an arbitration agreement is concluded, one could argue that the responsibility to ensure access to justice is conferred to the arbitral tribunal. A similar argument was formulated in a French case of 2016 where juge d'appui (i.e., a judge which assist the arbitration) ordered ICC arbitral tribunal to proceed with arbitration without the payment of an impecunious party.[27] This case arose in the context where two parties in arbitral proceedings failed to pay advances on costs.[28] As parties failed to pay their respective advances, their claims were held withdrawn. One of these parties launched court proceedings against ICC for holding its claim withdrawn. The juge d'appui found that in this case there a risk of denial of justice as it was manifest that the party was impecunious. ICC actions to hold the claim of this party withdrawn created an obstacle for it to access justice. ICC was ordered to reinstate the claim, lift suspension and proceed with the case. ICC appealed the decision, and the Paris Court of Appeal quashed the decision as the question raised in the case was outside the jurisdiction of juge d'appui. Despite that, it goes to show that there might be room to question who is exactly responsible for ensuring access to justice in this regard and, thus, holds jurisdiction over this particular dispute related to impecuniosity.

That being said, even if theoretically jurisdictional powers to resolve the issue of impecuniosity and enforcement of an arbitration agreement may well rest within the authority of arbitral tribunal, it seems practically unfeasible that an arbitral tribunal would rule on it in any event where there is an impecunious party.

2.2. PARALLEL PROCEEDINGS

A possibility of parallel proceedings is another procedural matter to be considered where a party to an arbitration agreement is impecunious.

[22] MC Cardoso, 'Impecunious Parties in International Commercial Arbitration' (2020) 36(1) *Arbitration International* 123, 131 <https://doi.org/10.1093/arbint/aiaa002>.

[23] Moyano, 'Impecuniosity and Validity of Arbitration Agreements' 643.

[24] Moyano, 'Impecuniosity and Validity of Arbitration Agreements' 643.

[25] For example, ICC Rules of Arbitration (2021) art 37(6).

[26] *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 15 March 2018) ECLI:CE:ECHR:2018:0315JUD005135707.

[27] Paris Court of Appeal, 24 May 2016, No 15/23553.

[28] V Chessa and N Barysheva, 'Impecuniosity and Denial of Justice: Walking On Eggshells' (Kluwer Arbitration Blog, 15 November 2016) <https://arbitrationblog.kluwerarbitration.com/2016/11/15/impecuniosity-and-denial-of-justice-walking-on-eggshells/> accessed 20 August 2025.

The problem of parallel proceedings can arise in cases where there is a claim and a counterclaim in the same dispute.[29] In particular, the problem can arise due to the fact that one of the parties may initiate litigation proceedings, while the other one may commence arbitration.

Impecunious claimant might proceed to litigate the matter, and counterclaiming respondent may initiate arbitration. On the other hand, an impecunious respondent may commence litigation to have its claim heard, while claimant would proceed with arbitration. In both cases, the impecunious party can raise a jurisdictional objection and submit its claim to the courts. That would create a problem of parallel proceedings causing possibility of conflicting decisions, waste of resources and potential for abuse of process.[30] In addition, the impecunious party may lack funds to participate in both proceedings in the first place.[31] For that, a policy decision has to be made in dealing with parallel proceedings where there is an impecunious party.

Rules dealing with the problem of parallel proceedings like Article II(3) of the New York Convention, competence-competence principle, anti-suit injunctions, *lis pendens* and non-enforcement of a conflicting decision have been regarded as insufficient.[32] A sufficient rule would be the one which would provide priority in time to arbitral tribunal to decide with a minimal court oversight to curb the abuse of process.[33] A framework of resolving the issue of parallel proceedings has been suggested by the International Law Association in its 2006 report on *lis pendens*. In the report, the authority of the arbitral tribunal to decide on its own jurisdiction has been supported where parallel proceedings have been initiated in either the courts of the seat of arbitration or in another state.[34] However, an exception is made on grounds of sound case management, avoidance of conflicting decisions, prevention of waste of resources or protection of a party from abuse of process. For that, arbitral tribunal has to; first, have authority to stay proceedings on such grounds under applicable law; second, to be satisfied with the substantive connection between the outcome of the other proceedings to the arbitral ones; and, thirdly, to be satisfied that material damage will not be inflicted to the party opposing the stay.[35]

In case of impecuniosity such a restrictive view on parallel proceedings and stay could be considered as it would allow to strike the balance between the party seeking stay and opposing it. As a matter of precluding waste of resources, avoiding conflicting decisions or protecting a party from abuse of process, arbitral proceedings could be stayed where one of the parties have initiated court proceeding being unable to afford arbitration. For example, problems of waste of resources and conflicting decisions could occur where a court will proceed to make a full review regarding the enforcement of an arbitration agreement challenged on the basis of impecuniosity. Moreover, the impecunious party can argue that it is unable to arbitrate the dispute due to actions of the other party. In such case, the impecunious party may have the only option to present its claim in court and refusal to stay of arbitral proceedings could eventually

[29] MP Fabbri, 'Inapplicability of the Arbitration Agreement Due to the Impecuniosity of the Party' (2018) 15(57) *Revista Brasileira de Arbitragem* 67, 69 <https://doi.org/10.54648/rba2018004>.

[30] G Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions' (2008) *Dispute Resolution International* 110, 110-13 <https://access.archive-ouverte.unige.ch/access/metadata/fda15e14-e226-4cf6-a503-3d19c1c0df3f/download> accessed 20 August 2025.

[31] Fabbri, 'Inapplicability of the Arbitration Agreement Due to the Impecuniosity of the Party' 94.

[32] Kaufmann-Kohler 'How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions' 111.

[33] Ibid 113.

[34] International Law Association, Recommendations on Lis Pendens and Res Judicata and Arbitration (Seventy-First Conference, Berlin 2004; adopted 2006, amended 2009) 26.

[35] Ibid 26.

lead to abuse of process by the party having the financials for arbitration, leaving the impecunious party defenceless.

Therefore, in cases where an arbitral tribunal enjoys wide discretion to stay or proceed with arbitration while parallel proceedings are initiated, as well as, where other conditions are met, the issue of impecuniosity should be given to decide for a court. Especially, where the impecunious party would have no other forum to presents in position on the matter.

2.3. EFFECT OF IMPECUNIOSITY ON FUTURE DISPUTES

One more procedural matter to be considered, where due to impecuniosity an arbitration agreement or an arbitral award is sought to be refused enforcement, is the effect on impecuniosity to future disputes under the arbitration agreement.

The grounds of nullity and inoperability have a permanent effect to the applicability of an arbitration agreement to future disputes while the ground of incapability of performance can relate to temporary effect.[36] Where an arbitration agreement is null and void, such an agreement is an agreement that never existed. Thus, no disputes could have been or could be arbitrated under such agreement. As for inoperability, the agreement becomes permanently inapplicable due to the seizure of its effect, like after a waiver of an arbitration agreement. If an arbitration agreement is rendered incapable of being performed, the effect could only extend to an individual dispute.[37] Other disputes under different circumstances which allow to set the arbitration in motion can be referred to arbitration.

That said, impecuniosity can hardly fall under the exceptions of nullity and inoperability set in Article II(3) of New York Convention. As for the first, impecuniosity of a party which is analysed in the present work occurs after valid inception of an arbitration agreement. For this reason, impecuniosity does not render the arbitration agreement null and void *ab initio* as under this ground of New York Convention.[38] In regard to inoperability, it is linked to the seizure of the effect of an arbitration agreement.[39] Impecuniosity, however, does not impact the effect of the arbitration agreement. Impecuniosity affects the ability of a party to perform the arbitration agreement. Therefore, impecuniosity can most likely be used to refuse enforcement of an arbitration agreement that it became incapable of being performed.

This is further supported by the recent case law of the Polish Supreme Court, who ruled that a decision against the enforcement of the clause due to impecuniosity has no bearing for the future enforcement of this clause.[40] The Court emphasised that impecuniosity is a temporary phenomenon, meaning that where the inability to bear the costs of the arbitration proceedings ceases the arbitration agreement should be enforced. However, this excludes cases where the state court has already subsumed the jurisdiction for that particular dispute, as jurisdiction once vested continues (lat. *perpetuatio fori*).

Therefore, considering that impecuniosity may be a temporary status, which supports its qualification as a fact rendering an arbitration agreement incapable of being performed, the arbitration agreement should be applicable to future dispute where the argument of impecuniosity is raised and confirmed. In case the financial status of the impecunious party alters, arbitration would be performable as per party agreement for future disputes.

2.4. BURDEN OF PROOF

In determining the effect of impecuniosity to the performance of an arbitration agreement, impecuniosity has to be proved. For that, the

[36] Cardoso, 'Impecunious Parties in International Commercial Arbitration' 145.
[37] Ibid 145.
[38] Born, International Commercial Arbitration 903.
[39] Ibid 904.
[40] Sąd Najwyższy, II CSKP 897/22 (2022).

burden of proof has to be allocated to one of the parties, as well as, a certain standard of proof has to be applied in proving such financial state and the unenforceability of an arbitration agreement.

The general rule in international arbitration is the principle of *actori incumbit onus probandi*, meaning that the claiming party has to prove the facts it relies on.[41] Accordingly, a party relying on the arbitration agreement has to prove its existence. Having established that, the burden of proof shifts to the other party which seeks refusal to enforce an arbitration agreement under on Article II(3) of New York Convention. It bears the burden of proof.[42]

Likewise, in a case where a party is claiming that arbitration agreement is incapable of being performed due to impecuniosity, the party relying on arbitration agreement would have to prove its existence. Then the impecunious party would bear the burden of proving that it is impecunious, and therefore the arbitration agreement should not be enforced.

2.5. STANDARD OF PROOF

Regarding the standard of proof, in international arbitration standard of proof under the general rule is referred to as the balance of probabilities or "more likely than not".[43] Article II(3) of New York Convention which sets grounds for refusal to enforce an arbitration agreement is said to establish a weighty (high) burden of proof.[44] The very same is advocated for claims of impecuniosity rendering an arbitration agreement incapable of being performed under the New York Convention.[45]

The underlying rationale for such standard of proof is to deter artificial and frivolous claims[46] which would be in line with validation principle and pro-enforcement objectives of New York Convention[47]. Status of insolvency should not be sufficient to prove impecuniosity.[48] Such party must prove that the fact that it, in good faith, lacked financial means to initiate arbitration at the time of filing the claim.[49] Disclosure of the financial situation has to be full, without reservations and conducted in good faith.[50] The party may provide evidence like tax returns, bank and financial statements, even documents containing confidential information.[51] In some cases a relief from court fees may be sufficient.[52]

Hence, the impecunious party bears the burden of proof where it relies on its financial status to bar the enforcement of an arbitration agreement or an arbitral award. In the following vein, the burden to prove impecuniosity which has detrimental effect to the ability of such party to commence arbitration has to be high. Such party must in good faith fully disclose all available information about its financial situation.

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[41] Born, International Commercial Arbitration 2488.

[42] Ibid 902.

[43] Ibid 2489.

[44] Ibid 902.

[45] Gerome Goh, 'An Arbitral Tribunal's Dilemma: The Plea of Financially Impecunious Parties' (2020) 37(4) *Journal of International Arbitration* 479, 501-2 <https://doi.org/10.54648/joia2020022>; Cardoso, 'Impecunious Parties in International Commercial Arbitration' 139; Moyano, 'Impecuniosity and Validity of Arbitration Agreements' 645; Fabbri, 'Inapplicability of the Arbitration Agreement Due to the Impecuniosity of the Party' 81-82.

[46] Moyano, 'Impecuniosity and Validity of Arbitration Agreements' 452.

[47] Born, International Commercial Arbitration 896.

[48] High Court of Justice, QBD (Comm), 13 November 2007; Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), 6 October 2016, No 2-1314-943/2016; Goh, 'An Arbitral Tribunal's Dilemma: The Plea of Financially Impecunious Parties' 501.

[49] Goh, 'An Arbitral Tribunal's Dilemma: The Plea of Financially Impecunious Parties' 501.

[50] High Court of Justice, QBD (Comm), 13 November 2007; US District Court, Northern District of Texas, 20 May 2005, No 3:04-CV-1070-L.

[51] Fabbri, 'Inapplicability of the Arbitration Agreement Due to the Impecuniosity of the Party' 82.

[52] Sąd Najwyższy, II CSKP 897/22 (2022).

CONCLUSIONS

Impecuniosity in international commercial arbitration remains a pressing issue, shaped both by evolving global economic conditions and by the heightened protection of fundamental rights within legal orders such as that of the European Union. As new cases continue to emerge, fresh perspectives are gradually reshaping the debate. From a procedural standpoint, impecuniosity often prompts a less pro-arbitration approach in individual cases, rendering the legal framework stricter, more rigid, and less consensual. Yet, in global terms, these developments may ultimately strengthen arbitration by aligning it more closely with principles of access to justice and thereby ensuring its legitimacy in an increasingly complex world. And eventually, impecuniosity is not an impossible issue – it is a very practical one and it demands action from its stakeholders.