Impecuniosity in international commercial arbitration

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This paper explores the issue of financial resources in international commercial arbitration. Namely, the effect of impecuniosity to the enforcement of an arbitration agreement or an arbitral award. This paper aims to provide key considerations which may determine the enforceability an arbitration agreement or an arbitral award where a party to an arbitration agreement lacks funds to fulfil its obligation to arbitrate disputes. For that reason, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and case law relating to the issue of impecuniosity in arbitration is analysed.

INTRODUCTION

Once praised for low costs in comparison to litigation[1], in the past decade international commercial arbitration[2] has faced a substantial amount of criticism for its high costs.[3] Even proponents of international arbitration are acknowledging that international arbitration has become a highly expensive dispute resolution process.[4] Alarmingly, these costs have been considered as potentially setting a financial barrier to access justice.[5]

Practicalities of having the dispute resolved in arbitration mirrors this correlation of high costs and access to justice in international arbitration. In particular, parties to an arbitration agreement lacking funds have been recorded pleading that they are incapable to bear hefty costs of arbitration and, therefore, they should be released from the obligation to arbitrate their disputes. Such pleas are often based on the argument that the enforcement of an arbitration agreement would infringe their right to access justice. The opposing view provides that arbitration agreement has a predominantly contractual nature and financial struggles of party to a contract do not affect its performance. Courts of different jurisdictions have taken various and sometimes opposing views on this issue and its legal qualification.

Therefore, this article aims to determine whether lack of financial resources can be a ground to refuse enforcement of an arbitration

[1] BORN, Gary. International Commercial Arbitration, Third Edition. Kluwer Law International, 2021, p. 85.

[2] Terms "arbitration" and "international arbitration" used in this article shall mean international commercial arbitration only.

[3] Under several survey since 2006 costs related costs related to arbitration have been regarded as the worst characteristics of international arbitration. Queen Mary University of London and PricewaterhouseCoopers. International arbitration: Corporate attitudes and practices 2006. Survey, 2006, p. 6-7. Internet access: <https://arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf >[accessed on 24 August 2023]; Queen Mary University of London and White & Case. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration. Survey, 2015, p. 7. Internet access: <https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> [accessed on 24 August 2023]; Queen Mary University of London and White & Case. 2018 International Arbitration Survey: The Evolution of International Arbitration. Survey, 2018, p. 8. Internet access: <https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> [accessed on 24 August 2023].

[4] BORN, Gary. International Commercial Arbitration […], p. 86; BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 1.123.

[5] Ng'etich, Raphael. The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration. *Alternative Dispute Resolution*, 2017, Nr. 5(2), p. 112-113.

agreement or an arbitral award. Considering that, this article is divided into three main parts which accordingly address the substance of this issue in international arbitration, impecuniosity as a legal defence and (un)enforceability of an arbitration agreement or an arbitral award due to impecuniosity, followed by conclusions. As unification of domestic arbitration laws is at considerably high level and domestic arbitration legislations do not address the issue of impecuniosity, the analysis in this article is based on the New York Convention.

I. ISSUE OF IMPECUNIOSITY IN INTERNATIONAL ARBITRATION

1.1. DEFINITION OF IMPECUNIOSITY IN INTERNATIONAL ARBITRATION

Arbitration is a dispute resolution mechanism financed by the parties themselves.[6] That is contrary to domestic court proceedings financed by the state.[7] Generally, these costs are made up from a number of expenses which are divided into costs of arbitration and costs of legal representation.[8]

Costs of arbitration usually include a registration fee[9] and the so-called "advance on costs" or "advance costs" made up of fees and expenses of arbitrators[10] and experts[11], expenses for arbitral proceedings' logistics (e. g., rent of a hearing room, travel and costs alike)[12] and administration by the arbitral institution or, in case of an *ad hoc* arbitration without an institution, a hired secretary[13]. As the general rule stands, after the commencement of arbitration parties will be requested to pay the advance costs in equal shares.[14] Failure to cover advance costs leads to suspension of proceedings for a given time until the parties fulfil their obligations. If until the end of the given time advance costs are not paid by both parties or one (substituting the payment for the other), the proceedings are terminated and the claim or the counterclaim is considered withdrawn.[15] In this light, failure to meet these costs leads to a dead-end in pursuit of justice via arbitration.

Amount wise, costs of arbitration are said to be a drop in the ocean compared with costs of legal representation.[16] On average legal representation costs in international arbitration can make up to 83 percent.[17] Despite the enormous amount of legal fees, these costs are necessary to present the case to the arbitral tribunal.[18] Costs of legal

[6] ADULOJU, Bamikole M. Chapter 15 Rethinking Costs in International Arbitration. In *The Impact of Covid on International Disputes*. Leiden: Brill, 2022, p. 245.

[7] BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 4.202.

[8] GOTANDA, John Y. Awarding Costs and Attorneys' Fees in International Commercial Arbitrations. *Michigan Journal of International Law*, 1999, Nr. 21(1), p. 9.

[9] ADULOJU, Bamikole M. Chapter 15 Rethinking Costs in International Arbitration [...], p. 246. If the registration fee is not paid, the institution fixes a time period within which the filling party must make the payment, otherwise the arbitration is considered to have not been commenced (e. g., ICC Rules of Arbitration, 2021, Art. 4, para. 4). For example, under ICC Rules of Arbitration the registration fee is USD 5'000, which is around EUR 4'500 (ICC Rules of Arbitration, 2021, Art. 4, para. 4, part a). Such fee is also present under SIAC, HKIAC, LCIA arbitration rules.

[10] BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 36.

[11] *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Editors E. Gaillard, and J. Savage. Hague: Kluwer Law International, 1999, p. 684.

[12] BORN, Gary. International Commercial Arbitration [...], 2021, p. 86.

[13] BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 36.

[14] *Fouchard, Gaillard, Goldman On International Commercial Arbitration* [...], p. 685. That is, however, not the finite amount of advance costs, as the tribunal may readjust it at any time during arbitration. Such rules are provided in ICC SIAC, ICC and UNCITRAL arbitration rules.

[15] For example, ICC Rules of Arbitration, 2021, Art. 37, para. 6.

[16] BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 36.

[17] International Chamber of Commerce. ICC Arbitration and ADR Commission Report on Decisions on Costs in International Arbitration. Survey, 2015, p. 3. Internet access: <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/> [accessed on 24 August 2023].

[18] ADULOJU, Bamikole M. Chapter 15 Rethinking Costs in International Arbitration. In *The Impact of Covid on International Disputes*. Leiden: Brill, 2022, p. 245.

representation include fees and expenses of lawyers, party-appointed experts, transportation, evidence and witness presentation before the arbitral tribunal, as well as, costs of provisional measures, document production.[19] These costs are borne by parties themselves. Notably, even if there is no obligation to have a legal representative, it is acknowledged that professional representation is highly recommended in arbitration cases, as the equal treatment of parties may even impose it.[20]

Considering these substantial costs are borne by the parties[21], not every party may have the financial resources to accommodate such spendings. In such case the issue of impecuniosity arises.

Generally, impecuniosity is referred to as a state of a legal entity or a person which is lacking financial resources.[22] In arbitration, such term is used to define a situation when a party of an arbitration agreement is lacking or has no option to obtain sufficient financial resources to pursue justice in arbitral proceedings or to meet the costs of such proceedings.[23]

Objectively, it is a situation where a party lacks sufficient financial resources either to commence arbitration or to present its case. This as well includes situations where the party has the funds to commence arbitration and to present the case, but such expenses would jeopardize the livelihood of that party.[24] Therefore, the term may encompass situations from temporary lack of financial resources to bankruptcy.[25] Impecuniosity differs from the status of bankruptcy as the latter is evaluated on the basis of clear and established rules and the former is a rather vague term.[26] Nevertheless, state of bankruptcy and one of impecuniosity can overlap.[27] From the subjective point of view, the definition of impecuniosity should only encompass an actual and sincere lack of funds or an inability to obtain such for arbitral proceedings.[28] Otherwise, it may be abused.[29] For example, it may just be a calculated refusal to financially participate in arbitration (i. e., intentional refusal to pay an equal share of advance costs).[30] Such behaviour should be considered

[19] CREMADES, Anne-Carole and MAZURANIC, Alexandre. Chapter 9: Costs in Arbitration. In *International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition)*. Kluwer Law International, 2013, p. 193; ADULOJU, Bamikole M. Chapter 15 Rethinking Costs in International Arbitration. In *The Impact of Covid on International Disputes*. Leiden: Brill, 2022, p. 245-246.

[20] REINER, Adreas. Impecuniosity of Parties and its Effect on Arbitration – From the Perspective of Austrian law. In *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements? Based on a Conference Organized by the German Institution of Arbitration (DIS) on 29th November 2002 in Berlin*. Frankfurt am Main: Peter Lang, 2004, p. 46.

[21] ADULOJU, Bamikole M. Chapter 15 Rethinking Costs in International Arbitration. In *The Impact of Covid on International Disputes*. Leiden: Brill, 2022, p. 245.

[22] KÜHNER, Detlev. The Impact of Party Impecuniosity on Arbitration Agreements: The Example of France and Germany. *Journal of International Arbitration*, 2014, Nr. 31(6), p. 807.

[23] ŽIVKOVIĆ, Patricia. Impecunious Parties in Arbitration: An Overview of European National Courts' Practice. *Croatian Arbitration Yearbook*, 2016, Nr. 32, p. 34; KÜHNER, Detlev. The Impact of Party Impecuniosity [...], p. 807; MOYANO, Juan P. Impecuniosity and Validity of Arbitration Agreements. *Journal of International Arbitration*, 2017, Nr. 34(4), p. 632.

[24] CARDOSO, Marcel C. E. Impecunious parties in international commercial arbitration. *Arbitration International*, 2020, Nr. 36(1), p. 124.

[25] MOYANO, Juan P. Impecuniosity and Validity [...], p. 632.

[26] SACHS, Klaus. Arbitration and State Sovereignty – Protection of the weak Party in Arbitration. *Revista Brasileira de Arbitragem*, 2007, Nr. 4(13), p. 100.

[27] ŽIVKOVIĆ, Patricia. Impecunious Parties in Arbitration: [...], p. 34.

[28] MOYANO, Juan P. Impecuniosity and Validity [...], p. 632.

[29] GOH, Teng J. G. An Arbitral Tribunal's Dilemma: The Plea of Financially Impecunious Parties. *Journal of International Arbitration*, 2020, Nr. 37(4), p. 482.

[30] MOYANO, Juan P. Impecuniosity and Validity [...], p. 632.

a guerrilla tactic to delay the arbitral proceedings[31] rather than impecuniosity.

Therefore, as an impecunious party sincerely has no chance of pursuing justice or receiving just treatment in arbitral proceedings, impecuniosity may gravely impact party's ability to participate in arbitration.

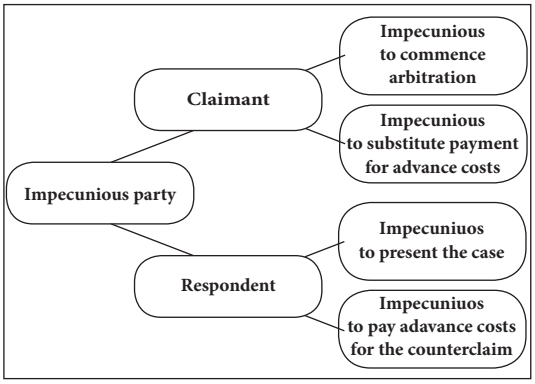
1.2 IMPACT OF IMPECUNIOSITY TO ARBITRAL PROCEEDINGS

The impact of impecuniosity to the arbitral proceedings differs depending on the fact which party relies on impecuniosity as a means of defence. Impecuniosity of both parties should not create a legal issue. Parties under explicit or implicit agreement are free to abandon the arbitration agreement and to litigate the matter in a court. In such case, an arbitration agreement can be rendered inoperative under New York Convention.[32] Failure or refusal to pay advance costs by both parties may constitute a waiver of the right to arbitrate.[33] A rather different situation can occur when only one of the parties to an arbitration agreement lacks financial resources to arbitrate.

If the impecunious party is claimant, there are several scenarios at hand. First, claimant might not be able to cover its advance costs because of impecuniosity and, moreover, there is little to no ground to believe that respondent will have any interest in financing a claim against itself. Second of all, even if claimant might be able to cover his own share, respondent might fail or refuse to pay his share of advance cost and claimant will have the option to substitute the payment. If the claimant is not able to cover respondent's share of advance costs, this will lead to suspension or termination of arbitral proceedings and the claim being held withdrawn. In such case, claimant may recourse to domestic courts. In both instances, claimant may be left without an option to vindicate its rights.

In the case where respondent is impecunious, first of all, even if claimant makes a substitute for the whole payment on advance costs, respondent might be unable to present its case at all, especially if the case at hand is complex involving lengthy and expertise-requiring proceedings. Secondly, respondent filing a counterclaim may face the very same issue as claimant. Respondent, among other things, will have to pay advance costs. In case where claimant requests to provide separate advances on costs and arbitral tribunal satisfies such a request, impecunious respondents' counterclaim may be held withdrawn if the respondent lacks funds to cover these costs and claimant will be more than reluctant to finance a claim against itself.

In conclusion, impecuniosity can impact arbitral proceedings in the following ways:



Source: Compiled by the author.

As shown, impecuniosity of one party to an arbitration agreement can lead to a situation where the impecunious one is not able to present its case or to participate in the arbitral proceedings at all. That brings *pacta sunt servanda* and the right to access justice to conflict[34] as arbitration agreements are of dual nature being a contract that binds parties and a mechanism for dispute resolution.

[31] HORVATH, Günther J. and WILSKE, Stephan. *Guerrilla Tactics in International Arbitration*. Wolters Kluwer Law International, 2013, p. 10.

[32] BORN, Gary. *International Commercial Arbitration* [...], p. 903.

[33] ŽIVKOVIĆ, Patricia. Impecunious Parties in Arbitration: [...], p. 46.

[34] ŽIVKOVIĆ, Patricia. Impecunious Parties in Arbitration: [...], p. 37.

1.3. THE ISSUE OF IMPECUNIOSITY AND THE NATURE OF ARBITRATION AGREEMENT

Arbitration agreement is a contract and the general principle of *pacta sunt servanda* applies.[35] However, it is a *sui generis* contract involving the obligation of the parties to resolve their dispute outside the court system established by the state.[36] Thus, an arbitration agreement has both a contractual character by the virtue of requiring a consent of parties and a jurisdictional one by the virtue of providing the jurisdiction to an arbitral tribunal.[37] That being said, when determining the effect of impecuniosity to arbitration neither of these characters should be overlooked.

In principle arbitration agreements are subject to the same rules as all other contracts. In this sense, impecuniosity may be considered under contractual terms. For example, under UNIDROIT Principles, recommended rules for international commercial contracts, impecuniosity would hardly fall under any of the clause which would allow such a party to abandon its obligations to arbitrate disputes. *Force majeure* would not be applicable as, first, the impecunious party should have control over its financial situation.[38] The ground of gross disparity and hardship would as well be inapplicable in the present case. The ground of gross disparity applies to situations prior to or at the time of contracting[39] and hardship clause – where these circumstances were not within the control of this party[40]. These conditions are not met and such contractual defences fall short in securing the access to justice of the impecunious party. Even though such analysis is limited only to UNIDROIT Principles and does not allow to make a conclusive remark, *prima facie* contractual approach provides that there are no grounds which would justify impecuniosity as a legal defence.

The jurisdictional nature of the arbitration agreement provides the ground for the arbitral tribunal to establish its jurisdiction and authority over that of a court.[41] As parties confer these powers to an arbitral tribunal with an agreement, they waive their right to access judicial remedies with it as well.[42] However, the extent of such waiver is not self-evident. It begs a question whether under such waiver parties completely exit the umbrella of the state court system. And furthermore, it is questionable whether a party agreeing to arbitrate disputes would, as well, agree to abandon its substantive right if it lacks financial resources to resolve a dispute in arbitration.[43] Regarding the first question, the extent of such waiver depends on the particular legal setting.[44] Although, in principle there is no possibility to derogate from the right to judicial protection entirely by mutual agreement.[45] As a matter of fact, arbitration agreement is a contractual choice of a dispute resolu-

[35] *Fouchard, Gaillard, Goldman On International Commercial Arbitration* [...], p. 382.

[36] BORN, Gary. *International Commercial Arbitration* [...], p. 263.

[37] LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration*. Kluwer Law International, 2003, p. 100.

[38] UNIDROIT Principles of International Commercial Contract. Rome: UNIDROIT, 2016, p. 240. Internet access: <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf> [accessed on 24 August 2023].

[39] *Ibid.*, p. 109.

[40] *Ibid.*, p. 427.

[41] LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration* [...], p. 100.

[42] BORN, Gary. *International Commercial Arbitration* [...], p. 1351.

[43] WAGNER, Gerhard. Poor Parties and German Forum: Placing Arbitration under thè Sword of Damocles. In: German Institution of Arbitration (eds.) (2004). In *Financial Capacity of the Parties: A Condition for the Validity of Arbitration Agreements? Based on a Conference Organized by the German Institution of Arbitration (DIS) on 29th November 2002 in Berlin*. Frankfurt am Main: Peter Lang, 2004, p. 12.

[44] BORN, Gary. *International Commercial Arbitration* [...], p. 694.

[45] WEDAM-LUKIC, Dragica. Arbitration and Article 6 of The European Convention On Human Rights. Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 1998, Nr. 64(5), p. 16. For example, Lithuanian Code of Civil Procedure explicitly provides that a waiver to apply to court is invalid.

tion forum.[46] By the virtue of such agreement parties agree on a particular venue for their claims, not for a waiver of their right to bring a claim in any forum if the chosen one is inaccessible.[47] As for the second question, assuming that parties act according to "*bonus pater familias*" or a "*reasonable man*" standard, no one would simply agree to waive its substantive right if it becomes impecunious after entering an arbitration agreement.[48] Arbitration agreements are drawn to substitute the jurisdiction of state courts for different reasons[49] and such agreements are not concluded to effectively bar oneself from vindicating a substantive right if arbitration becomes inaccessible.

That being said, the jurisdictional nature of the arbitration agreement which is related to the waiver of right to access a court is of fundamental importance and should not be undermined. Enforcement of arbitration agreement solely under contractual rules could infringe the fundamental right to vindicate rights of a party lacking financial resources. For this reason, enforcement of arbitration agreements and arbitral awards should be subject to rules which ensure the balance between the binding nature of contracts and fundamental right to access justice.

II. IMPECUNIOSITY AS A LEGAL DEFENCE TO REFUSE ENFORCEMENT OF AN ARBITRATION AGREEMENT AND AN ARBITRAL AWARD

Under the premise established in the last section, in an international setting an adequate legal instrument could be the New York Convention. New York Convention does encompass rules for the enforcement of an arbitration agreements or an arbitral award. These rules may be applicable to addresses the impecuniosity of a party.

2.1. IMPECUNIOSITY AS A GROUND TO REFUSE ENFORCEMENT OF AN ARBITRATION AGREEMENT

An impecunious claimant or counterclaiming respondent may challenge the enforcement of an arbitration agreement at the outset of arbitral proceedings. For that, such impecunious party may commence litigation by relying on Article II(3) of the New York Convention. Such party must prove that the arbitration agreement is either null and void, inoperative or incapable of being performed. Otherwise, the court shall refer the parties to arbitrate their dispute. Despite the fact that these grounds are broad and inclusive to a range of contractual defences[50], the impecunious party will have to choose the particular ground carefully as the burden of proof is hefty and allocated to the party claiming it.[51]

The first ground is referring to the validity of the arbitration agreement *ab initio*.[52] In other words, this ground refers to invalidity prior to concluding an agreement.[53] It is argued that this ground encompasses all challenges concerning the existence or validity of an arbitration agreement.[54] When it comes to impecuniosity, generally, it has been rejected that this would be a feasible ground to refuse enforcement of an arbitration agreement.[55] It should only be considered as an

[46] BORN, Gary. International Commercial Arbitration [...], p. 71.
[47] WAGNER, Gerhard. Poor Parties and German Forum: [...], p. 12.
[48] *Ibid.*, p. 12.
[49] BORN, Gary. International Commercial Arbitration [...], p. 73.
[50] BORN, Gary. International Commercial Arbitration [...], p. 900.
[51] Ibid, p. 902.
[52] Ibid, p. 903.
[53] For example, arbitration agreement is null and void in cases where there is no reference to a particular legal relationship, parties have not reached a valid agreement due to lack of consent, misrepresentation, duress or the arbitration agreement has a reference to an arbitral institution which is uncertain or non-existent (LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration* [...], p. 342).
[54] BORN, Gary. International Commercial Arbitration [...], p. 903.
[55] MOYANO, Juan P. Impecuniosity and Validity [...], p. 634; GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 484-485; SANLI, Necip F. Party Impecuniosity and International Arbitration: The Interplay between Failure to Pay the Advance Costs and Validity of Arbitration Agreement in International Arbitration. *Public and Private International Law Bulletin*, 2020, Nr. 40(1), p. 577.

ancillary argument at most.[56] The predominant position is that impecuniosity as discussed only occurs after the conclusion of an arbitration agreement.[57] Thus, impecuniosity seems to fall outside the scope of this ground, as impecuniosity is related to the performance of the arbitration agreement and does not concern the existence or validity of an arbitration agreement.

As for the second ground, inoperability of an arbitration agreement refers to a situation where the agreement was validly concluded, but after that has ceased the effect.[58] In other words, the arbitration agreement has become inapplicable to the parties or the dispute[59] at the time when a court is requested to refer the parties to arbitration.[60] In this case, inoperability of an arbitration agreement is hardly a feasible ground. Lack of financial resources only has an effect on the capacity of the impecunious party to arbitrate the dispute. Impecuniosity does not equate to a mutually agreed waiver of the right to arbitrate, nor does it mean any definite dispute resolution with *res judicata* effect. In this sense, second ground falls short as well.

An arbitration agreement is incapable of being performed where arbitration "*cannot effectively be set in motion*".[61] Incapability to perform the arbitration agreement is a more practical ground.[62] It is a ground to set-aside an arbitration agreement when it is physically or legally impossible to perform.[63] As for impecuniosity, where an impecunious party has no financial means to participate in arbitration, the right to access justice might be infringed. In this sense impecuniosity could be regarded as a legal barrier. Effectively, seeking to uphold the right to access justice, the arbitration would be barred from being set in motion. In this light, impecuniosity could be qualified as a ground due to which arbitration agreement became incapable of being performed under the New York Convention.

2.2. IMPECUNIOSITY AS A GROUND TO REFUSE RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD

In cases where an arbitral award has been rendered, the impecunious respondent may seek the refusal to recognise and enforce such an award on the grounds of inability to participate in the arbitral proceedings. In particular, there may be two separate grounds under the New York Convention. Similar to the pre-award stage, the impecunious party has to be precise in choosing the ground, otherwise under the presumptive validity of an arbitral award the court will recognise and enforce the award.[64]

One ground that is set-forth in Article V(1)(b) provides that recognition and enforcement

[56] CARDOSO, Marcel C. E. Impecunious parties [...], p. 138. As a supplementing argument, it may serve in rendering an arbitration agreement null and void on the grounds of duress or unconscionability, if at the time of contracting the impecunious party was dealing with financial difficulties and was forced to contract (MOYANO, Juan P. Impecuniosity and Validity [...], p. 634).

[57] MOYANO, Juan P. Impecuniosity and Validity [...], p. 634; GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 484-485; SANLI, Necip F. Party Impecuniosity and International Arbitration: [...], p. 577.

[58] BORN, Gary. International Commercial Arbitration [...], p. 904.

[59] *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards: New York 1958.* Editors E. Gaillard, and George A. Bermann. Brill, 2017, p. 80.

[60] Port, 2010, p. 106. That includes such examples as a waiver or repudiation of the right to arbitrate (BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 138), as well as, a failure to meet time limits to render an award or having an award with a *res judicata* effect rendered (LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration* [...], p. 343).

[61] LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration* [...], p. 344.

[62] For instance, it is applied in cases where it is impossible to establish an arbitral tribunal because party-appointed arbitrator is unable or refuses to perform its functions or the arbitral institution is dissolved (BLACKABY, Nigel, *et al. Redfern and Hunter on International Arbitration* [...], p. 138; LEW, Julian D. M., MISTELIS, Loukas A. and KRÖLL, Stefan. *Comparative International Commercial Arbitration* [...], p. 344).

[63] BORN, Gary. International Commercial Arbitration [...], p. 905.

[64] BORN, Gary. International Commercial Arbitration [...], p. 3719.

of an arbitral award may be refused if the party against whom the award is invoked has been denied of an opportunity to present a case. This ground relates to grave infringements of procedural fairness which materially affects the arbitral proceedings or the award.[65] Even if in principle lack of legal representation is not a ground on itself for refusal to recognise and enforce an arbitral award, nevertheless, in exceptional circumstances and highly complex cases it may pose an issue of enforceability.[66] In that case, the incapability of legal representative might be the issue which is connected to the fact that the party lacked funds to hire a capable lawyer. What is important, however, that pleas of financial constraints and ability to present a case have not held up in court under Article V(1)(b).[67] Thus, it is a matter of fact, whether a court would refuse enforcement, if a party lacking funds does not have the capabilities to present its case.[68]

Another ground on which an impecunious party may request to refuse recognition and enforcement of an arbitral award is public policy in Article V(2)(b). Under this ground a court might refuse to recognise and enforce an arbitral award, if it is contrary to the public policy of the country. Public policy exception includes cases of serious procedural unfairness or irregularities, which overlap with Article V(2)(b).[69] Infringement of this so-called procedural public policy is found rarely and restrictively.[70] As for lack of funds, lack of legal representation due to impecuniosity has not been found to breach procedural public policy.[71] The only feasible scenario in which public policy can be found to be a valid ground to refuse the recognition and enforcement, is where effectively the right to vindicate its substantive rights would be denied.[72] The result of such proceedings would effectively bar such impecunious party to vindicate its rights, if the arbitral award would stand as a *res judicata* in this matter.

III. (UN)ENFORCEABILITY OF AN ARBITRATION AGREEMENT OR AN ARBITRAL AWARD DUE TO IMPECUNIOSITY

The theory whether impecuniosity could bar enforcement of an arbitration agreement or an arbitral award has been tested in practice. Case law has addressed this issue in a variety of ways. One of them focuses on the contractual nature of the arbitration agreement. Such approach asses the legitimacy of impecuniosity as an obstacle to perform the arbitration agreement.

An English case, the *Paczy v. Haendler & Natermann*, is a good example of such approach.[73] In this case the question whether impecuniosity of a party can render an arbitration agreement incapable of being performed has been raised. Claimant, a British national, initiated court proceedings against a German company, disregarding the arbitration clause. Respondent requested to stay the proceedings which the court granted. Claimant invited respondent to commence arbitration as due to financial reasons claimant itself was unable to. As respondent refused, claimant sought to litigate the matter once again

[65] Procedural fairness, determined under uniform international standards, includes, among other safeguards, the ones ensuring participation in arbitral proceedings. (BORN, Gary. *International Commercial Arbitration* [...], p. 3836).

[66] BORN, Gary. Legal representation in arbitration. Lexis Nexis blog, 2014. Internet access: <https://www.lexisnexis.co.uk/blog/dispute-resolution/legal-representation-in-arbitration> [accessed on 24 August 2023].

[67] BORN, Gary. International Commercial Arbitration, Third Edition. Kluwer Law International, 2021, p. 3854.

[68] Namely, on the facts that impecunious party cannot afford legal representation, hire an expert, reach a hearing site or other situations impeded its ability to present a case.

[69] BORN, Gary. International Commercial Arbitration [...], p. 4044.

[70] *Ibid.*, p. 4050.

[71] *Ibid.*, p. 4047.

[72] For example, that could be the case where respondent's counterclaim is inseparably related to the claim and due to non-payment of advance costs is left unresolved (ŽIVKOVIĆ, Patricia. Impecunious Parties in Arbitration: [...], p. 47).

[73] Janos Paczy v. Haendler & Natermann GMBH [1981] WL 188128.

and the court removed the stay. Respondent appealed and the Court of Appeal ruled in favor of respondent. Claimant argued that it is unable to cover the costs of arbitration as he is unemployed, relies on unemployment pay and social benefits. In addition, it has acquired legal aid for litigation. As the Court of Appeal ruled that impecuniosity does not render an arbitration agreement incapable of being performed, the court made a comparison to a sale of land. The court proceeded with this line that a mere fact that a purchaser of a land lacks financial capacity to pay the full price does not render a contract incapable of being performed. The court explained that an arbitration agreement is incapable of being performed if the circumstances prevent the performance of such agreement, even if parties are ready, able and willing to perform it. In such way, the court made a distinction between a party being incapable of performing the agreement and the agreement being incapable of being performed, where only the latter is a ground to refuse enforcement of an arbitration agreement. Provided these arguments, the court dismissed the claim of impecuniosity.

This rationale has been followed in at least two later cases: *Amr Amin Hamza EL Nasharty v. J. Sainsbury Plc* and *Trunk Flooring Ltd. v. HSBC Asset Finance (U.K.) Ltd., Costa Rica S.R.L*. In the first case court followed the precedent and rejected claims that any issues regarding access to justice of Article 6 of the ECHR arise.[74] Interestingly, the court provided that claimant has failed to submit sufficient evidence proving it lacked funds to pursue the claim in the chosen forum, namely arbitration. Even though this case law is a continuation of the precedent, the court gave room to question whether impecuniosity would not have been a legal ground to escape the commitment to arbitrate, if sufficient evidence would have been present. However, in a later case *Trunk Flooring Ltd. V. HSBC Asset Finance (U.K.) Ltd., Costa Rica S.R.L.* the English court stated that neither the financial incapacity of a party to arbitrate a dispute, nor the inability of such party to satisfy a subsequent arbitral award renders an arbitration agreement incapable of being performed.[75]

Lithuanian and Polish case law suggest a similar outcome where impecuniosity is used a legal defence. Lithuanian court rejected that an arbitration agreement becomes incapable of being performed due to lack of funds explicitly providing that arbitration agreements are bound by the principle of *pacta sunt servanda*.[76] Court pointed out that an impecunious party should attempt to arbitrate the dispute in good faith as, for instance, seek to raise funds for arbitration. Further, court did acknowledge that impecuniosity does complicate access to justice, but eventually provided that poor financial situation cannot be a sufficient reason to refuse to enforcement of an arbitration agreement. The Polish court has, as well, rejected the argument of impecuniosity.[77] Court's position was that arbitration provides fewer procedural guarantees than litigation, and moreover, impecuniosity of a party is a subjective factor which can change in the future.[78]

Despite being pro-arbitration, such case law has been criticised for purely contractual view analysis of an arbitration agreement.[79] For example, the comparison made by the English court between the obligation to pay the price under

[74] Amr Amin Hamza El Nasharty v. J. Sainsbury Plc [2007] WL 3389508.

[75] Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd and Costa Rica SRL [2015] NIQB.

[76] Lietuvos apeliacinio teismo 2016 m. spalio 6 d. nutartis civilinėje byloje Nr. 2-1314-943/2016.

[77] Postanowienie Sądu Apelacyjnego w Warszawie z dnia 27 kwietnia 2020 r. VII AGz 35/20. In DURBAS, Maciej and KOL, Rafał. *Lack of funds does not enable parties to escape arbitration*. Lexicology blog, 2021. Internet access: <https://www.lexology.com/commentary/arbitration-adr/poland/kubas-kos-gakowski/lack-of-funds-does-not-enable-parties-to-escape-arbitration> [accessed on 24 August 2023].

[78] DURBAS, Maciej and KOL, Rafał. *Lack of funds does not enable parties to escape arbitration*. Lexicology blog, 2021.

[79] CARDOSO, Marcel C. E. Impecunious parties [...], p. 126.

a sale of land and the obligation to perform an arbitration agreement is a doubtful one. Where a party is lacking financial capacity to pay the price for the good, such party does not lose any substantive rights. On contrary, where a party is unable to perform an arbitration agreement, enforcement of it could simply strip such party of its substantive right. Similar comments could be made regarding the case law of Lithuanian and Polish courts. Lithuanian court's opinion that the impecunious party may raise necessary funds could be flawed, if such party is insolvent or soon to be such. Polish court was correct that arbitration provides fewer procedural guarantees[80], but where an impecuniosity defence is raised, the main question is whether substantive rights will be barred from being vindicated or not. That does not include analysis of compliance with procedural guarantees like impartiality and independence, fair trail, adversarial and public hearing.

These points adhere to the opposing view on this issue, which focuses on determining the effect of enforcing an arbitration agreement or arbitral award to the right to access justice of the impecunious party. A prominent example is a so-called "Poor Plumber's case" decided by the Federal Court of Justice of Germany. In this case two German parties entered into an arbitration agreement connected to a commercial contract for installation of heating and sanitary systems.[81] Prior to proceedings, the prospective respondent requested to resolve the matter by litigation. At that time claimant refused. However, due to lack of funds, respondent did not commence arbitration. After a year claimant itself informed the respondent that it terminates the arbitration agreement and will commence court proceedings for the breach of contract. In court claimant argued that the arbitration agreement became incapable of being performed as it lacked financial funds to arbitrate the dispute. The Federal Court of Justice supported the claimant on two points. First, the court noted claimant had no financial capacity to afford arbitration, but it had legal aid to pursue the claim in court. In this regard, the court noted that respondent was not willing to cover all costs alone. The court compared that otherwise claimant would lose the right to recourse at all and respondent as a German party would not be put into a worse position in litigation than claimant who is as well a German party. In this light, the court rendered the arbitration agreement being incapable of performance. Lower instance German courts have since followed the approach taken by the Federal Court of Justice.[82]

French case law suggests that impecuniosity threatening the right to access justice could bar enforcement of an arbitration agreement. In the case *Tagli'apau v. Amrest Holdings SE, La Tagliatella and Pastificio service SLU* the Court of Cassation of France allowed to litigate the dispute where an impecunious claimant was unable to cover advance costs of respondent who refused to pay its share and invoked arbitration agreement in court proceedings.[83] The court found that respondent has breached its duty of procedural loyalty by refusing to pay advance costs, and later by relying on the very same arbitration agreement. Second of all, the court provided that even though the jurisdiction to rule on this matter rests within the authority of the arbitral tribunal, a party may recourse to court if access to justice becomes impossible. In particular, the court noted that an impecunious party cannot be denied justice where its claim has been held withdrawn due to the actions of other party and where later due to impecuniosity it became unable to substitute payment for respondent's share. The court held that the opposite situation would equate to a

[80] *Mutu and Pechstein v. Switzerland* [ECtHR], No. 40575/10 and 67474/10, [02.10.2018]. ECLI:CE:ECHR:2018:-1002JUD004057510.

[81] BGH, 14092000 - III ZR 33/00.

[82] SANLI, Necip F. Party Impecuniosity and International Arbitration: [...], p. 581.

[83] *Tagli'apau v. Amrest Holdings SE, La Tagliatella and Pastificio service SLU*, 9 February 2022 No. 21-11.253.

violation of Article 6 of ECHR.[84] In the *Philippe Pottier and SARL CPP Le Mans Distribution v. SAS Carrefour Proximité France and SAS CSF* case the Court of Cassation confirmed that.[85] Notably, the court argued that only in that case where an impecunious party has sought to arbitrate the dispute, but failed due to impecuniosity and misconduct of the other party, court proceedings would be allowed to commence. In this vein, court found that refusal to consider the state of impecuniosity would violate Article 6 of ECHR. In another French case, the *Société Pirelli & C. v. Société Licensing Projects* case, the Court of Cassation decided on the issue of impecuniosity in the post-award stage.[86] The court decided that arbitral tribunal's refusal to examine the counterclaim together with the claim can in principle infringe rights to access justice and equal treatment of parties. However, only if claims were inseparable, which would be an infringement of international public policy.

Hungarian court[87] and Portuguese court[88] provided similar conclusions holding that right to arbitration is superseded by the right to access justice as the state must safeguard this right, even if it recognises arbitration as a legal means of resolving disputes. Portuguese court emphasized that right to arbitration is superseded by the right to access justice, as the state must safeguard this right, even if it recognises arbitration as a legal means of resolving disputes.

This does emphasize that access to justice is a fundamental right, which should not be deprived due to lack of financial means. However, the dynamics do differ in an international setting which was not the case in German and French cases. International arbitration is often chosen to avoid a biased and partial forum.[89] Therefore, such view is encouraging, but fails to provide a balance approach for an international setting

There have been cases which move one step forward by looking into the cause of impecuniosity. In an English case *Fakes v. Taylor Woodrow Construction Ltd.* claimant, who was a plumbing subcontractor, initiated court proceedings to recover over GBP 80'000.[90] Claimant argued that it became insolvent due to respondent's breach of contract. As a result of the same breach, claimant argued that it as well lacked funds to arbitrate the dispute, but had legal aid to litigate it. The court allowed to initiate court proceedings reasoning that claimant could be denied justice, if he would be referred to arbitration. The court found that by the breach of contract respondent has induced claimant's insolvency, which in turn affect claimant's ability to fulfil its duty under the arbitration agreement and, instead, legal aid

[84] ROSHER, Peter, ROBERT, Erwan and CALLOWAY, Adam. Supreme Court, Arbitration Agreements and Jurisdictional Challenges: Parties Cannot Have Their Cake and Eat It. Kluwer Arbitration Blog, 2022. Internet access: <https://arbitrationblog.kluwerarbitration.com/2022/04/20/french-supreme-court-arbitration-agreements-and-jurisdictional-challenges-parties-cannot-have-their-cake-and-eat-it/> [accessed on 24 August 2023].

[85] *Philippe Pottier and SARL CPP Le Mans Distribution v. SAS Carrefour Proximité France and SAS CSF,* 28 September 2022 No. 21-21.738 50. In BOULMELH, Karim, DE BAILLEUL, Marine and MOKALED, Larina. Baker McKenzie International Arbitration Yearbook 2022-2023 – France. Global arbitration news, 2022. Internet access: <https://www.globalarbitrationnews.com/2023/01/01/baker-mckenzie-international-arbitration-yearbook-2022-2023-france/> [accessed on 24 August 2023].

[86] *Société Pirelli & C. v. Société Licensing Projects*, 28 March 2013 No. 11-27770.

[87] Szegedi Ítélőtábla, Gf.I.30.014/2012. In LÁSZLÓ, András D. Restrictive Tendencies in Hungarian Arbitration Law – Arbitration Agreements Are Not Enforceable Against Companies under Involuntary Liquidation. Kluwer Arbitration Blog, 2015. Internet access: <https://arbitrationblog.kluwerarbitration.com/2015/05/04/restrictive-tendencies-in-hungarian-arbitration-law-arbitration-agreements-are-not-enforceable-against-companies-under-involuntary-liquidation/> [accessed on 24 August 2023].

[88] Wall Street Institute de Portugal - Centro de Inglês S.A., WSI - Consultadoria Marketing and Others v. Centro de Inglês Santa Bárbara, Lda., Tribunal Constitucional Portugal, 311/2008, 30 May 2008.

[89] BORN, Gary. International Commercial Arbitration [...], p. 72.

[90] Fakes v Taylor Woodrow Ltd [1973] 1 QB 436.

was available. This position later was followed in *Goodman v. Winchester & Alton Railway Plc*[91] and considered in *Trustee of the Property of Andrews v. Brock Builders (Kessingland) Ltd.* cases[92].

Such approach has been considered by the Supreme Court of Uganda.[93] In this case the Supreme Court of Uganda concluded that impecuniosity in itself is insufficient to render an arbitration agreement incapable of being performed. However, if the impecunious party is able to prove that it became impecunious because of the actions of the other party, and thus unable to arbitrate the dispute, in such case the enforcement of an arbitration agreement may be refused. Similarly, the Portuguese Supreme Court ruled in *A (Netherlands) v. B & Cia. Ltda., C and others* case.[94] In this case respondent requested to refuse recognition and enforcement of an arbitral award due to breach of public policy, as its counterclaim was not heard in the arbitral proceedings. The court dismissed the request. However, the court made room for an exception. The court provided that if after contracting the party becomes impecunious without any fault of its own, such party may recourse to litigation where access to arbitration is barred.

That being said, case law does suggest that within a restricted set of conditions courts are willing to refuse enforcement of an arbitration agreement or an arbitral award. Courts seem to draw the attention to four main circumstances.

3.1. BEHAVIOUR OF THE IMPECUNIOUS PARTY

One of them relates to the behaviour of an impecunious party.[95] In particular, courts have investigated whether good faith attempts fulfil the obligation to arbitrate dispute have been made.[96]

Good faith attempts to arbitrate should not be understood just as attempts to file a claim, as that can be conducted formally without any expectation to arbitrate the dispute at all. Even where the filing fee is paid, filing such a claim would be a poor decision as the party is at financial distress anyway and that could further worsen the situation of the impecunious party. Therefore, good faith attempts to arbitrate could be understood as actions which show-case a feasible solution for the issue of impecuniosity. Both non-financial (like re-negotiations regarding the arbitration clause[97]) and financial solutions (as third-party funding, bank and insurance instruments[98]). A genuine search or request for funding of an arbitration case could constitute a good faith attempt to arbitrate.

Therefore, even if such attempts fall short, good faith actions should be considered positively by the court. That in turn would provide more credibility that an action to litigate the matter is not a guerrilla tactic or alike.

3.2. CAUSE AND TIMING OF IMPECUNIOSITY OF SUCH PARTY

Another point which courts note in deciding the enforcement of an arbitration agreement or an arbitral award is the cause of impecuniosity and

[91] Winchester & Alton Railway plc [1985] 1 WLR 141.

[92] Trustee of the property of Andrews v Brock Builders (Kessingland) Ltd (1997) 3W.

[93] Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central, Supreme Court of Uganda, Civil Appeal No. 18 of 2002, 16 January 2004.

[94] A (Netherlands) v. B & Cia. Ltda., C and Others, Supremo Tribunal de Justiça, 1647/02, 9 November 2003. In ŽIVKOVIĆ, Patricia. Impecunious party in arbitration proceedings and its rights under Article 6(1) of the European Convention on Human Rights. *Journal of Constitutionalism & Human Rights*, 2015, Nr. 1-2(7), p. 46.

[95] MOYANO, Juan P. Impecuniosity and Validity [...], p. 651.

[96] For example, *Tagli'apau v. Amrest Holdings SE, La Tagliatella and Pastificio service SLU*, 9 February 2022 No. 21-11.253; decision of Court of Cassation of France 28 September 2022.

[97] For example, parties are free to agree that the case will be decided by one arbitrator instead of three (SACHS, Klaus. Arbitration and State Sovereignty [...], p. 106). A similar example would be where parties may agree to arbitrate the dispute under arbitration rules which provide a less costly procedure.

[98] SANLI, Necip F. Party Impecuniosity and International Arbitration: [...], p. 598, 601.

its timing.[99] Regarding the cause, differentiation between two cases should be made.

In those situations where a party became impecunious due to its own fault, it should not hinder the enforceability an arbitration agreement or an arbitral award.[100] Any clear indication of bad faith or unethical behaviour like transfer of funds to related entities after commencement of arbitral proceedings without a cause would suffice a fault.[101] Events or actions outside the contractual relationship between arbitration agreement parties would not suffice a ground for refusal. The non-impecunious party of the arbitration agreement has never explicitly or implicitly assumed such risks by signing an arbitration clause. Therefore, such party cannot be put in jeopardy due to such event.[102]

Courts have given a due consideration to the actions of the other party of the arbitration agreement.[103] Where the non-impecunious party abuses its rights and, in such way, causes the impecuniosity of another party, this could may well be regarded as a breach of duties under the arbitration agreement. Considering that the duty to arbitrate disputes has traits of a pecuniary obligation, parties of such agreement should take a care regard to each other's financial ability to carry it out. Such stance may be supported by the contract law.[104]

As for the timing of impecuniosity, the relevant timeframe where impecuniosity should have materialised is after the conclusion of the arbitration agreement. As mentioned, impecuniosity does not concern the validity of the agreement and it occurs after entering into one. When entering into an arbitration agreement, parties have to make informed decisions and assume risks arising out of it[105], including the fact that arbitration is a privately funded dispute adjudication mechanism and arbitration cost schedules are public. Hence, if a party was lacking funds for arbitration or could reasonably foresee it at the time of contracting, a claim of impecuniosity should be disregarded. Such party should bear the risk by knowingly opting for arbitration while being unable to afford it. In case where a party became impecunious after entering into an arbitration agreement, such argument could have ground. More importantly, this argument has ground where a party had funds entering an arbitration agreement, but has become impecunious after contracting due to the fault of the other party of the arbitration agreement.

Therefore, if the abuse of rights by the party to an arbitration agreement deprives the other party to access justice and it had occurred after concluding the arbitration agreement, that should be a legitimate point in considering to refuse enforcement of an arbitration agreement or an arbitral award.

3.3. ABILITY OF THE IMPECUNIOUS PARTY TO RECOURSE TO ANOTHER FORUM

Courts have drawn the attention to the means of the impecunious party to recourse to another forum.[106] Therefore, another point worth con-

[99] Fakes v Taylor Woodrow Ltd [1973] 1 QB 436; Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central, Supreme Court of Uganda, Civil Appeal No. 18 of 2002, 16 January 2004.

[100] A (Netherlands) v. B & Cia. Ltda., C and Others, Supremo Tribunal de Justiça, 1647/02, 9 November 2003.

[101] GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 502.

[102] For example. economic crisis or downturn, third party actions.

[103] Fakes v Taylor Woodrow Ltd [1973] 1 QB 436; Fulgensius Mungereza v. PricewaterhouseCoopers Africa Central, Supreme Court of Uganda, Civil Appeal No. 18 of 2002, 16 January 2004.

[104] For example, under Article 7.1.2 of UNIDROIT Principles, a party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act (UNIDROIT Principles [...], p. 228).

[105] CARDOSO, Marcel C. E. Impecunious parties [...], p. 139.

[106] BGH, 14092000 - III ZR 33/00; A (Netherlands) v. B & Cia. Ltda., C and Others, Supremo Tribunal de Justiça, 1647/02, 9 November 2003; Wall Street Institute de Portugal - Centro de Inglês S.A., WSI - Consultadoria Marketing and Others v. Centro de Inglês Santa Bárbara, Lda., Tribunal Constitucional Portugal, 311/2008, 30 May 2008.

sidering is the capacity of the impecunious to have its claim heard in another forum than an arbitral tribunal.

The reason of refusing enforcement of an arbitration agreement or an arbitral award due to impecuniosity is to provide the party lacking financial resources a forum to adjudicate its claim.[107] In other words, the sole reason for such refusal is to ensure the general access to justice for the impecunious party. Where such party would have no ability to recourse to a court, there is no point that the arbitration agreement should have been disregarded.[108] Therefore, courts rightly dismissed the arguments of impecuniosity, where a party had no resources to recourse to another forum.[109]

Understandably, recourse to a domestic forum could undermine the very reason why the other party chose arbitration in the first place.[110] However, that should not frustrate the situation, if it is found that the other party has induced the financial hardship of the impecunious party. Such party which causes impecuniosity of another party to an arbitration agreement should bear the risk that the dispute will be heard in domestic forum.[111] In that case where such circumstance is not found, the non-impecunious party should not be put into disadvantaged position without any justification.

The ability to recourse to another forum should be proven by the impecunious party with evidence. Legal aid certificate[112], financial tools like third party funding, bank and insurance instruments or any other form of financial assistance provided only for litigation[113] would suffice as such. Mere prospects or promises to provide financial means of the impecunious party in order to litigate the dispute should not does not render an arbitration agreement or an arbitral award unenforceable. The important point is whether substantive rights might be lost due to impecuniosity. Therefore, counterclaiming respondent may just be using impecuniosity as a guerrilla tactic to avoid any responsibility without any legitimate claim. Therefore, where respondent relies on impecuniosity, preliminary evaluation of counterclaim could well benefit the consideration.

Thus, the substantial inseparability of a counterclaim and a claim, as well as, *prima facie* success of the counterclaim are the few additional points that arise considering the procedural status of an impecunious party.

CONCLUSIONS

Containing a non-pecuniary obligation to arbitrate disputes and a restricted waiver of the fundamental right to access justice, arbitration agreement has to be enforced with care regard to the right to access justice. Particularly in those cases where a party to an arbitration agreement lacks financial resources. As access to justice is only waivable in part and the principle of *pacta sunt servanda* is not an absolute one, the defence of impecuniosity should not be dismissed solely on contractual grounds, otherwise access to justice can be infringed.

Although not addressed directly, the impecuniosity defence is covered by the New York Convention. It the pre-award stage can fall within Article II(3) of New York Convention, namely, that an arbitration agreement could be declared incapable of being performed due to financial impecuniosity of a party. Impecuniosity barring party's access to justice can be viewed as a legal impediment. In the award-enforcement

[107] CARDOSO, Marcel C. E. Impecunious parties [...], p. 140.
[108] GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 502.
[109] For example, A (Netherlands) v. B & Cia. Ltda., C and Others, Supremo Tribunal de Justiça, 1647/02, 9 November 2003.
[110] BORN, Gary. International Commercial Arbitration [...], p. 72.
[111] For example, Article 7.1.2 of UNIDROIT Principles.
[112] GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 502.
[113] CARDOSO, Marcel C. E. Impecunious parties [...], p. 141.

be considered satisfactory. Agreements, guarantees and documents alike should be given for the court to review.

Therefore, means of the impecunious party to recourse to another forum than an arbitral tribunal is one more point to considered in deciding enforcement of an arbitration agreement or an arbitral award.

3.4. PROCEDURAL STATUS OF THE IMPECUNIOUS PARTY

Procedural status of the party lacking financial resources has significance in resolving the issue of impecuniosity, as well. Particularly, where respondent is counterclaiming, courts and scholars have drawn the attention to a few points.

Inseparability of the claim and the counterclaim has been often considered.[114] Generally, counterclaims which contain a substantive defence allowing to set-off the claim have been considered inseparable to the claim.[115] In case law where such circumstance was found, the claim has not been allowed to proceed without the consideration of the counterclaim.[116] Understandably, if the dispute is resolved and the counterclaim with a substantive defence is not considered, respondent could face a bar to seek judicial relief in any other forum due to rules of *res judicata* or *lis pendens*.[117] Even if such claim of a respondent would be admitted in the future, it raises the issue of conflicting decisions between an arbitral tribunal and court.[118]

Seeking to avoid any chance that a frivolous or vexatious counterclaim has been brought by respondent, *prima facie* success of the counterclaim could be important to consider, as well.[119] Respondent might be impecunious, but that stage, party impecuniosity might fall within the ground of international public policy under Article V(2)(b) of New York Convention. Hence, impecuniosity can also be a ground to refuse enforcement of an arbitral award as the lack of funds may infringe access to justice which is part of international public policy.

Analysis of case law revolving around the issue of impecuniosity suggests that pro-enforcement approach is predominant. However, where enforcement would equate to denial of justice due to impecuniosity of a party, courts are willing to relieve the party form its commitment to arbitrate disputes. Courts found that access to justice might be infringed considering the behaviour of the impecunious party, the cause and the timing of impecuniosity of such party, ability of the impecunious party to recourse to another forum and the procedural status of the impecunious party. Unsatisfactorily, courts consider each of the circumstance alone rather than as a set of conditions, leaving more space for anti-arbitration decisions. Therefore, a more restricted approach encompassing evaluation of all relevant circumstances should be adopted.

Namely, after determining the impecunious state of a party, the effect of enforcing an arbitration agreement to the access to justice of an impecunious party should be analysed. An impecunious party may be relieved of its duty to arbitrate disputes or an arbitral award may be refused enforcement, only where denial to access justice is found. Such grave infringement should only be found under the full set of circumstances: (i) the impecunious party has attempted to arbitrate the dispute in good faith; (ii) the impecuniosity

[114] *Société Pirelli & C. v. Société Licensing Projects*, 28 March 2013 No. 11-27770; CARDOSO, Marcel C. E. Impecunious parties [...], p. 142.

[115] GOH, Teng J. G. An Arbitral Tribunal's Dilemma: [...], p. 503. An example of such situation would be where one party brings a claim that a contract has been terminated unlawfully and request damages. The other party could accordingly launch a claim to declare that the contract has been terminated lawfully and request restitution.

[116] *Société Pirelli & C. v. Société Licensing Projects*, 28 March 2013 No. 11-27770.

[117] CARDOSO, Marcel C. E. Impecunious parties [...], p. 142.

[118] *Ibid.*, p. 142.

[119] FABBRI, Mauricio P. Inapplicability of the Arbitration Agreement Due to the Impecuniosity of the Party. *Revista Brasileira de Arbitragem*, 2018, Nr. 15(57), p. 81.

of such party has been caused by the other party to the arbitration agreement and only after the conclusion of the arbitration agreement; (iii) the impecunious party has the means to recourse to another forum than arbitration; (iv) additionally for counterclaiming respondent, its claim is *prima facie* substantiated and materially inseparable to the claim of the claimant.