



ARBITRATION AND RIGHT OF ACCESS TO JUSTICE: TIPS FOR A SUCCESSFUL MARRIAGE

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INTRODUCTION

The right of access to justice guaranteed by article 6 of the European Convention of Human Rights (ECHR) and arbitration are predetermined to have a difficult relationship. The ECHR secures everyone the right to have their civil claims brought before a court or a tribunal¹ and financial obstacles should not impact this right.² On the contrary, arbitration is a form of private justice paid by the parties.³ Therefore, a lack of financial resources is likely to close access to the arbitrator. Nevertheless, their “marriage” was recently celebrated when, on 17 November 2011, the Paris Court of Appeal (Court) decided that “arbitral tribunals are not exempt from applying [the right of access to justice]”.⁴

The Court was invited by a party to uphold, based on article 6 of the ECHR, the right of access to justice. The Court was faced with the following issue: shall an arbitral award, in which arbitrators followed the ICC court’s decision to withdraw counterclaims of an impecunious defendant because of the non-payment of the advance on costs, be annulled for violation of right of access to justice?

The facts of the case arose in 2001, when the Italian company Pirelli and Spanish company Licensing Project (LP) entered into a license agreement allowing LP to produce and sell shoes under several Pirelli’s brands. In 2007, a dispute arose in relation to the use of one of the brands. LP suspended payments of royalties, and Pirelli subsequently terminated the agreement. Later in 2007, a Barcelona court declared LP insolvent and in 2009, opened liquidation proceedings against it.⁵

¹ Golder v. United Kingdom, Eur. Ct. H.R. (ser. A) at §36 (1975). The right of access to justice is not absolute, *id.* §38. However, restrictions must not be excessive. *See* Aerts v. Belgium, 1998-V Eur. Ct. H.R.; Gnähore v. France, 2000-IX. Eur. Ct. H.R., in Jean-François Renucci, *Introduction to the European Convention on Human Rights: The rights guaranteed and the protection mechanism* 69 (Council of Europe Publishing, 2005).

² Airey v. Ireland, Eur. Ct. H.R. (ser. A) (1979) [obligation for states to establish legal aid systems]; Garcia Manibarado v. Spain, 2000-II Eur. Ct. H.R.; Kreuz v. Poland, 2001-VI Eur. Ct. H.R. [violation of right of access to justice by excessive procedure costs]; Aït-Mouhoub v. France, 1998-VIII Eur. Ct. H.R. [violation of right of access to justice by excessive amount of security for costs], in Renucci, *supra* note 1.

³ Daniel Cohen, *Non-paiement de la provision d'arbitrage, droit d'accès à la justice et égalité des parties : avancée ou menace pour l'arbitrage ?*, 1 PARIS J. OF INT'L ARB. 159, II.A (2012).

⁴ Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 17, 2011, n° 09/24158 [“[T]he right of access to justice implies that a person cannot be deprived of the concrete faculty to have its claims decided by a judge; any restriction to the right of access to justice must be proportionate to requirements of the sound administration of justice; arbitral tribunals are not exempt from the application of these principles”]. The substance and limit of right of access to justice announced by the Court echoed directly the ECtHR’s case law.

⁵ The Court did not discuss the objective arbitrability. But it is worth noting that the arbitral tribunal decided in the partial award on jurisdiction rendered in September 2008 that the provision of the Spanish Bankruptcy Law

In 2007, Pirelli started arbitration under the International Chamber of Commerce Arbitration Rules (ICC Rules) in Paris in accordance with the arbitration clause in the agreement. Pirelli notably requested the acknowledgment of the regular termination of the agreement and the payment of outstanding royalties by LP. LP formed several counterclaims stating particularly that Pirelli should compensate it because Pirelli granted LP a license for a brand not in its possession and terminated the agreement unlawfully.

In 2009, Pirelli requested the ICC Court to fix separate advance on costs according to article 30.2 of the 1998 ICC Rules (article 36.3 of the 2012 ICC Rules).⁶ The ICC Court granted Pirelli's request despite LP's objection of lacking financial means. LP could not pay the advance on costs and as a result, the ICC court decided that the counterclaims were deemed to have been withdrawn pursuant to article 30.4 of the 1998 ICC Rules (article 36.6 of the 2012 ICC Rules).⁷ The ICC Court noted that in accordance with the ICC Rules, LP is not precluded to present its claims in future proceedings. In the final award rendered in Paris in October 2009, the arbitral tribunal admitted all of Pirelli's claims⁸ and did not consider LP's counterclaims.

LP initiated the proceedings to set aside the final award. It argued that the arbitral proceeding, in which the arbitral tribunal did not hear its counterclaim because of its failure to pay the advance of costs even if LP was materially unable to make such a payment, violated its right of access to justice and principle of equal treatment both guaranteed by article 6 of the ECHR. The Paris Court of Appeal annulled the award on these two grounds.

The "marriage" between right of access to justice and arbitration is to some extent forced because the right of access to justice triumphs over party autonomy to submit dispute to arbitration governed by a procedure agreed by the parties (I). Nevertheless, the Court's decision in this author's view does not provide an appropriate solution for cases when a party to

(22/2003, art. 51.2) under which the bankruptcy renders arbitral agreement inapplicable does not apply to international arbitration. The partial award has not been challenged.

⁶ Article 36.3 of the 2012 ICC Rules: "Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims."

⁷ Article 36.6 of the 2012 ICC Rules: "When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may (...) set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding."

⁸ The arbitral tribunal notably condemned LP to pay 2.992.000€ corresponding to unpaid royalties.

arbitration is impecunious. Therefore, the tips for a “successful marriage” between right of access to justice and arbitration are needed and some alternative solutions will be explored (II).

I. FORCED MARRIAGE: RIGHT OF ACCESS TO JUSTICE TRIUMPHS OVER PARTY AUTONOMY

The relationship between right of access to justice and arbitration is not one of equals. The “marriage” is forced because right of access to justice can in certain circumstances, such as a presence of an impecunious party, override the parties’ choice of arbitration as a forum and of the ICC Rules as a procedure.

In the present case, the Court gives effect to right of access to justice and principle of equal treatment of parties and annuls the award on the ground of article 1520 4° (violation of due process) et 5° (violation of international public policy) of the French Code of Civil Procedure (CPC).

First, the Court reaffirmed right of access to justice. Nobody shall be deprived of the ability to have its claims decided by a judge. Any restrictions to this right must be proportionate to requirements of sound administration of justice. When applying the rule to this case, the Court found that the decision to hold LP’s counterclaims as withdrawn constituted an excessive measure in circumstances of this case. LP was in liquidation and was unable to pay the advance on costs, which deprived LP of the possibility of having its claims decided by a judge. The Court highlighted that for a company in liquidation proceedings the ability allowed to it by the ICC Rules to introduce its counterclaims in another arbitral proceeding was purely theoretical.

The Court also reaffirmed the principle of equal treatment of parties. It would be violated when a defendant could only answer to the claims of an adverse party and would not be able to submit to the arbitral tribunal its counterclaims, sufficiently connected to principal claims, which could eventually result in defendant’s release by offsetting mutual debts.

By this decision, the Court emphasized the jurisdictional nature of the arbitration⁹ by stating that arbitral tribunals are not exempt from applying the right of access to justice. The

⁹ Cohen, *supra* note 3.

jurisdictional nature is reinforced to the detriment of its contractual nature in order to protect fundamental rights of a party faced with a lack of financial resources.¹⁰

The regress of the contractual nature of arbitration is characterized in this case by a non-application of one of the provisions of the ICC Rules by the Court. And yet, a party autonomy is recognized to play a large role in choice of procedural rules in international arbitration.¹¹ When parties agreed on particular rules to govern the arbitration, this choice has a contractual nature and obliges parties as well as arbitrations.¹² Therefore, the Court's decision was received with criticism.¹³ According to one author, the judge cannot pick in the contract only the provisions, which he approves, as he does here in the ICC Rules transformed in consequence into a sieve.¹⁴

To avoid any confusion, the Court did not declare void the ICC Rules' provision on advance on costs; it only refused to apply it after finding *in concreto* that its application leads to a disproportionate restriction of the right of access to justice.¹⁵ To avoid the annulment, the arbitral tribunal should have disregarded the parties' contractual choice of the ICC Rules in respect to the provision on advance on costs and assured the respect of the fundamental principles such as access to justice and principle of equal treatment of parties.¹⁶

It is worthwhile to consider the Court's statement that "arbitral tribunals are not exempt from applying [the right of access to justice]" in perspective with the older case, in which the

¹⁰ Maximin de Fontmichel, *La force obligatoire du règlement d'arbitrage à l'épreuve des principes fondamentaux du procès*, 142 PETITES AFFICHES 3, I. (2012).

¹¹ For example, article 1509 of French Code of Civil Procedure provides: "An arbitration agreement may define the procedure re to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules." Cohen, *supra* note 3.

¹² Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, ord. réf. [preliminary order], June 23, 1988, *République de Guinée* (3^e esp.), note Philippe Fouchard (Fr.), REV. ARB. 657 (1988); Cour d'appel [CA] [regional court of appeal] Paris, Sept. 15, 1998, *Sté Cubic*, note Pierre Lalive (Fr.), REV. ARB. 103 (1999) *in* Cohen, *supra* note 3.

¹³ Thomas Clay, RECUEIL DALLOZ 3023, E.2 (2011); Cohen, *supra* note 3.

¹⁴ Clay, *supra* note 10. For another recent case where the French court decides not to apply a specific provision of the ICC Rules see Cour d'appel [CA] [regional court of appeal] Reims, Nov. 2, 2011, *Sté Tecnimont*, and the commentary by the same author about "beaded" application of the arbitration rules. Thomas Clay, *L'application perlée du règlement d'arbitrage pour la contestation des liens non révélés entre arbitre et conseil*, 4 PARIS J. OF INT'L ARB. 1109 (2011).

¹⁵ It is worth noting that the Court's methodology of analyzing the breach of right of access to justice seems identical to one followed by the ECtHR. Xavier Boucobza & Yves-Marie Serinet, *Les principes du procès équitable dans l'arbitrage international*, 1 JDI 41, §20 (2012).

¹⁶ Assuring the respect of fundamental principles of fair trial shall compel the arbitrator to disregard parties' intent. Fontmichel, *supra* note 10. See Charles Jarrosson, *Qui tient les rênes de l'arbitrage? Volonté des parties et autorité de l'arbitre*, REV. ARB. 601 (1999), *in* Fontmichel, *supra* note 10, at note 44.

French Supreme Court decided that article 6 of the ECHR applies only to states and state courts and is not applicable to arbitration.¹⁷

In light of the *Cubic* case, the right of access to justice is considered to be only an indirect constraint for arbitrators.¹⁸ Arbitrators apply article 6 of the ECHR in order to render an enforceable award because a French state court, which has a direct obligation to apply article 6 of the ECHR, would not uphold an award violating article 6 of the ECHR in annulment or enforcement proceedings. The present decision puts an additional pressure on arbitrators to comply with the right of access to justice in order to see their awards enforced in France.

It is also worth noting that new French arbitration law (CPC. art. 1522) as well as for example Swiss arbitration law (PILA art. 192), allow an express waiver of annulment proceeding, which could avoid the scrutiny of award in regard to requirements of article 6 of the ECHR. However, the compatibility of such waiver with article 6 of the ECHR has been recently questioned.¹⁹

Another consideration worth mentioning is the possible impact of this decision on the enforcement of foreign awards in France. The right of access to justice is considered by the present decision as a part of the French international public policy. As a result, a foreign award in which an arbitral tribunal did not comply with the right to access to justice formulated by the Court could presumably have its enforcement refused in France. In a comparative perspective, the Portuguese Supreme Court of Justice seemed to adopt this approach.²⁰

¹⁷ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 1e ch., Feb. 20, 2001, *Cubic Defense Systems v. ICC*, Bull. civ. 2001, I, n° 39.

¹⁸ Christophe Seraglini, *case note on Cass., 1e ch. civ., Feb. 20, 2001*, REV. CRIT. DIP 124, at §6 (2002); Alexis Mourre, *Le droit français de l'arbitrage international face à la Convention européenne des droits de l'homme*, GAZ. PAL. (special issue Cah. de l'arbitrage), at §6 (2000); *contra* Sébastien Besson, *Arbitration and Human Rights*, 24 ASA BULLETIN (issue 3) 39, at 406 (2006) [article 6 of the ECHR is directly applicable before arbitrators].

¹⁹ Nora Krausz, *Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6*, 28 J. INT'L ARB. 137, at 156-162 (2011).

²⁰ Supremo Tribunal de Justiça [Supreme Court of Justice], 1647/02, Nov. 9, 2003, *in* Albert Jan van den Berg, XXXII Y.B. Comm'l Arb. 474 (2007). In this case, an international commercial agreement contained an arbitration clause designating the Netherlands as the seat of arbitration. Although defendants argued in the arbitral proceedings a lack of financial means their counterclaim was annulled failure to pay a deposit on costs. An award was rendered in favor of a Dutch claimant. The claimant moved to seek enforcement of the award in Portugal. The defendants argued that the enforcement should be refused for the violation of public policy. The Court nevertheless enforced the award. The Court stated: "When the appellants agreed with [the Dutch company] to submit to an arbitral tribunal in the Netherlands, they were aware that arbitral tribunals imply charges and expenses, and they should have provided for [such costs]. They failed to do so. *Sibi imputat!*" *Id.*, at 479. However, the Court interestingly added: "We could say that it is one thing to provide for such eventuality when signing the agreement (and consequently leaving the protective umbrella of the state courts by accepting the future intervention of a foreign arbitral tribunal applying a foreign law); it is something else to subsequently find

Even if in this case, the relationship between the right of access to justice and arbitration seems to be a “forced marriage,” it is important to note that in other circumstances it can well be seen as a “marriage of convenience.” The right of access to justice helped the constitution of arbitral tribunals²¹ as well as the enforcement of an arbitral award.²²

II. TIPS FOR A SUCCESSFUL MARRIAGE: HOW TO ARTICULATE RIGHT OF ACCESS TO JUSTICE AND ARBITRATION IN PRESENCE OF AN IMPECUNIOUS PARTY?

In the Court’s opinion, the ICC Court should have refused to apply the disputed provision of the ICC Rules and the arbitral tribunal should have heard LP’s counterclaims.²³ When they did not, the award was annulled for a violation of the right of access to justice and principle of equal treatment of parties.

The solution of the Court could be perceived as a balanced and optimal solution between two other alternatives: either give full effect to the parties’ autonomy by applying all the

oneself without fault in a situation of economic insufficiency that makes access to justice totally impossible where the obligation to submit to the arbitral tribunal still exists. However, in this latter case [the debtor] should allege the facts proving in a conclusive manner that the obligation is extinguished because performance hereunder has become impossible through no fault of its own (...). This allegation was not made here.” *Id.* Therefore, the Portuguese Supreme Court seems to admit that in the circumstances, such as in the commented case where LP proved that the arbitration rendered its access to justice impossible, an award in which an arbitral tribunal would have refused to hear the counterclaim would be refused enforcement in Portugal under the public policy exception of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for the violation of the right of access to justice.

²¹ Cour de cassation [Cass.] [supreme court for judicial matters] civ. 1e ch., Feb. 1, 2005, Bull. civ. 2005, I, n° 53. In this case opposing Iranian state petrol company to the state of Israel the right of access to justice served as basis for jurisdiction of the French judge acting in support of the constitution of the arbitral tribunal. The right of access to justice prevented the denial of justice and gave efficiency to the parties’ intent to submit their dispute to arbitration. Boucobza & Serinet, *supra* note 15, at §31. In another case, a claimant started arbitration against UNESCO based on an arbitral agreement in their contract. The claimant appointed his arbitrator but UNESCO refused to do so. The claimant requested a French state court to appoint an arbitrator on behalf of UNESCO. The UNESCO raised a judicial immunity defense. The trial court gave effect to the arbitral agreement notwithstanding the judicial immunity. The UNESCO appointed its arbitrator but it also appealed the lower judge’s decision. The Paris Court of Appeal rejected the appeal by stating that the judicial immunity if sustained would deprive the claimant of the opportunity to submit its case to a tribunal, which would be contrary to the public policy by constituting a denial of justice and a violation of article 6 of the ECHR. Cour d’appel [CA] [regional court of appeal] Paris, June 19, 1998, *UNESCO v. Boulois*, REV. ARB. 343 (1999); for a commentary on this decision see Charles Jarrosson, *Note - Cour d’appel de Paris (14 e Ch. A) 19 juin 1998 - Unesco v. Boulois*, REV. ARB. 345 (1999).

²² *Regent company c/ Ukraine*, Eur. Ct. H.R., April 3, 2008, n° 773/03 [Ukraine violated article 6 of the ECHR and engaged its responsibility by refusing to enforce an arbitral award]. The right of access to justice guaranteed in this case an effective enforcement of arbitral award. Jean-Baptiste Racine, *Note - April 3, 2008, Eur. Ct. H.R. (5th Section)*, REV. D’ARB. 802, 807 (2009).

²³ Boucobza & Serinet, *supra* note 15, at §27.

provisions of the ICC Rules, which would lead to the denial of justice for LP, or refuse completely to give effect to party's autonomy, declare the arbitration agreement inapplicable, and allow LP accessing to state courts.²⁴

In this author's view, the Court's solution is not satisfactory, first, given the nature of the arbitration as a private justice paid by the parties. The result of the Court's decision would turn arbitration centers "into philanthropic institutions and arbitrators into workers animated by the ideal of gratuity."²⁵

Secondly, leaving the control until the annulment stage is also not satisfactory because the annulment of the award - as in this case - results in two years of arbitral proceedings for nothing, another two years of state proceedings for annulment and resources wasted.²⁶ In addition, Pirelli did not receive justice as well as LP, which was not able to present its counterclaims. These considerations invite a search for more satisfactory solutions in situations when a party to arbitration is impecunious.²⁷

It has been suggested that arbitration centers could create funds providing aid to impecunious parties to arbitration.²⁸ This proposal would avoid recourse to state courts and at the same time guarantee right of access to justice.²⁹ However, it would necessarily lead to an increase of arbitration costs. Institutional costs would encompass a premium financing this mutual fund. Solidarity hardly goes together with the nature of arbitration as a private justice paid by the parties. It also conflicts with a current pressure to reduce costs of arbitration. Furthermore, this solution does not provide any help in cases of *ad hoc* arbitrations.

The other general solution, which would guarantee access to justice in presence of impecunious to respondents as well as claimants, would consist of allowing parties to turn to state courts.³⁰ Having France as an example, it is useful to distinguish two types of situations:

²⁴ Fontmichel, *supra* note 10; Boucobza & Serinet, *supra* note 15.

²⁵ Cohen, *supra* note 3 [translation from French provided by the author].

²⁶ The Court's decision states that in the final award the LP was condemned to pay 288.750\$ for arbitration fees and 100.835,22€ for Pirelli's legal costs. In the annulment proceedings Pirelli asked another 50.000€ for its legal costs.

²⁷ In the context of the present case this article focuses on situations involving business-to-business relationships as opposed to situations where one party is for example a consumer or an employee.

²⁸ Fontmichel, *supra* note 10.

²⁹ *Id.*

³⁰ Turning to state courts will not be necessary in exceptional cases when an impecunious party finds a third party to fund costs. Third party funding may establish a balance between the right to arbitrate and the right of access to justice for impecunious parties. Caroline Duclercq, *Third Party Funding: vers un arbitrage pour tous?*, LE CERCLE LES ECHOS, Jan. 9, 2013, <http://lecercle.lesechos.fr/entreprises-marches/services/autres/221162629/third-party-funding-vers-arbitrage>. However, third party funding will be available in

when a French judge does not have personal jurisdiction over the dispute to decide it on merits and when he does.

The first situation will concern in general arbitrations having seat in France and involving foreign parties, such as the present case. An impecunious respondent, such as LP, could address, when a problem arises, a state judge (in France, it would be *juge d'appui*), who could hold certain provisions of the arbitral agreement or of the applicable rules not applicable for contravening procedural public policy.³¹ This would avoid addressing the issue *a posteriori* at the annulment stage and save parties' resources. However, it would create parallel litigation delaying arbitral proceeding, increase costs and not resolve itself the issue of who would pay arbitrators hearing the counterclaims of an impecunious respondent.

We could accept this solution notwithstanding the inconveniences, or accept the control *a posteriori* at the annulment proceeding, which has also its disadvantages as it was mentioned earlier. In both situations, we have deal with the question who will pay arbitration costs on behalf of an impecunious respondent.

One suggestion how to deal with the arbitration costs is to allow the arbitral tribunal hearing the counterclaims of an impecunious party to address the issue of arbitration costs only at enforcement stage.³² The problem with this solution is that arbitrators would still not be paid during proceedings and that the recovery of administrative and arbitrators' fees against an impecunious party is highly uncertain. It seems that the perfect solution simply does not exist.

The central question is who should bear the risk of paying arbitration costs on behalf of an impecunious respondent. It could be a claimant, who would pay on behalf of a respondent, hoping to recover the costs when the award is enforced. It could be the ICC and arbitrators, which would also hope to recover the arbitration costs on the enforcement stage or it could be only the ICC by setting up a special insurance for cases involving an impecunious party.³³ Finally, it could be all ICC users by paying a premium, which would be used to create a mutual fund, a kind of private legal aid.

If neither of the solutions in regard to who should pay arbitration costs on behalf of an impecunious respondent were accepted, the alternative would seem to be to provide a claimant

only a minority of cases because of the high criteria for case selection. Therefore, it cannot represent a generalized solution to the issue of the access to justice in presence of impecunious parties to arbitration.

³¹ Fontmichel, *supra* note 10.

³² Boucobza & Serinet, *supra* note 15, at §40.

³³ However, it is highly possible that the price of insurance would be reflected in ICC administration fees and *de facto* paid by all users.

with an option to start the litigation against an impecunious respondent directly in a state court of competent jurisdiction over the dispute.³⁴

For an impecunious claimant, the situation is different. He could try to apply to a state court having jurisdiction over the dispute requesting to declare the arbitral agreement incapable of being performed and let the claim proceed in that state court.³⁵ He could also ask a French judge to declare the arbitral agreement manifestly inapplicable (CPC art. 1448)³⁶ and try to enforce that judgment in his home country in order to start court proceedings despite of the existence of an arbitral agreement.

The second situation concerns cases when a French judge would have jurisdiction over the merits of the dispute. This would often concern arbitrations having the seat in France or abroad involving a French party.³⁷

In this situation, in the presence of an impecunious respondent, a claimant could have an option to start the litigation directly in French court.³⁸ A claimant would be sure to receive a judgment,³⁹ and right of access to justice of an impecunious respondent would be protected.⁴⁰ It would avoid starting arbitral proceedings, which would lead to a deadlock when an impecunious party would assert counterclaims. In that situation, an arbitral tribunal would either need to hear

³⁴ This solution is discussed in more details further in the article.

³⁵ This possibility was approved by a German court, *supra* note 45, but rejected for example by a Court of Appeal of England and Wales. *Supra* note 46.

³⁶ See the recent decision of the Paris Commercial Court. *Supra* note 43.

³⁷ Outside of the cases when a French party is a defendant, French courts would also have jurisdiction for example in cases involving a French party and another party not having domicile in the European Union (EU) when France is the place of delivery in a contract for sale of goods or the place of performance in a contract for services. Article 46 of French Code of Civil Procedure; see Hélène Gaudement-Tallon, *Compétence internationale*, RÉP. PR. CIV. DALLOZ n°29 (2007). The jurisdiction of the French courts when a French party is involved is particularly broad thanks to the exorbitant jurisdiction conferred by article 14 and 15 of the French Civil Code; see Gaudement-Tallon, *id.*, at n°108-152. A French claimant can for example sue in France a defendant who does not have domicile in France. Art. 14 of the French Civil Code. The situation when a French party and a party having domicile in the EU are involved is governed by the Council Regulation (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). Outside of the cases when a French party is a defendant, French courts would have jurisdiction for example when under a contract for sale of goods the goods are delivered in France or under a contract for services the services are provided in France. Article 5.1b) of the Brussels I Regulation.

³⁸ Carine Dupeyron & Flore Poloni, *Procédure de liquidation d'une partie, arbitrage et droit d'accès à la justice : l'impossible équation?*, 30 ASA BULLETIN (issue 2) 467, 477 (2012).

³⁹ The neutrality is often seen as an important feature why parties seek to arbitrate. If a claimant from country x will sue a French company in France instead of conducting arbitration in a third country, the neutrality, which the claimant sought, is lost. However, having a valid judgment in France could be often more advantageous for the claimant than having an award, which could be possibly not enforceable in France because of the violation of the right of access to justice.

⁴⁰ Dupeyron & Poloni, *supra* note 38, at 477.

them for free⁴¹ or risk the annulment of the award because the right of access to justice was violated. Presumably, in many cases an impecunious respondent would not agree on judicial jurisdiction.

What would happen if a respondent would assert arbitral jurisdiction?⁴² The respondent would have the burden of proof to demonstrate that it has sufficient means to carry on the arbitration. In appropriate circumstances, a judge could ask for a security for costs, which would be, if necessary, used to pay the subsequent arbitral proceedings. This would avoid the scenario in which a bad faith respondent wants to bring claimant into arbitral proceedings where he will need to bear all the costs or the validity of an award will be endangered for the violation of the right of access to justice.

As stated above, starting the proceedings in a state court should be an option for a claimant, but he would still keep his right to start arbitration. In that case, he should bear the risk that in accordance with the Court's holding. If he does not pay the advance on costs also for the impecunious defendant's counterclaims, there will be a risk that the award could be annulled.

If a claimant is impecunious, he should bear a heavy burden of proof to convince a state court that his financial conditions do not allow him to start arbitration.⁴³ The threshold for not giving effect to the arbitral agreement should remain high.⁴⁴

⁴¹ The situation would be different if claimant would decide to pay advance on costs on behalf of respondent, which he is expressly allowed to do by article 35.5 of the 2012 ICC Rules. But the most of the time the claimant has no interest to do so, because the recovery of its own claim against an impecunious party is already uncertain. Dupeyron & Poloni, *supra* note 38, at 476. In comparative perspective, it is worth noting that under the 1998 LCIA Rules the LCIA court may order a party to pay deposits in place of another party failing to do so in order to make arbitration proceed. Article 24.3 1998 LCIA Rules: "In the event that a party fails or refuses to provide any deposit as directed by the LCIA Court, the LCIA Court may direct the other party or parties to effect a substitute payment to allow the arbitration to proceed (subject to any award on costs). In such circumstances, the party paying the substitute payment shall be entitled to recover that amount as a debt immediately due from the defaulting party."

⁴² Dupeyron & Poloni, *supra* note 38, at 477. A bad faith respondent could try to make a claimant bear either the costs of arbitral proceedings, or the risk of annulment of the award. *Id.*

⁴³ The French trial judge has recently decided to disregard an arbitral agreement because of the violation of the right of access to justice in a case when after a unilateral termination of franchise agreement a French company was unable to pay advance on costs necessary in order to enlist its claim against a Danish company at the Danish Institute of Arbitration. The judge took into the considerations the French company's benefits in past four years (on average 13 000€/year) undisputed by the other party, the fact that it had no economic activity since the termination of the agreement in 2011 and the amount of advance on costs (between 20 000 to 80 000€ according to the parties). He concluded that commencing the arbitration was materially impossible for the French company. Tribunal de commerce [trial court for commercial matters] Paris, May 17, 2011, R.G. 2011003447, *unreported*. Whether this approach will be followed by French higher courts is to be seen.

⁴⁴ "If the claimant's evidence as to his lack of means is inadequate, then no doubt the court will be quick to draw the inference that he is simply trying to avoid the arbitral process." Imran Benson, *In search of justice*, 162 N.L.J. (7519) 839 (2012). It was noted in the context of the English legal system, that the "courts are well able to determine the financial means of a person, it is the sort of decision which judges reach every day in security for

The solution consisting in letting an impecunious claimant to start litigation directly in a state court notwithstanding an arbitral agreement was approved in 2000 by a German Federal Court of Justice⁴⁵ and disapproved in 1980 by the Court of Appeal of England and Wales.⁴⁶ However, the decision of the Court of Appeal could come differently today notably because of the promulgation of the Human Rights Act in 1998.⁴⁷

The current state of law makes a court from a state-party to the ECHR face a dilemma, either to deny justice to an impecunious claimant and violate in consequence the ECHR, or to disregard an arbitral agreement.⁴⁸ The right of access to justice should prevail over the party autonomy.⁴⁹

costs applications”. *Id.* It is also worth noting that if a plaintiff fails to convince a judge about his material impossibility to afford arbitral proceeding, a judge in France (as in many other jurisdictions such the United Kingdom) has the discretion to make him bear the legal costs of the defendant, which helps to discourage abusive proceedings. Article 700 of the French Code of Civil Procedure.

⁴⁵ The Federal Court of Justice declared an arbitration agreement incapable of being performed because the claimant was not able to afford the arbitration costs. The claimant had the only chance to introduce his claim before a state court, thanks to the legal aid for which he had qualified. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 14, 2000 (CLOUT Case 404 - Art. 8(1) MAL), *in* Albert Jan van den Berg, XXVII Y.B. Comm'l Arb. 265 (2002).

⁴⁶ *Haendler & Natermann GmbH v. Mr. Janos Paczy*, Court of Appeal, Dec. 3, 1980, *in* Pieter Sanders, IX Y.B. Comm'l Arb. 447 (1984) [“(…) I am prepared to assume in the plaintiff's favour that he is incapable of finding the deposit [to cover costs of arbitration under the ICC Rules], although I am bound to say that I am not at all satisfied that the evidence establishes that in at all an absolute sense. The agreement only becomes incapable of performance in my view if the circumstances are such that it could no longer be performed, even if both parties were ready, able and willing to perform it. Impecuniosity is not, I think, a circumstance of that kind. (...) In my judgment the plaintiff cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement. (...)”]; *see* *El Nasharty v J Sainsbury* [2007] EWHC 2618 (Comm), [2007] All ER (D) 200 (Nov) [Tomlinson, J.: “inability of one party to meet his financial obligations under the ICC or comparable rules or procedures does not render the arbitration agreement inoperative or incapable of being performed—see *Janos Paczy v Haendler and Natermann*”], *in* Benson, *supra* note 44.

⁴⁷ According to article 3(1) of the Human Rights Act 1998: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” This section requires the court to reconcile the right of access to justice embodied in article 6 of the ECHR with section 9 of the 1996 Arbitration Act: (1) A party to an arbitration agreement against whom legal proceedings are brought (...) may (...) apply to the court in which the proceedings have been brought to stay the proceedings (...). (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. Benson, *supra* note 44, at 839. As a result, “courts should revisit the decision in *Paczy* and should interpret ‘incapable of being performed’ as the first instance judge did then, namely: that if a person’s proven pecuniary position means they cannot meet the costs of an arbitration then the arbitration agreement is indeed incapable of being performed.” *Id.*

⁴⁸ Alexis Mourre, *Réflexion sur quelques aspects du droit à un procès équitable en matière d'arbitrage après les arrêts du 6 novembre 1998 et 20 février 2001 de la Cour de cassation française in* L'ARBITRAGE ET LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 2072 (Bruylant, 2001) *in* Yas Banifatemi, *Le 'droit au juge' et l'arbitrage commercial international in* LIBERTÉS, JUSTICE, TOLÉRANCE. MÉLANGES EN L'HONNEUR DU DOYEN G. COHEN-JONATHAN 177 (2004).

⁴⁹ Tribunal de commerce de Paris, *supra* note 43; Banifatemi, *supra* note 48, at 177-178. The author emphasizes that an arbitral agreement should be disregarded only in the cases when a claimant is at the situation of a real impossibility to pay the advance on costs. *Id.* As an example, the author argues that an arbitral agreement should

CONCLUSION

In consequence of the present decision, the ICC could amend its rules as it did after *Dutco* case.⁵⁰ Overall, the creation of a mutual fund to provide aid for impecunious parties provides the only solution assuring the right of access to justice in situations of impecunious respondent as well as claimant. If the ICC would like to react only to the present decision, it could simply let arbitral tribunals to hear counterclaims of an impecunious party and leave the arbitration costs to be decided in the award and possibly recovered at the enforcement stage.⁵¹ But the ICC will surely wait with any amendment until the final decision of the French Supreme Court on the matter.⁵²

The French Supreme Court could vacate the present decision and give full effect to parties' autonomy. However, considering that the ECHR is directly applicable to French courts, a court refusing to give effect to rights guaranteed by the ECHR would engage the state responsibility before the European Court of Human Rights.⁵³

The French Supreme Court could also confirm the Court's decision, which could eventually bring changes to the ICC Rules and practice as well as a possible future evolution towards a greater intervention of a French judge in cases involving an impecunious party to arbitration. Particularly, French case law on manifest inapplicability of arbitral clauses could be extended to situations involving an impecunious party to arbitration. The confirmation of the decision could also lead to the refusal of the enforcement in France of foreign awards violating the right of access to justice in presence of an impecunious party.

not be disregarded when parties would agree that an arbitral tribunal would decide the matter of costs in its award. *Id.* This situation seems rather theoretical because an arbitral tribunal usually requires some advance on costs. Under the institutional rules of arbitration (*see e.g.* art. 36 of the 2012 ICC Rules) a claimant has to usually pay an advance on costs in order that the arbitral institution constitutes the arbitral tribunal. In an *ad hoc* arbitration under the UNCITRAL Arbitration Rules (2010) the arbitral tribunal may also request a deposit on costs pursuant to article 43.

⁵⁰ The ICC amended its arbitration rules to comply with the case *Dutco*, in which a French Supreme Court required the equal treatment of parties in choice of arbitrators in multi-party arbitrations. Cour de cassation [Cass.] [supreme court for judicial matters] civ. 1e ch., Jan. 7, 1992, n°89-18708, Bull. civ. I n°2. In the present case, the ICC could include rules how to deal with arbitrations involving an impecunious party.

⁵¹ In some cases, an impecunious respondent can prevail and arbitration costs will be paid by a claimant, which will remove any uncertainty of recovering costs from an impecunious party at the enforcement stage.

⁵² The appeal (*pourvoi en cassation*) against the commented decision was introduced on 8 December 2011. Dupeyron & Poloni, *supra* note 38, at note 27.

⁵³ R c/ Suisse, App. No. 10881/84, 51 Eur. Comm'n H.R. at 83 (1987); Seraglini, *supra* note 18, at §9; Mourre, *supra* note 18, at §5.

There exist worries that if the Court's decision was confirmed, it could negatively impact the choice of Paris as an arbitral seat in international arbitrations.⁵⁴ In this author's view, such worries are overstated, notably because the cases involving an impecunious party to arbitration in business-to-business relations, such the present case, are rare.⁵⁵

This author fully supports a strong pro-arbitration policy in a great majority of the cases. However, in a case such as the present one, arbitration as well as state courts from the member states to the ECHR cannot disregard the fundamental rights such as the right of access to justice enshrined in the ECHR. The Court's decision confirmed this view. Nevertheless, the appeal to the French Supreme Court is to be highly followed.

⁵⁴ Cohen, *supra* note 3, at II.B.

⁵⁵ It should be also taken into account that other traditional arbitral seats in Europe such as London, Geneva or Stockholm are all situated also in states parties to the ECHR. Therefore, if a case similar to the present one occurs in these countries, the solution in the light of the requirements of article 6 of the ECHR should be similar.