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## Impecuniosity And Denial Of Justice: Walking On Eggshells

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The issues of impecuniosity and access to justice arise cyclically in different jurisdictions and under different forms. Recently, the debate has been raised again in France.

On 24 May 2016, the Paris Court of Appeal quashed a decision of the French *juge d'appui* (judge acting in support of the arbitration) enjoining the ICC to reintroduce claims that had been withdrawn by the ICC following the parties' failure to pay the advance on costs (*ICC v. S.A.R.L. Projet Pilote Garoubé*, Paris Court of Appeal, 24 May 2016, no. 15/23553, available [here](#)).

At the outset, the dispute arose between Garoubé and the State of Cameroon out of the termination of a concession contract for the exploitation of a protected territory in the North of Cameroon. Garoubé filed a request for arbitration with the ICC and the parties agreed to fix the place of arbitration in Paris (France).

During the course of the arbitration proceedings, both parties failed to pay the global amount of the advance on costs fixed by the ICC Court. The ICC thus fixed separate advances on costs, pursuant to the ICC Rules. Article 30.4 of the 1998 ICC Rules provides:

“When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn.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 or counterclaims at a later date in another proceeding.”

Therefore, in compliance with this provision, failing the corresponding payment by the parties, the ICC informed the parties of the withdrawal of their respective claims. As a result, the case was entirely withdrawn.

On 12 June 2015, Garoubé started proceedings against the ICC before the President of the Tribunal de grande instance of Paris, acting as *juge d'appui* against the decision of the ICC to withdraw the parties' claims. The State of Cameroon was not a party in these proceedings.

On 16 November 2015, the President of the *Tribunal de grande instance* of Paris, acting as *juge d'appui*, stated that, although it was not its role to interfere in the activity of the arbitral tribunal or the arbitral institution, it nonetheless had jurisdiction if there was a risk of denial of justice. On this basis, the *juge d'appui* held that it was “manifest” that Garoubé was facing financial difficulties. Therefore, the judge concluded that, taking into account the circumstances of the case and the financial situation of Garoubé, the decision of the ICC to withdraw the parties’ claims represented an obstacle to Garoubé’s access to justice.

The ICC was thus ordered by the *juge d'appui* to (i) reinstate the claims of Garoubé, (ii) lift the suspension over the arbitral tribunal’s activities, and (iii) invite the arbitral tribunal to issue a partial award on liability.

This decision arrived as a bombshell in the French arbitration landscape. The surprise was due to a number of puzzling elements: the wide interpretation by the French judge of its intervention in case of denial of justice, the uncertain assessment of the impecuniosity (the decision only says that it was “manifest” without referring to any criteria on which to rely on) and the unprecedented injunction made to an arbitral institution.

In December 2015, the ICC filed an appeal for abuse of power, which is the only possible recourse available in French procedural law against an order of the *juge d'appui*.

Before the Paris Court of Appeal, the ICC thus argued that the *juge d'appui* had exceeded its powers and requested the annulment of the order of 16 November 2015. In particular, the ICC alleged that the *juge d'appui* only has the power to rule over the constitution of the arbitral tribunal and the extension of the time limit to issue the award in cases in which the arbitration is not submitted to a specific arbitral institution. The ICC then went on arguing that the *juge d'appui*, in any event, committed a breach of due process by failing to hear the State of Cameroon and the members of the arbitral tribunal.

On the other side, Garoubé argued that the appeal for nullity filed by the ICC was inadmissible and the abuse of power by the *juge d'appui* was not established because the judge had (i) not interfered in the arbitration proceedings nor in the application of the ICC Rules by the institution, and (ii) simply ordered the ICC to take necessary actions to prevent a denial of justice.

The Court of Appeal ultimately quashed the decision of the *juge d'appui* and decided that the assessment of the ICC advance on costs mechanism does not fall under the jurisdiction of the *juge d'appui*. The Court of Appeal’s decision is based on the following grounds:

- abuse of power, as the *juge d'appui* only has jurisdiction to rule over the constitution of the arbitral tribunals and the extension of the time limit to render arbitral awards; and
- breach of due process, as the *juge d'appui* examined both parties’ claims without hearing the other party to the arbitration proceedings.

Therefore, the parties seeking to overturn a decision taken by an arbitral institution must file a request before the ordinary judge having jurisdiction over the contract between the parties and the arbitral institution and not before the *juge d'appui*.

The Court of Appeal’s decision interestingly sheds light on the limits of the powers granted to the French *juge d'appui* in case of denial of justice. In other words, the provisions on denial of justice

are not a blank cheque to the French *juge d'appui*. Rather, pursuant to the Court of Appeal, they are limited to the constitution of the arbitral tribunal. This decision thus confirms that the intervention of the judge acting in support of the arbitration is subsidiary and cannot be substituted to the arbitration institution when it comes to the administration of the proceedings (see also in this respect the order of the *Tribunal de grande instance* of Paris of 23 June 1988).

However, by quashing the *juge d'appui*'s order on purely procedural and jurisdictional grounds, the Paris Court of Appeal avoided the perilous issue of impecuniosity. As a result, if Garoubé's claims were taken before the proper judge, the ICC could still potentially be enjoined to reintroduce claims already withdrawn. Although it seems likely that the judge having jurisdiction over the contract between the parties and the arbitral institution will decide that the provisions of the ICC Rules – and in particular the decision on withdrawal of claims – shall apply, the issue of the denial of justice remains wide open.

The Paris Court of Appeal decision is in line with French case law as far as the non-interventionist approach is concerned. In the *Lola Fleurs* decision, for instance, the French judge has strictly applied the *competence-competence* principle even where one of the parties was impecunious and considered that the impecuniosity of a party does not per se prevent the arbitration agreement to apply (Paris Court of Appeal, 26 February 2013, no. 12/12953).

However, when it comes to access to justice, the position of the French courts is less clear. At the stage of set-aside proceedings, in the *Pirelli* decision, the French Supreme Court held that the refusal of the arbitral tribunal to consider the counterclaims of a party that failed to pay the advance on costs may infringe the right of access to a judge and the principle of fair and equal treatment of the parties (*Pirelli*, Cour de cassation, 1e civ., 28 March 2013, no. 11-27.770).

Contrary to the *Pirelli* decision, in the *Garoubé* case, both claimant and counterclaimant failed to pay the advance on costs fixed by the ICC. A decision to withdraw both parties' claims and counterclaims due to such failure is obviously less prejudicial and is less likely to amount to a breach of due process.

Having said that, should Garoubé decide to bring the matter before the ordinary French judge, it remains to be seen how it will examine the impecuniosity issue. It will have to balance on the one hand the performance of the contract between the ICC and the parties and on the other hand the effectiveness of the access to justice.

All in all, this matter should be watched closely as the fate of impecunious parties in arbitration proceedings seated in France may also have an impact elsewhere.

\* *CASTALDIPARTNERS*, the views expressed are those of the authors alone.

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