

INSOLVENT RESPONDENTS AND SEPARABILITY OF COUNTERCLAIMS IN INSTITUTIONAL
ARBITRATIONS: A CAM CASE MANAGER PERSPECTIVE.

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Abstract

Payment of funds in arbitration proceedings has always been a topic of debate. One of the advantages of opting for administered arbitration is the guarantee of having an institution which manages the financial aspects of the proceedings. Institutions usually request the parties to submit advance payments in order to ensure that the professionals involved are adequately remunerated.

The aim of this article is to analyse the problems which may arise from the lack of payment of such advance on costs requests, especially when there is partial insolvency and the insolvent respondent has filed a counterclaim.

When this situation occurs, many institutions, including the Chamber of Arbitration of Milan provide that the values of the parties' claims may be separated, but the decision on separability sometimes is very sensitive, as it may have very significant implications on the whole proceedings.

I. Introduction

As is generally known, the system of costs in arbitration is different from that of courts. While in courts the remuneration of judges, judicial clerks etc. is provided for by the State, arbitration is a private proceeding which entails private funding by the parties.

The professionals involved in arbitral proceedings are the parties' counsel, arbitrators, arbitration secretaries, and in the case of an administered arbitration, the arbitration institution. The issues related to parties' counsel costs do not affect the prosecution of the proceedings at any stage, since they are privately and separately managed by an agreement between the party and its counsel. On the other hand, several problems arise with regard to payments of arbitrators and the arbitration institution. Indeed such costs, before an award is delivered, have to be borne by all the parties involved in the proceedings. As the following sections of this article will examine in depth, such a joint financial obligation can create a very uncertain and precarious equilibrium since the parties' interests are often diametrically opposed.

In order to allow arbitrators and arbitration institutions to carry out their duties with adequate economic coverage, it is a universally accepted practice to request the parties to provide advance payments on the costs of arbitration, as a necessary condition for the proceedings. While in a majority of cases, such costs are duly and promptly paid by the parties, there are also quite a few cases in which all the parties, or at least one party, (usually the respondent) does not provide the requested payment. Such obstructive behaviour can seriously jeopardise the existence and continuation of the proceedings.

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II. Regulatory framework

A. Arbitration laws and acts

The aforementioned praxis of advance payments has been followed both in ad hoc and administered proceedings, and has been crystallised in many arbitration rules and laws.

In Italy, Article 816 septies of the Code of Civil Procedure states that the arbitrators can ask for an advanced payment for the “foreseeable” expenses of the proceedings, and subordinate the prosecution of the proceedings to such payment. If neither party submits the requested payment within the time-limit set out by the arbitral tribunal, the parties are no longer bound by the arbitration clause with reference to that dispute and consequently, the arbitration can be closed.¹

Furthermore, Article 2234 of the Italian Civil Code, in the chapter regulating intellectual professions, provides that clients, unless differently agreed, have the duty to pay in advance the expenses for the tasks to be fulfilled by the professionals and to submit advance payments of the fees according to commercial praxis. Arbitrators are, without a doubt, included in the above mentioned category.²

The issue of advance payments of arbitrators and arbitral institutions has also been regulated in other countries. In Spain, for example, Article 21.2 of the Arbitration Law provides that, unless differently agreed, both the arbitrators and the arbitration institutions are entitled to request advanced payments on the costs of arbitration, including arbitrators’ fees and institution fees. In case of default in payment, the arbitrators shall suspend and close the proceedings.³ However, on the other hand, the procedural and arbitration rules of several other countries do not tackle this issue.⁴

¹ The article words as follow: “*Anticipazione delle spese. Gli arbitri possono subordinare la prosecuzione del procedimento al versamento anticipato delle spese prevedibili. Salvo diverso accordo delle parti, gli arbitri determinano la misura dell’anticipazione a carico di ciascuna parte.*”

Se una delle parti non presta l’anticipazione richiestale, l’altra può anticipare la totalità delle spese. Se le parti non provvedono all’anticipazione nel termine fissato dagli arbitri, non sono più vincolate alla convenzione di arbitrato con riguardo alla controversia che ha dato origine al procedimento arbitrale”.

Whether this rule is limited to the expenses or has to be interpreted in a broader way in order to include arbitrators’ fees, is a matter of academic debate. The majority of scholars and practitioners prefer the first interpretation on the grounds that broadening the scope of application of the rule increases the risk of application of the heavy sanctionary measures provided therein. Indeed, the sanction provided for in case of defaulting party appears to be particularly strict, considering that in 99% of the cases the amount to be paid for expenses is by far lower than the arbitrators’ fees. As a matter of fact, such a system may translate into a very easy way to escape arbitration, provided that if such rule applied also to arbitrators’ fees, the respondent could be incentivized to file a specious high-value counterclaim without paying its advance. At that point, it may often happen that when the claimant is unable to pay respondent’s advance, the arbitral tribunal could declare the closing of the proceedings and the arbitration clause would no longer bind the parties for that dispute. A better solution might be to limit the application of the sanction to those cases in which the advanced requests for the arbitrators’ fees are not paid. *See, inter alia*, LAURA SALVANESCHI, *ARBITRATO* 546 *et seq.* (2014); BENEDETTELLI CONSOLO RADICATI DI BROZOLO, *COMMENTARIO BREVE AL DIRITTO DELL’ARBITRATO NAZIONALE ED INTERNAZIONALE* 250 *et seq.* (2010).

² Art. 2234 provides: “*Il cliente, salvo diversa pattuizione, deve anticipare al prestatore d’opera le spese occorrenti al compimento dell’opera e corrispondere, secondo gli usi, gli acconti sul compenso*”.

³ Article 21.2 of the Spanish Arbitration Act (R.C.L. 2003, 60) words as follow: “*Salvo pacto en contrario, tanto los árbitros como la institución arbitral podrán exigir a las partes las provisiones de fondos que estimen necesarias para atender a los honorarios y gastos de los árbitros y a los que puedan producirse en la administración del arbitraje. A falta de provisión de fondos por las partes, los árbitros podrán suspender o dar por concluidas las actuaciones arbitrales. Si dentro del plazo alguna de las partes no hubiere realizado su provisión, los*

B. Arbitration Rules

Most arbitration rules also provide for advanced payments on the costs of the arbitration as a requirement for the continuation of the proceedings.⁵

Considering the specific features of the Italian law and of the Chamber of Arbitration of Milan [“CAM”], the rules of this institution will be taken as example for the exposition of the problems associated with advance payments, but mechanisms similar to that set forth in the CAM rules (and the related problems) can be seen in many other arbitration rules, including that of the ICC.

Articles 37.1 and 37.2 of the CAM Rules provide: “When the request for arbitration and the statement of defence are filed, the Secretariat shall direct the parties to make an advance on the costs of the arbitration, setting a time limit for the parties to make it.

The Secretariat may direct the parties to make further advances in relation to work done or at any change of the amount in dispute, setting a time limit for these advances.”⁶

Article 38 provides as follows:

“1. Where a party fails to lodge an advance as requested, the Secretariat may direct the other party to make a substitutive payment, setting a time limit there for, or may divide the value of the dispute, if it has not already done so, and direct each party to deposit an amount based on the value of its claims, setting a time limit therefore.

2. If any of the advances directed is not made within the time limit set therefore, the Secretariat may suspend the entire proceedings or only the proceedings related to the claim to which the lack of payment relates. The Secretariat shall lift the suspension when the payment is made.

3. Where the parties do not deposit the amount within one month of the notice of the order of suspension under paragraph 2, the Secretariat may declare the closing of the entire proceedings, or the proceedings related to the claim to which the lack of payment relates, without affecting the arbitral agreement.”⁷

III. Main approaches to the obligation to pay advance on the costs of the proceedings

Since many arbitration laws and rules contain provisions pertaining to the request of deposits for the costs of arbitration with strict sanctions in case of partial or total default, scholars and practitioners have investigated the nature of such payment obligation and have proposed different solutions.

árbitros, antes de acordar la conclusión o suspensión de las actuaciones, lo comunicarán a las demás partes, por si tuvieren interés en suplirla dentro del plazo que les fijaren.”

⁴ See, e.g., CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] (Fr.); Federal Arbitration Act 9 U.S.C. (1925).

⁵ ICC Rules, art. 37 (2017), “Advance to Cover the Costs of the Arbitration”. For other instances, see also LCIA Rules, art. 24 (2014); SCC Rules, art. 51 (2017); ICDR International Arbitration Rules, art. 36; VIAC Rules, art. 42; DIS Arbitration Rules § 25; Permanent Court of Arbitration Rules, art. 43; SIAC Rules, r. 34 (2016).

⁶ For the allocation between the parties of such provisional request, see section IV below.

⁷ See, e.g., ICC Rules, art. 37 & app. III, art. 1 (“Advance on Costs”) (2017); SCC rules, art. 51 (2017); SIAC Rules, art. 34 (2016).

The most supported thesis with reference to the nature of such provisions, as we will very briefly see below, considers the request of deposit as a contractual obligation or as a procedural matter.

Indeed, the issue of advance on costs is in the nature of a hybrid, a peculiar obligation with a mix of substantive and procedural content: the arbitration clause contained in the agreement has, without any doubt, a contractual nature. The contractual reason why a party signs an arbitration clause is to settle potential disputes arising from an agreement through arbitration. Therefore, the substantial goal of the clause is to ensure that the parties obtain a decision from a precise adjudicatory authority. On the other hand, arbitration is also a procedure which entails observance of the parties' procedural powers and duties, and involves sanctions as a consequence of specific party behaviour.

The non-fulfilment of the advance payment obligation prevents the parties from obtaining a decision from such authority. The question therefore, is whether the non-fulfilment of this obligation can be interpreted as a breach of the contract, or just as a breach of a procedural rule? It goes without saying that the different characterization brings different consequences (and remedies) for the parties involved.

The supporters of the contractual approach are convinced that since the obligation arises from a contractual clause, it has to be treated entirely as a contractual obligation, with the consequence that if a party fails to pay his part of the requested deposit, such party commits a breach of contract and the other party is entitled to seek remedies⁸ correlated to such a breach. The competent authority, in this case, would be the arbitral tribunal.⁹

In case of institutional arbitration, it is easier to maintain that the obligation has a contractual nature, because when the parties signed the arbitration clause, they knew (or should have known) and accepted all the rules of the chosen institution as part of the agreement, including the mechanism for the payment of arbitration costs. For ad hoc proceedings, however, the applicable substantive and procedural law becomes extremely relevant.

⁸ Such remedies include damages, *see e.g.*, Codice di procedura civile [C.p.c.] [Code of Civil Procedure], art. 1218 (It.). If we consider the obligation as an “authentic contractual obligation” under the Italian substantive law we might even get to argue that the non-fulfilment, in some rare case, might lead to a termination of the entire contract under Article 1453 of the Italian Civil Code, where such non-fulfilment is not deemed to be scarcely relevant and the non-defaulting party submitted such request. Article 1453 states that “*Nei contratti con prestazioni corrispettive, quando uno dei contraenti non adempie le sue obbligazioni, l'altro può a sua scelta chiedere l'adempimento o la risoluzione del contratto, salvo, in ogni caso, il risarcimento del danno. La risoluzione può essere domandata anche quando il giudizio è stato promosso per ottenere l'adempimento; ma non può più chiedersi l'adempimento quando è stata domandata la risoluzione.*”

Dalla data della domanda di risoluzione l'inadempiente non può più adempiere la propria obbligazione.” In any case such a thesis appears to be easily refutable, considering the autonomy of the arbitration clause.

⁹ Even if some scholars took into consideration the possibility of bringing the claim before a State court, under certain circumstances, on the grounds that in case of defaulting party there would be a heavy contractual breach that would entail an imbalance of the contractual *synallagma*, that would entitle the other party to rescind the arbitration agreement (*See YVES DERAIS & ERIC SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION, 345 et seq. (2d ed. 2005).* In favour of the contractual approach, *see Thomas Rohner & Michal Lazopoulos, Respondent's Refusal to Pay its Share of the Advance on Costs, 3 ASA BULL. 549 (Sept. 2011).*

The supporters of the procedural approach have a different view, which has been endorsed by authoritative arbitrators.¹⁰ In a 2008 ICC case¹¹, the arbitral tribunal explained that “*the agreement to arbitrate is a separate contract which differs in its nature from a contract on the merits in as much as it is a contract of a procedural nature, but it is a contract nevertheless, giving rise to a procedural obligation to provide the advance on costs.*”¹²

Such interpretation, in administered arbitrations, entails an administrative characterization of the obligation, the non-fulfilment of which results in consequences provided for by the rules. The rules often contain a detailed procedural mechanism in case of a default by a party,¹³ authorizing the arbitral tribunal to stay the proceedings.

On the other hand, in case of ad hoc proceedings, it appears more risky for the arbitral tribunal to stay the proceedings when the procedural law applicable in the seat of arbitration does not tackle the issue. From the arbitrators’ perspective in these cases, it might be more prudent to continue the proceedings bearing in mind that it is better to seek remedies after delivering the award (for the non-payment of fees) rather than risk further action by the parties to enforce the agreement.

Further, with respect to the remedies available to a non-defaulting party, depending on the classification of the obligation, the arbitral tribunal might render a partial award in the case of contractual approach, or grant an interim measure in the case of a procedural approach.

There is however, a third approach; the good faith approach, which suggests that the obligation to pay the advances on costs would be included in the broader obligation to execute their agreements (including the arbitration agreement) cooperatively and in good faith. This approach has its roots in civil law countries, from the general theory of obligations, which shall apply to all contracts. One of the fundamental principles of such a theory is the performance in good faith of all the obligations which arise in a certain (civil law) judicial system. It aims to protect the non-defaulting party from the unfair behaviour of the opposing party since the latter has a right to rely on the correct fulfilment of the obligation by all the parties involved in the contract. Since the arbitration clause is part of the contract, such principle shall also apply to the execution the arbitration clause.¹⁴

IV. Case managers’ funds requests

After these brief theoretical considerations, this section moves on to a study of the practical approach adopted by a case manager when an advance on the costs has to be requested.¹⁵

¹⁰ See for instance the opinions of Xavier Favre-Bulle in this regard.

¹¹ The Swiss Law was applicable in the matter and the place of arbitration was Geneva, Switzerland.

¹² Nadia Darwazeh & Simon Greenberg, *No One’s Credit Is As Good As Cash: Awards and Orders for the Payment of The ICC Advance on Costs*, 31(5) J. INT. ARB. 557, 562 (2014).

¹³ See section IV.

¹⁴ For more detailed studies on the theme, see e.g., Darwazeh & Greenberg, *supra* note 12; Micha Bühler, *Non-payment of the advance on costs by the respondent party – is there really a remedy?*, 2 ASA BULL. 290 *et seq.* (June, 2006).

¹⁵ The analysis will focus only on the failure to pay advance costs due to insolvency of respondent and not the failure to pay in other circumstances, even if the mechanisms in both cases are similar. The differences are mostly in the approach of the Secretariat using its discretionary powers within the same regulatory framework.

First of all, it has to be specified that under the CAM Rules, the first advanced payment request is based on the determination of the value of the dispute by the Secretariat “on the basis of the request for arbitration and the statement of defence, as well as of any further indications given by the parties and the Arbitral Tribunal.”¹⁶

Further, Article 35(3) of the CAM Rules provides that “At any stage of the proceedings the Secretariat, where it deems it appropriate, may divide the value of the dispute in relation to the claims of each party and may direct each party to pay the costs related to its claim.”

Provided that the Secretariat has full discretion in applying Article 35(3) of the Rules, in a vast majority of cases, the first request is made on a “united funds” basis, regardless of the existence of counterclaims, in equal shares for each party,¹⁷ also taking into consideration the joint obligation of the parties to pay the requested funds.¹⁸

The amount requested depends on the value of the claim and the higher the percentage value of the claim, the lower is the request. In this aspect, the CAM policy differs from that of many other institutions, which make the first request more burdensome to cover all the fees.¹⁹ The CAM however, prefers making subsequent requests in due course (and when concretely deemed necessary) in order to allow the parties to start the proceedings without immediately forcing them into big investments.

It is important to underline that the first request is particularly relevant because if the parties do not make their payments, the arbitral tribunal cannot be constituted.²⁰ Unlike the decision on the suspension, in this case there is no discretion for the Secretariat; the non-payment is an objective circumstance which prevents the arbitral tribunal from being constituted.

V. Non-fulfilment of payment obligation and separation of claims

Bearing the above in mind, it is interesting to explore the procedure followed after a request is made.

If the entire requested amount is paid (whether by one or by all the parties), the proceedings continue; if nobody or just one party pays its shares, one or more payment requests (depending on the case) may be made by the Secretariat.

When after payment requests the non-fulfilment persists, the Secretariat usually suspends the whole proceedings as per Article 38 of the Rules, including claims and counterclaims.

¹⁶ See Arbitration Rules of the Milan Chamber of Arbitration, art. 35(2) (2010) [*hereinafter* “CAM Rules”].

¹⁷ In multi-party arbitrations, the Secretariat may form two groups for the purpose of funds payments, when common interests are represented by more than one party, and divide the requests in just two shares, or make a *pro rata* request to each party.

¹⁸ When a counterclaim is filed, the Secretariat might decide to separate the funds *sua sponte* (at its own discretion) and *ab origine* (from the beginning) in rare cases, for example when there is large disproportion between the value of the claim and the value of the counterclaim.

¹⁹ Such Secretariat praxis is not crystallised in the rules; the Secretariat has full discretion on the issue.

²⁰ See CAM Rules, art. 21(1).

However, when only the claimant submitted the payment and the respondent filed a counterclaim, the claimant may ask the Secretariat (before or after the suspension) to separate the value of his claim and the value of the respondent's counterclaim, together with the related advanced payment request, as per Article 38(1) of the Rules.

At this point, the Secretariat has the discretion to accept the claimant's request. Formally such a decision is limited to the separation of the values of claims and advanced requests on funds but this decision can have extremely relevant consequences for the prosecution of the proceedings since it might lead to the annulment of the counterclaim if the respondent's non-fulfilment persists.²¹

The request for separation of the values of claims might also occur at a later stage of the proceedings when the arbitral tribunal is already constituted. In these cases, especially when some of the proceedings before a tribunal have been carried out,²² the decision of the Secretariat is usually easier because it is possible to obtain the point of view of the arbitral tribunal, which is usually able to provide an authoritative opinion on the convenience of a separation. In these cases, it is very likely that the Secretariat, even if not formally bound by the arbitral tribunal's position, will carefully take it into consideration and support it.

Conversely, when the Secretariat has to tackle the issue before an arbitral tribunal is formally constituted, the decision is trickier, because the onus to decide is on the Secretariat alone. It means necessarily that such a decision has to be taken *prima facie*, reserving the right to reverse it at a later stage, before the partial closing of the proceedings is declared as per Article 38.3 of the CAM Rules.

It is pertinent to discuss some of the criteria the Secretariat might employ in its decision.

One factor that is certainly in favour of granting the separation is the higher chance of (at least a partial) prosecution of the proceedings. When the prosecution of the entire proceedings is jeopardised by only one party's default, striking out such party's counterclaims guarantees a higher chance of prosecution of the proceedings. When the Secretariat has to take a decision, it usually considers this aspect and proceeds with the separation, in order to guarantee a better and more complete service to the parties. However, this consideration is not sufficient by itself.

In order to reach a positive decision on the separation, more requirements may need to be fulfilled and more aspects taken into consideration. Theoretically, every time that the Secretariat attributes a precise value to a counterclaim, the value of such claim might be formally separated from that of the claimant's, regardless of the content and the merits of both claims. As per the CAM Rules, the value of any claim can be estimated. Even when the quantification of the value is complicated, there are criteria which can be successfully adopted, such as Annex "A" (7) of the Rules which states that: "Where the value of the dispute is undetermined and undeterminable, the Chamber of Arbitration shall determine it in equity." However, the Secretariat has to be prudent and take in to consideration other aspects before deciding to support such an approach because separation at an

²¹ See CAM Rules, art. 38(3).

²² For instance, if proceedings like discovery, full documents production and witness examination etc. have been initiated.

initial stage can have counter-productive effects at a later stage (after the arbitral tribunal is constituted). In particular, the arbitral tribunal may deem the counterclaims too closely connected to the main claims to be separated, and suggest that the Secretariat reverse its decision to separate the values or even worse, to reverse its decision to strike out the counterclaims when the respondent's insolvency persists.

This situation might have a negative impact on the entire proceedings, as the "resuscitation" of the counterclaims at any time entails a specific and additional procedure.²³ This also means that the Secretariat, in order to decide the issue, may undertake a "prognostic evaluation", acting as if it was the arbitral tribunal and incidentally deciding on the substantial separability of the claims. Therefore, the Secretariat decides the issue with caution, considering different aspects. The first thing to consider at this point is the scope of the application of the arbitration clause. In a vast majority of cases, arbitration clauses cover all the disputes arising out of, or related to the agreement containing it. This means that when a claimant brings a claim regarding the breach of a precise clause, the respondent, in his defensive brief, can decide whether to bring his defence only with respect to that aspect of the agreement or rather broaden the extent of the dispute to include other aspects and clauses of the agreement.²⁴

This principle is different from the procedural law principles applied in many courts, where a counterclaim can be brought in the same proceedings only when it is connected with the original claim.²⁵ In arbitration proceedings, the only jurisdiction requirement is that the counterclaim fall within the scope of application of the arbitration agreement, regardless of its direct connection with the claim.

The separation of counterclaims is undisputed and easy to grant when the counterclaims pertain to other parts of the agreement containing the arbitration clause which were not brought up by the claimant and are not connected to his claim.²⁶ Issues arise however, when the counterclaims are connected with the claim. When such connection exists, striking out the counterclaim might have as a consequence denial of justice, as maintained by one respondent in the famous ICC case, *Pirelli v. Licensing Project*.²⁷ In this case, the impecunious respondent did not pay the requested advances on costs, and therefore was informed that its counterclaim would be deemed to be withdrawn, according to Article 30(4) of the ICC Arbitration Rules (1998). The proceedings continued only with reference to the original claim and the arbitral tribunal delivered the final award.

²³ For instance, witness and expert witness deposition, production of further documents etc.

²⁴ In any case the Respondent can reserve the right to start a different arbitration afterwards filing other claims therein.

²⁵ See e.g., Codice di procedura civile [C.p.c.] [Code of Civil Procedure], art. 36 (It.) which provides that: "*Il giudice competente per la causa principale conosce anche delle domande riconvenzionali che dipendono dal titolo dedotto in giudizio dall'attore o da quello che già appartiene alla causa come mezzo di eccezione...*". As a matter of fact, Italian Courts tend to follow a very broad interpretation of such rule, accepting the counterclaims even in case of a small connection with the original claim. See CRISANTO MANDRIOLI & ANTONIO CARRATTA, DIRITTO PROCESSUALE CIVILE I 160 §§. (2016).

²⁶ When the counterclaim is blatantly extraneous to the arbitration agreement, instead, it might be wiser to wait for the constitution of the arbitral tribunal because it can decide the issue with a broader award on jurisdiction immediately after the constitution.

²⁷ *Licensing Projects SL v. Pirelli & C. SpA*.

Thereafter, the respondent that had no funds to finance his claim, successfully brought an action before the Court of Appeal of Paris for the annulment of the award. The Court quashed the award on the grounds that it infringed the party's right to access justice (under article 6 paragraph 1 of the ECHR). The decision of the Court of Appeal was later overruled by the Supreme Court, which specified that the arbitral tribunal has to respect and guarantee the right to access to justice, but an infringement of such right occurs only when the counterclaim is inseparable from the main claim.²⁸ Unfortunately, the Supreme Court did not clarify the instances where the counterclaims would not be separable and referred the decision back to the Court of Appeal of Versailles, thereby transferring to it the burden of providing more light on the issue.²⁹

Bearing this in mind, in order to decide whether a counterclaim connected to the original claim is separable, a characterization of its nature has to be made. If such a claim (or the part of it which aims the rejection of the main claim) can be incidentally treated as a defence against the original claim even after the counterclaim has been set aside, then the claims might be considered separable. Else, the claims must be jointly decided lest a denial of justice should occur.³⁰

The investigation has to move also to the scope of application of *res judicata*.³¹ When after the separation, the arbitral tribunal decides incidentally an issue without *res judicata* authority, such decision does not prevent the respondent to bring a claim afterwards in order to get a (different) decision on that issue (by another arbitral tribunal or by a court). On the other hand, if the issue is covered by *res judicata*, a potential denial of justice might occur.

Considering the differences between the various jurisdictional systems, these issues have to be tackled on a case-by-case basis depending on the substantial and procedural law applicable to the proceedings.

VI. Consequences of the (partial) closing of the proceedings

An interesting point to examine is what happens when the separation occurs, the respondent's insolvency persists, and the closing of the proceedings with relation to his counterclaim is declared as per Article 38.3 of the CAM Rules by the Secretariat.

²⁸ Cour de Cassation [Cass.] [Court of Cassation] 1e civ. Mar. 28, 2013, Bull. civ. I, No. 59 (Fr.).

²⁹ For a commentary on this case *See, inter alia*, Jaroslav Kudrna, *Arbitration and Right of Access to Justice: Tips for a Successful Marriage*, 46 N.Y.U. J. INT'L L. & POL. (2013); Marie Danis, *In the fields of arbitration and international private law, annulment decisions handed down by the cour de cassation are scarce and often instructive*, AUGUST DEBOUZY (July 29, 2013).

³⁰ If a defence can be incidentally considered by the arbitral tribunal, theoretically there is no risk of denial of justice since the decision taken incidentally is not covered by *res judicata*. The classification of claims, for this purpose, appears to be fundamental. In common law countries, for example, the difference between permissive and compulsory counterclaims might play an important role. Under the Italian procedural law, the nature of the decision sought might be relevant: in case a "constitutive judgement" (*sentenza costitutiva*) deriving from "*azione di risoluzione*" or a "declaratory judgement" (*sentenza dichiarativa*) deriving from "*azione di nullità*" is filed, the counterclaim might be deemed inseparable from the main claim because they cannot be considered as mere defenses. Italian scholars, in order to distinguish the nature of counterclaims, created the category of "*eccezioni riconvenzionali*", in contrast with "*domande riconvenzionali*", which might be useful for deciding the issue. Such categories help to clarify whether the counterclaim filed by the respondent broadens or not the "*thema decidendum*" (terms of reference). The latter (*domande riconvenzionali*) would have such effect whereas the former (*eccezioni riconvenzionali*) would only aim to the rejection of the main claim and would formally but not substantially broaden the "*thema decidendum*". For a detailed study, *see* MANDRIOLI & CARRATTA, *supra* note 25, at 161, n. 43.

³¹ *See* SALVANESCHI, *supra* note 1.

Article 38.3 clarifies that such a situation does not affect the arbitral agreement; therefore the respondent is still entitled to bring his claims in a successive and different arbitration proceeding. The question is whether this arbitration shall be administered again by the CAM, or whether it shall be ad hoc? At this point it is very clear that the system of costs has not been respected by the respondent, and therefore applying Italian procedural law to the proceedings, the institution can refuse the administration of the proceedings.³² If that happens, the respondent might start ad hoc proceedings and, if he eventually wants to bring his claim before the court, he might use the mechanism set out by Article 816 septies of the Italian Code of Civil Procedure.³³

Alternatively, the respondent might try to bring his claim in a domestic court, but in this case, it is very likely that the other party will successfully raise an objection with regard to the lack of jurisdiction of the court.

VII. Conclusion

The separation of claims is still a very delicate issue which has to be considered on a case-by-case basis. The reasons for providing for such mechanisms in arbitration rules, while noble, can clash with the risk of delaying the proceedings or even worse, denying a party his right of access to justice. It is for these reasons that separation of claims should not be abused by arbitral institutions.

At the same time, efforts should be made to find solutions for dis-incentivizing the behaviour of those respondents who although not facing financial problems, do not pay their funds for the sake of mere obstructionism. Such behaviour should be heavily sanctioned.

Due to the increase in administered arbitration proceedings, it can be hoped that the law-makers recognise the problem, and intervene as soon as possible to regulate the issue, giving more powers to arbitral tribunals and institutions and providing proper sanctions in case of specious abuse of this mechanism. A proper sanction that could be easily adopted in this respect could be to entitle arbitral tribunals to make a decision regarding attorney fees taking into consideration aspects of the proceedings, or punishing also the obstructionist winning party when deemed appropriate regardless of the Italian “*principio della soccombenza*”, which is the procedural principle usually applied by arbitrators (according to which the losing party shall bear the whole costs of the proceedings).

³² Codice di Procedura Civile [C.p.c.] [Code of Civil Procedure], art. 832 (It.) which regulates administered arbitration, states that: “*The arbitration agreement may refer to a pre-established arbitration rules. In case of conflict between the provisions of the arbitration agreement and the arbitration rules, the arbitration agreement shall prevail. Unless the parties have agreed otherwise, the rules in force on the date on which the arbitral proceedings begins shall apply. Institutions in the nature of associations and those set up for the representation of the interests of professional categories may not appoint arbitrators in disputes where their own associates or members of the professional category are opposed to third parties. The rules may provide for further cases of replacement or challenge of the arbitrators in addition to those provided by the law. Should the arbitral institution decline to administer the arbitration, the arbitration agreement shall remain effective and the preceding Chapters of this Title shall be applicable*” (Translation to English by Prof. Piero Bernardini in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION n. 49 (Jan Paulsson ed., 2006).

³³ See *supra* note 1; For an in-depth analysis, see Benedetta Coppo, *Article 38 – Failure to Deposit*, in THE CHAMBER OF ARBITRATION OF MILAN RULES: A COMMENTARY 611 *et seq.* (Ugo Draetta & Riccardo Luzzatto eds., 2012).

As for the arbitral institutions, considering that the aforementioned unfair behaviour entails additional work for them, a potential sanction could be to increase the fees of the institution, regardless the schedule of fees, in exceptional cases.