

Impecuniosity and the Inoperativeness of Arbitration Agreements in Portugal: A Critical Appraisal

Introduction

The principle of “*pacta sunt servanda*”—agreements must be *religiously* kept—forms the bedrock of international contract and arbitration law. Arbitration agreements, in particular, have historically been insulated from *ex post* challenges, with courts across most jurisdictions insisting that parties abide by their chosen forum. This resilience stems both from contractual freedom and from international harmonization under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and UNCITRAL Model Law, which has fostered a pro-enforcement culture worldwide.

Portuguese courts, however, have recently developed a distinctive line of jurisprudence recognizing impecuniosity—post-agreement financial incapacity—as grounds to render arbitration agreements “inoperative”. The recent Lisbon Court of Appeal decision of 19 December 2024 (Case No. 7845/22.9T8LRS.L1-2) exemplifies this trajectory, holding that a company unable to afford the costs of arbitration could bypass the arbitration agreement and proceed in state courts.

While motivated by access-to-justice concerns, this jurisprudence raises serious issues. It appears at odds with the text and spirit of the Portuguese Arbitration Law (Lei da Arbitragem Voluntária, Law 63/2011, “LAV”), undermines contractual certainty, and diverges from the New York Convention and comparative international standards. Moreover, it risks encouraging strategic behavior, destabilizing arbitration practice in Portugal.

This article offers a comparative and critical analysis of this jurisprudence. It argues that impecuniosity should be recognized only in narrow, objectively demonstrable cases, and that Portugal should realign its approach with the international consensus favoring robust enforcement of arbitration agreements.

1. The Lisbon Court of Appeal’s 2024 Decision

In Case No. 7845/22.9T8LRS.L1-2 (Lisbon Court of Appeal, 19 Dec. 2024), the claimant—a company that had ceased operations in 2020, reported €740,000 in accumulated losses, €590,000 in negative equity, €1.8 million in liabilities (including €1.3 million owed to suppliers), and €1 million in unrecovered receivables—invoked impecuniosity to bypass an arbitration clause contained in its contract.

The Court held that the arbitration clause had become inoperative because the claimant (“petitioner” in state court) lacked the financial means to constitute and operate an arbitral tribunal. Crucially, the Court also held that failure to raise impecuniosity in a prior arbitral proceeding did not bar the claim in the present lawsuit.

This reasoning reflects a growing willingness of Portuguese courts to prioritize access to justice over the sanctity of arbitration agreements. Yet, as will be shown, this approach conflicts with both domestic legislative design and international arbitration practice.

2. Legislative Framework: Arbitration as the Rule

The Portuguese Arbitration Law (LAV) provides that courts must decline jurisdiction in favor of arbitration where a valid arbitration agreement exists, unless the agreement is “manifestly null, ineffective, or incapable of being performed” (Art. 5 LAV). Moreover, Article 18 enshrines the kompetenz-kompetenz principle, granting arbitral tribunals primary authority to decide their jurisdiction.

The LAV mirrors the New York Convention, Article II(3) and the UNCITRAL Model Law, which obliges courts to refer parties to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. Financial hardship is nowhere recognized as a ground.

Thus, while the LAV does allow for rare exceptions, the legislative intent is clear: arbitration agreements are binding, and state courts should intervene only in cases of manifest invalidity or impossibility—not economic difficulty. As we have written elsewhere, where there is a “glimpse” of connectivity between the dispute and the arbitration agreement, court judges must decline their jurisdiction to hear cases brought before them.

3. Portuguese Jurisprudence: Divergent Lines

Portuguese courts have not been consistent in their approach to impecuniosity and the enforcement of arbitration agreements. On the one hand, there is a line of jurisprudence that accepts financial incapacity as sufficient to render an arbitration agreement inoperative. The Supreme Court of Justice, in a decision of 12 November 2019 (Case 98/19.0YRLSB.S1), recognized that impecuniosity may justify recourse to state courts where the incapacity is supervening, not attributable to the party, and objectively proven, even if the mere granting of legal aid was held insufficient on its own. Similarly, the Guimarães Court of Appeal on 21 February 2019 (Case 88/18.0T8GMR.G1) held that inability to pay arbitration costs could neutralize an arbitration clause. The Lisbon Court of Appeal has also followed this path: in a

2020 decision (Case 113/19.0T8LSB.L1-7) it considered that legal aid was an indicator of the prohibitive nature of arbitration costs, and in its more recent ruling of 19 December 2024 (Case 7845/22.9T8LRS.L1-2), it went further by treating severe corporate financial distress as sufficient to bypass arbitration altogether.

On the other hand, an opposite line of cases insists on upholding arbitration agreements even in circumstances of financial difficulty. The Lisbon Court of Appeal ruled in 2015 (Case 007/14.5T8LSB.L1-2) that hardship does not excuse parties from arbitration, while the Porto Court of Appeal in the same year (Case 072/13.2TBPRT.P1) reaffirmed the principle that questions of jurisdiction belong to arbitral tribunals unless there is manifest nullity. In 2018, the Lisbon Court of Appeal enforced arbitration clauses in the context of swap contracts (Case 071/17.8T8LSB.L1-2), rejecting attempts to evade arbitration for reasons of convenience. The Supreme Court of Justice likewise confirmed in 2016 (Case 010/15.5YRLSB.S1) that ongoing financial distress and restructuring proceedings did not suspend the validity of an arbitration clause.

The result is a jurisprudential split. One current privileges access to justice and recognizes impecuniosity as an exceptional ground to displace arbitration, while the other adheres to the sanctity of arbitration agreements, applying them strictly even in difficult economic circumstances. This tension between contractual enforcement and fairness-based exceptions remains one of the most unsettled issues in Portuguese arbitration law.

4. Comparative Perspectives

When seen from an international vantage point, the Portuguese jurisprudence that accepts impecuniosity as rendering an arbitration clause inoperative stands as a clear outlier. In France, the courts have long adopted a strongly pro-arbitration stance. Both the Paris Court of Appeal and the Cour de Cassation have consistently affirmed that arbitration agreements are binding regardless of the financial circumstances of the parties. Concerns about access to justice are addressed instead through institutional mechanisms, the possibility of cost advances, or state-supported legal aid, rather than through judicial intervention that displaces arbitration. The French approach reflects the broader doctrine that *pacta sunt servanda* and the autonomy of arbitration must prevail unless truly exceptional grounds exist, none of which includes impecuniosity.

Spain offers a similar picture. The Spanish Arbitration Law, read in harmony with the New York Convention, obliges courts to enforce arbitration agreements unless they are manifestly null or incapable of being performed. The Spanish Supreme Court has reinforced this interpretation, stressing that the economic difficulty of a party does not suffice to neutralize

the binding nature of an arbitration clause. In fact, the Spanish judiciary has explicitly recognized that to admit impecuniosity as a ground for inoperativeness would run counter to the principle of legal certainty and to Spain's international obligations as a signatory to the New York Convention, as illustrated by decisions such as STS 102/2021 (BOE-A-2021-4492).

The same approach is evident in Germany and Switzerland. The German Federal Court of Justice (BGH), in a widely cited judgment (NJW 2009, 3714), dismissed the notion that cost considerations could override the parties' contractual agreement to arbitrate.

Swiss jurisprudence, similarly, insists that parties who voluntarily agree to arbitration are bound by their commitment even if arbitration proves more onerous than anticipated. In these jurisdictions, impecuniosity is seen as a matter to be addressed within the arbitral process, or by recourse to procedural support mechanisms, but never as a justification for bypassing arbitration.

Comparative analysis thus reveals that the Portuguese position, as reflected in the 2024 Lisbon Court of Appeal decision and its predecessors, departs significantly from the dominant trend. By allowing impecuniosity to displace arbitration agreements, Portugal risks weakening its credibility as a jurisdiction aligned with the pro-enforcement spirit of the New York Convention and undermines the consistency and predictability that are hallmarks of international arbitration.

5. The Problem with the Impecuniosity Doctrine

The doctrine that allows impecuniosity to neutralize arbitration agreements is problematic on several levels. At the contractual level, it undermines the principle of *pacta sunt servanda*. Arbitration clauses are freely negotiated commitments, and to permit a party to escape them simply by invoking financial incapacity risks turning arbitration into an optional mechanism, enforceable only when "convenient". This outcome erodes legal certainty and predictability, both of which are essential for commercial transactions.

From a statutory perspective, the doctrine is difficult to reconcile with the Portuguese Arbitration Law. Article 5 restricts judicial intervention to cases of manifest nullity, inoperativeness, or ineffectiveness of the arbitration agreement, while Article 18 enshrines the principle of *kompetenz-kompetenz*, reserving jurisdictional determinations primarily to the arbitral tribunal. Financial incapacity is not listed among the grounds of inoperativeness, and its judicial recognition stretches the concept beyond what the legislature appears to have intended.

At the international level, the doctrine conflicts with the New York Convention of 1958, which has been ratified by more than 170 states and is the cornerstone of international arbitration. The Convention recognizes only a narrow set of defenses against enforcement, and impecuniosity is not among them. To admit it would place Portuguese jurisprudence at odds with the global pro-arbitration consensus and potentially expose awards to enforcement difficulties abroad.

Finally, the doctrine creates perverse incentives. If impecuniosity can invalidate an arbitration clause, parties may be tempted to undercapitalize, delay payments, or otherwise manipulate their financial posture in order to avoid arbitration. This possibility threatens to transform arbitration into a fragile and easily avoidable institution, precisely the opposite of what international commercial practice requires.

For all these reasons, impecuniosity as a ground for torpedoing arbitration agreements introduces more risks than safeguards. It weakens contractual certainty, undermines statutory coherence, and isolates Portugal from the mainstream of international arbitration practice.

6. Toward a Balanced Standard

The Portuguese jurisprudence that allows impecuniosity to displace arbitration agreements stands in uneasy tension with the principle of *pacta sunt servanda*, the framework of the Portuguese Arbitration Law, and the obligations flowing from the New York Convention of 1958. While it reflects a genuine concern for access to justice, it does so at the expense of legal certainty and international coherence. Comparative experience in France, Spain, Germany, Switzerland, and most other jurisdictions demonstrates that impecuniosity is addressed through procedural safeguards, legal aid, or institutional cost-allocation mechanisms, rather than through judicial invalidation of the arbitration agreement itself.

By carving out this exception, Portuguese courts risk presenting Portugal as an arbitration-hostile jurisdiction, introducing uncertainty for parties who choose Portugal as the seat of arbitration or who contract with Portuguese counterparties. This uncertainty undermines confidence in arbitration as a stable and predictable dispute resolution mechanism, precisely the qualities that have made it the cornerstone of international commerce. If this jurisprudential line is allowed to develop unchecked, it may not only weaken the enforceability of arbitration agreements domestically but also cast doubt on the international recognition of Portuguese arbitral awards.

A “recalibration” is therefore needed. Safeguarding access to justice is an imperative, but it must be achieved without hollowing out arbitration agreements and without detaching Portuguese jurisprudence from the international consensus. Courts should interpret impecuniosity as a matter for arbitral procedure or state support mechanisms, not as a ground to nullify freely assumed commitments. Only by aligning with international best practices can Portugal maintain its credibility as an arbitration-friendly jurisdiction and uphold both the contractual autonomy of the parties and the integrity of its international obligations.

Conclusion

The Lisbon Court of Appeal’s 2024 decision expands the impecuniosity exception in a way that risks destabilizing arbitration practice in Portugal. By allowing financial hardship to torpedo arbitration agreements, the decision undermines *pacta sunt servanda*, contradicts the LAV, diverges from the New York Convention, and departs from the prevailing comparative approach.

Portuguese courts should recalibrate their jurisprudence: preserve arbitration agreements as binding, limit impecuniosity to exceptional, objectively verifiable cases of denial of justice, and adopt institutional measures to support access. Only then can Portugal maintain credibility as an arbitration-friendly jurisdiction while addressing legitimate fairness concerns.