You Can't Have Your Cake and Eat It too:

The Refusal to Pay an Advance on Costs Renders Subsequent Objection to the Jurisdiction of State Courts Inadmissible

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Resumen : *En la sentencia Tagli'apau c. Amrest Holdings y otros (Cass. Civ. 1ère, 9 de febrero de 2022, n.º 21-11253), la Corte de Casación francesa anuló la decisión de la corte de segunda instancia que declinó su competencia en favor de la instancia arbitral en una controversia derivada de un contrato de franquicia. La Corte de Casación concluyó que una parte que había paralizado el procedimiento de arbitraje al negarse a pagar su parte del anticipo de las costas no podía invocar posteriormente la jurisdicción exclusiva de un tribunal arbitral para oponerse a la jurisdicción de un tribunal estatal. Si bien la sentencia del tribunal constituye una advertencia a partes que emplean tácticas dilatorias, la Corte no analizó el posible impacto, en casos similares, de la situación financiera de las partes y las intenciones de la parte que no paga. De esta manera, la sentencia deja la puerta abierta a enfoques más matizados.*

INTRODUCTION

On 9 February 2022, the French Court of Cassation struck down a judgment of the Pau Court of Appeal relating to a dispute between a franchisee and a franchisor. The parties had previously been engaged in an arbitration that hit a wall when one of the parties refused to pay its share of the advance on arbitration costs. The arbitration claims were withdrawn, and the dispute ended up making the round in national courts, finally landing before France's highest court.

The judgment of the Court of Cassation further elaborates the content of the principle of procedural loyalty (loyauté procédurale) in arbitration proceedings and doles out the punishment of inadmissibility in subsequent national proceedings on erring parties.

BACKGROUND OF THE DISPUTE

The parties to the case were SAS Tagli'apau and its liquidator Selarl Ekip' (collectively, the "**Claimants**") and Amherst Holdings SE, SAS La Tagliatella, and Pastifico Service SLU (collectively, the "**Respondents**"). In 2011, SAS Tagli'apau (France) concluded a franchise agreement with Pastifico Services SLU (Spain) (later acquired by Amherst Holdings SE and succeeded by SAS La Tagliatella) for a duration of 9 years (the "**Franchise Agreement**"). The Franchise Agreement contained an ICC arbitration clause. SAS Tagli'apau opened its franchised enterprise in 2012, but it was not successful, and in 2015, SAS Tagli'apau found itself in financial difficulty. On 12 April 2016, the Pau Commercial Court opened insolvency proceedings (procédure de sauvegarde) with respect to SAS Tagli'apau and appointed a legal representative for the company. The procédure de sauvegarde later progressed into the judicial liquidation (liquidation judiciairei) stage of insolvency, and Selarl Ekip' was appointed as Tagli'apau's judicial liquidator. In parallel, the parties had several disagreements regarding the Franchise Agreement, with Tagli'apau alleging breach of contract and blaming Pastifico Services SLU for the franchise's failure.

On 29 April 2016, SAS Tagli'apau filed a request for arbitration with the ICC, seeking termination of the Franchise Agreement and claiming damages. In accordance with

110 Paris and New York qualified independent counsel and arbitrator.

Article 36 of the 2012 ICC Arbitration Rules in force at the time[111], the ICC requested that the parties pay an advance on costs. While the Claimants paid their share of the advance, the Respondents refused. SAS Tagli'apau was insolvent and could not cover the Respondent's share of the advance. Since the parties had not paid the advance on costs, the ICC Secretariat considered the Claimants' claims withdrawn in accordance with Article 36(6) of the 2012 ICC Rules[112].

PROCEEDINGS BEFORE FRENCH STATE COURTS

Proceedings Before the Pau Commercial Court

Having been unable to pursue its claims in arbitration, the Claimants brought a case against Pastificio's successor, SAS La Tagliatella, before the Pau Commercial Court, arguing that the arbitration clause was inapplicable, and requesting that the Franchise Agreement be terminated, and the termination backdated to 29 April 2016 (i.e., when the Claimants had submitted a request for arbitration to the ICC). The Respondents objected to the court's jurisdiction, basing their arguments on the Franchise Agreement's arbitration clause and the principle of competence-competence. By judgment of 26 May 2020, the Commercial Court of Pau denied jurisdiction over disputes concerning the Franchise Agreement in favor of the ICC on the basis of the arbitration clause.

Judgment of the Pau Court of Appeal

The Claimants appealed the commercial court's judgment before the Pau Court of Appeal[113], arguing that the Respondents were not entitled to invoke the arbitration clause in the Franchise Agreement because they had effectively paralyzed the proceedings launched pursuant to that very clause by refusing to pay their share of the advance on costs.

The Pau Court of Appeal rejected the Claimants' arguments and declined jurisdiction, holding that the Respondents had not waived the arbitration clause by refusing to pay the advance on costs:

> "Pursuant to Article 1448 of the Code of Civil Procedure[114], when a dispute arising from an arbitration agreement is brought before a State court, the latter declares itself incompetent unless the arbitral tribunal has not been seized and if the arbitration agreement is manifestly void or manifestly unenforceable.

111 Current Article 37 of the 2021 ICC Arbitration Rules.

112 2012 ICC Rules, Article 36(6): "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 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."

113 As the subsequent judgment of the Court of Cassation is very succinct, it is helpful to review the Pau Court of Apeal's judgement.

114 Article 1448 of the Code of Civil Procedure: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion. Any stipulation contrary to the present article shall be deemed not written."

[…]

[T]he [Claimants] argue[115] that the [Respondents] are not [entitled] to raise an objection to the jurisdiction of the State judge because they have waived the application of the arbitration clause. […] [The Claimants] maintain that the respondent companies expressly and openly waived the application of the arbitration clause by refusing to pay their share of the advance on costs of the arbitration.

However, it should be recalled that it was the [Claimants] who, in April 2016, seized the International Court of Arbitration of the ICC. In this context, it cannot be usefully argued that [the Respondents] have waived the application of the arbitration clause simply because [the Claimants] would have had no other choice than to go to the Commercial Court of Pau. […] Thus, even considering [the Respondents'] refusal to pay their share of the advance, their abstention on this point could not constitute an irrevocable renunciation of the arbitration clause as regards the jurisdictional incompetence exception validly raised before the State court.

The Pau Court of Appeal likewise recalled that the arbitral tribunal had been seized and it alone had jurisdiction to rule on its jurisdiction:

[The Claimants] argue that the [Respondents] are not entitled to invoke the principle of competence-competence. [The Claimants] explain that since their claims before the arbitral tribunal have been withdrawn, the parties find themselves in the same situation as if the arbitral tribunal had not been seized. […] Above all, the fact that [the Claimants'] claims were withdrawn shows that the arbitral tribunal has indeed been seized. Under these conditions, it cannot be considered that [State courts] have jurisdiction because the arbitral tribunal had not been seized. On the other hand, it should be recalled that pursuant to Article 1465[116] of the Code of Civil Procedure, only the arbitral tribunal has jurisdiction to rule on disputes relating to its own jurisdiction. Thus, the State court must declare itself incompetent unless the arbitration agreement is manifestly void. In this case, there is no allegation of manifest nullity of the arbitration agreement.

The Pau Court of Appeal likewise referred to the Respondents' arguments that the Claimants had accepted the validity of the arbitration clause by submitting a request for arbitration to the ICC, and that the arbitration clause is severable from the Franchise Agreement.

Part of the Claimant's arguments relied on its impecuniosity, which the Pau Court of Appeal analyzed at length, but which nevertheless failed to persuade the court:

"[The Claimants] argue that their impecuniosity also renders the arbitration clause inapplicable in this case. They invoke the obligation of the arbitral judge to ensure access to justice.

They state that their current situation does not allow them to sue before the arbitral tribunal, which renders the arbitration agreement completely ineffective.

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115 Note that the Claimants also raised an estoppel argument with respect to some of the Respondents who had previously objected to the jurisdiction of the arbitral tribunal. As this argument was not presented before the Court of Cassation, it is not included in the present commentary of the case.

116 Article 1465 of the Code of Civil Procedure: "The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction."

> They argue that after paying their share of the arbitration costs, their claims were ultimately withdrawn due to the [Respondents'] willful breach of their obligations under the ICC Rules. If the jurisdiction of the commercial court were not retained, they claim to be in a situation of denial of justice.

The court likewise referred to the Respondents' arguments that the costs fixed by the ICC were elevated because the Claimants had overstated their claims:

> On this point, the [Respondents] usefully recall that the arbitration costs and therefore the provisions include the fees and costs of the arbitrators, the administrative costs of the ICC, the fees and costs of the experts appointed by the arbitral tribunal as well as the costs incurred by the parties in connection with their defense in the arbitration. All these costs are calculated in proportion to the amounts in the context of the dispute. Therefore, parties that have presented overstated claims may be sanctioned when arbitration costs are awarded.
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> Thus, the Respondents argue that the [Claimants'] exorbitant financial claims […] directly and necessarily increased the arbitration costs[.]

The court recalled that the ICC allows one party to cover the advance on costs of the other, and that the withdrawal of claims due to a failure to pay does not do away with the arbitration clause:

> Pursuant to the arbitration rules, any party always has the right to pay the part of the advance due by any other party if the latter does not pay the part incumbent upon it. In this respect, it must be considered that the procedure of the rules has been respected since 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 shall be considered as withdrawn. However, such withdrawal does not deprive the party concerned of the right to subsequently reintroduce the same claim in another procedure.
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> Indeed it must be noted that the ICC rules do not deprive the parties who have not satisfied the payment of the provisions from subsequently reintroducing a request for arbitration, the arbitration clause thus retaining all its effects, and the parties are not deemed to have waived.

The Pau Court of Appeal then rejected the Claimants' argument that the arbitration clause was inapplicable due to the Claimants' inability to pay the totality of the advance:

> Furthermore, the binding force of the arbitration clause is independent of the financial health of one of the signatory parties. To this extent, the arbitration clause cannot be considered manifestly inapplicable within the meaning of Article 1448 [of the Code of Civil Procedure] solely because of the alleged impossibility of the judicial liquidator to meet the cost of the arbitration proceedings. The party claiming impecuniosity cannot therefore use this fact as an argument to evade arbitral jurisdiction.

The Pau Court of Appeal then made a pronouncement as to Article 36 of the ICC Rules that would prove to be crucial in the subsequent proceedings before the Court of Cassation:

> The [Respondents] rightly argue that pursuant to Article 36 of the Arbitration Rules, the plaintiff in the proceedings alone bears the advance on costs. On the other hand, [counterclaims] may give rise to the fixing of separate provisions for the respondent. Under these conditions, the [Respondents] could validly not pay their share of the advance; [the Court also notes that the Respondents] did produce a statement of defense to the arbitration procedure, which confirms an absence of waiver of this clause.
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> Moreover, no provision of the Arbitration Rules requires [the Respondents] to justify their abstention, whereas this same rules allow them to not be forced to assume the payment of an advance on costs based on claims that, by virtue of the amounts requested, condition the fixing of the such costs.
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> Above all, the Arbitration Rules allow claimants to challenge the decision to withdraw their claims before the arbitral institution. Indeed, pursuant to Article 36(6) of the Rules, when an application is considered withdrawn, the party concerned that intends to oppose it may request, within 15 days, that the question be decided by the Court. Withdrawal does not deprive the party concerned of the right to subsequently reintroduce the same request in another procedure.
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> It should be noted that the [Claimants] have in no way filed a request to have the disputes relating to the payment of costs settled by the Court."

After this lengthy and somewhat scattered analysis, the Pau Court of Appeal confirmed the judgment of the Commercial Court of Pau and declined jurisdiction over the dispute.

Judgment of the Court of Cassation

The Claimants then launched a cassation appeal before the Court of Cassation. The Claimants based their case on five arguments, namely, that:

(1) A clause that creates a significant imbalance in the rights and obligations of the parties is abusive; and that the Pau Court of Appeal violated the Commercial Code and the Civil Code by declining jurisdiction while failing to examine, ex officio if necessary, whether the dispute resolution clause in the Franchise Agreement was abusive insofar as it obliged one party to advance arbitration fees that the other had refused to pay.

(2) A State court must decline jurisdiction over a dispute subject to an arbitration clause unless the arbitral tribunal has not yet been constituted and the arbitration clause is manifestly void or unenforceable; and that the Pau Court of Appeal breached Article 1448 of the Code of Civil Procedure by incorrectly basing its decision on the fact that "parties that have overstated their claims may be sanctioned at the time of allocation of the costs of arbitration".

(3) Article 36 of the ICC Rules of Arbitration provides that "the advance on costs fixed by the Court pursuant to […] Article 36(2) shall be payable in equal shares by the claimant and the respondent"; and that the Pau Court of Appeal violated Article 36 of the ICC Arbitration Rules, and Article 1134 of the Civil Code[117] by

117 Article 1134 of the Civil Code: "Legally formed agreements take the place of law for the parties that made them. They may only be revoked by the parties' mutual consent, or for causes authorized by law. They must be performed in good faith."

holding that "the Respondents rightly argue that pursuant to Article 36 of the Arbitration Rules, the claimant party to the proceedings alone bears the costs" and that "these same Rules allow [the Respondents] to not be forced to assume the payment of costs".

(4) Parties to an arbitration must act with loyalty with respect to one another; that the party which paralyzed the arbitration proceedings by refusing to pay its share of the advance on costs engaged in unfair procedural behavior and is thus prevented from invoking the arbitration clause and the exclusive jurisdiction of an arbitral tribunal to oppose the jurisdiction of State courts; and that the Pau Court of Appeal violated Article 1462 of the Code of Civil Procedure[118] and the principle of procedural loyalty by nevertheless declining jurisdiction.

(5) That any party has the right to access a court to assert its rights; that the impossibility to access a judge, even an arbitrator, who is responsible for ruling on that party's claims, established the jurisdiction of State courts; that a party whose claims are withdrawn by an arbitral tribunal on account of the other party's failure to pay its share of advance on costs, while the jurisdiction of that same arbitral tribunal is invoked as a reason for State courts to decline jurisdiction, suffers from a denial of justice; and that the Pau Court of Appeal denied justice to the Claimant and violated Article 6(1) of the European Convention on Human Rights [Right to a fair trial] by declining jurisdiction in favor of the ICC, even though the claimant did not have the funds to advance the respondents portion of the arbitrating costs.

The Court of Cassation summarily dismissed the Claimant's first two arguments on the grounds that they did not relate to a legal or procedural error that could be subject to cassation[119], but was persuaded by the Claimants' third and fourth arguments.

With respect to the Claimant's third argument that the Pau Court of Appeal had incorrectly sided with the Respondents' position that under Article 36 of the ICC Arbitration Rules, the advance on costs is to be borne by the claimant party alone, even though the second paragraph of that same article states that the advance on costs fixed is payable in equal shares by the claimant and the respondent, the Court of Cassation held:

"Given the obligation that a judge may not distort the writing that is submitted before them:

The judgment declared the [Pau Court of Apeal's judgment] incompetent in favor of an arbitral tribunal, on the basis that pursuant to Article 36 of the ICC Arbitration Rules, the plaintiff in the proceedings alone bears the costs of the provisions.

In so ruling, even though the aforementioned [Article 36(2)] provides, that the provision for costs fixed by the ICC is due in equal shares by the plaintiff and the defendant, the Court of Appeal, which has distorted these clear and precise terms, violated the above principle."[120]

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118 Article 1462 of the Code of Civil Procedure: "A dispute shall be submitted to the arbitral tribunal either jointly by the parties or by the most diligent party."

119 Cassation Court Decision, ¶ 3.

120 Cassation Court Decision, ¶¶ 5-6.

The Court of Cassation likewise sided with the Respondents' fourth argument regarding the principle of procedural loyalty, and that a party that has paralyzed an arbitration by refusing to pay its share of the advance on costs is no longer entitled to invoke the exclusive jurisdiction of an arbitral tribunal to oppose the jurisdiction of State courts, holding:

> "Given the principle of loyalty that governs the parties to an arbitration agreement:
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> The judgment declared the [Pau Court of Apeal's judgment] incompetent in favor of an arbitral tribunal, also on the basis that the ICC rules do not deprive the parties who have not satisfied the payment of the provisions from subsequently reintroducing a request for arbitration, as the arbitration clause, which the parties are not deemed to have waived, [remains valid].
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> In so ruling, even though [the Respondents], who themselves had caused the withdrawal of the request for arbitration by the ICC by not paying their part of the advance on costs, were not entitled to object to the jurisdiction of the State court by invoking the arbitration clause, the [Pau Court of Appeal] violated the aforementioned principle."[121]

The Court of Cassation did not analyze the Claimants' fifth argument with respect to the European Convention on Human Rights but annulled the judgment of the Pau Court of Appeal in its entirety and remanded the matter to the Bordeaux Court of Appeal on the basis of the Claimants' third and fourth arguments.

WHAT THE JUDGMENT OF THE COURT OF CASSATION MEANS FOR ARBITRATION IN FRANCE

At first blush, the judgment of the Court of Cassation may seem to go against France's famously pro-arbitration stance. However, it is in line with existing law and jurisprudence. The principle of procedural loyalty is well established in France[122], and its application in both internal and international arbitral proceedings is codified in Article 1464(3) of the Code of Civil Procedure, which provides that "[b]oth parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings."[123] In essence, the principle of procedural loyalty combines elements of good faith and estoppel[124]. Among others, the principle obliges parties to an arbitration to present their claims and arguments in a timely manner, to inform the arbitrator of any known procedural irregularities, and to present annulment arguments that are incompatible with positions taken during the arbitration[125]. And now, according to the judgment of the Court of Cassation, the principle also entails a punishment for parties that render an arbitration proceeding ineffective by refusing to pay their share of the costs.

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121 Cassation Court Decision, ¶¶ 7-8.

122 See C. Seraglini, J. Ortscheidt, Droit de l'arbitrage interne et international (2nd ed, LGDJ) (2019), ¶ 815, note 114.

123 Article 1506(3) of the Code of Civil Procedure extends the application of Article 1464 to international arbitration.

124 See T. Clay, Code de l'arbitrage commenté (2nd ed, Lexis Nexis) (2021), pp. 131-141.

125 See C. Seraglini, J. Ortscheidt, Droit de l'arbitrage interne et international (2nd ed, LGDJ) (2019), ¶ 815.

It should be noted that, crucially, the Court of Cassation did not declare the Franchise Agreement's arbitration clause invalid, but rather found that the Respondents' jurisdictional objection on the basis of that clause was inadmissible. In theory, this would mean that the parties could still make use of that clause to arbitrate their Franchise Agreement relationship, possibly even in relation to the same dispute, should the matter of the payment of the advance on costs be resolved. The judgment of the Court of Cassation proposes a fairly simple mechanism – a breach of the principle of procedural loyalty will entail a punishment down the procedural the line – the inadmissibility of a jurisdictional objection.

The judgment has been criticized as having a corrosive effect on arbitration[126]. However, by penalizing a party that has paralyzed an arbitration by refusing to pay its share of the costs, the Court of Cassation has safeguarded access to justice and promoted the efficiency of the arbitral process by affirming that disloyal conduct by a party will be punished[127]. Indeed, in the case of a reluctant respondent facing an impecunious claimant, it would be all too easy to simply fail to pay its share of arbitration costs in order to block the other party from pursing its claims. It should be noted that the ICC Arbitration Rules provide no sanction for a party that fails to pay its share of the advance on costs – under the Rules, such failure will result in either the other party paying the total of the advance if it so wishes, or the claims being withdrawn. Even from a purely international arbitration perspective, there would be little sense in locking the parties in an arbitration standstill. The judgment of the Court of Cassation thus sends out a warning to parties engaging in dilatory tactics – even if the applicable arbitration rules do not punish them, the French courts will.

The judgment of the Court of Cassation remains silent on several aspects that may prove crucial in the future. One could be tempted to conclude that the court's decision means that paralyzing an arbitration for unjustified reasons will result in the inadmissibility of a jurisdictional objection before State courts later on. However, the judgment of the Court of Cassation is not at all clear on this point. While the Claimants' fifth argument referred to its impecuniosity, the judgment of the Court of Cassation does not analyze or even mention the Claimants' financial situation. The judgment likewise does not mention Article 36(5) of the ICC Arbitration Rules, which allows one party to pay the advances of the other should it fail to pay it, instead focusing exclusively on Article 36(2), which provides that the advance on costs is borne equally by both parties. It is not clear whether the Court of Cassation would have found a breach of the principle of procedural loyalty had the Claimants been in a position to fully pay the costs of the arbitration on their own.

Nor does the Court of Cassation delve into the financial situation of the Respondents. As this issue is not touched upon in the Pau Court of Appeal judgment, one can assume that the Respondents' refusal to pay their portion of the advance on costs was a question of will rather than possibility. One can posit that the Court

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126 J. Jourdan-Marques, 'Chronique d'arbitrage : et pour quelques dollars de plus' (16 March 2022) : <https://www.dalloz-actualite.fr/flash/chronique-d-arbitrage-et-pour-quelques-dollars-de-plus#.YnxHTxPMKPR>.

127 On this point, see also P. Paschalidis, G. Bové, 'Tagli'apau and others v. Pastificio and others - Judgment of the French Court of Cassation' 9 February 2022, Jus Mundi (April 2022): <https://jusmundi.com/en/document/publication/en-tagliapau-and-others-v-pastificio-and-others-judgment-of-the-french-court-of-cassation-9-february-2022?su=%2Fen%2Fsearch%3Fpage%3D1%26lang%3Den%26document-types%5B0%5D%3Dwiki%26wiki-collections%5B0%5D%3Dother>.

of Cassation may have come to a different conclusion had the Respondents been impecunious and unable to pay their share of the arbitration costs.

This courts' lack of deeper analysis leaves open the question of how the parties' financial situations could have a bearing on whether or not the principle of procedural loyalty is breached.

Similar questions remain as to the motivation behind the Respondents' refusal to pay its share of the advance. Although heavily implied in the Claimants' arguments, neither the judgment of the Pau Court of Appeal, nor that of the Court of Cassation delves into the Respondents' motivation for not paying its share of the advance on costs. The silence of the Court of Cassation on this point could mean one of two things – either it implicitly accepted that the Respondents' non-payment of the advance on costs was part of a nefarious strategy, or that, for purposes of breaching the principle of procedural loyalty, it does not matter – what counts is the failure to pay, not the intention behind it. The latter would potentially also do away with any questions regarding the non-paying party's financial situation. While it seems unlikely that the court's reasoning should be applied in such a mechanic and un-nuanced manner, it is regrettable that the Court of Cassation left that door open and failed to provide more guidance in this regard, especially as the parties' arguments made it more than appropriate to do so.

While the Court of Cassation's judgment will undoubtedly make parties think twice about playing procedural games, future cases will have to further elaborate on the rules.