

The Instant Cost Order

Kluwer Arbitration Blog

October 19, 2010

[Niuscha Bassiri \(Hanotiau & van den Berg\)](#)

Please refer to this post as: Niuscha Bassiri, 'The Instant Cost Order', Kluwer Arbitration Blog, October 19 2010, <http://arbitrationblog.kluwerarbitration.com/2010/10/19/the-instant-cost-order/>

The "Instant Cost Order" is the practical implementation of a means to address the much discussed issue of (the lack of) cost efficiency in international arbitration. It also tackles the question of how proactive tribunals should be in order to control party-driven arbitral proceedings.

The majority of the costs incurred in an arbitral proceeding does usually have its base in the legal and other costs of the parties. The arbitration costs, i.e., arbitrators' fees, administrative charges of arbitral institutions, and hearing facilities will add to the total cost of an arbitration proceeding. In order to control the development of costs, it appears that parties require the tribunal's guidance in relation to legal and other costs, which will necessarily impact the arbitration costs.

Counsel are faced with the problem that although they might wish to keep the costs on a reasonable level they have to do the utmost for their clients to present their case. This is often translated in over-sized submissions, numerous applications for purely strategic reasons, and voluminous production of documents requests.

It is in relation to these procedural steps that the pro-active tribunal can give helpful guidance to the parties in order to minimize the costs without curtailing the parties' right to present their case. Directions on the maximum length of submissions as well as short deadlines for submissions in relation to procedural applications are solutions used. The "Instant Cost Order" is another solution which deserves to be given closer attention, which has, in my research, not been explored further, or at least not publicly known.

So here comes the suggestion:

1. The implementation of the "Instant Cost Order" requires the tribunal to be transparent about this measure as early as possible. Ideally, it should be introduced by the tribunal during the preparatory conference when establishing the procedural rules of the arbitral proceeding.
2. The "Instant Cost Order" may be issued in relation to distinct procedural phases or procedures, such as interim measures applications and production of document requests. It may also be issued in situations of procedural applications, which have resulted in significant work and time investment of the parties and the tribunal (be it that an application served a real procedural issue or was introduced as an obvious dilatory tactic by one party) and/or which have seriously jeopardized the earlier established timetable of the arbitral proceeding in one or the other way.
3. In practical terms the following steps may be followed: (i) the tribunal should request cost submissions by the parties in relation to the specific procedure or application while recording its own time spent on determining on this specific procedure or application; (ii) within a short time frame after the tribunal has issued its order on the specific procedure or application, the tribunal issues an "Instant Cost Order" in which the parties' legal and other costs as well as the arbitrators' hours spent and disbursements, if any, in relation to the specific procedure or application are mentioned; (iii) the "Instant Cost Order" also includes an order on which party should bear the costs on a percentage level, without deciding on the reasonableness of these costs; and (iv) the tribunal's final decision on costs may be based on the "Instant Cost Order(s)" issued during the arbitral proceeding.

The advantages of such "Instant Cost Order" are obvious: (i) transparency in relation to the costs

involved vis-à-vis counsel and parties already during the arbitral proceeding; (ii) incentive for parties to re-consider the introduction of dilatory applications and to minimize production of document requests; (iii) the final cost decision by the tribunal is based on a more accurate basis than in cases where the tribunal reserved its decision on costs of a specific procedure or application to the final stage of the arbitral proceeding, often at a stage when the memory of the work and time involved concerning the specific procedures and applications during the arbitral proceeding may have already faded.

Moreover, the signal given to the parties that the tribunal is adamant about its goal to conduct a cost and time efficient proceeding has a psychological effect, which should not be undermined. Considering that the extra work involved for counsel and arbitrators alike is minimal, the “Instant Cost Order” is a procedural measure of little effort, providing counsel guidance on how to avoid cost explosions during complex arbitration proceedings.