“Costs Follow Conduct” – A Musical Altercation

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When ABBA launched “*The Winner Takes It All*” in 1980, modern arbitration was still in its infancy. The ICC case numbers were just about to become four-digit, while the cases administered by ICSID could still be counted on two hands.

Yet already at that time, “The Winner Takes It All” exemplified one of the two predominant methods for apportioning costs in international arbitration: the “costs follow the event” rule.

The Winner Takes It All

ABBA's lyrics “*I don't wanna talk, about things we've gone through, though it's hurting me, now it's history*” read like a typical cost submission of an attorney who petitioned the tribunal not to take his numerous unsuccessful procedural motions into account when apportioning costs, not least because the opposing counsel also did her share to complicate the proceedings (“*I've played all my cards, and that's what you've done too, nothing more to say, no more ace to play*”).

The “winner takes it all” approach, commonly referred to as “costs follow the event” rule stipulates that the losing party compensates the winner for its costs. It is one of two dominant approaches adopted by tribunals in civil as well as common law countries and stands in contrast to the so-called “American Rule” according to which each party bears its own legal costs, regardless of the outcome of the dispute.

But just as in the music world, “*the winner takes it all*” is only half the story. Along with other criteria, the parties' conduct is also an aspect that is regularly considered by tribunals when apportioning the costs of the proceedings. The UNCITRAL Arbitration Rules 1976 already provided for the possibility to allocate the costs, “*taking into account the circumstances of the case*”. And while ABBA's melody still resonated, arbitral tribunals had already factored in the party's conduct in their cost decisions, laying the foundation of the “costs follow conduct” approach.

In *LETCO v. Liberia*, ICSID Case No. ARB/83/2, para. 378, the tribunal awarded the full costs of arbitration to the claimants including their own expenses holding that “*the decision is based largely on Liberia's procedural bad faith. Not only did Liberia fail to partake in these arbitral proceedings, contrary to its contractual agreement, but it has also undertaken judicial proceedings in Liberia in order to nullify the results of this arbitration.*” Similarly, in *Ultrasystems Inc. v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No. 27-84-3 (4 March 1983), the tribunal apportioned the costs holding that “*extra costs were incurred by the Claimant through Isiran's failure to provide information as to its status until a late stage of the proceedings*“[fn]reprinted in Iran-US CTR 100, 113; cf. excerpt

in CARON/CAPLAN, the UNCITRAL Arbitration Rules – A Commentary, 2nd ed. 2013, p. 894[/fn].

And even as parties yelled the chorus of Queen's "*I want it all*" (1989), tribunals considered and weighed the parties' conduct in their cost decisions[fn]cf. eg. Dadras International and Per-Am Construction Corp. vs. The Islamic Republic of Iran and Tehran Redevelopment Company, Iran-US Claims Tribunal, Award No. 567-213/215-3 [7 November 1995][/fn], where the arbitral tribunal held that "*the respondents have caused considerable disruption of the arbitral process and have unnecessarily occupied the resources of this Tribunal by pursuing their unfounded allegations of forgery and belatedly proffering the unconvincing testimony of Mr. Golzar*".

What goes around…comes around

Nowadays, it is impossible to ignore a tribunal's competence to take the conduct of a party into account. The Rolling Stones had tried to explain that "*You can't always get what you want*" (1969); but ever since Justin Timberlake's number-one hit "*What goes around…comes around*" (2006) it should be clear to everyone involved that the conduct displayed during (or even prior to) the proceedings might show consequences. Whereas most of arbitration rules contain the generic wording (as e.g. used in the UNCITRAL Arbitration Rules 1976 or 2013; cf. art. 40(1) and (2) Swiss Rules; art. 35.1 and 37 SIAC Rules; art. 35.2 DIS Rules; art 34 ICDR Rules), other arbitration rules make the application of a "costs follow conduct" approach very explicit: art. 38(5) of the revised 2017 ICC Rules (and already art. 37(5) of the 2012 ICC Rules) provides that "*[i]n making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*" (see also art. 49(6) and 50 of the 2017 SCC Rules).

There are various scenarios that might warrant considering the parties' conduct in cost decisions. In general, the circumstances that call for the application of the "costs follow conduct" rule have been described such as falsifying witness or expert evidence, late counsel appointments that create a conflict of interest, repeated unsuccessful challenges against an arbitrator, voluminous or continuous document requests, unjustified failure to meet deadlines, false submissions to the tribunal, failure to comply with procedural orders, excessive legal arguments or exaggerated claims, dilatory tactics, due process paranoia etc.[fn]DOUG JONES, Using Costs Orders to Control the Expense of International Commercial Arbitration, The International Journal of Arbitration, Mediation and Dispute Management, 2016, p. 298 et seq.; CARON/CAPLAN, p. 872, with further references; ICC COMMISSION REPORT, Decisions on Costs in International Arbitration, ICC Disp. Resolution Bull 2015/2, para. 78-84, and Appendix A, p. 23[/fn]

In practice, it's difficult to determine when a legal argument is "excessive" or whether it was clear that the challenges would be "unsuccessful". Publicly known cases where costs were allocated for party conduct typically combine several of these factors (see *LETCO v Liberia*, ICSID Case No. ARB/83/2, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4). An illustrative example is the award of 16 September 2003 in *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, para. 24.2 in which the arbitral tribunal concluded:

> "*[t]he Claimant's written presentation of its case has also been convoluted, repetitive, and legally incoherent. It has obliged the Respondent and the Tribunal to examine a myriad of factual issues which have ultimately been revealed as irrelevant to any conceivable legal theory of jurisdiction, liability or recovery. Its characterisation of evidence has been unacceptably slanted, and has required the Respondent and the Tribunal to verify every allegation with suspicion.*"

Karma Police

Recent developments suggest that the "costs follow [party] conduct" principle is gradually extending to further encompass counsel conduct. Following Radiohead's call for a "Karma Police" that would "arrest this man" since "*he talks in maths, he buzzes like a fridge, he's like a detuned radio*" (1997), sanctions for unnecessary "buzzing" of legal representatives are increasingly discussed in the arbitration world. Under the 2013 IBA Guidelines on Party Representation in International Arbitration, arbitral tribunals can take the party representative's misconduct into account when allocating the costs of the proceedings. The 2014 LCIA rules further bestow arbitral tribunals with the power to sanction the legal representative in case of breach of the LCIA General Guidelines for the Parties' Legal Representatives.[fn]art. 18.6 of the LCIA Rules; see also GONZÁLEZ-BUENO, Arbitral tribunals' decisions on costs sanctioning the parties for counsel behavior: A phenomenon expected to increase?, Kluwer Arbitration Blog, April 16, 2014[/fn]

Yet, the emergence of this "costs follow [party and counsel] conduct" principle is no novelty. Already in *Abrahim Rahman Goshani v. The Government of the Islamic Republic of Iran*, Iran-US-Claims Tribunal Award No. 546-812-3 (concurring and dissenting opinion of 2 March 1993, paras. 14 and 15) the arbitrator referred to previous case law where the tribunal had taken into account a counsel's conduct during the arbitral proceedings. It was held that the case had been

> "*unnecessarily complicated – and the time and energy of all concerned (…) wasted – by the Respondent's representatives. […] while vigorous argumentation is understandable and expected, chimerical theories and careless contradictions – whether they are a product of overzealous lawyering or other questionable behavior – are not acceptable*".

However, the allocation of costs in consideration of the legal representatives' conduct raises a myriad of questions regarding, *inter alia*, the arbitral tribunal's jurisdiction over the party's counsel, the law and ethical standards to be applied and the risk of double jeopardy for counsel's breaches of professional rules that are sanctioned by disciplinary authorities and could potentially also be taken into account by an arbitral tribunal.[fn]*see* also criticism in ASA BOARD Position on IBA Guidelines, paras. 1.1-1.4, 2.1, and conclusions 2 and 5)[/fn]

In light of these concerns, arbitral tribunals are unlikely to develop into a full-fledged "Karma Police" and may – in case of doubt – come full circle and apportion the costs in favor of the winner, as foreboded by ABBA all these years back.