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Arbitral tribunals' decisions on costs sanctioning the parties for counsel behavior: A phenomenon expected to increase?

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Guidelines 26 and 27 of the IBA Guidelines on Party Representation in International Arbitration have again raised the debate on the extent that Arbitral Tribunals are entitled to deal with "guerrilla tactics". [1)] The present contribution will in particular discuss Arbitral Tribunals' power to sanction parties for the behavior of their counsel in the proceedings by a ruling on costs.

Guideline 26 – on the "remedies for misconduct" – gives Arbitral Tribunals the discretionary power to take into account the Party Representative's Misconduct [2)] when apportioning the costs of the arbitration. This Guideline specifically provides that the Party Representative should be notified and heard before any sanction is determined. Guideline 27 gives a non-exhaustive list of factors that Arbitral Tribunals should take into account when deciding whether or not to apply the remedies set forth under Guideline 26.

A question arises as to how often Arbitral Tribunals sanction parties through cost allocation and whether Guidelines 26 and 27 may increase the use of such a tool in the proceedings.

Preliminarily, it is important to stress that costs regularly represent a considerable portion of the amount in dispute in small or medium sized disputes. Thus, they are a matter of growing concern in the business community. Accordingly, the allocation of costs can be a crucial issue. Despite the importance of the issue, there is conversely a lot of uncertainty regarding the application of existing rules on costs' allocation. Arbitration agreements very rarely give guidance to the arbitrators as to how costs should be allocated. Even when the arbitration agreements adopt procedural rules on costs' allocation, those rules will invariably say little or nothing about the arbitrator's power to sanction parties for their Counsel's behavior in the proceedings. Such an uncertainty is coupled with the fact that, generally costs are the last claim treated in the briefs. Counsel rarely, if at all, will develop sophisticated arguments on the allocation of the costs. The only well recognized principle in costs allocation is that Arbitral Tribunals have discretion on decisions on costs. As a result, the standards governing costs and the practice adopted by Arbitral Tribunals become of corresponding importance.

Currently, several procedural rules explicitly provide as a general rule that costs ordinarily follow the event. See for example: Rule 28.4 of LCIA which provides that "*[u]nless the parties otherwise*

*agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle t**hat costs should reflect the parties' relative success and failure in the award or arbitration**, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate*" (emphasis added); or Rule 44 of SCC which sets forth that "*[u]nless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, **having regard to the outcome of the case and other relevant circumstances***" (emphasis added).

However, the same rules also provide that such principle applies unless "o*ther circumstances*" require otherwise. Interestingly enough, some procedural rules expressly link the party's behaviour to cost allocation. See in this respect Articles 28 and 31 of ICDR's International Arbitration Rules permit cost/fee shifting for "*dilatory or bad faith conduct*"; or Article 37(5) of the ICC Rules which 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 manne*r".

On the other side, arbitration rules increasingly include specific reference to an obligation of "good faith" on the parties' side in the conduct of the arbitration proceedings. Art. 15(7) Swiss International Arbitration Rules provides that "*[a]ll participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delay […]*". Rule 29 of the JAMS sets forth that "*[t]he Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees […]*".

Indeed, the ethical misconduct, or rather, the plea for standards of counsel's conduct is a growing concern. The practice has shown that "guerrilla tactics" are sometimes used as a form of strategy in the management of the proceedings. Most common is misuse of an arbitration tool, (for example voluminous or continuous document requests) or other abuse of proceedings, when requiring unnecessary steps of the proceedings.

Based on the above, is it likely that Guidelines 26 and 27 – by providing in clear words the arbitral tribunals' possibility to sanction the parties for their procedural behavior – would lead to a misuse of such discretionary power?

The arbitration rules examined above demonstrate that the allocation of costs may largely depend on a number of elements. Most importantly, some rules presently in force endorse the principle that parties' conduct and the time and effort invested in bringing its claims or defenses will have financial consequences on costs and therefore upon the allocation of costs at the end of the proceedings. Hence, there is already an widespread awareness that the parties' conduct in the management of the proceedings can have an impact on the costs' decision. If we are seeing an increase in decisions on costs sanctioning the parties for counsel behavior, it is unlikely that such an increase is to be ascribed to the publication of the Guidelines. Furthermore, it is important to note that Guidelines 26 and 27 are drafted in a very cautious way. Finally, as it has been already pointed out by some authors [3] costs' allocation will often represent a point of compromise within arbitral tribunals in order to reach a unanimous award and avoid dissenting opinions.

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References

?1 See Günther J. Horvath, Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration* (2013).

?2 Both terms are defined in the preamble of the IBA Guidelines.

?3 B. Hanotiau, "The Parties' Costs in Arbitration", Dossier of the ICC Institute of World Business Law: *Evaluation of Damages in International Arbitration* (2006), p. 213.

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