

**Guidelines to
The Instant Cost Order**

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These Guidelines to the “Instant Cost Order” are an attempt to address briefly various questions and comments prompted by the first published mentioning of the “Instant Cost Order” on Kluwer Arbitration Blog on 19 October 2010.

Scope of Use

The scope of use of the “Instant Cost Order” depends on the type of arbitration, including the size of the matter, the parties, and the counsel involved. Thus, it appears to be best placed in larger arbitration proceedings, with counsel being fairly familiar with the arbitral process.

Within the arbitration proceedings, the “Instant Cost Order” may be used in relation to separable procedures and applications, such as interim order applications, document production procedures, protective order applications, and similar.

Further, while delaying and costly procedures can well occur in smaller cases, it is usually in cases with higher amounts in dispute where knowledgeable counsel may opt for applications which may result in rising costs during the proceedings. Therefore, the tribunal should be aware of specificities of the case at hand. Using the “Instant Cost Order” in order to control costs in a case, no matter what, is not suggested.

The “Instant Cost Order” ordering which party should bear the costs for a specific procedure on a percentage level is a real alternative to an (interim) award on costs for various reasons. The most obvious ones are (i) cost; and (ii) time. Both of these factors are significantly lower and less when issuing an “Instant Cost Order” rather than an (interim) award on costs.

Moreover, in an “Instant Cost Order” the tribunal will not decide on the reasonableness of the costs incurred, but only on a percentage level, which will facilitate the decision-making process at the final stage of the arbitration proceedings when deciding on the total costs.

Manner of Use

I. As mentioned in the Kluwer Arbitration Blog, the “Instant Cost Order” requires the tribunal to be transparent about this measure as early as possible. Were it to be included into the procedural rules after having suggested such approach to the parties, the following wording for inclusion in the procedural rules may be used:

Either upon the request of a Party, or upon the Tribunal’s own discretion, the Tribunal may issue an instant cost order in relation to specific parts of the arbitration proceedings, after having consulted the Parties. The Tribunal’s order as to which Party shall bear the costs of the specific part of the arbitration proceedings in an instant cost order is subject to the Tribunal’s final decision on costs.

II. In my article in Kluwer Arbitration Blog under item (3), the specific steps as to the manner of use of the “Instant Cost Order” are laid out. They serve as rough steps and are not meant to be exhaustive, but rather to define the minimum framework in practical terms.

As to the first step mentioned in the article in the Kluwer Arbitration Blog, “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”, entails the ability of the parties and the tribunal to be diligent in separating their time recording in order to avoid an overlap in time recording with other parts of the procedure.

With respect to the second and third steps mentioned in article in the Kluwer Arbitration Blog, “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”, and “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”, requires the tribunal to act quickly and without too much ado.

The “Instant Cost Order” may refer in its consideration part to the following, which, again, is not meant to be exhaustive, but serve as a minimum: (i) the procedural rule allowing the tribunal to issue such order; (ii) the separable procedural application at stake; (iii) the parties’ legal and other costs; (iv) the arbitrators’ hours spent and disbursements; and (v) any facts and circumstances the tribunal deems important to form its decision on costs in relation to the procedural application it has just decided upon. In the operative part of the “Instant Cost Order” the tribunal may keep it short by ordering which party shall bear the costs on which percentage level.

With regard to the fourth step mentioned in the article in the Kluwer Arbitration Blog, “the tribunal’s final decision on costs may be based on the ‘Instant Cost Order(s)’ issued during the arbitral proceeding”, has the benefit of the tribunal being most accurate at the end of the arbitration proceedings when finally deciding on the total costs.