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Making the loser pay

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By Bruce Paulsen

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For those who engage in dispute resolution both in the United States and abroad, there is a stark contrast between litigation in the United States -- where each party bears its own fees -- and litigation in countries such as England, where by law the prevailing party can recover at least a portion of its attorneys' fees.

Under the so-called American rule, regardless of who wins a suit, each party must pay its own fees. While the American rule allows the "little guy" to sue a large corporation without fear of being exposed to an award of fees, it is often a source of frustration for those subjected to meritless suits that they nevertheless have to pay to defend.

There are situations in the United States where the loser does pay, but generally only where the losing party has engaged in some form of "frivolous conduct," by bringing an action that has no basis in fact or law. Even when facing a lawsuit that lacks merit, many judges are hesitant to award sanctions, including the prevailing party's attorneys' fees, for frivolous conduct. Sensibly, most lawyers advise their clients that it is unlikely that they will be able to recover their fees once a case is over.

Occasionally, however, a judge shows real backbone and makes the loser pay when the situation warrants it. That was the case recently, when a New York County Supreme Court justice handed down what may become the largest sanctions award in the history of New York State. In that case, a tenant under a long-term lease of a midtown office tower, sued its landlord, as well as a number of parties who had previously been involved with the lease, for \$115 million, alleging a massive fraud to create a lease with "unconscionable" above-market rent. The tenant, of course, knew exactly what the

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rent was when he bought the lease. All of the defendants moved to dismiss, and sought sanctions under New York law. The judge ruled that the suit, brought by a prominent New York real estate developer, was "completely without merit" and based on an "implausible, if not absurd, factual scenario." The court went on to sanction both the tenant and its attorney, and awarded the defendants all of their attorneys' fees. A result such as this is rare, however.

If you really want the loser to pay, there are at least two ways to address the issue when drafting your commercial agreements. You can choose a "loser pays" jurisdiction, such as London, or provide for fee-shifting in your agreements. In making the choice, parties often assume that they will be the prevailing party in any dispute. This is, of course, not always the case, and both sides of the issue need to be considered when deciding how your jurisdiction/arbitration clauses should be drafted. There can be strategic advantage obtained under the American rule.

In addition, if you choose arbitration, you can opt out of the American rule by choosing arbitration rules which permit the arbitrators to award attorneys' fees or by putting a fee-shifting provision directly in the arbitration clause. That way, even if the arbitration is conducted in the United States, the arbitrators will not be bound by the American Rule and can award fees.

If you can, choose whether or not to have the loser pay at the time the agreements are drafted and not later. If you are relying on a judge in the United States to award you fees if you win your case, you are most likely to be disappointed.

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