Controlling Costs in Domestic Energy Arbitrations

by The Hon. Mark Whittington[1], JAMS

In recent years, energy industry users have increasingly voiced the complaint that arbitration has become much like litigation: too costly and protracted. To address these concerns, the parties and attorneys involved must make conscious decisions, both before and after a dispute arises, to undertake an arbitration process that contains procedures best suited to fairly resolve the dispute and meet the parties' expectations in an expeditious and cost-effective manner.

Pre-Dispute Drafting

The Arbitration Clause – Clearly drafted arbitration clauses avoid uncertainty and disagreement as to their meaning and effect. As a general rule, broad form arbitration clauses (all disputes between the parties arising out of the agreement are submitted to arbitration) are preferable to narrow form clauses which frequently result in extended and expensive disagreement over whether the dispute in question is covered by the arbitration clause. Venue, choice of law and procedure should be clearly spelled out to avoid later disagreement.

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Discovery, a significant cause of increased expense in arbitrations, must be addressed. Even when the dispute may involve millions of dollars, discovery can be tailored to develop essential evidence and keep costs under control. The parties should either include specific language addressing e-discovery, the number of depositions and production of documentary evidence or adopt the discovery procedures of one of the recognized ADR providers (AAA, JAMS, etc.). The arbitration clause should also address selection and appointment of the arbitrator(s). Disputes with respect to selection of the arbitrator(s), in particular a three arbitrator panel, can result in significant delay and added expense. For this reason, the parties should clearly set forth the selection procedure and consider relying upon a sole arbitrator unless the amount in controversy and issues involved dictate otherwise.

After the Dispute Arises

The Scheduling Conference - The manner in which the initial scheduling conference is conducted is vitally important. When controlling costs and length of the proceeding is the goal of the parties, that desire should be clearly communicated to the arbitrator(s) as well as the opposing side and a general counsel or other party representative should participate in the scheduling conference. Too often, attorneys and arbitrators who are comfortable appearing in court under federal and state procedural rules will adopt those rules for an arbitration proceeding unless a party makes its wishes known otherwise.

Attorneys should meet and confer prior to the scheduling conference to reach agreement on as many deadlines as possible. At the initial scheduling conference, which will be

conducted by conference call, a timetable for disposition should be developed containing the shortest times that are realistic given the nature of the case. Arbitrators are being urged to be pro-active in controlling costs. Most arbitrators consider six to eight months a reasonable amount of time to prepare a case for hearing.

Discovery should be limited to what is absolutely essential and not simply track the process available in litigation. The scope of discovery in arbitration is limited to relevant evidence and strict adherence to this rule will avoid "fishing expeditions". Informal exchange of documents is required and interrogatories and requests for production are strictly limited. Depositions can also be limited to key fact witnesses and decision makers. E-discovery can be a major cause of increased cost and, if applicable, should be addressed at the scheduling conference.

Other cost saving methods that can be adopted at the scheduling conference are (1) use of e-filing for all pleadings if provided (2) production of documents in electronic format only (3) maximizing the use of IT systems including video-conferencing and *Skype* (4) limiting documents required to be filed or delivered to the arbitrator, and (5) establishing a presumption that all documents are authentic and admissible unless specifically challenged.

Motion practice – Hearings on motions significantly increase the cost of arbitrations. Procedural disputes, particularly those involving discovery, should be resolved via informal telephone or video conferences with the arbitrator. Dispositive motions should be limited to purely legal issues that may resolve one or more claims in the arbitration. Any dispositive

motion that might involve a fact issue has little chance of success and is an unjustified expense. Arbitrators rarely grant such motions because failure to consider relevant evidence is one of the few remaining grounds for vacatur of an arbitration award and a party has limited ability to obtain appellate review.

The Hearing – Hearings requiring the presence of the arbitrator(s), parties, attorneys and witnesses are expensive and should be as short as possible. The arbitrator(s) should be provided with briefing and a proposed award in advance of the hearing to allow them to become fully informed as to the issues to be addressed. Exhibits should be exchanged and admissibility agreed prior to the hearing. Brief opening statements may be appropriate but written closing statements are generally more helpful to the arbitrator(s). To reduce costs, witnesses should appear and testify through video conference rather than in person. Deposition excerpts should be used liberally.

After the Hearing

Type of Award – The major expense to be incurred after the hearing, other than an appeal, is preparation of the award by the arbitrator(s). A reasoned award can require significant time and effort by the arbitrator(s) and add to delay in resolving a case. A simple award supported by findings of fact and conclusions of law will provide a basis for the arbitrator(s) analysis and protect appellate grounds. Such an award is generally less expensive and time consuming than a reasoned award.

Effective and informed decision making by business users is essential to accomplish the goals of an arbitration program. With the assistance of knowledgeable counsel, choices must be made and business users should take an active role in the process if they really want arbitration to be a cost-effective and efficient alternative to litigation.