

## **TAKING THE MYSTERY OUT OF THE PROCESS: Resolution of Energy Disputes at the American Arbitration Association**

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July 20, 2005

In 2003 I was asked to meet with members of the Energy Bar Association to explain administration of energy cases by the American Arbitration Association (AAA). The goal was to take the mystery out of the arbitral process by explaining the factors that impact administration of an energy case. At the conclusion of the meeting I was asked to capture in the form of an article the content of that presentation. This article is a belated attempt to fulfill that promise.

### *Commencing ADR*

To expedite administration it is essential that the correct form be filed with the American Arbitration Association (AAA). To ascertain what form to use review the ADR provision contained in the applicable tariff, FERC order or the underlying contract. If the ADR provision provides for use of AAA rules or some level of administration by AAA, complete either a Request for Mediation or a Demand for Arbitration.<sup>1</sup> Only one party needs to sign the Request or the Demand. Attach to the Request or the Demand a copy of the applicable ADR provision and a check for the administrative filing fee. If unsure as to the appropriate amount of the administrative filing fee, contact the AAA's Customer Service group at 800-778-7879. File the Request or the Demand with the nearest AAA regional office or case management center. For a listing of the office and center addresses, please consult the AAA website ([www.adr.org](http://www.adr.org)).

If the applicable ADR provision provides for use of AAA's International Dispute Resolution Procedures, complete and file a Notice of Arbitration with the AAA's International Centre for Dispute Resolution (ICDR) in New York City. Only one party needs to sign the Notice. Check the box indicating that the International Dispute Resolution Procedures shall apply. Attach to the Notice a copy of the ADR provision and a check for the applicable administrative filing fee.

If the applicable ADR provision does not require use of AAA's domestic or international rules or administrative involvement by AAA, but the parties have agreed to either the use of AAA's rules or administration by the AAA, complete a Submission to ADR form. Check the appropriate box indicating the nature of the ADR process (e.g., mediation or arbitration) and indicate which set of AAA rules are to apply. All parties must sign the Submission form.<sup>2</sup>

### *Administered Versus Ad Hoc*

If an ADR administrator is not specified in the applicable ADR provision and a disagreement concerning administration arises prior to the appointment of an arbitrator, the only recourse for a party will be court action. In addition, if an arbitral proceeding is being administered by the arbitrator(s),<sup>3</sup> and not by a third party administrator such as the AAA, and a disagreement arises concerning the materiality of the conflict disclosures made by the arbitrator(s) or the manner in which an arbitrator is interpreting and applying the arbitration provision, the only recourse for a party will be court action.

### *Condition Precedent*

If the applicable tariff, FERC order or underlying contract references a condition precedent to arbitration (e.g., negotiation or mediation),<sup>4</sup> to prevent unnecessary delay attach a cover letter to the Request for Mediation, the Demand for Arbitration or the Submission to ADR indicating to the AAA when, where and how the mandatory condition was met. If the condition has not been fulfilled, indicate whether the parties have or have not agreed to waive the requirement.

### *Standard Versus Customized Procedures*

Many ADR clauses merely reference a set of AAA rules. Thus, AAA will administer the resultant ADR proceeding according to AAA's standard administrative practices. Other ADR clauses, however, include procedural provisions that either preempt or supplement provisions of the applicable AAA rules.<sup>5</sup> To ensure that AAA follows the correct administrative procedures attach a copy of the applicable ADR clause to the Request for Mediation, the Demand for Arbitration or the Submission to ADR. In a cover letter highlight the need for AAA to modify standard administrative practices per the attached ADR provisions.

### *Domestic Versus International Arbitration*

If the ADR provision in the tariff or contract does not specify use of a particular set of AAA rules, absent agreement of the parties AAA will decide which set of AAA rules will govern the proceeding. In recent years, AAA has administered the majority of energy disputes using the Commercial Arbitration Rules. The International Arbitration rules, however, will apply to an energy case if the dispute involves a company that is headquartered outside of the United States or the underlying transaction is deemed to be international in scope according to the definition established under the United Nations Commission on International Trade (UNCITRAL).<sup>6</sup>

Major differences exist in the way in which international versus domestic arbitrations are administered. For example, international arbitrators can appoint one or more independent experts and apportion the reasonable costs for legal representation of a successful party. To eliminate the potential for unwelcome surprise, parties should familiarize themselves

with the nature of the procedural differences.<sup>7</sup> A copy of the Commercial and the International Arbitration Rules can be obtained from the AAA website (www.adr.org). In addition, if the applicable ADR provision does not specify the set of AAA rules that shall govern a proceeding, parties should consider stipulating prior to the selection of the arbitrator(s) to the use of either the AAA Commercial or the AAA International Arbitration Rules.

If enforcement of an arbitration award is to take place in a country that is a signatory of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the arbitral proceeding must comply with requirements set out in that treaty. If the AAA International Arbitration Rules govern the arbitration, the procedural requirements for enforcement shall be satisfied. If, however, the AAA Commercial Arbitration Rules apply, the parties need to adopt by mutual consent use of the AAA Supplementary Procedures for International Commercial Arbitration to ensure enforcement of a subsequent award under the New York Convention.<sup>8</sup> If the underlying arbitration agreement specifies the use of customized administrative procedures in lieu of using a set of AAA rules and the award will have to be enforced overseas, the parties need to verify prior to commencement of the arbitration that the customized procedures will meet the requirements for enforcement.

#### *AAA Specialty Panels*

The AAA maintains a number of specialty panels. One such is the national energy panel of mediators and arbitrators. Another is the Large Complex Case Panel. After extensive internal review, existing members of the AAA energy panel were classified in 2004 as having demonstrated expertise in the fields of alternative energy sources, coal, electric energy, oil, gas, and energy plant construction. Those with extensive arbitration experience and expertise were also assigned to the Large Complex Case panel. New additions to the AAA energy panel undergo the same in depth screening process. Thus, members of the AAA energy panel are uniquely qualified to handle a wide range of technical, economic, legal and financial disputes, including matters relating to emissions trading, natural gas and oil production agreements, transportation and sales, independent power and joint agreements, and environmental issues.

One way to ensure that prospective neutrals meet the needs of the parties is to attach to the Request for Mediation, the Demand for Arbitration or the Submission to ADR a cover letter indicating neutral selection preferences.<sup>9</sup> For example, should a list of prospective mediators or arbitrators include non-attorneys as well as attorneys? If the dispute involves energy plant construction would the parties prefer a mediator or arbitrator who is a member of the AAA construction panel? To reduce travel costs do the parties want AAA to limit the geographic search for a prospective neutral? To reduce mediator or arbitrator costs would the parties like to specify an acceptable range for neutral compensation?

Upon obtaining the mutual consent of the parties concerning neutral preferences and search restrictions, AAA will seek prospective neutrals who meet the mutually agreed

upon parameters. If a list of prospective neutrals does not meet the agreed upon search criteria, parties should immediately contact the Assistant Vice President or Vice President responsible for the AAA Case Management Center administering the case.

### *Number and Neutrality of Arbitrators*

To reduce costs, scheduling delays and the potential for disputes involving potential conflict disclosures, parties might consider stipulating post-dispute to using one arbitrator when the amount in controversy is less than \$1,000,000 unless the complexity or uniqueness of the legal or technical issues, or an applicable tariff or FERC order, mandates the use of three experts. Or parties involved in a domestic dispute<sup>10</sup> might consider, providing any applicable tariff or FERC order is silent on the issue, requiring that party appointed arbitrators function in a neutral capacity.<sup>11</sup> If the parties are unable to agree concerning the use of neutral party-appointed arbitrators,<sup>12</sup> to minimize delay and impasse, parties might consider, providing any applicable tariff or FERC order is silent on the issue, allowing the neutral chair of the arbitral panel authority to unilaterally render decisions involving procedural matters.

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<sup>1</sup> For example, the California ISO Open Access Transmission Tariff effective October 13, 2000, the Midwest Open Access Transmission Tariff effective April 1, 2005, the PJM Access Transmission Tariff effective March 20, 2003, the ERCOT Tariff for Transmission Service effective January 1, 2002 and FERC Order 2003-A Standardization of Generator Interconnection Agreements and Procedures issued March 4, 2004 reference use of AAA's arbitration rules. Thus, a party wishing to file a case with AAA involving one of these tariffs or the FERC order would submit a Demand form.

<sup>2</sup> For example, the ISO New England Transmission, Markets and Services Tariff effective February 1, 2005, the New York ISO Open Access Transmission Service Tariff effective December 31, 2003 and the SPP RTO Open Access Transmission Service Tariff do not reference either the AAA rules or administration by the AAA. Thus, parties wishing to submit a dispute to AAA arising out of one of these tariffs would need to complete a Submission form.

<sup>3</sup> Administration by the arbitrator is referred to as "ad hoc" arbitration. The CPR Arbitration Rules specifically provide for ad hoc arbitration or administration by the arbitrator(s). In contrast, the AAA rules provide for administration by a neutral third party, the AAA. Reference to use of a set of AAA arbitration rules in an ADR agreement by default provides for administration by the AAA.

<sup>4</sup> For example, all of the tariffs referenced in footnotes one and two above provide for some type of internal dispute resolution process – either negotiation and/or mediation.

<sup>5</sup> For example, although referencing use of the AAA Commercial Arbitration rules, the arbitration provisions of FERC Order 2003-A and the MISO, the PJM and the ERCOT tariffs referenced above in footnote one slightly modify the standard administrative procedures contained within the referenced AAA rules. The arbitration provisions of the CAISO tariff referenced above in footnote one extensively modify the standard administrative procedures contained within the referenced AAA rules.

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<sup>6</sup> The UNCITRAL definition provides that a dispute is international in scope if any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is situated outside the country in which the parties have their place of business. Thus, AAA could elect to have an energy dispute involving two domestic companies administered by the AAA's International Centre for Dispute Resolution (the ICDR) using the AAA International Arbitration rules even if enforcement of a subsequent award would occur within the United States.

<sup>7</sup> In addition to procedural differences, cases are administered in different AAA case management centers depending upon whether the case is deemed to be domestic or international in scope. AAA has four case management centers that administer domestic cases. They are located in Dallas, TX, Fresno, CA, Atlanta, GA and Providence, RI. The AAA International Centre for Dispute Resolution is headquartered in New York City and has an office in Dublin, Ireland.

<sup>8</sup> The supplemental procedures provide for (1) the exchange of documentary evidence or lists of witnesses between the parties prior to the hearing; (2) provision to the arbitrator of the initiating documents and supplementary documents prior to the hearing; (3) issuance of a reasoned award; (4) AAA involvement in the scheduling of hearings; (5) establishment of a language of the arbitration.

<sup>9</sup> When specifying preferences, parties need to be sensitive to the fact that requiring unique subject matter expertise can dramatically increase the costs of ADR if the pool of prospective neutrals is limited and geographically dispersed.

<sup>10</sup> The AAA International Arbitration Rules automatically provide for neutral party-appointed arbitrators because use of neutral arbitrators is a requirement for enforcement under the New York Convention.

<sup>11</sup> Allowing party-appointed arbitrators to function in a non-neutral capacity (i.e., advocating a particular party's position) tends to defeat a primary reason for incurring the cost of three arbitrators – namely, independent evaluation of the merits of a difficult case by three impartial experts. In addition, using non-neutral party-appointed arbitrators may give rise to an inability to reach agreement on interim orders and ultimately lack of a majority decision.

<sup>12</sup> Prior to July 1, 2003, the AAA Commercial Arbitration Rules provided that absent party agreement party-appointed arbitrators would serve in a non-neutral capacity. Anticipating changes to the Code of Ethics for Commercial Arbitrators (ratified April 1, 2004), AAA revised the provision in the Commercial rules governing the conduct of party-appointed arbitrators. Absent party agreement party-appointed arbitrators must now serve in a neutral capacity. The revised Code of Ethics also: (1) requires that the party-appointed arbitrator obtain from the parties written confirmation in the event the parties want party-appointed arbitrators to serve in a non-neutral capacity; (2) specifies the nature of the interactions that may and may not take place between the non-neutral party-appointed arbitrator and the party that made the appointment; (3) requires extensive disclosure of potential conflicts of interest to all parties.