

# Better, Faster, More Economical Arbitration for Energy Disputes

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**“[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as any other terms in their contract.”**

*Baravati v. Josephtal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

## So why don't more parties craft unique arbitration provisions?

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- Prior negative experience with arbitration
  - Arbitration takes as long as litigation
  - Arbitration is as expensive as litigation
  - Arbitration lacks appellate review
- Jury waiver is preferable
- Lack of planning
- Lack of creativity / knowledge of options
- Fear

## Presentation Thesis

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Arbitration, even in domestic cases, provides a superior form of dispute resolution in most business transactions, if the parties:

- assess disputes that are likely to arise;
- determine the attributes of arbitration best suited to resolving those disputes;
- draft a clause reflecting their intent; and
- select counsel and arbitrators experienced in arbitration who are willing and able to effect that intent.

## Attributes of Arbitration “The Basics”

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- Administered or *ad hoc*
- One arbitrator or a tribunal of three
- Manner of selecting qualified arbitrators
- Discovery restrictions
- Joinder / consolidation
- Form of the Award

## Attributes of Arbitration “Advanced”

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- Electronically Stored Information
- Nontraditional forms of arbitration
- Manner of offering evidence
- Restrictions on number of fact witnesses
- Manner for presenting expert evidence
- Limitations on the arbitrators’ authority
- Coordinating provisions / strategies across the company

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