

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. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

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

- 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

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”

- 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”

- 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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