

# Alternative Dispute Resolution in Energy Disputes: A New Formula for a New Era?

*Two recent reports – by Fulbright & Jaworski and by The Energy ADR Forum – demonstrate in considerable depth the positive potential of ADR in the energy arena. They offer some provocative ideas on how the U.S. experience of ADR in the domestic arena might be usefully applied to energy disputes in the burgeoning international arena.*

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## 1. Introduction

For those of us who survived almost two decades of high drama (and ensuing litigation) in the U.S. and international power industries, and all their related plagues, mostly in the 1990s – environmental and siting deadlocks, grossly protracted regulatory disputes, and the collapse of an independent power producer (IPP) industry in the overhang of corruption and the disease of Enronitis – the search for new models for dispute resolution seems long overdue.

This search is also increasingly urgent in the face of more recent challenges for the power industry, such as climate change, and a new ethic of corporate social responsibility (CSR) that is emerging in the business world. As a sign of its significance, CSR was a prevailing theme at the International Bar Association's (IBA) annual conference in Chicago last fall.

**A**mazingly, after all those horrendous and never-ending court and administrative litigation dramas in energy industries in past decades

(remember FERC's "E Quad 7" case, ER-7777), one might have expected by now an overall revamping of our dispute resolution mechanisms in the energy sectors, especially power.

That does not mean that FERC and state energy regulatory agencies have not made solid efforts to modernize their processes, and to be more aggressive in battling alleged corruption. For example, on July 26, FERC issued two major "show cause" orders, stating its intent to impose massive penalties against alleged natural gas market manipulators, FERC's first claimed exercise of its "new" enforcement authority (enacted way back in 2005).

However, these regulatory agencies are limited in this endeavor by the scope of their jurisdictions. There has been no effective nationwide initiative for an overall revamp of energy dispute resolution – especially in a power industry that will become more and more international – for basic economic resource reasons.

**A**fter the almost complete collapse of what had been a high-profile, largely U.S.-based IPP industry that had massive international aspirations (e.g., in India and China) in the 1990s, today there are modest signs of the re-emergence of an international IPP industry. New IPP players (including some revived veterans of the first IPP era, such as AES) are becoming more active again internationally. This re-emergence is particularly

evident in certain countries in Africa (as reported by this author in *The Electricity Journal* in October and December 2006). Moreover, the governments of many developing countries, supported by international financial institutions (IFIs) such as the World Bank and the Inter-American Development Bank, are starting to take meaningful steps to create the transparent legal, regulatory, and institutional

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regimes that are so necessary to facilitate and sustain such a revival.

However, if the U.S. power industry is to go seriously international again, there has to be an effective international dispute resolution regime for the growing investments and project developments in emerging energy markets that IPPs will make. Painful memories still linger of how dispute resolution could get bogged down in jurisdictional battles in courts in India over IPP access to international arbitration – and that in a country that has long established Western-style

judicial regimes. In other emerging markets in that era, such as China and Indonesia, even the basic concepts of legal protection for IPP investments, and for sustainable long-term contracts protected by international arbitration, seemed vulnerable or challenged.

**M**oreover, with all those lingering memories of how long energy dispute resolution can take in the U.S. (recall again E Quad 7!), it seems like the right time to undergo a comprehensive review of where we are in developing an effective "alternative dispute resolution" (ADR) regime or mechanisms for the energy sectors in the U.S., and whether we can develop any ADR initiatives to tackle dispute resolution in that even more challenging international IPP arena that appears to be on the path to revival. With the emergence of new legal models for private infrastructure developments in developing countries that still have traditionally state-owned-utility dominated industries but are now trying to attract private investment – models often advanced under the broad rubric of "public-private partnerships" (PPPs) – dispute resolution will have to take on new legal complications that ADR might manage better.

This article will take a broad approach to reviewing the whole range of options ADR potentially applicable to energy – from simple facilitation of dispute

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