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Arbitration of Oil and Gas Disputes

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I. Arbitration: Why It May be Preferable to Litigation

(a) A Panacea?

In a paper delivered to the 46th Mineral Law Institute back in 1999, New Orleans attorney William Pitts quoted the following from Chief Justice Warren Burger:

> The notion that ordinary people want black-robed judges, well-dressed lawyers and fine courtrooms as a setting to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and as inexpensively as possible.[1]

At first glance, arbitration may seem like a panacea. It features the "speedy disposition of differences through informal procedures without resort to court action."[2]

One leading commentator defines arbitration as follows: "Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the

[1] William Pitts, *ADR in the Oil and Gas Context*, quoting Warren Burger, "Our Vicious Legal Spiral," 16 Judges J. 22, 49 (1977)

[2] *Firmin v. Garber*, 353 So.2d 975, 977 (La. 1977); *National Tea Co. v. Richmond*, 548 So.2d 930, 933 (La. 1989).

place of the tribunals provided for by the ordinary processes of law." It has been more succinctly described as "a private system of justice offering benefits of reduced delay and expense."[3]

Arbitration is commonly used to resolve legal disputes in these areas: construction, commercial, corporate, consumer, employment, labor, maritime, environmental, energy, and insurance. It is not typically used in tort or personal injury cases, because there is usually no contractual relationship between the parties or any agreement to arbitrate over an accident or injury which the parties do not anticipate will occur.[4] In addition, attempts to compel a severely injured person to arbitrate may be legislatively prohibited or deemed "unconscionable."

A foundational principle of arbitration is that the parties must consent to it. Ordinarily, a party consents by signing a contract containing an arbitration clause. However, under certain legal theories, a court may compel arbitration where there is no signature or express agreement. These theories include agency, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary, waiver, and estoppel.[5]

A determination as to whether the parties have agreed to arbitrate involves two considerations: (1) whether there is a valid agreement between the parties; and (2) whether the

[3] Domke on Commercial Arbitration, 3d (2017), Vol.1, Part 1.

[4] *See*, *Duhon v. Activelaf, L.L.C.*, 16-0818 (La. 10/19/16), 192 So.3d 762, where the Louisiana Supreme Court struck down as adhesionary and unenforceable an arbitration provision requiring patrons of a Lafayette indoor trampoline park to arbitrate any dispute. Because the provision was "camouflaged" within an eleven-sentence paragraph, nine of which did not relate to arbitration, it failed to comply with notice standards earlier set forth in *Aguillard v. Auction Management Corp*., 04-2804 (La. 6/29/05), 908 So.2d 1.

[5] *Arthur Andersen, L.L.P. v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 189, 173 L.Ed.2d 832 (2009); *Sturdy Built Homes, L.L.C. v Carl E. Woodward, L.L.C.* 11-881 (La. App. 4 Cir. 12/14/11), 82 So.3d 473.

dispute falls within the scope of that agreement.[6] Courts may apply ordinary principles of state contract law to determine whether the parties have formed a valid agreement to arbitrate.[7]

The basic premise of arbitration is that instead of becoming enmired in lengthy, costly, and risky litigation, before unknown and unpredictable fact-finders, the parties can choose their own arbitrator, limit discovery, maintain confidentiality, and obtain a quick hearing. In certain specialized or technical areas (such as engineering or accounting), the parties can select an arbitrator who has extensive training, experience, and certification in that particular area.

The arbitrator's decision will be final, eliminating the expense and uncertainty of appeals. Also, arbitration awards are enforceable. They can be confirmed by a local district court and transformed into a judgment, as enforceable as any judgment rendered by a court of law.[8]

Under both federal and Louisiana law arbitration is "favored."[9] Contractual provisions to settle any controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10]

The right to arbitrate can be waived, but there is a presumption against waiver. Neither answering a judicial complaint nor a period of delay in filing an arbitration demand necessarily constitutes a waiver, especially where there is no prejudice to the opposing party. Nevertheless,

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[6] On the issue of who decides whether a claim must be arbitrated, under AAA Commercial Rule 7(a), "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope and validity of the arbitration agreement." However, where the assertion of arbitrability is "wholly groundless," a court may decide that claims are not arbitrable. *Archer and White Sales, Inc. v. Henry Schein, Inc,* 878 F.3d 488 (5th Cir. 2017).

[7] *Prasad v. Bullard,* 10-291 (La. App. 5 Cir. 10/12/10), 51 So.3d 35.

[8] La. R.S. 9:4212.

[9] 9 U.S.C. 1, et seq.; La. R.S. 9:4201, et seq.

[10] 28 U.S.C. 2; La. R.S. 9: 4202.

waiver may occur where a party has resorted to judicial remedies and allowed a significant amount of time to elapse before demanding arbitration, so as to indicate an overall intent to litigate instead of arbitrate.[11]

(b) But Wait--Is All This Too Good to be True?

Is arbitration really less expensive?

Generally speaking, yes, but not always. The parties must pay for the arbitrator or arbitrators, whose hourly fees may tend toward the steep side. The parties may also have to pay filing fees to an entity administering the arbitration, such as the American Arbitration Association (AAA). While administration by the AAA is by no means required, it is considered the leading administrator of arbitrations, and the AAA has promulgated detailed rules and procedures for arbitration of commercial, construction, consumer, employment, and international disputes.[12]

Is discovery really limited? Excessive discovery is discouraged, but arbitrators enjoy a wide degree of latitude in handling discovery issues. Under Rule 22 of the AAA Commercial Arbitration Rules, an arbitrator "shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." This certainly sounds reasonable, but how it plays out in practice can vary depending upon the individual views of the arbitrator and the nature of the dispute. Some arbitrators endeavor to limit discovery to no more than three depositions per

[11] *Lorusso v. Landrieu Enterprises, Inc.*, 02-2346 (La. App. 4 Cir. 5/21/03), 848 So.2d 656*; Hospital Service District No. 3 of the Parish of Lafourche v. Fidelity and Deposit Company of Maryland*, 99-2773 (La. App. 1 Cir. 1/16/01, 809 So.2d 145, *writ denied*, 01-0679 (La. 4/27/01).

[12] These Rules can be found at www.adr.org.

side. Others are more liberal, allowing numerous depositions to be taken and written discovery requests propounded, with the resulting concern that an arbitration, meant to be speedy and efficient, may morph into "its nemesis"—litigation.

Can you obtain discovery from non-parties? This is an unsettled area. Under Section 7 of the Federal Arbitration Act (FAA), arbitrators may summon in writing any person to attend before them and to bring any book, record, or document which may be deemed material as evidence in the case. But this refers to the arbitration hearing. Courts disagree as to whether arbitrators may compel production of documents from a third party prior to the hearing.[13] Arbitral subpoenas for depositions of third parties are generally not permitted under the Federal Arbitration Act.[14]

Can you file dispositive motions? Under Rule 33 of the AAA Commercial Rules, the arbitrator "may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." In practice, dispositive motions are viewed with caution. Because they run counter to the purpose of giving the parties a fast and fair hearing, they are rarely granted.

[13] *See, e.g., Life Receivables Trust v. Syndicate 102 at Lloyd's of London,* 549 F.3d 210 (2d Cir. 2008)(no document subpoena permitted); *Hay Grp. v. EBS Acquisition Corp*., 360 F.3d 404 (3d Cir. 2004)(pre-hearing subpoena for documents unenforceable); *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2000)(arbitrators have implicit power to order production of documents for review prior to hearing*); Am. Fed. Of Television & Radio Artists, AFL-CIO v. WJBK-TV,* 164 F.3d 1004 (6th Cir. 1999) (approving subpoena to non-party for prehearing documents).

[14] *Atmel Corp. v. LM Ericsson Telefon,AB,* 371 F.Supp. 2d 402 (S.D.N.Y. 2005).

What about the possibility of appeal? Just as there is no crying in baseball, there is no appeal in arbitration. Allowing an appeal to a court of law from an arbitrator's decision thwarts the purpose of achieving a quick and final resolution of the dispute.[15]

But can the parties contractually grant themselves the right to judicial appeal from an arbitrator's decision? In the case of *Hall Street Associates, Inc. v. Mattel, Inc.*,[16] an arbitration clause provided for judicial review of any arbitrator errors of fact and law. The U.S. Supreme Court held that under the FAA, which applies to arbitration agreements affecting interstate commerce, contractual agreements to expand judicial review are prohibited and unenforceable. The FAA's four specified grounds for vacating an award are exclusive. As a result, "manifest disregard of the law" does not constitute grounds for review of an award under FAA.

But could state or common law provide a separate basis for expanding judicial review? In a California case, the arbitration agreement provided that the arbitrators "shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." The California Supreme Court held this was permissible under the state's arbitration act. Even though that statute sets forth specific grounds for vacating an award, it does not limit the parties' right to expand review by contract.[17]

What if you have good reason to believe the arbitrators made a mistake of law or fact? In one recent case, the Louisiana Fourth Circuit Court of Appeal vacated an arbitration award

[15] A separate question is whether the parties may contractually agree to allow an appeal to another arbitration panel. See Section IV of this paper.

[16] 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008)

[17] *Connection Inc. v. DIRECTV*, 44 Cal. 4th 1334, 190 P.3d 586 (2008).

on grounds that the arbitrators had erroneously found that a construction peremption statute could be applied retroactively. Taking no position on that issue, the Louisiana Supreme Court reversed, reaffirming the principle that judges are not allowed to substitute their views for those of arbitrators chosen by the parties.[18]

So what are the grounds to "vacate" an arbitration award? The short answer is an award can only be vacated on grounds set forth in the statute. Under La. R.S. 9:4210[19] an award may be vacated where: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption on the part of the arbitrators or any of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of other misbehavior by which the rights of any party have been prejudiced; (4) or the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

In sum, probably the three main "trade-offs" in deciding to resolve disputes by arbitration as opposed to litigation are: (1) no right to trial by jury; (2) no right to broad discovery; and (3) no right to appeal. In this respect, it should be noted that the Louisiana Supreme Court has imposed strict rules governing the inclusion of arbitration clauses in attorney-client retainer agreements. Because of the fiduciary duties owed to clients, attorneys must fully disclose the terms and scope of any arbitration clause and explicitly set forth the

[18] *Crescent Property Partners, LLC v. American Mfrs. Mutual Ins. Co*., 14-0969 (La. 1/28/15), 158 So.3d 798.

[19] The grounds for vacating an arbitration award under the FAA mirror those enumerated by La. R.S. 9:4210. *See* 9 U.S.C. §10.

rights clients will be giving up. Attorneys must also advise clients of their right to seek independent counsel before signing the contract.[20]

II. Arbitration of Oil & Gas Cases

(a) General Principles

In oil and gas cases, the same considerations apply. In his 1999 paper attorney Pitts noted that methods of alternative dispute resolution are increasingly used by oil and gas companies to achieve these business objectives:

> Controlling legal costs
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> Controlling liability costs
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> Maintaining parties' control over resolution of disputes
>
> Promoting fair and prompt resolution of disputes
>
> Maintaining ongoing business relationships
>
> Preventing unfavorable publicity
>
> Preventing unfavorable legal precedents[21]

More recently, a distinguished Louisiana oil and gas lawyer, well-known to this group, enumerated these reasons why arbitration may be preferable to litigation:

> The trier of fact is someone trained and experienced in the subject matter of the dispute.
>
> The proceedings can be conducted in privacy, preserving the confidentiality of documents or exhibits filed in the proceedings.
>
> The parties can draft their own arbitration agreement.

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[20] *Hodges v. Reasonover*, 12-0043 (La. 7/2/12), 103 So.3d 1069.

[21] *See* Pitts, *supra*, n.1.

The decision will be final.

The parties may be more likely to continue their relationship before and after the dispute is resolved.

"Thus," the author colorfully concludes, "if a client does not want its company hauled into an unfriendly forum; subjected to numerous, expensive, time-consuming, limitless depositions; giving up its computers or records to forensic examination; and potentially submitting its economic future to a decision by a trier of fact who does not know a "Pugh Clause" from Santa Claus, that client might consider including a tailored arbitration clause in its contract."[22]

Here it should be emphasized that parties to an arbitration agreement enjoy wide discretion to craft their own rules. Arbitration provisions often incorporate by reference the AAA Commercial Rules, but if the parties want to they can include more specific language in their agreement. For example, if the parties wish to limit recoverable damages, allow or prohibit recovery of attorney fees, designate certain experts to render opinions, or provide for confidentiality of an award, they are generally free to do so.

In a 2017 online article entitled "Oil and Gas Arbitration," published by the College of Commercial Arbitrators, authors James M. Gaitis, John Burritt McArthur, Gary V. McGowan, and Susan S. Soussan point out that the oil and gas industry has "long been a leader in promoting the resolution of industry disputes through the use of binding arbitration." In addition, both the domestic and international oil and gas industry have become "leading players in promotion and development of arbitration materials." The Association of

[22] Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 LA. L. REV. 691, 779-781 (Spring 2016).

International Petroleum Negotiators (AIPN) provides model forms of arbitration provisions. The American Association of Professional Landmen (AAPL) and International Association of Drilling Contractors (IADC) have also promulgated draft arbitration provisions for use in oil and gas contracts.

Certain arbitration panels specialize in handling energy disputes. These include the AAA National Energy Panel, the Center for Public Resources (CPR) Institute for Conflict Prevention and Resolution Energy Oil & Gas panel, the Institute for Energy Law Energy Arbitrators List, and the International Centre for Dispute Resolution (ICDR) Energy Arbitrators List. These panels consist of arbitrators with a significant oil and gas background and meaningful arbitration experience and training.

(b) Specific Contracts

As Mr. Pitts noted, the oil and gas industry "is primarily based on contractual relationships." Such contracts include mineral leases; joint exploration agreements; joint operation agreements; farm-out agreements; transportation, storage, processing and/or sales contracts; like-kind exchange agreements; sale or exchange of producing properties agreements; gas plant operations for two or more producers; closure of facilities; take-or-pay agreements; bidding on OCS and onshore competitive lease sales; and lease reassignment rights.

Purchase and Sale Agreements

Agreements for the purchase and sale of oil and gas properties typically contain an arbitration clause.[23] Of particular interest is that such agreements often call for a "tiered

[23] *Id*. at p. 777.

approach" to alternative dispute resolution, requiring the following process: (1) face-to-face negotiations between high-level officers of each party; (2) if that does not resolve the dispute, the parties agree to mediate their differences; and (3) if mediation does not prove fruitful, the parties agree to binding arbitration. Mr. Pitts also noted that "companies are beginning to include mandatory negotiation clauses in their contracts."

A Purchase and Sale Agreement (PSA) may provide for arbitration of disputes relating to title or environmental defects and resulting adjustments to the purchase price. A certified public accountant may be designated to assist in resolving a price adjustment dispute. Further, the arbitration provision may specify the qualifications of the person who will serve as "title arbitrator" or "defect referee."

Here is an example:

> Any dispute shall be referred to a title attorney or other consultant experienced in the examination of title to properties of a similar character located in the state where the Assets are located mutually agreed upon by Purchaser and Seller for prompt resolution (the "Defect Referee"). The Defect Referee must have at least 10 years' experience and must not have worked as an employee or outside counsel for either Party or its Affiliates during the 5-year period preceding the arbitration or have any financial interest in the dispute.

Similarly, a provision relating to an alleged environmental defect may call for referral of the dispute to a qualified environmental consultant or engineer.[24]

The four authors of the aforementioned online article describe in detail the kinds of oil and gas contracts where disputes may arise and discuss reasons why binding arbitration can benefit the parties.[25] These contracts include:

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[24] *Id.* at p. 778.

[25] The section draws heavily from the excellent online article, "Oil & Gas Arbitration," by James Gaitis, John Burritt McArthur, Gary V. McGowan, and Susan S. Soussan.

1. Upstream Disputes

Joint Operating Agreements—These agreements cover the rights and duties of operators and non-operating working interest owners with respect to drilling, completion, operation, and plugging and abandonment of wells. According to the authors, most JOAs covering onshore exploration and development do not contain arbitration provisions, whereas most offshore operating agreements do mandate arbitration.

Balancing Agreements—These are agreements whereby companies supply each other with oil or natural gas by exchanging production in different parts of the country. They contain a "balancing clause" which comes into play when the distribution of production falls out of balance with ownership of production. Many of these agreements contain an arbitration clause.

Joint Venture and Partnership Agreements—These are designed to facilitate equity investment. Domestic agreements (the authors say) traditionally did not contain arbitration clauses, but arbitration clauses are more common when the participants are larger oil and gas companies and the project costs are very high.

Areas of Mutual Interest Agreements--Arbitration clauses are increasingly used where the property conveyed is extensive, located offshore, or when the transaction is international in nature. AMI's prevent a party from acquiring interests in a defined area without offering the remaining parties an opportunity to participate in the interest.

Unitization Agreements: These agreements combine individual leases into a larger area operated under single management. Unit agreements traditionally did not include arbitration clauses. Those involving large properties are more likely to contain them.

Drilling and Service Contracts: These contracts set forth the rights and duties of drilling contractors and well operators. They pertain to a variety of drilling rigs, from land-based rigs to offshore drilling rigs and drill ships. Arbitrations clauses in these contracts are common.

2. Midstream Disputes:

Gas Gathering and Production Handling Disputes: Producers pay a fee to the owner of a gas gathering system to receive their production and deliver it to a processing plant or a pipeline. Gas gathering agreements often contain arbitration agreements. Offshore production handling agreements are typically entered into between the operator of a production platform and the operator of satellite wells drilled on other offshore blocks. The authors note that these agreements "contain highly detailed arbitration provisions designed to ensure an expedited and expert resolution of a broad variety of disputes."

Gas Processing Disputes—A key purpose of gas processing agreements is to "treat" gas and remove impurities, separating natural gas liquids to ensure that "residue" gas satisfies downstream quality specifications. Arbitrable issues include construction problems, design defects, measurement disputes, and allocation agreements.

3. Downstream Disputes:

Gas Sales Agreements/Liquefied Natural Gas Sales Agreements--These sales agreements specify the price, terms of delivery, quality of gas, volumes, payment logistics, and duration of the agreements. Most LNG contracts involving U.S.-based liquefaction facilities, the authors note, are between international parties, but nonetheless provide for arbitrations conducted in the United States.

EPC Agreements/Refineries/Petrochemical Plants—The authors note that the "first step" in the design and construction of a processing unit in a refinery or chemical plant is negotiation of an engineering, procurement, and construction (EPC) contract. These contracts often call for arbitration of disputes. The authors observe that "the complexity and technical aspects of an EPC dispute often are beyond the ken of judges and juries."

Royalty/Mineral Owner Disputes—Private and public parties lease their minerals to oil and gas companies who explore for and produce oil and gas. These mineral leases tend (or tended) to be "form contracts" which "historically did not include arbitration clauses." However, this has been changing in recent years such that disputes under oil and gas leases are increasingly being arbitrated. The authors also take note of recent U.S. Supreme Court decisions enforcing contractual waivers of the right to pursue class arbitration.[26]

III. Arbitration of Oil and Gas Disputes: Recent Cases

Here are brief summaries of certain recent cases addressing arbitration issues in the context of oil and gas disputes. As you will note, the issues litigated—such as the authority of the arbitrator, the scope of arbitration agreements, the process of appointing arbitrators, grounds for vacatur, and waiver of the right to arbitrate-- are not necessarily "peculiar" to oil and gas cases.

[26] *DIRECTV, Inc. v. Imburgia*, 577 U.S. __, 136 S. Ct. 463 (2015); *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 131 S. Ct. 1740 (2011); *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758 (2010).

Mack Energy Co. v. Expert Oil and Gas, LLC, 2014-1127 (La. 10/3/14); 159 So.3d 437.

The parties had a joint interest in Lake Salvador Field. The Operating Agreement included a COPAS accounting procedure.[27] (COPAS stands for Council of the Petroleum Accountants Society). Pursuant to this agreement, plaintiffs invoked their right to audit the joint account. The auditor found the operator had overcharged the account, impermissibly charging the sum of $978,000 to the owners. But the parties could not reach agreement on this issue, and therefore invoked the arbitration provision of their Participation Agreement. The arbitration claim made by the non-operators was for $978,000, but the arbitrator awarded the owners substantially more--approximately $1.6 million. This was premised on certain employment documents which the arbitrator asked to be produced during the hearing, but which were not entered as exhibits.

Plaintiffs moved to confirm the award, while defendant moved to vacate it. The district court confirmed the award, and the operator appealed. The court of appeal affirmed by majority vote, after which the La. Supreme Court granted writs.

Reviewing the record, the Louisiana Supreme Court held that the arbitrator had authority under La. R.S. 9:2406, and under the parties' procedural agreement, to order the production of employment records during the arbitration. "When, as here, parties submit their dispute for resolution by arbitration, the role of the courts in reviewing the outcome is limited. As we have previously explained, "[a]rbitration is a substitute for litigation," and [j]udges are not entitled to substitute their judgment for that of the arbitrators chosen by the parties."

[27] 2014-1127 (La. 10/3/14); 159 So.3d 437.

ExPert Oil & Gas, L.L.C. v. Mack Energy Co., et al., 2016-0068 (La. App. 1 Cir. 9/16/16); 203 So.3d 1080.

In a follow-up case, *ExPert Oil & Gas, L.L.C. v. Mack Energy Co., et al.*, decided by the Louisiana First Circuit Court of Appeal, ExPert filed a petition to nullify the judgment of the district court confirming the arbitrator's award, contending it had been obtained through ill practices. Allegedly, the arbitrator admitted making a mistake in his calculations. Mack Energy filed an exception of no cause of action, which the trial court granted. The court of appeal held that by agreeing to arbitration, parties accept the risk of procedural and substantive mistakes of either fact or law by the arbitrators, and those are not reviewable by the courts. Since calculation errors are not a basis to vacate an award, they are also not a basis for nullifying the judgment of the district court confirming the award.

Goodrich Petroleum Co., LLC v. MRC Energy Co., 2013-1435 (La. App. 4th Cir. 4/16/14); 137 So.3d 200, *reh'g denied* (5/18/14), *writ denied*, 2014-1199 (La. 9/19/14); 149 So.3d 249.

This case presented a dispute over application of the Louisiana Risk Fee Act, La. R.S. 30:10A(2), to three wells drilled by one of the parties. Under the Act, a party drilling a unit well may call upon other owners in the unit to either participate in the cost, risk and expense of drilling the well or become subject to a "risk fee charge."

Since the Participation Agreement between Goodrich Petroleum and Matador contained an arbitration provision, the dispute was submitted to three arbitrators. They agreed to bifurcate the case so that the first issue to be decided was whether or not Goodrich Petroleum had any liability for costs pursuant to the Louisiana Risk Fee Act. The parties agreed to decide this issue in the same manner as cross-motions for summary judgment—based upon briefs, documentary evidence, and oral argument. A majority of the arbitrators decided in favor of

Goodrich Petroleum, finding Matador had improperly charged the expenses allocable to the non-consenting owner's tract to the Matador/Goodrich joint operating account, with the expectation that Goodrich would bear one-half of those expenses.

Matador then asked the panel to address accounting issues, to which Goodrich objected. The panel determined that it was empowered to resolve accounting issues. To a large extent the panel decided those issues in favor of Matador.

Goodrich then moved to confirm the first part of the award, but to vacate the second part. Matador did not contest confirmation of the first award but sought to confirm the second part. The trial court confirmed the first award but vacated the second, and Matador appealed.

The Fourth Circuit Court of Appeal emphasized the broad language of the arbitration agreement—"any and all controversies or claims arising out of or relating to their Agreement . . . will be submitted to final and binding 30-day arbitration." The agreement also envisioned "repeated use" of arbitration proceedings to resolve any and all disputes. As a result, the Fourth Circuit reversed the trial court's vacatur of the second part of the award.

Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397 (5th Cir 2007).

Texaco initiated arbitration proceedings against Apache as called for in certain farm-in agreements. The arbitrator held that Apache had breached its commitment to Texaco in reckless indifference to Texaco's interests. He also invalidated an exculpatory clause as void under New York law. The arbitrator awarded Texaco $71 million, $20 million of which constituted consequential damages. The district court confirmed the award and Apache appealed, contending the arbitrator exceeded his powers and manifestly disregarded the law.

Noting the farm-in agreements contained broad arbitration language covering "any dispute" arising out of the contract, the court held the arbitrator did not exceed his powers. There was no indication in the exculpatory clause that the parties did not intend to arbitrate the validity and enforceability of that clause itself. Further, according to the contract, once the exculpatory clause was deemed unenforceable, no barrier existed to awarding consequential damages allowed under New York law. Finally, "manifest disregard" of the law is a non-statutory ground for vacating an arbitrator's decision, and this phrase encompasses more than mere error or misunderstanding with respect to the law. It entails an appreciation of the existence of a clearly governing legal principle and a decision to ignore it. In this instance, the arbitrator did not manifestly disregard the law by failing to enforce the exculpatory clause or by awarding consequential damages to Texaco.

BP Exploration Libya Ltd. and Exxon Mobil Libya Ltd. v. Noble North Africa Ltd., 689 F. 3d 481 (5th Cir. 2012).

In a dispute over an alleged breach of an Assignment Agreement, the parties disagreed over the appointment of arbitrators. Despite an agreement that they would arbitrate before three arbitrators, the district court ordered the parties to proceed before five--namely, three party-appointed arbitrators, who would then choose two neutral arbitrators. If the party-appointed arbitrators could not agree on whom to appoint, the district court ordered the parties to petition the Secretary-General of the Permanent Court at The Hague for appointment of the two neutral arbitrators.

On appeal, the Fifth Circuit held that the district court was authorized to use its appointment power under 9 USC § 5, but it erred in deviating from the parties' agreement to arbitrate before a three-member panel. In so ruling the court cited a U.S. Supreme Court case

holding that the FAA favors selection of arbitrators by the parties rather than the courts.[28] The FAA authorizes a court to intervene "to select an arbitrator upon application of a party" in three instances: (1) if the arbitration agreement does not provide a method of selecting arbitrators; (2) if the arbitration agreement provides a method but a party to the agreement has failed to follow that method; or (3) if there is a "lapse" in the naming of an arbitrator.[29]

In this case Exxon and BP contended there had been a lapse in the process. Noble disagreed. Upon reviewing the facts, the court held that the arbitrator appointment process, specified in §18.2 of the Drilling Agreement, had suffered a "mechanical breakdown" or lapse. The court emphasized that proper designation of the panel is "of the utmost importance," because an improperly appointed panel puts the arbitration award at risk for vacatur.

Forest Oil Corporation v. El Rucio Land & Cattle Company, Inc., 518 S.W. 3d 422 (Tex. 2017).

One issue in this case was whether the arbitration award should be vacated due to "evident partiality" of a neutral arbitrator or because the arbitrators had exceeded their powers. Evident partiality is established by the non-disclosure of "facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." Disclosure is only required when the facts are material. The court held there was no direct evidence that the arbitrator "should not be disqualified for failure to disclose a trivial, non-prejudicial, not consummated invitation to act as mediator."

[28] *Rent-A-Center, West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010).

[29] 9 U.S.C. § 5.

A second issue was whether the panel exceeded its authority by awarding damages not permitted by Texas law. The Settlement Agreement gave the arbitrators authority to award punitive damages allowed by Texas substantive law. It also provided that all "disputes relating to this Agreement, or disputes over the scope of this arbitration clause, will be resolved by arbitration." As a result, determining what damages Texas law allows fell within the arbitrators' broad authority.

In Matter of Mirant Corp., 613 F.3d 584 (5th Cir. 2010)

In a case involving an alleged breach of a purchase and sale agreement, the district court denied a motion to compel arbitration. In various briefs filed in the district court Castex Energy had reserved "in a footnote" the right to compel arbitration, but it did not file a motion to compel arbitration until the litigation had been pending for 18 months, and only then in response to a third amended complaint. MC Asset Recovery (MCAR) argued that Castex had waived the right to arbitrate, because it had substantially invoked the judicial process by filing multiple motions to dismiss. The district court agreed.

Noting the strong presumption against waiver, and the requirement that a party must engage in some overt act evincing a desire to litigate rather than arbitrate, the Fifth Circuit nevertheless held that standard was met. Castex had filed a motion to dismiss with prejudice, which was tantamount to seeking a decision on the merits. Castex could have filed an alternative motion to compel arbitration, but chose not to. Listing arbitration as an affirmative defense in an Answer is not a timely demand for arbitration. In addition, MCAR spent over $260, 000 in defending against Castex discovery motions and motions to dismiss. That expense supported a finding of prejudice.

IV. Other Issues of Interest

(a) An Appellate Arbitration Panel?

One creative idea for parties who wish to allow for the possibility of appeal is to provide for review, not by a district court, but by an "appellate" arbitration panel. Such a panel would be available to provide meaningful review for manifest disregard of the law. Under AAA Optional Appellate Rules, parties by written agreement may vary the procedures. Here is an appeal provision approved by the AAA:

> Notwithstanding any language to the contrary in the contract documents, the parties hereby agree that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules . . . and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award . . . . Following the appeal process the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof.

(b) Attorney's Fees and Recoverable Damages:

Under Rule 47(a) of the AAA Commercial Rules, "an arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." Attorney fees are usually awarded where the underlying contract or applicable law allows, or where the arbitration agreement expressly provides for such recovery. Contracts occasionally allow recovery of attorney fees by the "prevailing party," although the definition of that term is subject to dispute. Similarly, whether consequential or punitive damages may be recovered usually depends on the language of the contract and the applicable law. These issues underscore the critical importance of drafting a careful, thorough, and clear arbitration agreement at the outset.

(c) Appointment of a Special Master?

Although this is to some degree "off topic," parties who, lacking an arbitration agreement, find themselves involved in litigation of a complex, multi-party, highly technical matter might consider requesting the appointment of a Special Master. Some Louisiana judges are receptive to such requests; some are not. Special Masters are not arbitrators. They are not empowered to make binding decisions, only recommendations. But they can bring valuable specialized knowledge and training to the resolution of a dispute. See La. R.S. 13:4165 and Fed. R. Civ. P. 53.