



Oil & Gas Arbitration

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I. Introduction

The oil & gas industry has long been a leader in promoting the resolution of industry disputes through the use of binding arbitration. In the international sphere, the oft-mentioned *Abu Dhabi*, *Qatar*, *ARAMCO*, *Aminoil*, and *Libya* cases played a critical role in promoting the acceptance of investor-state arbitration and the applicability of international law to oil & gas industry disputes involving host nations. Today, the vast majority of international commercial oil & gas disputes are resolved through arbitration.

Arbitration of domestic oil & gas disputes also gained an early foothold in the United States. As early as the 1950s, U.S. “natural gas companies” began to incorporate arbitration provisions into Natural Gas Act-era gas purchase agreements. By the 1970s, industry contracts, such as the Trans Alaska Pipeline System Agreement, included arbitration clauses, as did a series of very large Alaska Royalty Settlement Agreements in the early 1990s. Nevertheless, even in the 1980s and thereafter, many forms of oil & gas contracts did not incorporate arbitration provisions. With the advent of the twenty-first century, most sectors of the oil & gas industry now include arbitration provisions in many, if not most, of their contracts.

Overall, the domestic and international oil & gas industry has become one of the leading players in the promotion of arbitration and the development of arbitration materials. For example, the Association of International Petroleum Negotiators (the AIPN) has developed model form arbitration provisions to be utilized in a broad variety of oil & gas contracts, and other oil & gas industry organizations, such as the American Association of Petroleum Landmen (AAPL) and the International Association of Drilling Contractors, too, draft arbitration provisions for use in oil & gas contracts.

Oil & gas contracts inherently give rise to many forms of disputes, large and small. The following discussion identifies many of the kinds of disputes that frequently arise in the oil & gas industry and discusses the many reasons why binding arbitration can benefit the parties and better ensure a prompt, rational, and final resolution of those disputes.

II. Commonly Arbitrated Oil & Gas Disputes

A. Upstream Disputes

1. Joint Operating Agreements

The joint operating agreement (JOA), a form of contract used almost universally in the upstream sector of the oil & gas industry, covers the rights and duties of operators and nonoperating working interest owners (“nonoperators”) with respect to the drilling, completion, operation, and plugging and abandonment of oil & gas wells. JOAs are similar in many ways to joint venture (JV) agreements. Most JOAs covering *onshore* exploration and development do not contain arbitration provisions. In contrast, most *offshore* operating agreements, which often pertain to not only drilling operations but also the construction and operation of offshore drilling and production platforms and related facilities, do mandate arbitration.

Many JOAs and offshore operating agreements are long-term in nature. Projects implemented under these agreements can cost many millions, and sometimes billions, of dollars. Over the life of the JOA, different kinds of disputes can arise, and many of them are resolved through binding arbitration. Most often, those disputes concern (1) the scope and intent of the JOA or operating agreement; (2) the alleged breach of the operator’s duties; (3) billing and payment issues under various forms of accounting provisions, often standardized “COPAS” accounting provisions; (4) whether the challenged conduct is subject to a fiduciary standard; (5) the affect, if any, of various exculpatory and limitations restricting clauses; (6) claims of fraud and misrepresentation, usually allegedly over inducement of a JOA; and (7) diverse issues relating to various elections that may be made during the course of operations. Offshore operating agreements also engender disputes arising from the complicated task of designing, constructing, operating, and decommissioning offshore platforms.

2. Balancing Agreements

Companies often negotiate agreements that supply each other with oil or natural gas by exchanging production in different parts of the country. For instance, Exxon traditionally produced substantial volumes of oil in Alaska, whereas Chevron produced substantial volumes from offshore Louisiana Gulf of Mexico leases. Exxon had a large refinery on the Louisiana coast, and Chevron refined oil in California. The companies had an agreement under which Exxon supplied Alaska North Slope oil to Chevron in California and Chevron reciprocated with barrels of oil supplied to Exxon in Louisiana. Parties in such situations can exchange oil or natural gas on a volumetric basis, sometimes with a price adjustment if the product is worth more in one location than in another. Different owners in producing fields also may have balancing agreements with each other because they know that some owners likely will have more demand than others for production at various times (*e.g.*, because of differences in their sales agreements) and the distribution of production can fall out of balance with ownership of production. Such agreements often have a balancing clause or are subject to a separate balancing agreement and require

rebalancing at periodic intervals. Balances may have to be made up with product (*e.g.*, barrels of oil), or the agreement may contain a price to make up imbalances—terms rife with potential for disputes. Many of these agreements have arbitration clauses.

3. JVs and Mining Partnerships

Other contracts frequently used to facilitate the involvement of multiple investors in one or more oilfield projects include JV and partnership agreements. Although these two forms of agreements differ in many significant ways, they also usually have common features, such as the required participation in a common interest or purpose, some sharing of profits and losses, and some degree of common control or direction. Courts typically treat the parties to such agreements as fiduciaries. The JOA lends itself to an investment format with an active producer who “operates” the investment and handles the physical aspects of the project, whereas the nonoperators are more passive and primarily are involved to fund their share of the project. Although JV and partnership agreements can accommodate a wide variety of parties, these agreements are particularly useful for projects among industry participants when the nonoperating parties want to play a more active role than envisioned under standard JOAs. JV agreements typically cover a single project; partnership agreements, in contrast, often cover multiple projects.

Because the objective of JV and partnership agreements is to facilitate equity investment, it is no surprise that issues that tend to be disputed under these agreements often are similar to those that arise under JOAs: (1) disagreements over the scope and purpose of the venture or partnership, including whether property an individual venturer or partner acquires must be shared with the JV or partnership; (2) alleged negligence and mismanagement; (3) alleged underpayment or overbilling for costs; (4) disputes over the nature of the parties’ relationship, including whether it is fiduciary in nature; and (5) misrepresentations that allegedly induced one or more of the parties to enter into the agreement.

In contrast to similar international agreements, domestic oil & gas JV and partnership agreements traditionally did not contain arbitration clauses. Arbitration clauses are more common when all of the participants are larger oil & gas companies; when the project costs are very high, as in many Gulf of Mexico JVs; or when one of the JV parties maintains its headquarters in, or is incorporated in, the region where the project is located.

4. Farmout Agreements and Area of Mutual Interest Agreements

Lessees often use farmout agreements to transfer an option to another oil company that is willing to develop properties that do not fit the lessees’ current budgetary constraints. The company receiving an option to earn an interest—the farmee or farmouttee—receives that interest if it develops minerals on the property, usually entirely at its own expense. The farmor issuing the farmout may regain some or all of the conveyed working interest, or alternatively an overriding royalty interest, after the farmee recoups its costs. Farmouts thus can provide a useful means for large companies to expand development of their

properties beyond their budgetary and staff capacities and, for the farmee, can provide a way to gain access to leased acreage without having to pay an upfront lease bonus.

Arbitration clauses were rare in farmout agreements a generation ago but increasingly are used when the property conveyed is extensive or offshore or when the transaction is international in nature. Farmout agreements historically generate disputes concerning such matters as how “payout” should be measured and whether the prices and costs used to compute payout are proper. Less frequently, the parties dispute title, the scope of the interest conveyed, or damages the farmee allegedly has inflicted upon the property.

Areas of mutual interest (AMIs) often are included in JOAs, JV and partnership agreements, farmouts, and other investment forms. They prevent one or all of the parties from acquiring interests in a defined area without offering the remaining parties an opportunity to share the interest. Parties also can enter into stand-alone AMIs, although this is less common. AMIs protect investors from promoters who otherwise might use the investors’ money to generate geologic, engineering, or seismic information while holding other acreage benefitted by this information for themselves alone. As with farmout agreements, stand-alone AMIs are more likely to have arbitration clauses when the area covered is large, the anticipated reserves extensive, or the agreements cover offshore properties or international parties.

5. Unitization Agreements

Unit agreements combine individual leases into a larger area operated under a single management structure, with the agreement appointing a single operator to develop the unitized property. The owners of any portion of the unit area share revenues on a geographic or reserve-estimated basis. Such agreements are used to avoid the inefficiency of individual drilling, which can force parties to separately drill wells in an inefficient and wasteful race to capture the oil and gas in the common reservoir. Traditionally, parties waited to unitize properties until primary production from wells was depleted and expensive secondary or tertiary recovery projects were required to achieve further commercial production. The common control of a larger area was necessary to plan efficient recovery operations. In some areas, including the major fields in the state of Alaska, leases have been unitized before initial drilling and production commences, in part because of the outsized cost of projects in those remote areas. The main effect of a unit agreement is to allow development and production over a larger area than would occur under the individual leases or even under a governmentally established “drilling and spacing unit.” Production anywhere in the unitized area “holds” all leases, although the lessees must prudently develop the entire unit. The unit agreement governs the mechanics of development and revenue allocation but usually does not change the prices and costs applicable to individual royalty payments.

Like JOAs and leases, unit agreements usually have been form agreements and traditionally did not include arbitration clauses. Unitizations that combine large properties or involve more extensive development projects are more likely to be customized and to have arbitration clauses. Likely disputes under these agreements tend

to focus on the scope and nature of development, timing of production, reservoir engineering determinations, calculation of revenue interests in separate participating areas, decommissioning, and physical damage to the unit area.

6. Drilling Contracts and Service Contracts

Oil & gas drilling contracts are sophisticated instruments that delineate the rights and duties of drilling contractors and well operators relating to the drilling, completion, equipping, and plugging and abandonment of oil & gas wells. Drilling contracts can take many forms—most typically turnkey contracts or day rate contracts—and can cover the drilling of deep or shallow onshore or offshore wells and can relate to a single well or multiple-well projects. They can pertain to a broad variety of drilling rigs, ranging from simple land-based rigs to offshore drilling rigs and drill ships. Arbitrations involving drilling contracts address not only the types of disputes that can affect any oil & gas contract—for example, disputes relating to contract formation and assignments—but also a varied array of disputes that are unique and are associated with the complex engineering associated with drilling oil & gas wells and the sometimes unpredictable events that can occur during the course of drilling operations.

In addition, although the rights and duties of the drilling contractor and operator are normally reasonably well defined in drilling contracts, arbitrable issues often arise regarding those rights and duties. The accuracy of data provided by the operator or the performance of drilling personnel or the drilling equipment often are called into question. And although most arbitrable disputes regarding drilling contracts do not involve accidents at the drill site, the risk or alleged risk of accidents that might jeopardize the safety of the crew, the environment, or the drilling equipment often lie at the heart of the arbitrating parties' dispute.

B. Midstream Disputes

1. Gas Gathering and Production Handling Disputes

Many oil & gas producers find that the only means of bringing their production to market is via a gas gathering agreement whereby producers pay a fee to the owner of a gas gathering system to receive their production and deliver it to either a gas processing plant or a pipeline. Gas gathering agreements tend to be bespoke contracts drafted for a particular system, and they often contain arbitration agreements. Arbitrations involving gas gathering disputes tend to focus on issues relating to capacity, pressure maintenance, deliverability, dedications of production, receipt and redelivery, and many issues that are similar to those that at one time frequently arose under gas purchase agreements. Because gas gathering literally occurs midstream in the chain of events beginning with oil & gas production and ending at the burner tip, arbitrations involving gas gathering disputes often have the potential of affecting third parties upstream or downstream of the gathering facility.

Offshore production handling agreements (PHAs) typically are between the operator and working interest owners of a production platform, on one hand, and, on the other hand, the operator(s) and working interest owners of satellite wells drilled on other offshore blocks who, in the absence of such an agreement, would have no means of delivering their production to a pipeline and of obtaining any necessary processing before that delivery occurs. PHAs can be very sophisticated instruments. Some PHAs, such as the AAPL 2006 Deepwater Production Handling and Operating Services Agreement, contain highly detailed arbitration provisions designed to ensure an expedited and expert resolution of a broad variety of disputes. Those disputes can relate to simple accounting issues or to the many technical issues that can arise in the course of gathering oil & gas production from multiple offshore wells and delivering it to a single production platform for measurement, processing, treatment, and subsequent redelivery into a subsea pipeline.

2. Gas Processing Disputes

Gas processing agreements have two general objectives: (1) to “treat” the gas and remove impurities and contaminants from the gas delivered to the plant and (2) to “process” the gas and separate valuable natural gas liquids (NGLs) from the gas while ensuring that the remaining “residue gas” satisfies downstream pipeline quality specifications.

Specifically, the processing of natural gas production involves removal of oil, water, contaminants such as carbon dioxide and sulphur, and a variety of valuable NGLs, including ethane, butane, propane, isobutane, and natural gasoline. Gas processing agreements sometimes contain provisions relating to the initial commitment for construction of the plant and typically contain specific provisions relating to the supplier’s and processor’s separate commitments, delivery and receipt points, and the quality of both the gas delivered to the plant tailgate and the residue gas delivered from the plant outlet to the transporting pipeline subsequent to processing. Processing agreements usually also specify plant capacity operating conditions and the nature of the processor’s commitment to take some or all of the gas produced by the supplier within a designated area. The supplier’s production from that area usually, but not always, is dedicated to the processing agreement. The processor also commits to use commercially reasonable efforts to operate the facility in an effort to maintain its take of production from the supplier although, as is the case with many oil & gas industry contracts, the underlying contract will almost always contain a *force majeure* provision that can relieve either party from some or all of their contractual duties for a specified period of time upon the advent of defined *force majeure* events. Other gas processing agreement provisions concern the consequences of a failure of the processor to receive gas and the failure of the supplier to market residue gas. Like other oil & gas contracts that involve the custody transfer of produced hydrocarbons, gas processing agreements contain provisions relating to the measurement of the gas delivered to the plant, of the NGLs separated from the gas, and of the residue gas delivered to the transporting pipeline.

Common arbitrable issues arising under gas processing agreements include:

- 1.) Construction Issues—One or more components of the processing plant malfunction. Expert testimony usually is required to establish the cause and explain the root cause analysis prepared by the company or expert investigators. Challenges are often made to the expert's qualifications to give an opinion on the matter before the arbitrators. The arbitrator must decide whether to exclude the expert's testimony or give it whatever weight it deserves.
- 2.) Suspension of Operations and/or Production—Processor claims market value of the natural gas by-products has fallen far below the production cost of the natural gas so that it is no longer profitable for the processor and it suspends production. Is suspension allowed under the contract? Does the contract allow suspension if failure to process fully is due to a lack of an amine contractor? Who is responsible?
- 3.) Curtailment—The processor is required to use commercially reasonable efforts to maintain processing capacity. However, what if there are factors beyond its control and it cannot maintain capacity? Were the processor's efforts commercially reasonable?
- 4.) Design Defect—Plant never constructed in a manner necessary for the plant to operate correctly. Supplier does not receive the level of NGLs for which it contracted. Counter argument—no guaranteed recovery. Opposing expert witnesses testify to facility design and operating and maintenance standards.
- 5.) *Force Majeure*—Generally, experts will proffer testimony as to the root cause of the event that caused the plant to shut down. Often a very detailed examination and understanding of what caused the breakdown in the plant is necessary. Sometimes hyper-technical construction issues are involved; sometimes the dispute is merely about economics.
- 6.) Measurement Disputes—The supplier alleges that the processor has incorrectly measured the volume of gas delivered to the plant, the NGLs processed from the supplier's gas, or the volume of the remaining residue gas. Some claims may involve allegations of malfunctioning or inaccurate measurement equipment or the failure of the processor to properly maintain measurement equipment.
- 7.) Allocation Agreements—Some processing agreements contain unique allocation provisions or potentially are affected by separate allocation agreements. Disputes can arise regarding the supplier's entitlement to a particular percentage of either the produced NGLs or the proceeds resulting from the sale of the processed NGLs.

C. Downstream Disputes

1. Gas Sales Agreements/Liquefied Natural Gas (LNG) Sales Agreements

Natural gas is sold under agreements denominated “sales agreements,” “purchase agreements,” or “purchase and sale agreements.” These agreements specify the price, terms of delivery, quality of gas, volumes, payment logistics, and duration of the agreements—all terms that harbor potential disputes. In the era of regulated interstate natural gas prices, which began with a Supreme Court decision in 1954 and ended as regulated prices were phased out in the mid-to-late 1980s by operation of the Natural Gas Policy Act of 1978, gas sales agreements often were called “take-or-pay” contracts because the buyers made “take-or-pay” promises. Take-or-pay contracts committed buyers to pay for an agreed volume of gas, often a high percentage of the total monthly volume a well or group of wells were believed (based on well deliverability tests) capable of producing, even in months when the buyers did not physically take the gas. Gas purchase and sales agreements during the regulatory era often were upstream agreements with the sale and title transfer occurring at the wellhead, where the gas went into the waiting pipeline of an interstate gas buyer. Today the sales are more likely to be shorter term sales of processed gas made at the tailgate of a gas processing plant, or the nearby intake of an interstate pipeline, where “hub” markets with multiple buyers and sellers usually are found.

Long-term gas sales agreements have largely disappeared from the United States in part because of the take-or-pay experience and in part because of efforts by Congress and the Federal Energy Regulatory Commission to produce competitive upstream markets and the short-term hub markets that have resulted. As natural gas production has increased around the world, however, disputes over take-or-pay contracts have reappeared in a number of international markets.

Contemporary U.S. LNG sales and purchase agreements often contain take-or-pay provisions. LNG tolling agreements also often include a similar “use-or-pay” provision that requires the exporting party to pay a tolling fee when that party does not deliver gas to the LNG facility for liquefaction. (Such terms also are common in electricity tolling agreements.) In addition to establishing the parties’ rights and duties relating to a broad variety of delivery and receipt, operational, and maritime issues, such LNG agreements typically contain many provisions that are similar to traditional gas sales agreement provisions associated with quantity, quality, and *force majeure*. Most LNG contracts involving U.S.-based liquefaction facilities are between international parties. They nonetheless normally provide for arbitrations conducted in the United States and sometimes require application of domestic arbitration rules. As the LNG industry continues to develop, it is likely that more and more LNG disputes will be arbitrated in the years to come.

2. Refineries/Petrochemical Plants

a. design and construction

Few undertakings entail as much capital, planning, range of technical expertise, and complex management and coordination as the design and construction of a processing unit in a refinery or chemical plant. Of course, the first step in such a project is the negotiation of a contract—known as an engineering, procurement, and construction (“EPC”) contract—between owner and engineer/builder. EPC contracts often provide for arbitration of disputes.

Claims arising out of an EPC contract may include:

Contractor Claims:

- Extra time and additional compensation for owner changes to scope of work
- Extra time and additional compensation for owner changes to design or specifications that causes rework
- Additional compensation for owner-caused acceleration of the work
- Extra time and additional compensation for late owner deliverables, such as owner-provided specifications and equipment
- Damages for owner-caused delays

Owner Claims:

- Costs to repair or to replace defective work
- Damages caused by defective work
- Warranty claims
- Damages (usually liquidated) for late achievement of mechanical completion

An EPC arbitration usually presents numerous fact issues—many more than a typical dispute. For example, a case might involve scores of change claims, each of which concerns a particular feature of design or construction and its own unique story. This means an unusually large number of exhibits and numerous fact witnesses.

Usually, technical advice is required to decide issues concerning quality of work or materials and to identify and quantify the causes and impacts of delay. Thus, the disputes are expert intensive. Often, large sums of money are at stake—sometimes hundreds of millions of dollars.

Parties favor arbitration of such disputes for a number of reasons. The complexity and technical aspects of an EPC dispute often are beyond the ken of judges and juries. The parties can choose arbitrators who are familiar with plant construction and its lexicon and who are experienced in dealing with difficult construction claims, such as delay and acceleration. In addition, arbitration affords the flexibility to make dispute resolution speedier and more efficient. Curtailed discovery prevents either party from waging a war

of attrition by deposing dozens of witnesses. And the evidentiary hearing can be shortened by using written witness statements instead of live direct testimony.

b. supply agreements

Petrochemical plants often contract with each other for the sale/purchase of chemicals. Plant A produces the chemical continuously as a by-product in its refining process, and Plant B needs a reliable, ongoing supply of the chemical in its refining process. And, of course, plants sell their refined hydrocarbon products or produced chemicals to other third parties who intend to resell the product or use it in a manufacturing process.

Such contracts provide for term (spot or deliveries over a period of time), quantities of delivery per period (expressed in terms of output, requirements, fixed, or variable), and price (expressed as fixed, formulaic, variable over time, or variable per an index). When disputes arise, they may concern quality, price, volume, term, obligation to deliver (dedications, *force majeure*), delays in delivery, or nondelivery.

Arbitration enjoys several advantages over court litigation of such disputes. First, properly crafted and conducted, arbitration is faster and less costly. Second, confidentiality of the contract terms is sometimes desired. Third, though less complex than an EPC dispute, the evidence surrounding price, quantity, and termination can require industry knowledge or familiarity, which is achievable only in an arbitration panel.

3. *Mergers & Acquisitions/Sales of Oil & Gas Assets and Technology*

a. mergers & acquisitions/sales of leasehold interests and producing properties

The oil & gas industry provides a useful illustration of the flexibility private contracts can bring to business relationships. One example is the wide variety of contracts under which mineral rights can be sold. Such contracts include JOAs that can cause the transfer of equity interests, JVs, mining partnerships, drilling fund agreements, asset sales agreements, and stock purchases in oil companies. Contracts involving the sale and transfer of substantial oil & gas leasehold interests often include warranties of title and provide the purchaser with a post-closing period within which to examine title and claim refunds as the result of failure of title. Such contractual provisions can and do give rise to arbitral disputes regarding allegations of fraud, negligence, or breach of warranty.

Individual mineral owners, too, can sell, rather than lease, producing and undeveloped mineral interests and still retain any ownership interest they might have in the surface. Interest in the sale and purchase of such properties fluctuates with oil & gas prices and the status of other investment markets. Contracts for sales of mineral or leasehold interests differ from investment contracts like JOAs, JVs, and leases that create ongoing relationships between the parties. In these sales contracts, the seller may retain no interest and the buyer acquires all mineral rights and thereby avoids an ongoing relationship with the seller.

Leasehold and mineral sales contracts and agreements entered into by individuals for the purpose of selling developed and undeveloped properties tend to spur the same type of disputes common to larger oil & gas asset sales: disagreements over the condition of the property, title, misrepresentations, and, if the price is anything other than a set cash price, the operation of the pricing mechanism.

b. sales of oil & gas intellectual property and technology

The oil & gas industry is driven by technological development and innovation, and many hundreds of new patents involving the oil & gas industry are issued every year. As a consequence, the development of oil & gas technology gives rise to valuable property rights that are themselves commodities of sorts that may be bought and sold by competitors. Disputes arising under contractual agreements relating to the development, purchase, and sale of oil & gas intellectual property—for example, pertaining to drilling equipment design and engineering or new processing or refining technology—often are arbitrated. Those disputes can involve such issues as breach of contract, patent infringement, the achievement of development milestones, and noncompete agreements.

D. Royalty/Mineral Owner Disputes

The U.S. oil & gas industry is based substantially upon mineral interests owned by private parties, even though some state governments and the federal government are very large mineral owners. In almost all other countries, the sovereign owns all mineral rights. In the United States, both private and public parties lease their minerals to oil & gas companies that explore for, and produce, oil and natural gas. The leases used in these transactions are remarkably brief and tended, and still tend, to be form contracts that use a small set of terms that have been used for decades. The lessee generally drafts or selects the lease, although in the right market conditions large and even small mineral owners often are able to negotiate a broad variety of lease terms.

Form leases historically did not include arbitration clauses and it thus remains unusual for a domestic oil & gas lease dispute to be arbitrated. Nevertheless, an increasing number of oil & gas leases do now contain arbitration provisions and, as a result, typical disputes arising under oil & gas leases now are being arbitrated, for example, in areas underlain by the Marcellus and Utica shales. In addition, some class action royalty settlement agreements contain arbitration clauses, as do certain large settlements governing royalty payments to the state of Alaska. Leases between large oil companies are more likely to have arbitration clauses than leases between nonindustry mineral owners and an oil company. In light of recent United States Supreme Court decisions enforcing contractual waivers of the right to pursue class arbitration, it is logical to expect that in the future, oil & gas producers will attempt to include in new oil & gas leases arbitration provisions that contain such class waivers.

III. Procedural Issues in Oil & Gas Arbitrations

Every arbitration is unique to some degree, but it is nonetheless fair to say that many oil & gas arbitrations involve similar procedural and jurisdictional issues. For example, it has become relatively common for dispute resolution provisions in oil & gas contracts to be in the form of a “tiered” provision that requires the parties to attempt to negotiate or mediate a settlement of their dispute before an arbitration is commenced. Such provisions often give rise to issues concerning whether one or more of the parties have satisfied conditions precedent to arbitration and to associated allegations that the arbitral tribunal lacks the authority or jurisdiction to adjudicate the claimant’s claims. Because many oil & gas projects are time sensitive or require continuity in order to avoid loss or harm caused by delays, oil & gas arbitrations often feature requests for emergency arbitral relief or the issuance of emergency or conservatory measures by the arbitral tribunal.

Oil & gas arbitrations can involve complicated issues at the prehearing stage. Oil & gas operations involve complex technology that can generate unprecedented volumes of data. Disputes regarding the scope of “discovery” and information exchanges in oil & gas arbitrations often ensue and are of great importance to the parties. Often the desired information is in the possession of third parties—whether they be service industry contractors, manufacturers, or upstream, midstream, or downstream players—with the result that requests for the issuance of third-party subpoenas are not uncommon.

Many oil & gas companies are involved in both domestic and international operations and, as a result, have substantial experience in innovations first advanced in international operations. As a consequence, many domestic oil & gas operations now feature the use of written direct testimony. Other innovations from other sectors, such as the construction industry—for example, the use of so-called hot-tubbing of expert witnesses—now are common in oil & gas arbitrations.

IV. Why Arbitrating Oil & Gas Disputes Often Benefits the Parties

Oil & gas contracts often involve the expenditure of large sums of money and the attendant allocation of significant risks and benefits. Many oil & gas contracts also are, or can prove to be, long-term in nature. In other instances, an oil & gas contract of a relatively short-term nature or of relatively modest value might be critical to the parties’ ongoing business or constitute a significant source of income for one of the parties. When disputes arise under oil & gas industry contracts, there often are urgent reasons why, at least from the perspective of one of the parties, the dispute must be resolved promptly and with sufficient clarity to ensure the protection of the parties’ rights and the enforcement of the parties’ obligations. In some instances, the parties need clarification regarding how the contract should be performed for the remainder of its term. One or both sides may have trade secret, trademarked, or patented information—the value of which rests upon its confidentiality—and may be unwilling to risk publicly exposing their

property rights and interests in court filings. In other instances, a party might need a prompt resolution of the parties' dispute for financial reasons. Regardless of the nature of the dispute, binding arbitration almost always provides a pragmatic and efficacious means of resolving commercial disputes that arise in the oil & gas industry. In many situations, it is the only process that will satisfy the various business needs of the parties.

In each of the areas discussed above, arbitration can provide a number of benefits that court proceedings will not supply:

1. Assurances regarding the expertise of the arbitrators—familiarity with oil & gas contracts, lexicon, and nomenclature
2. The ability to understand technical testimony relating to the oil & gas industry
3. Expedited process, efficiencies in general, speed, and lower cost
4. Knowledge of long-term implications of contract performance in the oil & gas industry setting
5. The ability to craft appropriate remedies
6. The ability to draft enforceable awards in both domestic and international disputes
7. Confidentiality
8. Greater certainty of outcome with chosen arbitrators than jury outcome
9. Agreed limits upon discovery (agreed “mutual détente”)

Many arbitration institutions readily acknowledge the need for qualified arbitrators with specialized experience in the oil & gas industry. The following specialized oil & gas arbitrator panels thus have been formed in the United States to satisfy that need: (a) the American Arbitration Association National Energy Panel, (b) the CPR Institute for Conflict Prevention & Resolution Energy/Oil & Gas Panel, (c) the Institute for Energy Law Energy Arbitrators List, and (d) the ICDR Energy Arbitrators List. Resources such as these provide oil & gas industry participants with the means of identifying arbitrator candidates who have substantial oil & gas background and meaningful arbitration training and experience. There is no doubt that disputing oil & gas parties usually prefer arbitrators with those dual qualifications and for that reason also continue to prefer to be able to unilaterally appoint at least one of the arbitrators on a tripartite arbitral tribunal. In any event, the historical trend shows that oil & gas arbitration not only is here to stay but also can be expected to increasingly supplant prolonged court litigation as the means of resolving oil & gas disputes.

The above discussion provides only a sample of the many types of oil & gas energy industry disputes that are arbitrated in the United States. Other forms of oil & gas contracts, such as gas transportation and exchange agreements, remain relevant in the industry, and those agreements normally contain arbitration provisions as well. The same may be said of a broad variety of oil & gas service industry contracts and the master services agreements that sometimes govern them. For the purposes of this introductory paper, it is not imperative that every form of oil & gas industry contract be addressed. Rather, it suffices to emphasize by way of example that the arbitration of oil & gas disputes represents a highly sophisticated means of resolving industry disputes and will remain so in the future.

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