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# OIL AND GAS ADR: HAS THE TIME COME?

Stan Leasure

# OIL AND GAS ADR: HAS THE TIME COME?<sup>1</sup>

STANLEY A. LEASURE<sup>2</sup>

## I. WHO NEEDS AN ALTERNATIVE?

The inefficiency of the traditional litigation process is manifest. Initial pleadings are filed and discovery requests served. Objections to the propriety of the discovery requests follow. This issue is fully litigated. Protective orders are requested, resisted and finally issued. Thereafter, mounds of paperwork, much of which having nothing to do with the issues involved, are accumulated at great expense and effort. Extensive motion practice is conducted in what is frequently a vain attempt to narrow the issues. Dispositive motions are filed, resisted and ultimately decided. Depositions drag on interminably. After a year or two or three, a trial is set and the resolution of the controversy is entrusted to either a judge who is a generalist with usually no specific knowledge or expertise in the area or, alternatively, to a jury of citizens who are selected based upon the principal qualification that they know nothing about anything important to the litigation. After the verdict is rendered, the almost obligatory appeal follows with its own labyrinthine process. A year or so later, the matter is finally concluded. Can there be any wonder that alternatives to this have been developed?

## II. WORKING DEFINITIONS

**Mediation.** Mediation is a meeting at which a neutral third party, the mediator, assists the parties to a dispute to reach a settlement on terms they can all live with. The mediator makes no decisions and cannot force a settlement between the parties. Mediation can occur, by agreement of the parties, at any time during the life of a dispute, from a point before suit is filed to a point after judgment while the case is on appeal. In a nutshell, mediation is a process where the mediator helps the parties resolve their own dispute.<sup>3</sup>

**Arbitration.** For purposes of this article, “arbitration” will be defined as a dispute resolution methodology by which the parties agree to submit a dispute to one or more neutral third parties for a binding resolution.<sup>4</sup> It is a form of ADR in which the parties to a dispute agree to present their case to one or more neutral third parties, the arbitrator(s), for decision. Like mediation, the agreement to arbitrate can be made with respect to an existing dispute or by virtue of a pre-existing arbitration clause in a commercial contract. Unlike mediation, the arbitrator, not the parties, makes the decision. The decision of the arbitrator can, by agreement of the parties, be either binding or advisory. The arbitration hearing is adversarial and similar to a presentation in court, with relaxed rules of procedure and evidence.<sup>5</sup>

## III. MEDIATION—THE PROCESS

### A. OVERVIEW

Mediation is a nonbinding process usually entered into by agreement. The parties retain a neutral third party—the mediator—to help them reach a voluntary settlement. The parties themselves decide whether to settle or proceed with litigation. The mediator is not a judge or jury. The mediator doesn't determine who is good, bad, right, wrong, reasonable or unreasonable.

The parties retain all decision-making authority. Most mediations are the result of an agreement between the parties. In many jurisdictions, the trial court in which a condemnation case is pending is authorized to order the parties to mediation.

When can mediation be conducted? Speaking generally, mediation can be done at any time from the date of taking to the final resolution of the case on appeal. This depends on local custom, but usually mediations in condemnation cases take place after litigation has commenced and the parties have conducted basic discovery. Usually mediations in natural resources cases best occur—in litigated cases at least—after the parties have conducted basic discovery. It is possible to mediate a case too soon. The parties and their attorneys need a thorough understanding of the issues. The best time to mediate is usually after exchange of the appraisal reports and limited discovery. Trial preparation expense incurred after this point will simply be sunk costs if the case is settled at the mediation.<sup>6</sup>

## **B. MEDIATOR SELECTION**

Mediator selection is critical. The mediator is neither judge nor jury. The mediator makes no rulings on evidence. The mediator does not decide who is right or wrong or who wins or loses. The mediator cannot force a settlement. Quite simply, the mediator facilitates communication between the parties with the goal being a resolution of the dispute. In natural resources matters the parties and their attorneys will find it advantageous to employ a mediator with a combination of significant mediation experience and oil and gas expertise. Oil and gas cases are not routine. They involve a special language, special procedural rules, and a measure of damages unlike other cases. The parties and their attorneys must also decide the type mediator they want. Mediators fall into two basic categories, facilitative and evaluative. Facilitative mediators, as the term implies, see their role as facilitating agreement and helping the parties brainstorm positions and find acceptable solutions. Facilitative mediators do not generally offer opinions. They see their role as assisting the dialogue between the parties. Many facilitative mediators do not use private caucuses, but choose to remain in the general session throughout the mediation.<sup>7</sup>

Evaluative mediators also facilitate and help the parties think through and brainstorm positions and acceptable outcomes. The difference is that evaluative mediators—when asked—will also offer opinions on any of the many issues which arise in eminent domain matters including the potential outcome at trial. This almost always occurs within the confidential confines of the private caucus. The facilitative tools are important assets to bring to bear in an eminent domain dispute. But in my view, a properly qualified mediator using evaluative techniques can bring an important additional entirely dimension to the process of dispute resolution in the context of a condemnation case. Since both parties have qualified counsel present, I see no reason for the mediator to hesitate, when asked, to offer an opinion—in private caucus—on any of the intermediate issues which arise in an eminent domain case or even the ultimate issue in these cases. This is one of the main advantages of employing a mediator with eminent domain expertise.<sup>8</sup>

## **C. MEDIATION AGREEMENT**

The execution of a mediation agreement is the first step in the process. Mediation agreements vary by mediator, but usually cover the following basic points: identity of the mediator; the fees

of the mediator and identification of the responsible party or parties; timing of the mediation; identity of the representatives to attend the mediation; and location of the mediation.

#### **D. CONFIDENTIAL MEDIATION MEMORANDUM**

The attorney's role in the mediation begins in earnest with the preparation and submission of the confidential mediation memorandum. It is through this document, submitted separately and confidentially by each side, that the mediator first learns about the issues and the factors which will be important in a resolution to a case. In advance of the mediation, the mediator will usually ask the attorneys to submit a confidential mediation statement. The mediation memorandum typically covers a number of things including: identification of settlement representatives (not counsel) who will attend the mediation; status of discovery; a statement of whether the party has enough information to make a settlement offer and if not what additional information is needed; history of settlement offers; contested issues of fact and law; perceived strengths and weaknesses; status of discovery; and a statement of points the attorney believes affects the client's chances of winning at trial. It is very important that those with decision-making authority attend the mediation. Most mediators, me included, strongly prefer and recommend that those with settlement authority attend the mediation in person. That way they can be affected by the facts and circumstances as they develop at the mediation and have the opportunity to see, hear, and evaluate the attorneys and parties first hand.<sup>9</sup>

Sometimes an attorney will attempt to "hide the ball" from the mediator in the mediation memorandum. To read some mediation memoranda, one could assume that an appropriate approach to the mediation would be for the mediator to simply ask the other side to capitulate during the open session. A presentation of the strengths of a client's position from the advocate is anticipated. However, an analysis by the advocate of the weaknesses existing in the client's position is helpful at this point.

#### **E. THE MEDIATION SESSION**

The procedure used at the mediation session can be as varied as the wishes of the parties and the practice of the mediator. However, the typical mediation breaks down into three parts: a group session, several private caucuses and, hopefully, the preparation and execution of a settlement agreement.

##### **1. Opening Session**

The procedure used at the mediation session can vary with the wishes of the parties and the practice of the mediator. The typical mediation breaks down into three parts: a group session, several private caucuses and usually the preparation and execution of a settlement agreement. The mediation typically begins with a group session at which all the parties and their attorneys are present. During the group session, all of the parties and their counsel are present together with the mediator. It is at this point in the mediation that the mediator will typically require all persons present, including counsel, to execute a confidentiality agreement. At the commencement of the group session, the mediator will discuss her role, the goals of the mediation and the procedure to be used. The mediator will almost certainly stress the confidentiality aspects of the mediation and obtain the commitment of the parties to act in good

faith throughout the process. In addition, the mediator will, at the outset, want to assure that the parties present have the authority to make a binding settlement agreement. It is critical to a successful mediation that the clients' real decision makers be present with authority to make a binding settlement agreement.

After the introduction, counsel for each of the parties will be permitted to make an opening statement about the case and to outline, for the other side and mediator, the factors believed to be the most important in evaluating the case. Also, the parties will be permitted, if they desire, to make a presentation. These presentations are akin to a combined opening statement/closing argument presented at trial. Their purpose is to persuade the decision makers on the other side. Sometimes, the opening statement is the first realistic view the opposing decision maker has ever been required to take of the fact that his or her position is not legally, factually and morally unassailable.<sup>10</sup>

## **2. Private Caucuses**

After the opening session, the parties usually break up into private caucuses with the representatives of the landowner in one room and the representatives of the condemning authority in another. The mediator meets separately with each side. In these private caucuses the mediator tries to clarify the facts; explore the pluses and minuses of each side; discuss the strengths and weaknesses of the other party's position; and obtain an opening settlement offer to convey to the other side. Further I usually find it helpful to evaluate how significant the "people" problems are so that I can begin to them from the substantive problems.

The attorneys must be prepared to assess for the mediator—and client—the prospects of success at trial. Additionally, the advocate must be prepared to evaluate the probable range of recovery if the case proceeds to trial. Hopefully, these discussions will have taken place between the client representative and counsel prior to the mediation session, but if not, the attorney should anticipate that such discussions will occur during the private caucuses. The client representative must also be prepared to engage with the mediator in the private caucuses. While it is unlikely that the mediator will push the client representative for a "bottom line" settlement position, it is common to probe the client representative about the strengths and weaknesses of the case and the important interests and evaluation factors. Several private caucuses are usually required before the parties reach a settlement.<sup>11</sup>

## **3. Settlement Agreement**

Assuming the eminent domain mediation goes as most do and the case settles the last step is drafting the settlement agreement by the attorneys for the parties. It is almost always best to remain at the mediation session until the attorneys draft a settlement agreement and the parties in interest sign it. This precludes a subsequent change of mind resulting from buyer's remorse or other factors. If this crucial step is not ignored, the parties and their counsel can leave the mediation confident the case is over.

## **F. ADVANTAGES OF MEDIATION**

### **1. Confidentiality**

Confidentiality is one of the primary benefits of mediation. While litigation is a very public process and a matter of public record, ADR is generally confidential, pursuant to the protective provision of state law. As a general rule, confidentiality in the context of mediation means: that third parties have no right to attend or learn about mediation communications; if the case goes to trial neither the fact of the mediation nor the statements of the parties can be used in court; communications made to the mediator in private caucuses cannot be disclosed to the other party without express consent.<sup>12</sup> Litigation is a very public process and a matter of public record. Depending on the protective provisions of state law mediation is generally confidential. In addition, most mediators recommend that all participants execute confidentiality agreements. A typical confidentiality agreement reinforces state law on the following points, among others: mediation statements are privileged, non-discoverable and inadmissible in any legal proceeding; the privileged character of the information is not altered by disclosure to the mediator who cannot be compelled to disclose records or to testify at any judicial proceeding; and no aspect of the mediation can be relied upon or introduced into evidence in any judicial proceeding. ADR is almost always more confidential, more efficient and more cost effective than litigation. The advantage of confidentiality in the resolution of any dispute is obvious, particularly so in connection with most oil and gas related disputes. The cloak of confidentiality, in fact, enhances the prospect of the successful resolution of most controversies. Confidentiality is one of ADR's most important advantages.<sup>13</sup>

### **2. Control**

Perhaps the greatest advantage of eminent domain mediation is the control the parties themselves can have over the process and the result. First, the parties agree on a mediator and determine the time line on which the dispute resolution will be managed. Almost every party to a dispute wants the dispute over as soon as possible. Mediation almost always permits a resolution much sooner than possible through litigation. It is not affected by the dictates of the court dockets. It can be scheduled at the first date agreeable to the parties. Mediation permits resolution of the dispute at the earliest possible date. In mediation the focus shifts from compliance with court imposed rules of evidence and civil procedure, to the particular requirements of the eminent domain case at hand. The condemnor and landowner can focus on the specific requirements of their eminent domain case in light of their specific interests.

The most important advantage of mediation over condemnation litigation is that with the help of an experienced and well trained mediator, the parties can decide their own fate. The ADR process permits the parties to select the neutral to assist in the resolution of the dispute. This can be a distinct advantage in the natural resources arena. It would often prove beneficial to enlist the services of a neutral with experience in the field and an understanding of the issues and the context in which those issues arose. This is contrasted with the system of litigation where the decision is entrusted to judges and juries who are less likely to understand the complex issues which arise in natural resources litigation, thus increasing the chance of aberrant decisions.

Also, mediation provides the opportunity for creative solutions specifically tailored to the dispute and the special needs of the parties. Through the mediation process the parties have ultimate flexibility.

### **3. Cost**

Mediation has also proven to be more cost effective, usually resulting in significantly lower total costs than litigation. The cost savings can be particularly pronounced in eminent domain disputes. The cost of presenting the complex proof often required in these cases can be significant considering legal fees, expert witness fees, court costs, court reporting fees, exhibit preparation costs, and perhaps most of all lost productivity costs with respect to employees of the of corporate parties required to spend many hours in trial preparation.

### **G. EFFECTIVE MEDIATION ADVOCACY**

The representation of clients in mediation session is significantly different from conducting a trial in court. In fact, some of the techniques of advocacy used in the litigation process are counterproductive in a mediation setting. As noted above, the attorney's role in the mediation begins with the preparation and submission of the confidential mediation memorandum. The preparation of this document often receives little attention. It is through this document, submitted separately and confidentially from each side, that the mediator first learns about the issues and the factors which will be important in a resolution to a case. It is frequently the case that an attorney representing a party to a mediation will attempt to play "hide the ball" from the mediator in the mediation memorandum. To read some mediation memoranda, one would conclude that the attorney views the mediator's role as simply to convince the other side that his client is one hundred percent correct and that an appropriate approach to the mediation would be for the mediator to ask the other side to capitulate during the open session. A presentation of the strengths of his client's position from the advocate is anticipated. However, recognition and an analysis by the advocate of the weaknesses of his client's position are also very helpful in the confidential mediation memorandum.

The next order of business is the preparation of the client representative for the mediation process. If the client representative is somewhat, or even completely, unfamiliar with the mediation process the task can be time consuming. It is important that the attorney advise the client representative in detail of the role of the mediator and the goal of the mediation process. The steps in the mediation meeting should be fully explained. As previously noted, the client representative will be invited to make a presentation during the general session. The decision must be made by counsel and the client prior to the mediation as to what, if any, presentation will be made by the client representative at the general session. This is not the time for an off the cuff soliloquy.

The client representative must also be forewarned about the sometimes slow, frustrating progress to be expected during the mediation process. I frequently tell parties to mediation that mediation is like making sausage. You probably would not want to see it made. Likewise, you may want your case settled, but the process may be somewhat unpleasant. Frequently, the parties find this to be true. They should be told to expect it. It will lessen their frustration level. Frustrated decision makers are not conducive to a successful mediation. The client representative must also be prepared to be engaged by the mediator in the private caucuses. While it is unlikely

that the mediator will push the client representative for a “bottom line” settlement position, it is common for the client representative to be probed concerning the strengths and weaknesses of the case and the important evaluative factors and interests.

In the opening session, the attorneys for each side will be called upon to make an opening statement. That opening statement should outline the important factors to be considered in the evaluation of the case. This presentation is, in reality, more akin to a combination opening statement/closing argument presented at trial. Its purpose is to persuade the decision maker on the other side of the merits of your position. However, unlike at trial, it must be presented in a manner such that the decision maker, who at mediation is the opposing party, will be affected and, hopefully, persuaded without anger, insult or offense. Sometimes, the opening statement is the first realistic view the opposing decision maker has ever been required to take of the fact that his or her position is not legally, factually and morally unassailable. The goal of the opening statement should not be to elevate the blood pressure of the decision maker on the other side to stroke level.

Likewise, in the private caucuses, the attorney should be prepared to discuss with the mediator the strengths and weaknesses of his client’s position. The advocate should be prepared to assess for the mediator the prospects of success at trial. Additionally, the advocate must be prepared to evaluate the probable range of recovery if the case proceeds to trial. Hopefully, these discussions will have taken place between the client representative and counsel prior to the mediation session, but if not, the attorney should anticipate that such discussions will occur during the private caucuses.<sup>14</sup>

## **H. MEDIATION IN CONCLUSION**

Oil and gas cases are complex, time consuming, and expensive to litigate. They usually come with a myriad issues attached. As I stated at the beginning of this article, mediation should be conducted in connection with disputes that cannot be quickly concluded by agreement. The advantages of mediation include a high rate of settlement success, confidentiality, speed, efficiency, control, and cost. Mediation can, by definition, yield a reasonable result that both parties can live with.

## **III. ARBITRATION**

### **A. THE ARBITRATION AGREEMENT**

The agreement to arbitrate can come in the form of a pre-dispute arbitration agreement incorporated into a contract prior to the emergence of a dispute or, alternatively, an agreement entered into after a dispute has arisen. The procedural and evidentiary rules with respect to arbitration are based on the agreement of the parties and can be quite relaxed in comparison to the rigidity and complexity of the procedural processes that are the hallmark of our litigation system.<sup>15</sup> Subsequent to the hearing, the arbitrator renders an arbitral award, deciding the substantive issues. A number of advantages to arbitration have been recognized, including confidentiality, control over the timeline and process, reduced costs, and increased potential for preserving the relationship between the disputing parties.<sup>16</sup>

## **B. THE FEDERAL ARBITRATION ACT**

### **1. OVERVIEW**

The Federal Arbitration Act (FAA) is the principal federal statute dealing with arbitration.<sup>17</sup> It was passed by Congress in 1925 to compel the previously reluctant judiciary to enforce arbitration clauses in contracts and was the genesis of a new national policy establishing arbitration as a favored method of dispute resolution.<sup>18</sup> The FAA mandates enforcement of arbitration agreements in maritime transactions or transactions “involving commerce.”<sup>19</sup> The United States Supreme Court has interpreted the FAA expansively, finding it applicable to many transactions on the basis of their relationship to interstate commerce.<sup>20</sup>

### **2. THE PROCESS**

Arbitration is a consensual adjudicatory ADR mechanism. In arbitration, parties to a dispute agree to submit the resolution of their dispute to one or more neutral decision-makers. The arbitral process involves an abbreviated trial-like adversary proceeding in which the arbitrator hears evidence and thereafter determines the outcome and awards a remedy. Typically, the parties agree that the arbitral decision will be binding. Under arbitration law there is little opportunity for judicial review of the award.

Arbitration agreements can arise either pre-dispute or post dispute. Parties entering into a contractual agreement may, at the outset, agree that any disputes connected with the contract will be submitted to binding arbitration. Alternatively, parties finding themselves in the midst of a dispute may agree at that point to submit it to arbitration.

The procedures for arbitration are as varied as the parties and their attorneys. The process for selecting arbitrator will be set out in the arbitration agreement. There are a number of arbitration service providers such as the American Arbitration Association, Judicial Arbitration and Mediation Service and National Arbitration Forum. These arbitration service providers make available a panel of arbitrators and a set of prepackaged procedural rules for use by their clients. Arbitrators may be experts in the subject matter of the dispute, business persons, lawyers or former judges. The charges the services of these providers vary, but usually consist of: (1) an administrative fee—usually a percentage of the amount in dispute; (2) the arbitrator(s) fees, based on an hourly rate; and (3) out of pocket expenses. As an alternative to utilizing national arbitration service providers, the parties can elect to design their own process and hire their own arbitrator.

Arbitration has prehearing procedures similar—but much more streamlined and limited—than that found in litigation. There will be some form of abbreviated discovery, and simplified rules of procedure and evidence. The arbitrator will be available and involved during this part of the process. One of the greatest advantages of arbitration over litigation is the abbreviated procedure and flexibility in scheduling and process.

The arbitration hearing is adversarial. Informal rules of procedure and evidence will generally have been agreed to. The hearing will proceed much like a civil lawsuit; but with informal rules

of procedure and evidence. The hearing will include opening statements, presentation of testimonial and documentary evidence first by the moving party and then by the respondent, with cross examination by the parties and questioning by the arbitrator.

The arbitration award will be issued shortly after the conclusion of the evidence at the arbitration hearing. The arbitrator decides issues of law and fact and awards the prevailing party a remedy. The arbitrator will draft an award setting forth his or her conclusions in a summary fashion, but usually without explanation of the award, unless requested by the parties in advance. The parties will typically waive the requirement of a hearing record.

As discussed more fully below, there is very limited judicial review of arbitration awards. The grounds include only such things as arbitrator fraud, corruption or bias; failure on the part of the arbitrator to comply with procedural due process; and failure of the arbitrator to render an award within the scope of the authority granted by the parties. Court assistance in enforcing the arbitration agreement and collecting the ultimate award is available through the Federal Arbitration Act and its state counterparts.

### **3. SIGNIFICANT PROVISIONS**

#### **a. Enforcement**

Congress created mechanisms for that enforcement. Federal courts in which litigation is instituted with respect to a matter covered by a valid arbitration clause are authorized to stay that litigation pending completion of the required arbitration;<sup>21</sup> seek an order from the District Court compelling arbitration if a signatory to an arbitration agreement refuses to arbitrate or files suit instead;<sup>22</sup> and if the parties have so agreed, judgment may be entered on an arbitral award.<sup>23</sup>

#### **b. Vacatur of Awards**

The FAA provides only four grounds for vacatur of arbitration awards:

1. The award was procured by corruption, fraud, or undue means;
2. There was evident partiality or corruption in the arbitrators, or either of them;
3. The arbitrators were guilty of misconduct and refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;
4. 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.<sup>24</sup>

Generally, these statutory grounds are interpreted on an exceedingly narrow basis.<sup>25</sup> Some courts have recognized a limited number of judicially created grounds to set aside an arbitration award. These include circumstances in which the arbitral award is “in manifest disregard of the law,” “contrary to public policy,” “irrational” or “arbitrary and capricious.”<sup>26</sup>

### C. THE ARKANSAS UNIFORM ARBITRATION ACT

Arkansas passed the Arkansas Uniform Arbitration Act in 1969.<sup>27</sup> The General Assembly followed, in most respects the outline of the FAA, but elected to exclude “personal injury or tort matters, employer-employee disputes [and matters involving] any insured or beneficiary under any insurance policy or annuity contract” from the scope of the AUAA.<sup>28</sup> The enforcement<sup>29</sup> and vacatur<sup>30</sup> provisions of the AUAA are similar to those found in the FAA, with some modifications.

The AUAA provides for the court appointment of arbitrators in the event the parties fail to agree to an appointment mechanism in their arbitration clause or that clause otherwise fails,<sup>31</sup> a time and method for notice of the arbitral hearing and mandates the parties’ entitlement to be heard, present evidence and confront adverse witnesses;<sup>32</sup> and subpoena power to compel the attendance of witnesses and production of documentary evidence.<sup>33</sup> The AUAA provides the court with power to modify or correct an award within 90 days under circumstances in which:

1. The award contains an evident miscalculation of figures or mistake in description;
2. A matter not submitted to the arbitrators has been the subject of an award and the award may be corrected without affecting the merits of the decision upon the issues submitted;
3. The award is imperfect in form, but not affecting the merits of the controversy.<sup>34</sup>

The issue of arbitrability of claims has frequently arisen in Arkansas. This usually requires determining the manner in which arbitration agreements are to be interpreted. The Arkansas Supreme Court has taught that the overarching principle is to give effect to the intent of the parties.<sup>35</sup> Doubts and ambiguities regarding the arbitrability are to be resolved in favor of arbitration<sup>36</sup> but, the arbitration agreement is to be construed in accordance with its plain meaning in circumstances in which the parties have clearly expressed their intention.<sup>37</sup>

Nationally, as noted above, the courts have recognized certain judicially created grounds on which arbitration award may be set aside. The Arkansas appellate courts have recognized manifest disregard for the law<sup>38</sup> and violation of public policy as non-statutory grounds for vacatur.<sup>39</sup> “Manifest disregard for the law” in Arkansas requires a showing “that the arbitrator knew the law and expressly disregarded it.”<sup>40</sup>

### D. CONFLICTS OF LAWS

Another issue which frequently arises is the question of choice of law between the FAA and one of its state counterparts such as the AUAA. Not infrequently, the terms of the FAA differ significantly from arbitration statutes adopted in the various states. For example, in Arkansas, tort claims are excluded from the coverage of the AUAA.<sup>41</sup> They are covered by the FAA.<sup>42</sup> In Oklahoma, arbitral provisions in nursing home contracts are prohibited; they are not by the FAA.<sup>43</sup> It is not surprising that significant choice of law questions arise as to whether the FAA or state law applies to a given dispute.<sup>44</sup> As previously discussed, the Federal Arbitration Act applies only to maritime transactions and, more importantly for our purposes, contracts

affecting interstate commerce.<sup>45</sup> The linchpin of most of these disputes centers on the question of whether the transaction at issue falls within the interstate commerce rubric of the FAA or not.<sup>46</sup> If it does, the FAA applies; and if it does not, state law applies.<sup>47</sup> However, the parties to an arbitration agreement have the additional option to designate in the arbitration agreement whether the FAA or the AUAA will apply and the courts are bound to enforce that provision:

Here, the parties specifically agreed that the FAA would apply. Where the parties designate in the arbitration agreement which arbitration statute they wish to have control, the court should apply their choice.<sup>48</sup>

### **E. ARBITRATION IN CONCLUSION**

To those unfamiliar with it, arbitration law can seem like a jurisprudential labyrinth similar to that encountered by the uninitiated venturing into the Bankruptcy Code for the first time. The boundaries of this area of the law are defined statutorily at both the federal and state levels with a significant overlay of common law; again both state and federal. The trick, if there is one, is to recognize that the seminal question is whether it is the Federal Arbitration Act or the Arkansas Uniform Arbitration Act that is applicable. The answers to all of the other questions may be very different depending on the answer to that seminal question. This determination usually depends on whether the transaction in question falls within the broadened umbrella of "interstate commerce" as defined by the United States Supreme Court in this context or, alternatively, whether the parties have designated the applicable law in the arbitration agreement itself. Once this determination has been made, most of the questions will deal with arbitrability, enforcement or vacatur as discussed in a general fashion herein.

### **IV. CONCLUSION**

Oil and gas litigation is slow, expensive and difficult with many direct and indirect secondary effects. ADR's advantages over litigation include: a high rate of success, confidentiality, speed, efficiency, control, and cost. ADR usually yields results the parties can live with and are likely to honor. It is not a cure-all. Some cases must be litigated. But ADR is a process that should be considered in every natural resources dispute and in most; it will yield a good result.

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<sup>1</sup>This paper is adapted in part from: Leasure, Stanley A. and Anderson, Wayne L., *Arbitration in Arkansas: A Legal Primer*, THE ARKANSAS LAWYER, 43 Ark. Law. 14 (2008) and Leasure, Stanley A., *Eminent Domain Disputes: The Role for Mediation*, forthcoming in INTERNATIONAL RIGHT OF WAY ASSOCIATION MAGAZINE, MARCH/April 2012. No person, firm or entity should act upon this article or the concomitant presentation (the content) without first seeking professional legal or business advice and counsel. The content should not be construed as legal or business advice or opinion. For that, you should retain an attorney or other qualified professional in your jurisdiction.

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<sup>3</sup>See generally, Peter R. Silverman, THE CLIENT'S GUIDE TO MEDIATION AND ARBITRATION 17-30 (AMERICAN BAR ASSOCIATION 2008).

<sup>4</sup>Black's Law Dictionary (8<sup>th</sup> ed. 2004).

<sup>5</sup>See generally, Peter R. Silverman, THE CLIENT'S GUIDE TO MEDIATION AND ARBITRATION 17-30 (AMERICAN BAR ASSOCIATION 2008).

<sup>6</sup>See generally, Jay Folberg *et al*, RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 249-250 (ASPEN PUBLISHERS 2010).

<sup>7</sup>See generally, *Id.* at 274-274.

<sup>8</sup>*Id.*

<sup>9</sup>Peter R. Silverman, THE CLIENT'S GUIDE TO MEDIATION AND ARBITRATION 49-56. (AMERICAN BAR ASSOCIATION 2008).

<sup>10</sup>See generally, Jay Folberg *et al*, RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 377-385 (ASPEN PUBLISHERS 2010).

<sup>11</sup>See generally, *Id.* at 386-406.

<sup>12</sup>Of course, if one party conveys or permits the mediator to convey facts, those facts are subject to being used at the trial by the other party. However, statements made by one party cannot be admitted into evidence as an admission against interest by the other party.

<sup>13</sup>See generally, Peter R. Silverman, THE CLIENT'S GUIDE TO MEDIATION AND ARBITRATION 8-11. (AMERICAN BAR ASSOCIATION 2008).

<sup>14</sup>See generally, Dwight Golann, REPRESENTING CLIENTS IN MEDIATION (AMERICAN BAR ASSOCIATION 2000).

<sup>15</sup>Alan D. Lash, *Arbitrating Commercial Healthcare Disputes: the Good, the Bad and the Unknown*, 62-JAN DISP. RESOL. J. 21, 25 (2008).

<sup>16</sup>Michael Scott Hall, *Issue Preclusion Is No Illusion for Arbitration in Arkansas: Riverdale Development Co. v. Ruffin Building Systems, Inc.*, 58 ARK. L. REV. 929, 929 (2006).

<sup>17</sup>9 U.S.C. §§1 *et seq.*

<sup>18</sup>*Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 280, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8<sup>th</sup> Cir. 1999); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001); See generally Stanley A. Leasure *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, 60 OKLAHOMA LAW REVIEW, 60 Okla. L. Rev. 737 (2007).

<sup>19</sup>9 U.S.C.A. § 2

<sup>20</sup>*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (court adopted a "commerce in fact" test); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) ("involving commerce" declared functionally equivalent to "affecting commerce").

<sup>21</sup>9 U.S.C.A. § 3.

<sup>22</sup>9 U.S.C.A. § 4.

<sup>23</sup>9 U.S.C.A. § 9.

<sup>24</sup>9 U.S.C.A. § 10.

<sup>25</sup>*A.G. Edwards & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1403 (9<sup>th</sup> Cir. 1992) (undue means); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9<sup>th</sup> Cir. 1982), *Cert. denied* 459 U.S. 990 (1982); *Bell Aerospace Co. Div. of Textron, Inc. v. Local 516 Int'l Union*, 500 F.2d 921, 923 (2d Cir. 1974) (arbitrator misconduct); *United Paper Workers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) (powers of arbitrator exceeded); Stanley A. Leasure, *Vacatur of Arbitration Awards: The Poor Loser Problem or Loser Pays?*, 29 U. Ark. Little Rock L. Rev. 489, 505-511 (2007).

<sup>26</sup>Lawrence R. Mills, J. Lani Bader, Thomas J. Brewer & Peggy J. Williams, *Vacating Arbitration Awards*, Disp Resol. Mag., Summer 2005, at 23.

<sup>27</sup>Ark. Code Ann. §§ 16-108-201-224.

<sup>28</sup>Ark. Code Ann. § 16-108-201 (b) (2).

<sup>29</sup>Ark. Code Ann. § 16-108-202; Ark. Code Ann. § 16-108-214.

<sup>30</sup>Ark. Code Ann. § 16-108-212 (a).

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- <sup>31</sup> Ark. Code Ann. § 16-108-203.
- <sup>32</sup> Ark. Code Ann. §16-108-205.
- <sup>33</sup> Ark. Code Ann. §16-108-207.
- <sup>34</sup> Ark. Code Ann. §16-108-213 (a).
- <sup>35</sup> *Heart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001).
- <sup>36</sup> *Neosho Const. Co. v. Weaver-Bailey Contractors*, 69 Ark. App. 137, 10 S.W.3d 463 (2000).
- <sup>37</sup> *Pest Management, Inc. v. Langer*, 96 Ark. App. 220, 240 S.W.3d 149 (2006 WL 2741921 at \*3 (2006)); *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 500 (8<sup>th</sup> Cir. 2007); *Cash in a Flash Check Advance of Arkansas, L.L.C. v. Spencer*, 348 Ark. 459,466, 74 S.W.3d 600 (2002).
- <sup>38</sup> *Chrobak v. Edward D. Jones & Co.*, 46 Ark. App. 105, 106, 878 S.W.2d 760 (Ark. App., 1994).
- <sup>39</sup> *Heart v. McChristian*, 344 Ark. 656, 667, 42 S.W.3d 552 (Ark. 2001).
- <sup>40</sup> *Chrobak v. Edward D. Jones & Co.*, 46 Ark. App. 105, 112, 878 S.W.2d 760 (Ark. App. 1994).
- <sup>41</sup> Ark. Code Ann. 16-108-201(b)(2).
- <sup>42</sup> 9 U.S.C.A. § 2.
- <sup>43</sup> 63 Okl. St. Ann. § 1-1939, 9 U.S.C.A. § 2. See Stanley A. Leasure, *Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way*, forthcoming 60 Oklahoma Law Review 737 (2007).
- <sup>44</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (federal courts bound by FAA under diversity jurisdiction); *Moses H. Cohn Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (FAA applicable in both federal and state courts to disputes within its ambit); *Southland Corporation v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (FAA preempts contrary state law with respect to disputes governed by the FAA).
- <sup>45</sup> 9 U.S.C.A. § 2.
- <sup>46</sup> *Id.*
- <sup>47</sup> *A.G. Edwards & Sons, Inc. v. Myrick*, 88 Ark. App. 125, 195 S.W.3d 388 (2004).
- <sup>48</sup> *Pest Management, Inc. v. Langer*, 96 Ark. App. 220, 240 S.W.3d 149, 2006 WL 2741921 at \*3 (2006).