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A PRIMER AS TO ARBITRATION PREPARATION

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Arbitration occurs as a result of numerous circumstances. Sometimes arbitration is the result a contract term requiring arbitration. Other times it is by consent. While many attorneys and litigants are familiar with how the arbitration process works in a general fashion, many parties and their lawyers possess only a dim understanding of how arbitration actually differs from court proceedings. The arbitration process is often further confusing because there exist certain myths pertaining to the arbitration process. These myths include the notion that arbitration is typically less expensive or that arbitration can be completed more quickly than litigation. These myths, while sometimes true, complicate a meaningful understanding of the arbitration process.

The objective of this article is to assist lawyers and parties to better understand how the arbitration process works. This paper is a very general outline of that process focusing on Pre-Arbitration Hearing matters. It is not meant to address the entirely of all of the issues that might arise when a claim is subject to arbitration. This article is intended to provide background so that participants can better prepare themselves for arbitration increasing the likelihood of a better result.

Special emphasis in this paper at times is focused on arbitration involving the oil and gas industry. However, the general sentiment set forth herein is typically true of most any arbitration. Thus, although this paper makes occasional reference to the oil and gas industry the general insights set forth herein can be applied universally.

We begin by a brief discussion pertaining to how it is that issues come to be resolved by arbitration. Often there is a term in a controlling contract that mandates arbitration. When arbitration is called for in a contract, as is frequently the case in a commercial context, it is important to review all of the salient contracts to understand the underlying terms of arbitration. Like other terms and conditions of any contract, should no one choose to enforce an arbitration provision that unenforced provision can at times be ignored. Hence, even if a contract calls for arbitration, any party not inclined to move forward with arbitration should discuss with opposing

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counsel the option of waiving such a provision. Beware, even if there is consent among the parties to waive an Arbitration clause there is a possibility that upon the filing of a Complaint for Breach of Contract or other cause of action in a Court of competent jurisdiction a presiding judge, independent of the preferences of the parties or their counsel, can refuse to allow judicial proceedings to move forward pending the completion of arbitration. In reality, more a frequent fact pattern involves a party filing a Complaint in a Court of competent jurisdiction, only to be faced immediately with a Motion to Stay asking that Court to not take any further action unless or until an arbitration proceeding has been completed. It is also the case that despite a controversy being subject to Arbitration, a party will sometimes file a Complaint to avoid the running of applicable Statute of Limitations to establish a mechanism to reduce any Award of Judgment at a later point in time, or to file a Lis Pendens to encumber real property. As a result, merely because a Court action has been filed does not in and of itself divest a party from the right to seek arbitration where such is called for in a contract.

Terminology as such is used in Arbitration is also important. The party seeking relief is typically referred to as the claimant. The dispute is called a claim. The relief sought is referred to as a demand.

An initial issue involving the arbitration process involves what rules will be invoked. It is an unfortunate reality that many arbitration provisions as such exist in a contract fail to designate precisely what rules that will be used in arbitration. While there are many different sets of rules of arbitration, three commonly utilized set of rules include those of the American Arbitration Association ("AAA"), the Judicial Arbitration and Mediation Services ("JAMS"), and the Arbitration Rules of the London Court of International Arbitration ("LCIA"). One must be careful when designating AAA rules in a contract because there exist several different sets of arbitration rules used by the AAA[2]. Common sets of rules used in this Article include AAA Commercial Arbitration Rules, JAMS Comprehensive Arbitration Rules and Procedures, and the LCIA.

It is important to become familiar with the rules being used in your case. If there is no designation of rules in a contract or even if the parties informally agree to arbitrate it will be necessary for counsel to come to a resolution involving precisely what rules will be used. If the parties and their counsel cannot agree on the rules, a Court can involve itself for a limited purpose of designating which rules will be used. Unfortunately, involving a Court on a limited basis to designate arbitration rules - or many of the other variables involving arbitration - can be expensive and time consuming.

Once a set of rules has been designated, these rules will set forth exactly what must be set forth as to the substance of the claim, where the arbitration will be conducted, how an arbitrator or arbitrators will be selected, and to the extent, if at all, that the Rules of Civil Procedure (particularly involving Discovery) and the Rules of Evidence will be utilized. Where

[2] These include Commercial Arbitration Rules and Mediation Procedures (including procedures for Large, Complex Commercial Disputes), Labor Arbitration Rules, International Dispute Resolution Procedures, Employment Arbitration Rules and Mediation Procedures, Construction Industry Rules and Mediation Procedures (including Procedures for Large Complex Construction Disputes and Consumer Arbitration Rules).

appropriate, it is important to also become familiar with state statutes addressing the arbitration process as these statutes may establish how to proceed where a contract is silent or ambiguous as to how to proceed in cases where arbitration is called for, but insufficient specifics are provided. It is important to be aware of the laws of any given state and, as appropriate, Federal Statutes as well.

Even those familiar with the arbitration process are well advised to review or even re-review the rules in their entirety upon taking on an arbitration representation. As with any type of adversary proceeding, attention to detail involving deadlines at the inception of a case is paramount to increasing the likelihood of a better result. Understanding how the rules might impact not only procedure, but substance is crucial to well representing a client. For example, there can exist significant limitations pertaining to how and when counterclaims can be asserted or amended. There can be significant limitations pertaining to the objecting to the selection of a particular arbitrator or the number of arbitrators. Arbitration sometimes gets stereotyped as having few or even more lenient rules. While the notion that arbitration tends to be more informal than that of litigation is generally true, this generality does not mean that there exist no enforceable rules involving arbitration. In fact, there are numerous rules. Understanding and applying these rules is critical to a better result.

Selection of the arbitrators can be addressed informally amongst counsel where there exists no arbitration agreement and arbitration is being pursued voluntarily. Even where there is a specific term or condition of a contract establishing the rules of arbitration to be used, there can be poor definition as to how the arbiter or arbiters to be selected. For instance, the AAA rules, absent other contractual terms, mandates a 3 person arbitration panel if claims involve an amount greater than $1,000,000 or a single arbitrator if a claim is less than that threshold amount.[3] In contradistinction, JAMS calls for a single arbitrator unless the parties agree otherwise.[4] The LCIA reserves significant latitude in deciding the number of arbiters in a case[5].

Even under circumstances whereby the number of arbitrators is either designated or agreed upon, there still can exist the question as to how to select an arbitrator. Again, the first area of analysis involves that as stated in the contract. Should a contract not provide any guidance, it is then necessary to review other governing rules, statutes or legal authority. Although not always the case, it is very common that the arbiter or arbiters will be selected from a list of potential candidates which designates who might act as an arbiter or a member of panel of arbiters. The process of selecting an arbiter is often one of exclusion. Like selecting jurors, potential arbiters are typically struck and not selected. The parties do not in many cases, absent agreement, pick the arbiter, but instead strike candidates from a list of potential arbiters deemed to be unacceptable.

[3] See Rule L-2(c), AAA Commercial Arbitration Rules, Procedures for Large, Complex Commercial Disputes

[4] See JAMS Comprehensive Arbitration Rules and Procedures, Rule 12

[5] See LCIA, Rule 5.

It is important to emphasize that as a matter of experience or training an arbiter need not be an attorney or a retired judge. Particularly in disputes involving the oil and gas industry an understanding of not only the law, but underlying industry practices and technological issues, can be useful in the selection of experienced industry professionals as arbiters. These individuals sometimes act as better arbiters than the use of lawyers, especially those who often lack industry experience. In fact, one of the distinct advantages of the arbitration process is that whether a single arbiter or a panel of arbiters, the decision maker can be selected because they possess specific industry experience or issue knowledge. This expertise can lend itself to not only a better quality award, but the avoiding of having to educate the trier of fact as to technical issues, the law or both. However, if non-attorneys are to be selected, thought needs to be made in the drafting phase of a contract designating arbitration in that a minority of the members of JAMS, the AAA or the LCIA are non-lawyers with industry experience. Unless the parties can agree, it is often challenging to locate those with industry specific experience to act as an arbiter out of these arbitration oriented organizations.

It is sometimes the case that even after an arbiter or panel of arbiters is selected, there still exist a final vetting process where the individual or individuals selected must on their own volition disclose any fact or other circumstances whereby their impartiality may be placed in question[6]. For instance, an arbiter may only after being selected realize there is a previous professional relationship with a witness or an employee of a participating party. Depending upon the gravity of the complicating circumstance, an arbiter might on their own accord resign, at which point a replacement arbiter must be selected. Or there might be objections to the arbiter as additional information is made known. Depending upon the rules in place, the process as to removing or selecting a replacement arbiter can vary. As rule of thumb, if an arbiter must resign the same process utilized to originally select an arbiter or panel of arbiters is again used. If a selected arbiter cannot act, a list of potential replacement arbiters can be produced or the previous list reexamined.

Do not underestimate the significance of the identity of the arbiter or arbiters. This sentiment is especially so because any appeal of arbitration award is highly unlikely. Unlike litigation where there is almost always an appeal of right, the grounds upon which to appeal an arbitration award are significantly narrow[7].

The characteristics of more acceptable arbiters include experience involving the factual and legal issues presented without any personal or industry bias. Particularly in matters involving the oil and gas industry, experience in a particular section of the industry, whether upstream, midstream, or downstream, can be of significance. Accordingly, when moving through the process of striking potential arbiters it is a good idea to set aside adequate time well

[6] AAA R-17 outlines the circumstances where an Arbitration selected must disclose potentially adverse information to participants. JAMS Rule 15 accomplishes the same. Article 10 of the Arbitration Rules of the LCIA discusses Revocation of the Articles Appointment.

[7] None of the AAA Rules, the JAMS rules or the LCAI Articles discuss appeal. It is the substantive law and statute in the given jurisdiction as well as applicable case law that sets forth legal authority to appeal; such is extrinsic fraud and the like.

in advance of deadlines to consider the potential strengths and weaknesses of each arbiter being considered. Due diligence in this day in age includes an internet investigation by using Google or other search engines; telephoning other lawyers or professionals who may have had dealings with potential arbiters; and checking appropriate websites, Facebook, and LinkedIn for information as to any lawyer or arbiter in question. A review of Facebook and LinkedIn as well other social media not only makes sense, it is mandatory. Typically, the selection of an arbiter never involves any ex parte communication with potential arbiter candidates. However, depending on circumstances an interview may be arranged so long as no communications made are of an ex parte nature.

It is also important to emphasize that if it is learned that a potential arbiter may not be appropriate, it is incumbent that such factual basis be disclosed to opposing counsel as well as the organization in question. To the extent there exists a body of judicial decisions involving circumstances where fitness to serve as an arbiter is called into question, objections not timely or immediately raised can be deemed to be waived. It is also important to keep in mind that the standard to object to an arbiter may not necessarily be what was actually known by an attorney or the parties at the point in time that the arbiter in question was selected, but whether or not such information could have been known through the implementation of due diligence. The byword is to make sure that all arbiters are adequately vetted and that any issues pertaining to any actual or potential conflict of interest or other concerns pertaining to the propriety of one acting as an arbitrator ought to be considered in advance of actual selection and any objections timely raised.

After an arbitrator is selected, there is typically a phone conference involving the organizing and administration of the arbitration proceedings. Sometimes these first meetings are referred to as preliminary hearings.[8] However, these proceedings go by other names such as status conferences, scheduling conferences, etc. It is often the case that either the organization hosting the arbitration or the arbiter himself will provide in advance an agenda pertaining to the topics to be discussed at (what we will call hereafter in this paper) as these preliminary hearings.

Typically, topics are limited exclusively to that of a procedural nature. It is the goal of these preliminary hearings to establish a schedule for the entire case moving forward. Issues pertaining to discovery are often a subject of discussion. This conversation may include the type of discovery that is permitted, the breath of such discovery and deadlines. This preliminary hearing is also an opportunity to discuss whether or not the arbiter will be accepting motions and how they will be decided. Motions practice as we shall touch upon is somewhat discouraged in arbitration. Depending upon the background of the arbitrator, including whether one is a practicing lawyer or part of an arbitration organization, the handling of the exchange of information will impact how to address services of documents and general exchange protocol.

It is often the case that the arbitrator at a preliminary hearing will request a short overview of the case. This is not to be interpreted as an opportunity necessarily to argue the specifics of the case, but is an exercise to generally familiarize the arbiter or arbiters with some of the case specifics. Remember, often at this early stage of the proceedings all the arbitrator

[8] See Rule 21 of the AAA Commercial Arbitration rules, Rule 16 of the JAMS Comprehensive Arbitration Rules and Article 22 of the London Court of International Arbitration.

will have at his or her disposal is a copy of the claim.[9] Between the substance of the claim and the answer, there can often be very little information available to the arbitrator at those early stages.

At a preliminary hearing, the arbitrator will frequently (but not always) work backwards beginning with the selection of a date for the actual arbitration hearing. As such, it is important at any preliminary hearing to have a copy not only of your own schedule, but a schedule of your client and important witnesses. This preliminary hearing is also a good opportunity to discuss with the arbiter as to whether or not non-traditional forms of presentation of evidence will be received and how they will be analyzed. Especially with the use of Skype, WebEx, "Go To Meeting", etc. the effective production of witness is much easier than in the past.

The presentation of facts at arbitration typically does not focus on the more technical issues involving the Rules of Evidence. Rather, the benchmark at the presentation of evidence at arbitration involves one of persuasiveness. Typically, the arbiter will accept virtually all types of evidence in a case no matter how remote or even completely unsuitable, especially when compared to the presentation of evidence at trial. An arbitrator will often utilize a common sense approach in addressing the admission of evidence. As a litigant, it is important to never presume that merely because an arbiter has accepted a piece of evidence that such evidence will be accorded any significant weight. For instance, the presentation of affidavits (depending upon circumstances) can be extremely persuasive, (for instance – involving the authenticity of a document), or entirely unpersuasive, perhaps in the instance where the arbiter feels an affidavit is being provided to avoid an opportunity for cross examination of a witness.[10] Along those same lines and as mentioned above, it is important to discuss with the arbiter in advance whether or not evidence will be accepted by WebEx or Skype, telephone, or by other non-traditional forms of presentation. It is also important to think through in advance logistic issues such as the quality of internet connections or Wi-Fi signals. It is important to consider whether or not credibility of the witness will be a significant issue. A good rule of thumb is the greater the issue as to the credibility of the witness, the greater the need to present the witness in person.

The preliminary hearing is also a good opportunity to discuss non-traditional methods of potential presentation of evidence. Typically, arbitrations are conducted consistent with generally accepted norms of trial. There is a party presenting a witness through direct examination, followed by cross-examination, redirect and, depending upon the preference of the trier of fact, re-cross. However, arbitration affords unique presentation opportunities such as the simultaneous calling of expert witnesses. The calling of opposing expert witnesses simultaneously allows evidence to be juxtaposed against the other immediately. There are also opportunities for expert examination to not be conducted by legal counsel, but by the expert witnesses themselves. This approach allows each expert to cross examine the other. While the

[9] See Rule 4, 5, and 6 of the American Arbitration Association as to claims and counterclaims, Rules 5, 9, and 10 of the James Comprehensive Arbitration Rules and Articles 1and 2 of the London Court of International Arbitration as to the specific of raising and answering claims.

[10] See Rule 34 of the AAA General Arbitration Rules, Rule 22(d) of JAMS Comprehensive Arbitration Rules and Article 14 of the LCIA.

purpose of this paper is to not outline every creative approach to the presentation of information to the arbiter, the point is that if these non-traditional approaches one being they addressed should be considered at the preliminary hearing. If non-traditional approaches are being considered, it is wise to discuss these approaches in advance of the preliminary hearing amongst counsel so that the parties can be prepared to discuss the topic in a meaningful fashion with the arbiter or arbiters at the preliminary hearing. Likewise, if there exist unique facts, for example those of complex or emerging technology, these topics need to be discussed of the preliminary hearing as well. In addition, if a witness is experiencing physical problems, a witness might be leaving the employ of a party, or a witness might be absent from the jurisdiction for an excessive amount of time, these master logistical issues pertaining to not only the retaining, but the presenting, of evidence ought to be addressed. This preliminary hearing is also a good time to discuss matters involving the taking of depositions. This is especially so where there are out of state witnesses. There should be discussion as to precisely how the parties might go about securing personal jurisdiction of these out-of-state witnesses so that a non-compliant witness can be brought to be deposed.

The preliminary hearing is further an opportunity to discuss precisely the type of award that is being requested of the arbiter or arbitrators[11]. A traditional award is basic in that this type award will merely state the prevailing party and the amount of monetary damages awarded. It is not the purpose of this article to review the relative costs and benefits of a "simple" award as opposed to an award with more detail. Suffice to say, there are advantages and disadvantages to various approaches. For example, if the arbitration addresses a dispute as to contractual term that will be used by the parties in the future, more description in an award may be of great assistance in assisting the parties avoiding future disputes. There is also a form of award that uses a traditional organization of a Court Order where there are findings of fact, a discussion of law and conclusions. Because the availability of appeal is so small, it is often the case that participants do not want to incur the expense to have an arbiter or arbiters to go through a detailed analysis. Irrespective, a discussion with the arbiter or arbitrators as to the form of award is appropriate.

Because of the lower standards as to the presentation of evidence at arbitration and traditional notions that arbitration will significantly limit the utilization of Discovery, it is necessary to work through Discovery related issues. To the extent depositions are allowed, there often may be either a limit on the number of depositions that can be scheduled by each party or the number of hours that can be spent taking a deposition. The use of Written Discovery such as Interrogatories, Request for Production of Documents, and Requests for Admission can be extremely limited, if not prohibited. Often, the exchange of Discovery will be limited to that involving the parties.[12]

[11] The AAA General Rules 46 and 47 discuss these specifics, as does JAMS Rule 24 and Article 26 of the LCIA Arbitration Rules.

[12] The American Arbitration Association Commercial Arbitration Rules does not spell out an opportunity for discussing other that in Rule 22(b)(iii) affording an opportunity to Request for Production of Documents. JAMS

Limitations as to the taking of depositions in part can be explained because of procedural difficulty in securing personal jurisdiction over third party witnesses. Unlike a Court of competent jurisdiction, an arbitrator alone has no real ability to enforce subpoenas[13]. Yes, subpoenas can be served on virtually any witness. However, enforcing subpoenas issued by an arbiter or legal counsel particularly on out of state witnesses can be problematic from an enforcement point of view. This complication is further exasperated depending upon whether or not the arbitration is being pursued pursuant to the Federal Arbitration Act or a private contract, not to mention the particular law in not only the state of the arbitration, but the state in which the deponent witness is found. The same jurisdictional and enforcement related complications exist pertaining to the securing of written documents from non-parties. Suffice to say, all of these topics individually are meritorious of their own law review articles. For the purposes of this paper, merely keep in mind that the securing of testimony or written documents from third parties can be extremely complex in the context of arbitration – particularly across state lines.

There also may exist procedural and substantive issues pertaining to precisely who might be a party that is subject to an arbitration proceeding. Again, this is a topic worthy of a law review article, but it is necessary to keep in mind that arbitration tends to work better if there is a traditional aligning of parties along the lines of Plaintiff and Defendant. Where there are third parties, for instance a third party beneficiary to a contract or perhaps in a context of the oil and gas industry where there are master services contracts with numerous ancillary or junior contracts relying on the master service contract to implement that primary contract, determining any obligation to participate in arbitration can be challenging. Here there can be significant legal issues as to whether or not certain third parties must arbitrate. There can also be timing related issues as to whether arbitration leads or follows other litigation. The decision as to whether or not certain third parties must participate in arbitration can itself be an independent subject of litigation. In other words, Court Orders sometimes need to be secured to determine whether or not third parties need to participate in arbitration. Suffice to say, resorting to a Court to determine legal issues involving whether or not a party who has not executed a contract must participate in arbitration somewhat defeats some of the primary objectives of arbitration as to cost and the amount of time it takes to resolve a claim. Yet, these issues must be considered.

Arbitration procedure tends to focus upon the arbitration hearing, not a myriad of motions to more finely define issues or eliminate claims. As a result, at any preliminary hearing it is important to discuss what, if any, types of motions that will be permitted. It is important to also discuss with the arbitrator or arbitrators the permitted length of any motions and not only the process of raising issues by motion, but responding to the same as well as of the procedures leading to a ruling. Typically, motions to dismiss and for motions summary judgment are not

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Comprehensive Arbitration Rule 17 allows the taking of 2 Depositions. Article 22 of the London Court International Arbitration Rules allows inspections.

[13] Again, please consult State and Federal law, as applicable, as to statutes or case law that address the handling of securing the attendance of witnesses at Deposition or Arbitration Hearing.

tools utilized in arbitration.[14] The rules of arbitration tend to be often focused instead on allowing an arbitrator to consider material information in the decision making process. Many commentators find the notion of the summary judgment process antithetical to the entire arbitration process. Depending on the context of suggested dispositive motions there can be a significant disinclination as to utilizing this process. Again, the key is to revise the rules, discuss these matters with opposing counsel and discuss the same with the Arbitrator or Arbitrators.

Arbitration tends to be designed to ensure that a hearing is heard on the merits. Harkening back to the preliminary hearing, it is important to discuss how the arbitration hearing is to be conducted. Sometimes practices are assisted by checklists. It is often wise to discuss in broad a number of topics such as: 1) Does the arbitrator want or require pre-hearing briefs, and if so, of what nature?; 2) Will the Rules of Evidence be applied, and, if so, how?; 3) How are exhibits to be organized and presented? (For instance, does the arbitrator wish to have all the exhibits marked in advance of the hearing in light of the fact that virtually all of them will be "admitted" for consideration or should there be another methodology to produce the same?); 4) Will there be opening statements and, if so, what is the arbiter looking for as a matter of content as well as how much time will be afforded to present the same?; 5) Will the arbitrator put any restrictions on the amount of time afforded to each side to presented their case?; 6) How does the arbitrator wish to address matters involving the use of testimony by Skype, WebEx, videotape, etc.?; 7) What type of equipment is necessary to present evidence (it is becoming more common for entire cases to be reduced to presentation by flash drive so that the parties are merely opening files on their computer?); 8) Does the arbiter intend to close the presentation of evidence at the end of the hearing or will he or she keep the evidence portion of the case open and, if so, how?; 9) If there is a provision allowing for attorney's fees and costs, how should this information be presented (for instance, should the issue of attorneys fees be bifurcated so that the parties will not invest resources in expert witnesses or time until it is known that there is a prevailing party or who that might be)?; 10) Can witnesses be presented out of order to take into account their schedules?; 11) Does the arbitrator have a strict schedule pertaining to not only the beginning and end of day, but the taking of mid-morning, lunch, and mid-afternoon breaks?; 12) Is the arbitrator willing to hear matters during evening hours and weekends?

At the conclusion of the taking of evidence, there must be an award. We have discussed the various types of awards that can be issued. Yet, there also exists the timing of the award as well as whether or not there will be an opportunity for the parties to request the arbitrator to either revisit or revise that award after its publication. The later topic is typically prescribed by Rule[15]. There ought to be discussion with the arbiter as to how the award will be finalized so

[14] Rule 22 of the Commercial Arbitration Rules of the Administration Arbitration Association allows such motion upon the discretion of the arbitrator. The same is true of Rule 18 of the JAMS Comprehensive Rules and Procedures. The process is not referred to in the London Court of International Arbitration Rules.

[15] JAMS Rule 24 and American Arbitration Association each allow for an award within 30 days of the closing of evidence. London Court of International Arbitration Article 26 is silent.

that in the unlikely event anyone attempts to appeal or, more likely, a party moves to enforce the arbitration award there exists an adequate record for a District Court to act upon.

In summary, another checklist as to suggestions to increase the likelihood of a better arbitration result might help: 1) Make sure if the arbitration is being held pursuant to a contract that the contract that contains the arbitration provision is reviewed and understood. 2) To the extent the parties either agree to a set of arbitration rules by virtue of contract or otherwise, it is incumbent to be knowledgeable as to those arbitration rules. 3) Make sure that any condition precedent pertaining to mediation has been satisfied prior to arbitration being sought. 4) Deadlines called for in the arbitration must be calendared. 5) Make sure to understand what is required as to the content of the arbitration claim and be familiar with whether or not a counterclaim is appropriate at the time of the answer or whether the filing of an independent claim is necessary. 6) Make sure to engage in adequate due diligence pertaining to any potential arbiters noting any and all potential conflicts of any nature making sure to timely raise any and all protests involving impartiality. 7) Make sure that a preliminary hearing is scheduled in a reasonable amount of time after a claim is filed so arbitration can be scheduled and that thereafter there is a good understanding going into the preliminary hearing exactly what is to be discussed at that proceeding. 8) Draft checklist in advance of the preliminary hearing outlining all issues to be discussed. 9) At the preliminary hearing make sure to discuss matters involving the exchange of information as well as to all matters involving the use of Written Discovery and the taking of depositions (especially as to third parties), particularly where securing cooperation of witnesses or third parties may be complicated. 10) Particularly if there are third parties that are not participating in arbitration, but might be later joined, discuss those issues as well as how these issues might be resolved with the arbiter at the preliminary hearing. 11) Make sure to calendar all deadlines established at the hearing. 12) Arbiters hate the presentation of cumulative and redundant information, particularly documents. If at all possible, documents that each side will be relying upon should be presented jointly. 13) Think through whether or not it is necessary or useful to have a court reporter present. Although a court reporter is not required, please recall that testimony in arbitration is a statement under oath and may have other uses outside and independent that of arbitration. Make sure to consider all the opportunities available as a result of possessing any statement made under oath. 14) Make sure to know whether or not pre-hearing briefs are being sought and what the arbitrator is looking for as to the content to the same. For instance, it is often the case that if the arbitration involves garden variety issues of contract law, here an arbitrator does not want a significant brief on contract law merely restating that which he already knows. On the other hand, if there are esoteric areas of law or facts, this content should be considered this time. 15) If there are novel technical or legal issues make sure to discuss this topic in advance with the arbitrator. For instance, if it is helpful for an arbiter to read a learned treatise pertaining to a specific area of technical or legal information, something that is not at all unusual in the field of oil and gas, it makes sense to try to provide such information to the arbitrator well in advance of the arbitration. The arbitration will go much more quickly and a considered result more likely if the arbitrator has the ability to educate himself pertaining to technical issues prior to the holding of an evidentiary hearing. From the point of view of an arbitrator, it is always difficult to simultaneously learn technical processes while hearing evidence. A party always runs the risk, particularly early in a proceeding that if an arbitrator does not understand technical issues evidence may be presented and not adequately considered or even understood. 16) To the extent a deposition in whole or part will be used in a

hearing, make sure to have this portion of the deposition ready for video presentation or copied from a transcript. 17) As to legal issues, if one is relying upon a certain case or set of statutes make this legal authority available to the arbitrator in advance. The more acquainted any arbitrator is with the contested areas of law; the more likely the arbitrator will be able to consider all of the evidence in an even handed fashion. 18) Never presume that because arbitration is thought to be less formal than trial that witness preparation is not as necessary. Such is not true. Make sure to prepare direct examination and cross examination with the same diligence as that at trial. Make sure that when one is relying upon documents in the presentation of evidence or cross examination that one is organized so that time is not wasted with the "fumbling" of documents. 19) If an opening statement is allowed, make sure to not only prepare content consistent with the wishes of the arbitrator, but to specifically be ready to ask the arbitrator whether he or she has any questions. Be also ready to answer. Because arbitration is much more informal than court, arbitrators are far less likely to be concerned about issues that could result in mistrust or appeal. Because of the lack of motions or more technical pleadings, an arbitrator might walk into a hearing not appreciating a certain set of issues will arise. 20) Be ready for closing argument. Remember, it is not necessary that closing argument be conducted at the immediate end of evidence. In fact, sometimes it is helpful for an arbiter to have an opportunity to review the totality of the information presented during evidence prior to taking a closing statement. It can easily be the case that an arbitrator may close evidence on a Wednesday afternoon, and thereafter allow parties to present argument either in person or telephonically on Monday. This delay allows not only the arbitrator to focus on the information provided, but allows counsel to consider all issues of fact, law, and strategy pertaining to the presentation of argument. 21) Please make sure that there is a good understanding as to when information is no longer being accepted by the arbitrator. Arbiters will sometimes allow the parties to provide additional evidence after what otherwise would be the formal close of proceedings, particularly in the event that new issues arise such that an affidavit or witness needs to be taken out of time. While there are a multitude of circumstances that such circumstance can arise, a key concept is to make sure to not allow the closing of evidence if additional evidence needs to be provided or a circumstance exists whereby all the information has been provided, but there is no formal close of the presentation of the evidence. 22) Lastly, it is necessary to know when and in what form an award will be provided. There also needs to be consideration as to whether or not there will be an opportunity to have the arbiter reconsider his or her award or even challenge technical issues, whether they be clerical or otherwise.

In conclusion, just as good preparation and organization is a solid foundation for a successful litigation result, such is likewise an equally important foundation for a good result at arbitration. Particularly to those that have not participated in arbitration very often, there can be a sense that arbitration is so informal that preparation is not as important as in litigation. Such is not the case. Like many things, good communication and a candid discussion of issues, whether factual, legal, procedural or substantive are all part of a well-functioning arbitration. However, there is little any party can do at an arbitration hearing to make up for inadequate preparations. In summary, it is the goal of this article to raise issues that might be of assistance to counsel and parties well in advance of their arbitration hearing to increase the probability of a better result. Hopefully, I have been successful in providing such information.