The Energy Law Advisor

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In This Issue

Volume 5, No.4 -- July 2011

Industry News

Dear IEL Advisory Board Members:

It is with great pride that we introduce another edition of The Energy Law Advisor dedicated to oilfield service companies and related topics. Similar to Volume 5, No. 3 published in June, the articles were been prepared by dedicated and knowledgeable in-house counsel from our Advisory Board and Oilfield Services Committee ("OFS") members. We invite all Advisory Board members to prepare and submit oilfield services related articles for upcoming issues. We also note that while we continue to grow quickly, we always welcome more participation on any level, including joining the OFS.

Also, please remember the OFS is hosting its first comprehensive CLE seminar on October 10 at the Hilton Houston Post Oak. A link to the program details and how to register is below. Please help us make the 1st Oilfield Law Service Conference a success, and do not hesitate to contact Billy Jacobson or myself with any ideas, thoughts, or general comments you might have to improve the OFS or any of its future activities.

Regards,
Jay G. Martin and William Jacobson

Just the Facts: A Practical Guide for Oil Field Service Company Counsel When Evaluating the Application of New Economic Sanctions to Ongoing Business Operations
Submitted by: Natalia Shehadeh (Director of Trade Compliance, Weatherford International Ltd.) and Tisha Jones (Trade Compliance Counsel, Weatherford International Ltd.)

This article outlines the critical fact-gathering steps an in-house counsel should consider in advance of any evaluation of the legal application of economic sanctions. In short, this article provides examples of information that should be made immediately available to the company's in-house counsel to best position counsel to undertake a thorough legal review of the applicability of the new economic sanctions to the company and its operations in or relating to Country X.

Get the full story.

Houston, Texas

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"Black Swan: Practical Aspects of Force Majeure"
Submitted by: Sudan I. Maccio (Corporate Counsel - International, Valerus Compression Services LP)

Force majeure is literally "a greater force" that prevents a party from honoring a contract. Such greater force is normally an unforeseeable event that is out of the control of the affected party. The object of this article is to discuss the practical aspects of a force majeure provisions in contracts where the catastrophic events may affect the obligations of the parties.

Get the full story.

The Three-Legged Stool: A Practical Approach to Negotiating Choice of Law Provisions by Reference to Anti-Injunction Statutes in Texas and Louisiana

Choice of law elections in commercial contract negotiations are often a negotiated but largely unexplored point. This article looks at the impact of two states' anti-indemnity statutes to illustrate the three essential issues that should always be considered by negotiators. These three issues are: (*i*) whether a particular choice of law election is beneficial on its face, (*ii*) whether the contractual election will be enforced, and (*iii*) what standard of review will be utilized by a court or arbitrator in deciding whether and how to balance local law and the contractual choice of law.

Get the full story.

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contact Brit Brown at bbrown@bmpllp.com and ieladvisor@cailaw.org.

Members in the News

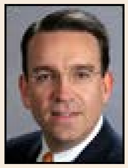

Alton Hall

Alton Hall has joined Cozen O'Connor. He represents both public and private sector entities in complex commercial cases, environmental and toxic tort litigation, personal injury cases, professional and products liability cases, and in regulatory matters.

Daniel Zwart has joined Godwin Ronquillo. He provides legal advice to clients involved in civil and commercial litigation and business disputes.


Daniel Zwart

New Sustaining Members are Buchanan Ingersoll &


Sean Moran


Ryan Purpura

Rooney PC (**Sean Moran** and **Ryan Purpura**, Pittsburgh) and Noble Energy, Inc. (**Aaron G. Carlson**, **Arnold J. Johnson**, **Kirk A. Moore**, **David A. Shelfer**, **Don Wendland** and **Ann Elizabeth White** (Houston) are the designated advisory board representatives. **Meghan Eilers** and **Zulana Ward**(Houston) are the designated Young Energy Professional advisory board representatives.)

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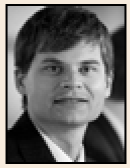
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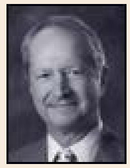
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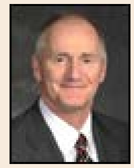
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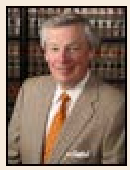
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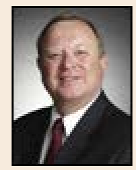
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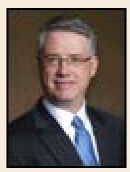
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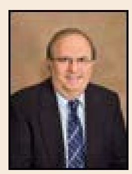
Bill Williams

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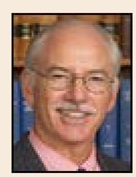
Chris Kulander


Emily Meazell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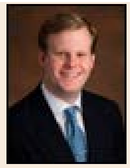
James Thompson



James Thompson

ZUMA Energy and Environmental Law, Mexico City).

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Share your thoughts on current issues and developments in the field with other members of the Advisory Board in our new members-only IEL Advisory Board LinkedIn group. If you are not already a member of LinkedIn, click here for directions on how to join.

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To visit the members website, click here and enter the password that was sent to you recently by email (If you need the email sent to you again, please email iel@cailaw.org. Here you will find current information about the Institute, the Advisory Board and the members themselves, including member photo rosters, committee descriptions and rosters, and a calendar of upcoming events. Here you can also access our new members-only online forum on LinkedIn, our bimonthly newsletter *The Energy Law Advisor*, our *Online Articles Index*, our other publications, and a description of Sponsorship Opportunities at upcoming programs.

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Submit your member announcements for the next issue,
with a photo if possible, to ieladvisor@cailaw.org.

Calendar of Events

International Oil and Gas Law, Contracts, and Negotiations: Upstream Issues and Agreements
September 19-23, 2011 | Houston, Texas

International Oil and Gas Law, Contracts, and Negotiations: Midstream Issues and Agreements
September 26-30, 2011 | Houston, Texas

Oilfield Services Law Conference
October 10, 2011 | Houston, Texas

Oil and Gas Law Short Course
October 17-21, 2011 | Westminster, Colorado

10th Annual Energy Litigation Conference
November 3, 2011 | Houston, Texas

2nd International Offshore Oil & Gas Law Conference
December 7-8, 2011 | New Orleans, Louisiana

63rd Annual Oil & Gas Law Conference
February 16-17, 2012 | Houston, Texas

2nd IEL-ANADE Conference: Renewable Energy
March 16-17, 2012 | Mexico City, Mexico

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Just the Facts: A Practical Guide for Oil Field Service Company Counsel When Evaluating the Application of New Economic Sanctions to Ongoing Business Operations

Submitted by: Natalia Shehadeh (Director of Trade Compliance, Weatherford International Ltd.) and Tisha Jones (Trade Compliance Counsel, Weatherford International Ltd.)

As you are preparing to leave work on Friday night, an email arrives in your inbox. Five minutes ago, there were few, if any, restrictions on conducting business in or with Country X, but an email notification of a United Nations Resolution, a U.S. Presidential Executive Order, a European Union Council Resolution, or a Canadian Regulation just changed that. This is the position in which many in-house counsel and their company clients were recently placed when the United Nations, and various members including the United States, European Union and Canada, announced new sanctions against Libya.

Rather than analyze the legal and substantive reach and application of these evolving sanctions to U.S., EU and Canadian entities, this article outlines the critical fact-gathering steps an in-house counsel should consider in advance of any evaluation of the legal application of such economic sanctions. In short, this article provides examples of information that should be made immediately available to the company's in-house counsel to best position counsel to undertake a thorough legal review of the applicability of the new economic sanctions to the company and its operations in or relating to Country X.

Step 1: Identify Scope of Business Operations

The company should ascertain what type of business the company is currently conducting in Country X, through what entities and supported by what members of management so as to understand the full scope of the operation and the jurisdictional reach of the new economic sanctions. For example, does the company maintain a physical base of operations in Country X, or does the company sell into Country X and/or buy from Country X via other countries?

It is also critical to evaluate the national identity of the entity or entities used for any business activities in or with Country X, and identify the officers and management members of those entities. The entity-identity review will assist with the jurisdictional analysis required to evaluate the application of any new sanctions on the company's operations. For example, while existing U.S., EU and Canadian economic sanctions identify the individuals and entities subject to each regime's sanctions programs, certain types of entities may not receive the same treatment in one country as compared to another. Certain existing U.S. sanctions programs extend the jurisdictional reach to foreign subsidiaries of the U.S. parent company. However, certain existing EU sanctions programs may not extend the jurisdictional reach of the program to similarly situated foreign subsidiaries of an EU parent company. In contrast, historically, U.S. and EU sanctions have treated foreign branches of national entities similarly and made the same subject to the scope of past economic sanctions programs. It is important to gather these operational facts so that the entities subject to the sanctions can be fully evaluated in the context of the company's activities, which may straddle multiple jurisdictions.

The same analysis should be applied once the officers and management team members are identified to determine whether those company employees are in any way captured by the scope of the new economic sanctions. In the event the scope of new sanctions against Country X extends to the activities of individuals from the U.S., EU or Canada wherever located, which is typically the case, the company will want to know whether it has any such nationals in Country X who will require advice on their individual go-forward actions on behalf of the company, or who may need to be recused from taking any further actions.

Step 2: Identify Financial Activities

Identify what financial activities the company conducts in and/or with Country X. This should include a list of financial institutions with which the company holds accounts and the names of the authorized signatories for those accounts. The purpose of each institution account should also be identified. For example, it will be helpful to understand which accounts are used for payroll, receipt of customer receipts and payment of vendor obligations

Also helpful to know are any other financial instruments in which the company has an interest in Country X, such as letters of credit, performance bond guarantees, or similar assets or obligations. The new economic sanctions against Country X may include sanctions against specifically-named entities and individuals, which can include financial institutions. Knowing whether the company has any holdings with those listed financial institutions will help in the assessment of potential blocking and reporting requirements often required by sanctions programs.

Step 3: Identify Customers and Vendors

Identify current customers and vendors in Country X, and vendors outside of Country X that perhaps provide support to the company's operations in Country X, with which the company may have outstanding legal and/or performance obligations. Care should be taken in reviewing all contracts with these entities to assess, for example, potential claims by or against the company for impossibility of performance and force majeure. The analysis can help mitigate both legal and financial obligations going forward in the event, as a result of the sanctions, the company has an argument to be excused from performance of any outstanding obligations to customers and/or vendors.

The company should also identify any outstanding receivables owed by its customers to consider whether those debts can be recovered if paid by the customer to the company after imposition of the sanctions. Naturally, the extent of such recovery is dependent upon the scope of the sanctions and application to individual entities. However, having the information readily available is critical to evaluating the of receipt of funds that could arrive just following imposition of the sanctions.

Step 4: Identify Assets and Inventory

Identifying any other equipment-related assets in country is important for a variety of reasons. From a risk management perspective, the company should know what overall value it has outstanding in the country in the event that, due to the particular scope of the new sanctions, the company's asset insurance coverage lapses. This is not an unusual occurrence in cases of comprehensive sanctions imposed by the U.S. and EU since many insurance carriers used in the oil field services sector are either U.S.- or EU-based companies. Potential losses resulting from theft of assets or other asset damage during a period of no insurance coverage are risks the company’s tax and finance departments should be made aware of in advance in the event the resulting losses must be reported, either internally, externally, or perhaps both.

Also, some sanctions programs may prohibit the movement of certain assets out of the sanctioned country without prior permission. For example, in extreme cases, for sensitive equipment that may be highly controlled from an export controls standpoint, regulatory authorities from the countries where the equipment originated may request a status of whether the company has any such assets in country. With respect to oil field services companies, it is plausible that a regulatory body may inquire about the status of hazardous materials such as explosives or radioactive materials, or other sensitive goods in a country where the sanctions were imposed due to an insurrection, civil war, or similar hostilities to ensure all parties are aware of any enhanced risks associated with the possible theft of those items.

Finally, similar to the list of vendor obligations, in the event the company has any leased equipment in Country X from vendors located either in Country X or in other countries, the company will want to evaluate its legal obligations and exposure in the event it is unable to return the equipment to the vendor as a result of the scope of the new economic sanctions.

Step 5: Identify Shipment Status

Since new economic sanctions can be imposed with little notice, if any, it is helpful to understand the status of the company's supply chain with regard to Country X. The company should ascertain what shipments the company or its vendors may have en route to Country X either in support of the company’s operations or its customers. Specifically, the company should get assistance from its supply chain team, or related internal departments, regarding what shipments have yet to depart for Country X, what may be en route, and what has arrived in Country X but may be awaiting customs clearance. If the sanctions would prohibit these exports then rerouting the shipments in a timely manner may help mitigate the related legal risks and associated financial risks, if that is a lawful action pursuant to the new sanctions. Having these details readily available will enable in-house counsel to advise the company regarding what the sanctions will permit vis-à-vis those shipments, as applicable.

Ultimately, the two best steps that in-house counsel can take are to gather as much information as possible regarding the company's operations in or relating to Country X and make sure management knows who to contact for guidance. Knowing the full extent of the company's business in Country X will enable in-house counsel to competently advise what steps should be taken in response to the new economic sanctions.

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"Black Swan: Practical Aspects of Force Majeure"

Submitted by: Sudan I. Maccio (Corporate Counsel - International, Valerus Compression Services LP)

"A Black Swan is a highly improbable event with three principal characteristics: It is unpredictable; it carries a massive impact; and, after the fact, we concoct an explanation that makes it appear less random, and more predictable, than it was. (…)"

In recent days, as tsunamis, nuclear accidents, revolutions, regime change and serious civil disruptions have occurred in traditionally stable countries around the world, those attorneys with international clients or working in-house for companies with international operations potentially affected by such events, have been carefully reading contract terms trying to determine if any of such events affect contractual obligations of their clients. In our world, the term "force majeure" refers to these catastrophic events. Force majeure is literally "a greater force" that prevents a party from honoring a contract. Such greater force is normally an unforeseeable event that is out of the control of the affected party. The object of this article is to discuss the practical aspects of a force majeure provisions in contracts where the catastrophic events may affect the obligations of the parties.

Force majeure does not discriminate between developed and developing nations. A force majeure event can occur in down town Manhattan, Tokyo, Tripoli or in Tegucigalpa. The challenge when parties negotiate a contract, from the very simple purchase order to the most complex engineering, procurement and construction project, is understand how a force majeure event may influence their business processes and plan for the contractual consequences of a force majeure event. This concern may seem obvious and there are all kinds of templates and standard language to choose from, however, the following details are key factors to consider:

<u>Definition, Definition, Definition</u>. A good definition of what will constitute a "force majeure event" should be the first step. It is a good practice to define the term as broadly (or narrowly) as possible, as "Black Swans" may come in very different shapes and forms. The definition should generally, at a minimum, include natural disasters (hurricanes, snow, tsunamis) or “acts of God”, acts of terror (illegal acts of third parties), acts of war, (that could be declared between to sovereign nations or military actions within national groups), and acts of government (decrees, changes in law and trade sanctions). It is prudent to itemize all these events as an open list, so an event that is equally unforeseeable and unpredictable (but is not in the list) also constitutes a force majeure event.

<u>Consistency between Definition and Applicable Law</u>. It is always prudent to understand how the laws that govern the interpretation and consequences of the contract deal with force majeure, especially if such obligation will take place in a foreign jurisdiction. However, if the contract is clear the law will rarely prevent the enforcement of a force majeure clause. On the contrary, in most civil law jurisdictions application of force majeure will be a default rule that will apply to the contract even if the parties are silent on the issue.

<u>Duration</u>. The duration of a force majeure event is also a key factor to consider. The decision of whether a contract obligation will be merely suspended or terminated due to impossibility of performance will depend on the conditions of the business and if "time is of the essence". A commercial property project owner may be able to wait if building materials are several weeks late due to a flood affecting its suppliers; but a refinery operator could suffer for the lost income if a turnaround or other major maintenance project shuts down its refinery for just a couple of days. In any event, it is in the best interest of the parties to discuss

and agree on a waiting period after which either party may declare the contract terminated.

Cash Flow. A contractor that provides services or sells a product must worry about payments for ongoing costs during a force majeure event. A service provider may want to clarify that, despite the contract suspension due to force majeure, certain stand by payments are still due, as costs may still be incurred in keeping equipment and personnel ready in remote locations even if operations are suspended. This is particularly important in oilfield services where wells are often in remote areas. Equipment suppliers may be wise to consider during negotiation, which party shall bear the cost of items that are unique to a project, or specially manufactured to fit the needs of a client/operator, in case a force majeure event makes impossible it to deliver such products. On the other hand, a client/operator of equipment or owner of a major project may wish to consider whether a contractor must reimburse advance payments in case a force majeure event makes impossible manufacturing, designing or delivering equipment.

Payment Obligations. It is very common to exclude payment obligations from the obligations excused due to force majeure. For instance if a hurricane destroys an offshore rig and a supplier honored all its obligations under a contract with the rig operator before the catastrophe, the operator should still make the corresponding payment to this supplier at contract rates. However, this may be true in the case of natural disasters but may not be the case if government action prevents the banking system from actually processing a payment. This type of events may occur (and do occur) internationally. A foreign nation may impose exchange control measures prohibiting buyers in that country from making payments in US Dollars pending government approval. In addition, trade sanctions may be imposed prohibiting making or receiving any payments coming from a country, such as the recent case of the US and EU sanctions imposed on Libya. In the case of Libya, making or receiving any payment from certain individuals and instrumentalities of the Libyan Government, including their national oil and gas companies, was prohibited.

In summary, if the parties agree ex-ante on the consequences of "unforeseeable" events, they may mitigate or prevent future disputes. However, contracts are like maps: they provide roadmap but do not cover all the events that could affect the obligations of the parties in the future. Sophisticated operators and service providers in the oil and gas industry understand this issue and deal with the "Black Swan" problem by implementing risk management policies that include force majeure clauses in all their contracts. In the end, when disaster strikes having the best contract clause possible always gives the best alternative to a negotiated solution.

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The Three-Legged Stool: A Practical Approach to Negotiating Choice of Law Provisions by Reference to Anti-Injunction Statutes in Texas and Louisiana
Submitted by: Eric Cassidy, Squire Sanders & Dempsey (US), LLP

Choice of law elections in commercial contract negotiations are often a negotiated but largely unexplored point. In this article, we look to the impact of two states' anti-indemnity statutes to illustrate the three essential issues that should always be considered by negotiators. These three issues are: (*i*) whether a particular choice of law election is beneficial on its face, (*ii*) whether the contractual election will be enforced, and (*iii*) what standard of review will be utilized by a court or arbitrator in deciding whether and how to balance local law and the contractual choice of law.

Background
In the 1980s, Texas and Louisiana both enacted anti-indemnity statutes based on a public policy goal of protecting downstream contractors from being forced to accept one-sided contractual indemnities that insulated an upstream party against virtually all risk.[1] But despite this shared policy concern, the Texas and Louisiana anti-indemnity acts are markedly different: Texas allows contractual indemnities in contracts that are backed by insurance and meet certain statutory requirements; Louisiana's anti-indemnity act simply voids contractual indemnities outright. These fundamentally different regulatory approaches to the same policy aim demonstrate what is at stake when a court or arbitration panel must decide whether to apply Texas or Louisiana law to a master service agreement that may cover dozens or hundreds of projects in multiple jurisdictions.

What Happens When a Choice of Law Election is Litigated?
Just because a contract contains a choice-of-law provision selecting Texas law does *not* mean a court will apply Texas' anti-indemnity statute. Historically, courts and arbitration panels have looked to three factors when deciding whether to apply Texas' or Louisiana's indemnity statutes to a particular contract: (*i*) in Louisiana, courts look to statutory language highlighting the location of the well, which routinely preempts a contractual Texas choice-of-law provision; (*ii*) in Texas, courts look to contractual choice-of-law provisions, and specifically the place of performance of the contractual indemnities; and (*iii*) in both states, courts look to public policy, with a noteworthy Louisiana decision breaking from the traditional rule and holding that Texas law applied to a contract when the wells at issue were located in Louisiana.

The question is how to draft a contract to hedge risk and maximize the odds that a court will apply the law of the state whose statute is most beneficial to a company's interests? Careful drafters view anti-indemnity statues as a "three-legged stool." To achieve a stable balance, a contract must account for (*i*) the location of the well, (*ii*) choice-of-law, and (*iii*) public policy. This article provides a practical roadmap to these factors, starting with a brief overview of difference between the Texas and Louisiana anti-indemnity statutes.

Review of the Texas and Louisiana Anti-Indemnity Acts[2]
The Texas Oilfield Anti-Indemnity Act (the "Texas Act") broadly applies to oilfield contracts for work servicing mine shafts, drifts, or "other structure intended for use in exploring for or producing a mineral"[3] Under the Texas Act, a company cannot shield itself from liability for its own actions against claims for personal injury, death, or property damage by including contractual indemnity provisions in an oilfield contract.[4]

But there is an important exception to this rule that allows a company to hedge its risk. The Texas Act makes contractual indemnities valid and enforceable if they are supported by insurance and meet basic statutory requirements. Parties to a contract may negotiate mutual indemnity provisions, but only if these provisions are backed by insurance. Mutual indemnity is allowed when insurance is purchased "for the benefit of the other party as indemnitee."[5] The parties do not have to purchase insurance for the same amount of coverage. But if one party has more limited coverage, any contractual indemnity obligation is limited to the amount of coverage held by the party with the least insurance. Thus, contracting parties may negotiate mutual indemnification only to the extent that it is truly mutual, and no more.[6] By requiring indemnities that are mutual and supported by adequate insurance, Texas law increases the probability that an injured party may recover not just a paper judgment, but one that is collectible.

In contrast, the Louisiana Oilfield Act (the "Louisiana Act") nullifies, as against public policy, insurance and indemnity provisions in oilfield services contacts to the extent those provisions apply to death or bodily injury.[7] Louisiana refuses to permit a hold harmless clause pertaining to the indemnities' negligence in a drilling contract. Louisiana does not allow mutual indemnification, even when the obligations are reciprocal and backed by insurance. The result is that indemnities in a master services agreement or drilling contract are typically unenforceable under the Louisiana Act.

<u>The First Approach: Focusing on Location of the Project</u>

Louisiana law follows the general rule that a company may be indemnified against its own negligence if the indemnification is clearly expressed in the parties' contract.[8] The Oilfield Anti-Indemnity Act creates a public policy exception to this rule.[9] Historically, both state and federal courts have taken the general view that anti-indemnity statutes preempt contractual choice of law elections because public policy concerns require a court or arbitration panel to disregard a conflicting commercial term in a contract.[10]

Beginning in 1992, whether a court would apply Louisiana’s anti-indemnity act was largely dependent upon the location or "functional nexus" of the well.[11] This shift in focus was based on interpretation of the Louisiana statute’s requirement that a contract relate not only to exploration, production, and transportation activities, but also to an actual well. The practical reality was a court would make a fact intensive, case-by-case analysis that almost always ended with the court applying the law of the state where the well was located – a *lex loci drilling situs.* If the well was located in or around Louisiana, the court would apply Louisiana law and Louisiana's anti-indemnity act. This, in turn, led to the result that contractual indemnity provisions were found to be unenforceable or void.

To hedge their risk, many companies historically negotiated Texas choice-of-law provisions in oilfield services contracts in an effort to circumvent the Louisiana Act. But for many years, both state and federal courts routinely held that choice of law provisions in oilfield contracts cannot avoid the application of the Louisiana Act when a project is located in Louisiana.[12]

In applying this "first leg" to negotiating contracts, it was important to manage expectations and realize that a contract signed in Texas, by two companies domiciled in Texas, that included a Texas choice-of-law provision, could be preempted and the Louisiana anti-indemnity statute applied once the work crossed state lines and was performed at a well located in Louisiana territory.

<u>The Second Approach: Focusing on the Location Where Performance of the Required Contractual Indemnities Might Occur</u>

By contrast, Texas courts in the last decade have looked not to the location of the well, but instead to the place of performance of *the indemnity*.[13] In *Chesapeake v. Ensco Offshore*, the parties signed a standard form contract that contained mutual indemnities backed by equal insurance policies. The court defined the issue regarding place of performance in terms of the freedom of contract. Under a conflict of law analysis, the court focused on the location for performing the indemnity obligations, not the location of the well or where the work was performed. The court noted, "[h]ere, the drilling took place in Louisiana, but the suing took place in Texas."[14]

The contract also contained a Texas choice-of-law provision. The court noted that the choice-of-law provision would be honored under a conflicts analysis unless Louisiana had a more significant relationship to the transaction and Texas law would violate Louisiana's public policy, among other factors. But the Texas court found that Texas’s and Louisiana’s anti-indemnity statutes were both premised on the same public policy judgment: to protect contractors from unequal bargaining power and what amounted to contracts of adhesion containing one-sided indemnities.[15] Louisiana's public policy of protecting contractors, which traditionally was used to justify applying the Louisiana Act, was no different from the public policy underlying the Texas Act.

To the extent a company wants the contractual indemnities to be enforced, it should negotiate the inclusion of a Texas choice-of-law provision and immediately seek to enforce its rights by filing any legal action in a Texas state court (even if the company immediately moves to compel arbitration). These factors are key, along with the domicile of the parties. Similarly, if a contractor wants to avoid contractual indemnities, it should negotiate a Louisiana choice-of-law provision, or, at the very least, a choice-of-law provision identifying another state's law as controlling.

Public Policy Versus Contractual Choice

A 2007 Louisiana state-court decision may mark a shift away from the traditional Louisiana approach focusing on the location of the well and toward the Texas approach of recognizing the parties' freedom to contract. The decision in *King v. I.E. Miller of Eunice, Inc.*[16] is noteworthy because the court found that the parties' relationship to Louisiana was stronger than their relationship to Texas, based in part on the fact that the work order at issue was for work in Louisiana where the accident occurred.[17] These facts would normally lead to the conclusion that Louisiana law applied.

However, in applying a conflict of laws analysis, the *King* court found that the facts weighed in favor of applying Texas law.[18] The court noted that the master service agreement was drafted by the contractor and contained a Texas choice-of-law provision. The court concluded that the nondrafting party was therefore justified in expecting any dispute to be governed by Texas law based on the choice-of-law provision.[19]

The *King* court also found that Texas' policy of enforcing private contracts that were freely and voluntarily negotiated outweighed Louisiana's public policy of protecting oilfield subcontractors.[15] This finding was based, at least in part, on the fact that the party seeking to void the contractual indemnity was *not* a small subcontractor or the class of persons the policy was designed to protect. Because the party was not a subcontractor, the court nimbly found that Louisiana's public policy of protecting oilfield subcontractors was outweighed by Texas' public policy of freedom of contract.[21] The court concluded that Texas law based on its analysis of public policy, even if the parties had not negotiated a Texas choice-of-law provision.

The court ultimately held that Texas law would apply whether based on the choice-of-law provision or public policy and vacated the trial court's order voiding the contract's mutual indemnity and defense provisions.[22]

What is the impact of this decision when negotiating an oilfield contract? The relative size of the companies to the contract matters. If two companies are considered large, multi-national, or more generally "big oil," the party asking to enforce a Texas choice-of-law provision when the well or wells fall within Louisiana's jurisdiction has a strong argument that the public policy concerns reflected in Louisiana's statute do not apply—neither company is a smaller subcontractor. It may also be possible to point to the sophistication of the two companies, as well as such factors as the pedigree of outside counsel or whether the marketplace at the time was thriving and no party was "forced" to accept the work. These kinds of factors, even though not specifically mentioned in *King*, provide an argument that a party was not subject to "unequal" bargaining power during negotiations and therefore does not fall within the public policy concerns that are often the key factor a court or arbitration will examine.

Conclusion

While it is too soon to predict whether the *King* decision is the beginning of a trend or an anomaly, the comparison of Texas and Louisiana's approaches to this issue illustrate the importance of thoughtful choice of law elections in master service agreements and other potentially multi-jurisdictional service contracts. Choice of law elections may or may not be determinative in and of themselves, and it will remain necessary to monitor the use of multi-jurisdictional service contracts after execution to assure that projects governed by the agreement are sited in jurisdictions where the contractor understands the statutory environment and the *current* likelihood (if any) that local courts will honor a contractual election that may conflict with local law.

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[1] Tex. Civ. Prac. & Rem. Code Ann. §§ 127.001-127.008; La Rev. Stat. Ann. § 9:2780.

[2] This article is not intended to be a comprehensive review of the statutes. For a more comprehensive treatment, *see* Schill Jr., Gus A., Recent Developments Regarding Maritime Contribution and Indemnity, 51 La. L. Rev. 975 (1991); Grand, Edward B. and Lisa Brown, Risk Apportionment in Natural Resources Transactions Through Indemnification Clauses and Releases, 22 Corp. Couns. Rev. 209 (2003).

[3] Tex. Civ. Prac. & Rem. Code Ann. §127.001(2)(B). An early decision, however, held that the statute does not apply to "repair of an offshore drilling rig where there is absolutely no connection with the drilling of a well." *See Transworld Drilling Co. v. Levingston Shipbuilding Co.*, 693 S.W.2d 19, 23 (Tex. App.—Beaumont 1985, no writ).

[4] There are certain exceptions. The Act does not preclude indemnities relating to property damage, death, or personal injury caused by radioactivity; property damage caused by pollution; or property damage from reservoir or underground damage.

[5] Tex. Civ. Prac. & Rem. Code Ann. §127.005(b).

[6] *Id*. at 127.001(3). The Texas Act also allows unilateral indemnity when the indemnities are supported by insurance or self-insurance not exceeding $500,000. The indemnity obligation is limited to the scope of coverage and the dollar amount of insurance or self-insurance provided by the party acting as indemnitor.

[7] La. Rev. Stat. Ann. § 9:2780(B) (providing that "any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water . . . is void and unenforceable"); *see also Doucet v. Gulf Oil Corp.*, 783 F.2d 518, 524 (5th Cir..), *cert. denied*, 479 U.S. 883, 107 S. Ct. 272 (1986); *Carney v. Marathon Oil Co.*, 632 F. Supp. 1037, 1047-49 (W.D. La. 1986).

[8] *See, e.g., Rodrigue v. Legros,* 563 So. 2d 248, 254 (La. 1990).

[9] *Id*.

[10] *Id*.

[11] *See, e.g., Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 251 (5th Cir. 2001) (citing *Transcontinental Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985 (5th Cir. 1992).

[12] *Matte v. Zapata Offshore Co*., 784 F.2d 628, 631 (5th Cir. 1986); *Lirette v. Union Tex. Petroleum Corp*., 467 So.2d 29, 32 (La. Ct. App. 1st 1985).

[13] *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163 (Tex. App.—Houston [14th Dist.] 2002 no pet.).

[14] *Id*. at 171.

[15] *Id*. at 173.

[16] 970 So.2d 703 (La. Ct. App. 3d 2007). For an excellent, detailed analysis of this decision, *see* Hurley, Grady S., Hurley on King v. Miller, Emerging Issues (LEXIS 2008)

[17] *Id*. at 706.

[18] *Id*.

[19] *Id*. at 707.

[20] *Id*.

[21] *Id*.

[22] *Id*.

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