The Energy Law Advisor

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In This Issue

Industry News

Dear Members of the Institute for Energy Law,

The Editorial Board of the Energy Law Advisor ("ELA") is pleased to announce that it is transitioning the ELA to a six issue per year publication, effective this year with Volume 5. The increase is made possible because of the contributions from member and non-member authors, and we continue to invite all of the Institute's members to submit article proposals for future issues. Please contact any member of the Editorial Board for further information on editorial guidelines and schedules or to propose a topic for consideration.

The Editorial Board would also like to point out that this issue, as well as future Issue No. 4, are dedicated to the Oilfield Services Committee ("OFS") which was formed in 2010. The OFS has already generated strong interest and support thanks in large part to the Committee's Chairman, Jay Martin, Vice President, Chief Compliance Officer & Sr. Deputy General Counsel of Baker Hughes Incorporated, and Vice-Chairman William Jacoboson, Vice President, Chief Compliance Officer, and Co-General Counsel for Weatherford International. We are pleased to spotlight the Institute's latest practice committee and are very thankful for the excellent articles being submitted by members of the Oilfield Services Committee for publication in this Issue No. 3 and the next Issue No. 4.

Sincerely,
Brit Brown

The Brits Are Coming: Is Your Compliance Program Ready for the Bribery Act?
Submitted by: Ryan D. McConnell, Jeffery B. Vaden, and Katharine Southard

On July 1, 2011—three days before Independence Day—a number of U.S. companies will become subject to the UK Bribery Act. The act prohibits companies carrying on business in the United Kingdom from engaging in (a) commercial bribery, (b) bribery of foreign public officials (including employees of public enterprises), and (c) failure to prevent (a) or (b). The UK Bribery Act subjects companies to unlimited fines and individuals to up to ten years in prison. This article looks at the practical impacts the new laws will have on U.S. companies.

Get the full story.

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The Dangers of Overlooking the "Miscellaneous" Section of the Contract

Submitted by: Steven Harris and Amanda Dodds

With some regularity, oilfield service companies and their customers (and, for that matter, parties in virtually any type of commercial transaction) find themselves substantially dependent in any contract dispute on terms in the "Miscellaneous" section in the back of the contract, where many of the non-commercial clauses typically reside. This article looks at three of the more fundamental "back of the contract" issues that drafters and negotiators should consider: (i) choices of law and venue, (ii) arbitration agreements, and (iii) contractual limitations of remedies.

Get the full story.

Court Validates Expansive View of "Foreign Official" under the FCPA

Submitted by: Jay G. Martin (Vice President, Chief Compliance Officer & Sr. Deputy General Counsel, Baker Hughes Incorporated)

A new California federal court opinion issued on April 20, 2011 addresses this issue and confirmed the Department of Justice's ("DOJ") broad view of the meaning of "foreign official" under the Foreign Corrupt Practices Act. This is a brief update on the impact of *United States v. Noriega*.

Get the full story.

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To submit an industry news item for the next issue,
contact Brit Brown at bbrown@bmpllp.com and ieladvisor@cailaw.org.

Members in the News

Dear Energy Law Advisor Readers:

As Chair of IEL's Oilfield Services Committee ("OFS"), I am pleased to write this update on the recent and upcoming activities of the OSC. Although our committee is still young compared to the other practice groups in the IEL, we have had a lot of interest from the IEL Advisory Board members. In fact, we have already had 47 join the OFS, and look forward to increasing the membership even more as the OFS continues to work on great events.

Many of you participated in the ethics presentation the OFS co-hosted with the Young Energy Professional Committee in late March. The event was a great success both in substance and attendance. We look forward to participating and hosting additional events in the future, and welcome any and all ideas from the members.

We are particularly excited about the first ever Oilfield Services Seminar to be held on October 10 at the Hilton Houston Post Oak. The seminar will provide a focused analysis of topics of greatest concern to service companies such as risk allocation and compliance, and provide up-to-date briefings on recent developments. Registration has not formally begun, but please keep an eye out for upcoming messages from the IEL regarding the event, and how you can participate.

We hope you enjoy this issue of the *Energy Law Advisor* dedicated to oilfield service topics, and a special thanks to those who contributed the great content for this and upcoming issues.

Regards,
Jay G. Martin

In Memory of Anita Stover (1936-2011)

While working at The Center for American and International Law (formerly the Southwestern Legal Foundation) among one of the many functions she performed with kindness, competence and dignity was serving as the Assistant Administrative Editor and then the Administrative Editor of the *Oil and Gas Reporter*. During her tenure she provided leadership and understanding to the many editors of the *Reporter* who called on her frequently to assist them in their editorial duties. She firmly, but always courteously, reminded those of us who have been privileged to serve on the Editorial Board that we needed to submit our cases to her. She was there when we needed her and always responded to our requests with a smile and a chuckle, knowing full well that by the dint of her personality we on the Editorial Board would see that there were sufficient cases available for our monthly deadlines. Anita was a professional in the best sense of the word and more importantly, a good friend to all of us who were blessed to know her. She remained a dedicated member of the Advisory Board after her retirement.

Bruce Kramer
Administrative Editor, *Oil and Gas Reporter*

Sustaining Member Hess Corporation added **Toni D. Hennike** (Vice President and General Counsel, Exploration & Production, Houston) as an advisory board member.


Toni Hennike


Brad Berge

Supporting Member Holland & Hart LLP added **Brad Berge** (Santa Fe) as an advisory board representative.

A new Associate Member is **Edward M. "Ted" Holt** (Maynard Cooper & Gale, Birmingham).


Edward "Ted" Holt

A new Law School Member is the University of Arkansas School of Law (**Thomas C. Daily**, Fayetteville).


Wes Thoman

New Young Energy Professional Members are **Luis M. Bernal** (Executive Director, PR Energy Affairs Administration, Guaynabo), **Flavio Inocencio** (Angola LNG, Lisbon) and **Wes Thoman** (Greenberg Traurig, LLP, Houston).

Participate in the IEL Advisory Board LinkedIn Group

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.

Visit the Advisory Board Members website

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

3rd IEL-SEERIL International Oil and Gas Law Conference
June 26-28, 2011 | London, United Kingdom

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

2nd Conference on the Law of Shale Plays
September 7-8, 2011 | Ft. Worth, 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

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The Brits Are Coming: Is Your Compliance Program Ready for the Bribery Act?
Submitted by: Ryan D. McConnell, Jeffery B. Vaden, and Katharine Southard

On July 1, 2011—three days before Independence Day—a number of U.S. companies will become subject to the UK Bribery Act. The act prohibits companies carrying on business in the United Kingdom from engaging in (a) commercial bribery, (b) bribery of foreign public officials (including employees of public enterprises), and (c) failure to prevent (a) or (b). The UK Bribery Act subjects companies to unlimited fines and individuals to up to ten years in prison. UK authorities have maintained that a "common sense approach" will prevail when evaluating whether companies have a "demonstrable business presence" in the UK for purposes of subjecting them to the act. For instance, having a UK subsidiary does not necessarily mean that a parent company is "carrying on business" in the UK, so long as that subsidiary acts independently of its parent or other group companies. Although UK courts will ultimately determine jurisdiction, any company that "carr[ies] on business or part of a business" in the UK may face criminal charges for failure to prevent bribery by an employee or agent acting on its behalf—the only defense available to a company is having "adequate procedures."

On March 30, 2011, the UK's Ministry of Justice, the Director of Public Prosecutions, and the Director of the Serious Fraud Office issued guidance on how the act will be enforced and six principles an organization can take to ensure its compliance program meets the "adequate procedures" defense. The six "adequate procedures" principles echo the guidance in the U.S. Sentencing Guidelines as set forth below:

UK Bribery Adequate Procedures Six Principles	**U.S. Sentencing Guidelines Seven Elements in §8B2.1(b)**
(1) Proportionate Procedures: Company must have procedures for preventing bribery by associated persons proportionate to the bribery risks faced and to the nature, scale, and complexity of the business' activities.	(1) Company must establish compliance standards and procedures that are reasonably capable of reducing the prospect of criminal conduct. (6) Company must consistently enforce compliance standards with appropriate disciplinary mechanisms.
(2) Top level commitment: A company's top-level management must be committed to preventing bribery by associated persons and to fostering a company culture in which bribery is unacceptable. This should include (1) top-level internal and external communication of company's zero-tolerance approach to bribery; and (2) top-level involvement in developing anti-bribery procedures.	(2) Company must assign specific high-level personnel the oversight responsibility for company standards and procedures. (3) Company must use due care not to delegate substantial discretionary authority to individuals whom the organization knows, or should know, have the propensity to engage in illegal activities.
Risk Assessment: Top level management should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by associated persons. The assessment should be periodic, informed, and documented. Risk assessment procedures should be proportionate to the company's size and to the nature, scale and location of its activities. This should include: (i) country risk; (ii) sector risk; (iii) transaction risk	(5) Company must take reasonable steps to achieve compliance with company standards, *e.g.,* by utilizing monitoring and auditing systems designed to detect criminal conduct by employees and by having in place a reporting system for employees to report suspected misconduct.

(higher risk transactions include government purchasing and charitable and political contributions); (iv) business opportunity risk (higher with projects that have high-value, that involve many intermediaries, or that lack a clear legitimate objective); and (v) business partnership risk (relationships with third parties who interact with foreign officials involve greater risk).	
Due diligence: Businesses should apply a proportionate and risk-based approach in performing due diligence on parties who perform or will perform services for or on behalf of the company, in order to mitigate identified bribery risks.	(5) Company must take reasonable steps to achieve compliance with company standards, *e.g.,* by utilizing monitoring and auditing systems designed to detect criminal conduct by employees and by having in place a reporting system for employees to report suspected misconduct.
Communication: A company should ensure that its bribery prevention policies and procedures are embedded and understood throughout the company through internal and external communication, including training (tailored to risks associated with particular positions), that is proportionate to the risks it faces.	(4) Company must effectively communicate company standards and procedures to all employees, *e.g*., through employee training programs.
Monitor and Review: A company should monitor and review procedures designed to prevent bribery by associated persons and make improvements where necessary. A company should monitor and adjust controls required to mitigate changing bribery risks. In addition to regular monitoring, a business may choose to review its procedures in response to certain events, including governmental changes in countries in which it operates or the occurrence of a possible bribery incident involving the company.	(5) Company must take reasonable steps to achieve compliance with company standards, *e.g.,* by utilizing monitoring and auditing systems designed to detect criminal conduct by employees and by having in place a reporting system for employees to report suspected misconduct. (7) After an offense has been detected, company must take all reasonable steps necessary to respond to the offense and prevent similar offenses, *e.g*., through modification or revision of the compliance program.

One area of concern that the guidance mitigates is "bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations." The guidance makes clear that the purpose of the act is not to criminalize such expenditures. Rather, to constitute a bribe under the UK law, there must be an intention for the benefit or advantage "to influence the official in his or her official role and thereby secure business or a business advantage" and "sufficient connection between the advantage and the intention to influence." Examples of permissible entertainment expenses under the act include Wimbledon or Grand Prix tickets, flight/accommodations to demonstrate product if not a sham trip, the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event, fine dining, or attendance at baseball match (whatever that may be).

The guidance provides less comfort for companies on the issue of facilitation payments. Unlike the FCPA, the UK Bribery Act has no exception for facilitation payments that are paid to induce a government official into performing an action that is required by law, such as paying for police protection or for expediting a visa at a point of entry. According to the guidance, large payments or a pattern of payments favors prosecution, while small payments by a vulnerable payer, made pursuant to a company's compliance policy and self-reported, are not likely to merit charges. The authors have reviewed forty oil and gas company Codes of Conduct and the majority of those codes fail to address this concern. Indeed, only fifteen of the forty Codes of Conduct mentioned facilitation payments. Of those fifteen, only two completely prohibited facilitation payments in the absence of an imminent threat to the health safety or welfare of an employee, family

member or co-worker. Only seven out of the fifteen codes that mentioned facilitation payments noted that facilitation payments may be illegal under the local laws of certain countries. And only ten of those fifteen codes mentioned/emphasized the importance of properly recording facilitation payments in company books and records.

The guidance notes that there is no one size fits all compliance policy, so application of the principles varies depending on the company. In the next few months, however, every company subject to the UK Bribery Act should ensure that their compliance policies adequately address not only bribery of foreign officials but commercial bribery as well. In addition, companies subject to the UK law should ensure their policies on facilitation payments address the prohibition in the UK law.

Ryan McConnell and Jeff Vaden are former federal prosecutors in Houston, Texas. Jeff is a partner at Bracewell and Giuliani LLP. Ryan is a partner at Haynes and Boone, LLP. Both advise clients on corporate compliance issues as well as defend companies under civil and criminal investigation by U.S. or foreign governments. Katharine Southard is an associate at Haynes and Boone, LLP.

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The Dangers of Overlooking the "Miscellaneous" Section of the Contract

Submitted by: Steven Harris and Amanda Dodds[1]

With some regularity, oilfield service companies and their customers (and, for that matter, parties in virtually any type of commercial transaction) find themselves substantially dependent in any contract dispute on terms in the "Miscellaneous" section in the back of the contract, where many of the non-commercial clauses typically reside. Some of these "back of the contract" non-commercial provisions can have a material impact on dispute resolution; they often govern who will hear a dispute, what type of dispute mechanism will be employed, what law will govern the dispute, and what remedies will be available to the prevailing party. In this short article, we address three of the more fundamental "back of the contract" issues that drafters and negotiators should consider: (i) choices of law and venue, (ii) arbitration agreements, and (iii) contractual limitations of remedies.

I. Choice of Law Versus Choice of Venue or Forum.

Commercial parties often focus on the "choice of law" election as an important element of the transaction; however, they may overlook the distinction between "choice of law" elections and venue or forum selection decisions of equal importance. Parties sometimes conflate these very separate concepts in a single paragraph (or, worse yet, a single sentence) that may easily yield no clear elections, conflicting indications of the parties' intent, or worst of all – unenforceable elections. Unintended consequences of inconsistent or incomplete provisions for these issues can thus impact the parties' original bargain dramatically.

To facilitate the parties' commercial aims, negotiators and drafters should consider three issues when drafting or negotiating provisions for choices of law and choices of venue or forum:

> A. the need for some reasonable connection between the chosen law and the parties or the project;
> B. the need for a distinct forum/venue selection clause that is reasonable in the circumstances; and
> C. the impact of contractual elections on their exposure to claims by third-parties such as subcontractors, vendors, landowners, or bystanders.

A. Choice of Law

Generally speaking, a "choice of law" election determines the substantive law governing disputes arising in connection with any of the transaction(s) controlled by the contract. But choice of law provisions do not typically govern procedural law applicable to these disputes, nor do they affect the forum or venue in which such disputes will be heard. Nevertheless, choice of law elections are integral to interstate and international transactions, such as multi-state and multi-national oil field services and rental agreements, because a clear election of governing substantive law provides important certainty in predicting how legal issues are likely to be decided. Choice of law provisions are particularly important in the oil and gas industry. While some jurisdictions' natural resources laws are well-developed, the laws of other jurisdictions (particularly in developing nations and states experiencing recent booms in shale gas production) may not be as well-defined. Parties should consider the differences between the substantive law chosen in these types of agreements and that which exists in any jurisdiction in which a new project is to be located. Issues can rage from enforceability of particular clauses to the implied duties of various parties in a particular setting. Potential problems can arise when legal duties and rights (and the interaction of local law and contract terms) are not well understood at the outset. Examples may include the absence or presence of particular operator duties, the rights of non-operating working interest parties, the degree to which landowners may be third-party beneficiaries to operating and service agreements, the ability of parties to limit or specify remedies and indemnities, the relevant third-party liabilities that may face project participants, and the impact of local regulation on the project.

However, choice of law provisions do not live in a vacuum and they must be accompanied by compatible decisions about choice of venue or forum because it is often the case that the venue or forum selected by the parties for their disputes is not in the jurisdiction whose substantive law is to be applied. If the courts of the selected venue or forum are unfamiliar with or hostile to the substantive law selected by the parties, misapplication of the relevant substantive law can undermine the original choice of law and distort or destroy the commercial aims of the parties.

Indeed, the limits of a substantive "choice of law" election can be impacted by the construction and enforcement of the provision itself in later litigation. In determining whether the choice of law provision is valid, the procedural law *of the forum* may override the selected substantive law. For example, federal choice of law rules dictate that federal courts should honor the parties' choice of law unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purpose of the federal law. *Champion v. ADT Sec. Servs., Inc.*, No. 2:08-CV-417-TJW, 2010 U.S. Dist. Lexis 121012, at *11 n.1 (E.D. Tex. Nov. 15, 2010). In diversity cases, a federal court must follow the choice of law rules of the forum state. *Int'l Interests, L.P. v. Hardy*, 448 F.3d 303, 306 (5th Cir. 2006); *Verdine v. Ensco Offshore Co.*, 255 F.3d 246, 250-54 (5th Cir. 2001).

> Texas follows a similar "no relationship" test[2]. Under Texas law:
>
> the parties' freedom to choose what jurisdiction's law will apply . . . [is not] unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply.

Hardy, 448 F.3d at 307 (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990). In order to effect this policy, Texas has adopted Section 187 of the Restatement (Second) of Conflict of Laws. The resulting rule is explained in *Newby v. Enron Corp.* where the U.S. district court sitting in Texas held that the New York choice of law provision was unenforceable under Texas law, as New York did not have a substantial relationship to the parties or the transaction. *Newby v. Enron Corp. (In re Enron Corp. Secs., Derivative & "ERISA" Litig.)*, 391 F. Supp. 2d 541, 585 (S.D. Tex. 2005). The court held that despite the presence of several interpleader defendants and possibly one outside director domiciled in New York and a settlement meeting having taken place there, New York had no significant relationship to the parties or the agreement in issue, and the contractual choice of law election was therefore unenforceable. *Id*.

Finally, in addition to the impact of local procedural law, consideration must be given by drafters to the fact that contractual choice of law provisions may be subject to preemption by local substantive law where the project may be located or where claims arise. A jurisdiction may determine that public policy requires application of local law irrespective of contractual elections to the contrary. If that forum has a substantial relationship to the project or parties,the supervening local law may be applied, even if the litigation arises elsewhere.

A common example of when a choice of law provision could be preempted by local law is in the case of risk shifting provisions, such as indemnity clauses in oil field services agreements. When the choice of law selected differs from the location of the well, there is a risk that the public policy, or anti-indemnity statute, of the state in which the well is located will override the contractual choice of law provision. For example, the Fifth Circuit has held that choice of law and indemnity provisions in master services agreements are void and unenforceable under Louisiana public policy set forth in the Louisiana Oilfield Indemnity Act.[3] *Verdine*, 255 F.3d at 250-54 (maritime choice of law was held to be void); *Roberts v. Energy Dev. Corp.*, 235 F.3d 935,943-44 (5th Cir. 2000) (Texas choice of law provision was held to be void); *Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir. 1986) (maritime choice of law was held to be void). Likewise, when work is to be performed in the outer continental shelf, the federal public policy expressed in the Outer Continental Self Lands Act may require the application of the substantive law of the state adjacent to the shelf. *See Roberts*, 235 F.3d at 938 n.1.; *Matte*, 784 F.2d at 631.

B. Forum or Venue Selection

Unlike choice of law elections, forum selection clauses, especially in international agreements, are generally enforceable under U.S. federal law[4] no matter what forum is selected by the parties. However, choices of "forum" and "venue" involve two distinct concepts. "Venue" is a procedural term of art in U.S. jurisdictions that is frequently called "locus" in other jurisdictions. It is the geographical location in which any litigation

arising in connection with the contract may be initiated. "Forum" can mean either "venue" or the type of court to which the parties are directed.

1. Geographical forum or venue elections. The United States Supreme Court has held that a freely negotiated forum selection clause "unaffected by fraud, undue influence, or overweening bargaining power should be given full effect." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972). A party resisting enforcement of a forum selection clause bears a "heavy burden of proof." *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008). A forum selection clause should be upheld unless the party opposing its enforcement can show that the clause was unreasonable. *Id*. The Fifth Circuit has held that a forum selection clause is unreasonable if: (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching[5]; (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum[6]; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy[7]; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state[8]. *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 15, 18). Thus, absent extraordinary circumstances, a forum selection clause in a bargained for exchange between sophisticated parties will be enforced.
2. "Judicial" forum selection. Separate from the choice of geographical venue or forum is the potential election of one or more judicial forums within a particular legal system. In some jurisdictions, there may only be one type of court; however, in many there are state or local courts and federal or national courts that operate separately. It is critical to understand the court system of the state or nation in which a selected venue or forum may be located.

It is also critical to avoid elections of judicial forums which are incapable of hearing the dispute. Selecting a specific judicial forum that lacks subject matter jurisdiction as the exclusive forum for any dispute will make the election unenforceable. For example, U.S. district courts are not clothed with general jurisdiction; they are courts of specific jurisdiction and the maximum constitutional bounds of federal courts' subject-matter jurisdiction is defined by the United States Constitution and the Congressional enabling statutes and are not subject to contractual modification. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). Merely selecting a federal forum does not confer subject matter jurisdiction on the court. *Quicksilver Resources, Inc. v. Eagle Drilling, LLC*, No. H-08-869, 2008 U.S. Dist. Lexis 58896, at *21, n.8 (S.D. Tex. Aug. 1, 2008); *Barnes v. JCO Ecommerce, L.P.*, No. 3:05-CV-1239-D, 2004 U.S. Dist. Lexis 12484, at*2 (N.D. Tex. July 2, 2004). Therefore, if a federal court is specified and that court does not have subject matter jurisdiction, then the forum selection clause cannot be enforced. *See Quicksilver*, 2008 U.S. Dist. Lexis 58896, at *21, n.8.

Likewise, if the forum selection clause specifies a forum that does not exist, for example, the “High Court of New York,” then the clause is unenforceable. *BP Marine Ams. v. Geostar Shipping Co. N.V.*, No. 94-2118 SECTION: E/4, 1995 U.S. Dist. LEXIS 3764, at *11 (E.D. La. Mar. 22, 1995).

Additionally, when the parties fail to distinguish between geographical venue and a choice of judicial forum, or needlessly limit the venue in a way that conflicts with the organization of the desired judicial forum, the results can deprive the parties of their intended bargain. For example, a forum selection clause providing for venue ***"in"*** a specific U.S. county (as opposed to a designated court, such as federal district and division) provides a geographic forum, allowing the parties to elect between the alternative forums in federal and state court. *Alliance Health Group LLC v. Bridging Health Options LLC*, 553 F.3d 397, 399-400 (5th Cir. 2008). But this election may not permit the litigation to proceed in federal court, despite an express election to that effect. If no U.S. District Court is physically located within the designated county, then the clause is ineffective. *Alliance*, 553 F.3d at 399-400. This oversight will be construed as an election to proceed exclusively in the state court located in that county and results in a waiver of the parties’ right to remove the action to federal court. *Collin County, Tex. v. Siemens Bus. Servs., Inc.*, 250 Fed. Appx. 45, 52 (5th Cir. 2007). A similar result occurs if the parties designate the courts ***"of"*** Texas or a specific county. Since U.S. district courts are not courts "of" a state, the language will be construed to mandate litigation in the state court system selected. *Alliance,* 553 F.3d at 400.

C. Impact of Contractual Elections on the Parties’ Exposure to Claims by Third-Parties

Finally, consideration must be given to the fact that third-party litigants can sometimes foil the best-laid

plans of the contract parties by initiating litigation in jurisdictions or courts, and under governing laws, any of which may be different from those selected by the parties – or even highly unfriendly to one or more of the contract parties. Compelled joinder or consolidation of multiple cases or parties (contract parties and non-parties) may also limit or prevent application of contractual choice of law and choice of forum provisions if the third-party claims predominate. This issue highlights the importance of negotiating consistent "back-to-back" contract terms in any setting, such as an oil or gas project, where multi-tier contracts often exist.

II. Impact of Arbitration Agreements on Contractual Rights and Duties of the Parties (For Better or Worse).

An arbitration agreement within a larger commercial contract is generally treated by courts enforcing or construing the arbitration agreement as a free-standing contract within the larger commercial contract; however, their impact on the larger commercial agreement can be profound and unforeseen. If the arbitration mechanism does not fit the commercial needs of the parties, it can frustrate or distort the parties' ability to reap the benefits (or limit the exposure) to which they agreed in the transaction. And because arbitrators' jurisdiction is largely a creature of the arbitration agreement, ill-fitting or unclear arbitration provisions can defeat the best intentions of the parties at the outset of the transaction.

For example, a highly particularized and strict arbitration agreement with detailed procedural and (frequently very short) temporal provisions can seem a means to assure efficient and inexpensive dispute resolution. In practice, however, detailed arbitration provisions almost always fail to fit the ultimate needs of the parties when a dispute arises. Arbitral rule-making bodies therefore generally provide a reasonable amount of discretion for arbitrators to modify schedules, permit discovery or consider evidence as they deem appropriate – precisely because rigid and detailed pre-dispute rules are so frequently unhelpful. An example might be the difficulties associated with disputes among the working interest parties under a JOA subject to arbitration. Clients may want certainty, but the only certain outcome of highly formalized arbitration provisions is difficulty in application. Moreover, arbitration agreements frequently take a "one size fits all" approach – such that a technical dispute will be handled in the same manner as a commercial issue, despite the fact that the arbitrators' qualifications for each should be totally different. It makes no sense to have arbitrator-engineers deciding accounting issues or arbitrator accountants defining the prudent operator standard – yet parties frequently fail to consider whether a highly particularized arbitration provision may prove too cumbersome to administer in reality. It may be prudent to leave more flexibility in the arbitration agreement simply to afford the parties and the arbitrators more discretion to tailor the proceeding to the actual dispute. Besides, without that inherent flexibility in the arbitration agreement, courts are required to enforce arbitration provisions *as written* or not at all. Courts can interpret arbitration agreements but they cannot rewrite hopelessly defective or "pathological" arbitration agreements[9]; they can only refuse to enforce them.

This unintended consequence of detail can be seen in efforts to enforce overly complex arbitrator qualification requirements that seem at the negotiation stage to assure that any panel will be composed of "experts" in the relevant field, capable of rendering a more predictable and rational outcome. In practice, the result is that it is simply impossible to seat a panel. First, overly detailed and narrow qualification requirements necessarily reduce the field and may make it impossible to find truly qualified and *neutral* arbitrators at all. Many industries are comprised of fairly small communities of lawyers, experts, and executives from which a panel of "experts" might be composed.

But the difficult goal of finding qualified arbitrator "experts" from a narrow body of candidates is often made wholly illusory by the effects of "expertise" on fact-finders. In contrast to the preferences of many clients, seasoned trial lawyers often hold the firm belief that "expertise" in the subject matter of a lawsuit or arbitration is not nearly as important as "expertise" in conducting efficient and fair trials or arbitrations. Indeed, substantive "expertise" in the industry or transaction in dispute can be (and often is) detrimental to the parties because the fact-finder is actually less than neutral. While an "expert" arbitrator may not favor one party over the other for personal reasons, they often reject or resist opinions, analysis, or data that conflict with their pre-existing beliefs about that for which they are "experts" in their own right. The best arbitrators are good judges, not "experts" in issues before them.

While arbitrator qualification criteria can be self-defeating, they are not entirely irrelevant. For example, an arbitrator should be familiar with the governing substantive law selected by the parties, as well as the type of legal system in which the parties wish to operate (and litigate). Thus, an arbitrator grounded in a civil-law system may not be inclined to conduct an arbitration in the same style that a common-law trained

arbitrator would. He or she may be much less inclined to permit pre-hearing discovery or permit cross-examination (especially of expert witnesses) of the type routinely conducted in common-law jurisdictions. Since arbitrators are not typically constrained to the rules of procedure provided by the jurisdiction from which the contracting parties have taken the governing substantive law for the transaction, it is important that the arbitrator(s) are comfortable with the type of hearing that the parties want to conduct.

Again, consideration of these issues at the negotiating stage can avoid a host of sometimes irreconcilable problems later when the parties are in litigation and no longer willing to agree on anything.

While a choice of law or venue election in a typical domestic service contract prompts the types of concerns noted above, an entirely different risk is presented by a failure to consider the ramifications of a designation for the seat of arbitration in an international agreement.

Situs of the hearings determines jurisdiction governing enforcement and review of the award – not choice of substantive law.

III. Impact and Efficacy of Limitations of Remedies and Waivers of Certain Types of Damages.

Parties often desire limitations of remedy clauses to cap their own exposure to claims from the counterparty. These can include wholesale waivers of consequential and punitive damages as well as specific limited remedies for particular types of breaches or disputes.

There are two fundamental issues to consider when drafting or negotiating limitations of remedy provisions. First, to be enforceable, they must provide the party subject to the limitation with a meaningful remedy for the type of breach in question. Thus, in Section 2.719 of the Uniform Commercial Code, provision is made for disregarding such contractual limits in transactions for the sale of goods whenever "circumstances cause an exclusive or limited remedy to fail of its essential purpose." That is, when a limited or exclusive remedy fails to provide a remedy, the limitation may be disregarded by the courts. Second, they must be written carefully to expressly provide that the prescribed limited remedy is exclusive. One should also consider the impact of contractually limited remedies provisions on the commercial aims of a transaction.

A. "What goes around comes around." Most limitations of remedy provisions are bilateral, as they should be. Remember, however, that while it may be desirable to limit your own exposure to consequential or punitive damages in the abstract, it may not be prudent to limit your ability to obtain such damages from the counterparty. A side-effect of bilateral limited remedies is limited means to obtain relief for the other party's breach. Contractual waivers of consequential and punitive damages can make that decision much easier and cheaper for a party seeking a way out of an unfavorable contract. Most jurisdictions regard "mere breach" of contract – even if the breach is overtly intentional or strategic – as distinct from tort claims that might entitle the injured party to consequential or punitive damages.

B. A limitation of remedies only goes as far as the contract goes – at best. Contractual limitations of remedy generally only cover (and limit) remedies for contract-based claims. Any attempt to expand the waiver beyond the subject-matter of the contract is likely futile; and even certain types of transactions (such as oilfield services agreements) may be subject to statutory prohibitions of limited or exclusive remedies.

C. Limitations of remedies can conflict with other contract obligations. It is not uncommon for service agreements to contain indemnities (which may or may not be enforceable under governing law) in addition to limitations of remedies or waivers of consequential and punitive damages. One potential trap for the unwary arises when a limitation of remedies provision unintentionally limits or bars indemnity claims. Since courts will read the contract as a whole and harmonize the various clauses, rather than construe them independently of one another, there exists the risk that a court will reconcile the two clauses by limiting the indemnity to avoid disregarding the limitation of remedy. If the parties contractually limit their liability to one another to actual damages and include indemnities for first-party and third-party claims, they may unwittingly narrow the indemnity provision by implication to only actual damage claims.

IV. Conclusion

The “back of the contract” is often the least negotiated portion of the document; yet it contains some of the most critical provisions when and if litigation ensues. Thoughtful drafting can limit or prevent a number of procedural and mechanical problems that otherwise may defeat the commercial purpose of the contract.

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[2] Likewise, Mississippi law provides that parties may legitimately control the choice of substantive law in a contract dispute as long as the state law selected bears a reasonable relation to the transaction. *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 418 (5th Cir. 1980). New York law also provides that a choice of law provision will be enforced provided that the law of the State selected has a reasonable relationship to the agreement. *See Newby v. Enron Corp. (In re Enron Corp. Secs., Derivative & "ERISA" Litig.)*, 391 F. Supp. 2d 541, 584, n.52. (S.D. Tex. 2005).

[3] “The Louisiana legislature adopted the Act to eliminate defense and indemnity provisions forced on Louisiana oilfield contractors. *See* La. Rev. Stat. Ann. § 9:2780(A). 'The purpose of the legislator, and thus the policy interest of the state, is to protect certain contractors, namely those in oilfields, from being forced through indemnity provisions to bear the risk of their principal's negligence.'" *Verdine*, 255 F.3d at 250-54. The Fifth Circuit held that "[t]o permit parties to contract around the Oilfield Indemnity Act would reinstate as the norm their unequal bargaining positions, and defeat the purpose of that legislation. [And that they] will not participate in such an obvious end-run of the Louisiana Legislature's effort to improve oilfield safety.” *Matte*, 784 F.2d at 631.

[4] Federal law should be applied to determine the enforceability of forum selection cases in both federal question and diversity cases. *See Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997). Additionally, the Texas Supreme Court has explicitly adopted federal law for determining the validity and enforcement of forum selection clauses. *In re AIU Ins. Co.*, 148 S.W.3d 109,111 (Tex. 2004).

[5] To qualify as unreasonable, the fraud and overreaching must be specific to the forum selection clause. *Haynsworth*, 121 F.3d at 963. This means that in order for a forum selection clause in the contract to be unenforceable the inclusion of the forum selection clause itself must be the product of fraud or coercion, as opposed to the contract as a whole being a product of fraud or coercion. *Id*. Therefore, forum selection clauses are rarely held unenforceable due to fraud or overreaching.

[6] For example, the court held that a forum selection clause, providing any arbitration arising out of the contract would take place in Caracas, Venezuela, was unenforceable because it would deprive the plaintiff of his day in court as the diplomatic relations between the United States and Venezuela had changed considerably since the time the contract was formed and the change was unknown and unforeseeable at the time the contract was negotiated. *Northrop Grumman Ship Sys. v. Ministry of Def. of. The Republic of Venezuela*, NO. 1:02cv785WJG-JMR, 2010 U.S. Dist. LEXIS 134830, at *12-13 (S.D. Miss. 2010). To the contrary, mere inconvenience and additional expense does not deprive a litigant of their day in court. *See Automotive Consultants Div., Progressive Marketing Group, Inc., v. Farls*, No. CA 3:02-CV-171-Rc, 2003 U.S. Dist. LEXIS 4729, at *13-14 (N.D. Tex. Mar. 26, 2003) (the court found nothing unreasonable or unjust about requiring the defendant to litigate in Texas, although the defendant would be "somewhat inconvenienced" as he is a resident of Pennsylvania and most if not all of the material witnesses were located in Pennsylvania, because retaining the case in Texas would not deprive the defendant of his day in court).

[7] For example, a forum selection clause in a cruise passenger’s ticket requiring litigation in Athens, Greece was unenforceable because enforcement was fundamentally unfair as the cruise departed from and returned to Galveston, Texas, the plaintiff received the nonrefundable ticket only a couple days before the departure, and the plaintiff had no practical alternative to accepting the ticket and the clause. *Schaff v. Sun Line Cruises, Inc.*, 999 F. Supp. 924, 927 (S.D. Tex. 1998); *but c.f. Williams v. M/J Jubilee*, 431 F. Supp. 2d 677, 681 (S.D. Tex. 2003) (a forum selection clause in a cruise passenger’s ticket requiring litigation in Florida was enforceable because Florida is not “a remote alien forum,” even though the ticket was only

50% refundable at the time of purchase).

[8] For example, forum selection clauses violate a strong Louisiana public policy against forum selection clauses in employment contracts and will not be enforced. La. Rev. Stat. Ann. § 23:921(A)(2); *but c.f. Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (holding that federal public policy favoring international arbitration agreements overrides Louisiana's public policy). *See also Moreno v. Milk Train, Inc.*, 182 F. Supp. 2d 590 (W.D. Tex. 2002) (holding that forum selection clauses in employment contracts for migrant farm workers are void because they are contrary to the public policy expressed in the Migrant and Seasonal Agricultural Workers Protection Act that allows workers to file suit in any district having jurisdiction over the parties).

[9] Sometimes arbitration clauses are internally ambiguous or irreconcilable to such an extent as to be difficult or impossible to enforce or perform. These are often called "pathological" arbitration clauses, because they are impossible or difficult to implement. Often-times in the process of attempting to tailor an arbitration clause to the commercial desires of the parties, lawyers and their clients invent or revise language in ways that are intended to customize the arbitral process, but create irreconcilable internal conflicts or uncertainties that ultimately prevent arbitration altogether. Examples include naming a deceased arbitrator in advance, creating schedules and deadlines that are unattainable in practice, invoking a set of arbitral rules that do not exist or that exist in multiple and conflicting iterations, creating unrealistic requirements for qualifying arbitrators or creating a contractual procedural process that conflicts with governing law such as a judicial review mechanism that governing law prohibits. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 522 U.S. 576 (2008). Equally troublesome is the passing reference to a requirement for exclusive and binding arbitration with no specific provision calling out the governing rules, location or other key elements. *See, e.g.* R. Doak Bishop, *A Practical Guide for Drafting Int'l Arbitration Clauses*, 1 Int'l Energy L. & Tax'n Rev. 16 (2000).

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Court Validates Expansive View of "Foreign Official" under the FCPA

Submitted by: Jay G. Martin (Vice President, Chief Compliance Officer & Sr. Deputy General Counsel, Baker Hughes Incorporated)

Section (f)(1)(A) of the Foreign Corrupt Practice Act ("FCPA") defines "foreign official" as "any officer or employee of a foreign government or any department, agency, *or instrumentality thereof*, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or *instrumentality*, or for or on behalf of any such public international organization." [emphasis added]

The "foreign official" concept always created a great deal of uncertainty, as the statute does not provide guidance concerning what types of entities constitute an "instrumentality." A new California federal court opinion issued on April 20, 2011 addresses this issue and confirmed the Department of Justice's ("DOJ") broad view of the meaning of "foreign official".

In *United States v. Noriega,* Lindsey Manufacturing executives stood trial for bribing high ranking employees of the *Comisión Federal de Electricidad* ("CFE"), an electric utility company wholly owned by the Mexican government. The defendants alleged that the CFE employees could not be considered "foreign officials" since CFE is not a foreign "government," "department," "agency," nor an "instrumentality" of the Mexican government.

However, the Court rejected the defendants' argument, stating that just because a state-owned company might not share all of the characteristics of a "department" or "agency" did not prevent it from being characterized as an "instrumentality." Instead, the court adopted a more expansive view and set out a non-exclusive, five-part test including characteristics that would tend to characterize a state-owned company as an "instrumentality":

1. It provides service to citizens of the jurisdiction;
2. Key officers and directors are, or are appointed by, government officials;
3. Financing received, at least in large part, through government appropriations or government mandate taxes, licenses, fee or royalties;
4. Is vested with and exercises exclusive or controlling power to administer its designated functions; and
5. Is widely perceived and understood to be performing official or governmental, functions.

The OECD Convention's definition of "public enterprise" which includes "any enterprise" over which government "may, directly or indirectly, exercise a dominant influence" was also endorsed by the *Noriega* court.

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