

Chapter 14

MASTER SERVICE AGREEMENTS AND RISK ALLOCATION: IN WHOSE GOOD HANDS ARE YOU?

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§ 14.01 Introduction ¹⁽¹⁾

[¶1] Master service agreements (MSA) should be an important part of a company's risk allocation program. An MSA allows a company to implement acceptable terms and conditions in advance without having to negotiate while work is waiting to be performed; this also allows a more thoughtful approach to problems concerning risk allocation (such as anti-indemnity statutes or other potential restrictions on indemnity or insurance). In addition, an MSA program can promote a consistent approach to risk allocation that allows a company's various MSAs to fit together with other contracts the company will use, such as drilling or construction contracts. In the absence of a consistent approach, contracts that appear favorable when viewed alone may be so inconsistent that they create unintended exposures.

[¶2] This chapter will address the basics of risk allocation in an MSA, discuss different approaches (particularly as respects potential impediments to indemnity or insurance), analyze steps that should be taken to make sure the MSAs and other contracts fit together, and review possible pitfalls to be avoided. While each jurisdiction will have its own particular requirements, this chapter should provide a good reference point for analysis of your clients' MSAs and their MSA programs.

§ 14.02 Overview

[1] General Description of a Master Service Agreement (MSA)

[¶3] A company in the oil and gas business knows that, from time to time, it will need the services of various contractors to perform different types of work. The MSA is a means for the company to enter into an agreement in advance with its contractors as to what terms and conditions will govern such work. The MSA does not obligate the company to use the contractor or the contractor to accept any particular work, but if the parties agree on particular work, the MSA provides the basic governing terms and conditions. The “contract” to perform a [14-5] particular job actually results when the owner or operator, in accordance with an MSA, requests the contractor to perform a given task and the contractor agrees. ²⁽²⁾ Such work orders (or work requests) can be written or oral, and they will usually contain important business terms including the type of work, the price, and any applicable time limits.

[¶4] The MSA is often used for services that are performed by oil and gas service contractors on a repetitive basis (e.g., well services, casual labor, and equipment maintenance) and the work is often performed onsite. These two characteristics, repetition and common work site, provide the basis for a risk allocation scheme between the contractor and the company.

[2] Importance of Using MSA for Risk Allocation

[¶5] One of the main benefits of using an MSA from a risk allocation standpoint is that it allows a company to decide on an approach to risk allocation in advance and then draft the MSA to implement the risk allocation scheme. As discussed below, this requires the company to understand its different contracts and think through how they will fit together.

[¶6] Once the approach has been determined, being able to negotiate the MSA, without the pressure of immediately needing the contractor to perform some work, can be a very important benefit. In addition, knowing and understanding the risk allocation scheme in advance allows the company to identify those contractual provisions that are most critical to its risk allocation plan. These benefits result in the ability to plan ahead and avoid surprises by identifying tolerances for risk acceptance and by planning insurance protection.

[¶7] Conducting drilling operations requires the operator to enter into a drilling contract and generally requires various other contracts such as consultant agreements, well service contracts, vessel charters, and flight services agreements. Even with a solid risk management philosophy, every organization knows that from time to time it may have to deviate from its preferred risk allocation scheme. The flexibility

provided by the MSA is key in [14-6] allowing the operator to anticipate these challenges and to ensure the best possible fit between and among its contracts.

[3] Be Aware that MSAs Do Not Work for All Types of Contracts

[¶8]As discussed in more detail in section 14.10, MSAs will not work for every type of service contract. Certain contracts, such as drilling contracts and construction contracts, have very specific issues and are better handled on a single contract basis. Other contracts, such as vessel charters or flight service agreements, may work well for repeated use but still be so specific as to require various unique provisions. Yet other types of contracts, such as rental contracts, purchase orders, or contracts for services without a common workplace, may not fit the typical risk allocation approach of an MSA.

§ 14.03 It is Critically Important that the MSA Fit with the Company's Other Contracts

[1] Risk Allocation Requires Understanding Interaction of Various Contracts

[a] The Importance of the Drilling Contract

[¶9]The typical drilling contract ³⁽³⁾ will allocate certain risks on a reciprocal basis (including personal injury, damage to property, certain pollution risks, and consequential damages), regardless of fault. Other risks, such as well control, downhole pollution, loss or damage to the hole or downhole tools, and reservoir damage, are often assumed by the operator, at least to some degree. The drilling contract is one of the most important contracts an operator will enter into, and it is the drilling contract that generally creates a framework within which the MSA risk allocation must operate. For instance, a drilling contract usually requires the operator to provide indemnity for all of the operator's other contractors, and the company has to make sure that each of its other contracts match up and provide that protection.

[14-7]

[b] Related Contracts

[¶10]Somewhat similarly, any offshore operator will need to enter into vessel charters and/or flight services agreements (FSAs), and these contracts also need to fit with the MSAs. For example, a vessel owner may (like a drilling contractor) attempt to require a broad reciprocal indemnity, regardless of fault, so the MSA may need to fit with that type of contract. On the other hand, an FSA often allocates risk, at least to a large extent, based on fault, and a fault-based indemnity scheme may not mesh with a typical MSA indemnity without extensive revision.

[¶11]Interaction with these types of contracts needs to be anticipated in the MSA. In addition, the applicable law will be an issue. For example, master service agreements may be subject to state law even if they relate to work on a jack-up drilling rig and contain a maritime choice-of-law provision. In addition, there are provisions that should be used in the MSA to maximize the enforceability of the negotiated indemnity and insurance protection despite possible application of a state anti-indemnity statute (or other restrictions on indemnity). ⁵⁽⁴⁾ In addition, the company should recognize that certain underlying indemnity and insurance protection may not be fully enforceable and that some gaps in the operator's underlying protection may be unavoidable. ⁶⁽⁵⁾ In the absence of a good understanding of the effect of its underlying contracts, it is very difficult for an operator to evaluate accurately the risks presented by certain provisions in the drilling contract. ⁷⁽⁶⁾

[c] MSAs Working Together

[¶12]Finally, each MSA needs to allocate risk in a way that works with the company's other MSAs. Most of the operator's contractors will be working under an MSA, and the MSAs must be designed so that the company does not agree to provide [14-8] indemnity protection that is not supported by, or provided by, the other MSAs.

[2] Effect of Failure of Contracts to Fit Properly

[a] When a “Good” Indemnity is Not Good Enough

[¶13] A “good” indemnity that does not fit will increase the operator's unexpected risk and exposure. If there is any contract (such as the drilling contract) in which the operator has agreed to assume liability for bodily injury or property damage to its other contractors, the operator will owe indemnity for injuries to such contractor's employees. On the other hand, the injured party's employer may owe indemnity to the company for the company's tort liability to the injured party, but not for the company's indemnity obligation. In other words, even if the indemnity obligation owed to the company is enforceable, the company will not be fully protected if the indemnity owed by each contractor does not fit with the company's other indemnity obligations.

[¶14] It is important to note that the drilling contractor will normally try to require the operator to assume liability for all personal injury or property damage sustained by the operator's other contractors. Consequently, the operator should either attempt to limit this assumption of risk or make certain that it has obtained “back-up” or “pass-through” indemnity and insurance protection from its other contractors (in the applicable MSA, charter, or other contract). Otherwise, the operator may be entitled to insurance or indemnity protection from its other contractors, but not be able to pass such protection on to the drilling contractor.

[b] What Can Happen Without Pass-Through Protection

[¶15] The consequences of failing to obtain pass-through protection can be harsh. In *Foreman v. Exxon Corp.*, ⁸⁽⁷⁾ the employee of an oil company's contractor (offshore) was injured. The plaintiff sued the oil company and the drilling contractor. The oil company owed indemnity to the drilling contractor for injuries to employees of the company's other contractors, such as the [14-9] plaintiff. While the contractor/employer of the plaintiff owed indemnity to the oil company, the indemnity did not cover the oil company's indemnity obligation to the drilling contractor. At trial, the oil company defended the drilling contractor, and the contractor/employer defended the company. The negligence of the drilling contractor was significantly greater than that of the oil company, but because of the indemnity, the oil company actually had to pay the proportionate fault attributed to the drilling contractor—which was more than five times greater than that attributed to the company. ⁹⁽⁸⁾ The lesson from *Foreman* is simple: ensure that the company's indemnity obligations to its other contractors are covered in each MSA.

[3] Methods of Ensuring that the MSA Fits with Other Contracts

[¶16] Absent express language, an indemnity provision will not be interpreted to cover the indemnitee's contractual liability to a third party. ¹⁰⁽⁹⁾ An indemnity provision covering all claims for or on account of personal injury to a contractor's employee provides the company (as the indemnitee) with protection from a tort claim by the employee. However, if the company has itself agreed to indemnify another party (such as a drilling contractor) for personal injury claims by employees of the company's contractors, the indemnity from the employer/contractor will not cover the company's contractual liability to the third party. Obtaining protection for such a contractual indemnity obligation requires a specific provision. Under both Louisiana law ¹¹⁽¹⁰⁾ and maritime law, ¹²⁽¹¹⁾ the company's contractual obligation to a third party arises from its contract with the third party—not from the injury or claim by the plaintiff.

[¶17] There needs to be some mechanism under the MSA for ensuring that the operator is entitled to indemnity protection from its MSA contractors that can be passed through to the [14-10] drilling contractor or other contractors entitled to indemnity. If the company owes indemnity to Contractor “A” for injuries to Contractor “B's” employee, the company needs to be sure that the indemnity it receives from Contractor “B” can be extended to Company “A.”

[¶18] There are several ways to obtain pass-through protection. One of the most common methods is to use a broad definition of “Company Group” that includes the company's other contractors and subcontractors as entities to whom indemnity is owed. An example of such definition is found below:

13(12)

[¶19] Contractor agrees to RELEASE, DEFEND, INDEMNIFY and HOLD HARMLESS Company, its parent, subsidiary, related and affiliated companies, and its and all of their co-owners, co-lessees, partners, co-venturers, and joint venturers, and the officers, directors, employees, agents, assigns, representatives, managers, consultants, insurers, subrogees, and other contractors and subcontractors (with the exception of Contractor and its subcontractors) of all of the foregoing (individually and collectively referred to as “Company Group”) from and against... 14(13)

[¶20] With such a broad definition of “Company Group,” the other contractors become direct indemnitees. Another approach is to provide that the indemnity obligation is owed to the company and, among others, to those to whom the company owes indemnity. 15(14)

[¶21] Finally, another alternative is to include contractual obligations owed by the company as part of the scope of the indemnity obligation. For example, the indemnity provision can specifically provide that the company is entitled to indemnity for “any claims... including claims for contractual indemnity.”

[14-11]

§ 14.04 Basic Indemnity Provisions and Risk Allocation

[1] General Rules on Indemnity Provisions

[a] Using “Magic Language”

[¶22] It is generally permissible for a contract to require that one party (the indemnitor) indemnify another party (the indemnitee) for the indemnitee's own negligence. But that intent must be clearly expressed. Under maritime law and Louisiana law, for example, no talismanic language is required to make an indemnity agreement enforceable, but the intent to indemnify against the indemnitee's negligence must be expressed in “clear” and “unequivocal terms.” 16(15) A clause excluding sole negligence has been held to evidence the parties' intent to include the negligence of the indemnitee. 17(16) But a safer course of action is to refer specifically to the “negligence” of the indemnitee.

[¶23] Texas courts follow a two-part test for enforceable indemnities, which requires that (1) the intent to indemnify the indemnitee for its own negligence must be stated in “specific” terms, and (2) the provision must be “conspicuous.” The first part of that rule is the “express negligence” doctrine, which is a stricter standard than that required under Louisiana and maritime law. 18(17) In addition, unlike under Louisiana law, excluding sole negligence is apparently not sufficient under Texas law to allow indemnity for concurrent negligence. 19(18)

[¶24] The standard for the “conspicuousness” prong of the test is provided in the Texas Uniform Commercial Code 20(19) and is [14-12] designed to ensure that the indemnitor is sufficiently aware of and has consented to the indemnity. 21(20) Whether an agreement meets the requirements of the Texas “conspicuousness” doctrine requires a fact-specific analysis. 22(21)

[¶25] This Texas express negligence requirement applies to strict liability claims. 23(22) Under Louisiana law, however, indemnification for strict liability need not be stated in unequivocal terms if an intent to indemnify for strict liability can be gleaned from other language in the contract. 24(23) The Texas express negligence doctrine applies to a prospective release as well as to indemnity provisions. 25(24) However, an indemnity provision in a settlement and release agreement has been held not to be subject to the express negligence doctrine, the rationale being that its [14-13] requirements must be met only in agreements that relieve a party *in advance* of liability for its own negligence. 26(25)

[¶26] It is advisable under all three tests, maritime, Louisiana, and Texas, for the contract to cover not merely indemnification for the “negligence” of the indemnitee, but to specifically include the “sole or

concurrent” fault or negligence of the indemnitee. Otherwise, the indemnitor may argue that the provision is not sufficiently clear. ²⁷⁽²⁶⁾ Moreover, to avoid any arguments concerning intent, the indemnity provision should include references to strict liability, unseaworthiness, and pre-existing conditions, and, it should include a duty to “release” and to “defend” with a statement regarding the payment of attorneys’ fees.

[b] Are Defense Costs Included?

^[¶27] Whether the contractual obligation of the indemnitor to indemnify and/or to defend the indemnitee includes an obligation to reimburse defense costs varies according to the jurisdiction and the particular language at issue. Under maritime law, it appears that the duty to indemnify includes the duty to defend. ²⁸⁽²⁷⁾ Louisiana law is unclear on this point. The Fifth Circuit has construed Louisiana law as not allowing defense costs based solely on an obligation to indemnify, but some state courts have held to the contrary. ²⁹⁽²⁸⁾ Texas courts have determined that the duty to “protect, indemnify and save harmless” does include the payment of costs of defense. ³⁰⁽²⁹⁾ However, without an express reference in the indemnification provision to claims based on negligence, there is no indemnity for defense costs incurred in connection with a negligence claim ^[14-14] irrespective of whether the claim is ultimately proved. ³¹⁽³⁰⁾ The Louisiana rule is different and allows recovery of defense costs (assuming defense costs are covered in the applicable provision) even if there is no reference to negligence, provided the indemnitee is found free from fault. ³²⁽³¹⁾

^[¶28] Absent a specific provision, an indemnitee has no right to recover legal fees incurred in seeking to prove its right to indemnification, as distinguished from legal fees expended to defend the principal claim on the merits. In either case, any doubt regarding the indemnitee’s intent should be removed by using specific language to address the issue. While the requirements of each potentially applicable jurisdiction should be considered, including appropriate language (e.g., “including the payment of defense costs”) in the indemnity provision will maximize recovery for defense costs. ³³⁽³²⁾

[2] Importance of Extending Protection to the Proper Parties (and Obtaining Pass-Through Protection) —Define Company Group Broadly

^[¶29] When the company obtains insurance protection from a contractor (whether under a drilling contract or any other contract), the two most important elements are to ensure that the insurance protection is at least as broad as the indemnity obligations and that both the insurance and the indemnity obligations extend to all parties that the operator wants to receive such protections. To achieve this latter goal, the company should use its broadly defined group (such as “Company Group”) to identify the parties entitled to indemnity and insurance protection. ³⁴⁽³³⁾ In addition to the company’s economic family and the company’s other contractors, the company should consider whether there are other entities that should be included in Company Group because the operator is contractually or economically committed to them (such ^[14-15] as the company’s lessor(s), companies with which it has sharing agreements, or any party for whom the operator is performing services). Without such a broad group of indemnitees, the company may be left with uninsured exposure that could have been avoided either through insurance or indemnification.

[3] Effect of Applicable Law

^[¶30] In preparing an indemnity scheme, it is important to take into account what law may be applicable to the indemnity and insurance provisions. The MSA may be interpreted under a law different from that applied to the drilling contract, and it may vary from MSA to MSA and even from one job to another. While all jurisdictions generally require indemnity provisions to be clear and specific, the level of scrutiny, and the existence of potential restrictions, vary from jurisdiction to jurisdiction (and sometimes with respect to the type of work). For example, as discussed below in section 14.07, many

states have anti-indemnity statutes for construction-related work, and several have statutes voiding certain indemnity provisions in oil and gas contracts. The MSA should, to the extent possible, anticipate the possible application of an unanticipated legal scheme and make adjustments to suit the possible legal framework that could be applied.

§ 14.05 Possible Approaches to Risk Allocation

[1] Allocation of Particular Risks Without Regard to Fault

[¶31] One of the most common approaches to risk allocation in an MSA relating to oil and gas operations is to allocate risk without regard to fault based on who employs the injured party or who owns the property that is damaged. Such risk allocation schemes have the benefit of certainty, but it is important to understand the nature and scope of the risks being assumed.

[2] Reciprocal Indemnity Provisions

[¶32] In a typical reciprocal indemnity provision, each party assumes responsibility for claims for injury or damage to its own employees and property, regardless of fault. Contractors, however, frequently ask for a “broad” reciprocal indemnity in which the company is asked to indemnify for all such claims asserted by the company's other contractors and [14-16] subcontractors, and their employees, in return for the contractor accepting responsibility for its subcontractors. But such a broad reciprocal indemnity means that the company will always owe indemnity to someone and will be responsible for virtually every party at the worksite, at least in the first instance. While such obligations could, in theory, generally be passed on to the other contractors, enforceability or other problems can leave the company with significant additional risk.

[3] Modified Indemnity is Preferable from the Company's Standpoint

[¶33] In contrast to a broad reciprocal indemnity, the better indemnity approach for a company is for it to assume responsibility for its own employees and property, but not those of its other contractors. However, the company may want to require each contractor to take responsibility for itself and its subcontractors and to agree to indemnify the broadly defined Company Group. This approach provides maximum flexibility for the company, while still providing pass-through indemnity protection that will ultimately benefit other contractors and the company as well.

§ 14.06 Basic Insurance Provisions

[1] Insurance Protection Should Be Extended to All Parties Entitled to Indemnity

[¶34] The insurance protection provided for the company in the MSA should be at least as broad as the indemnity protection, and the company should require that the insurance protections be extended to the same broadly defined group (such as “Company Group”). 35(34) Use of Company Group as the recipient of both insurance and indemnity obligations protects against insolvency, and it also maximizes the chances that the risk allocation provisions will be enforceable. There are instances in which a contractor's indemnity obligations may be invalid, but insurance protection, if provided, would be fully enforceable. 36(35) [14-17] Hence, the insurance protections can be a critical part of the contractual risk allocation provisions.

[2] Basic Insurance Requirements to Maximize Protection

[a] Insurance Interplay with Indemnity

[¶35] As a general rule, the insurance protection required by the company should cover at least the same risks and extend to the same parties as the indemnity protection, both for the purpose of insuring solvency of the contractor and for the purpose of maximizing enforceability of the agreed risk allocation. Many form contracts, however, would limit insurance protection, thereby lessening the chances of maximum enforceability. To minimize some of these problems, and to achieve maximum insurance

protection, there are certain general insurance requirements that should be included by the company whenever possible. The three basic insurance protections that should be required by an operator in all of its contracts are (1) that Company Group be named as additional insured, (2) that there be a waiver of subrogation in favor of Company Group, and (3) that coverage should be primary for any other insurance—providing coverage in favor of Company Group (at least for risk and liabilities assumed by the contractor).

[b] Additional Insured

[¶36]Being named an additional insured is an affirmative protection that gives the additional insured direct rights under the policy of insurance. Additional insureds generally have the same rights to coverage as a named insured. **37(36)** This can be particularly important as respects the duty to defend or when coverage issues or other conflicts arise between the insurer and an indemnified party/additional insured.

[c] Waiver of Subrogation

[¶37]The company's contracts should also require a waiver of subrogation in favor of all indemnified parties. The waiver of **[14-18]** sub-rogation is a defensive protection that prevents the contractor's insurer from asserting a claim against an indemnified party for its proportionate fault following a casualty. Additional insured protection is most effective in a liability policy, while the waiver of subrogation is most common in conjunction with a property policy or a workers' compensation policy. If at all possible, however, both protections should be required under all of the contractor's policies because there are instances in which a waiver of subrogation can provide more protection than being named as an additional insured. **38(37)**

[d] Primary Coverage

[¶38]The third key protection is to require that the insurance provided by the contractor is primary to any other coverage in favor of the indemnified parties, at least for the risks and liabilities assumed by the contractor. **39(38)** Otherwise, the court may compare the “other insurance” clauses in the contractor's policies and require the company's policies to share a loss. **40(39)** This can completely negate the parties' intent that the contractor's insurance will respond to a loss that was allocated to the contractor.

[e] Insurance Certificates

[¶39]The company should also require a certificate of insurance evidencing that the required coverages are in place. The normal insurance certificate provided by a contractor will very often be **[14-19]** on the “Acord” form, which limits the requirement for notice of cancellation and purports to limit the company's right to rely on the certificate. These disclaimers can have a significant effect on the additional insured's rights. For example, in *TIG Insurance Co. v. Sedgwick James of Washington*, **41(40)** the broker issued a certificate listing a company as an additional insured, but the policy under which the certificate was issued did not provide any additional insured coverage. The court relied in part on the disclaimer language in the certificate, which specifically stated that it did not alter the terms of the underlying policy, to hold that the disappointed certificate holder had no claim against the insurer or the broker.

[¶40]If possible, the operator should consider using its own form of certificate of insurance to facilitate review of compliance with the insurance requirements. A tailor-made certificate can offer several advantages to the company, including more complete descriptions of coverages and endorsements, the elimination of certain restrictions, and better readability. In the event it is impractical or difficult to have the company's insurance certificate custom-made, the company should consider rejecting the Acord form, or at least reserving the right to inspect the contractor's policies to ensure compliance with the contract (and to learn of any unknown restrictions on coverage or excessive deductibles).

[f] Appropriate Limitations

[¶41] Finally, the company should not overlook limitations on the contractor's insurance and should attempt to ensure that any excessive or impractical provisions are modified. First, the minimum coverages and limits required should be adequate to cover the anticipated risks. Risky projects involving potential high risk items (such as drilling rigs) or work call for higher minimum limits. Second, the proper territorial limits must be in place. Among industries near the Gulf of Mexico, it is common for the policy's coverage to extend to the "GOM." But where the company or its contractors will be working in new locations or deeper waters, it is important to ensure that the policies are [14-20] endorsed to reflect the broader territory. 42(41) Next, the company should require 30 days' notice of cancellation or material change. And finally, the insurance requirements should state that the minimum limits are not a limitation or restriction on indemnity 43(42) and should include any specific provisions required as a result of a potentially applicable anti-indemnity statute. 44(43)

§ 14.07 Restrictions on Indemnity and Insurance Provisions

[1] Oil and Gas Anti-Indemnity Statutes

[¶42] In drafting the risk allocation provisions in the MSA, the operator must take into account the impact of any potentially applicable oilfield anti-indemnity statutes. Several states have oilfield anti-indemnity statutes: Louisiana, Texas, New Mexico, and Wyoming. To varying degrees, these statutes invalidate insurance and indemnity provisions requiring protection for fault of the indemnitee. The highlights of these statutes are discussed below. They usually void provisions in agreements that "pertain to a well" for oil, gas, or water, in which one party is required to indemnify the other for the indemnified party's fault. It is important to note that because the MSA is a multi-use contract, the courts frequently look to the work order or work request designating the specific work to determine whether the particular job fits within the types of agreements affected by an anti-indemnity act. 45(44)

[14-21]

[a] Louisiana

[¶43] The Louisiana Oilfield Anti-Indemnity Act (LOIA) 46(45) invalidates indemnification provisions for death or bodily injury; Indemnity and insurance protection for property damage are *not* affected by the LOIA. The courts have applied a two-step process for determining whether the LOIA applies. 47(46) First, the contract must pertain to an identifiable well, 48(47) and second, the contract must be related to the exploration, development, production, or transportation of oil, gas, or water. The LOIA does not permit contractual contribution, and it admits to few exceptions, 49(48) but one of the exceptions generally applies to farmout agreements and operating agreements. 50(49) Even insurance protection for the indemnity is generally held to be invalid. 51(50) The LOIA is available [14-22] as a defense to both the indemnitor and its insurer when a demand is made for additional insured protection by the indemnitee. However, *Marcel v. Placid Oil Co.*, 52(51) provides a narrow exception to this rule if the indemnitee/additional insured is able to prove that it has actually paid for the required insurance. 53(52) In addition, a waiver of subrogation may be valid if there is no accompanying indemnity claim. 54(53)

[b] Texas

[¶44] The Texas Oilfield Anti-Indemnity Act (the TOAIA) 55(54) applies to both property damage claims and claims for bodily injury or death. 56(55) Section 127.001(1)(B) and (4)(B)(i) specifically excludes joint operating agreements and agreements for purchasing, selling, gathering, storing, or transporting gas or natural gas liquids by pipeline or fixed associated facilities. 57(56) The TOAIA recognizes two exceptions: a limited unilateral indemnity and a mutual indemnity. The unilateral indemnity is valid if the parties agree, in writing, that the indemnity will be supported by insurance (up to \$500,000). 58(57) The "mutual" indemnity exception is limited "to the extent of the coverage and dollar

limits of [14-23] insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.” 59(58) It is clear that the breadth of the TOAIA is not limited to the provision of “well services” that are “performed in the wellbore.” 60(59) But the determination of whether an agreement “pertains to” or is “collateral to” a well will generally be very fact-specific. 61(60) Significantly, the TOAIA does not apply to insurance that does not directly support the indemnity, 62(61) and this means that insurance provisions can provide more protection than indemnity agreements in certain instances. 63(62)

[c] Wyoming

[¶45]The Wyoming Anti-Indemnity Act (the Wyoming Act) 64(63) also applies to both personal injury and property damage claims. Its scope is generally the same as the TOAIA, invalidating any agreement pertaining to any “well for oil, gas or water, or mine for any mineral” to the extent such contract “purport[s] to relieve the indemnitee against loss or liability for” his own negligence. 65(64) The Wyoming Act has been interpreted as allowing “partial indemnity” to the extent the indemnitee is not negligent. 66(65)

[14-24]

[d] New Mexico

[¶46]As with the TOAIA and the Wyoming Act, the New Mexico Anti-Indemnity Act (the New Mexico Act) 67(66) applies to claims for both personal injury and property damage, and the scope is similar to the other anti-indemnity acts. 68(67) The New Mexico Act has no exception for insurance coverage, 69(68) and a 1999 amendment expressly prohibits requiring insurance protection. 70(69) In *Reagan v. McGee Drilling Corp.*, 71(70) the court held that a Texas choice of law clause was enforceable, despite the absence of any similar exception under New Mexico's anti-indemnity statute, because the two states' policies were the same, to promote safety, even though Texas' statute was less strict. The recent amendment purporting to negate insurance coverage could alter this result and make enforcement problematic.

[2] Construction Anti-Indemnity Statutes

[¶47]The Fifth Circuit has recognized that “[c]onstruction work is a type of service often provided by oil and gas service contractors.” 72(71) Thus, even if an oilfield anti-indemnity act is not applicable, it is possible that one of the many state statutes barring indemnity for construction contracts might be applicable. Many states (including Texas and New Mexico) have construction anti-indemnity statutes. 73(72) The New Mexico statute is [14-25] typical and refers to numerous and extremely broad categories of work like “construction,” “repair,” “installation,” “demolition,” and “maintenance.” Therefore, practitioners in jurisdictions with these type of statutes should consider carefully whether the work contemplated in the MSA (or in the accompanying work order) will be considered “construction.”

[3] Maritime Restrictions

[¶48]Maritime law also has certain potentially applicable restrictions on indemnity. The Longshore and Harbor Workers Compensation Act (LHWCA) 74(73) prohibits an indemnity claim by a “Vessel” (including a jack-up rig) against the employer of an injured longshoreman. 75(74) However, there are exceptions. First, a reciprocal indemnity under 33 U.S.C. 905(c) is allowed when the Outer Continental Shelf Lands Act (OCSLA) 76(75) is applicable, 77(76) and insurance protection is enforceable even if the indemnity is invalid under 33 U.S.C. 905(b). 78(77) Moreover, the reciprocal indemnity requirement of section 905(c) can be satisfied by pass-through indemnities from two of the operator's contractors. 79(78) Second, section 905(b) only prohibits indemnity from an LHWCA employer to a “Vessel.” Indemnity from a non-employer is not affected by section 905(b). Similarly, a non-Vessel is not prohibited from

obtaining indemnity from an LHWCA employer. When an operator acts in more than one capacity, such as charterer of a crewboat and operator of a fixed platform, section 905(b) may only preclude indemnity for “Vessel” negligence, i.e., negligence in the capacity of vessel owner or charterer. **80(79)**

[14-26]

§ 14.08 Specialized Maritime Indemnity and Insurance Issues

[1] Maritime Indemnity Issues

[a] Is It a Maritime Contract?

[¶49]A jack-up drilling rig is considered a vessel, so a drilling contract using a jack-up is governed by maritime law, **81(80)** unless the contract selects another applicable law. **82(81)** If an MSA will cover any services performed on a jack-up or other drilling rig considered a vessel, such services are often, but not always, governed by maritime law. **83(82)** Contracts involving both maritime and non-maritime work present a closer question. In *Agip Petroleum Co. v. Gulf Island Fabrication, Inc.*, **84(83)** the court held that maritime law would apply to a contract to transport and install a production platform on the outer continental shelf (OCS); the contract specified that maritime law would apply and, although the installation portion of the work might be considered non-maritime, the maritime transportation function, the situs of the work on navigable waters, and the use of vessels to erect the platform predominated. Subject to certain exceptions, indemnity and insurance provisions are generally fully enforceable under maritime law, so maritime law is usually preferable to state law. **85(84)**

[b] Scope of Maritime Indemnity

[¶50]If the contract might be governed by maritime law, the contract should expressly provide that the contractor's indemnity obligations apply even if an accident arises out of ingress or egress of personnel or loading or unloading of cargo. **[14-27]** Otherwise, the company's indemnity protection may not apply in those instances. **86(85)**

[2] Maritime Insurance Issues

[¶51]If the contractor is supplying a vessel, the company must require the contractor to provide maritime insurance coverages, including coverage for maritime personal injury and hull and protection and indemnity (P&I) coverage. To avoid any unintended reduction in coverage, the P&I policy should be endorsed to provide full coverage to Company Group despite any right to limitation of liability, **87(86)** and to provide full coverage to Company Group without regard to liability “as owner of the vessel” (and to delete any “as owner” clause). Otherwise, the coverage afforded the company (and Company Group) could be substantially reduced. **88(87)**

[¶52]P&I policies typically provide coverage to an insured in its capacity “as owner” of one or more vessels. As applied to an oil company chartering a vessel, this “as owner” language limits the company's coverage as additional insured to liability incurred in its capacity as charterer of the vessel. **89(88)** Consequently, under *Lanasse*, there is no P&I coverage for platform-based negligence of the operator unless the policy is modified. Accordingly, it is important to include language in the MSA's insurance provision requiring an endorsement expanding the coverage afforded by the P&I policy, **90(89)** so as to provide for full coverage for the indemnitees whether or not the liability has been incurred “as owner of the vessel.” **91(90)**

[14-28]

§ 14.09 Other Important Provisions Relating to Risk Allocation

[1] Choice of Law Clauses

[a] Why Choice of Law?

[¶53] A choice of law provision is desirable because it can be used to attempt to select a legal framework that will allow the intent of the parties to be achieved. The general rule is that a choice of law provision will be honored if the chosen law has a reasonable relation to the parties or the performance of the contract and is not against the public policy of the forum state. ⁹²⁽⁹¹⁾ However, anti-indemnity statutes can negate a choice of law provision, so the legal analysis of the various potential applicable laws remains important. Moreover, different laws may apply if several MSAs are being performed at the same drilling location, and the results can be anything but straight-forward. ⁹³⁽⁹²⁾ In addition, the ancillary MSAs are generally intertwined with the drilling contract itself, and the law that applies to those MSAs can be very significant. This is especially true as respects the risk allocations and indemnity and insurance obligations undertaken in the drilling contract. ⁹⁴⁽⁹³⁾ To avoid an argument that the chosen state's conflicts rules may apply, the provision should specify that the law chosen is to apply “exclusive of conflicts of law principles.”

[b] Effect of Public Policy

[¶54] Choice of law provisions are generally not effective if a public policy issue is involved, as is often determined to be the case if All policies required under this Section shall be endorsed to provide full coverage to Company Group as additional insured without limiting coverage to liability “as owner of the vessel” and to delete any “as owner” clause and any other language purporting to limit coverage to liability of an insured “as owner of the vessel.” Pugh, *supra* note 3, at 8-73 to 8-78. [14-29] an anti-indemnity statute is applicable. For example, in *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, ⁹⁵⁽⁹⁴⁾ the court rejected a Texas choice of law provision, which would have allowed indemnity for an accident occurring at a drilling site in Louisiana. Despite the fact that one party was a Texas-based company and the fact that the contract was partially negotiated in Texas, the court found that Louisiana had a more significant interest, partly due to the fundamental policy expressed in the LOIA. The issue, however, remains very fact-intensive. ⁹⁶⁽⁹⁵⁾

[c] OCSLA

[¶55] Whether a contractual indemnity or insurance obligation is enforceable often turns on whether the contract is determined to be a maritime contract or is governed by state law through the OCSLA. If operations on the OCS are involved, the adoption of the law of the adjacent state as surrogate federal law by the OCSLA, if applicable, is generally considered a mandatory choice of law. Thus, a drilling contract involving a platform drilling rig is considered to be performed on an “artificial island” and is therefore governed by the law of the adjacent state pursuant to the OCSLA. ⁹⁷⁽⁹⁶⁾

[¶56] In the context of contractual disputes arising from operations conducted on the OCS, the Fifth Circuit, in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, ⁹⁸⁽⁹⁷⁾ held that state law applies as surrogate federal law (pursuant to the OCSLA) if the following three conditions are satisfied: (1) the controversy arises on a situs [14-30] covered by the OCSLA, (2) federal maritime law does not apply of its own force, and (3) state law is not inconsistent with federal law. Each prong of this test creates its own issues. For the OCSLA situs requirement to be met, the controversy must generally arise on the subsoil, seabed, or an artificial structure permanently or temporarily attached thereto. ⁹⁹⁽⁹⁸⁾ Federal law will apply “of its own force” when the dispute implicates a federal statute or, more commonly, when it involves a maritime contract. In the absence of a maritime contract, often the only argument for enforceability is that a state anti-indemnity statute is inconsistent with federal law, but such arguments have not met with success. ¹⁰⁰⁽⁹⁹⁾ Questions sometimes do arise as to the identity of the “adjacent state,” requiring the application of a multi-factor test provided in *Snyder Oil Corp. v. Samedan Oil Corp.*, ¹⁰¹⁽¹⁰⁰⁾ that includes: (1) geographic proximity, (2) federal agencies' determination, (3) prior court decisions, and (4) projected boundaries. ¹⁰²⁽¹⁰¹⁾

[2] Savings Clauses

[¶57] A savings clause provides that the invalidity of any particular provision will not invalidate the entire contract. **103(102)** This type of clause is particularly important when dealing with an MSA, which typically will cover services that are performed in various different jurisdictions.

[14-31]

[¶58] There are two general approaches to a savings clause. The first approach, which is historically more common, is to provide that any invalid provision is simply considered deleted and the remainder of the agreement remains valid. The second approach, which can be especially valuable in a multi-jurisdiction contract such as an MSA, is to provide that an invalid provision is deemed to be amended to the extent necessary to make it enforceable. One possible approach is as follows:

[¶59] In the event that any provision in this Agreement is deemed by a court of competent jurisdiction in a controversy arising under this Agreement to be unenforceable under either state or federal law, then that provision shall be deemed amended to the minimum extent required to comply with state law.

[3] Choice of Forum Clauses

[a] Purpose

[¶60] A choice of forum clause provides for a particular forum where both parties agree in advance that a dispute concerning the contract can be resolved. The selection can be mandatory or permissive and generally includes both a submission to personal jurisdiction and a selection of a particular venue or venues (or a waiver of any objection to a particular venue).

[b] Public Policy Issues

[¶61] In certain situations, a forum selection clause can be declared invalid as against public policy by a particular jurisdiction. For example, in Louisiana, La. Rev. Stat. 9:2779 provides that any selection of a forum in a construction contract to be performed in Louisiana is null and void as against public policy. While that statute was held in *OPE International LP v. Chet Morrison Contractors, Inc.* **104(103)** to be preempted by the Federal Arbitration Act, **105(104)** the issue is one that should be checked in all relevant jurisdictions, particularly if there is no arbitration clause.

[4] Primacy Clauses

[¶62] The primacy clause declares that in the event of a conflict between or among various documents or terms within **[14-32]** documents, one provision or agreement will control over the others. The primacy clause is particularly useful in an MSA because the MSA is not a “stand alone” contract, and a work order or request will normally be issued to identify the specific task to be accomplished and to initiate the work. This work order may be drafted by the company, but it could be drafted by the contractor, particularly if the work request was oral. In such instances, it is critically important that the MSA control over the contractor's work order. **106(105)** In addition, there may be competing documents, such as a company work request and a contractor-generated work ticket. If the contractor's work ticket contains provisions that conflict with those in the MSA, the company may have a problem on its hands without direction as to which document will control. Moreover, the failure to react prospectively to a competing work order document could result in a finding that the company has acquiesced in the terms of the contractor's work order. **107(106)**

[5] Arbitration Clauses

[¶63] An arbitration clause generally provides that disputes arising out of the contract will be resolved by arbitration rather than the courts. Such clauses are fully enforceable and in fact are favored in law. **108(107)** They can be narrowly tailored to require arbitration only for certain issues or they can be

intended to cover all issues relating to the contract. If all disputes are intended to be subject to arbitration, it is important that the arbitration clause be drafted broadly to cover all possible disputes. An advantage or disadvantage of arbitration, depending upon one's view of the outcome, is that decisions are difficult to appeal. ¹⁰⁹⁽¹⁰⁸⁾ Parties must be careful not to waive their right to **[14-33]** arbitration prior to requesting it by conduct that is inconsistent with the desire to arbitrate a dispute. ¹¹⁰⁽¹⁰⁹⁾

§ 14.10 Proper Risk Allocation Requires an Understanding as to When an MSA Should be Used

[1] If There is No Common Workplace, Benefits of MSA May Be Illusory

[a] Assumptions

^[¶64] Sometimes the typical MSA risk allocation is not appropriate. For example, the typical MSA usually contemplates a common workplace and assumes a trade off of risk between parties. If that underlying assumption is not present, the risk allocation may need to be revised.

[b] Contractor Has No Risk

^[¶65] In a tool rental contract, the contractor generally has no personnel at risk and generally will not accept risk of loss or damage to rented property (unless the renter pays for insurance). Consequently, an operator who provides full indemnity to the tool renter for injury or damage to the operators' employees or property will largely be giving something for nothing.

[c] No Common Workplace The same is generally true for a service contract that is performed away from the company's workplace. In the absence of a common workplace, the operator will not likely injure or damage the contractor, but the contractor's products (or the result of its service) could certainly cause loss or damage to the operator. In these instances, the absence of a common workplace undercuts the original rationale for a reciprocal indemnity approach to risk allocation.

[14-34]

[2] Certain Risks are “Part of the Bargain” and Should Not Be Reallocated

^[¶66] Even if there is or may be a common workplace, a reciprocal approach to risk allocation may not be appropriate if a particular risk is one that the owner intends for the contractor to take. For example, in a construction contract, the contractor is usually intended to be responsible for loss or damage to the work or the item being constructed. However, it is very common to provide, by contract, that title to the work or the item being built vests in the company as the work takes place. In those instances, the typical MSA risk allocation must, at a minimum, be modified to prevent the operator from owing indemnity to the contractor for property damage to the work.

^[¶67] Another example can be a trucking contract or other transportation contract. If a company hires a trucking company to care for company property during transportation, the company certainly does not want to indemnify the contractor for damage to transported property.

[3] Where Typical Risk Allocation is Not Appropriate, a Variation May Still Be Desirable

^[¶68] If the incongruous aspect of the contract is carved out, or its scope is limited, MSAs can be made to fit, such as by excluding the cargo from the risk allocation scheme in a trucking contract or providing for a unilateral indemnity rather than a reciprocal one. In other instances, an MSA may be appropriate for smaller contracts, like a small construction contract, if the contractor is required to retain the particular risk (such as loss or damage to the work).

§ 14.11 Conclusion

[¶69] An MSA is an important tool for an operator. It allows the company to put a comprehensive risk allocation scheme into place that takes into account the realities of the operator's business. In addition, the MSA can be negotiated in advance so as to minimize delays. It is important, however, to understand how the MSA will interact with other contracts, particularly the drilling contract, and how the risk allocation provisions will be impacted by applicable law. Otherwise, what looks like a good MSA can create significant unanticipated risk.

[15-1]

Endnotes

1 (Popup - Vol 48 Ch 14 Fn 1)

¹ The authors gratefully acknowledge the assistance of Michael A. Golemi and Kelly T. Scalise in the preparation of this chapter.

2 (Popup - Vol 48 Ch 14 Fn 2)

² See, e.g., *Ridings v. Danos & Curole Marine Contractors, Inc.*, 723 So. 2d 979 (La. Ct. App. 4th Cir. 1998).

3 (Popup - Vol 48 Ch 14 Fn 3)

³ For a detailed discussion of various issues relating to insurance, indemnity, and risk allocation issues in the International Association of Drilling Contractors (IADC) Offshore Daywork Drilling Contract form (and a comparison with the IADC Onshore Daywork Drilling Contract), see William W. Pugh, “The IADC Offshore Drilling Contract,” *Oil & Gas Development on the Outer Continental Shelf 8-1* (Rocky Mt. Min. L. Fdn. 1998).

4 (Popup - Vol 48 Ch 14 Fn 5)

⁵ *Id.* at 8-38 to 8-45 and § 14.07 of this chapter.

5 (Popup - Vol 48 Ch 14 Fn 6)

⁶ Pugh, *supra* note 3, at 8-22 to 8-24.

6 (Popup - Vol 48 Ch 14 Fn 7)

⁷ For example, some contractors may attempt to refuse to agree to a “pass-through” in a MSA unless they receive some assurance that they will receive the same protection from other contractors. *Id.* at 8-22, 8-34 & 8-35, 8-61 to 8-66 and § 14.05(2) of this chapter.

7 (Popup - Vol 48 Ch 14 Fn 8)

⁸ 770 F.2d 490 (5th Cir. 1985).

8 (Popup - Vol 48 Ch 14 Fn 9)

⁹ For a more detailed discussion of the *Foreman* case and related issues, see Pugh, *supra* note 3, at 8-22.

9 (Popup - Vol 48 Ch 14 Fn 10)

¹⁰ *Foreman*, 770 F.2d at 495; *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333-34 (5th Cir. 1981).

10 (Popup - Vol 48 Ch 14 Fn 11)

¹¹ *Foreman*, 770 F.2d at 495.

11 (Popup - Vol 48 Ch 14 Fn 12)

¹² *Corbitt*, 654 F.2d at 333-34.

12 (Popup - Vol 48 Ch 14 Fn 13)

¹³ This provision, which was drafted by one of the authors, was analyzed in *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992).

13 (Popup - Vol 48 Ch 14 Fn 14)

¹⁴ *Campbell* also provides an illustration of an effective “pass-through.” 979 F.2d at 1119 (Texas law) (Contractor had a duty to defend and indemnify both an oil company and a vessel owner for its employee's claims because the contractor, under the applicable MSA provisions, owed indemnity to both the oil company and its other contractor (the vessel owner) as part of the “Company Group.”); see Pugh, *supra* note 3, at 8-22.

14 (Popup - Vol 48 Ch 14 Fn 15)

¹⁵ The intent to provide this “pass-through” coverage must be clear. If the passthrough protection is intended to be provided by expanding the category of indemnitees, the company must be careful to use a clear cross reference.

15 (Popup - Vol 48 Ch 14 Fn 16)

¹⁶ *Perkins v. Rubicon, Inc.*, 563 So. 2d 258 (La. 1990); *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *modified*, 22 F.3d 568 (5th Cir. 1994), *cert. denied sub nom. Sea Savage, Inc. v. Chevron U.S.A. Inc.*, 513 U.S. 994 (1994).

16 (Popup - Vol 48 Ch 14 Fn 17)

¹⁷ *DeWoody v. Citgo Petroleum Corp.*, 595 So. 2d 395 (La. Ct. App. 3d Cir. 1992).

17 (Popup - Vol 48 Ch 14 Fn 18)

¹⁸ *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705 (Tex. 1987).

18 (Popup - Vol 48 Ch 14 Fn 19)

¹⁹ *Linden-Alimak, Inc. v. McDonald*, 745 S.W.2d 82 (Tex. Civ. App.—Fort Worth 1988) (indemnity for “any and all claims, demands,... of every character whatsoever.... excepting only claims arising out of accidents resulting from the sole negligence of Owner” did not satisfy the express negligence test). *Id.* at 86.

19 (Popup - Vol 48 Ch 14 Fn 20)

²⁰ *See* Tex. Bus. & Com. Code Ann. § 1.201(10) (1994 & Supp. 2002). Indemnity provisions or releases that are located on the back of work orders in a series of uniformly numbered paragraphs with no heading and without contrasting type are *not* sufficiently conspicuous. *Dresser Indus. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993). An indemnity provision contained on the back of a contract in fine italic print is *not* sufficiently conspicuous either. *McGehee v. Certainteed Corp.*, 101 F.3d 1078 (5th Cir. 1996). In contrast, an indemnity or release which appears in an unhidden paragraph on the front side of a one-page contract under a clearly identified and separate heading (and not surrounded by unrelated terms) satisfies the conspicuousness requirement. *See Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990). Note that the requirements of conspicuousness are inapplicable when the indemnitor possesses actual knowledge of the indemnity agreement. *Dresser*, 853 S.W.2d at 508 n.2.

20 (Popup - Vol 48 Ch 14 Fn 21)

²¹ *Dresser*, 853 S.W.2d at 509.

21 (Popup - Vol 48 Ch 14 Fn 22)

²² *See, e.g., Griffin Indus., Inc. v. Foodmaker, Inc.*, 22 S.W.3d 33 (Tex. Civ. App.—Houston [14th Dist.] 2000) (holding that an agreement met the express negligence rule even where the agreement's indemnity clause was in the same size and type as the balance of the document); *UPS Truck Leasing, Inc.*

v. Leaseway Transfer Pool, Inc., 27 S.W.3d 174 (Tex. Civ. App.—San Antonio 2000) (indemnity clause unenforceable in part because the agreement did not contain a separate heading with a reference to indemnity); Douglas Cablevision IV, L.P. v. Southwestern Elec. Power Co., 992 S.W.2d 503 (Tex. Civ. App.—Texarkana 1999) (employing an “objective test,” under which there was no consideration of the commercial context or the relative sophistication of the parties and holding that an indemnity provision without a heading or distinctive type in a 13-page contract was *not* conspicuous); *contra* Air Liquide America Corp. v. Grain Bros., Inc., 11 F. Supp. 2d 709 (S.D. Tex. 1997) (considering the commercial context and holding that an indemnity provision with the same type but with a heading that said, in all capital letters, “INJURIES AND DAMAGES,” was conspicuous).

22 (Popup - Vol 48 Ch 14 Fn 23)

²³ Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Ry. Co., 890 S.W.2d 455 (Tex. 1994).

23 (Popup - Vol 48 Ch 14 Fn 24)

²⁴ Sovereign Ins. Co. v. Texas Pipe Line Co., 488 So. 2d 982 (La. 1986); *see also* Hyde v. Chevron U.S.A, Inc., 697 F.2d 614 (5th Cir. 1983).

24 (Popup - Vol 48 Ch 14 Fn 25)

²⁵ *Dresser*, 853 S.W.2d at 509. However, insurance obligations are not directly subject to the “express negligence” rule. Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794 (Tex. 1992), *cert. denied sub nom.* Youell & Cos. v. Getty Oil Co., 510 U.S. 820 (1993) (Texas Supreme Court refused to extend the express negligence rule to an additional insured provision that did not directly support an indemnity agreement).

25 (Popup - Vol 48 Ch 14 Fn 26)

²⁶ *Lehmann v. Har-Con Corp.*, No. 14-98-00666-CV, 2002 WL 389680 (Tex. Civ. App.—Houston [14th Dist.], Mar. 14, 2002).

26 (Popup - Vol 48 Ch 14 Fn 27)

²⁷ *Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 758 S.W.2d 843 (Tex. Civ. App.—Corpus Christi 1988), *rev'd*, 768 S.W.2d 724 (Tex. 1989).

27 (Popup - Vol 48 Ch 14 Fn 28)

²⁸ *Lirette v. Popich Bros. Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983).

28 (Popup - Vol 48 Ch 14 Fn 29)

²⁹ *Perry v. Chevron, U.S.A., Inc.*, 887 F.2d 624, 630 (5th Cir. 1989) (requirement that the indemnitor “shall indemnify and hold [indemnitee] harmless” was held insufficient to satisfy Louisiana law's requirement that attorneys' fees may not be awarded unless expressly provided for by contract or by statute); *see contra* *Curtis v. Curtis*, 680 So. 2d 1327, 1332 (La. Ct. App. 2d Cir. 1996) (“hold harmless” provision includes duty to pay attorneys' fees, even if not specifically mentioned in contract).

29 (Popup - Vol 48 Ch 14 Fn 30)

³⁰ *See, e.g.*, *Delta Drilling Co. v. Cruz*, 707 S.W.2d 660 (Tex. Civ. App.—Corpus Christi 1986, writ *ref'd n.r.e.*).

30 (Popup - Vol 48 Ch 14 Fn 31)

³¹ Fisk Elec. Co. v. Constructors & Assocs., Inc., 888 S.W.2d 813 (Tex. 1994).

31 (Popup - Vol 48 Ch 14 Fn 32)

³² Meloy v. Conoco, Inc., 504 So. 2d 833, 836 (La. 1987).

32 (Popup - Vol 48 Ch 14 Fn 33)

³³ Texas E. Transmission Corp. v. McMoRan Offshore Exploration Co., 877 F.2d 1214 (5th Cir. 1989), *cert. denied sub nom.* Marathon Oil Co. v. McMoRan Offshore Exploration Co., 493 U.S. 937 (1989). As respects attorneys' fees incurred in seeking indemnification, this should be addressed in a separate provision.

33 (Popup - Vol 48 Ch 14 Fn 34)

³⁴ For a sample definition of Company Group, see § 14.03[3] *supra*.

34 (Popup - Vol 48 Ch 14 Fn 35)

³⁵ For a detailed review of contractual insurance requirements, especially in the context of Joint Operating Agreements, see William W. Pugh, "You Can't Always Get What You Want, But You Can Avoid Costly Mistakes: Insurance Issues for Oil & Gas Operators," 45 *Rocky Mt. Afire. L. Inst.* 10-1 (1999).

35 (Popup - Vol 48 Ch 14 Fn 36)

³⁶ See § 14.07[1][a]-[b], & [3], *infra*.

36 (Popup - Vol 48 Ch 14 Fn 37)

³⁷ See, e.g., Liberty Mut. Ins. Co. v. Travelers Indem. Co., 78 F.3d 639, 642 (D.C. Cir. 1996); Wyner v. N. Am. Specialty Ins. Co., 78 F.3d 752, 756 (1st Cir. 1996); Scott v. Salerno, 688 A.2d 614 (N.J. Super. Ct. App. Div.), *cert. denied*, 694 A.2d 194 (N.J. 1997); Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 475 S.E.2d 264 (Va. 1996).

37 (Popup - Vol 48 Ch 14 Fn 38)

³⁸ See *Marathon Oil Co. v. Mid-Continent Underwriters*, 786 F.2d 1301 (5th Cir. 1986) (Where the contractor's insurer paid 100% of a judgment, and the operator, as additional insured, was only covered under the policy for a portion of that liability, the contractor's insurer nevertheless could not recover the uninsured portion from the operator by way of subrogation because the insurer had waived subrogation against the operator.) A waiver of subrogation is especially important in a drilling contract because of the magnitude of the property damage risk and the possible concern that the operator's coverage might exclude coverage for damage to the drilling rig.

38 (Popup - Vol 48 Ch 14 Fn 39)

³⁹ Coverage should be limited to the risks and liabilities assumed by each party. *Ogea v. Loffland Bros. Co.*, 622 F.2d 186 (5th Cir. 1980) (Broad insurance provision, which named company A as additional insured (without restriction) was held to supersede the indemnity provisions (under which company A would have owed indemnity); the court held that the parties must have intended for the indemnity to apply only after the insurance protection had been exhausted.); *Tullier v. Halliburton Geophysical Servs., Inc.*, 81 F.3d 552 (5th Cir. 1996).

39 (Popup - Vol 48 Ch 14 Fn 40)

⁴⁰ *Hodgen v. Forest Oil Corp.*, 862 F. Supp. 1567 (W.D. La. 1994), *affd in part, quest. cert. to*

Louisiana Supreme Court, 87 F.3d 1512 (5th Cir. 1996), *cert. quest. denied*, 681 So. 2d 354 (La. 1996), *affd*, 115 F.3d 358 (5th Cir. 1997).

40 (Popup - Vol 48 Ch 14 Fn 41)

⁴¹ 276 F.3d 754 (5th Cir. 2002).

41 (Popup - Vol 48 Ch 14 Fn 42)

⁴² The authors are aware of a situation in which a stevedore was sued for multiple fatalities after a vessel it loaded sank in the Gulf of Mexico, allegedly due to the stevedore's failure to load the vessel correctly. The insurer successfully denied coverage on the grounds that the accident took place outside of the policy's three-mile territorial limit.

42 (Popup - Vol 48 Ch 14 Fn 43)

⁴³ *Dickerson v. Cont'l Oil Co.*, 449 F.2d 1209 (5th Cir. 1971), *cert. denied sub nom.* *Ins. Co. of N. Am. v. Cont'l Oil Co.*, 405 U.S. 934 (1972).

43 (Popup - Vol 48 Ch 14 Fn 44)

⁴⁴ See 14.07[1] *supra*. See generally Pugh, *supra* note 3, at 8-42, discussing the insurance requirements under the Texas Oilfield Anti-Indemnity Act (TOAIA). On the other hand, if Louisiana law may apply, a provision complying with *Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994), should be considered. See 14.07[1][a] and Pugh, *supra* note 3, at 8-38. If protection and indemnity (P&I) coverage is required, endorsements should be required providing full coverage regardless of any "as owner" coverage restriction and to delete any restriction of coverage in the event of limitation of liability. See 14.08[2] *infra* and Pugh, *supra* note 3, at 8-73.

44 (Popup - Vol 48 Ch 14 Fn 45)

⁴⁵ *Roberts v. Energy Dev. Corp.*, 104 F.3d 782 (5th Cir. 1997); *In re John E. Graham & Sons*, 210 F.3d 333 (5th Cir. 2000).

45 (Popup - Vol 48 Ch 14 Fn 46)

⁴⁶ La. Rev. Stat. Ann. 9:2780 (1991 & Supp. 2002). For an extensive discussion of anti-indemnity statutes, see Pugh, *supra* note 3, at 8-38 to 8-45, and Pugh, *supra* note 35, at 10-24 to 10-29.

46 (Popup - Vol 48 Ch 14 Fn 47)

⁴⁷ See, e.g., *Lloyds of London v. Transcont'l Gas Pipe Line Corp.*, 38 F.3d 193 (5th Cir. 1994); *Fontenot v. Chevron U.S.A., Inc.*, 676 So. 2d 557 (La. 1996); *Palmour v. Gray Ins. Co.*, 731 So. 2d 911 (La. Ct. App. 5th Cir. 1999) (LOIA did not apply to a lease to a drilling contractor in connection with the fabrication of an offshore drilling rig. Although the drilling contractor was in the business of performing oilfield work, it did not regularly fabricate oil rigs, and the crane could be used for other tasks besides oilfield work.); *but see Verdine v. ENSCO Offshore Co.*, 255 F.3d 246 (5th Cir. 2001) (The court seemed to read the LOIA broadly and applied it to an agreement for repairs on a dismantled fixed platform rig because the rig would later be used to drill six wells.).

47 (Popup - Vol 48 Ch 14 Fn 48)

⁴⁸ Note that several wells serviced by one platform offshore are considered a single well for LOIA purposes. *Transcont'l Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985 (5th Cir. 1992). Compare *Johnson v. Amoco Production Co.*, 5 F.3d 949 (5th Cir. 1993) (limiting the situation contemplated by *Transcont'l Gas* to offshore operations and holding that a number of wells surrounding an inland facility

are not to be characterized as a single well).

48 (Popup - Vol 48 Ch 14 Fn 49)

⁴⁹ However, costs of defense can be recovered if there is no negligence or fault on the part of the indemnitee. *Meloy v. Conoco, Inc.*, 504 So. 2d 833, 839 (La. 1987). Note that, at least in the LOIA context, the potential indemnitee cannot settle a plaintiff's suit without waiving its claim for defense costs under *Meloy*. *Tanksley v. Gulf Oil Corp.*, 848 F.2d 515 (5th Cir. 1988); *contra* *Ridings v. Danos & Carole Marine Contractors, Inc.*, 723 So. 2d 979, 983 n.2 (La. Ct. App. 4th Cir. 1998). Other exceptions include the sulphur industry and indemnification for a contract to control a wild well. La. Rev. Stat. Ann. 9:2780(D) (1991 & Supp. 2002).

49 (Popup - Vol 48 Ch 14 Fn 50)

⁵⁰ La. Rev. Stat. Ann. 9:2780(D) (1991 & Supp. 2002).

50 (Popup - Vol 48 Ch 14 Fn 51)

⁵¹ La. Rev. Stat. Ann. 9:2780(G) invalidates any contractual requirement that a party be named as an additional insured or be granted a waiver of subrogation if there is negligence on the part of the indemnitee. *Babineaux v. McBroom Rig Bldg. Serv., Inc.*, 806 F.2d 1282 (5th Cir. 1987).

51 (Popup - Vol 48 Ch 14 Fn 52)

⁵² 11 F.3d 563 (5th Cir. 1994).

52 (Popup - Vol 48 Ch 14 Fn 53)

⁵³ *See also* *Amoco Prod. Co. COG-EPCO 1992 Ltd. P'ship v. Lexington Ins. Co.*, 745 So. 2d 676 (La. Ct. App. 4th Cir. 1999), *writ denied*, 755 So. 2d 253 (La. 2000) (ruling indicates that calculating the cost of additional insured protection may be problematic).

53 (Popup - Vol 48 Ch 14 Fn 54)

⁵⁴ *Fontenot v. Chevron U.S.A., Inc.*, 676 So. 2d 557, 567 (La. 1996).

54 (Popup - Vol 48 Ch 14 Fn 55)

⁵⁵ Tex. Civ. Prac. & Rem. Code 127.001-127.008 (1997 & Supp. 2002) constitute the most recent version of the Texas Oilfield Anti-Indemnity Act.

55 (Popup - Vol 48 Ch 14 Fn 56)

⁵⁶ Tex. Civ. Prac. & Rem. Code 127.003(a)(2) (1997).

56 (Popup - Vol 48 Ch 14 Fn 57)

⁵⁷ Neither the TOAIA (section 127.007), nor the LOIA, section H, apply to prohibit the owner of land or the surface estate from securing an indemnity from a mineral lessee, operator, or contractor conducting exploration or production operations on the property. Section 127.004 of the TOAIA, similar to language in the LOIA, states that the statute does not apply to indemnity for losses or damage resulting from radioactivity, pollution cleanup and control, certain costs to control a wild well, or reservoir damage.

57 (Popup - Vol 48 Ch 14 Fn 58)

⁵⁸ Tex. Civ. Prac. & Rem. Code 127.001(6) (1997) defines a "unilateral indemnity obligation" as one in which the indemnitor agrees to indemnify the indemnitee for personal injury or death to the employees of the indemnitor or of the indemnitor's contractors, with no reciprocal indemnification by the indemnitee

to the indemnitor.

58 (Popup - Vol 48 Ch 14 Fn 59)

⁵⁹ Tex. Civ. Prac. & Rem. Code 127.005(b) (1997).

59 (Popup - Vol 48 Ch 14 Fn 60)

⁶⁰ *In re* John E. Graham & Sons, 210 F.3d 333, 344 (5th Cir. 2000).

60 (Popup - Vol 48 Ch 14 Fn 61)

⁶¹ *See, e.g., id.* at 339 (Although TOAIA requires a “close nexus between production activities and the agreement at issue,” a contract calling for fabrication and installation of a manifold on a satellite production platform, and to tie in flow lines at the actual wellheads on the platform, is controlled by the TOAIA.); *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 20 S.W.3d 119 (Tex. Civ. App—Houston [14th Dist] 2000, n.w.h.) (TOAIA did not invalidate indemnity provision contained in a terminal loading agreement, even though transportation of gasoline was an act collateral to well services).

61 (Popup - Vol 48 Ch 14 Fn 62)

⁶² *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992); *Certain Under-writers at Lloyd's, London v. Oryx Energy Co.*, 142 F.3d 255, *reh'g en banc denied*, 149 F.3d 1181 (5th Cir. 1998); *Mid-Continent Casualty Co. v. Swift Energy Co.*, 206 F.3d 487 (5th Cir. 2000).

62 (Popup - Vol 48 Ch 14 Fn 63)

⁶³ In *Getty*, there was (1) a separate insurance provision, and that provision (2) applied to all of the parties' insurance policies, not just those required by the contract. It is not clear whether both of these prongs are required.

63 (Popup - Vol 48 Ch 14 Fn 64)

⁶⁴ Wyo. Stat. 30-1-131 (2002).

64 (Popup - Vol 48 Ch 14 Fn 65)

⁶⁵ Wyo. Stat. 30-1-131(a) (2002); *see Northwinds of Wyo., Inc. v. Phillips Petroleum Co.*, 779 P.2d 753 (Wyo. 1989).

65 (Popup - Vol 48 Ch 14 Fn 66)

⁶⁶ *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 590, 592 (10th Cir. 1987).

66 (Popup - Vol 48 Ch 14 Fn 67)

⁶⁷ N.M. Stat. Ann. 56-7-2 (2002).

67 (Popup - Vol 48 Ch 14 Fn 68)

⁶⁸ The New Mexico Act does not prevent indemnity for the partial fault of the indemnitor even if the indemnitee is also partially at fault. *Guitard v. Gulf Oil Co.*, 670 P.2d 969 (N.M. Ct. App. 1983).

68 (Popup - Vol 48 Ch 14 Fn 69)

⁶⁹ *Amoco Production Co. v. Action Well Serv., Inc.*, 755 P.2d 52 (N.M. 1988).

69 (Popup - Vol 48 Ch 14 Fn 70)

⁷⁰ Subsection C now states that “[a] provision in an insurance contract indemnity agreement naming a

person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in Subsections A and B of this section, be void, is against public policy and void.” N.M. Stat. Ann. 56-7-2 (2002).

70 (Popup - Vol 48 Ch 14 Fn 71)

⁷¹ 933 P.2d 867 (N.M. Ct. App.), *cert. denied*, 932 P.2d 498 (N.M. 1997).

71 (Popup - Vol 48 Ch 14 Fn 72)

⁷² *In re John E. Graham & Sons*, 210 F.3d 333, 344 (5th Cir. 2000).

72 (Popup - Vol 48 Ch 14 Fn 73)

⁷³ *See, e.g.*, Ariz. Rev. Stat. Ann. 34-226 (2000); Ga. Code 13-8-2 (2002); Ind. Code Ann. 26-2-5-1, 26-2-5-2 (1995); Miss. Code Ann. 31-5-41 (1999); N.M. Stat. Ann. 56-7-1 (2001); Tex. Civ. Prac. & Rem. Code 130.002 (1997 & Supp. 2002). *See* Gerald R. Singer, *Shifting Risk of Accidental Loss in Business Contracts* 123, 139 (SC40 ALI-ABA 1998), for a listing of the states with construction industry anti-indemnity statutes.

73 (Popup - Vol 48 Ch 14 Fn 74)

⁷⁴ 33 U.S.C.A. 905(b) (2001).

74 (Popup - Vol 48 Ch 14 Fn 75)

⁷⁵ *Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174, 1177 (5th Cir. 1984), *cert. denied sub nom. Rig Hammers, Inc. v. Odeco Drilling, Inc.*, 470 U.S. 1053 (1985).

75 (Popup - Vol 48 Ch 14 Fn 76)

⁷⁶ 43 U.S.C.A. 1333 (1986).

76 (Popup - Vol 48 Ch 14 Fn 77)

⁷⁷ *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002).

77 (Popup - Vol 48 Ch 14 Fn 78)

⁷⁸ *Voisin*, 744 F.2d at 1177.

78 (Popup - Vol 48 Ch 14 Fn 79)

⁷⁹ *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1992).

79 (Popup - Vol 48 Ch 14 Fn 80)

⁸⁰ *See* *Crutchfield v. Atlas Offshore Boat Serv., Inc.*, 403 F. Supp. 920 (E.D. La. 1975) (permitting oil company to seek indemnity from employer for non-vessel negligence).

80 (Popup - Vol 48 Ch 14 Fn 81)

⁸¹ *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992).

81 (Popup - Vol 48 Ch 14 Fn 82)

⁸² *Stoot v. Fluor Drilling Serv., Inc.*, 851 F.2d 1514 (5th Cir. 1988).

82 (Popup - Vol 48 Ch 14 Fn 83)

⁸³ Compare *Campbell*, 979 F.2d 1115 and *Fontenot v. Southwestern Offshore Corp.*, 771 So. 2d 679 (La. Ct. App. 3d Cir. 2000) with *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978).

83 (Popup - Vol 48 Ch 14 Fn 84)

⁸⁴ 17 F. Supp. 2d 658 (S.D. Tex. 1998), *affd without opinion*, 281 F.3d 1279 (5th Cir. 2001).

84 (Popup - Vol 48 Ch 14 Fn 85)

⁸⁵ *Fontenot*, 771 So. 2d at 685 (reversing district court and holding that the MSA to provide mud services on a drilling rig was a maritime contract and thus the LOLA did not apply).

85 (Popup - Vol 48 Ch 14 Fn 86)

⁸⁶ *Gaspard v. Offshore Crane & Equip., Inc.*, 106 F.3d 1232 (5th Cir. 1997), *cert. denied sub nom. Seacor Marine, Inc. v. Chevron, U.S.A., Inc.*, 522 U.S. 1047 (1998); *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971), *cert. denied sub nom. Chevron Oil Co. v. Royal Ins. Co.*, 406 U.S. 921 (1972).

86 (Popup - Vol 48 Ch 14 Fn 87)

⁸⁷ See *Crown Zellerbach Corp. v. Ingram Industries, Inc.*, 783 F.2d 1296 (5th Cir. 1986), *cert. denied*, 479 U.S. 821 (1986).

87 (Popup - Vol 48 Ch 14 Fn 88)

⁸⁸ *Gaspard*, 106 F.3d at 1237.

88 (Popup - Vol 48 Ch 14 Fn 89)

⁸⁹ *Lanasse*, 450 F.2d at 584.

89 (Popup - Vol 48 Ch 14 Fn 90)

⁹⁰ Note that the *Lanasse* analysis does not apply in the context of a hull policy. *Wiley v. Offshore Painting Contractors, Inc.*, 716 F.2d 256 (5th Cir. 1983). See Pugh, *supra* note 3, at 8-73 to 8-77, and Pugh, *supra* note 36, at 10.07[I][b], for a discussion of the appropriate endorsement.

90 (Popup - Vol 48 Ch 14 Fn 91)

⁹¹ *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 905-06 (5th Cir. 1994). A possible endorsement is as follows:

91 (Popup - Vol 48 Ch 14 Fn 92)

⁹² See *Fina, Inc. v. ARCO*, 200 F.3d 266 (5th Cir. 2000) (upholding Delaware choice of law provision in the contract where enforcement of indemnity provision would not violate public policy of Texas, where Delaware's "crystal clear" standard for enforceable indemnities was not appreciably different than the Texas "express negligence" doctrine).

92 (Popup - Vol 48 Ch 14 Fn 93)

⁹³ See Pugh, *supra* note 3, at 8-36.

93 (Popup - Vol 48 Ch 14 Fn 94)

⁹⁴ *Id.* at 8-34.

94 (Popup - Vol 48 Ch 14 Fn 95)

⁹⁵ No. 14-00-00173-CV, 2001 WL 950687 (Tex. Civ. App.—Houston [14th Dist.] Aug. 23, 2001).

95 (Popup - Vol 48 Ch 14 Fn 96)

⁹⁶ See *Roberts v. Energy Dev. Corp.*, 235 F.3d 935 (5th Cir. 2000) (Fifth Circuit reversed the district court, holding that a Texas choice of law provision was invalid as applied to a Louisiana contractor under Louisiana's conflicts rules because its application would offend the public policy of Louisiana as expressed in the LOIA); see also *Fina, Inc. v. ARCO*, 200 F.3d at 270 (enforcing Delaware choice of law provision would not offend Texas' public policy where the standards for enforceable indemnities are nearly the same).

96 (Popup - Vol 48 Ch 14 Fn 97)

⁹⁷ See, e.g., *Certain Underwriters at Lloyd's, London v. Oryx Energy Co.*, 203 F.3d 898 (5th Cir. 2000) (appeal after remand); *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988).

97 (Popup - Vol 48 Ch 14 Fn 98)

⁹⁸ 895 F.2d 1043 (5th Cir.), *cert. denied sub nom. Union Texas Petroleum Corp. v. State Serv. Co.*, 498 U.S. 848 (1990).

98 (Popup - Vol 48 Ch 14 Fn 99)

⁹⁹ 43 U.S.C.A. 1349(b) (1986); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115(5th Cir. 1992).

99 (Popup - Vol 48 Ch 14 Fn 100)

¹⁰⁰ *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986) (LOIA not inconsistent with federal law); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1528 (5th Cir. 1996) (same).

100 (Popup - Vol 48 Ch 14 Fn 101)

¹⁰¹ 208 F.3d 521 (5th Cir. 2000).

101 (Popup - Vol 48 Ch 14 Fn 102)

¹⁰² For a detailed analysis of OCSLA issues, see Pugh, *supra* [note 3](#), at 8-3.

102 (Popup - Vol 48 Ch 14 Fn 103)

¹⁰³ See, e.g., *Ranger Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, No. 01-00-00586, 2002 WL 1041070 at *4 (Tex. Civ. App.—Houston [1st Disk] May 23, 2002) (under pre-amendment TOAIA, the court applied the contract's savings clause to hold that otherwise void indemnities would be enforceable, “but only up to the extent of coverage the parties agreed to provide in equal amounts”); *Rogers v. Snappy Car Rental, Inc.*, 639 A.2d 1154 (N.J. Super. Ct. 1993) (relying in part on savings clause to hold that statutory requirement that rental company provide customers with certain liability coverages would be stricken). Cf. *Weber Energy Corp. v. Grey Wolf Drilling Co.*, 976 S.W.2d 766 (Tex. Civ. App.—Houston [1st Disk] 1998), *rev'd in part*, 24 S.W.3d 344 (Tex. 2000) (imprecisely drafted savings clause was not applied to save an indemnity that was void under the TOAIA).

103 (Popup - Vol 48 Ch 14 Fn 104)

¹⁰⁴ 258 F.3d 443 (5th Cir. 2001).

104 (Popup - Vol 48 Ch 14 Fn 105)

¹⁰⁵ 9 U.S.C.A. 2 (1999).

105 (Popup - Vol 48 Ch 14 Fn 106)

106 *Portland Natural Gas Transmission Sys. v. Maritimes & Northeast Pipeline, LLC*, No. 993546 BLS, 2002 WL 1020727 (Mass. Super. Ct. Apr. 5, 2002) (relying in part on primacy clause to resolve conflict between competing agreements); *Cook Contracting Co. v. State*, 223 N.W.2d 15 (Mich. Ct. App. 1974).

106 (Popup - Vol 48 Ch 14 Fn 107)

107 See Harold J. Flanagan & Bryan C. Reuter, “Purchase Order Contracts: A Whole Lot More Than You Bargained For?,” 46 *Loy. L. Rev.* 365, 373 (2000) (discussing a party's acceptance of a purchase order's terms through “performance”).

107 (Popup - Vol 48 Ch 14 Fn 108)

108 See La. Rev. Stat. 9:4201-9:4217 (1997); 9 U.S.C.A. 1-14 (FAA) (1999 & Supp. 2002).

108 (Popup - Vol 48 Ch 14 Fn 109)

109 See, e.g., La. Rev. Stat. 9:4210 (1997) (providing limited reasons for overturning an arbitration award).

109 (Popup - Vol 48 Ch 14 Fn 110)

110 *Musso's Corner, Inc. v. A&R Underwriters, Inc.*, 539 So. 2d 915, 918 (La. Ct. App. 4th Cir. 1989) (“Although *U.S. 9:4201* states that written arbitration agreements are Valid, irrevocable, and enforceable,’ Louisiana courts have held that arbitration rights may be waived, by express words or by necessary implication.”); *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 83 (2d Cir. 1998), *cert. denied*, 528 U.S. 1058 (1999) (discussing the issue of waiver when the party seeking arbitration had actively participated in the litigation); *United Nuclear Corp. v. General Atomic Co.*, 597 P.2d 290 (N.M. 1979), *cert. denied*, 444 U.S. 911 (1979) (same).