

The Liskow logo features the word "Liskow" in a white, sans-serif font. A small green checkmark is positioned above the letter "i".

Liskow

The ACC Houston logo is contained within a white rectangular box. It features the letters "ACC" in a large, black, serif font, with a red arc above the "C". To the right of "ACC" is the text "Association of Corporate Counsel" in a smaller, black, sans-serif font. Below this, the word "HOUSTON" is written in a red, sans-serif font, flanked by two horizontal lines.

ACC Association of
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HOUSTON

INDEMNITY DEMYSTIFIED: Best Practices Every Lawyer Should Know

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Presentation Topics

-  **INTRODUCTION TO INDEMNITY**
-  **MASTER SERVICES AGREEMENTS**
-  **GENERAL INDEMNITY RULES**
-  **INDEMNITY CARVEOUTS, LIABILITY CAPS AND LIMITATION OF DAMAGES**
-  **ANTI-INDEMNITY ACTS**
-  **CHOICE OF LAW PROVISIONS**
-  **ENFORCEABILITY/LITIGATION**



INTRODUCTION TO INDEMNITY

INTRODUCTION TO INDEMNITY: Indemnity Generally

- Indemnity is an undertaking by one party to compensate the other party for certain costs and expenses
 - Can be imposed either by contract or by law
- Should be supported by insurance
 - In Texas oilfields insurance is required for enforceability
- Typically includes a defense clause
 - A clause obligating the indemnifying party to defend the indemnified party against third-party claims



INTRODUCTION TO INDEMNITY: Duty to Indemnify vs. Duty to Defend

- The duty to indemnify is the duty to reimburse a party for claims brought by a third party
 - The duty to indemnify is determined based on the facts actually established in the underlying suit, i.e., the duty is generally not triggered until the underlying suit is complete
- The duty to defend is the duty to reimburse a party for the costs and expenses of defending a claim
 - The duty to defend is determined by the allegations asserted in the underlying suit, i.e., the duty is triggered when the suit is filed
 - The party owing defense has the right to assume and control the defense, absent an agreement otherwise

INTRODUCTION TO INDEMNITY: Purpose of Indemnity Provisions

- Customizes risk allocation
- Clarifies which losses are to be borne by each party
- Allows the parties to tailor insurance coverage to known and manageable risks
- Establishes more predictable procedures for handling claims and losses during ongoing business relationships



INTRODUCTION TO INDEMNITY: Why Risk Allocation Matters



MAJOR FINANCIAL
EXPOSURE OFTEN
FLOWS FROM
INDEMNITY/LIABILITY
CAPS



UNDRAFTED OR
AMBIGUOUS
CLAUSES LEAD TO
COSTLY
LITIGATION



COURTS AND
REGULATORY OR
PUBLIC POLICY
CAN OVERRIDE
COMMERCIAL
EXPECTATIONS



CLIENTS
INCREASINGLY
DEMAND CLARITY
& RISK
BUDGETING



MASTER SERVICES AGREEMENTS

MASTER SERVICE AGREEMENTS: Generally

- Indemnity provisions are commonly found in Master Service Agreements (“MSA”)
- MSA’s are broad umbrella contracts between principals and their contractors that are designed to reduce misunderstandings and minimize litigation
- Used both onshore and offshore
- Can increase efficiency and predictability by reducing the number of contracts with varied provisions



MASTER SERVICE AGREEMENTS: Guidelines for Incorporating Indemnities

- Risk allocation is about predictability, meaning anything that could reduce predictability should be considered and accounted for
 - MSA language should control over any conflicting purchase order or any other document
 - Deviation from MSA should require special procedure and authorization from parties with authority to bind company
- Ensure there is consistency across the entire program with all MSAs
- Ensure that your indemnity provisions and insurance work together to effectively allocate your risk

MASTER SERVICE AGREEMENTS: Guidelines for Incorporating Indemnities



What provisions can I use to allocate risk?



How does statutory law or public policy affect which provisions I can or should use?

Specific language or other formality required?

- i.e., bold, different font, specific size etc.?
- Insurance?



What is my client's position?

i.e., service contractor, supplier, or operator/owner?



How does the MSA interact with other agreements or purchase orders?



How much risk is my client exposed to?



GENERAL INDEMNITY RULES

GENERAL INDEMNITY RULES: Notice Requirements

- Indemnity provisions must be clear and conspicuous under Texas law
 - Generally requiring bold font
 - Different font
 - Fully capitalized
 - Appropriate heading, etc.
- Louisiana and maritime law require indemnity provisions to be clear & unequivocal
 - No special requirements

INTRODUCTION TO INDEMNITY: Example of Indemnity Provision

Well drafted:

CONTRACTOR AGREES TO INDEMNIFY COMPANY FROM AND AGAINST ALL CLAIMS ON ACCOUNT OF BODILY INJURY OR LOSS OF OR DAMAGE TO PROPERTY OF COMPANY SUSTAINED DURING OR ARISING OUT OF THIS AGREEMENT OR THE OPERATIONS CONTEMPLATED THEREBY, REGARDLESS OF NEGLIGENCE OR OTHER FAULT OF COMPANY, EXCEPT TO THE EXTENT SUCH CLAIMS ARISE OUT OF COMPANY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

Poorly drafted:

Contractor shall indemnify Company from and against any and all loss, cost or expense (including reasonable attorneys' fees) attributable to any product liability claims arising out of a defect in design or manufacture of a Contractor product delivered within Company's territory.



GENERAL INDEMNITY RULES: Texas' Express Negligence Doctrine

- Agreements to indemnify one party from the consequences of its own negligence must meet the fair notice requirements: (1) the express negligence doctrine; and (2) conspicuousness

Express Negligence Doctrine

The intent to indemnify one party from the consequences of its own negligence must be expressed clearly and unambiguously within the agreement

Conspicuousness

THE INDEMNITY AGREEMENT MUST BE WRITTEN SO THAT A REASONABLE PERSON WOULD NOTICE IT (CAPITAL LETTERS, LARGER FONT SIZE, CONTRASTING FONT COLOR, BOLD TYPE, ETC.)


- But consider anti-indemnity statutes (discussed later)

GENERAL INDEMNITY RULES: Additional Insured Requirement

- If a party is an “additional insured” in an insurance policy, it is an insured on the policy and is entitled to the same benefits as the named insured, subject to limiting provisions in the policy
- MSAs often require the parties to list each other as additional insureds in their respective policies
- Entitles the additional insured to seek insurance directly from its counterparty’s insurance providers
- Example: “Contractor shall be named as an additional insured in each of Subcontractor’s policies, except Workers’ Compensation for liabilities assumed by Subcontractor under the terms of this Contract.”

GENERAL INDEMNITY RULES: Additional Insured Issues

- Insurance policies can incorporate underlying agreements
 - E.g., when the insurance policy provides that an “additional insured” is anyone required to be an additional insured by written contract, bid, or work order
- Regardless of what is agreed in the underlying MSA, the policy will control the insurance company’s obligations to its insureds
- Policy may adopt restrictions agreed in the underlying MSA, but the MSA cannot create coverage that is not available in the policy
- If the policy restricts the limits of coverage to the “minimum limits required by the contract” and the MSA requires minimum limits of “at least \$5,000,000” then the additional insured can only expect \$5,000,000 of coverage even if the policy has limits of \$10,000,000 or more



INDEMNITY CARVEOUTS, LIABILITY CAPS, AND LIMITATION OF DAMAGES

INDEMNITY CARVEOUTS: Generally

Indemnity carve-outs are exceptions to indemnity provisions.

Some carve-outs and special provisions that may appear in MSAs.

- Gross negligence
- Willful misconduct
- Tool carve-outs
- Reservoir damage
- Loss of the wellbore
- Blowouts and losses incurred during attempts to control a wild well
- Liability to third parties
- Punitive damages
- Data breach and confidentiality indemnities



INDEMNITY CARVEOUTS: Key Issues to Watch For

- Dangers of indemnity carveouts
 - Can “wash out” indemnity provisions
 - Meaning overbroad or affects most common issues making indemnity provision essentially ineffective
- Carve-outs for willful misconduct and gross negligence are common
- Be aware that the language willful misconduct and gross negligence are essentially treated the same (in Texas). *See BP Oil Pipeline Co. v. Plains Pipeline, L.P.*, 472 S.W.3d 296; 312-313 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Many jurisdictions treat them as differing standards with different culpability levels.
 - Texas courts apply the test for gross negligence when either of these terms are present. *See Id.*



LIABILITY CAPS: Generally



Provisions in contracts that limit the categories and amounts of damages for which a party may be liable



Contractors seeking to limit their overall liability



Often attempts to limit contractual damages and indemnity obligations



Typically, only runs in favor of the contractor

LIABILITY CAPS: Key Issues to Watch For

- **Unenforceability Issues:**

When courts find that agreements are unconscionable

Often when clauses limiting liability fail to provide a minimum adequate remedy for material breaches



- **Recent Development:**

- Third-party claims sitting outside liability caps — there is a trend toward treating indemnification obligations (especially IP infringement) as uncapped and separate from the general limitations on liability
 - This creates a growing tension between broadly drafted indemnities and low liability caps that can effectively undermine the value of the indemnity in practice

CONSEQUENTIAL DAMAGES: Generally

- Damages that flow actually, but not necessarily, from a breach of contract
- Waiver of consequential damages provisions can be a useful risk-allocation tool for the unknown
 - Helps keep contractual damages in a foreseeable and understandable range
- Ensure “consequential damages” is sufficiently defined:
 - Ex. include damages for “lost profits” or “lost of use” in the definition to avoid subsequent litigation on scope of consequential damages
- **Example:**
 - No Consequential or Indirect Damages. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY CLAIMS OF INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR SPECIAL DAMAGES WHATSOEVER.

LIABILITY CAPS AND CONSEQUENTIAL DAMAGES: Practical Takeaways

- Liability caps are a key risk-allocation tool, but they primarily protect the contractor
- Carefully review carveouts (e.g., gross negligence, willful misconduct, punitive damages), as they can override the cap
- Limitations on consequential damages help both parties achieve more predictable risk exposure
- Used together, liability caps and consequential damages waivers create a more balanced and predictable risk framework, which facilitates efficient deal-making





ANTI-INDEMNITY ACTS

ANTI-INDEMNITY ACTS: Generally

- Many states have some sort of anti-indemnity act with regards to construction and trucking contracts
 - These acts are statutes that limit or prohibit indemnifying another party for their negligence in oilfield, construction, or trucking contracts
 - Designed to protect contractors and service providers from unfair risk allocation
- Four states also have anti-indemnity acts covering oilfield contracts



ANTI-INDEMNITY ACTS: Oilfield Specific

- Texas voids indemnity clauses when they require one party to indemnify the other party against losses caused by the other party's negligence
 - Texas makes an exception if certain insurance requirements are met, contingent upon whether the provision is mutual or not
- Louisiana—voids oilfield indemnity clauses when they require one party to indemnify the other party against death or bodily injury caused by the other party's negligence
 - Subject to the “Marcel Exception” to preserve additional insured coverage
- New Mexico—voids all oilfield indemnity & additional insurance clauses when they require one party to indemnify the other party against losses caused by the other party's negligence
- Wyoming—voids all oilfield indemnity clauses, but not insurance, when they require one party to indemnify the other party against losses caused by the other party's negligence that arise from death or bodily injury to persons or injury to property
 - Invalidity of indemnity could affect “insured contract” status for additional insurance coverage



ANTI-INDEMNITY ACTS: Texas Construction Anti-Indemnity Act

- Chapter 151 of the Texas Insurance Code
- Invalidates regardless of fault indemnities and additional insurance obligations in construction contracts
- Exception for regardless of fault indemnities for bodily injury and death claims of the indemnitor's personnel or those of their subcontractors
- Exceptions include contracts subject to the Oilfield Act, insurance requirements related to OCIPs and CCIPs, and work on single family homes
- Many other states have similar construction anti-indemnity statutes
 - Many of those statutes only apply to obligations of contractors

ANTI-INDEMNITY ACTS: Texas Trucking Anti-Indemnity Statute



- Texas Transportation Code § 623.0155
- Generally prohibits provisions requiring a motor carrier to indemnify another party for that party's own negligence
- Applies to transportation-related services, including loading and unloading operations
- Primarily governs contracts involving transportation of property for hire
- Limitations: Applies only to certain for-hire motor-carrier agreements and does not prohibit indemnity for the motor carrier's own negligence or obligations outside transportation-related services
- Many states have similar trucking anti-indemnity statutes

ANTI-INDEMNITY ACTS: Practical Takeaways

- Always analyze the applicable state anti-indemnity laws before drafting or enforcing an indemnity provision. Pay particular attention if your contract involves onshore or offshore oil, construction, or trucking
- Do not assume a “standard” MSA is enforceable across jurisdictions — state law can dramatically impact risk allocation
- Ensure indemnity provisions satisfy applicable express negligence and conspicuousness requirements where necessary
- Review indemnity clauses together with insurance requirements, liability caps, and consequential damages waivers
- Courts often construe ambiguous indemnity language narrowly, making precise drafting critical





CHOICE OF LAW PROVISIONS

CHOICE OF LAW PROVISIONS: Generally

- A provision in a contract specifying the substantive law to apply to the contract
- The substantive law to be applied to a dispute is generally determined by a state's choice of law rules
- States' choice of law rules also govern whether the choice of law provision will be given effect
- Choice of Law and public policy exceptions can determine validity of indemnity agreements
- Example:
 - Choice of Law. This Agreement and all related documents shall be governed by the laws of the State of Texas without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Texas.



CHOICE OF LAW PROVISIONS: Texas Law

Texas Choice of Law Rules

- Texas follows two different tests for determining whether a choice of law provision will be given effect
 - Texas Business and Commerce Code ch. 271 for choices of law in large contracts that meet the requirements of the statute; and
 - Texas Business and Commerce Code § 1.301/Restatement (Second) of Conflict of Laws § 187(2) for all other instances

CHOICE OF LAW PROVISIONS: Texas Business & Commerce Code ch. 271

- Under Tex. Bus. & Com. Code ch. 271, The law chosen in a choice of law provision governs a transaction if:
 - The issues relate to a “qualified transaction”; and
 - The transaction bears a reasonable relation to that jurisdiction
- A “qualified transaction” is one in which a party does, or is obligated to, pay or receive consideration with an aggregate value of at least \$1 million
- A transaction bears a reasonable relation to a jurisdiction if:
 - A party to the transaction resides in that jurisdiction
 - A party has its place of business, or the party has its chief executive office or an office where the party conducts a significant amount of the negotiations related to the transaction, in that jurisdiction
 - A party is required to perform a substantial part of its obligations relating to the transaction in that jurisdiction; **OR**
 - A substantial part of the negotiations related to the transaction occurred in or from that jurisdiction and a party signed an agreement relating to the transaction in that jurisdiction

CHOICE OF LAW PROVISIONS: Texas Business & Commerce Code § 1.301

Texas Business and Commerce Code § 1.301 / Restatement (Second) of Conflict of Laws § 187(2)

- The law chosen in a choice of law provision governs a transaction unless either:

1.

The chosen state has no substantial relationship to the transaction or the parties and no other reasonable basis exists for the parties' choice

OR

2.

- (i) another state would be the state of applicable law absent an effective choice of law agreement;
- (ii) another state has a materially greater interest than the chosen state in determining the particular issue; and
- (iii) applying the chosen state's law would be contrary to a fundamental policy of another state



“First Prong”

“Second Prong”



CHOICE OF LAW PROVISIONS: The Outer Continental Shelf Lands Act

- The Outer Continental Shelf Lands Act (OCSLA) uses the law of the adjacent state as “surrogate” federal law when work is being performed on the Outer Continental Shelf
- OCSLA chooses the law of the adjacent state when
 - Focus of the contract is an OCSLA situs (e.g. contract is for welding on a platform)
 - Maritime law does not apply of its own force, and
 - State law does not conflict with federal law
- OCSLA’s choice of law is mandatory and when OCSLA applies any contractual choice of law will be ignored

CHOICE OF LAW PROVISIONS: OCSLA

- Whether maritime law applies of its own force is typically determined by whether the contract is a “maritime contract”
- The *Doiron* test asks if 1) work is in furtherance of oil and gas production on navigable waters, and 2) did the parties intend that a vessel would play a substantial role in the work
 - Substantial role is more than transportation or tool storage/work platform
- Once OCSLA does not apply, a contractual choice of law in a maritime contract will be enforced



Enforceability/ Litigation

ENFORCEABILITY/LITIGATION: Litigation in Indemnity and Liability Cap Disputes

- Disputes often arise over scope, enforceability, and interpretation of indemnities or liability cap provisions
- Courts examine contract language, negotiation history, and course of performance
- Choice of Law and public policy exceptions can determine validity
 - Texas Business and Commerce Code § 271
 - Texas Business and Commerce Code § 1.301
 - Restatement (Second) of Conflict of Laws § 187(2)
- Ambiguity in clause language is typically resolved against the drafter
- Discovery often focuses on intent and risk allocation evidence
 - Emails, drafts, insurance certificates, policies and endorsements
- Litigation outcomes also hinge on alignment with statutory and regulatory frameworks

ENFORCEABILITY/LITIGATION: Typical Issues Litigants Face

- Ambiguous indemnity scope: e.g., “arising out of” vs. “caused by” disputes
 - Is an injured party considered a “contractor” for purposes of the MSA or not
- Scope of indemnity coverage: bodily injury?, property?, pollution?, parties covered? etc.
- Negligence coverage: whether indemnity extends to indemnitee’s own negligence
- Liability cap applicability: does the cap apply to indemnity obligations, tort claims, or both?
- Disagreements over how the damage should be classified: e.g., direct, incidental, consequential, indirect, or extra-contractual
- Insurance conflicts: insurers disputing coverage or additional insured status
 - The policy and endorsement control additional insurance coverage
 - Insurance may incorporate agreements or contracts
- Statutory overrides: courts invalidating provision under anti-indemnity acts or public policy

ENFORCEABILITY/LITIGATION: Practical Litigation Strategies

- Frame indemnity and liability cap issues around contract clarity and intent
- Anticipate statutory arguments early—address anti-indemnity acts head-on
- Develop a record of negotiation intent (drafts, correspondence)
- Leverage insurance coverage to support indemnity enforcement
- First to file i.e., venue selection impacts choice of law
- Assert alternative theories of recovery (breach, contribution, subrogation)
- File early summary judgement when contract language is unambiguous



THANK YOU

FOR YOUR TIME AND CONSIDERATION



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