

THE TEXAS OILFIELD ANTI-INDEMNITY ACT VERSUS THE LOUISIANA
OILFIELD INDEMNITY ACT: HOW, WHEN, AND WHERE
INDEMNIFICATION PROVISIONS ARE VOID

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I. WHY UNDERSTANDING THE TOAIA AND LOIA IS IMPORTANT.

Understanding the ins-and-outs of both the Texas Oilfield Anti-Indemnity Act (TOAIA) and the Louisiana Oilfield Indemnity Act (LOIA) is a necessity when performing legal services for oil and gas projects in Texas, Louisiana, and across the states' lines. Understanding the Acts is especially important when the language of both Acts is seemingly identical, yet the Acts have been applied differently by Texas and Louisiana state courts.

Since both Acts were passed in the 1980s and amended in the 1990s, law journals have reviewed the history of both states' anti-indemnity provisions and how they differ judicially. The most recent article was published by the Tulane Law Review in 1996, and since then, courts have decided dozens of cases that affect the application of the Acts. This article will focus on those changes—giving practitioners an up-to-date guide on what the Acts mean today in practice by focusing on how the TOAIA and LOIA differ as described by Texas and Louisiana courts.

While summarizing cases from the last twenty years, this article will also compare and contrast the fundamental differences between the application of the TOAIA and the LOIA so that lawyers who work in the oil and gas industry across state lines understand how courts view specific indemnification provisions.

In turn, this article will also aid in determining choice of law issues. Most of the recent cases from the state and federal courts wrestle with whether the

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TOAIA or the LOIA applies when a choice of law clause is present. Understanding how the courts choose which Act to apply is essential because the decisions are outcome determinative.

II. THE BEGINNINGS OF THE TOAIA AND LOIA.

The oil and gas boom and the peak of oil prices in Louisiana and Texas in the early 1980s gave oil companies “tremendous economic leverage” in negotiating contracts with service companies.¹ There became an unequal bargaining power of oil companies and contractors because contractors had no choice but to agree to indemnify the oil company, lest the contractor risk losing the contract.²

However, once crude oil prices began to drop, it was no longer feasible for contractors and subcontractors to indemnify oil companies.³ The massive production led to a need for the two state legislatures to provide some form of protection—the result was the Oilfield Anti-Indemnity Acts.⁴ Without the Acts, there was a fear that unless competing contractors would absorb the liability exposure of their customers, they would be excluded from the oilfield market by more customer-friendly, accommodating competitors who were able to absorb the added costs.⁵ Therefore, the Acts, which void coverage, help prevent oil companies from forcing contractors to purchase contractual indemnity insurance coverage, preserving the fairness of competition among oilfield service contractors, and insuring against overreaching by their respective customers.⁶

Oilfield drilling sites are dangerous places, and the source of drilling site injuries can be hard to determine.⁷ A web of factors—such as numerous subcontracting companies, which company has the right to control, and the intersection of premises liability and agency law in drilling operations—

¹Diogenis C. Panagiotis, *Offshore Update—Five Years After Passage: Contractual Indemnity, Defense and Insurance under the Louisiana Oilfield Indemnity Act*, 10 MAR. L. 203, 203 (1985).

²*Amoco Prod. Co. v. Lexington Ins. Co.*, 98-1676 (La. App. 1 Cir. 9/24/99); 745 So. 2d 676, 678 (citing *Fontenot*, 95-1425 at p.8, 676 So. 2d at 563).

³*Panagiotis*, *supra* note 1, at 204.

⁴*See id.*

⁵*Id.*

⁶*See Amoco Prod. Co.*, 745 So. 2d at 680.

⁷*Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 168 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

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makes it almost impossible to determine who is at fault.⁸ As a result, there are usually two disputes to resolve: one pitting the injured party against all those potentially responsible, and another among the defendants to allocate fault and the resulting burden of any settlement or judgment.⁹

As long as there is uncertainty about whether indemnification clauses will be enforced, the bargained-for indemnification clauses will never accomplish their primary purpose.¹⁰ Despite the choice of law provisions in these contracts, the state courts have decided which Act applies or does not apply to drilling contracts in different ways. No bright-line rule exists in either state. Knowing whether the TOAIA or the LOIA applies to a contract will determine winners and losers in litigation because of the slight differences in the Acts.

A. The TOAIA and Its Application.

While this article addresses recent decisions made by Texas and Louisiana courts, it is still essential to understand the fundamental differences in the Acts. The TOAIA applies to agreements “pertaining to a well for oil, gas, or water or to a mine for a mineral,” which is void if:

it purports to indemnify a person against loss or liability for damage that: (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and (2) arises from: (A) personal injury or death; (B) property injury; or (C) any other loss, damage, or expense that arises from personal injury, death, or property injury.¹¹

The term “agreement” is defined by the statute as one “concerning the rendering of well or mine services,” which includes:

drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, purchasing, gathering, storing, or transporting

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ TEX. CIV. PRAC. & REM. CODE ANN. § 127.003.

oil, brine water, freshwater, produced water, condensate, petroleum products, or other liquid commodities, or otherwise rendering services in connection with a well drilled to produce or dispose of oil, gas, other minerals or water; and designing, excavating, constructing, improving, or otherwise rendering services in connection with a mine shaft, drift, or other structure intended for use in exploring for or producing a mineral.¹²

Texas Courts, in recent years, have given direction on whether or not the statute applies to specific agreements. For example, a contract to transport materials to a construction well pad site, a contract to repair an offshore drilling rig, and a contract for a petroleum loading terminal all do not “involve the drilling or servicing of a well.”¹³ Therefore, the TOAIA does not apply in those situations.

The TOAIA is unique because it provides for two exceptions to the rule that indemnification clauses in contracts pertaining to a well for oil, gas, or water or to a mine for a mineral are void. The exceptions apply if the parties use either a mutual indemnity obligation that is capped at the dollar limit of insurance each party has agreed to obtain or in a unilateral indemnity obligation, which is capped at \$500,000.¹⁴ Both the mutual indemnity obligation and the unilateral indemnity obligation apply to an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral as the statute describes.¹⁵ However, the unilateral indemnity obligation definition provided in the statute does not include coverage of property damage.¹⁶

¹²TEX. CIV. PRAC. & REM. CODE ANN. § 127.001.

¹³*Transworld Drilling v. Livingston Shipbuilding Co.*, 693 S.W.2d 19, 23 (Tex. App.—Beaumont 1985, no writ) (repairing an off-shore drilling rig); *Coastal Transp. Co. v. Crown Cent. Petrol. Corp.*, 20 S.W.3d 119, 128 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (petroleum loading terminal); *Catlin Specialty Ins., Co. v. L.A. Contractors, Ltd.*, No. H-14-261, 2016 WL 4276131, at *7 (S.D. Tex. July 25, 2016), *report and recommendation adopted*, No. H-14-0261, 2016 WL 4747689 (S.D. Tex. Aug. 15, 2016) (transporting materials to a well pad construction site); *see also* Thomas A. Donaho, *Texas Oilfield Indemnity Handbook*, BAKERHOSTETLER, <https://www.bakerlaw.com/webfiles/Litigation/2019/Articles/06-19-2019-Texas-Oilfield-Indemnity-Handbook.pdf>.

¹⁴TEX. CIV. PRAC. & REM. CODE ANN. § 127.005(c).

¹⁵*Id.* at § 127.001.

¹⁶*Id.* at § 127.001(6).

An example of such a contract is found in *Tesoro Petroleum Corp. v. Nabors Drilling United States*, where the parties provided in the drilling contract that both Nabors and Tesoro would maintain, at their own expense, insurance coverage “of the same kind and in the same amount” as is required of the other in the insurance and waiver of subrogation provision.¹⁷ The court found the indemnification was valid under the TOAIA.¹⁸ However, the indemnification would not have been valid if the language in the drilling contract purported that only one of the parties would indemnify the other party.¹⁹

B. The LOIA and Its Application.

The LOIA differs in several ways from the TOAIA. First, the statute does not apply to property damage but applies to:

[a]ny provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.²⁰

The statute reiterates three times that the LOIA only applies to agreements that pertain to a well for oil, gas, or water.²¹ The Fifth Circuit, applying Louisiana law, uses a two-part test to determine if the LOIA applies: “if (but only if) the agreement (1) pertains to a well *and* (2) is related to exploration, development, production, or transportation of oil, gas, or water, will the Act invalidate any indemnity provision contained in or collateral to

¹⁷ 106 S.W.3d 118, 129 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

¹⁸ *Id.* at 132.

¹⁹ *See id.* at 129–30.

²⁰ L.A. REV. STAT. ANN. § 9:2780(B) (2016).

²¹ *Transcon. Gas Pipe Line Corp. v. Transp. Ins. Co.*, 953 F.2d 985, 991 (5th Cir. 1992).

that agreement.”²² For example, in *Rogers v. Integrated Exploration and Production*, the court found that a contract for services on an oilfield platform that processed commingled gas from the platform owner’s pipelines, because the gas no longer was identified with a particular well, was outside the scope of the LOIA.²³ However, in an offshore drilling oilfield-related accident, a Louisiana court dismissed an indemnity claim that required a contractor to indemnify a principal for liability resulting from the principal’s negligence because it fell within the LOIA.²⁴

Another significant difference between the two acts is that the LOIA does not explicitly define any exceptions. The statute states: “waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the provisions of this Section, shall be null and void and of no force and effect.”²⁵

However, the Fifth Circuit has identified an exception to the LOIA known as the “Marcel” exception.²⁶ The court reasoned that the LOIA aims at preventing the shifting of the economic burden of insurance coverage or liability onto an independent contractor.²⁷ If the principal pays for its liability coverage, however, then no shifting occurs. The exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage.²⁸

C. *The LOIA and TOAIA have Different Public Policy Goals.*

Not only are there differences in the application of the Acts, but even more important are the differences in the policy goals of each Act. The public policy principle that prompted the passage of the LOIA was to protect contractors so that they would not be “excluded from the oilfield market by more customer-friendly accommodating competitors . . . who are able to absorb the added costs” from oil companies.²⁹

²² *Id.*

²³ 2018-0425 (La. App. 4 Cir. 2/20/19); 265 So. 3d 880, 887–88.

²⁴ *Jefferson v. Int’l Marine, LLC*, 2016-0472 (La. App. 1 Cir. 7/05/17); 224 So. 3d 50, 53.

²⁵ L.A. REV. STAT. ANN. § 9:2780 (2016).

²⁶ *See Marcel v. Placid Oil Co.*, 11 F.3d 563, 569 (5th Cir. 1994).

²⁷ *Id.*

²⁸ *Id.* at 570.

²⁹ *Amoco Prod. Co. v. Lexington Ins. Co.*, 98-1676 (La. App. 1 Cir. 9/24/99); 745 So. 2d 676, 680 (citing *Fontenot v. Chevron U.S.A., Inc.*, 95-1425, p. 8 (La. 7/2/96); 676 So. 2d 557, 562).

While the TOAIA was passed with these goals in mind, the TOAIA also provides exceptions that focus on allowing companies to limit costs, make costs more predictable, and allow for sophisticated parties to draft bargained for contracts that will not be destroyed by the Act.³⁰ Texas indemnity law allows companies to substitute insurance in place of uncertain liability, thus limiting costs and making them more predictable.³¹ This approach to risk allocation provides a level of certainty to all of the parties regarding liability exposure because each company can train its employees as to safe oilfield practices, manage its performance of the work, obtain insurance, and attempt to control the scope of its liability arising out of what is usually a typical workplace.³² Disregarding indemnity clauses (and the insurance agreements behind them) by applying another state's law does just the opposite.³³ In *Energy Service Co. of Bowie, Inc. v. Superior Snubbing Services*, the Texas Supreme Court in dicta stated that to restrict mutual indemnity obligations to signatories denies them the freedom to contract.³⁴ However, the Act also protects signatories' interests by voiding only certain indemnities not supported by liability insurance.³⁵

III. THE EXCEPTIONS UNDER THE TOAIA ALLOW COURTS TO RULE THAT INDEMNIFICATION CLAUSES SURVIVE, WHILE COURTS ANALYZING THE LOIA MORE OFTEN CAUSES INDEMNIFICATION CLAUSES TO FAIL.

The TOAIA, as previously mentioned, has explicit exceptions that are recognized by Texas courts.³⁶ In *Nabors Corp. Services v. Northfield Insurance Co.*, a petroleum company and a pool company entered into a master service agreement that contained mutual indemnity provisions whereby each party agreed to indemnify the other for any claims or causes of action, without limit, for any injuries or death.³⁷ The parties also agreed to

³⁰ *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 180 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

³¹ *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 196 (Tex. 2007).

³² *Id.*

³³ *Chesapeake Operating, Inc.*, 94 S.W.3d at 168.

³⁴ 236 S.W.3d at 196.

³⁵ *Id.*

³⁶ *See id.*

³⁷ 132 S.W.3d 90, 93 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

acquire insurance to cover these indemnity obligations in accordance with the safe harbor provisions of the TOAIA.³⁸ The pool company's insurer, Reliance, became insolvent before the settlement of a negligence claim against the petroleum company.³⁹ Thereafter, the petroleum company's insurer filed a declaratory action to determine if it owed reimbursement to the pool company.⁴⁰ Summary judgment was granted in favor of the petroleum company's insurer.⁴¹ The pool company argued that the trial court erred in granting the motion because once Reliance was placed into receivership, there was no longer any supporting insurance coverage, and the indemnity provision contained in the agreement was rendered void under the TOAIA.⁴² The pool company reasoned that because the purpose behind the TOAIA is to protect contractors from unfair indemnity obligations, the pool company was no longer protected due to Reliance's insolvency, and therefore the indemnification should be found void.⁴³

The Texas Supreme Court held that the TOAIA did not void the mutual indemnification provisions because of the exception provided in the statute.⁴⁴ The TOAIA did not alter the indemnity obligation of the pool company just because its insurer became insolvent before the settlement, proving that even in unique fact situations, Texas courts enforce the TOAIA exceptions.⁴⁵

In *Tesoro Petroleum Corp. v. Nabors Drilling United States, Inc.*, the insurance and waiver of subrogation provision in the parties' contract stated that each party would assume liability and agreed to indemnify the other "from and against all claims, demands, and causes of action" arising from the contract in favor of the party's own employees, subcontractors, or invitees "on account of bodily injury, death or damage to property."⁴⁶ The provision also stated that both parties would maintain, at their own expense, insurance coverage "of the same kind and in the same amount" as is required of the other.⁴⁷

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 93–94.

⁴² *Id.* at 95.

⁴³ *Id.*

⁴⁴ *See id.* at 99.

⁴⁵ *Id.*

⁴⁶ 106 S.W.3d 118, 122 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

⁴⁷ *Id.* at 129.

The Texas appellate court held that this mutual indemnification provision tracks the insurance requirements of Section 127.005 of the TOAIA.⁴⁸ The defendant contended that the provision was a release, not an indemnification, destroying the mutuality of the agreement.⁴⁹ The court reasoned the inclusion of a release where only a release makes sense is not enough to destroy the mutuality required for an enforceable indemnification agreement relating to an oil and gas well.⁵⁰ Therefore, the court held that the indemnification and release provisions of the drilling contract, taken together, constitute a “mutual indemnity obligation” as defined in the TOAIA.⁵¹ The agreement complied with the safe harbor requirements of the TOAIA for enforceable indemnity agreements pertaining to an oil or gas well.⁵²

In *Silverman v. Mike Rogers Drilling Co.*, a Louisiana court decided in opposition to the LOIA public policy concern, holding that the LOIA voided a provision that indemnified a contractor.⁵³ The contract between the parties stated, “operator shall release contractor of any liability for, and shall protect, defend and indemnify Contractor from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties.”⁵⁴ The defendant, an oilfield contractor, contended that the trial court incorrectly applied the provisions of the LOIA because it was designed to protect oilfield contractors like the defendant.⁵⁵ The trial court penalized the contractor and denied indemnity under the terms of a negotiated contract with the oil company.⁵⁶ A Louisiana court of appeals affirmed, stating that the court did not reach legislative intent with the clear and unambiguous language of the LOIA.⁵⁷ The clear language states that “any provision” which would mandate that an indemnitor indemnify an indemnitee in a situation involving damages

⁴⁸ *Id.*

⁴⁹ *Id.* at 130.

⁵⁰ *Id.* at 131.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See* 45-119 (La. App. 2 Cir. 4/14/10); 34 So. 3d 1099, 1103.

⁵⁴ *Id.* at 1100.

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *Id.* at 1103.

for death or bodily injury caused by the negligence of the indemnitee or its employee, is void.⁵⁸

A. In Recent Years, Texas Courts have Applied the TOAIA “Safe Harbor Provisions” More than Texas Courts have in the Past, Allowing More Clauses to Survive under the TOAIA.

The exceptions listed in the TOAIA, as previously discussed, are referred to by the courts as “safe harbor provisions.”⁵⁹ In the last twenty years, Texas courts have frequently found that both mutual indemnification and unilateral indemnification provisions are not void under the TOAIA.⁶⁰ A reason for the indemnification provisions’ success might be because lawyers have drafted better contracts to fall under these safe harbor provisions but could also be because of the promotion of the public policy goal in Texas—for sophisticated parties’ bargained-for contracts to remain enforceable.

In 2009, a Texas district court found a unilateral indemnification in a master service contract with a cap at \$500,000 to be valid between EOG and Baker Hughes.⁶¹ The Texas Supreme Court held that while Section 127.005 of the TOAIA required there to “be a written agreement to procure insurance or self-insurance to support mutual indemnity obligations, such an agreement is not void if the parties agree to provide insurance in differing amounts.”⁶² Section 127.005(b) only restricted the enforceability of an indemnity obligation to the coverage and dollar limits that applied equally to both parties.⁶³ The court ultimately concluded that Section 127.005 did not require a written agreement to specify the dollar amounts of insurance and upheld the indemnification.⁶⁴ Texas courts have made it clear that when both parties agree to support their indemnity obligations by obtaining insurance

⁵⁸ *See id.* at 1102.

⁵⁹ *E.g.*, *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 129 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

⁶⁰ *See, e.g., id.*

⁶¹ *Baker Hughes, Inc. v. Enron Res., Inc.*, No. 2008-16444 (234th Dist. Ct., Harris County, Tex. Apr. 13, 2009).

⁶² *Ken Petroleum Corp. v. Questor Drilling Corp.* 24 S.W.3d 344, 346 (Tex. 2000).

⁶³ *Id.*

⁶⁴ *Id.*

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coverage, it is undisputed that the indemnity provision falls outside TOAIA and therefore is not void.⁶⁵

B. Fewer Exceptions Under the LOIA Means More Indemnification Provisions are Void.

Because the LOIA only has a court-made exception, an indemnification provision will likely be void under the LOIA, but not under the TOAIA, especially because it is difficult to prove the Marcel exception applies. In *Amoco Production Co. v. Lexington Insurance Co.*, a Louisiana court of appeals stated that because of the minimal amount of premium paid by Amoco in contrast with the amount of coverage provided, Amoco failed to prove that the material part of the cost of its coverage was paid by someone other than the contractor.⁶⁶ As previously noted, the Marcel exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage.⁶⁷ Therefore, the indemnification provision was void.⁶⁸

C. Texas Courts have Discussed Cases Where the Indemnification Clauses Would be Found Void if the LOIA Applied but Would Survive if the TOAIA Applied.

In *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, a Texas court of appeals discussed the contrast in the exceptions under both the TOAIA and the LOIA.⁶⁹ The court concluded that the employer's indemnity claim would be enforceable under Texas law because the operative indemnity language met the requirements of the exceptions.⁷⁰ However, the employer's indemnity claim would be unenforceable under Louisiana law.⁷¹ Because of the differences in both Acts, a choice of law issue was created, and the winner

⁶⁵ See *Expro Ams., LLC v. Sanguine Gas Expl., LLC*, 351 S.W.3d 915, 929 (Tex. App.—Houston [14th Dist.] 2011 pet. denied).

⁶⁶ 98-1676 (La. App. 1 Cir. 9/24/99); 745 So. 2d 676, 681. The court also noted that the provision was beyond the scope of the LOIA because the coverage was procured *after* the explosion when the loss known to Amoco and Pride involved a fatality and several other serious injuries. *Id.*

⁶⁷ See *Marcel v. Placid Oil Co.*, 11 F.3d 563, 569–70 (5th Cir. 1994).

⁶⁸ *Amoco Prod. Co.*, 98-1676, 745 So. 2d at 680.

⁶⁹ See 94 S.W.3d 163, 168–69 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

⁷⁰ See *id.* at 180.

⁷¹ *Id.* at 169.

of the litigation turned on which state's law applied.⁷² Because of critical differences in the LOIA and the TOAIA, it is crucial for the court's decisions on choice of law issues to be predictable and known to the public for any future disputes. These clauses will never accomplish their primary purpose as long as there is substantial uncertainty about whether they will be enforced.⁷³

IV. DISPUTES IN THE PAST TWENTY YEARS ARE MORE ABOUT THE CHOICE OF LAW ISSUE RATHER THAN HOW THE LOIA OR THE TOAIA ARE APPLIED.

Before 1996, Louisiana and Texas courts were mainly hearing cases that disputed whether the indemnification clauses were void based on the facts of the cases, rather than what state law applied. The last time the Louisiana Supreme Court even decided a case based on the LOIA or the TOAIA was in 1996 in *Fontenot v. Chevron U.S.A, Inc.*⁷⁴ In the last ten years, most of the cases focus on which state's Act will apply to the case. The courts consider choice of law clauses, where the injuries took place, where the contract was signed, and many other factors. However, Texas, Louisiana, and the federal courts all apply these factors in different ways.

A. *Louisiana Courts Respect Choice of Law Clauses, while Texas Courts have Applied Different Tests.*

“Based on the considerations laid out in Louisiana's choice of law rules, it is clear that parties may agree in advance to apply non-Louisiana substantive law to the interpretation of an entire agreement, including indemnity provisions.”⁷⁵ Thus, parties are free to contract as they wish, whether they opt into Louisiana law (including the LOIA) as part of contracts that would otherwise be governed by other substantive law, or opt-out, as was done in *King* and *Hilcorp*.

⁷² *See id.*

⁷³ *Id.* at 168.

⁷⁴ *See* 95-1425 (La. 7/2/96); 676 So. 2d 557, 558–59.

⁷⁵ *Smith v. Hilcorp Energy Corp.*, No. 075502; 2011 La. Dist. LEXIS 181, at *16 (La. Dist. Ct. Sept. 10, 2011) (showing that Hilcorp and Hookup chose to apply either general maritime law or Texas law); *accord King v. I.E. Miller of Eunice, Inc.*, 07-167 (La. App. 3 Cir 11/21/07); 970 So. 2d 703, 707.

In *Smith v. Hilcorp Energy Corp.*, *King v. I.E. Miller of Eunice, Inc.*, and *Robbins v. Delta Wire Rope Inc.*, Louisiana courts held that the bargained-for choice of law clauses were not void, even if the clauses violated Louisiana's public policy goal to protect contractors.⁷⁶ In *King*, a Louisiana court discussed how the master service agreement with a reciprocal indemnity provision was drawn up by the company, and the employer accepted the Texas choice of law provision.⁷⁷ The employer justifiably expected to be subjected to Texas law and would have suffered minimal adverse consequences if subjected to Texas law.⁷⁸ The court stipulated that Texas's policy of upholding contracts that are freely and voluntarily entered into far outweighed Louisiana's policy of protecting oilfield subcontractors.⁷⁹

On the other hand, most Texas courts focus the choice of law analysis on where the injury occurred and which state has a materially more significant interest in the determination. One Texas court of appeals, applying the Second Restatement, stated that, "[i]n a contract *without* an express choice of law," indemnity is governed by the law of "the state which, with respect to that issue, has the most significant relationship to the transaction."⁸⁰ However, in a contract with an express choice of law, indemnity is governed by the law chosen by the parties unless (1) there is a state with a more significant relationship to the transaction, (2) applying the chosen law would contravene a fundamental policy of that state, and (3) that state has a materially greater interest in the determination of the particular issue.⁸¹ Texas courts adhere to the Second Restatement's favoritism for enforcing choice of law clauses, therefore reinforcing Texas's public policy goal of upholding bargained-for contracts.

⁷⁶*Robbins v. Delta Wire Rope, Inc.*, 2015-1757 (La. App. 1 Cir 6/03/16); 196 So. 3d 700, 702; *Hilcorp Energy Corp.*, 2011 La. Dist. LEXIS 181, at *16; *King*, 07-167, 970 So. 2d at 707.

⁷⁷*King*, 07-167, 970 So. 2d at 706.

⁷⁸*Id.* at 706-07.

⁷⁹*Id.* at 707.

⁸⁰*Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, 94 S.W.3d 163, 169 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing *Maxus Expl., Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex. 1991)); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

⁸¹*Chesapeake Operating, Inc.*, 94 S.W.3d at 169-70.

B. Texas Courts Adhere to the Parties' Choice of Law Clause.

In *Exco Resources Inc. v. Cudd Pressure Control, Inc.*, a Texas appellate court determined Louisiana law applied when the terms of the parties' contract had an indemnification provision regarding Texas law.⁸² However, the parties also contemplated in the contract that Louisiana law may apply to the indemnity provisions of the contract in certain circumstances, where "the work was done in Louisiana, the injury occurred in Louisiana, . . . the underlying lawsuit was pending in Louisiana," and the parties' justified expectations would not be frustrated by the application of Louisiana law.⁸³ The court concluded the trial court did not err by concluding that Louisiana law applied to the indemnity claims arising from work and alleged injuries at the well located in Louisiana.⁸⁴

The Texas Court of Appeals of Houston 14th District, in *Chesapeake Operating, Inc. v. Nabors Drilling USA, Inc.*, held that because the parties drafted a contract with a Texas choice of law provision, the parties should "have what they bargained for"—even though the accidents occurred wholly within Louisiana and arose solely out of the operation of Louisiana wells.⁸⁵ The court focused on the fact that the employer's claim was for liability and legal services incurred in Texas, not for the drilling services performed in Louisiana.⁸⁶ The only fight was about the performance of the indemnities, a fight conducted in Texas.⁸⁷ The court also considered the domicile of the parties, place of contracting, and place of negotiation, which all pointed to Texas.⁸⁸ However, the main reason for the court's holding that Texas law applied to the contract was because the choice of law could only be disregarded if it contravened a fundamental policy of Louisiana, and Louisiana had a materially greater interest in the determination of the indemnity issue than Texas.⁸⁹ The majority stated that neither was the case.⁹⁰ However, the dissent pointed out that Louisiana did have a greater interest in

⁸²No. 05-14-01364, 2016 Tex. App. LEXIS 4874, at *21–22 (Tex. App.—Dallas 2016, no pet.).

⁸³*Id.* at *21.

⁸⁴*Id.* at *23.

⁸⁵*See* 94 S.W.3d at 180.

⁸⁶*Id.* at 171–72.

⁸⁷*See id.* at 172.

⁸⁸*Id.* at 170.

⁸⁹*See id.* at 177.

⁹⁰*Id.*

regulating its dangerous activities and public policy concerns, primarily when the injuries occurred in Louisiana, and the wells were located in Louisiana.⁹¹ The *Nabors Drilling* case shows that Texas courts willingly enforce choice of law provisions in favor of Texas's goals of giving parties what they bargained for.

V. IN CONCLUSION, THE CHOICE OF LAW AND EXCEPTIONS UNDER EACH STATE'S OILFIELD-INDEMNITY ACT ARE IMPORTANT WHEN DRAFTING ANTI-INDEMNITY PROVISIONS.

The critical issue for transactional lawyers is first to decide what state law each party wants to apply to the contract. Although there is not a bright-line rule about whether Louisiana or Texas courts will uphold a choice of law provision, this article should help in seeing how the courts have swayed in the past. Parties take a risk when the contract merely says "Texas law applies" because in a contract with an express choice of law provision as such, Texas courts routinely hold that the clause means Texas choice of law rules apply, and therefore the "most significant relationship" test under the Second Restatement is used. Therefore, if the injuries, conduct, and contacts were more significantly related to the state of Louisiana, then Louisiana substantive law, including the LOIA, would apply to the contract. Also, considering the *Chesapeake Operating v. Nabors Drilling* and *King* opinions, the court will also consider public policy exceptions to determine whether Texas or Louisiana substantive law will apply. However, parties can reduce the risk of the "most significant relationship" test and public policy exceptions from interfering with the parties intentions by stating "Texas substantive law applies" or "Louisiana substantive law applies."

Once a transactional lawyer includes a choice of law provision that will uphold the intentions of the parties, the lawyer must determine how to draft the anti-indemnity provision—either to comply with the "safe harbor" provisions in Texas or the Marcel Exception in Louisiana so that the indemnification provision will not be found void under the applicable state's law. Proper drafting will ensure proper indemnification provisions are enforced to meet both parties' goals and avoid contentious litigation in the future.

⁹¹ See *id.* at 194 (Wittig, J., dissenting).