

Contractual Indemnities and Non-Derogable / Mandatory Provisions in International Arbitration

Jeremy Farr, Practice Area Leader | Energy, Infrastructure & Resources

Theo Hall, Senior Associate | Energy, Infrastructure & Resources

Drilling Contracts and Applicable Laws

DRILLING CONTRACTS

““Law” means all applicable laws including the following: constitutional law, civil law, common law, international law, equity, treaties, statutes, decrees, edicts, codes, orders, judgments, rules, ordinances, instructions and regulations of any local, municipal, territorial, provincial, federated, national or any other duly constituted governmental authority or agency having jurisdiction, including [country] legislation in the field of public procurement, safety of offshore petroleum operations, offshore law, construction and environmental laws.” [emphasis added]

EQUIPMENT WARRANTY

“Contractor represents and warrants that:

(a) the Equipment is (i) in good working order and conforms in all respects to the Law, Good Oilfield Practice and the descriptions and specifications set forth in this Agreement”.

LEGAL REQUIREMENTS

“Contractor Group shall, at its sole cost:

- (a) be subject to, comply and require its contractors and Subcontractors to comply with Law...*
- (d) comply with any and all requirements imposed by the provisions of [country] Law no. [xx] regarding safety of offshore petroleum operations and [country] Law no. [18] regarding certain measures required for the implementation of petroleum operations by the titleholders of petroleum agreements relating to offshore petroleum blocks.”*

Scenario – Civil Codes and Contractual Provisions

Gross Negligence / Wilful Misconduct

“(b) Notwithstanding anything to the contrary in this Agreement, each party shall bear full responsibility, for its Gross Negligence or Willful Misconduct attributable to its Managerial or Senior Supervisory Personnel and, in no event, will a Party be required to release or indemnify the other Party for Gross Negligence or Willful Misconduct attributable to the other Party's Managerial or Senior Supervisory Personnel. However, Contractor's liability for acts of its own Gross Negligence or Willful Misconduct attributable to its Managerial or Senior Supervisory Personnel pursuant to this Subsection 5.7 (b) in relation to any and all claims shall be limited to [xx]”

PROVISIONS OF A CIVIL CODE

What if, under the Civil Code of the country where the Contract was being performed:-

1. Parties could not discard the requirements of the Civil Code's tort liability provisions e.g. by contractual liability?
2. Parties cannot exclude wilful misconduct or gross negligence by contractual limitation of liability?

ARBITRATION AGREEMENT

“Any dispute, controversy or claim arising out of or relating to this Agreement, including any question regarding its existence, validity, interpretation, breach or termination, shall be finally resolved by arbitration....

The legal place, or seat, of arbitration shall be London, England, and the language of the arbitration shall be English. The arbitration shall take place in London.”

GOVERNING LAW CLAUSE

“This Agreement and all matters pertaining thereto, including matters of performance, non-performance, breach, remedies, arbitration, procedures, rights, duties and interpretation or construction, shall be governed by the laws of England and Wales, excluding any choice of law rules which would refer the matter to the law of another jurisdiction.”

Applicable Laws

1. Law of the Contract (“Substantive Law”)
2. Law of the Arbitration Agreement
3. Procedural Law of the Arbitration

Arbitration Agreements and Applicable Law

ARTICLE 46 English Arbitration Act

*“1) The arbitral tribunal shall decide the dispute—
(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or*

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

*(2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.”
[emphasis added]”*

Rome I Regulation

EU Rome I Regulation – Article 3(1)

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.”

Rome I Regulation – Article 3(3)

“3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.” [emphasis added]

Rome Regulation I – Article 9

Overriding mandatory provisions

1. *Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.*
2. *Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*
3. *Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”*
[emphasis added]

Rome I – Article 21

“Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.”

The Tribunal's Approach

Rome I – Arbitration Agreements

How is Rome I relevant to arbitration?

Accentuate Ltd v Asigra Inc [2009] EWHC 2655 (QB)

“[I] wish to add that nothing in this judgment should be taken as a criticism by me of the conduct or reasoning of the Arbitral Tribunal ... [I]t was the duty of the Tribunal to apply the law which, according to the [contract], was designated by the parties as the law applicable to the substance of the dispute. The passages cited from the Award...above demonstrate that the Tribunal was fully conscious of the relevant considerations. They were clearly aware that the English court might approach the matter differently for reasons which do not reflect adversely upon the Tribunal.” [emphasis added]

Soleimany v. Soleimany

“is not so much a question of what the arbitrator is entitled to do; the Dayan was entitled to make his award in the present case. But the court will not enforce it.” [emphasis added]

Contractual Construction

“Contractor Group shall, at its sole cost:

(a) be subject to, comply and require its contractors and Subcontractors to comply with Law...

The English Court Approach

Rome I Regulation – Article 3(3)

“3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.” [emphasis added]

Rome Regulation I – Article 9

Overriding mandatory provisions

1. *Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.*
2. *Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*
3. *Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”*
[emphasis added]

Enforcement of Arbitral Awards

Issues with Enforcement?

Article III of the NYC

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”

Article V of the NYC

“2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

Enforcement in English Courts

Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd

“Accordingly, an order of this court which directly enforced such an agreement [i.e. the agreement contrary to Kuwaiti public policy] would be in collision with the public policy of Kuwait.... Although direct enforcement of the contract would clearly be offensive to comity, enforcement of any such award in England under the New York Convention must be very much less so, for enforcement does not substantially depend on the public policy of Kuwait but of this country...the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.”

Soleimany v. Soleimany

“The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”

Cytec Industries BV (Netherlands) v. SNF sas (France), Cour de Cassation

“since this is a violation of international public policy, the annulment court considers only the compatibility of the effect of the award's recognition or enforcement with [international] public policy; the examination is limited to the flagrant, effective and concrete nature of the alleged violation.”

Risk Mitigation

Risk Mitigation

1. Operator's Insurance Policy?
2. Contingency Insurance?
3. Parent Company Guarantee

Key Takeaways

Key Takeaways

1. Governing Law / Arbitration clauses control applicable law;
2. Arbitral tribunals apply the law chosen by the parties to govern the contract. Rome I is not mandatorily applicable.
3. Courts are obliged to consider Rome I;
4. Courts in the local jurisdiction may refuse to recognise an award for public policy reasons;
5. Awards can be enforced anywhere the debtor has assets;
6. Take local legal advice and mitigate risk at contract signing!

K&L GATES