CHOICE OF LAW ON THE OUTER CONTINENTAL SHELF: IS THERE ANY CHOICE AT ALL?

By Richard E. Chandler Jr., Elizabeth G. Myers & Christopher H. Domingo

It has been approximately a year since disaster struck in the Macondo Prospect oil field off the coast of Louisiana. The explosion and subsequent firestorm aboard the Deepwater Horizon drilling rig left 11 dead, many more injured, and an unprecedented stain of oil stretching across our coastal waterways. In the wake of this human and environmental tragedy, the U.S. Secretary of the Interior declared a six-month moratorium on all deepwater offshore drilling, which remained in effect until October of last year.

Although the moratorium has now been lifted, the announcement did not signal an immediate return to business as usual in the Gulf.[1] Those wishing to resume operations are required to comply with a strict new set of rules and regulations designed to address environmental concerns and increase workplace safety. While issues related to blowout preventers, well design, and cementing practices will likely take center stage operationally over the coming months, eliminating potential confusion regarding the law that applies to those operations deserves focus and attention as well. So, before firing up the tugs and moving those deep water rigs back out to sea, let's take a look at the law that will govern you once you get there.

I. The Outer Continental Shelf Lands Act

If you've heard of the Outer Continental Shelf Lands Act (OCSLA), you're probably ahead of the curve. Found at 43 U.S.C. § 1331 *et seq.*, the OCSLA extends federal law to the subsoil and seabed of the outer continental shelf and to all structures (not including ships or vessels) permanently or temporarily attached to the seabed for the purpose of developing, producing, or exploring for oil. The statute essentially treats the outer continental shelf as if it were a federal enclave within a landlocked state.[2]

Although federal law applies to these lands and structures, the drafters of the OCSLA understood that federal law might not adequately cope with the full range of legal problems that may arise on the outer continental shelf.[3] The OCSLA fills in these gaps in federal law by adopting the civil and criminal laws of the adjacent state and applying those laws as surrogate federal law when certain conditions are met. The OCSLA thus functions as a congressionally mandated choice of law provision. When it applies, it dictates which law will govern in the event that a dispute arises—notwithstanding agreements or contractual choice of law provisions to the contrary.

II. When Does the Outer Continental Shelf Lands Act Invoke State Law?

The application of surrogate state law under the OCSLA is determined under a three-prong test adopted by the Fifth Circuit in *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*[4] First, the controversy must arise on a "situs" that is covered by the OCSLA, such as a drilling rig or other structure attached to the seabed. Second, federal maritime law must not apply of its own force, as it would onboard a vessel in navigable waters. Finally, state law must not be inconsistent with federal law. If all three of these conditions are met, the OCSLA mandates that state law be used to supplement and fill any gaps in federal law.

A. Does the Controversy Arise on an OCSLA Situs?

Whether a controversy "arises" on an OCSLA situs depends, in part, on the nature of the controversy. In a tort action, the requirement is met if the tort occurs on an OCSLA situs.[5] Take, for example, a crane operator performing work on a stationary platform on the outer continental shelf. If the crane topples over and causes injury to the operator, the tort occurred on an OCSLA situs (i.e., the stationary platform), and the first prong is met. If, however, the tort occurs on navigable waters away from an OCSLA situs, the requirement is not met, and the inquiry begins and ends there. Thus, if the crane operator is injured on a vessel while returning to shore at the end of his shift, state law clearly will not apply.

In pure contract cases bearing no relation to tortious conduct, a controversy "arises" on an OCSLA situs when a majority of the performance called for under the contract is to be performed there. This is determined by an analysis known as the focus-of-the-contract test.[6] Let's assume that our crane operator works injury-free, but files suit against his employer for refusing to pay his invoices. Here, courts will look to where the work called for under the contract is to be *performed*. In this case, a stationary drilling platform on the outer continental shelf satisfies the OCSLA situs requirement, and the first prong of the *PLT* test is met.

But if a tort case turns on where the injury occurred, and a contract case turns on where the work is to be performed, how then do we treat a contract case triggered by an underlying tort? By way of example, let's assume that our crane operator once again sustains injury onboard a vessel while returning home from his shift. Let's assume further that he files suit for injuries against his employer, who in turn seeks indemnification from a third party pursuant to a separate contract. Here, even though the operator's personal injury claim does not satisfy the situs requirement of the *PLT* test, courts still apply the focus-of-the-contract test to bring the indemnification battle within the auspices of the OCSLA.[7] Thus, irrespective of the location of the accident, if a contractual dispute arises, courts look to where the work under the contract was to be performed when determining whether the OCSLA situs requirement is met.

B. Does Federal Law Apply of its Own Force?

Assuming that the first prong of the *PLT* test is satisfied, courts look next to whether maritime law applies of its own force. Here, the Fifth Circuit has adopted the test laid out in *Davis & Sons, Inc. v. Gulf Oil Corp*.[8] Under *Davis*, courts conduct a case-by-case analysis of the nature and character of the contract—inclusive of subsequent work orders—and

attempt to discern whether the contract has a "genuinely salty flavor."[9] This fact-specific inquiry includes consideration of the following six factors:

1. What does the specific work order in effect at the time of injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?[10]

Based on these considerations, if a court finds that the contract covering the work in question is primarily maritime in nature, federal law applies of its own force and the OCSLA will not be invoked to apply adjacent state law to the controversy in question.[11]

C. Is State Law Consistent with Federal Law?

The third and final prong of the *PLT* test looks to whether the application of state law is consistent with federal law. As long as state law does not conflict, it will be adopted and applied as the law of the United States.[12]

III. Which State's Law Applies?

Assuming all three prongs of the *PLT* test are satisfied, the last step in the analysis is determining which state's law applies. Under the OCSLA, courts are to apply the civil and criminal laws of the "adjacent state," defined as the state that would house the seabed or structure in question if the state's boundaries were extended seaward toward the outer margin of the outer continental shelf.[13] Accordingly, if deepwater drilling operations are conducted off the coast of Texas, and the *PLT* test is met, Texas law will apply to supplement federal law. If the operations are conducted off the coast of Louisiana, Louisiana law will apply in the same fashion.[14]

IV. Looking Forward

What can we make of this academic exercise, and why is it important? As anyone associated with the legal battles being fought all along the Gulf Coast in the aftermath of Deepwater Horizon can tell you, contracts are important.[15] They allocate risk, they often determine the scope of liability and potential damages, and they are supposed to reflect a bargained-for agreement between the parties. But in order for that to occur, you must know whether the terms of your contracts are valid, enforceable, and applicable under the relevant law. With respect to work occurring on the outer continental shelf, that analysis may be far less straightforward than just inserting a choice of law provision into the contract. Ensuring you get the bargain you actually want, therefore, means understanding the inner workings of the OCSLA.

ENDNOTES

1 Indeed, new permits must be issued before companies may resume deepwater drilling activities. As of the drafting of this article, only 13 companies had received notice from the Bureau of Ocean Energy Management, Regulation, and Enforcement that they may be able to recommence previously-approved operations.

2 "The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a); see id. at § 1301(a).

3 *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357 (1969).

4 895 F.2d 1043 (5th Cir. 1990).

5 *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 784–87 (5th Cir. 2009).

6 *Id*. at 787.

7 *Id*. at 787–89.

8 919 F.2d 313 (5th Cir. 1991).

9 *Id*. at 316 (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961)).

10 *Davis*, 919 F.2d at 316.

11 In *Grand Isle*, the Court noted that when the controversy is based in contract and not in tort, it is permissible to consider this second prong of the *PLT* test prior to turning to the situs analysis. *Grand Isle*, 589 F.3d at 789 n.1. Judge Garza's cutting dissent responds that the majority's focus-of-the-contract test muddles the distinction between the first two prongs of the analysis, making it "at best redundant, at worst irrelevant." *Id*. at 800 (Garza, J., dissenting).

12 The vast majority of case law focuses on whether the first two prongs of the analysis are met, and accordingly, the third prong is usually not in dispute.

13 43 U.S.C. § 1333(a)(2)(A) (2007).

14 This is generally a fairly straightforward analysis, particularly in tort cases where the location of the injury controls. But uncertainty may arise in contractual disputes spanning multiple jurisdictions, such as in the case of directional drilling across state boundaries. While issues such as these remain open as of the drafting of this article, the Fifth Circuit has recognized the dilemma. Judge Owen's dissent in *Grand Isle* asks, "do courts look to the geographic location of the underlying occurrence that gives rise to the contractual dispute, or should the contract's relationship to a geographic area be considered instead? If the contract is considered, there are numerous possibilities, from a geographic perspective. Should courts look to the area in which the contract contemplates that some, a substantial amount, or a majority of the work has been performed? Alternatively, should the question be where the work will be performed over the life of the contract? Should courts instead consider the location of the work the injured party had been performing or was about to perform? Should we look to which fixed structure the worker was en route in furtherance of the contract, or leaving, when injured?" *Grand Isle*, 589 F.3d at 805–06 (Owen, J., dissenting).

15 Indeed, the potential liability in connection with the explosion and subsequent oil spill is tremendous, and the key litigation issue from a practical standpoint will likely be whether the indemnity provisions contained in the various parties' contracts are enforceable.

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