

DEPECAGE IN THE CONTEXT OF INTERNATIONAL UPSTREAM OIL AND GAS CONTRACTS

S A H A R K A R I M I *

E V A R I S T U S O S H I O N E B O **

I. INTRODUCTION

A crucial aspect of international investment contracts is the law applicable to the contracts. This is particularly so in international upstream oil and gas contracts which often involve complex aspects and phases relating to exploration, production, shipping and refining of crude oil. The law governing upstream oil and gas contracts is usually stipulated in the contracts through a clause commonly referred to as ‘choice-of-law’ clause. Quite often, the law of the forum where an investment project is situated is chosen by the contracting parties as the governing law. However, the parties to an international upstream oil and gas contract can choose to apply different laws and regulations to different terms in the same contract

* LL.M. (Calgary), Faculty member of the University of Kharazmi, Tehran, Iran
Email: Karimi_Sahar@khu.ac.ir

** Professor, Faculty of Law, University of Calgary; Ph.D. (Osgoode Hall Law School, York University, Toronto).

in order to make the contract flexible and adaptable to prevailing circumstances.

The private international law concept called *dépeçage* is helpful where the contracting parties desire to apply different laws to different terms in their contract. The theory of *dépeçage* involves the application of different laws to various legal issues arising from legal disputes. *Dépeçage* enables the resolution of legal issues by engaging in a choice-of-law analysis on an issue-by-issue basis. *Dépeçage* has increasingly been applied in cases involving tortious conduct, air crash disasters, and punitive damages in the United States.¹ However, the application of *dépeçage* in the United States is more pronounced in air crash disaster litigation.² Air crash disasters are “fertile ground for the application of *Dépeçage*” because they often traverse multiple states.³ The contract between the airline and the passenger may be entered into in one state while the air crash may occur in another state. As well, the victims of the air crash may be resident in states other than the state where the contract was entered into or where the air-crash occurred. Thus, the laws of multiple states may be engaged in one air crash litigation; hence these cases have had an important role in the development of the theory of *dépeçage* in the United States.⁴

Furthermore, the Restatement (Second) of Conflict of Laws in the United States not only provides a framework for the application of *dépeçage* by prescribing a choice-of-law analysis for each issue, but also enumerates the factors for determining the law governing each issue.⁵ The Restatement (Second) states that “(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties”.⁶ The Restatement articulates the factors to be considered

¹ See Christopher G Stevenson, “*Dépeçage*: Embracing Complexity to Solve Choice-of-Law Issues” (2003-2004) 37 Indiana Law Review 303 at 311-317. See also “Availability of Punitive Damages: *Dépeçage*” (March 26, 2008) online: *FindLaw* <<https://corporate.findlaw.com/litigation-disputes/availability-of-punitive-damages-depeceage.html>.> [perma.cc/B8YG-72HZ].

² See *In Re Disaster at Detroit Metropolitan Airport* (1987), [1989] 750 F. Supp. 793; *In Re Air Crash Disaster Near Roselawn* (1994), [1996] 926 F. Supp. 736.

³ Stevenson, *supra* note 1 at 311.

⁴ *Ibid.*

⁵ *Ibid* at 308.

⁶ *Restatement (Second) Conflict of Laws*, 2d (St Paul: American Law Institute Publishers, 1971;

in determining the applicable law as “(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.”⁷ These factors are evaluated according to their relative importance with respect to the particular issue in question.⁸

Dépeçage is particularly relevant in the context of international investment contracts, such as upstream oil and gas contracts, because these contracts often involve developing countries and foreign investors. By upstream oil and gas contracts we mean contracts governing the operational phases of oil and gas production including the processes, mechanisms and technologies for the exploration and production of oil and gas. Upstream oil and gas contracts often involve complex and multifaceted aspects which the laws of host developing countries may not be adequately equipped to handle. In other instances, foreign investors based primarily in the economically advanced countries may prefer the law of their home countries as the law governing their investment in developing countries in order to ensure the security and stability of their investments. Moreover, some developing countries that produce oil and gas are politically unstable leading to frequent changes in the laws and regulations governing investment projects. Foreign investors may attempt to ameliorate these risks by adopting different laws for different aspects of their investment contracts. Foreign investors can choose the law of a foreign state as the law governing aspects of their investment contracts, thus avoiding the risk of abrupt changes to the law of the host country.

In addition, upstream oil and gas projects not only have a long gestation period involving prospecting, exploration and production phases, but they also require large amount of capital investment. Thus, investors are often reluctant to invest in oil and gas projects unless the host government provides contractual and statutory guarantees or assurances regarding the stability of the legal and fiscal regimes governing the projects.⁹ In order to

revised 1986 and 1988), s. 145.(1)

⁷ *Ibid.* s. 145.(2).

⁸ *Ibid.* s 145.(2).

⁹ See Evaristus Oshionebo, “Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries” (2010) 10 *Asper Rev. Int’l Bus & Trade L.* 1 [hereafter “Stabilization Clauses”]; Peter D. Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford: Oxford University

make their countries attractive destinations for foreign investment, developing countries usually provide such guarantees in the forms of ‘stabilization clauses’, choice of law clauses, and arbitration clauses. As discussed below, choice of law clauses are the predicates for *dépeçage* as they enable the contracting parties to choose different governing laws for different parts of their contract. In this sense, *dépeçage* helps to assuage and pacify investors’ fears regarding the stability of domestic legal regimes in developing countries. Thus, *dépeçage* could aid developing countries in attracting foreign investments.

Dépeçage is helpful to developing countries in another sense; namely, the introduction and adoption of sustainable and state-of-the-art technologies in oil and gas operations. An upstream oil and gas contract may provide that domestic aspects of oil and gas operations (such as labour) shall be governed by the law of the host country, while the operational aspects (such as oil field operations) shall be governed by the law of a foreign (developed) country chosen by the parties. In such instances, the investor would be obliged to adopt modern and environmentally friendly technology that it may not otherwise have adopted for its operations in the host developing country. The adoption of such modern technology would aid the host developing country in promoting the sustainable exploitation of its oil and gas resources.

This article attempts to determine the extent to which *dépeçage* may be applied in the context of international upstream oil and gas contracts. We have chosen upstream oil and gas contracts as our primary focus in this article for the simple reason that upstream oil and gas contracts often tend to be international in nature as they involve contracting parties from different and differing jurisdictions. Moreover, the component parts of international upstream oil and gas contract have the capacity to be severable since they consist of different and separable parts, such as engineering,

Press, 2010). See also Margarita T.B. Coale, “Stabilization Clauses in International Petroleum Transactions” (2002) 30:(2) *Denver J Int L & Policy* 217 at 221 (arguing that in order to avoid the financial and other risks involved in oil and gas operations, companies frequently ask for assurances of stability of the legal and fiscal regimes governing oil and gas projects); Mario Mansour & Carole Nakhle, “Fiscal Stabilization in Oil and Gas Contracts: Evidence and Implications” (January 2016) online: (PDF) *The Oxford Institute for Energy Studies*, (arguing that “For investors, fiscal stability therefore secures the basis on which investment decisions are originally made”), <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Fiscal-Stabilization-in-Oil-and-Gas-Contracts-SP-37.pdf>>. [perma.cc/V5V4-BW2M].

procurement, construction, installation, exploration, production, maintenance, operation, financing, and insurance. The article notes that dépeçage is already occurring in the oil and gas industry through contractual clauses requiring the adoption of 'good oil field practices' as well as arbitration clauses. It argues that dépeçage has the potential to enhance the stability of contractual relationships by enabling parties to choose different governing laws for different parts of their contract. Through dépeçage the contracting parties may be better able to resolve conflicts by applying principles of domestic law, foreign law and private international law that suit the best interest of the parties. In addition, the adoption of the concept of dépeçage could help the contracting parties to avoid instances of legal impossibilities.

II. MEANING AND SCOPE OF *DEPECAGE*

In the French language dépeçage means cutting up or carving up an object.¹⁰ In the context of legal disputes, dépeçage is a rule in conflicts of law to the effect that "the laws of different states may be applied to different issues in the same dispute."¹¹ Dépeçage involves an issue-by-issue analysis whereby "if a case (or, more precisely, a cause of action) comprises more than one issue on which the substantive laws of the involved states conflict, each issue should be subjected to a separate choice-of-law analysis."¹² Thus, dépeçage arises where, based on such issue-by-issue analysis, the court applies the laws of different states, provinces or countries to the different issues arising from a case.¹³ In practice, dépeçage means the splitting of a case into component parts whereby each issue is compartmentalized and resolved under different governing laws.

Although dépeçage generally involves an issue-by-issue analysis of legal disputes, dépeçage is not susceptible to a precise definition as academic literature on the doctrine ascribe both narrow and broad scope to dépeçage. In the narrow sense, dépeçage means the application of the substantive laws

¹⁰ Collins Robert, *French English Dictionary*, 4th ed (United Kingdom: Harper Collins Publishers, 1995) at 233.

¹¹ "Depeçage" online: *Merriam-Webster Legal Dictionary*, <<https://www.merriam-webster.com/legal/depeçage>> [perma.cc/66L9-7FUA].

¹² Symeon C. Symeonides, "Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect" (2014) 45 *University of Toledo Law Review* 751 at 755.

¹³ *Ibid.* at 755.

of different jurisdictions (states or countries) to different issues in the same cause of action.¹⁴ Hence, *dépeçage* is said “to be present only when the rules of different states are applied to govern different substantive issues” in the same action.¹⁵ In the more restrictive sense, *dépeçage* is confined “to situations where by applying the rules of different states to different issues a result is reached which could not be obtained by exclusive application of the law of any one of the states concerned.”¹⁶ According to Symeonides,

dépeçage occurs only when the court applies the substantive laws of different states to the same *cause of action*, not the same case, such as when, in a contract cause of action, the court applies the law of State A to issues of form and the law of State B to issues of capacity. If the case consists of two causes of action, e.g., a contract cause of action, to which the court applies the law of State A, and also a tort cause of action, to which the court applies the law of State B, this phenomenon is not, properly speaking, *dépeçage*.¹⁷

Symeonides posits further that where a “case encompasses two actions against two unrelated defendants, such as when a car passenger injured in a two-car collision sues both her host-driver and the driver of the other car”, *dépeçage* cannot properly be said to have occurred “[i]f the court applies the law of State A to the first action (e.g., the parties' common domicile) and the law of State B (e.g., the accident state) to the action against the other driver”.¹⁸

In the broad sense, *dépeçage* covers both substantive and procedural aspects of legal disputes. In this sense, *dépeçage* occurs where the contracting parties provide for the substantive laws of one jurisdiction as the governing law of the contract while at the same time adopting the procedural rules of a different jurisdiction for adjudicating disputes arising from the contract. For example, *dépeçage* is applied in China principally in the context of the splitting of procedural and substantive issues.¹⁹ According to Allan Ong, in

¹⁴ *Ibid.* at 757.

¹⁵ Willis L.M. Reese, “*Dépeçage*: A Common Phenomenon in Choice of Law” (1973) 73 *Columbia Law Review* 58 at 58.

¹⁶ *Ibid.* at 58.

¹⁷ Symeonides, *supra* note 12 at 757.

¹⁸ *Ibid.* at 757-8.

¹⁹ Allan Verman Yap Ong, “Issues in the Application of *Dépeçage* in Chinese Private International Law” (2009) 8(3) *Chinese Journal of International Law* 637 at 645.

its broad sense *dépeçage* “finds its way in Chinese law insofar as it covers situations where the substantive law of one State and the procedural law of another State (in the latter case, usually Chinese law) apply in the adjudication of a contractual dispute.”²⁰ Elaborating further, Ong observes that in China, “[a] contract may therefore call for US law to govern, but when a dispute arises in this contract and the case is brought, the fact that the parties chose US law as the applicable law will not mean that courts will use US procedural law. In such case, if the dispute is brought to Chinese courts, then Chinese procedural law will apply in the proceedings. As such, *dépeçage* is applied in China.”²¹

Dépeçage is neither limited to substantive law nor procedural law; rather it encompasses both substantive and procedural laws. This is especially so in international investment contracts involving parties from different jurisdictions. Veijo Heiskanen captures this situation best by arguing that:

... *dépeçage* in investment treaty arbitration is by no means limited to the law governing the arbitration agreement. Indeed, international arbitration, as a field of legal practice, is based on certain “systemic” *dépeçage*: the laws applicable to the arbitration agreement, the arbitral proceedings, the arbitral tribunal, and finally, the merits of the claim or the subject matter of the dispute are frequently different in one respect, if not in several respects. In other words, *dépeçage* in the broad sense is inherent in the very nature of international arbitration as legal practice. This is particularly the case with respect to international investment arbitration, which usually raises a mixed set of issues under both public and private international law. But quite apart from such “systemic” *dépeçage*, the bifurcation or splitting of applicable laws also tend to arise as an issue within each of these fields. For example, it arises not only within the law governing the arbitration agreement, but also within the law governing the arbitral proceedings, the law governing the arbitral tribunal, and the law governing the merits of the claim, or the subject matter of the dispute.²²

This article adopts the broad meaning of *dépeçage* not only because international upstream oil and gas contracts often involve contracting parties from different jurisdictions but also, these contracts contain complex aspects which may not be adequately catered to by the laws of one jurisdiction. Moreover, the broad conception of *dépeçage* is better suited to international oil and gas contracts since these contracts often raise domestic and

²⁰ *Ibid.* at 645.

²¹ *Ibid.* at 645.

²² Veijo Heiskanen, “Forbidding *Dépeçage*: Law Governing Investment Treaty Arbitration” (2009) 32:(2) *Suffolk Transnational Law Review* 367 at 395-6.

international issues; have a duration that spans decades; involve constantly evolving technology; contain provisions regarding international arbitration; and they have parts that are separable from the contract itself.

III. CHOICE OF GOVERNING LAW IN INTERNATIONAL INVESTMENT CONTRACTS

‘Choice of law’ and *dépeçage* are separate but interrelated and complementary concepts. Choice of law refers to the ability of the contracting parties to freely choose the law or laws governing their contract, while *dépeçage* is the practical manifestation of the exercise of the freedom of choice by the contracting parties. As discussed below, *dépeçage* arises primarily under two scenarios; namely, (1) instances where the contracting parties have expressly chosen different governing laws for different issues arising from the contract, and (2) instances where, in the absence of a choice of law clause in a contract, *dépeçage* is implied and applied by a judge or arbitral tribunal based on the circumstances of the case. In the context of the former scenario, *dépeçage* depicts the choice of different governing laws for different issues arising from a contract; hence *dépeçage* could be said to be partly an offshoot of choice of law. Thus, this section of the article briefly discusses choice of governing law in international investment contracts in order to lay a foundation for, and contextualize, subsequent discussion regarding *dépeçage* by choice.

The law applicable to a contract is crucial because it not only shapes the way that dispute-resolving tribunals interpret the contract, but also helps to determine whether contractual obligations have been discharged by breach, frustration or completion of the obligations stipulated in the contract.²³ A determination of the loss and damages arising from breach of contract also depends on the applicable governing law, as demonstrated by *Drew Brown Ltd. v. The Orient Trader*,²⁴ which involved a claim for damages for breach of a contract of carriage containing a choice-of-law clause requiring the contract

²³ Stephen Antle & Jennifer K. Choi, “Choice of Contractual Governing Law and Dispute Resolution Jurisdiction”, in *Mining Agreements: Contracting for Goods & Services* (September 2015) Rocky Mt L Fdn 1 at 2, <[<https://rmmlf-casemakerlibra.com.ezproxy.lib.ucalgary.ca/home/index.aspx?pa=Mining|International&st=RMMLF&b=Mining%20Agreements-%20Contracting%20for%20Goods%20amper\\$cnt%20Services%20\(Sep%202015\)>](https://rmmlf-casemakerlibra.com.ezproxy.lib.ucalgary.ca/home/index.aspx?pa=Mining|International&st=RMMLF&b=Mining%20Agreements-%20Contracting%20for%20Goods%20amper$cnt%20Services%20(Sep%202015))>

²⁴ *Drew Brown Ltd v The ‘Orient Trader’*, [1974] SCR 1286.

to be construed in accordance with the law of the United States of America. The Supreme Court of Canada held that:

As the parties gave legal force to their agreement in accordance with the law of the United States of America, that is the proper law of the contract and the law by which, in accordance with their own choice, the legal rights and remedies of the parties, in relation to the carriage of the appellant's cargo, are to be determined.²⁵

Moreover, the governing law may delineate the rights and obligations of third-party beneficiaries under a contract, as well as their ability to enforce their rights under the contract.²⁶ In essence, parties to international investment contracts can provide predictability and certainty in their contractual relationships, including the rights and obligations of the contracting parties, by inserting choice-of-law provisions and choice of jurisdiction clauses in their contracts.²⁷ Furthermore, choice-of-law clauses could save time and resources as they enable parties to avoid “lengthy and expensive battles over personal and subject-matter jurisdiction” which may arise in the absence of choice-of-law clauses.²⁸

It is generally recognized that contracting parties have a right to determine the applicable governing law at the time of entering into the contract. The parties' autonomy is a generally accepted principle of private law, which allows parties to choose the applicable governing law for their contract.²⁹ The Judicial Committee of the Privy Council observed in 1939 that “[i]t is now well settled that by English law ... the proper law of the contract ‘is the law which the parties intended to apply.’ That intention is objectively ascertained and if not expressed will be presumed from the terms of the contract and the relevant surrounding circumstances.”³⁰ The Supreme Court of Canada restated this position in *Drew Brown Ltd. v. The Orient Trader* where it held that parties to a contract are entitled “to choose the law that

²⁵ *Ibid.*, at 1288.

²⁶ Antle & Choi, *supra* note 23 at 3.

²⁷ *Ibid.*

²⁸ Peter D. Ehrenhaft, “Effective International Commercial Arbitration” (1977) 9 *Law & Policy of International Business* 1191 at 1192.

²⁹ Mohammad Reza Baniassadi, “Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?” (1992) 10 *International Tax & Business Lawyer* 59 at 60.

³⁰ *Vita Food Products, Inc. v. Unus Shipping Company Limited (In Liquidation)* [1939] 2 D.L.R. 1 at 8. [*Vita Food Products*]

will govern the interpretation and application of the terms of their bargain.”³¹

At the international level, the European Community *Convention on the Law Applicable to Contractual Obligations* (“Rome Convention”) recognizes freedom of choice of governing law by providing that “a contract shall be governed by the law chosen by the parties” provided the choice is “expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.”³² In fact, the contracting parties can, by choice, “select the law applicable to the whole or a part only of the contract.”³³ Similarly, the *Inter-American Convention on the Law Applicable to International Contracts* (“Inter-American Convention”) expresses the “scope of the applicable law” and provides that the law applicable to a contract shall govern the performance of the obligations specified under the contract.³⁴ Under the Inter-American Convention, the law applicable to a contract governs principally “its interpretation; the rights and obligations of the parties; the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury and compensation; the various ways in which the obligations can be performed, and prescription and lapsing of actions; and the consequences of nullity or invalidity of the contract.”³⁵ Accordingly, choice-of-law clauses are often inserted in international investment contracts, including upstream oil and gas contracts.

IV. TWO APPROACHES TO THE THEORY OF *DEPEÇAGE*

A. *Dépeçage* by Choice

As discussed above, parties to a contract can freely choose their desired or preferred governing law. In fact, based on the parties’ autonomy,

³¹ *Drew Brown Ltd v The ‘Orient Trader’*, [1974] SCR 1286 at 1318.

³² Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980, 80/934/EEC), art. 3. [Rome Convention]

³³ *Ibid.*

³⁴ Inter-American Convention on the Law Applicable to International Contracts (17 March 1994, Organization of American States), 33 ILM 732, art. 14.

³⁵ *Ibid.* art 14

contracting parties can choose more than one applicable governing law. The freedom to choose more than one governing law enables the contracting parties to selectively adopt and apply the theory of dépeçage to their contract. The selective application of dépeçage (that is, 'dépeçage by choice') occurs where the parties to a contract choose to apply different governing laws to different parts of the contract either at the time of entering into the contract or through subsequent variation to the contract. For example, the contracting parties can agree on the application of the laws of one jurisdiction to a specific portion of their contract and select the laws of a different jurisdiction for other parts of the contract.

Writing in the context of international project financing, Kimmo Mettala has observed that "the parties can in principle divide the various rights and obligations arising out of the loan agreement into two (or more) categories and stipulate that a different law shall govern matters belonging to each category."³⁶ It is likewise possible for the parties to international upstream oil and gas contracts to split their contracts into several parts with each part subject to a different governing law. For example, the parties may prefer that parts of the contract dealing with technology should be governed by the laws of a technologically advanced country, while the parts dealing with labour rights and social issues are governed by the laws of the host country. The splitting of various aspects of the contract may enable the contracting parties to maintain the economic equilibrium struck at the time of the contract, while also promoting certainty of the investment environment.

The right of contracting parties to adopt dépeçage is implicitly recognized under international treaties and conventions. For example, the Inter-American Convention provides that the governing law expressly selected by the contracting parties shall govern the contract and the "said selection may relate to the entire contract or to a part of same."³⁷ The fact that this convention allows parties to select the governing law for a part of their contract implicitly enables parties to apply the theory of dépeçage. In other words, the Inter-American Convention recognizes the selective application of the theory of dépeçage through choice-of-law clauses. As well, by virtue of article 3.(1) of the Rome Convention, the parties to a contract

³⁶ Kimmo Mettala, "Governing-Law Clauses of Loan Agreements in International Project Financing" (1986) 20(1) *International Lawyer* 219 at 228.

³⁷ *Inter-American Convention*, *supra* note 34, at 7.

shall determine the governing law for the whole or only a portion of the contract.³⁸ Thus, although article 3.(1) of the Rome Convention does not expressly mention *dépeçage*, it encompasses the theory of *dépeçage* by enabling the parties to choose the governing law to be applied to the whole or a portion of the contract.³⁹ Furthermore, the *Convention on the Law Applicable to Contracts for the International Sale of Goods* (“the Hague Convention”)⁴⁰ not only recognizes the parties’ ability to choose the governing law for the whole or part of the contract but also enables the contracting parties to change the governing law after the conclusion of the contract.⁴¹ Under the Hague Convention “[t]he parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties.”⁴² In essence, while the Hague Convention does not expressly mention *dépeçage*, it enables contracting parties to adopt the concept of *dépeçage* by choosing different governing laws for the component parts of their contract.⁴³

B. Implied *Dépeçage*

A second instance where the doctrine of *dépeçage* may be applied in contracts occurs in situations where the contracting parties did not expressly provide a choice-of-law clause but based on the circumstances and context of the contract, the court (or arbitral tribunal) believes that different governing laws should apply to the issues in dispute. This is apparent in *Vita Food Products, Inc. v. Unus Shipping Company Limited* where the Privy Council

³⁸ *Rome Convention supra* note 32, art. 3(1) stating that “A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty 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 a part only of the contract.”

³⁹ *Ibid* art. 3.(1).

⁴⁰ *Convention on the Law Applicable to Contracts for the International Sale of Goods* (The Hague, 22 December 1986). [Hague Convention]

⁴¹ *Ibid*, art 7(1): “A contract of sale is governed by the law chosen by the parties. The parties’ agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.”

⁴² *Ibid*, art. 7.(2).

⁴³ *Ibid*, art 7.

observed that if the parties to a contract do not expressly stipulate the governing law, the parties' intention regarding the governing law "will be presumed from the terms of the contract and the relevant surrounding circumstances."⁴⁴ For example, a contract may be executed in one jurisdiction but its performance may be in a different jurisdiction, thus potentially raising issues that traverse multiple jurisdictions. As well, arbitrators may be compelled to apply different laws to different aspects of a legal dispute where, for example, the parties provided an arbitration clause, but the clause does not stipulate the procedural rules governing the arbitration. In such instances, arbitrators can apply the procedural rules of the forum or place of adjudication (that is, the *lex fori*) even though those rules are different from the rules of the place where the contract was made, or the laws chosen by the parties as the governing law for the contract.⁴⁵

Article 7 of the Inter-American Convention appears to allude to this when it states that the governing law that has been expressly selected by parties shall govern the contract and "in the event that there is no express agreement, [the governing law] must be evident from the parties' behavior and from the clauses of the contract, considered as a whole."⁴⁶ Likewise, the Hague Convention anticipates 'implied dépeçage' by providing that the parties' agreement on the choice of governing law "must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract."⁴⁷ The Hague Convention allows a court to imply dépeçage where it is "clearly demonstrated by the terms of the contract and the conduct of the parties" that the contracting parties intended different laws to govern different aspects of their contract.

Upstream oil and gas contracts are significant agreements; thus, parties are often aware of the importance of the applicable governing law. Parties to these contracts usually choose the applicable governing law(s) at the time of their agreement. However, there are instances where parties to such contracts have not expressly determined the applicable governing law. To resolve disputes in these instances, the court, arbitrator or other tribunals must first

⁴⁴ *Vita Food Products*, *supra* note 30 at 8.

⁴⁵ Vitek Danilowicz, "The Choice of Applicable Law in International Arbitration" (1986) 9 *Hastings International & Comparative Law Review* 235 at 238.

⁴⁶ *Inter-American* *supra* note 34, art. 7.

⁴⁷ *Hague Convention*, *supra* note 40, art. 7.(1).

identify the applicable governing law.⁴⁸ When parties do not express their desired governing law, judges or arbitrators attempt to find an implicit agreement of the parties on the applicable law.⁴⁹ If there are no expressed common intention of the parties, a judge or tribunal may select the most related and closest governing law based on the surrounding circumstances of the contract.⁵⁰ Here, judges and arbitrators can possibly adopt the theory of *dépeçage* in their choice-of-law analysis.

Thus, in cases where the contracting parties neglect to provide a choice-of-law for their contract, courts and arbitral tribunals may yet be able to apply different governing laws to different issues arising from the contract. For example, under the Rome Convention, where the contracting parties fail to choose the law applicable to their contract, “the contract shall be governed by the law of the country with which it is most closely connected”, although “a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.”⁵¹ For this purpose,

... It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.⁵²

Based on this provision, courts and arbitrators can apply the laws of one country to an issue because that country is the most closely connected to that issue, while at the same time applying the laws of a different country to other issues because that country is the most closely connected to those other issues.

Judges and arbitral tribunals can also unilaterally apply non-chosen governing laws to the issues arising from a contract if mandated by statutes

⁴⁸ Antle & Choi, *supra* note 23.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Rome Convention *supra* note 32, art. 4.1.

⁵² *Ibid.* art. 4.2.

or treaties to do so. This is particularly the case where the laws of the host country prescribe certain mandatory rules which the contracting parties cannot legally displace through choice-of-law clauses in a contract. Article 7 of the Rome Convention envisages such situation by providing that:

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Thus, even if the contracting parties chose the law of a foreign country as the governing law, the mandatory laws of the host country must be applied to the relevant parts of the contract.

V. SUITABILITY OF *DEPECAGE* FOR INTERNATIONAL UPSTREAM OIL AND GAS CONTRACTS

In the context of oil and gas development, upstream operations refer to the process and mechanisms for the exploration and production of oil and gas. Upstream operations require “various forms of data and management information, production accounting, well logs and other technical devices.”⁵³ Upstream oil and gas operations are conducted based on various contractual frameworks, including concessions (licences and leases); production sharing agreements (also known as production sharing contracts); joint venture agreements; joint operating agreements; service contracts; and Farm-out Agreements.⁵⁴ The nature and forms of oil and gas agreements may differ according to local laws and regulations as well as the parties’ preferences. For example, in the United States and Canada, most oil and gas agreements are

⁵³ Soala Ariweriokuma, *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (London & New York: Routledge, 2009) at 67.

⁵⁴ See Emmanuel Laryea, “Contractual Arrangements for Resource Investment” in Francis N. Botchway, ed., *Natural Resource Investment and Africa’s Development* (Cheltenham, UK: Edward Elgar Publishing Ltd., 2011) 107 at 108-123.

in the form of leases.⁵⁵ Elsewhere, oil and gas agreements are mainly concession agreements, production sharing agreements, joint operating agreements, or service contracts.⁵⁶ In this section of the article, we offer reasons why parties to international upstream oil and gas contracts may want to adopt *dépeçage* by choosing different governing laws for different aspects of their contract.

A. International Nature of Upstream Oil and Gas Contracts

Upstream oil and gas contracts are often international contracts. The oil and gas projects constituting the subject-matter of these contracts are not necessarily located in the same country where the project proponents are located. The international nature of oil and gas contracts is more apparent in developing countries where ownership of oil and gas resources is vested in the government in trust for the citizens of these countries. In South Africa, for example, “mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.”⁵⁷ As the sole owner and custodian of all oil and gas resources within its territory, only the government of developing countries can grant the right to explore and produce oil and gas. Thus, oil and gas contracts in developing countries manifest in the form of investor-state contracts.

This unique relationship between host developing countries and oil and gas companies needs special consideration in the process of choosing the appropriate governing laws. In fact, given the heavy dependence on oil and gas revenues by developing countries, upstream oil and gas contracts are considered a national treasure from the perspective of the host developing countries. Hence, host countries desire that oil and gas projects in their jurisdictions be governed by their domestic laws. However, the domestic laws of host countries might not be the most desirable for other parties involved in upstream oil and gas contracts who are often foreign investors. The adoption of the concept of *dépeçage* in these types of contracts would enable

⁵⁵ Charlotte J. Wright & Rebecca A. Gallun, *International Petroleum Accounting* (Tulsa: PennWell, 2005) at 26.

⁵⁶ *Ibid.*

⁵⁷ *Mineral and Petroleum Resources Development Act* (S Afr) 28 of 2002, s. 3.(1).

the parties to apply their preferred governing law to various aspects of the contract, thus making the process more convenient and satisfying for them.

B. Separability of Upstream Oil and Gas Contracts

Upstream oil and gas contracts have the capacity to be separable, as they consist of different and severable parts. Generally, these contracts contain different component parts such as technical and technological part (including transfer of technology to host developing countries); operations (including minimum work requirements, work practices, and insurance of facilities and assets); financial and fiscal aspects (including financing of projects in the case of joint venture projects, rate of taxes and royalty, fees and other charges, investment incentives and exemptions from import duty and currency restrictions); legal aspects (such as provisions regarding the obligations of the parties, determination of commerciality, methods for sharing crude oil in the case of production sharing arrangements, dispute resolution, applicable governing law, and grounds for termination of contract); labour and social aspects (such as employment and training of citizens of the host country, and procurement of domestic goods and services); and environmental aspects including health and safety of employees and host communities.

Although upstream oil and gas contracts contain various separable parts, these various parts must be implemented symmetrically in order to effectuate the contractual intention of the parties. However, each of these component parts may function better under a different governing law. Thus, applying different governing laws to various issues arising from the component parts of upstream oil and gas contract could give rise to a result that might not otherwise be achievable by the exclusive application of a sole governing law.

C. Long-Term Duration of Upstream Oil and Gas Contracts

Upstream oil and gas projects have time-consuming phases such as searching for seismic data, drilling of exploratory wells, installation of production and storage facilities, and actual production of oil and gas.⁵⁸ These stages typically take several years to accomplish and, in fact, the production phase could last for several decades. Hence, in reality, upstream

⁵⁸ Ariweriokuma, *supra* note 53 at 67.

oil and gas contracts are long-term agreements that exist for long periods such as twenty-five years or as long as the lease area contain commercial reserves of oil and gas. The long-term nature of oil and gas contracts is evident in article 4.1(1) of the agreement on the joint development and production sharing for the Azeri and Chirag Fields in Azerbaijan which provides that “the Contract term shall commence on the Effective Date and shall continue for a period of thirty (30) years after the Effective Date.”⁵⁹ In fact, many upstream oil and gas contracts are renewed upon expiry of the initial term of the contract.

The long-term nature of upstream oil and gas contracts can create difficulties in determining costs and expenses during the execution of the contract. Furthermore, the specific governing law that the parties to an upstream oil and gas contract agreed upon at the time of entering into the contract may change over time. Changes in the governing law might be such that application of the governing law to portions of the contract is no longer in the interest of the parties. Hence, the contracting parties may wish to split their contract into several parts and choose different governing laws from the onset, especially the laws of jurisdictions with well-established legal principles.

D. Complex Nature of Upstream Oil and Gas Contracts

Parties to international upstream oil and gas contracts may want to choose different governing laws for the component parts of their contracts due to the complex nature of these contracts. Oil and gas transactions involve prospecting, exploration and production phases. These phases may be represented by a single contract or by separate contracts such as an exploration contract and a production contract. The conflation of these various phases could become problematic particularly where the initial projections at the time of execution of the contract are not borne out by the result of actual prospecting or exploration which may indicate more or less oil reserve than initially projected by the parties. Even where the phases are separated, the parties may desire to apply different laws to different parts of

⁵⁹ *Agreement on the Joint Development and Production Sharing for the Azeri and Chirag Fields and the Deep Water Portion of the Gunashli field in the Azerbaijan Sector of the Caspian Sea*, (20 September 1994), art 4.1(a) online (PDF): HSS: *The Extractive Industries Transparency Commission* <http://files.hssk.gov.az/psa/doc_acg_psa_en.pdf> [perma.cc/NN4N-J8CS].

their contract. For example, the environmental aspects of the contract may be governed by domestic law, while parts of the contract dealing with technological matters may be governed by the laws of another jurisdiction.

As well, oil and gas contracts may provide for the transportation of crude oil through pipelines traversing several international jurisdictions. Cross-border pipelines consist of “very long trunk lines, often with a few different entry and exit points along the pipeline.”⁶⁰ Because these pipelines “cross more than one State, there are many complex legal and political issues involved” in the construction and utilization of the pipelines.⁶¹ A major legal issue arising from cross-border pipelines is the law applicable to the pipelines. While parties can resolve this issue through choice-of-law provisions, the selection of the laws of one country or jurisdiction as the governing law may not be acceptable to the other Countries through which the pipeline traverse. These countries may legitimately feel that the exclusion of their domestic laws could adversely affect the benefit they would derive from the pipeline. They may also be concerned that the non-application of their laws to the pipeline could diminish their ability to regulate the portion of the pipeline that passes through their territory. To assuage these legitimate concerns, the contract can provide multiple governing laws for the pipeline such that the laws of each of these countries govern the portion of the pipeline in its territory.

Moreover, international oil and gas contracts often raise a mixture of substantive issues involving domestic law and international law. Some aspects of oil and gas contracts are purely domestic while other aspects, particularly those relating to technology and oilfield practices, are either international in nature or better suited for the laws of the advanced Western countries, the home countries of most of the companies operating in the oil and gas industry. For example, given the gap in technological expertise and knowledge between developing countries and the economically advanced countries, a contractual clause that enjoins a company to adopt prevailing technology would be more effective if the law chosen by the parties for this aspect of the contract is the law of a developed country. It would be detrimental to the interest of the host developing country if such a clause is governed by the laws of the host country. Because prevailing technology in

⁶⁰ Lucille De Silva & Justyna Bremen, “Oil and Gas Transportation Agreements” in Anthony Jennings, ed., *Oil and Gas Production Contracts* (London: Thomson Reuters Legal Ltd., 2008) 149 at 157.

⁶¹ *Ibid.* at 157.

developing countries usually lag far behind the technology in developed countries, the interpretation of this clause based on the domestic laws of the host developing country means that oil and gas companies can adopt cheap technology in the host developing country at the expense of the environmental wellbeing of citizens. Conversely, if this clause is interpreted based on the laws of a developed country, the technology to be adopted by the company for its operations in the host developing country is the technology prevailing in the chosen developed country. This means that state-of-the-art technology, including environmentally friendly technology, would be adopted by the company, thus promoting environmental protection in the host developing country.

VI. PRACTICAL USE OF *DEPEÇAGE* IN INTERNATIONAL UPSTREAM OIL AND GAS CONTRACTS

In this section of the article we present evidence that, despite the lack of specific reference to *dépeçage* in upstream oil and gas contract, *dépeçage* is being used unwittingly in these types of contracts. International upstream oil and gas contracts usually contain clauses requiring companies to adopt 'good oil field practices' while also prescribing the governing law for the contract as the laws of the host country. 'Good oil field practices' are contractually defined as the practices commonly adopted in foreign and economically advanced jurisdictions, meaning that while any issue relating to 'good oil field practices' must be resolved by applying the laws of foreign jurisdictions, other parts of the contract are governed by the laws of the host country. As well, the contracting parties often split substantive issues from procedural issues and then deliberately choose to apply different laws to the substantive and procedural issues arising from the contract. Oil and gas contracts usually contain arbitration clauses requiring disputes to be settled in accordance with the rules of the arbitral body prescribed in the contract. The parties often elect to apply a different set of rules to the settlement of disputes, (for example, the rules of the International Center for the Settlement of Investment Disputes (ICSID)), while at the same time electing to apply the laws of the host country to substantive issues arising from the contract. In this sense, contractual clauses relating to 'good oil field practices' and arbitration clauses in oil and gas contracts exemplify the practical use of the theory of *dépeçage* in international upstream oil and gas contracts.

A. Application of *Dépeçage* through Clauses relating to ‘Good Oilfield Practices’

In most instances, host developing countries lack the technology and monetary power to exploit their abundant oil and gas resources.⁶² Most host developing countries do not have requisite technological expertise to prospect, explore and produce oil and gas resources in their territories. Hence, developing countries rely largely on foreign companies to exploit their oil and gas resources. However, the operations of foreign oil and gas companies in developing countries often cause severe physical damage to the environment as well as the health, economic, and social structure of local communities.⁶³ The adverse environmental impacts of oil and gas operations are accentuated in developing countries due to ineffective regulation and lack of enforcement of environmental standards.⁶⁴

Moreover, the laws of the host developing countries may not be fully developed to cater to the complex issues that often arise from oil and gas exploitation. Although there are certain aspects of upstream oil and gas operations that readily lend themselves to being governed by the domestic laws of host developing countries, such as labour and procurement of domestic goods and services, there are complex aspects of oil and gas operations that may be better managed and enforced through the application of foreign laws. For example, those aspects dealing with technology, especially environmentally friendly technologies, may be better governed by foreign laws such as the laws of the technologically advanced countries.

It is hardly surprising then that international oil and gas contracts between multinational corporations and developing countries are increasing adopting ‘good oilfield practices’ as the standard operating procedure for oil and gas exploitation. Although prescribed in oil and gas contracts, these operating practices and procedures in the oil and gas industry are drawn from industry guidelines such as the guidelines and standards of the International Association of Oil and Gas Producers and the American

⁶² Oshionebo, “Stabilization Clauses”, *supra* note 9 at 1.

⁶³ Alexandra S. Wawryk, “Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies” (2002) 20.(4) *Journal of Energy & Natural Resources Law* 402 at 402-3.

⁶⁴ Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) at 67-77.

Petroleum Institute.⁶⁵ International oil and gas contracts now commonly contain provisions regarding ‘good oilfield practices’, ‘best practices’, ‘best international practices’, ‘best practices of the oil industry’ or other similar phrases.⁶⁶ These phrases are industry terms that are mainly related to the methods of operations, avoidance of damage to the oil and gas-bearing strata, protection of the environment, protection of the health and safety of host communities, and conservation of oil and gas resource through the prevention of wasteful practices.⁶⁷

The phrase ‘good oilfield practices’ is generally thought to mean the practices that reasonably prudent oil and gas producers would adopt in comparable circumstances. It means the universally accepted processes and procedures for the sustainable production of oil and gas. For example, Brazil’s model concession Contract (2013) defines “best practices of the oil industry” as:

.... practices and procedures generally employed in the oil industry in the world, by prudent and diligent companies, subject to conditions and circumstances similar to those experienced with regard to appearance or relevant aspects of the Operations, aiming mainly to guarantee: (a) application of the best world Exploration and Production techniques in force; (b) conservation of oil and gas reserves, which implies the use of methods and procedures appropriate to maximize the recovery of hydrocarbons in a technical, economic and environmentally sustainable way, with the corresponding control of the decline of reserves and the minimization of losses on the surface; (c) operational safety, which requires the employment of methods and processes that ensure the safety of operations, contributing to the prevention of incidents; (d) preservation of the environment and respect to the people, which determines the adoption of technologies and procedures associated with the prevention and mitigation of environmental damage, as well as the control and environmental monitoring of the operations of Oil and Natural Gas Exploration and Production.⁶⁸

⁶⁵ Wawryk, *supra* note 63 at 404.

⁶⁶ Some scholars have argued that it would be better if the phrase ‘best oilfield practices’ were adopted and applied. See Emmanuel B. Kasimbazi, “Environmental Regulation of Oil and Gas Exploration and Production in Uganda” (2012) 30(2) *J Energy & Nat. Resources* L 185 at 217.

⁶⁷ R.E.S. Argyle, “Governmental Powers over Petroleum Recovery Rates - Offshore Western Australia” (1983) 15 *University of Western Australia Law Review* 14 at 22-23.

⁶⁸ *Concession Contract for Exploration and Production of Oil and Natural Gas*, Federative Republic of Brazil Ministry of Mines and Energy, Brazil, 2013, art. 1.3.28, <<https://resourcecontracts.org/contract/ocds-591adf2290683076/view#/pdf>> [perma.cc/XT8V-EPEP].

A similar definition is codified in statutes such as the *Petroleum (Submerged Lands) Act 1982* of South Australia which defines ‘good oil-field practice’ as “all those things that are generally accepted as good and safe in the carrying on of exploration for petroleum, or in operations for the recovery of petroleum, as the case may be.”⁶⁹ In the ensuing pages we analyze how the adoption of ‘good oilfield practices’ in oil and gas contracts leads to the application of dépeçage.

The Model Petroleum Agreement of Namibia (1998) provides that “[t]his Agreement, the interpretation thereof and any dispute arising thereunder or associated therewith shall be governed by and determined in accordance with the laws of Namibia.”⁷⁰ However, article 11 of this model agreement requires oil and gas companies to adopt ‘good oilfield practices’ in exploration and production activities in order to prevent or minimize environmental damage to the license area and adjoining or neighboring lands.⁷¹ The model agreement goes on to provide that the term ‘good oilfield practices’ “has the meaning assigned to it in section 1.(1) of the Petroleum Act.”⁷² Interestingly, section 1.(1) of the *Petroleum (Exploration and Production) Act* of Namibia defines ‘good oilfield practices’ as “any practices which are generally applied by persons involved in the exploration or production of petroleum in other countries of the world as good, safe, efficient and necessary in the carrying out of exploration operations or production operations.”⁷³ The effect of this provision is that, while disputes arising from the model agreement are to be resolved in accordance with the laws of Namibia, any issue revolving around whether or not a company adopted

⁶⁹ *Petroleum (Submerged Lands) Act 1982* (South Australia), 1982/033, s. 4.(1).

⁷⁰ *Model Petroleum Agreement* (The government of Namibia, Minister of Mines and Energy), 1998, clause 33, <https://resourcecontracts.org/contract/ocds-591adf-0557496060/view#/pdf> [perma.cc/RA7H-JR3S] [*Namibia’s Model Petroleum Agreement*]. See also *Petroleum Agreement between the Government of the Republic of Namibia and Signet Petroleum Limited, Cricket Investment (Pty) Ltd., National Petroleum Corporation of Namibia for Block 2914B* (June 2011), clause 34, <https://resourcecontracts.org/contract/ocds-591adf-6897637883/view#/pdf> [perma.cc/CEX9-TX28] [*Petroleum Agreement between Namibia and Signet*”]

⁷¹ *Namibia’s Model Petroleum Agreement*, *Ibid*, clause 11. See also *Petroleum Agreement between Namibia and Signet*, *Ibid*. clause 11.

⁷² *Namibia’s Model Petroleum Agreement* *Ibid*, clause 1.1(y). See also *Petroleum Agreement between Namibia and Signet*, *Ibid*. clause 1.1(cc).

⁷³ *Petroleum (Exploration and Production) Act 2 of 1991*, s. 1.(1).

‘good oilfield practices’ must be resolved in accordance with the practices generally applied in “other countries of the world”, presumably the technologically advanced countries. In other words, Namibian law is the governing law for the model agreement, but foreign law governs ‘good oilfield practices’ under the agreement. In this sense, Namibia’s model agreement incorporates the doctrine of *dépeçage*.

The Petroleum Contract between China National Offshore Oil Corporation, Primeline Energy China Limited and Primeline Petroleum Corporation is another example of a contract that adopts *dépeçage*.⁷⁴ This contract provides that Chinese law shall be the governing law but equally contains provisions that require adoption of international petroleum industry practices particularly where Chinese law does not cater to the issue in question.⁷⁵ Article 28.1 of this contract reads as follows:

The validity, interpretation and implementation of the Contract shall be governed by the laws of the People’s Republic of China. Failing the relevant provisions of the laws of the People’s Republic of China for the interpretation or implementation of the Contract, the principles of the applicable laws widely used in petroleum resources countries acceptable to the Parties shall be applicable.⁷⁶

As well, the contract expressly requires adoption of “international petroleum industry practice” in relation to other aspects of the contract including environmental protection and safety of the People’s Republic of China.⁷⁷ More specifically, the contract provides that:

In the course of performing the Petroleum Operations, the Operator shall abide by the laws, decrees, other rules and regulations with respect to environmental protection and safety of the People’s Republic of China and shall endeavor in accordance with the international petroleum industry practice to:

Minimize the damage and destruction to marine organisms and their living oceanic environments;

Control blowouts promptly and prevent or avoid waste or loss of Petroleum discovered in or produced from the Contract Area;

⁷⁴ Petroleum Contract between China National Offshore Oil Corporation and Primeline Energy China Limited, Primeline Petroleum Corporation for Contract Area 33/07 in the East China Sea of the People’s Republic of China (15 June 2012), <<https://resourcecontracts.org/contract/ocds-591adf6266688800/view#/pdf>> [perma.cc/44SM-LCH9].

⁷⁵ *Ibid*, art 28.1.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, art 8.6.

Prevent Petroleum from flowing into low pressure formations or damaging adjacent Petroleum-bearing formations;
Prevent water from flowing into Petroleum-bearing formations through dry holes or other wells, except for the purpose of secondary recovery;
Prevent land, forests, crops, buildings and other installations from being damaged and destroyed; and
Minimize the danger to personnel safety and health.⁷⁸

It is apparent from this contract that while Chinese law is the governing law in relation to issues relating to the validity, interpretation and implementation of the contract, a different realm of law (that is, ‘international petroleum industry practice’) is equally applicable to the contract. Hence, there is an explicit adoption of the theory of dépeçage through the use of two governing laws, viz, the laws of China and “the principles of the applicable laws widely used in petroleum resources countries acceptable to the Parties”.

Similarly, the petroleum contract between Ghana and Tullow adopts the concept of dépeçage by stipulating, on the one hand, that the governing law shall be the law of Ghana, while, on the hand, envisaging the application of foreign law to some aspects of the contract, including the contractor’s obligations and the penalty for failure to remediate pollution.⁷⁹ The contract provides that the Contractor shall exercise its rights and carry out its responsibilities in accordance with accepted petroleum industry practice, including taking appropriate steps to minimize ecological damage or destruction; control the flow and prevent the escape of petroleum; and prevent damage to onshore lands including trees, crops, buildings or other structures.⁸⁰ It provides further that, where petroleum-related pollution occurs the “Contractor shall, in accordance with accepted Petroleum industry practice, promptly take all necessary measures to control the pollution, to clean up Petroleum or other released material, or to repair, to the maximum extent feasible, damage resulting from any such

⁷⁸ *Ibid.* art. 8.6.

⁷⁹ *Petroleum Agreement among Government of the Republic of Ghana, Ghana National Petroleum Corporation and Tullow Ghana Limited, Sabre Oil and Gas Limited, Kosmos Energy Ghana HC in respect of the Deepwater Tano Contract Area* (dated March 10, 2006), arts. 17.4. & 26.1, <https://www.resourcecontracts.org/contract/ocds-591adf8934817155/view#/pdf> [perma.cc/BV68-3LUD] [hereafter “*Petroleum Agreement between Ghana and Tullow*”].

⁸⁰ *Ibid.* art. 17.4.

circumstances.”⁸¹ The contract goes on to prescribe the penalty for failure to control and remediate pollution by reference to international standards as follows:

If contractor does not act promptly so as to control, clean up or repair any pollution or damage GNPC [Ghana National Petroleum Corporation] may, after giving Contractor reasonable notice in the circumstances, take any actions which are necessary, in accordance with accepted international petroleum industry practice in the same or similar circumstances⁸²

The above provisions incorporate the private international law of the oil and gas industry regarding punitive or remedial orders for failure to control or clean up polluted sites. By the express intention of the parties, the private international law of the petroleum industry governs any issue relating to the appropriateness or suitability of any penalty or other remedial orders issued by the GNPC against the Contractor for failing to clean up or repair any polluted sites. Thus, where the GNPC orders the Contractor to undertake a specified remediation measure, any issue bordering on the appropriateness of the order must be resolved “in accordance with accepted international petroleum industry practice in the same or similar circumstances”. The phrase “accepted international petroleum industry practice” means practices and standards generally applied across the global oil and gas industry, not practices accepted in Ghana. Of course, Ghanaian law can incorporate industry-wide practices, but in the context of this contract, the parties have clearly adopted international oil and gas industry practices and standards as the yardstick for any remedial orders issued by the GNPC.

Can ‘Industry Practices’ be Chosen as part of the Governing Law?

For purposes of choice-of-law, is it imperative that the governing law chosen by contracting parties must be the laws of a sovereign state? Do private international rules and practices qualify as law? To put the question differently, are parties to international investment contracts able to choose non-state law as the law governing their contract? It may be argued that ‘good oilfield practices’, ‘best international practices’, “accepted international petroleum industry practice” and similar phrases do not qualify as substantive law because they do not arise solely from the laws of any

⁸¹ *Ibid.* art. 17.5.

⁸² *Ibid.* art. 17.7.

sovereign state and that rather, they are detached from the substantive laws of any identifiable sovereign state. However, as von Mehren and Kourides have long observed, for the purposes of choice-of-law, the contracting parties have the freedom to choose a body of law other than the domestic laws of a sovereign state.⁸³ The parties to international investment contracts “are not required to choose the law of their own nationality or, indeed, the law of any nationality”, thus “there is no compelling reason why they should not elect to have their contractual relations governed by principles and concepts that are not attached to any sovereign” state.⁸⁴ The “chosen law may the principle law of one of the contracting parties, the *lex mercatoria*, a general principle of law, the international law of contracts, or a combination of these rules.”⁸⁵ In effect, non-state commercial rules including industry practices and customs of international trade (that is, *lex mercatoria*) can be chosen by contracting parties as the governing law for the contract.⁸⁶

The position that parties to international oil and gas contracts can adopt private international law and ‘industry practices’ as the law governing aspects of their contract has long been upheld by arbitral tribunals, particularly in the Libyan arbitrations of the 1970s. The Libyan arbitrations arose from Libya’s nationalization of oil assets even though the oil and gas concessions contained stabilization clauses that restrained Libya from nationalizing these assets. As well, these concessions contained an identical choice-of-law clause (Clause 28.(7)) that prescribed the governing law as “the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.” Through this clause the parties expressly intended “to exclude from consideration any principles of Libyan law inconsistent with international law.”⁸⁷ In three separate arbitrations, the arbitrators were unanimous in concluding that this choice-of-law clause enjoined, first, the application of principles of Libyan law to the extent that

⁸³ Robert B. von Mehren & P. Nicholas Kourides, “International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases” (1981) 75 *American Journal of International Law* 476 at 511.

⁸⁴ *Ibid.* at 511.

⁸⁵ Baniassadi, *supra* note 29 at 60.

⁸⁶ “General Principles of Law in International Commercial Arbitration” (1988) 101 *Harvard Law Review* 1816 at 1819.

⁸⁷ Von Mehren & Kourides, *supra* note 83 at 500.

those principles are consistent with the principles of international law, and second, where Libyan law is inconsistent with international law, then the general principles of law must be applied to the concession. In the view of one arbitrator, “[t]he governing system of law is what that clause expressly provides, *viz*, in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals.”⁸⁸ More poignantly, another arbitrator held in a separate case that under this particular choice-of-law clause the governing law is “in the first place the law of Libya when consistent with international law, and subsidiarily the general principles of law.” The arbitrator reiterated thus:

... the principal proper law of the contract in said Concession is Libyan domestic law. But it is specified in the Agreements that this covers only “the principles of law of Libya common to the principles of international law”. Thus, it excludes any part of Libyan law which is in conflict with the principles of international law.⁸⁹

The parties’ ability to adopt ‘industry practices’ as the law governing aspects of their contract is reflected in more recent oil and gas contracts such as the petroleum agreement between Ghana and Tullow which contains a choice-of-law clause that provides that the contract “shall be governed by and construed in accordance with the laws of the Republic of Ghana consistent with such rules of international law as may be applicable, including the rules and principles as have been applied by international tribunals.”⁹⁰ The contract also specifies the rights of the contractor based on international petroleum industry practices as follows:

Subject to the provisions of this Agreement, Contractor shall be responsible for the conduct of Petroleum Operations and shall: conduct Petroleum Operations with utmost diligence, efficiency and economy, in accordance with accepted International Petroleum Industry practices, under the same or similar circumstances observing sound technical and engineering practices using appropriate advanced technology and effective equipment, machinery, materials and methods; take all practicable steps to ensure compliance with Section 3 of the Petroleum Law including ensuring the recovery and prevention of waste of

⁸⁸ *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, Award dated October 10, 1973, (1979) 53 ILR 297 at 329.

⁸⁹ *Libyan American Oil Co. v. The Government of the Libyan Arab Republic*, Award dated April 12, 1977, (1981) 20 ILM 1 at 35.

⁹⁰ *Petroleum Agreement between Ghana and Tullow*, *supra* note 79, art. 26.1.

Petroleum in the Contract Area in accordance with accepted International Petroleum Industry practices under the same or similar circumstances;⁹¹

As specified under the contract, Ghanaian law governs this contract but the choice of Ghanaian law by the contracting parties does not necessarily mean that all aspects of the contract are governed by the laws of Ghana. More specifically, under this contract the Operator is obliged to conduct their operations in accordance with “accepted International Petroleum Industry practices”. The interpretation of the phrase “accepted International Petroleum Industry practices” must be undertaken with a view to giving effect to the intention of the contracting parties. Given the tenor of the contract, including the parties’ expressed desire that the “Contractor shall take all necessary steps, in accordance with accepted Petroleum industry practice, to perform activities pursuant to the Agreement in a safe manner”,⁹² it is reasonable to interpret the phrase “accepted International Petroleum Industry practices” as meaning practices commonly adopted in technologically advanced countries, particularly oil and gas producing countries. The phrase “accepted International Petroleum Industry practices” is obviously intended to ensure that, in conducting petroleum operations in Ghana, the contractor adopts comparable practices adopted by industry practitioners in other countries. The adoption of “accepted International Petroleum Industry practices” in Ghana would ensure that the technology and equipment used by the contractor are modern and environmentally friendly, thus promoting environmental protection and sustainable exploitation of petroleum resources in Ghana. In this sense, then, the contract unwittingly adopts the concept of *dépeçage* because it envisages the application of Ghanaian laws to parts of the contract, while petroleum industry practices in foreign jurisdictions would govern issues relating to the contractor’s compliance with “accepted International Petroleum Industry practices.”

B. Application of *Dépeçage* through Arbitration Clauses

International investment transactions such as upstream oil and gas contracts usually contain provisions regarding dispute resolution. In most international investment contracts, parties provide choice of jurisdiction

⁹¹ *Ibid.* art 7.1(a)&(b).

⁹² *Ibid.* art. 17.2.

clauses regarding the competent court or tribunal that would adjudicate disputes arising from such contracts. In recent years, globalization and the attendant increase in international investment and international trade have led to an increase in reliance on arbitration as a dispute settlement mechanism in international commerce.⁹³ In the context of international oil and gas contracts, parties often choose international arbitration instead of litigation in national courts for a variety of reasons, including avoiding delays associated with court litigation and speeding up the dispute resolution process.⁹⁴ They may also be able to lower the expenses involved in dispute resolution by speeding up the process while court litigation tends to be protracted and expensive.⁹⁵ Moreover, international oil and gas disputes often involve complex issues, the resolution of which require special knowledge and expertise. The arbitration mechanism gives an opportunity for the parties to select suitable arbitrators with requisite experience.⁹⁶

Although some factors may bring some additional cost to the arbitration process, such as the expenses involved in administering the process, translation and experts' fees, and delays associated with scheduling hearings or even selecting the arbitrators,⁹⁷ arbitration reduces uncertainties in the dispute resolution process and offers the contracting parties a neutral process for dispute resolution.⁹⁸ Arbitration enables the contracting parties to secure a neutral and predictable standard for resolving disputes arising from the contract.⁹⁹ The parties' ability to predict and determine the law governing their dispute resolution provides a measure of certainty for investors with

⁹³ See generally Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (Sweet & Maxwell, 2004).

⁹⁴ "General Principles of Law in International Commercial Arbitration" *supra* note 86 at 1817.

⁹⁵ Ehrenhaft, *supra* note 28 at 1191.

⁹⁶ *Ibid.* at 1194 (arguing that arbitration enables parties to "choose as their judge a person knowledgeable in the particular business or legal issues involved.")

⁹⁷ See Francis J. Higgins, William G. Brown & Patrick J. Roach, "Pitfalls in International Commercial Arbitration" (1980) 35(4) *Business Lawyer* at 1035 at 1041-2; Henry P. De Vries, "International Commercial Arbitration: A Contractual Substitute for National Courts" (1982) 57 *Tulane Law Review* 42 at 61.

⁹⁸ Danilowicz, *supra* note 45 at 237.

⁹⁹ David J. Branson & Richard E. Wallace Jr., "Choosing the Substantive Law to Apply in International Commercial Arbitration" (1986) 27 *Virginia J. Intl L.* 39 at 39.

regard to dispute settlement. In addition, intellectual property rights of the parties including patents and trade secrets may be more secure by using arbitration to settle disputes. Litigation is a public way of dispute resolution in comparison to arbitration which may be held in private. These advantages associated with arbitration account for the attractiveness, popularity and universality of arbitration in the context of international investment.

The universality of arbitration clauses is apparent in international upstream oil and gas contracts which, almost always, contain arbitration clauses requiring the application of governing laws that are different from the laws governing the substantive parts of the contract. Although there is usually a determined law in upstream oil and gas agreements governing the substantive parts of the contract, the arbitration clauses provide that the arbitration rules of a different jurisdiction shall apply to any arbitration arising from the contract. In the ensuing pages, we analyze some upstream oil and gas contracts which contain a different governing law for the arbitration and settlement of disputes than the law governing the rest of the contract.

The production sharing contract between the National Oil Company of Liberia and Anadarko Liberia Block 10 Company prescribes Liberian law as the applicable law governing the contract. Article 23 of the contract provides that the construction and interpretation of the contract shall be based on Liberian law and states further that the Contractor, its subcontractors and assignees shall act “in accordance with the Laws of Liberia as in effect from the date of signing this contract (including with respect to labor, environmental, health and safety, customs and tax matters)” and “shall conduct itself in a manner consistent with international treaties to which Liberia is a party”.¹⁰⁰ The contract provides further that “this contract and the rights, obligations and duties of the Parties under the Contract shall be construed and interpreted in accordance with the Laws of Liberia and by such rules and principles of international law as may be applicable.”¹⁰¹ Although Liberian law is the governing law of the substantive parts of the contract, the contracting parties expressly chose a different law

¹⁰⁰ An Act To Ratify The Production Sharing Contract For Block Lb-10 Signed Between The National Oil Company Of Liberia (Nocol) On Behalf Of The Republic Of Liberia And Anadarko Liberia Block 10 Company (Approved 23 July 2009), art 23.1, <<https://www.resourcecontracts.org/contract/ocds-591adf-3001376476/view#/text>> [perma.cc/ZU3H-GBVH].

¹⁰¹ *Ibid.* art. 23.2.

as the law governing the resolution of any dispute arising from the contract. Article 31.1 of the contract states that any dispute arising from the contract “shall, at the request of the most diligent party, be referred for arbitration to the International Chamber of Commerce in accordance with its rules and regulations.”¹⁰²

Similarly, the parties to the Production Sharing Agreement between Tanzania and PanAfrican Energy Tanzania Limited agreed that “[t]his Agreement shall be governed by and construed in accordance with Tanzanian law.”¹⁰³ However, the contract also stipulates that any dispute arising from the contract shall be settled by arbitration in accordance with the rules and procedure of the International Centre for the Settlement of Investment Disputes (ICSID).¹⁰⁴ In addition, the contract provides that, in cases where disputes cannot be settled in accordance with the ICSID Rules, they “shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ‘ICC Rules’).”¹⁰⁵

Likewise, the production sharing Contract between Kenya and ERHC AGC Profond Ltd. provides that “This Contract shall be governed by, interpreted and construed in accordance with the Laws of Kenya.”¹⁰⁶ Although Kenyan law is the applicable governing law of the contract, the parties also agreed that dispute arising from the contract shall be resolved in accordance with the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.¹⁰⁷ According to article 41.(1) of this contract,

¹⁰² *Ibid*, art. 31.1.

¹⁰³ The Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited, Production Sharing Agreement Relating to the Songo Songo Gas Field, Dar es Salam, Tanzania, 11 October 2001, art 28.5 <<https://resourcecontracts.org/contract/ocds-591adf1440947345/view#/pdf>>.

¹⁰⁴ *Ibid*, art 27.4(a).

¹⁰⁵ *Ibid*, art. 27.4(b).

¹⁰⁶ *Production Sharing Contract between the Government of the Republic of Kenya and ERHC AGC Profond Ltd.* (Relating to the Block 11A), (2012) art. 40.(1), <<https://resourcecontracts.org/contract/ocds-591adf2656241484/view#/text>> [perma.cc/M8QA-3EXC]

¹⁰⁷ *Ibid*, art. 41.

Except as otherwise provided in this Contract, any question or dispute arising out of or in relation to or in connection with this Contract shall, as far as possible, be settled amicably. Where no settlement is reached within thirty (30) days from the date of the dispute or such a period as may be agreed upon by the parties, the dispute shall be referred to arbitration in accordance with the UNCITRAL arbitration rules adopted by the United Nations Commission on International Trade Law.¹⁰⁸

Finally, the production sharing contract between the government of Uganda and Tullow Uganda Limited provides that the laws of Uganda are the applicable governing laws.¹⁰⁹ At the same time, the contract provides that “any dispute arising under the Agreement which cannot be settled amicably within sixty (60) days, shall be referred to Arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules.”¹¹⁰

The choice-of-law provisions discussed above require the application of the rules and procedure of international arbitral institutions such as the ICSID, whereas the laws of the host countries apply to the substantive issues arising from the contracts. Pursuant to such choice-of-law provisions, arbitral tribunals adopt dépeçage in resolving international investment disputes. For example, in the International Chamber of Commerce (ICC) Award No. 4402,¹¹¹ a dispute arising from oil and gas extraction, the tribunal held that Swiss law is the applicable governing law to the contract according to the parties’ agreement.¹¹² However, the ICC rules were adopted as the law applicable to the procedure of the arbitration based on the parties’ intention at the time of the contract.¹¹³ In other words, the parties chose one applicable law (Swiss law) to resolve substantive issues while choosing a different law

¹⁰⁸ *Ibid.*, art. 41.(1).

¹⁰⁹ *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda by and between the Government of the Republic of Uganda and Tullow Uganda Limited, In respect of Exploration Area 1* (February 2012), art. 33.(1) (stating that “This agreement shall be governed by, interpreted and construed in accordance with the laws of Uganda”), <<https://resourcecontracts.org/contract/ocds-591adf-955222925/view#/pdf>> [perma.cc/CM9Z-UJ3X]

¹¹⁰ *Ibid.*, art. 26.1.

¹¹¹ *Company (Bahamas), Company (parent of first Claimant) (Luxembourg) v Company (France), Company (parent of first Defendant) (France)*, 1983 Digest of ICC - International Court of Arbitration Awards ICC (WL Can) at 1 (ICC Award No 4402).

¹¹² *Ibid.*

¹¹³ *Ibid.*

(ICC arbitral rules) as the governing law for their dispute resolution. Although dépeçage was not mentioned by the parties, in practice dépeçage was adopted by the parties and the arbitral tribunal due to the application of more than one governing law to the same contract. Similarly, in ICC Award No. 3100,¹¹⁴ the parties to the contract chose Algerian private law which, at the time of the contract, was based on the Civil Code of France.¹¹⁵ However, after the contract was signed Algeria enacted a new autochthonous Code.¹¹⁶ The arbitral tribunal held that “the principle of non-retroactivity of legislation, which was accepted by both Codes, required that the rights and obligations of the contract remained determined by the laws in force at the time of its formation”.¹¹⁷ Accordingly, French law was applied to the substantive aspects of the dispute.¹¹⁸ However, the Swiss arbitration Concordat was applied as the law governing the procedural aspects of the dispute including arbitration.¹¹⁹ Here, two different governing laws were adopted and applied, thus confirming the practical use of the theory of dépeçage.

VII. CRITERIA FOR APPLYING *DEPEÇAGE* IN THE ABSENCE OF CHOICE-OF-LAW CLAUSES

As discussed above, contracting parties are free to choose different governing laws for various parts of their contract and, in appropriate cases, judges can apply dépeçage even where the contracting parties do not expressly provide for the governing law. However, where the contracting parties have not chosen the governing law, judges and arbitrators must be careful to ensure that the application of dépeçage does not negate the contractual intention of the parties. As is well established, contracts must be interpreted in a manner that ensures that the intention of the parties prevails. Courts and arbitral tribunals may want to heed Willis Reese’s admonition to the effect that dépeçage should be invoked only “when

¹¹⁴ *Seller, a State Enterprise (Algeria) v Buyer, a State Enterprise (Africa)*, 1979 Digest of ICC - International Court of Arbitration Awards ICC (WL Can) at 1 (ICC Award No 3100).

¹¹⁵ *Ibid* at 2.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

application of the rules of different states to determine different issues in the same case (a) would result in the application to each issue of the rule of the state with the greatest concern in the determination of that issue, (b) would serve to effectuate the purpose of each of the rules applied, and (c) would not disappoint the expectations of the parties.”¹²⁰ In essence, *dépeçage* should be applied where it would protect the reasonable and justified expectations of the contracting parties.

Judges and arbitrators must establish clear parameters and criteria for the application of *dépeçage* in circumstances where the contracting parties have not expressly provided for *dépeçage* in their contract. The primary criteria must be the protection of the parties’ reasonable and justified expectations.¹²¹ To put it differently, *dépeçage* should not be applied in cases where it is inconsistent with the intention of the parties or where it defeats their reasonable expectations.¹²² Moreover, it is inappropriate for courts and arbitral tribunals to apply *dépeçage* in cases where the application of this theory would lead to the invalidation of a contract.¹²³ Rather, judges and arbitrators may apply *dépeçage* in order to preserve the validity of a contract, thus giving effect to the intention of the parties. In most instances, parties to a contract intend the contract to be valid and efficacious. However, a contract may be invalid in one jurisdiction whereas the same contract is valid in the alternative jurisdiction. As well, the penalty for breach of contract prescribed by the parties may be valid in one jurisdiction while invalid or unenforceable in the other jurisdiction.¹²⁴ Where the parties or circumstances of the contract are connected with multiple jurisdictions, the court may apply the laws of the jurisdiction where the contract is valid in order to give effect to the contractual intention of the parties.

That said, where parties have expressly provided for *dépeçage* in a contract, judges and arbitral tribunals must give effect to the intention of the parties by applying the chosen laws to the issues arising from the contract. Contracting parties deliberately adopt *dépeçage* because of its practical

¹²⁰ Reese, *supra* note 15 at 60.

¹²¹ *Ibid.* at 60.

¹²² *Ibid.* at 64.

¹²³ *Ibid.*

¹²⁴ See Craig M. Gertz, “The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual *Dépeçage*” (1991) 12 *Northwest Journal of International Law & Business* 163 at 165-7.

benefits. Dépeçage promotes certainty and stability of contractual relationships by enabling the parties to choose different governing laws for different parts of their contract. In the context of international upstream oil and gas contracts, the laws of the host developing country may be inadequate in relation to some aspects of the contracts. For example, domestic law may place a limit on damages for breach of contract to the obvious detriment of foreign investors who may have already invested large amount of capital in the host country at the time of the breach of contract. The contracting parties can avoid such inadequate domestic laws by choosing to apply foreign law to those parts of the contract that are not adequately catered to by the domestic laws of the host country. In this sense, dépeçage enables the contracting parties to achieve legal results and outcomes which could not be achieved by applying the laws of one jurisdiction.¹²⁵

VIII. OBSTACLES TO THE APPLICATION OF *DEPEÇAGE*

Every legal system has certain fundamental and mandatory rules (such as penal law, revenue law or other public law), as well as overriding public policy which must be applied regardless of the circumstances.¹²⁶ Thus, dépeçage is inapplicable where the law chosen by the contracting parties conflicts with the mandatory laws and rules of the forum jurisdiction. By implication, the mandatory laws of the forum jurisdiction automatically excludes the application of any foreign law which is contrary to those mandatory laws. As well, in the exercise of their sovereign powers, host countries may enact legislation outlawing or prohibiting the application of foreign laws to investments within their jurisdiction. As discussed below, mandatory laws and legal prohibition of foreign law represent significant obstacles to the application of dépeçage.

¹²⁵ Reese, *supra* note 15 at 58.

¹²⁶ Stephen G. A. Pitel & Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) at 30-39.

A. Mandatory Laws and Overriding Public Policy

Within the framework of a particular legal system, there are certain mandatory laws which are binding provisions that cannot be derogated from by contract.¹²⁷ Mandatory laws are the fundamental rules of a legal system that apply to legal disputes regardless of any choice-of-law provisions in a contract.¹²⁸ Thus, despite the general rule regarding parties' autonomy, courts and tribunals are compelled to apply mandatory domestic laws regardless of the parties' choice-of-law.¹²⁹ As well, domestic legal systems are anchored on certain fundamental public policy objectives which contracting parties cannot displace through contractual provisions. In essence, the mandatory laws and fundamental public policies of the forum jurisdiction override the choice-of-law clause in a contract.¹³⁰ Mandatory laws must be applied regardless of the parties' selected governing law or any other agreements.¹³¹ These laws are binding provisions and it is impossible to derogate from them.¹³² The pre-eminence of mandatory laws and rules is recognized in international instruments such as the Rome Convention which states that "[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."¹³³ Furthermore, article 16 of the Rome Convention recognizes a public policy exception to the rule that the governing law chosen by the parties governs a contract.¹³⁴

¹²⁷ Monika Pauknerová, "Mandatory Rules and Public Policy in International Contract Law" (2010) 11 ERA Forum 29 at 30.

¹²⁸ Pitel & Rafferty, *supra* note 126 at 298.

¹²⁹ Antle & Choi, *supra* note 23 at 2. See generally, Hossain Fazilatfar, *Overriding Mandatory Rules in International Commercial Arbitration* (Cheltenham, UK: Edward Elgar Publishing, 2019).

¹³⁰ Mettala, *supra* note 36 at 226.

¹³¹ Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 *Arbitration International* 274 at 275.

¹³² Simona Travnickova, "Limitation of Choice of Law - Mandatory Rules and Internationally Mandatory Rules" (2009) at 2, online (PDF): *Masaryk University Faculty of Law* <<https://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/travnickova.pdf>> [perma.cc/FN3A-SA5Z].

¹³³ *Rome Convention* *supra* note 32, art. 7(2).

¹³⁴ *Ibid*, art 16 (stating that "the application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with

The problem, however, is that while certain aspects of mandatory laws and rules are clearly delineated and defined by relevant statutes such those relating to penal law and revenue law, other aspects of mandatory rules are less certain. In the context of *dépeçage*, mandatory rules and “public policy” are sometimes unclear principles that need conceptual clarification. While mandatory rules are the fundamental rules of a legal system, mandatory rules could become complicated when dealing with international transactions in view of the international obligations of the host country. Moreover, at the international level, there is a difference between basic mandatory rules and overriding mandatory rules or super-mandatory rules.¹³⁵

In the commercial context, basic mandatory rules refer to the typical rules of private law such as those governing contracts. Some examples of basic mandatory rules include the essential elements of a contract, the rules relating to offer and acceptance, and the recognition and discharge of obligations.¹³⁶ The contracting parties can exclude these basic mandatory rules by choosing a different applicable governing law.¹³⁷ On the contrary, overriding mandatory rules or super-mandatory rules are those rules that form the cornerstone of any legal system and they dictate the relationship between persons as well as the relationship between the state and private individuals. Overriding mandatory rules are designed to promote the economic, social, and political objectives of the host country. In fact, the *EC Regulation on the Law Applicable to Contractual Obligations* defines ‘overriding mandatory provisions’ as “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”¹³⁸ These rules require strict implementation regardless of the results.¹³⁹ Overriding mandatory rules are

the public policy (“ordre public”) of the forum”).

¹³⁵ Pauknerová, *supra* note 127 at 30.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Regulation on the Law Applicable to Contractual Obligations* (Rome I), Regulation (EC) No 593/2008, 17 June 2008, art. 9(1), online (PDF): *Eur-Lex*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593> > [perma.cc/KBJ7-AAKS].

¹³⁹ Naciye Yilmaz, “Turkey: Overriding Mandatory Rules in Private International Law” (17 August 2015) online: *Mondaq* <<https://www.mondaq.com/turkey/contracts-and->

the anchor of any legal system and, as such, contracting parties cannot displace these rules through choice-of-law clauses.¹⁴⁰ In the context of international investment contracts, overriding mandatory rules are “provisions to which a state attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract.”¹⁴¹

Notwithstanding the clarity of the theoretical definition of mandatory rules, some problems may arise in practice. No doubt, there are certain provisions that have been clearly categorized by the legislature as overriding mandatory rules.¹⁴² However, in some instances, legal provisions are vague, and it is unclear whether the provisions are mandatory. In these instances, courts and arbitrators must undertake a case-by-case analysis to determine whether the provisions are mandatory rules.¹⁴³

A comparison of the judicial decisions in two similar cases demonstrates the difficulty in determining whether rules are mandatory. The first case, *Ingmar v. Eaton*, involves the principal, Eaton, a company incorporated in California and Ingmar, a company incorporated and based in the United Kingdom.¹⁴⁴ These companies entered into a commercial agency contract that expressly provided that the governing law was the law of California. However, in resolving a dispute regarding the commercial agent’s entitlement to indemnity or compensation upon termination of the contract, the European Court of Justice applied the United Kingdom Commercial Agent Regulations (implementing Directive 86/653/EEC) to guarantee certain minimum termination rights of Ingmar as a commercial

commercial-law/420492/overriding-mandatory-rules-in-private-international-law> [perma.cc/RJZ5-TY7]].

¹⁴⁰ Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation, COM (2002) 645 final at 33 online: Publications Office of the European Union <<https://op.europa.eu/en/publication-detail/-/publication/d60386fe-69d4-4846-bf01-b1d23b20e134>> [perma.cc/84ZT-8PF3].

¹⁴¹ *Ibid.*

¹⁴² Pitel & Rafferty, *supra* note 126 at 299.

¹⁴³ *Ibid.* at 299.

¹⁴⁴ *Ingmar GB Ltd v Eaton Leonard Technologies Inc*, Case C-381/98, 2000 European Court Reports I-09305, online: Eur-Lex <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0381>> [perma.cc/YHM8-CMTG].

agent.¹⁴⁵ The court determined that Directive 86/653/EEC, as implemented by the United Kingdom Commercial Agent Regulations, provides overriding mandatory rules in relation to the protection of commercial agents. According to the court, “the purpose of Articles 17 to 19 of the Directive, in particular, is to protect the commercial agent after termination of the contract” and for that purpose the regime established by the Directive “is mandatory in nature.”¹⁴⁶ The court elaborated further that the mandatory nature of the Directive “is confirmed by the fact that, under Article 19 of the Directive, the parties may not derogate from them to the detriment of the commercial agent before the contract expires.”¹⁴⁷ The court concluded poignantly thus:

It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

In the light of those considerations, the answer to the question must be that Articles 17 and 18 of the Directive, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.¹⁴⁸

However, in the case of *Sté Allium c Sté Alfin et Sté Groupe Inter Parfums*, the French Cour de Cassation reached a contrary conclusion.¹⁴⁹ In this case, Alfin, a New York company agreed on exclusive representation with the French company, Allium, for the distribution of American perfumes in France. The parties selected the law of New York as the governing law. When the relationship was terminated, the French agent demanded special compensation under the French *Commercial Code* (implementing Directive 86/653/EEC), alleging that Directive 86/653/EEC is mandatory and that it

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* at para. 21.

¹⁴⁷ *Ibid.* at para. 22.

¹⁴⁸ *Ibid.* at paras. 25 & 26.

¹⁴⁹ *Sté Allium c Sté Alfin et Sté Groupe Inter Parfums*, Cour de cassation, chambre commerciale, 28 novembre 2000, 98-11335.

overrides the governing law chosen by the parties. The Cour de Cassation refused to consider the provisions of the French Commercial Code which implements Directive 86/653/EEC as overriding mandatory rules.¹⁵⁰

In sum, although parties to international oil and gas contracts can choose more than one applicable law to govern their contracts, the chosen laws can be applied only to the extent that they do not conflict with the overriding mandatory rules of the forum country. Thus, where there is a conflict between overriding mandatory rules and the chosen law, the overriding mandatory rules would prevail. The limitation caused by the existence of mandatory rules could reduce the number of governing laws to one applicable law, thus automatically eliminating the application of the theory of dépeçage.

B. Prohibition of Foreign Laws

It is generally recognized that all independent countries have permanent sovereignty over natural resources situated within their territories. The United Nations has long recognized the “inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests”.¹⁵¹ In fact, the UN declared in 1962 that:

The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.¹⁵²

In exercising permanent sovereignty over natural resources, host countries can make laws and regulations regarding not only the parameters for the exploitation of natural resources within their territories, but the legal basis for resolving disputes arising from natural resource contracts. For example, a host country can enact legislation prohibiting the application of foreign law to investment projects within its territory. Host countries can equally prohibit the settlement of disputes arising from natural resource

¹⁵⁰ *Ibid.*

¹⁵¹ UN General Assembly Resolution on Permanent Sovereignty over Natural Resources (GAR 1803), 1962 at Preamble.

¹⁵² *Ibid.* at (2).

investments in foreign courts or foreign arbitral tribunals. Tanzania has adopted this position by enacting legislation to the effect that:

- (1) Pursuant to Article 27 (1) of the Constitution, permanent sovereignty over natural wealth and resources shall not be a subject of proceedings in any foreign court or tribunal.
- (2) For the purpose of subsection (1), disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic [of Tanzania] and in accordance with laws of Tanzania.
- (3) For the purpose of implementation of subsection (2), judicial bodies or other bodies established in the United Republic [of Tanzania] and application of laws of Tanzania shall be acknowledged and incorporated in any arrangement or agreement.¹⁵³

In effect, in Tanzania natural resources must not only be exploited in accordance with the laws of Tanzania, but more importantly, any dispute arising from a natural resource contract must be resolved through Tanzanian courts or by arbitral bodies established under the laws of Tanzania. In fact, the above Tanzanian enactment requires natural resource contracts to expressly provide that the governing law is Tanzanian law and, furthermore, that the adjudication of any dispute arising from such contracts shall be undertaken by Tanzanian courts or arbitral bodies. Thus, by implication, this enactment prohibits parties to an upstream oil and gas contract (and other natural resource contracts) from choosing foreign laws as the governing laws for their contract. Likewise, this enactment prevents the contracting parties from electing to resolve their disputes through foreign arbitration. In this sense, the Tanzanian enactment prevents the application of *dépeçage* in natural resource contracts, including upstream oil and gas contracts.

Apart from the assertion of sovereignty over natural resources, a country may equally prohibit the application of foreign laws to investment contracts within its territory if it appears that the contracting parties chose a foreign governing law for unsavory purposes, such as evasion of taxes or other legal obligations. In that regard, the United Kingdom's *Unfair Contract Terms Act* provides that "[t]his Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party

¹⁵³ *The Natural Wealth and Resources (Permanent Sovereignty) Act (Tanzania)*, 2017, s. 11.

imposing it to evade the operation of this Act”.¹⁵⁴ Thus, even where the contracting parties have chosen a foreign governing law for the whole or parts of their contract, this provision prevents courts and arbitral tribunals in the United Kingdom from applying dépeçage where the application of the foreign law would aid the parties in evading the operations of the *Unfair Contract Terms Act*.

IX. CONCLUSION

Our analysis of the theoretical foundation of dépeçage as well as the nature of international upstream oil and gas contracts has shown that dépeçage can be applied to resolve disputes arising from international upstream oil and gas contracts. In fact, as discussed above, dépeçage has previously been used in a practical manner in upstream oil and gas contracts via ‘good oilfield practices’ and arbitration clauses.

The application of dépeçage in international upstream oil and gas contracts may be necessitated by the peculiar circumstances of the oil and gas industry, particularly the complex nature of oil and gas transactions and the high risks involved in investing in some developing countries. As well, the varied interests of the contracting parties may necessitate the adoption of dépeçage. On the one hand, developing countries want to protect their sovereignty, hence they often demand that the laws governing upstream oil and gas projects must be the laws of the host country. Developing countries equally desire that oil and gas operations in their jurisdictions are conducted in an efficient and effective manner. Thus, they often require foreign investors to adopt ‘international best practices’ in conducting oil and gas operations. On the other hand, foreign investors are usually reluctant to resolve investment disputes in the courts of the host developing countries because they fear that the influence possessed by the government over the judiciary compromises the impartiality of domestic courts.

However, the interests of host developing countries and foreign investors regarding the law applicable to investment contracts are not mutually exclusive; rather these varied interests can be accommodated through the theory of dépeçage. As discussed above, international upstream oil and gas contracts cater to these differing interests by requiring companies to adopt ‘good oilfield practices’ (that is, practices that are generally applied on

¹⁵⁴ *Unfair Contract Terms Act* (UK), 1977 (Chapter 50), s. 27.(2).

industry-wide basis) while also providing expressly that the laws of the host country shall govern the contracts. The provision regarding ‘good oilfield practices’ is particularly significant because oil and gas exploration and production often cause severe physical damage to the environment as well as the health and social wellbeing of citizens. Good oilfield practices ensure that companies adopt modern technology, thus potentially minimizing environmental damage in developing countries. In addition, international upstream oil and gas contracts often adopt arbitration as a dispute resolution mechanism in order to assuage the fear by foreign investors regarding the impartiality of domestic courts in developing countries. Thus, while international upstream oil and gas contracts provide that the governing law is the law of the host country, the settlement of disputes arising from the contracts is often governed by the rules of a different jurisdiction, such as the ICSID rules. Arbitration has several advantages in comparison to litigation in domestic courts, such as speeding up the dispute resolution process; reliance on experts with knowledge and experience; and reducing uncertainties and complexities arising from litigation.

These contractual clauses relating to ‘good oilfield practices’ and arbitration are practical examples of the application of *dépeçage* in the oil and gas industry. However, caution must be observed in applying *dépeçage* to international upstream oil and gas contracts. Caution is particularly required where the parties have not expressly provided for *dépeçage* in their contract. In such cases, courts and arbitral tribunals must ensure that they apply *dépeçage* only where it would accord with, and effectuate, the intention of the contracting parties. *Dépeçage* must be applied in a manner that protects the reasonable expectations of the contracting parties. To paraphrase the court’s observation in *Babcock v. Jackson*,¹⁵⁵ in cases where the parties did not expressly choose the governing law, the court can adopt *dépeçage* by applying the law of the jurisdiction with the greatest concern with the specific issue raised in the litigation in order to achieve justice, fairness and best practical result.¹⁵⁶

¹⁵⁵ 191 N.E. 2d 279 (N.Y. 1963).

¹⁵⁶ *Ibid.* at 283.

