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Application of the Theory of Dépeçage to Upstream Oil and Gas Contracts

by

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Abstract

Determination of the applicable law in upstream oil and gas contracts plays an important role with regards to the parties' rights and liabilities. There are various approaches regarding the choice of applicable law and different theories have been expressed relating to choice-of-law provisions. This research explores one of these theories called Dépeçage in private international law and conflict of law.

The theory of Dépeçage is a concept in private international law that refers to the process of cutting a case into individual issues whereby each issue is constrained to a different applicable choice-of-law analysis. In other words, the theory of Dépeçage is the application of different laws to various legal issues arising from a dispute. The theory was first applied in Tort law and specifically aviation litigation. This research shows that there is an opportunity to gain many advantages by the application of the theory of Dépeçage in upstream oil and gas contracts. However, adopting this theory ought to be treated with caution due to its disadvantages and the issues it may cause if not applied within a specific framework.

Therefore, for appropriate application of Dépeçage, upstream oil and gas contracts must meet certain criteria such as protecting parties' justified expectations, and maintaining parties' interests. Also, this theory should not be applied in cases where it would lead to dissatisfaction of the contracting parties, destruction of legislative intention, or invalidation of a contract. Moreover, the applicable law that has the greatest concern for each issue must be applied to effectuate the purpose of each of the applied rules. In other words, choice-of-law values are significant principles for the application of Dépeçage. Lastly, judges and arbitrators must provide criteria and legal reasons for the application of Dépeçage in upstream oil and gas contracts during the dispute resolution process.

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Introduction

1. Purpose of Study

One of the crucial issues in upstream petroleum contracts is to determine which law is applicable to different aspects of the agreement and whether the applicable law is to be invoked during the execution of the contract and/or during the settlement of disputes. It is indisputable that the determination of the applicable law or governing law, as the case may be, is very important in identifying the relevant rights and duties of the parties to the contract.

However, the question that remains unsettled in various legal systems is whether the parties to an upstream petroleum contract are able to apply different laws and regulations to different terms and conditions in the same contract. Applying different laws to different parts of an upstream petroleum contract may lead to more flexibility and it makes the contract more adaptable to prevailing circumstances.

The private international law concept called Dépeçage may be helpful where the contracting parties desire to apply different laws to different terms in their contract. The theory of Dépeçage refers to the process of cutting a case into individual issues whereby each issue is constrained to a different applicable choice-of-law analysis. The concept of Dépeçage might apply in private international law or conflicts of law where different issues arising from an international contract may be governed by various legal systems. For instance, one law might govern the question of formation, validity, and interpretation, while another may govern the question of performance.

Federalism in the United States has an important role in the development of Dépeçage and the United States has become one of the countries that have a strong body of literature on this theory in relation to tort law and conflict of laws. This theory has been used in many other countries

especially in the field of tort law, but it has not received much attention within the Canadian legal system. However, there has not been a focus on the application of the theory of Dépeçage in contract law and specifically in the field of upstream oil and gas agreements.

Using the experience of other countries in regard to the application of Dépeçage in tort law will help provide a reasonable framework for its application in upstream oil and gas contracts. Moreover, there is a large body of work on its application, with regards to its advantages and disadvantages, especially in tort law. Investigating the theory of Dépeçage in relation to tort law may reveal application of its principles in upstream oil and gas contracts.

Although tort law constitutes the highest portion of the usage of the theory of Dépeçage between different fields of law, Dépeçage has been applied in several fields such as aviation, marriage law, international commercial arbitration, medical law, and consumer law. Providing criteria for the application of Dépeçage in these fields will aid in recognizing the possibility, advantages, and disadvantages of the application of Dépeçage in upstream oil and gas contracts. For example, Dépeçage could be applied in upstream oil and gas contracts in cases where its application would function to effectuate the purpose of the contract and where it would not be contrary to the parties' expectations.

The reason for concentrating on upstream oil and gas contracts is their capacity to be severable since they consist of different and separable parts such as engineering, procurement, construction, installation, hand over, maintenance, operation, financing, and insurance. In addition, there are a large number of international upstream oil and gas contracts between parties from different countries or even between parties from different states, where they would rather apply their own national or state laws.

A growing number of contracts in which the parties have different preference law, as well as governments' tendency to attract more foreign investments, lead to the theory of Dépeçage. If Dépeçage becomes accepted in upstream oil and gas contracts, the principles of private international law or conflicts of law procedures for applying different legal systems' rules to a particular contract would play a significant role to help both parties to protect their rights and interests.

It is necessary to critically review and study the legal literature regarding the concept of Dépeçage to see the possibility of the application of this theory to upstream oil and gas contracts. The theory of Dépeçage may serve to provide a proper response and concrete solution for the aforementioned problem of applying different governing laws in a particular contract. This thesis aims to provide the history, origin, current use, advantages and disadvantages of the application of Dépeçage. Another purpose of this research is to find criteria and legal framework for the proper use of Dépeçage. Furthermore, this study aims to determine whether a judge or an arbitrator could make a ruling using Dépeçage if the parties to a petroleum contract fail to express or imply the laws and legal systems governing their contract.

2. Research Questions

The primary objective of this research is to ascertain the possibility of application of the theory of Dépeçage in upstream oil and gas contracts. This study aims to determine the validity of applying Dépeçage in petroleum contracts that consist of different contractual parts. In this regard, the first task at hand is the definition and history of the theory of Dépeçage. As well, it will be necessary to find different areas of law in which Dépeçage has been applied.

This study aims to ascertain the position of Dépeçage in upstream oil and gas contracts when the parties have expressly mentioned this theory. Furthermore, it hopes to determine the legal

framework and criteria for the selective application of Dépeçage by parties in upstream oil and gas contracts. The final objective is to discover whether a judge or an arbitrator could apply Dépeçage if the parties to the petroleum contract fail to express or imply the legal systems governing their contract.

3. Research Methodology

This research relies on library-based materials and academic legal documents and databases. Since this project includes a comparison of different legal systems, such as civil law and common law, the author recognizes that it is impossible to consider the legal systems in every oil and gas producing country. Therefore, this research mainly concentrates on *lex petrolea* as well as the laws of the United States. "Lex petrolea" is the law utilized by petroleum tribunals as a central part of the transnational law applicable to hydrocarbon disputes.[1] Hence, the main focus is based on international conventions and regulations.

The United States has also been chosen since there is strong academic legal literature and practical usage relating to the theory of Dépeçage in the American legal system. This is due to the system of federalism in the United States and the fact that each state is governed by different laws based on a common law system similar to the Canadian legal system. Therefore, having such commonality will help in making a comparison.

In addition, European nations' regulations and conventions have also been considered as a representative of a unified body of law among different countries. A variety of petroleum contracts and consequently oil and gas regulations from Middle Eastern and African countries have been studied as well as some provinces in Canada, such as Québec.

[1] Nima Mersadi Tabari, "Lex Petrolea and the Protection of Upstream Foreign Direct Investments" (1 December 2014) at 1, online: http://ssrn.com/abstract=2532327.

Dépeçage has already been the subject of academic studies and there is a strong legal literature in the field. However, the aim of this research is to offer new perspectives on the doctrine of Dépeçage as it applies to upstream oil and gas contracts. Accordingly, this research mostly contains the study of primary resources, as well as secondary resources, in the theoretical and conceptual dimensions of the research project. In other words, the study reviews existing areas of law in which the theory of Dépeçage has been applied and examines the potential application of this theory to oil and gas contracts, an area that has not received much previous attention.

The first step of the study was to examine existing literature on the concept of Dépeçage. American databases and law reviews such as “Almanac of the Federal Judiciary”, “ALM Legal Intelligence”, “Bloomberg Law”, “CALI”, “Cornell Legal Research Engine”, “Environmental Law Reporter (ELR)”, “HeinOnline American Association of Law Libraries”, “HeinOnline Law Journal Library”, “HeinOnline United States Code”, “IndexMaster” and “JSTOR” had a significant role at this stage.

Moreover, civil law databases from different countries, including France, were used to find articles and secondary resources. “JurisClasseur Lexis/Nexis” and “vLex” are some examples of these databases. Furthermore, court cases and judgments were searched to improve and strengthen the research results. For this reason, “Juricaf”, “Jurisprudence” and websites of “Conseil Constitutionnel”, “Conseil d'État” and “Cour de Cassation” were utilized.

To complete the comparative study, it is essential to search primary resources in order to define the concept of Dépeçage in cases where it has been referred. Although this theory comes from the civil law, it has also been used in common law countries.[2] Additionally, similar concepts

[2] Broome v Antler’s Hunting Club, 448 F Supp 121 [1978] 595 F 2d 921 at 923; Don King Production, inc v Douglas, 742 F Supp 2d 786 at 791 [1990].

to Dépeçage exist in common law system. Therefore, in addition to searching databases for "Dépeçage", other phrases such as "severability", "separation" and "conflict of law" were queried.

In regard to these, "WestlawNext", "Quicklaw", and "Canadian legal information institute (CanLII)" are some notable databases that played a crucial role in finding these concepts in Canadian jurisdictions. Moreover, these phrases were equally searched in databases such as "Google Scholar", "HeinOnline", "LegalTrac", and "Alberta Law Collection" to find secondary resources.

In addition, the position of upstream oil and gas sector in the petroleum industry, as well as the special features of upstream petroleum agreements, have been investigated The reason was to evaluate the importance of the governing law and the possibility of the application of the theory of Dépeçage in this area. In order to do so, various primary resources such as oil and gas dispute resolutions and upstream petroleum agreements have been utilized. Moreover, a large number of secondary material such as articles related to upstream oil and gas contracts have been used. Databases such as "HeinOnline", "LegalTrac", "JStore", "Springer", and "ICC Digital Library" had a significant role in achieving the aims of this portion of the research.

After studying the concept of Dépeçage and upstream oil and gas sector, an investigation of the possibility of its applications in oil and gas contracts was the next step of this research. It is essential to study the application of Dépeçage in different contractual situations in order to determine whether it could be applied to oil and gas contracts.

Therefore, databases such as "Rocky Mountain Mineral Law Foundation Digital Library" which is more specialized in this field have been queried. Various search terms such as "governing law", "conflict of law", and "severability" in upstream oil and gas contracts have been used. Moreover, various Canadian and French databases especially "WestlawNext", "Quiclaw",

"CanLII", "JurisClasseur Lexis/Nexis", and "vLex" have been utilized to find different cases where Dépeçage has been applied.

4. Limitation of the Study

Although the research was carefully prepared and has reached its aims, there were some unavoidable limitations. First, the scope and area of the study are broad due to the international nature of the subject. Because of the time limit, the research focused on the most important international and national regulations.

A second limitation is the huge number of classified and private information in the area of oil and gas law. On the one hand, the majority of host countries do not have transparency in their oil and gas contracts so that reaching or publishing their actual petroleum agreements was not feasible. On the other hand, most of the dispute resolution processes related to oil and gas law are private. Therefore, having access to these types of data was a significant challenge.

5. Organization

In order to achieve the objectives articulated above, this thesis has been divided into three chapters. The first chapter, which serves as literature review, focuses on determining the definition of Dépeçage in the legal scholarship and it presents the history and origin of the theory of Dépeçage. Moreover, the different areas of law in which this theory has been applied are investigated in this section.

The second chapter discusses the special features of upstream oil and gas contracts that lead to the application of the theory of Dépeçage, while the third chapter focuses on the possibility of the application of the theory of Dépeçage in upstream oil and gas contracts. In this chapter, the

position of the upstream oil and gas sector within the petroleum industry and the importance of the governing law in upstream oil and gas contracts are discussed.

Additionally, this chapter discusses the criteria for the application of the theory of Dépeçage as well as the practical use of this theory in upstream oil and gas agreements. Furthermore, it examines the application of Dépeçage when it has been chosen by the contracting parties, as well as solutions where judges and arbitrators choose to apply Dépeçage. Obstacles to the application of Dépeçage in upstream oil and gas contracts are discussed in this chapter as well.

Lastly, this research concludes by summarizing the discussion in previous chapters including a summary of the possibility, criteria, advantages, and disadvantages of the application of Dépeçage in upstream oil and gas contracts.

Chapter 1
History and Evaluation of the Theory of Dépeçage

The word Dépeçage has several legal meanings. However, this chapter presents the meaning of the theory of Dépeçage as it relates to choice-of-law. This chapter also discusses the history of Dépeçage, including the development of this theory in the United States and other countries, as well as the impetus for its application. Moreover, it examines the general advantages and disadvantages of applying the theory of Dépeçage. Lastly, this chapter provides an overview of the different areas of law in which the theory of Dépeçage has been applied.

1. Definition of the Theory of Dépeçage

Dépeçage is a French word, meaning carving up, cutting up and dismembering[1] and specifically relates to dismembering animals.[2] Although it has been used in this sense in legal cases[3], there is another definition of Dépeçage which is more popular in legal contexts. The theory of Dépeçage is the application of different laws to various legal issues arising from disputes. Specifically, it is a choice-of-law on an issue-by-issue basis.[4]

In other words, Dépeçage is the process of cutting up a case into individual portions where each issue is constrained by a different applicable choice-of-law analysis.[5] Under the theory of Dépeçage, different substantive issues may be resolved under different governing laws[6] where the choices influencing decisions vary.[7]

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[1] Robert Collins, *French English Dictionary*, 4th ed (United Kingdom: Harper Collins Publishers, 1995) at 233.
[2] Alain Rey, *Le micro Robert (Dictionnaire d'apprentissage de la langue Française)*, (Paris: 1992) at 346.
[3] See: *Directeur des poursuites criminelles et pénales c Serge Lanchance*, 2014 QCCQ 12037, [2014] JQ 14009; *Sa Majesté la Reine c F T*, 2014 QCCQ 13211, [2014] JQ 15283; *Rayanld Pépin c Le minister du Revenu national*, 1994 TCJ 878, [1994] ACI 878.
[4] Bryan A Garner, *Black's Law Dictionary*, 7th ed (United Statas: West Group, 1999) at 448.
[5] *Felipe Ruiz v Blentech Corp (*1996) 89 F (3d) 320 at para 89, 1996 35 Fed R Serv 3d 1053, Prod Liab Rep (CCH) P 14, 668.
[6] LaPlante v Am Honda Motor Co Inc (1994) F (3d) 731 at para 27.
[7] Slavko Djordjevic, "Private International law Regime of Inter Vivos Contracts Whose Effects Are Postponed to the Death of the Contracting party Disposing of the Property - De Lege Lata and De Lege Ferenda" (2015) 17 Rev Eur L 39 at 59.

According to the commonly accepted definition of Dépeçage, this concept has to be considered in both broad and narrow senses.[8] In consonance with the broad definition, Dépeçage covers all situations where different governing rules are applied to different issues in the same case. Dépeçage can also narrowly be defined as applicable only when rules of different states are used to govern substantive issues in the same dispute.[9] There is even a narrower approach to the definition of Dépeçage, which states that Dépeçage can only be used in situations where applying different governing rules to different issues would give rise to a result that would not have been achieved by exclusive application of particular laws.[10]

2. History and Origin of the Theory of Dépeçage

The United States is one of the countries that have a strong academic legal literature and practical usage relating to the theory of Dépeçage. As a result of the system of federalism in the United States, each state is governed by different laws so that choice-of-law has been a topic of scholarship.[11] In other words, federalism creates an atmosphere in which the states have the ability to disagree with one another, thus giving birth to a situation where Dépeçage can be effectively used.[12] Hence, studying conflict of law system in the United States is beneficial in determining the applicability of the theory of Dépeçage.

Until the end of the nineteenth century, United States courts firmly enforced the doctrine of *lex loci deliciti*. The doctrine of *lex loci deliciti*, which was strictly enforced by the courts before the modern choice-of-law, holds that the law of the place a tort was committed is the appropriate governing law to apply.[13] According to this doctrine, the courts should pay

[8] William L M Reese, "Dépeçage: A Common Phenomenon in Choice-of-law" (1973) 73 Colum L Rev at 58.
[9] *Ibid*.
[10] *Ibid*.
[11] Christopher G Stevenson, "Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues" (2003-2004) 37 Ind L Rev 303 at 309.
[12] *Ibid* at 310.
[13] Garner, *supra* note 4 at 923.

attention only to the place where a tort was committed, and apply the law of such place.[14] Scholars have criticized the doctrine of *lex loci deliciti* because it does not meet underlying policy considerations in evaluating the significance of the circumstances surrounding rights and liabilities.[15]

The United States courts eventually brought into use a "center of gravity" or "grouping of contracts" approach to analyze issues related to choice-of-law as a way to reach the best practical results. [16] Under the "center of gravity" approach, the law of the jurisdiction that has the greatest concern with a specific issue either because of relationship or contact with the parties is determined as the governing law.[17]

The key case in the development of "center of gravity" doctrine and the defining moment of choice-of-law is said to be the case of *Babcock v Jackson*.[18] In this case,[19] a vehicle accident occurred in Ontario, Canada. During a car trip Ms. Babcock, a passenger at the time from Rochester, New York, was seriously injured when a driver, also from Rochester, lost control of his motor vehicle.[20] Ms. Babcock sued Mr. Jackson (the driver) in New York State, and the case raised questions regarding 'choice-of-law' and which state's law to apply. Should the law of the place of residence of the accident victims (New York) be applied, or the law of the place of the tort (Ontario)? According to the doctrine of *lex loci deliciti*, the potential applicable law should be from where the tort was committed.

The laws of Ontario prohibit a passenger from suing the driver of a vehicle and therefore the court will absolve Jackson of all charges.[21] The court, rejecting the traditional

[14] Stevenson, *supra* note 11 at 305.
[15] Harold P Southerland, "Sovereignty, Value Judgments, and Choice-of-law" (2000) 38 Brandeis LJ 451 at 478-79.
[16] Stevenson, *supra* note 11 at 307.
[17] Hassel E Yatena, "The Hornbook Method and the Conflict of Laws" (1928) 37 Yale LJ 468 at 482.
[18] Harold L Korn, "The Choice-of-Law Revolution: A Critique" (1983) 83 Colum L Rev 772 at 827.
[19] *Babcock v Jackson*, 1963 191 NE (2d) 279 at 279, [1963] 12 NY (2d) 473.
[20] *Ibid* at 280.
[21] *Ibid*.

method of determining the governing laws, stated that New York's laws should be applied.[22] In doing so, the court focused on "center of gravity" and disregarded *lex loci deliciti*. In other words, the court used an analysis process that weighed factors such as the relationship between the parties, connections to the locality, and residency. The court held that the parties did not have a substantial connection with Ontario and so it would be unfair to apply Ontario's laws and regulations. The Court found that the jurisdiction with the most connections was New York and so New York law should apply.[23] That could be considered as a first step in the choice-of-law revolution.

In 1969, the United States conflict of laws was updated through "Restatement (Second) of Conflict of Laws".[24] According to the doctrine provided in section 6 of the Restatement, courts are asked to determine the law which has the "most significant relationship" with the issue and its analysis according to the factors provided.[25] The "most significant relationship" doctrine in the United States system provides the ability to determine the law of the state that will apply not only to the entire contract but also to each separable issue in the case.[26]

3. Development and Application of the Theory of Dépeçage in the United States

Following the adoption of the "most significant relationship" doctrine in the United States, wider acceptance of Dépeçage was foreseen due to the increasing number of cases which would arise where different states have concerns in the determination of different issues; especially when the relevant rules of these states are not the same.[27]

[22] *Ibid* at 285.
[23] Yatena, *supra* note 17 at 483.
[24] Stevenson, *supra* note 11 at 309-310.
[25] *Ibid* at 308.
[26] *Ibid.*
[27] Reese, *supra* note 8 at 59.

The theory of Dépeçage has increasingly been applied in cases involving tortious conduct, air crash disasters, and punitive damages in the United States.[28] However, the primary resource directly related to the growth of the application of the theory of Dépeçage in the United States was air crash disasters. Air crash disaster litigations have been mentioned as "fertile ground for the application of Dépeçage".[29] There are some cases in this field which have been subjected to the application of Dépeçage. As a result of much scholarly discussion, these cases had an important role in the development of the theory of Dépeçage.[30]

One of these cases is *In re Disaster at Detroit Metropolitan Airport*[31]. In this case, the court saw the need for Dépeçage in the choice-of-law problem that was presented[32]. Since there were significant facts in the case which occurred in more than one state, the court must then identify which state's law has more significant contact. When a state has been identified, the court must then decide where the various substantive laws at issue differ with regards to the particular issue in the contest. In other words, the court must determine whether there is a conflict between the states' law in regard to the same issue. If so, it may result in the use of rules of different states to determine different issues in the same case.[33]

In the case *In re Disaster at Detroit Metropolitan Airport*,[34] the plaintiff filed wrongful death claims against McDonnell Douglas Corporation and Northwest Airlines seeking compensatory and punitive damages.[35] The court split the plaintiffs' liability claims against McDonnell Douglas Corporation from the punitive damage claim against Northwest Airlines.[36] On the issue of the product liability claim the court found that the laws of three

[28] John C Cabannis, "Availability of Punitive Damages: Dépeçage" (2008), online: http://corporate.findlaw.com/litigation-disputes/availability-of-punitive-damages-depecage.html.
[29] Stevenson, *supra* note 11 at 311.
[30] *Ibid*.
[31] *In Re Disaster at Detroit Metropolitan Airport* (1987), [1989] 750 F Supp 793 at 793.
[32] *Ibid*.
[33] Reese, *supra* note 8.
[34] In Re Disaster at Detroit Metropolitan Airport, *supra* note 31.
[35] *Ibid*.
[36] *Ibid* at 799.

states are applicable: (1) Michigan, where the plane crashed; (2) Missouri, the primary location of the business for McDonnell Douglas Corporation and (3) California, the place of the aircraft's manufacturer.[37] There was a conflict between Michigan's law with regards to product liability. Missouri and California used strict liability while Michigan applied a negligence standard.[38]

After the court analyzed which state had the greater interest that the state's law should be enforced, the court denounced Michigan's interests stating that it had no significant prerogative in applying its laws while the other two states were strongly interested in applying their product liability laws.[39] The court ultimately enforced California's product liability laws although California and Missouri had practically identical laws. The court stated that California law should apply because the alleged wrongful conduct occurred within its borders.[40]

With regards to punitive damages against Northwest Airlines, the court decided that either Michigan (where the crash occurred) or Minnesota (primary place of business) state law would apply.[41] However, there was a conflict in these laws regarding punitive damages. This was a major issue because applying one state's law would undermine the laws set out by the other state. Here, the court held that Michigan's law would apply and not allow for punitive damages.[42]

In the case *In Re Aircrash Disaster Near Roselawn* [43] which is similar to the *Disaster at Detroit Metropolitan Airport* case, the court utilized Dépeçage and found the importance of its understanding in that "the application of the law was not a general one but rather one that

[37] *Ibid.*
[38] *Ibid* at 800.
[39] *Ibid* at 802.
[40] *Ibid* at 804.
[41] *Ibid* at 803.
[42] *Ibid* at 808.
[43] *In Re Aircrash Disaster Near Roselawn* (1994), [1996] 926 F Supp 736 at para 740.

tries to account for the significance of the state's relation". Under the doctrine of Dépeçage, it is not uncommon to apply several different substantive states' laws to resolve air crash cases.[44]

In the cases mentioned above, the courts considered the benefits of Dépeçage to determine the suitability of its application. From this viewpoint, the application would become dependent on the facts of each case.[45] As a result, it is not possible to give fixed categories of legal issues to be subjected to the application of Dépeçage. However, "Dépeçage reveals and disposes of false conflicts where the contacts and/or interests of one state greatly outweigh another state's contacts or interests on a separate issue."[46]

Despite differences between bodies of law, a false conflict does not present a choice-of-law problem. This is due to the fact that a law of one state may be applied without undermining the other disinterested laws and policies of another state[47]. Hence, from this point of view, the true conflicts occur where multiple states have a great interest in applying their law to a particular issue.[48] In other words, in the case of true conflict, applying a law of one state will undermine another interested state's law and policy.

Furthermore, section 145 of the Restatement (Second) of Conflict of Laws in the United States lays the framework for the application of Dépeçage, by prescribing a choice-of-law analysis of each particular issue and providing the factors to be considered.[49] This section 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 under the principles stated in s 6.
> (2) Contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:
> (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

[44] Stevenson, *supra* note 11 at 313.
[45] *Ibid* at 319.
[46] *Ibid*.
[47] Christian L Wilde, "Dépeçage in the Choice of Tort Law" (1968) 41 S Cal L Rev 329 at 342.
[48] Stevenson, *supra* note 11 at 319.
[49] *Ibid* at 308.

(d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue."[50]

Despite the principle of federalism, which allows each state to decide their own laws, there are some states within the United States that do not follow the theory of Dépeçage. Indiana is one of the states that have yet to adopt the theory of Dépeçage. This is apparent in the decision of the Indiana Supreme court in the case of *Simon v. U.S.* [51] which states that although different claims have been allowed to be analyzed separately, Indiana does not allow issues within those counts to be analyzed individually.[52] The different approaches taken by different states to the acceptance of the theory of Dépeçage in tort law could potentially cause complications.

4. Development of the Theory of Dépeçage in Other Countries

Dépeçage has been recognized in European countries as well, and it occupies an important position in European reinsurance and marine insurance contracts.[53] Moreover, the *Rome Convention on the Law Applicable to Contractual Obligations of 1980* ("Rome Convention") which determines the applicable law of contractual obligations in countries of the European Union, provides that a governing law of contract shall be determined by parties and that the parties would be able to select the law applicable to the whole or only a portion of the contract.[54] Therefore, this partition can be applied to different parts of a contract or in complex contracts.[55] In other words, although the last sentence of article 3(1) of the Rome

[50] *Restatement (Second) Conflict of Laws,* 2d (St Paul: American Law Institute Publishers, 1971; revised 1986 and 1988), s 145.
[51] *Simon et al v US & Fare v US,* [2003] 0308 CQ 377, [2004] 2945 US C APP, 02 3997.
[52] *Ibid.*
[53] Francesco Seatzu, *Insurance in Private International Law* (Oxford: Hart Publishing, 2003) at 99.
[54] *Rome Convention on the Law Applicable to the Contractual Obligations,* 19 June 1980, 80/934/EEC, 1605 UNTS 59, art 3, online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41980A0934.
[55] Eugenia Mattheou et al, "Greek Report" Greek Notary Publics Institute at 36.

Convention does not mention the term Dépeçage,[56] it expressly provides that the parties' choice-of-law may apply either to the whole or only a part of the contract and it gives freedom of choice to the parties.[57]

Furthermore, Article 7(1) of The Hague Convention of 22 December 1986 on *the Law Applicable to Contracts for the International Sale of Goods*[58] gives permission for the application of Dépeçage. It states that parties are able to select their preferred governing law and they can apply that law only to a portion of the contract.[59] Although the word Dépeçage is not mentioned in article 7(2), it practically provides parties the ability to apply a governing law to the whole contract or parts of the contract. [60]

Article 9 of The Hague Convention of 1 July 1985 on the *Law Applicable to Trusts and on their Recognition*[61] expresses that "a severable aspect of the trust, particularly matters of administration, may be governed by a different law."[62] In other words, this article permits the application of Dépeçage by providing the criteria of severability of subjects. [63] Canada is one of the countries that ratified this Convention and it came into force in 1993.[64]

Since the application of the theory of Dépeçage has been accepted in different countries and legal systems, there is an international understanding of this concept, which could

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[56] Rome Convention on the Law Applicable to the Contractual Obligations, *supra* note 54, art 3(1): "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."

[57] Alan Reed, "The Rome I Regulation and Reapprochement of Anglo-American Choice of Law in Contract: A Heralded Triumph of Pragmatism over Theory" (2011) 23 Fla J Intl L 359 at 411.

[58] *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods*, 22 December 1986, art 7, online: http://www.hcch.net/index_en.php?act=conventions.status&cid=59.

[59] *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."

[60] *Ibid*, art 7(2): "The 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. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties."

[61] *Hague Convention on the Law Applicable to Trusts and on Their Recognition*, 1 July 1985, art 9.

[62] *Ibid*.

[63] *Ibid*.

[64] *Ibid.*

promote the application of Dépeçage in international private law. In fact, some scholars believe that the international acceptance of the theory of Dépeçage is a condition precedent to the emergence of an international convention on the international private law which does not yet exist.[65]

It should be considered that the acceptance and application of Dépeçage have occurred primarily in tort law. However, international acceptance of Dépeçage, even in tort law, might be beneficial as a first step for the application of Dépeçage in contract law and could eventually lead to a common, international understanding of this theory.

5. Impetus for the Application of the Theory of Dépeçage

There are many driving forces and factors behind the theory of Dépeçage.[66] The first factor is the growing number of contracts in which parties have different preferences regarding the governing laws. This is caused by the concept of federalism and the increase in the number of international contracts.

On the one hand, with the emergence of sovereign states, choice-of-law problems have increased because each state is allowed and encouraged to develop its own independent legal body of law.[67] On the other hand, with the increase in international trade and foreign investments that encompass international communication, the number of international contracts has increased significantly. With regards to the implementation of these contracts, international parties may wish to apply their own legal system or a legal system which they are accustomed to, to the contract.

The second impetus for the theory of Dépeçage is the increasing competition for foreign investments. Because of the significant role foreign investors play in an economy, there

[65] Sylvette Guillemard & Alain Prujiner, "La Codification International du Droit International Privé: un Échecs" (2005) 46 Les Cahiers de Droit 175 at 180.
[66] Stevenson, *supra* note 11 at 310.
[67] *Ibid*.

is great competition to attract them. Some of the main factors influencing foreign investors' decisions are the rules and regulations they must deal with and the restrictions they may face.[68] Moreover, host countries wish to maintain their economic policies and have political stability.[69] These goals can be achieved if both host countries and foreign investors have a choice in selecting their desired governing laws. The application of Dépeçage would grant parties the opportunity to choose their desired governing law for specific portions of the contract while satisfying the requirements set out by the other party via application of other governing laws to the rest of their agreement.

The third factor that leads to Dépeçage is advocacy and modern choice-of-law.[70] This concept refers to the reasonable diligence of attorneys in representing their clients and seeking the law that is most suitable for their clients. [71] By utilizing the theory of Dépeçage, lawyers are able to perform issue-by-issue analyses to achieve the most favorable outcome for their clients.[72]

In countries with legal systems containing federal and state law, preventing "forum shopping" is another principle that further aids the advancement of the theory of Dépeçage. Forum shopping primarily occurs when federal courts and state courts have concurrent jurisdiction over one claim. Since both the federal and state courts' procedural rules and the substantive law may vary in some cases, the plaintiff would be able to take advantage of this situation.[73] In other words, the plaintiff would have the ability to prefer one jurisdiction to another, on the basis of its best interest.

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[68] Factors Influencing Foreign Investment Decisions, online: http://www.globalization101.org/factors-influencing-foreign-investment-decisions/.
[69] Ted Stolt & Max Danielsson, "Choice of Country as Host to Foreign Direct Investment by Multinational Corporations" Master Thesis (Sweden: Luleå University of Technology, 2004) at 17.
[70] *Ibid*.
[71] *Rules of Professional Conduct*, The Law Society of Upper Canada 2004, c 3, s 3.2-3, online: https://www.lsuc.on.ca/list.aspx?id=671.
[72] Michael P Cox, "Choice of Law: Conflicts Doesn't Have to be a "Dismal Swamp"?" (2013-2014) 15 T M Cooley J Prac & Clinical L 125 at 152.
[73] Friedrich K Juenger, "Forum Shopping, Domestic and International" (1988-1989) 63 Tul L Rev 553 at 553.

Forum shopping mainly occurs in states where the doctrine of *lex fori* is used. The problem arises when the injured victim files their claim in a forum with the most favorable law for their situation. The theory of Dépeçage would help prevent forum shopping as it helps the court to divide the case into different parts and apply various state laws to different issues arising from the case.[74]

In conclusion, the increasing number of international transactions, competition for foreign investments, and the desire to provide the most suitable law based on modern choice-of-law will lead to the acceptance and utilization of the theory of Dépeçage. All of the above-mentioned factors are present in upstream oil and gas contracts. Therefore, there is a potential to utilize the theory of Dépeçage in order to provide beneficial outcomes for all parties potentially impacted by upstream oil and gas contracts.

6. Advantages and Disadvantages of Application of Dépeçage

There are different points of view and attitudes about the theory of Dépeçage and several reasons for its acceptance or rejection. A study of the advantages and disadvantages of Dépeçage is necessary in order to evaluate this theory and its potential application to upstream oil and gas contracts. For example, the cost-benefit analyses of application of this theory could be accomplished by comparing its advantages and disadvantages. The first section discusses the advantages of the application of Dépeçage, followed, in the second section, by the disadvantages.

a. Advantages of Application of the Theory of Dépeçage

The following are some of the advantages that could be gained by the application of the theory of Dépeçage.

[74] Maryllen Corna, "Confusion and Dissension Surrounding the Venue Transfer Statutes" (1992) 53 Ohio St LJ 319 at 328.

i. Resolving What Seems to Be a Legal Impossibility

A legal system aims to function as a whole while consisting of many different parts. By the application of Dépeçage, different bodies of law would function while still honoring the parties' interest.[75] Therefore, the theory of Dépeçage is not only a useful concept in choice-of-law analyses but it may also be essential to resolving what seems to be a legal impossibility.[76] This point can be highlighted especially in situations where using more than one governing law could have a strong positive effect on the effectiveness of a contract. Hence, Dépeçage has the benefit of reducing seemingly unsolvable conflicts by dividing the legal issues and applying different laws to the issues, depending on the parties' intentions.

ii. Maintaining the Parties' Interests

There is significant interest, for parties to a contract, regarding the application of their selected and desired governing law. Some situations prevent the complete application of the chosen law such as applying mandatory laws, which are different from the selected governing law, to portions of a contract. Here, because of necessity, the courts typically ignore the parties' desired governing law and instead apply the law relating to the mandatory rules.

In these types of cases, by the application of Dépeçage, differentiating between those sections governed by the mandatory law and those governed by the selected law will be possible. Hence, the desired outcomes for all concerned could be achieved by maintaining the parties' selected governing law, at least to the portion of the contract, which is not under the governance of mandatory rules.

[75] Stevenson, *supra* note 11 at 338.
[76] *Ibid* at 337.

iii. Increasing Foreign Investments

Determining the substantive applicable law or the law that will apply to disputes between foreign investors and local partners is one of the crucial issues facing foreign investors.[77] This issue is commonly highlighted in the case of joint venture agreements which is an important area where foreigners might wish to have the law of their country of origin as the applicable law. The theory of Dépeçage gives an opportunity to the parties to remove certain aspects of the local law that they may not want to apply to certain parts of their contract and determine the foreign law as the applicable law.[78]

iv. Solving Complex International Law Problems

The theory of Dépeçage could be used as a tool in foreign jurisdictions to solve complex private international law problems. Seemingly unsolvable conflicts can be solved by dividing the legal issues in the same case and applying different governing laws to them. In other words, Dépeçage might be a means to reach satisfactory legal solutions by adjusting conflict of law issues when they arise.[79]

This is particularly so in cases involving a positive conflict of laws, that is, a situation where there are two different governing laws which could be applied to a case.[80] Here, Dépeçage could divide the contract into more than one portion with each portion having the possibility of being governed by a different applicable law. As a result, the application of the theory of Dépeçage would help to solve the problem by considering more than one proper governing law for the contract as a whole.

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[77] Allan Verman Yap Ong, "Issues in the Application of Dépeçage in Chinese Private International Law" (2009) 8 Chinese J Intl L 637 at 647.
[78] *Ibid* at 648.
[79] *Ibid* at 655.
[80] Daniel Berlingher Remus, "The Renvoi in Private International Law" (2013) 3:1 Intl J of Social Science and Humanity 66 at 67.

In effect, through the application of Dépeçage, courts can exclude specific foreign law rules and apply the rest of selected foreign law regulations. For instance, the foreign law may not impose tort liability on a driver in favor of a gratuitous passenger in a car accident.[81] In this part, the court could apply the laws of its own jurisdiction on this specific issue to impose liability on the driver; while the foreign law could be applied to resolve other aspects of the dispute.[82]

v. Emphasis on the Most Related Law to the Given Issue

Dépeçage divides the same legal problem into different legal issues where their center of gravity may be different. There could be more than one law relevant to one legal problem. The theory of Dépeçage emphasizes the law which has the greatest concern with a given issue. Therefore, it will prevent failure in meeting parties' expectations since the most related law is usually the most probable regulation in accordance with the parties' expectations. Moreover, emphasizing the most related law to the given issue by the application of Dépeçage serves to benefit each state involved in a dispute.[83]

vi. Grant More Justice

Although there is a concern that the application of Dépeçage would favor one party over another, it should be noted that courts or arbitrators cannot freely pick and choose the applicable state law in order to benefit one party. They must justify their ruling on choice-of-law by disclosing the interest and the results of choosing the specific law that applies to the issue at hand.[84] Justifying their choice-of-law principles provide more opportunity to examine

[81] Stephen G A Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) at 30.
[82] *Ibid*.
[83] Reese, *supra* note 8 at 62.
[84] Courtland H Peterson, "Private International Law at the End of the Twentieth Century: Progress or Regress?" (1998) 46 Am J Comp L 197 at 224.

details of a specific law that may bring more justice for each separate issue in the same case. Thus, Dépeçage provides a tool for judges and arbitrators to make fair decisions.[85]

vii. Emphasis on the Social Consequences of a Judicial Decision

The process of selecting the jurisdictional law to apply to an inter-jurisdictional issue involves consideration of social consequences such as environmental or health effects.[86] The preferable governing law may be the governing law that imposes less social consequences on the contracting parties. Thus, due to the large number of international legal cases and contracts, the law of the place of execution of a contract may not necessarily be the one that is more suitable or desirable to govern the legal issue. Dépeçage enables the application of different governing laws to portions of a contract in order to make it more adaptable to social consequences.

b. Disadvantages of Application of the Theory of Dépeçage

In spite of the fact that the application of Dépeçage is beneficial in some cases, it may cause some problems as well. The followings are some disadvantages of application of Dépeçage.

i. Destruction of Legislative Intention

The unification of a governing law may be affected by the application of the theory of Dépeçage. Every legal system consists of univalent elements with a legislative intention behind them, allowing them to work as a system. Dépeçage separates areas of the same legal case and applies various governing laws to each of them. This approach would result in

[85] Robert A Sedler & Aaron D Twerski, "The Case against All Encompassing Federal Mass Tort Litigation: Sacrifice Without Gain" (1989) 73 Marq L Rev 76 at 88.
[86] Russell J Weintraub, "Beyond Depeeage: A "New Rule" Approach to Choice-of-law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code" (1974-1975) 25 Case W Res L Rev 16 at 17.

Dépeçage functioning inefficiently since choosing certain portions of one governing law may destroy legislative intention.[87]

For instance, one state may provide broader recovery for an issue but may place, through privileges and immunities clauses, some limitation on the person who is responsible. Another state may determine a narrower recovery but with no privileges and immunities clauses.[88] Holding one person responsible for broader recovery on the basis of a legal system without privilege clauses may be unfair and it could destroy the legislative intention.

However, some legal issues may consist of completely different areas of law. Both here and in the aforementioned issue, judges and arbitrators could avoid this problem by recognizing the differences in various chosen governing laws.

ii. A Means to Escape from Strict Choice-of-law Determinations

The application of Dépeçage allows courts too much discretion.[89] Moreover, parties could choose not to apply the applicable governing law on a particular issue arising from their contract in order to escape from formal rules. Thus the theory of Dépeçage has been labeled as an escape device to strict choice-of-law determinations.[90]

Likewise, Dépeçage would be inappropriately used when choosing one state law over another regarding the same issue where doing so will undermine the equilibrium of the two laws or where it would undermine the policies of the state whose laws are not chosen or applied by the court.[91] However, it has to be considered that by providing specific frame and

[87] Kermit Roosevelt III, "The Myth of Choice of Law: Rethinking Conflicts" (1999) 97 Mich L Rev 2448 at 2534.
[88] William H Allen & Erin A O'Hara, "Generation Law and Economics of Conflicts of Laws, Baxter's Comparative Impairment and Beyond" (1999) 51 Stan L Rev 1011 at 1036.
[89] Eric H Gaston, "Reassessing Connecticut's Eclectic Choice of Law Methodology: Time for (Another) New Direction" (1999) 73 Conn Bar J 462 at 465.
[90] *Ibid* at 446.
[91] Symeon C Symeonides, "Issue-by-issue Analysis and Dépeçage in Choice-of-law: Cause and Effect" (2013) 45 University of Toledo L Rev 45 at 56.

criteria for the application of the theory of Dépeçage, the problem of having too much discretion could be ameliorated.

iii. Effect on the Neutrality of Judges and Arbitrators

Overusing the theory of Dépeçage may affect the neutrality of courts and arbitrators. This could occur through the combination of different states' laws to create a set of rules that are more favorable to one party.[92] Furthermore, the use of Dépeçage jeopardizes equality because it could favour the party with a wider access to legal resources.

However, one must consider that the theory of Dépeçage does not equate to the absolute freedom of judges and arbitrators to choose the governing law. The application of the theory of Dépeçage must be based on reasonable criteria and well-defined framework. Moreover, dispute resolution tribunals must determine a logical relationship between the chosen law and related portions of the contract.

iv. Prolongation of the Process of Finding the Applicable Law

One of the rationales for rejecting Dépeçage is forcing courts or arbitrators to do extremely complex legal analysis. Moreover, applying the concept of Dépeçage causes further delay in reaching judicial decisions due to the long process of finding the applicable law for each issue present within the case.

Although the application of Dépeçage may bring some complexity in determining the governing laws, it should be noted that resolving conflict of laws issues and determining a nation's conflict of law rules can be a challenging and time-consuming process on its own. Furthermore, individual justice and social interest must be considered in the application of choice-of-law.

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[92] Thomas M Reavley & Jerome W Wesevich, "An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice-of-law in Single-Accident Mass-Tort Case" (1992) 71 Tex L Rev 1 at 184.

v. Inability to Function Where There Are No Clear Preferences

It has been mentioned that in cases where multiple states have equal advantages and interests, Dépeçage may not be efficient.[93] In these situations, interest analyses based on the theory of Dépeçage would fail because there is no reason to favor one applicable law over another. However, the same problem may arise in any choice-of-law analysis including the process of selecting one applicable law for the entirety of the contract. In fact, the theory of Dépeçage can prove to be beneficial in such instances, as it provides the ability to select all of the different governing laws with equal relationship to the subject.

vi. Lack of Requisite Background to Apply Different Foreign Laws

Law is not always about pure and natural law and it is related to various elements such as politics, culture, and history. The application of Dépeçage in contracts may involve some laws and regulations that some foreign countries may not have the necessary background to apply or enforce. For example, there might be penalties related to the environment but no room to enforce them because the host country does not pay so much attention to the environment as the foreign country.

vii. High Cost of Negotiation

In the process of applying different governing laws, the parties' legal counsel need to acquire comparative law skills. The parties' attorneys must be fairly familiar with different legal systems that could potentially be the governing law.[94] Thus, this process increases the

[93] Roosevelt, *supra* note 87.
[94] Georges R Delaume, "Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria" (1988-1989) 63 Tul L Rev 575 at 578.

cost of negotiation.[95] Moreover, parties need to spend more time and effort to define the best systems that meet their legal needs.[96]

In addition, finding an adequate choice-of-law needs a fair amount of knowledge about the variety of potentially applicable systems of law. Attorneys must search for laws that have a potential to govern the issue or issues in order to select a proper one in regards to their clients' interest. However, this costly process may have a positive effect on the knowledge and experience of attorneys in regard to the contracts and could make them more accustomed to the process.[97]

7. Different Areas of Law in which the Theory of Dépeçage Has Been Applied

The theory of Dépeçage has been applied in several areas of law, especially in the United States. As mentioned previously, tort law accounts for the majority of cases that have applied Dépeçage. Other than tort law, Dépeçage has also been applied in other areas of law such as aviation, marriage, consumer transactions, and international commercial arbitration. A study of the different areas of law that the theory of Dépeçage has been applied provides a beneficial background that could lead to a better understanding of the position and possibility of application of the theory of Dépeçage in upstream oil and gas contracts. Therefore, in this section, some legal fields that the theory of Dépeçage has been applied are briefly discussed.

[95] *Ibid*.
[96] Craig M Gertz, "The Selection of Choice-of-law Provisions in International Commercial Arbitration: A Case for Contractual Dépeçage" (1991-1992) 12 Nw J Intl L & Bus 163 at 179, online: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1332&context=njilb.
[97] *Ibid*.

a. Dépeçage in Aviation Law

Because of the nature of aviation disputes, most do not arise in the parties' location. There are different factors that have a significant role in aviation disputes such as the place where the plane crashed, the primary location of the parties' business, and the place of the aircraft's manufacturer. Therefore, one of the significant common issues in aviation litigation is the governing law.[98]

Before the early 1960s, the doctrine of *lex loci deliciti* was the generally accepted choice-of-law rule. According to this doctrine, the law of the place where the tort was committed is the appropriate governing law. This is evident in section 377 of Restatement (First) of Conflict of Laws which states that "[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place".[99] Moreover, in regard to the law governing a plaintiff's injury, section 378 of Restatement (First) of Conflict of Laws declares that "[t]he law of the place of wrong determines whether a person has sustained a legal injury".[100]

This Restatement was followed as most courts and judges applied the law of the place where an accident or injury occurred. As a result, a considerable amount of air crash cases follow the doctrine of *Lex loci deliciti*.[101] For example, in *Boeing Airplane Company v. Brown*[102], the court determined, according to the conflict rule of the state of Washington, that the law of the place where the accident occurred would ultimately control the substantive

[98] Jeffrey M Liggio, "Choice of Law in Aviation Litigation, Florida and Elsewhere: Confusion at the Threshold" (1982) 49 Ins Counsel J 69 at 69.
[99] *Restatement (First) Conflict of Laws,* 1d (St Paul: American Law Institute Publishers, 1934) s 377.
[100] *Ibid*, s 378.
[101] Michael Bogdan, "Aircraft Accidents in the Conflict of Laws" in Collected Courses of The Hague Academy of International Law, Vol 208 (Netherlands: Martinus Nijhoff Publishers, 1988) ISBN 0792300580 at 104.
[102] *Boeing Airplane Comp v Brown* (1961) 291 F (2d) 310 (US court of appeals for the 9th circuit, 1961).

question of liability for negligence. In Florida, the court adopted similar conflict rule in the case of *Hopkins v. Lockheed Aircraft Corporation*[103].

Moreover, in the case of *Richards v. the United States,*[104] the court applied the conflict rule of Oklahoma which was that the law of the state where the injury and subsequent death occurred is the governing law. In *Prashker v. Beech Aircraft Corp.*[105], the conflict rule of Delaware, which was the place of the alleged tort, was applied by the court to determine the substantive rights of the parties.

Due to the nature of aviation litigation, the traditional rule of *lex loci deliciti* is not suitable. Facilitating the determination of the applicable law by making the results more predictable is the main advantage of the *lex loci deliciti* rule. However, this advantage does not exist in most aviation litigation[106] as the location where the air crash occurres is not a predictable one. Furthermore, *lex loci deliciti* has been criticized for being too rigid because of strict application and its inability to meet the realistic expectations and interest of the parties and the states involved.[107]

To maintain proper conflict rules for aviation disputes, the points of contact that are more appropriate than the unpredicted aspect of the crashes should be used.[108] In other words, factors such as the parties' locality and residency are more predictable in comparison to traditional factors like the place of the airplane crash. Accordingly, United States courts adopted and applied the doctrine of "center of gravity".[109] The two cases in the history of

[103] *Hopkins v Lockheed Aircraft Corporation*, [1968] 394 F (2d) 656.
[104] *Richards v US*, [1962] 369 US 1.
[105] *Prashker v Beech Aircraft Corp.*, [1958] 258 F (2d) 602.
[106] Bogdan, *supra* note 101 at 153.
[107] Liggio, *supra* note 98 at 70.
[108] Bogdan, *supra* note 101 at 155.
[109] Liggio, *supra* note 98 at 70.

aviation litigation which applied the center of gravity rule for the first time are *Babcock v. Jackson*[110] and *Kilberg v. Northeast Airline Inc.*[111]

However, the problem was not completely solved by the application of the center of gravity rule. Therefore, section 145 of the "Restatement (Second) of Conflict of Laws"[112] introduced the doctrine of "most significant relationship" as the new conflict of laws approach in aviation disputes. The doctrine of "most significant relationship" considers different factors whereby each factor may be assigned different weight and importance.[113] Subsequently, as a result of this conflict of law rule, the law of the state that has the factor with the most significant relationship to any aviation dispute would be applied.

The problem that arises from the application of the "most significant relationship" rule is that different outcomes could arise for the different parties engaged in the aviation litigation. The case of the air crash disaster, near Chicago, Illinois on May 1979 is an example of this problem.[114] In this case, the Northern District of Illinois court applied the Illinois conflict rule, which was the most significant relationship, and held that the law of the principal place of business of each of the defendants is the proper governing law in regard to punitive damages. Hence, one of the parties whose principal place of business was New York would not be subject to punitive damages claims because New York law did not provide for punitive damages. However, another party, whose place of business was Missouri, would be subject to punitive damages according to the law of that state.[115]

Hence, in order to improve the function of choice-of-law in aviation litigation, which contain different and separable issues, a different conflict of law rule should be employed.

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[110] *Babcock v Jackson, supra* note 19.
[111] *Kilberg v Northeast Airline Inc.,* [1961] 172 NE2d 556.
[112] Restatement (Second) Conflict of Laws, *supra* note 50.
[113] Liggio, *supra* note 98 at 72.
[114] *In Re Air Crash Disaster, Near Chicago, Illinois* (1979), [1981] 644 F (2d) 594, s 17.
[115] *Ibid*.

However, it is not always possible to meet parties' expectations in regard to all of the issues by the application of one governing law to the entire case. As a result, Dépeçage became the next choice-of-law rule added to aviation litigation.

The theory of Dépeçage gives more flexibility to the court in order to apply the most suitable governing law to each part of aviation disputes. In other words, by using Dépeçage in air crash cases, there is no need to find only one factor with the most significant relationship to the case and apply its governing law to all of its aspects. Dividing an aviation dispute into different issues in order to apply different governing laws to them, as enjoined by the theory of Dépeçage, may help meet parties' expectations.

The court applied Dépeçage as its choice-of-law rule in the aviation case of *Reyno v. Piper Aircraft Co*[116]. In this case, the court stated that "the issues are separable and the balance of comparative interests may vary"; thus, it is necessary to individually analyze each issue and compare it to governmental interests.[117]

b. Dépeçage in Marriage Law

Marriage is an important foundation of society that affects the status of the parties, as well as their rights and duties. In family law, cases involve elements from different domestic laws that will possibly bring about issues which contain different choice-of-law rules.[118] For instance, if a couple married in France and, both are residents of the United Kingdom, then any dispute related to their marriage may have to be referred to either French law or English law.

Here, if the issue raised were related to the formal validity of the marriage, the governing law would be French law, which is the law of the place of celebration of the

[116] *Reyno v Piper Aircraft Co*, (1980), [1980] 630 F (2d) 149.
[117] *Ibid* at 167.
[118] James Fawcett, Janeen M Carruthers & Peter M North, *Cheshire, North and Fawcett Private International Law*, 14th ed (United States, New York: Oxford University Press, 2008) at 54.

marriage. If the dispute were related to capacity, English law would govern it. Hence, one general dispute relating to the validity of a marriage may be considered as two separate parts referable to different governing laws.[119] Consequently, in some cases, there might be different issues that require consideration of different governing laws.

Due to the special nature and significance of marriage cases, there are different factors that have to be considered in order to have a definite and suitable choice of legal principles. The first important principle is the presumption of validity of marriage wherever it is possible,[120] to protect family relationships.[121] An international uniformity in marriage status should be promoted in marriage law to prevent considering a marriage valid in one country but not in another. Additionally, the applicable law should be predictable, and vague rules should be avoided. In other words, parties should be able to ascertain the applicable law even when there is no litigation.[122]

An understanding of conflict of law rules is necessary for marriage litigation in order to offer professional advice and utilize other "tools" for resolution of conflicts.[123] Moreover, the choice-of-law rules should meet the reasonable expectations of all parties.[124] Furthermore, cultural structures and moral and religious concerns are additional factors that should be considered when providing suitable conflict of law rules. For example, situations such as same-sex marriages, bigamy, and polygamy become important in selecting the different approaches of various national laws.[125]

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[119] *Ibid.*
[120] Albert A Ehrenzweig, *A Treatise on the Conflict of Laws* (St Paul: West Publishing Co, 1962) at 378.
[121] John Swan, "A New Approach to Marriage and Divorce in the Conflict of Laws" (1974) 24 UTLJ 27 at 39.
[122] Peter M North, "Development of Rules of Private International Law, in 166 Recueil Des Cours" in Collected Courses of The Hague Academy of International Law, (Netherlands: Sijthoff & Noordhoff, 1980) at 43.
[123] Ralph Gibson et al, *Law Commission Working Paper No. 89, Private International Law: Choice of Law 4Rules in Marriage* (London: Her Majesty's Stationery Office, 1985) para 2.35.
[124] Restatement (Second) Conflict of Laws, *supra* note 50, s 6(2)(d).
[125] Alan Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rule" (2000) 20 NYL Sch J Intl & Comp L 387 at 390.

In the United States, prior to the second Restatement of conflict of law, the law of the place of celebration was the general governing law for all issues of marital validity.[126] The chosen governing law, according to this rigid approach, would not always have the capacity to consider all the above-mentioned factors; many of which play a significant role in the resolution of family law cases. However, in 1934, the Restatement First of conflict of laws affirmed the previously declared common law approach.[127]

Section 121 of the First Restatement of Conflicts of laws adopted the rule of the place of celebration[128] by providing that "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."[129] However, section 131 and 132 of the first Restatement are regarded as exceptions to this rule.[130]

Expressed exceptions to this governing rule in section 132 of the first Restatement is related to invalidity of marriage based on the law relating to the location of domicile. In this case, domicile would be an interest-creating approach between a marriage and a state.[131] This exception considers that some matters are invalid when they are contrary to the law of the state of either party's place of residence.[132] Issues considered invalid involve:

"(a) polygamous marriage,

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[126] Peter M North, *Private International Law Problems in Common Law Jurisdictions* (Martinus: Nijhoff, 1993) at 25.
[127] Peter D Maddaugh, "Validity of Marriage and the Conflict of Laws: A Critique of the Present Anglo-American Position" (1973) 23 UTLJ 117 at 126.
[128] Linda Silberman, "Same-Sex Marriage: Refining the Conflict of Laws Analysis" (2005) 153 U Pa L Rev 2195 at 2200.
[129] Restatement (First) Conflict of Laws, *supra* note 99, s 121: "Law Governing Validity of Marriage: Except as stated in s 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."
[130] Restatement (First) Conflict of Laws, *supra* note 99, s 131: "Remarriage After Parties To Divorce Both Forbidden To Remarry: If by statute each party to a divorce granted in the state is forbidden for a certain time or during the life of the other party, to marry again, and one party goes into another state and marries, being permitted to do so by the law of that state, the marriage is valid everywhere, even in the state where the divorce was granted, unless (a) the time named is a time within which an appeal to a higher court may be taken; or (b) the statute which forbids the parties to marry is interpreted as being applicable to the marriage of domiciliaries in another state; or (c) the marriage is otherwise invalid under the rule stated in § 132."
[131] Willis L M Reese, "Marriage in American Conflict of Laws" (1977) 26 Intl & Comp L Q 952 at 955.
[132] Maddaugh, *supra* note 127.

(b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicile,

(c) marriage between persons of different races where such marriages are at the domicile regarded as odious,

(d) marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state."[133]

In 1971, the second Restatement of conflict of law caused a fundamental revolution in the interest analysis of choice-of-law principles in the United States.[134] The second Restatement adopted the law that has the most significant relationship to the particular issue as the proper governing law.[135] Section 283 of the second Restatement[136] states that "[t]he validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in section 6."[137]

According to Section 6 of the second Restatement of conflict of law "a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."[138] However, in the cases that directives do not exist, the relevant choice-of-law principle according to the section 6 of the second Restatement includes:

"(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

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[133] Restatement (First) Conflict of Laws, *supra* note 99, s 132.
[134] Peter M North, "Development of Rules of Private International Law in the Field of Family Law" in Peter M North, *Essays in Private International Law*, (Oxford: Clarendon Press, 1993) 109-169 at 125.
[135] Reed, *supra* note 125 at 410.
[136] Restatement (Second) Conflict of Laws, *supra* note 50, s 283: "Validity of Marriage (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6. (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."
[137] *Ibid*.
[138] *Ibid*, s 6(1).

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied."[139]

Moreover, section 283 of the second Restatement provides that "a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."[140]

Therefore, in contrast to the first Restatement, the second Restatement states that the place of celebration might not necessarily have the greatest interest in the evaluation of the validity of a marriage. However, in some cases, several competing states may have an interest in the marriage as a fundamental institution (for example, when the parties were domiciled in different states before getting married or effected a change in domicile after the marriage).[141]

There should be a broader perspective on marriage, in comparison to torts since it contains a general expectation with regards to the relationship to be validated.[142] Therefore, the most possible, clear, and certain choice-of-law rule is desirable in marriage law.[143] In addition, remarriage after divorce, family relationships and consanguinity, nonage, polygamy, and absence of consent are the five main categories in marriage law that application of the different governing law would greatly impact.[144] These issues require an independent evaluation with regards to the interest of the various states as well as the interest of the parties.

Here, an issue-by-issue analysis approach would function better than a case-by-case one. Hence, Dépeçage provides a choice-of-law rule to fit the specific subjects and considers

[139] *Ibid*, s 6(2).
[140] *Ibid*, s 283.
[141] Reed, *supra* note 125 at 412.
[142] Swan, *supra* note 121 at 44.
[143] *Ibid* at 45.
[144] T Downes, "Recognition of Divorce and Capacity to Remarry", 35 Intl & Comp L Q 170 (1986) at 176.

the individual requirements of each issue in order to avoid broad jurisdiction-selection.[145] In addition, a combination of interest analysis with Dépeçage would serve to provide specific and certain choice-of-law formulations.[146] This twin approach could improve the substantive policy objectives, protect the parties' reasonable expectations, and provide more predictability while promoting international uniformity of decisions in regards to marriage law.[147]

The case *Radwan v. Radwan (No.2)*[148] is an example of this functional re-categorization to achieve a preferred result. Here, the application of Dépeçage to a specific compartmentalized issue led to the avoidance of rigid jurisdiction-selection. In this case, a domiciled Englishwoman married an already married domiciled Egyptian in Paris in a valid polygamous marriage recognized under Egyptian law. The couple then returned to Egypt, which they intended to be their matrimonial home. The husband divorced his first wife and five years later they moved to England and lived there for fourteen years.[149]

The wife began a divorce proceeding in English court, and the question was raised regarding the validity of her marriage. The parties had lived together for a significant number of years in Egypt, and both believed for over 19 years that their marriage was valid. As a result, the courts stated that the relevant law for validation of marriage with respect to polygamy (and not necessary other issues, such as age) was that of the parties' domicile of choice.[150]

c. Dépeçage in Consumer Contracts

The application of the theory of Dépeçage in consumer contracts could arise as a result of laws and regulations or it may exist due to the of parties' intention. The theory of Dépeçage

[145] North, *supra* note 126 at 37.
[146] Reed, *supra* note 125 at 391.
[147] Reed, *supra* note 125 at 391.
[148] Radwan v Radwan (No.2) [1972] 3 All E R 967.
[149] *Ibid.*
[150] *Ibid.*

may also be applied where there is an international convention related to a consumer transaction but the convention does not cover all the issues arising from the transaction. In these cases, the provisions of the international convention will apply to the contract, and for the portions of the contract which are not covered by the convention, the local law or any other applicable law would be applied.

Moreover, statutory application of Dépeçage may even arise due to regional conventions. These cases mainly occur in European law in the form of directives issued by the European Union. In fact, the existence of a common market between European countries requires a coordination in their contract law and consumer regulations. The EU Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC)[151] and Council Directive of 5 April 1993 on Unfair Terms in Consumer Contracts (93/13/EEC)[152] are some examples of regional conventions on consumer law.

The directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [153] regulates some areas of liability for defective products. The directive provides regulations that govern related sections in contracts. In situations where the directive offers no regulation for parts of a contract, national laws will be applied. Therefore, in contracts containing different terms relating to product liability, the areas that fall within the scope of the directive are governed by its regulations while the rest of the contract would remain under national law.

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[151] Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 25 July 1985, 85/374/EEC, Official Journal of the European Communities, No L 210 (entered into force 30 July 1985) at 29-33, online: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0374&from=en.

[152] Council Directive on Unfair Terms in Consumer Contracts, 5 April 1993, 93/13/EEC, Official Journal of the European Communities, L 95 (entered into force 16 April 1993) at 29, online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML.

[153] Council Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, *supra* note 151.

Moreover, the EU Council Directive of 5 April 1993 on Unfair Terms in Consumer Contracts[154] encourages the application of Dépeçage in the same way. If a contract contains terms related to consumer law, which is the subject of this directive, the directive would take precedence while the national law would be applied to the remaining areas of the contract. Furthermore, according to article 1(2) of this directive, "the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community is a party, particularly in the transport area, shall not be subject to the provisions of this Directive." [155] Consequently, national laws and relevant international law govern the parts that have been excluded based on this article.

Another possibility of application of Dépeçage could be present according to the regulations issued under this directive. Article 8 of the EU Council Directive of 5 April 1993 on Unfair Terms in Consumer Contracts[156] expresses that the "[m]ember States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer." [157]Accordingly, the directive permits member states to apply stricter domestic regulations in the case of unfair terms. Therefore, the directive will be applied in the recognition of unfair terms and the stricter national law would govern the penalties; thus, encouraging the application of the theory of Dépeçage.

Consumer law contains mandatory rules and it has a close relationship with public policies. Accordingly, even though parties could select their desired law to govern their contracts in contract law, this ability has been minimalized in consumer law. However, in

[154] Council Directive on Unfair Terms in Consumer Contracts, *supra* note 152.
[155] *Ibid*, art 1(2).
[156] *Ibid*, art 8.
[157] *Ibid*.

situations where a foreign law provides more protection for consumers, parties may choose to adopt that law by the application of the theory of Dépeçage. Therefore, the selective foreign law would be applied to some parts of the contract while the rest of the contract will remain governed by national law.

d. Dépeçage in International Commercial Arbitration

International commercial arbitration has become a common tool of dispute resolution due to the rapid increase in international trade and because of its advantages for parties.[158] Providing a proper choice-of-law for these international commercial contracts has a significant impact in decreasing risks and costs arising from dispute resolution.[159] Moreover, choice-of-law clauses in international commercial contracts containing arbitration clauses may not only affect the outcome of a dispute;[160] they also have some influence on the arbitrators and the procedure and process of arbitration.[161]

Parties to an international arbitration may impose restrictions in regards to choice-of-law by choosing the same governing laws for both their contract and arbitration procedure.[162] However, parties to international contracts containing arbitration clauses can agree to apply different governing laws to different potential issues arising from their contract.[163] For example, parties may agree that a particular law shall apply to the arbitration of disputes, while a different law would apply to the contract in general.[164]

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[158] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration,* 4th ed (Sweet & Maxwell, 2004) at 17.
[159] Gertz, *supra* note 96 at 173.
[160] David J Branson & Richard E Wallace, "Choosing the Substantive Law to Apply in International Commercial Arbitration" (1986) 27 Va J Intl L 39 at 45.
[161] Vitek Danielowicz, "The Choice of applicable Law in International Arbitration" (1985-1986) 9 Hastings Intl & Comp L Rev 235 at 237.
[162] GT Yates, *Arbitration or Court Litigation for Private International Dispute Resolution The Lesser of Two Evils*, in Carbonnea TE (ed) Resolving Transnational Disputes Through International Arbitration (Virginia: University Press of Virginia, 1984) at 233.
[163] Georges R Delaume, *Law and Practice of Transnational Contracts* (New York: Oceana Publications Inc, 1988) at 9.
[164] Danielowicz, *supra* note 161.

Accordingly, application of Dépeçage in international arbitrations provides parties with full autonomy over their choice-of-law. This allows them to best adopt separate governing laws for both their arbitration process and their contract.[165] Most arbitration agreements and clauses refer to the rules of an institution of arbitration such as the International Chamber of Commerce ("ICC") and provide for their governance over procedures of arbitration.[166]

An example of this is demonstrated in ICC Award No. 4695, *Brazil, Panama and USA v Defendant Brazil*[167]. In this case, the parties specified Brazilian law as the applicable law of the contract at the time of the agreement.[168] At the same time, the parties agreed to have any dispute resolved by arbitration in Paris under the ICC Rules.[169] At the time of the dispute, the claimants (Brazilian, Panamanian and American companies) brought the arbitration proceeding on the basis of the ICC procedure, as provided under the arbitration clause.[170]

The tribunal upheld and approved the separability of the substantive and procedural law of the arbitration agreement.[171] Here, the choice-of-law for the contract was Brazilian law while the ICC rules governed the arbitration. The arbitrators mentioned that the source of the validity of both laws was the choice-of-law made by the parties.[172] Further discussion and examples of the application of Dépeçage by international arbitral tribunals are provided in section 4 of chapter 3.

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[165] Gertz, *supra* note 96.
[166] Gertz, *supra* note 96 at 173.
[167] *Claimants (Brazil, Panama and USA) v Defendant (Brazil),* 1984 Digest of ICC - International Court of Arbitration Awards ICC (WL Can) at 1 (ICC Award No 4695).
[168] *Ibid* at 2.
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*
[172] *Ibid.*

Chapter 2
Special Features of Upstream Oil and Gas Contracts Leading to the Application of the theory of Dépeçage

Upstream oil and gas contracts define the terms of the relationship between oil companies and host countries, and regulate their rights and obligations with legal effect. Most host countries have their own preferred type of petroleum contracts, especially for upstream projects. However, contracts related to the upstream sector contain special features that would make it more convenient to apply the theory of Dépeçage. Special features of upstream oil and gas contracts such as complexity and separability play a significant role in determining the law that governs the contracts. This chapter presents some of the most important features in order to determine the extent to which the theory of Dépeçage can be applied.

1. Complexity

Oil and gas contracts are often complex, and they tend to be international, long-term, and contain different components, parts and various contractual and legal frameworks including different taxation systems.

a. Contractual Components

Upstream oil and gas contracts have different contractual components and require various considerations. Some examples include engineering, procurement, construction, installation, hand-over, maintenance, operation, financing, insurance, and dispute resolution. Therefore, a comprehensive management and broad knowledge and use of experts are necessary.

The experts that work in an upstream oil and gas project might have various approaches for selection of applicable governing law since each portion may function better under the

governance of different applicable law. Here, imposing the same governing law on all of these parts may not grant satisfaction to some of these contractual components. However, having various governing laws without considering the ability of the contract to work as a distinctive legal instrument may create inconsistency. Therefore, a considerate application of the theory of Dépeçage could be helpful to reach adequate choices of law.

Furthermore, since an upstream oil and gas contract consists of various components, one governing law may not adequately address all the component parts of the contract. Also in some cases, even if the governing law regulates a particular issue it might still be ambiguous or inadequate. As an example, some host countries might not focus on regulating environmental issues to protect the environment. Choosing different governing laws for the environmental issues of the upstream oil and gas contract through the application of Dépeçage may help the parties to avoid the deficiencies in environmental regulations in the host state. Moreover, it may be challenging or even impossible for the parties to cover all their expectations through terms and articles of the contract.

b. Contractual Frameworks

The petroleum industry operates in accordance with various contractual frameworks and agreements around the world. The types of contracts frequently used for upstream oil and gas projects are concessions, production sharing agreements (PSAs, also known as production sharing contracts, PSCs), joint venture agreements, service contracts, and Farm-Out Agreements.[1]

Choosing the particular type of upstream contract and providing contractual clauses that correspond to the needs and expectations of parties is one of the most important stages in

[1] Choi Woosug, "Oil and Gas Law: Types of Agreement in International Oil and Gas Operations" (2009) at 2, online: http://ils.khu.ac.kr/lawbook-gbr/2-1/2-1-5.pdf

upstream oil and gas projects.[2] Forms of oil and gas agreements may differ according to local laws and regulations as well as other parties' preferences. For example, in the United States and Canada, most oil and gas agreements are in the form of mineral leases.[3] Elsewhere, oil and gas agreements are mainly concession agreements, production sharing agreements, joint operating agreements, or service contracts.[4]

Therefore, upstream contracts must be in compliance with the host country's laws and regulations.[5] Moreover, the host countries have to comply with contractors' preferred regulations to attract foreign investors and develop their oil and gas industry. The parties may not always want the same applicable law to govern their contract. Hence, Dépeçage could significantly assist the parties in the process of choosing their governing law by granting the opportunity to choose more than one applicable law to govern the contract.

c. Taxation Systems

The amount of income tax that companies must pay and the procedure of tax accounting differ significantly according to various tax laws.[6] Moreover, oil and gas companies must assess and pay several taxes other than income tax. For instance, companies must determine and pay import duties, severance or production taxes, value added taxes, as well as employment-related ones.[7] In addition, most governments impose special petroleum taxes that are often based on the quantity or value of petroleum production. These may be imposed in

[2] Mohamed Fathi Ghandour, "Production Sharing Agreements (PSAs) in Azerbaijan: The case of Azeri-Chirag-Guneshli" Master of Business Administration Thesis (Paris: IPAG Business School, 2011) at 62, online: http://dspace.khazar.org/jspui/bitstream/123456789/1404/1/Mohamed%20Fathi%20Ghandour.pdf.
[3] Charlotte J Wright & Rebecca A Gallun, *International Petroleum Accounting* (United States of America, PennWell Books, 2005) ISBN-139781593700164 at 26.
[4] *Ibid*.
[5] Woosug, *supra* note 1.
[6] Wright & Gallun, *supra* note 3 at 25.
[7] *Ibid*.

order to reach particular goals such as generating more income or motivating oil and gas companies to invest in certain regions.[8]

For example, there is a section under article XIII of the production sharing agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation, and PanAfrican Energy Tanzania Limited that is related to additional profits tax.[9] Article 13.1(a) of this agreement states that:

> "PanAfrican Tanzania shall be subject to an Additional Profits Tax that shall be calculated on a Contract Area basis in accordance with the provisions of this Section 13.1. Additional Profits Tax shall be calculated for each year and shall vary with the real rate of return earned by PanAfrican Tanzania on the net cash flow from the Contract Area."[10]

The complex taxation system on upstream oil and gas, and their relationship to the host country's law creates the necessity of applying the host country's tax regulations. Although taxation laws are usually related to the host country legal system, they may not be the preferable one for the other parties to the contracts. Forcing foreign investors to accept the host country's rules and regulations as the law applicable to all parts of the contracts might negatively affect their decision to enter into the agreement. Here, through the application of Dépeçage, parties would be able to apply the most appropriate law to their taxation system while having the opportunity to apply different governing laws to other portions of the contract. This will lead to greater satisfaction for all parties.

2. **Separability**

Upstream oil and gas contracts have the capacity to be severable, as they consist of different and separable parts. Generally, these types of contracts can be studied under different

[8] *Ibid*.
[9] *Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited, Relating to the Songo Gas Field, Dar es Salam, Tanzania*, 11 October 2001, art XIII at 40.
[10] *Ibid*, art 13.1 at 40.

categories such as technical and technological, economic and commercial, financial and fiscal, contractual, legal and environmental.

Exploration, operation, engineering, construction, installation, hand-over and using the latest oil and gas technology are considered as part of the technical and technological category.[11] The rate of return for investments, imports and exports of petroleum productions, international transportation and insurance coverages are all examples of economic and commercial aspects of upstream oil and gas contracts; while issues such as accounting, financing oil and gas projects, taxation systems, and operating expenses are considered part of the financial and fiscal portion.

The contractual category involves negotiation, determination, and execution of oil and gas contracts. Parties' commitment and obligations, dispute resolution and applicable governing law are some elements of the legal side of the upstream oil and gas contract. Safety, health, and environmental issues are all considered as part of the environmental section.

In fact, upstream oil and gas contracts contain various separable parts that need to work as a unified body. Although these are the parts of one unique contract, each may function better under a different governing law. Applying different governing laws to various issues of upstream oil and gas contact through Dépeçage could give rise to a result that might not otherwise be achievable by exclusive application of a particular governing law.[12]

One of the disadvantages of the theory of Dépeçage is that it could destroy the legislative intention by separating different aspects of the same contract and applying different governing laws.[13] However, separability of upstream oil and gas contracts decreases the probability of this accruing. In other words, since the component parts of upstream oil and gas

[11] Nasrollah Ebrahimi & Farokh Javandel Jananlu, "TEFSEL Risk Management in Regulation of International Oil Contracts" (Spring and Summer 2015) 1:1 Energy Law Studies17 at 20.
[12] *Ibid*.
[13] *Ibid*.

contracts are separable, it is unlikely that the application of different governing law to the different component parts would negatively affect the legislative intention.

3. Long Term

The upstream oil and gas sector includes time-consuming phases such as searching for potential crude oil and natural gas fields, drilling exploratory wells, and operating developmental wells to bring the oil and gas to the surface.[14] These stages are typically governed by upstream oil and gas contracts. Thus, due to the nature of their subjects, upstream oil and gas contracts are long-term agreements that exist for long periods such as twenty-five years.[15] For example, according to article 4.1(1) of the 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, "the Contract term shall commence on the Effective Date and shall continue for a period of thirty (30) years after the Effective Date."[16]

This long-term feature 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

[14] Basic Information, Coalbed Methane Outreach Program (CMOP), online: https://www3.epa.gov/cmop/basic.html, (Accessed 31 May 2016).
[15] Amir Hosein Mabadi, "Legal Strategies in Upstream Oil and Gas Contracts to Attract Foreign Investment: Iran's Case" LLM Dissertation (Tehran: Faculty of law of Shahid Beheshti University, 2008) at 123, online: http://ssrn.com/abstract=1745427.
[16] *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*, among the State Oil Company of the Azerbaijan Republic and Amoco Caspian Sea Petroleum Limited, BP Exploration (Caspian Sea) Limited, Delta Nimir Khazar Limited, Den Norske Stats Oljeselskap a.s, Lukoil Joint Stock Company, Mcdermott Azerbaijan Inc., Pennzoil Caspian Corporation, Ramco Hazar Energy Limited, Turkiye Petrolleri A.O., Unocal Khazar Ltd., Agreement Date: 20 September 1994, Verification Date: 1 February 2003, art 4.1(a) at 10.

the parties. In such cases, by the application of the theory of Dépeçage, parties would be able to change the applicable law governing sections of the contract to their preferred one.

4. International Nature

Most upstream oil and gas contracts are international contracts. The oil and gas projects constituting the subject-matter of those contracts are not necessarily located in the same country where the headquarters of the company or companies leading the projects are located. Often the contractors handling aspects of oil and gas project are from a different country than the company that owns the project. In most cases, contractors have to facilitate the drilling as well as the shipment of resources. Hence, all the parties are bound together via contracts.

Due to this international nature of upstream oil and gas contracts, the governing law of the contracts is one of the major issues that may arise. The parties to the upstream oil and gas contract want to apply their preferred governing law, while also trying to satisfy other parties such as contractors and sub-contractors. In addition, these contracts could be between parties from different states, where they would rather apply their own state laws. Moreover, another significant problem may be to find a competent court or other dispute resolution tribunals to resolve any dispute.

Accordingly, there is a severe need for a system that could satisfy the parties with regard to the governing laws. The application of Dépeçage in these types of contracts would enable both parties to apply their preferred governing law to various aspects of the contract, thus making the process more convenient for them.

5. Relationship with the Host Country

Petroleum and its production, as the main subject of upstream oil and gas contracts, could be considered a national treasure from the perspective of the host country. This close

relationship may need special consideration in the process of choosing the appropriate governing laws. In many of these cases, the host country desires that oil and gas projects be governed by the law of the host country. However, this governing law might not be the most desirable one for the other parties involved in upstream oil and gas contracts.

The following are some examples of the contractual relationship between upstream oil and gas contracts and host countries that may require the application of host countries' laws. In these cases, the theory of Dépeçage grants the ability to all parties to apply the host country's laws to parts of the contract while applying a different governing law for the rest of the contract.

a. Ownership of Mineral Resources and Reservoir

Oil and gas companies must have a contract with the owner of mineral rights prior to exploration and production operations. The owner of mineral resources might be the government and public authorities or it might be a private person. In the United States and some parts of Canada, mineral rights are privately owned except for minerals located on public lands.[17] However, in other oil-producing countries "sovereigns, kings, dictators, emirs, relevant ministry of natural resources or democratic governments of one kind or another"[18] usually own the mineral deposits.

Public or private ownership of oil and gas reservoirs affect oil and gas contracts, including their frameworks and provisions. If there is public ownership of oil and gas resources and reserves, the government of the host country is directly involved. Moreover, in the case of private ownership of reservoirs, the government could also be indirectly involved such as

[17] Charles Moerbe, "International Operations: Contracts with the Government and Basic Concepts of International Operating Agreements" (2000) Lewis Mosburg's Oil & Gas Newsletter at 1, online: http://www.mosburgoil-gas.com/html/body_moerbe_11_96_5a.html.
[18] *Ibid*.

through an applicable taxation system. Therefore, the ownership of oil and gas reservoirs, as immovable properties, significantly binds them to their host country.

In these cases, applying the host country laws might be the most effortless but not the most efficient choice. In other words, although there might be a need for applying host country laws to some parts of the contracts based on the ownership of reservoir, different governing laws could be applied to the rest of upstream oil and gas contracts. Here, by the use of the theory of Dépeçage, parties would be able to separate various portions of their contract and apply more than one governing law.

b. Domestic Supply and Consumption

Because petroleum products are necessary for human activities, there is a domestic need for them in order to satisfy the internal consumption requirement of the host countries. There are clauses in some upstream oil and gas contracts to ensure the domestic supply of oil and gas products for internal consumption. These clauses impose an obligation on the parties to satisfy domestic demand for oil and gas products. The host country may be entitled to a percentage of oil and gas production to satisfy domestic demands. For example, article 18.1 of the production sharing agreement between the government of the Republic of Uganda and Tullow Uganda Limited expresses that:

> "Out of the total quantity of Crude Oil production to which the Licensee is entitled in each Calendar Quarter, the Government may elect to take a quantity of Crude Oil, of the gravity, grade and quality of its choice, that the Government requires to satisfy the requirements of internal consumption in Uganda for such Calendar Year… ."[19]

[19] *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda, Between the Government of the Republic of Uganda and Tullow Uganda Limited, In respect of Exploration Area 1*, February 2012, art 18.1 at 41.

Article 29 of the production sharing contract between the government of the Republic of Kenya and ERHC AGC Profond Ltd. is another example related to the domestic supply obligation.[20] According to the first section of this article:

> "The Contractor shall have the obligation to supply in priority Crude Oil for domestic consumption in Kenya and shall sell to the Government that portion of the Contractor's share of Production, which is necessary to satisfy the domestic supply requirements in accordance with the following provisions."[21]

c. Domestic Resources

Oil and gas operations are huge projects that require a significant workforce as well as supplies. Therefore, the home countries want to benefit from this situation to improve their economy by producing more job opportunities. Hence, there are some clauses in oil and gas contracts obligating the other party to use domestic equipment, goods, and services. Due to these clauses, the labor law system of the host country would be involved. The following are some examples of this kind of obligations in upstream oil and gas contracts:

1. Article XV of the production sharing agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited expresses the necessity of using Tanzanian Resources during the execution of the contract.[22] According to article 15.1 of this agreement:

> "PanAfrican Tanzania shall give preference to the purchase of Tanzanian goods and materials; provided, however, that such goods and materials are of an acceptable quality and are available on a timely basis in the quantity required, on competitive terms." [23]

[20] *Production Sharing Contract between the Government of the Republic of Kenya and ERHC AGC Profond Ltd.*, Relating to the Block 11A, art 29 at 40.
[21] *Ibid*, art 29(1) at 40.
[22] Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited, Relating to the Songo Gas Field, Dar es Salam, *supra* note 9, art XV at 46.
[23] *Ibid*, art 15.1 at 46.

Moreover, according to article 15.2 of this contract, the contractor shall preferentially employ Tanzanian services when it is possible.[24] This article expresses that:

> "PanAfrican Tanzania shall also give preference to the employment of Tanzanian service contractors as far as they are financially and technically competent and possess the necessary skills to perform the work required by PanAfrican Tanzania, and such contractors are available on a timely basis and on competitive terms." [25]

2. Article 13 of the production sharing contract between the government of the Republic of Kenya and ERHC AGC Profond Ltd. is related to local employment, training and community development project.[26] This article states in part that:

> "The Contractor, its contractors and sub-contractors shall, where possible, employ Kenya citizens in the Petroleum Operations, and until expiry or termination of this Contract, shall train those citizens. The training program shall be established with the consultation of the Minister."[27]

3. Article 20.1 of the production sharing agreement between the government of the Republic of Uganda and Tullow Uganda Limited states that:

> "In procurement, Licensee shall give preference to goods which are produced or available in Uganda and services which are rendered by Ugandan citizens and companies unless such goods and services are offered on terms which are not equal to or better than imported goods and services with regard to quality, price and availability at the time and in the quantities required."[28]

4. In the production sharing contract between the government of the Republic of Kenya and ERHC AGC Profond Ltd., preference for Kenyan goods and services is prescribed under article 31. Preference shall be given to Kenyan resources when the prices, quality, quantity and timeline of delivery are comparable with non-Kenyan resources. According to article 31(1) of this contract:

> "The Contractor, its contractors and subcontractors shall give preference to Kenyan materials and supplies for use in Petroleum Operations as long as their prices, quality,

[24] *Ibid*, art 15.2 at 46.
[25] *Ibid*.
[26] *Production Sharing Contract between the Government of the Republic of Kenya and ERHC AGC Profond Ltd, supra* note 20, art 13 at 23.
[27] *Ibid*, art 13(1) at 23.
[28] *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda, Between the Government of the Republic of Uganda and Tullow Uganda Limited, In respect of Exploration Area 1, supra* note 19, art 20.1 at 44.

> quantities and timeliness of delivery are comparable with the prices, quality, quantities and timeliness of delivery of non-Kenyan materials and supplies."[29]

Moreover, article 31(2) states that "[t]he Contractor, its contractors and subcontractors shall give preference to Kenyan contractors for services connected with Petroleum Operations as long as their prices, quality of performance and timeliness are comparable with the prices, quality of performance and timeliness of non-Kenyan service contractors."[30]

6. Fluid Nature of Consideration

Consideration, in general, is not a legal obligation but it is a promise that the offeror requests.[31] In legal terms, consideration is something with an objectively determined value at least to the parties, exchanged by them to enter into the contract.[32] Payment, the promise of performance or even forbearance, that is not doing an act, can be considered as consideration by parties.[33] In other words, it is an exchange of promises that "must be some benefit to the party by whom the promise is made, or to a third person at his instance".[34] The existence of consideration plays a significant role in determining the validity of a contract. Upstream oil and gas contracts have special features based on the consideration that may be affected by the parties' choice-of-law. The specific nature of their consideration includes the undetermined product for sale and floating rate.

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[29] *Ibid*, art 31(1) at 42.
[30] *Ibid*, art 31(2) at 42.
[31] Samuel Williston, "Consideration in Bilateral Contracts" (1913-1914) 27 Harv L Rev at 506.
[32] *West's Encyclopedia of American Law*, 2nd ed, (2008), Consideration, online: http://legal-dictionary.thefreedictionary.com/Consideration+(law), (Accessed 11 May 2017).
[33] *Ibid.*
[34] John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* (1856) consideration, online: http://legal-dictionary.thefreedictionary.com/Consideration+(law), (Accessed 11 May 2017).

a. Undetermined Product for Sale

Undetermined product for sale refers to the uncertainty of the quantity and quality of crude oil and/or natural gas at the time of the contract. As a result, there is a clause in upstream oil and gas contracts relating to the measurement of petroleum. For example, article 25(1) of the production-sharing contract between the government of the Republic of Kenya and ERHC AGC Profond Ltd.[35] provides that: "[t]he volume and quality of Petroleum produced and saved from the Contract Area shall be measured by methods and appliances customarily used in good international petroleum industry practice and approved by the Minister."[36]

Another example is article 13.2(a) of the 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. This article provides that "the volume and quality of petroleum produced by contractor shall be measured by methods and appliances in accordance with generally accepted international Petroleum industry practice, and shall be monitored by the Parties."[37] Similarly, article 11 of the strategic alliance agreement between the Nigerian Petroleum Development Company Limited and Septa Energy Nigeria Limited mentions different ways to evaluate and determine the quality of crude oil that is subject of the contract.[38]

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[35] *Production Sharing Contract between the Government of the Republic of Kenya and ERHC AGC Profond Ltd, supra* note 20.
[36] *Ibid*, art 25(1) at 32.
[37] 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, *supra* note 16, art 13.2(a) at 41.
[38] *Strategic Alliance Agreement between Nigerian Petroleum Development Company Limited and Septa Energy Nigeria Limited, The Development and Production of OMLS 4, 38 and 41* (2010) art 11 at 28: "11.1: Available Crude Oil shall be valued in accordance with the following procedures: (a) on the commencement of production from new reservoirs, PMT shall engage the services of an independent laboratory of good repute to determine the assay of the new Crude Oil. (b) When a new Crude Oil stream is produced, lifting shall be made for a trial marketing period of three (3) calendar months or the period to requires to lift the first three (3) cargoes, whichever is shorter. during the trial marketing period PMT shall: (i) collect samples of the new Crude Oil upon which the assay shall be performed as provided in Article 11.1(a) above; (ii) determine quality and yield pattern of the new Crude Oil;
(iii) share the marketing such that each party markets approximately their proportionate share of the new Crude Oil, notwithstanding the fact that a Party's share of Available Crude Oil may be lifted in the process; payments thereafter shall be made in accordance with Article 10.5; (iv) exchange information regarding the marketing of

As is apparent from the examples above, the contracting parties usually provide a mechanism for ascertaining the quantity of petroleum that constitutes consideration at the time of entering the contract. However, the actual determination needs to take place during the execution of the contract. Where the mechanism prescribed by the parties fails to determine the exact quantity of petroleum that constitutes consideration under the contract, the entire contract could be defeated for lack of consideration. In other words, the ambiguity regarding consideration at the time of entering into the contract may result in the contract becoming invalid in some legal systems. For instance, at common law, consideration must be certain in order to be effective. Also, according to article 233(2) of the Iranian Civil Code,[39] the vagueness of the consideration in a contract nullifies the contract itself.[40]

In such cases, the theory of Dépeçage could solve this problem of invalidity of contract arising from the vagueness of consideration. Parties will be able to select a different governing

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the new Crude Oil including documents which verify the sales price and terms of each lifting; (v) apply the actual F.O.B. Sales price to determine the price of each lifting. Such F.O.B. sales pricing for each lifting shall continue after the trial marketing period until a valuation of the new Crude Oil has been completed but in no event shall it be longer than ninety (90) days after conclusion of the trial marketing period. (c) as soon as practicable but in any event not later than sixty (60) days after the end of the trial marketing period, PMT shall review the assay, yield, and actual sales data. PMT shall present a proposal for the valuation of the new Crude Oil. A valuation method either spot related or any other method acceptable to both parties shall be stablished for determining the price for each lifting of Available Crude Oil. Such valuation method shall be in accordance with the Official Selling Price published by NNPC or relevant government authority. It is the intention of the parties that such prices shall reflect the true market value of the new Crude Oil. The valuation method determine hereunder (including the product yield values) shall be mutually agreed within thirty (30) days from the after-mentioned meeting failing which; determination of such valuation shall be referred to an independent consultant. (d) upon the conclusion of the trial marketing period, the Parties shall be entitled to lift their share of available Crude Oil pursuant to Article 10 and the Lifting Procedure. (e) when a new Crude Oil stream is produced from the Contact Area and is co-mingled with an existing Crude Oil produced in Nigeria which has an established Official Selling Price basis then such basis shall be applied to the extent practicable for determining the Official Selling Price of the new Crude Oil. PMT shall meet and decide on any appropriate modifications to such established valuation basis which may be required to reflect any change in the market value of the Crude Oil as a result of co-mingling.
11.2: If in the opinion of either Party an agreed price valuation method fails to reflect the market value of the Crude Oil produced in the Contract Area, then such Party shall propose to the other Party modifications to such valuation method once in six (6) months but in no event more than twice in any year. The Parties shall them meet within thirty (30) days of such proposal and mutually agree on any modifications to such valuation within thirty (30) days from such meeting failing which, determination of such valuation shall be referred to an independent consultant."

[39] *The Civil Code of the Islamic Republic of Iran*, 1935, art 233: "The following conditions are of no effect and will nullify the contract itself: 1. Conditions which are contrary to the requirements of a contract. 2. Conditions which are unknown and of which lack of knowledge entails ignorance of the consideration."

[40] *Ibid*.

law to apply to the portion of the contract relating to consideration, thus maintaining the validity of the contract. They can then keep their preferred governing law and apply it to the rest of the contract.

b. Floating Rate

The price for crude oil or natural gas is not a fixed one and there is a floating rate system for pricing petroleum products. The consideration in many upstream oil and gas contracts is crude oil, natural gas or other petroleum products. However, upstream contracts are usually long-term contracts and it is not possible to determine the oil price at the time of entering into the contract. Therefore, parties usually rely on a floating rate system to determine the value of consideration in these contracts.

In most upstream oil and gas contracts, the "market price" is mentioned as the value of the petroleum products since the price of oil may change significantly during the contract. For example, article 15.1 of the production sharing agreement between the government of the Republic of Uganda and Tullow Uganda Limited expresses that:

> "Crude Oil shall, for all purposes of this Agreement, be valued at the end of each Month … the market price ("Market Price") used to value Crude Oil shall, where arm's length sales transactions is freely convertible currencies of Crude Oil to third parties have been made during the preceding month, be the weighted average of the per Barrel net realized price obtained FOB at the Seaboard Terminal or any other point of export for such arm's length third party sales less, in the event that a separate pipeline company is formed pursuant to paragraph 16.2, the average tariff charge per Barrel for such month imposed by the pipeline company for transporting the oil from the Delivery Point to the Seaboard Terminal or any other point of export."[41]

In some legal systems, this may cause uncertainty with regards to consideration and the question of the validity of the contract. Thus, applying a different governing law to this part of

[41] *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda, Between the Government of the Republic of Uganda and Tullow Uganda Limited, In respect of Exploration Area 1*, *supra* note 19, art 15.1 at 34.

the contract through the application of Dépeçage could help to resolve this issue. In these cases, having a different law to govern this part of the agreement helps to maintain the validity of the contract.

Chapter 3
Possibility of the Application of the Theory of Dépeçage in Upstream Oil and Gas Contracts

The oil and gas industry consists of the global process of exploration, production, purifying, transportation, and marketing of oil products.[1] The exploration and production sector for crude oil and natural gas is also known as the upstream oil and gas industry.[2] This chapter explores the importance of the governing law and choice-of-law in this upstream sector of the oil and gas industry.

Choice-of-law analysis including the selection of applicable governing law for upstream oil and gas contracts is a fundamental issue that has significant implications on different aspects of a contract such as interpretation, validity, and dispute resolution. This topic will be further assessed by investigating the possibility and criteria for the application of the theory of Dépeçage as well as the practical use of Dépeçage in some parts of upstream oil and gas contracts. Moreover, different approaches to the application of Dépeçage in upstream oil and gas contracts will be discussed.

1. Position of Upstream Oil and Gas Sector in the Oil and Gas Industry

The entire chain of the oil and gas industry consists of three major sectors: upstream, midstream and downstream.[3] The upstream oil and gas industry involves exploration of oil fields and extraction of crude oil from the ground.[4] Therefore, it consists of different stages

[1] Robert D Bott, *Petroleum Industries, "The Canadian Encyclopedia"*, 6th ed (Toronto: Historica Canada, 2009), online: http://www.thecanadianencyclopedia.ca/en/article/petroleum-industries/, (Accessed 6 October 2016).
[2] Petroleum Services Association of Canada (PSAC), "Industry Overview" , online: http://www.psac.ca/business/industry-overview/ , (Accessed 30 May 2016).
[3] *Ibid*.
[4] Organization of the Petroleum Exporting Countries (Public Relations & Information Department), *I to know (An Introduction to the Oil Industry & OPEC)*, 2nd ed (Austria, Vienna: 2013) ISBN 978-3-200-02193-8 at 27.

such as searching for potential underground or underwater crude oil and natural gas fields, drilling exploratory wells, and subsequently developing production wells.[5] Production is considered an upstream operation, and facilities used to achieve the production are called upstream facilities.[6]

Canada has a good international reputation in many areas of the upstream oil and gas sector such as oil sands developments, environmental protection, operations in cold climate, and upgrading heavy oil.[7] More than one thousand exploration and production companies and a significant number of drilling contractors, service rig operators, and various scientific and technical companies are working as a part of the upstream oil and gas sector in Canada.[8]

Accordingly, the total revenue of the upstream oil and gas sector in Canada in 2000 was CD$ 63 billion.[9] Moreover, in five years from 2008-2012, the Canadian government collected a total revenue of CD$ 20.7 billion from upstream oil and gas production and related activities.[10] In 2015, the total Canadian crude oil production was 3.87 million barrels per day.[11] The price per barrel was CD$ 57.76[12] and the total revenue was CD$ 81.59 billion.

For the purpose of this study, only the contracts covering upstream oil and gas operations will be examined. However, providing a brief description of other sectors in the oil and gas industry leads to a better understanding of the position of the upstream sector. The

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[5] Basic Information, Coalbed Methane Outreach Program (CMOP), online: https://www3.epa.gov/cmop/basic.html, (Accessed 31 May 2016).
[6] Howard R Williams & Charles J Meyers, *Manual of Oil and Gas Terms*, 3rd ed (2006) 821 Rel. 13/820 Rel. 41-12, Word: Upstream at 1115.
[7] Petroleum Services Association of Canada (PSAC), *supra* note 2.
[8] *Ibid*.
[9] *Ibid*.
[10] Natural Recourses Canada, "Energy Markets Fact book 2014-2015" (2015) Cat. No. M136-1/2014E-PDF (Online) ISSN 2291-9074 at 7, online: http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/files/pdf/2014/14-0173EnergyMarketFacts_e.pdf
[11] Canadian Association of Petroleum Producers, "Economic Forecast, Trends and Benchmarking" (2015), online: http://www.capp.ca/canadian-oil-and-natural-gas/economic-competitiveness/economic-forecast-trends-and-benchmarking, (Accessed 18 April 2017).
[12] Alberta Energy Regulator, "Crude Oil Prices" (updated March 2017), online: https://www.aer.ca/data-and-publications/statistical-reports/oil-prices, (Accessed 18 April 2017).

midstream industry provides the fundamental connection between the areas of oil and gas production and the location of most consumers.[13] Petroleum storage and transportation of commodities (e.g., crude oil, natural gas, liquid natural gas, and Sulphur) are considered as midstream sector.[14] Thus, the major players in the midstream petroleum sector in Canada are transmission pipeline companies.[15]

Downstream operations consist of refineries and marketing. Oil refineries, petrochemical plants, oil and gas distributors, and retail outlets are some of the major players in the downstream sector.[16] In other words, downstream is the process of turning crude oil into usable products and providing petroleum products such as gasoline and fuel oils to consumers.[17]

2. Importance of Governing Law in Upstream Oil and Gas Contracts

The applicable governing law and its determination in a contract are crucial since it will define the way that dispute-resolving tribunals must interpret the contract.[18] Additionally, determination of the governing law enables parties to have control over the fundamental issues of the contract such as validity, performance, and parties' rights and liabilities.[19]

Furthermore, it helps to determine whether contractual obligations have been discharged by breach, frustration or completion of the obligations.[20] Definition of loss and determination of damages arising from breach of contract also depend on the applicable

[13] Petroleum Services Association of Canada (PSAC), *supra* note 2.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] Investopedia, "Downstream", online: http://www.investopedia.com/terms/d/downstream.asp, (Accessed 11 November 2016).
[18] Stephen Antle & Jennifer K Choi, "Choice of Contractual Governing Law and Dispute Resolution Jurisdiction", (2015) Rocky Mt L Fdn 1 at 2.
[19] Ibid.
[20] Ibid at 3.

governing law.[21] Another significance of the governing law is defining third parties' rights, benefits and obligations as well as their ability to claim under the contract.[22]

In addition, according to article 14 of Inter-American Convention on the Law Applicable to International Contracts ("Inter-American Convention"), which expresses the "scope of the applicable law",[23] the applicable governing law of a contract shall govern the performance of the obligations that have been raised by the contract, and "the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation".[24]

Moreover, throughout the process of oil and gas production and life of a reservoir, many disputes could arise. Due to the international nature of upstream oil and gas contracts, determination of the governing law is a significant issue with regards to the resolution of disputes arising from such contracts.[25] Choice-of-law clauses are inserted in most international contracts. According to these provisions, parties determine the applicable governing law at the time of entering into the contract to make their contractual relationship more certain and predictable. [26]

Dépeçage is a choice-of-law theory that should be considered in the process of determining the applicable law of the contract. Due to the importance of the applicable governing law, choice-of-law is one fundamental issue in a contract where there might not be

[21] Drew Brown Ltd v "Orient Trader" [1972], SCJ NO 143.
[22] Antle & Choi, *supra* note 18 at 3.
[23] Inter-American Convention on the Law Applicable to International Contracts, 17 March 1994, Organization of American States, 33 ILM 732, art 14:
The law applicable to the contract in virtue of Chapter 2 of this Convention shall govern principally: a) its interpretation; b) the rights and obligations of the parties; c) the performance of the obligations established by the contract and the consequences of nonperformance of the contract, including assessment of injury to the extent that this may determine payment of compensation; d) the various ways in which the obligations can be performed, and prescription and lapsing of actions; e) the consequences of nullity or invalidity of the contract.
[24] *Ibid*, art 9.
[25] Antle & Choi, *supra* note 18.
[26] *Ibid*.

a common agreement between the parties. With the application of the theory of Dépeçage in upstream oil and gas contracts, different legal systems' rules could be applied to a particular contract that would play a significant role in achieving the priorities of the parties.

Although certain advantages may be gained by the application of the theory of Dépeçage, one must also consider its negative effects on upstream oil and gas contracts. Therefore, there is need to investigate the criteria for the application of Dépeçage in order to reach certain answers on the possibility of its application to upstream oil and gas contracts.

3. Criteria for Application of the Theory of Dépeçage in Upstream Oil and Gas Contracts

Contracts and cases that are appropriate for the application of Dépeçage must meet certain criteria. The first criterion for consideration during the application of the theory of Dépeçage is the protection of the parties' justified expectations. [27] Maintaining parties' interests in upstream oil and gas contracts must be considered as one of the significant criteria for the application of Dépeçage. This theory should not be applied in cases where it leads to dissatisfaction of the parties or where it defeats their expectations.[28]

Moreover, the theory of Dépeçage ought not to be applied to a contract if it would lead to destroying legislative intention. In addition, it is inappropriate for courts to apply Dépeçage in cases where the application of this theory would lead to the invalidation of a contract or a trust.[29] Therefore, Dépeçage should be applied with caution.

Additionally, each issue must relate to the applicable law that has the greatest concern for that issue.[30] If there is no interest in determining specific governing laws, the theory of

[27] William L M Reese, "Dépeçage: A Common Phenomenon in Choice-of-law" (1973) 73 Colum L Rev at 60.
[28] *Ibid* at 64.
[29] *Ibid*.
[30] *Ibid* at 60.

Dépeçage should not be applied.[31] As well, Dépeçage must not be used when it would not function to fulfill the target of each of the selected rules. [32]

In effect, Dépeçage should function to effectuate the purpose of each of the applied rules and bring choice-of-law values.[33] There should be an actual preference for the use of specific rules to help the selected portion of a contract function better. Hence, if there were no preference for applying different laws, it would serve no purpose to do so. Moreover, during the process of choosing different foreign laws, the required background for their application should be considered. Otherwise, the chosen rules, without the requirements of their application, cannot be applied because they would not be able to serve their purposes.

Another criterion has been provided to limit the application of Dépeçage. This will arise in cases where the governing laws provide protection for one of the parties. For instance, in consumer contracts, it is inappropriate to apply a foreign law which is less protective of the consumer than the domestic one.[34]

Finally, judges and arbitrators must provide strict and determined approaches for the application of Dépeçage in upstream oil and gas contracts. This ought to be done to maintain their neutrality and prevent parties from using this theory to escape from the choice-of-law execution. The criteria, legal reasons, and logistic needs for the application of Dépeçage, and its role in fulfilling the parties' expectations must be stated by judges and arbitrators during dispute resolution.

In order to achieve maximum advantages from its application, these criteria should be considered by parties in upstream oil and gas contracts before applying the theory of

[31] *Ibid* at 64.
[32] *Ibid*.
[33] *Ibid* at 60.
[34] Rosario Duaso Cales, "La Determination du Cadre Juridictionnel et Legislative Applicable aux Contrats de Cyberconsommation" (November 2002) at 4, lex electronica http://www.les-electronica.org.

Dépeçage. Considering these criteria also provides them with an opportunity to avoid the disadvantages associated with this theory which could affect the validity of their contract.

4. Practical Use of Dépeçage in Upstream Oil and Gas Contracts

Despite the lack of general acceptance of the theory of Dépeçage in upstream oil and gas contract, it has been partially used in these types of contracts. Arbitration clauses and clauses related to the good oil field practice are examples of provisions that could be considered as partial and practical use of the theory of Dépeçage in upstream petroleum contracts.

a. Practical Use of Dépeçage through Arbitration Clauses

Dispute resolution is one of the main issues that should be mentioned in massive international transactions such as upstream oil and gas contracts. In most international contracts, parties provide choice-of-jurisdiction clauses to determine the competent court or any other possible tribunal to adjudicate disputes arising from such contracts. [35] Arbitration is a dispute resolution option, which has potential advantages in comparison to litigation in courts. [36] Thus, international commercial arbitration has been used repeatedly to settle contractual disputes arising from the rapid increase in international trade.[37] Recognition and expansion of international arbitral institutions are motivated by some key factors, including but not limited to consistency, predictability, and efficiency in commercial affairs.[38]

There are several reasons for parties to choose international arbitration instead of litigation in national courts. One of them is avoiding delays associated with court litigation and

[35] Antle & Choi, *supra* note 18.
[36] *Ibid*.
[37] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration,* 4th ed (Sweet & Maxwell, 2004) at 20.
[38] Trevor C W Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 144.

speeding the dispute resolution process.[39] They may also be able to lower the expenses involved in disputes resolution by speeding the process while litigation tends to be protracted and expensive.[40] However, there are some factors that may bring some additional cost to the arbitration process,[41] such as the expenses involved in administrating the process[42] and delays associated with scheduling hearings or even selecting the arbitrators.[43] Moreover, in some particular business or legal issue, experts with knowledge or experience are needed to resolve the disputes. Choosing the arbitration system gives an opportunity to the parties to select suitable factfinders with experience.[44]

Reducing uncertainties and complexities of application of a foreign system of litigation is another benefit of using international arbitration. Hence the parties would have a more neutral, certain and appropriate dispute resolution.[45] In addition, parties' trade secrets or personal issues may be more secure by using arbitration since litigation is a public way of dispute resolution in comparison to arbitration. Furthermore, parties' ability to predict and determine the law governing their dispute resolution is another advantage of using international arbitration.[46] These advantages of international arbitration explain why the use of arbitration clauses in international contracts is "almost universal".[47]

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[39] "General Principals of Law in International Commercial Arbitration" (1988) 101 Harv L Rev 1816 at 1817, online: https://www.jstor.org/stable/pdf/1341437.pdf?refreqid=excelsior%3A1f976e898ce8f9b1a0e18d2d91f9f9a2

[40] Peter D Ehrenhaft, "Effective International Arbitration" (1977) 9 L & Poly Intl Bus 1191 at 1191.

[41] Francis J Higgins, "Brown and Roach, Pitfalls in international Commercial Arbitration" (1980) 35 Bus L at 1035.

[42] De Vries, "International Commercial Arbitration: A Contractual Substitute for Courts" (1982) 57 Tul L Rev 42 at 61.

[43] Michael Kerr, "International Arbitration v Litigation" (1980) 1980 J Bus L 164 at 176.

[44] Ehrenhaft, *supra* note 40 at 1193.

[45] Vitek Danielowicz, "The Choice of applicable Law in International Arbitration" (1985-1986) 9 Hastings Intl & Comp L Rev 235 at 236.

[46] David J Branson & Richard E Wallace, "Choosing the Substantive Law to Apply in International Commercial Arbitration" (1986) 27 Va J Intl L 39 at 39.

[47] Kerr, *supra* note 43 at 164.

Upstream oil and gas contracts are international contracts with special needs and features. Hence arbitration clauses are often included in upstream oil and gas contracts. Many existing arbitration clauses in upstream oil and gas contracts have their own different governing law. In other words, although there is usually a determined law in upstream agreements governing substantive parts of the contract, the arbitration clauses may provide that the arbitration rules of a different jurisdiction shall apply to any arbitration arising from the contract.

This could be said to be a practical and partial use of the theory of Dépeçage in upstream oil and gas contracts. The following are some examples of upstream oil and gas contracts which contain a different governing law for the arbitration clause than the rest of the contract.

1. The ICC (International Chamber of Commerce) Award No. 4402[48] is a dispute resolution case regarding oil and gas extraction.[49] In this case, the tribunal held Swiss law as the applicable governing law to the contract according to the parties' agreement.[50] However, the ICC rules were mentioned as the law applicable to the procedure of the arbitration based on the parties' intention at the time of the contract.[51] In other words, the parties chose the different applicable law to their dispute resolution and the ICC arbitrators recognized their intention. Therefore, although Dépeçage was not mentioned, a practical form of this theory is apparent here due to the application of more than one governing law to the same contract.

2. In the ICC Award No. 3100,[52] parties to the contract agreed on the application of Algerian private law, which was for all intents and purposes, based on the Civil Code of France

[48] *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).
[49] *Ibid* at 2.
[50] *Ibid*.
[51] *Ibid*.
[52] *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).

at the time of the contract.[53] However, in the meantime, a new autochthonous code had been enacted.[54] The dispute resolution tribunal stated 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"[55]. Accordingly, French law was applied to the substantive aspects of the dispute.[56] However, the Swiss arbitration Concordat was applied as the law governing the procedural aspects of the arbitration.[57] Here, two different governing laws were adopted and applied. Therefore, this can be considered as a practical use of the theory of Dépeçage.

3. In the production sharing contract between the National Oil Company of Liberia (NOCOL) and Anadarko Liberia Block 10 Company, the Liberian law is mentioned as the applicable law governing the contract.[58] Article 23 of this contract expresses that:

> "Except as explicitly provided in this Contract, the Contractor shall be subject to Liberian law as in effect from time to time, including with respect to labor, environmental, health and safety, custom and tax matters, and shall conduct itself in a manner consistent with Liberia's obligations under international treaties and agreements in so far as those have the effect of Law in Liberia."[59]

Moreover, according to the second part of the same article, the construction and interpretation of the contract shall be based on Liberian law.[60] Although Liberian law is the determined governing law of the contract, the law that governs dispute resolution through arbitration is the rules and regulations of the ICC. This is according to article 31.1 of the contract which states that "… the dispute shall, at the request of the most diligent party, be

[53] *Ibid* at 2.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *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*, Published by Authority Ministry of Foreign Affairs, Approved 23 July 2009, Printed 29 July 2009.
[59] *Ibid*, art 23 at 47.
[60] *Ibid*.

referred for arbitration to the International Chamber of Commerce in accordance with its rules and regulations."[61]

4. Parties to the Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation, and PanAfrican Energy Tanzania Limited, selected Tanzanian law as the law governing this contract. Article 28.5 of this contract states that "this Agreement shall be governed by and construed in accordance with Tanzanian law."[62] However, article 27.4(a) of this contract expresses that any dispute arising out of the contract shall be settled by arbitration in accordance with the Rules and Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes. [63] This Centre was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"). [64] In addition, according to article 27.4(B), 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")."[65]

5. Article 40 of the production sharing Contract between the government of the Republic of Kenya and ERHC AGC Profond Ltd. provides that the laws of Kenya are the applicable governing laws of the contract.[66] The first section of this article states that "[t]his Contract shall be governed by, interpreted and construed in accordance with the Laws of Kenya."[67] Although Kenyan law is the applicable governing law of this contract, the parties also agreed on the United Nations Commission On International Trade Law (UNCITRAL)

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[61] *Ibid*, art 31.1 at 57.
[62] *Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited, Relating to the Songo Gas Field, Dar es Salam, Tanzania*, 11 October 2001, art 28.5 at 82.
[63] *Ibid*, art 27.4(a) at 78.
[64] *Ibid*, art 27.4(a) at 78.
[65] *Ibid*, 27.4(b) at 78.
[66] *Production Sharing Contract between the Government of the Republic of Kenya and ERHC AGC Profond Ltd.*, Relating to the Block 11A, art 40 at 48.
[67] *Ibid*, art 40(1) at 48.

arbitration rules as the applicable law for their dispute resolution.[68] According to article 41(1) of this contract:

> "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."[69]

6. The production sharing agreement between the government of the Republic of Uganda and Tullow Uganda Limited provides that the laws of Uganda are the applicable governing law.[70] Article 33.1 of this contract expresses that "[t]his agreement shall be governed by, interpreted and construed in accordance with the laws of Uganda." At the same time, the United Nations Commission for International Trade Law (UNCITRAL) arbitration rules govern any arbitration arising from the contract.[71] According to Article 26.1, "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."[72]

b. Practical Use of Dépeçage through Clauses Related to 'Good Oilfield Practices'

The process of exploration and production of oil and gas has the potential to cause severe damage to the physical environment as well as the health, economic, and social structure of local communities.[73] However, environmental laws and regulations in developing countries

[68] *Ibid*, art 41 at 48.
[69] *Ibid*, art 41(1) at 48.
[70] *Production Sharing Agreement for Petroleum Exploration Development and Production in the Republic of Uganda, Between the Government of the Republic of Uganda and Tullow Uganda Limited, In respect of Exploration Area 1*, February 2012.
[71] *Ibid*, art 33.1.
[72] *Ibid*, art 26.1 at 55.
[73] Alexandra S Wawryk, "International Environmental Standards in the Oil Industry: Improving the Operations of Transnational Oil Companies in Emerging Economies", University of Adelaide at 1, online: http://ugandaoilandgas.com/linked/international_environmental_standards_in_the_oil_industry.pdf (Accessed 20 October 2017).

are not effective enough since they are often inadequate, and there are insufficient means to enforce them.[74] Furthermore, host countries of upstream oil and gas projects, in most cases, lack the technology and monetary power to exploit their abundant mineral resources.[75] In fact, many host governments do not have the required legal background in technology, and expertise related to discovering and developing petroleum resources in their country.

Although there are certain aspects of upstream oil and gas contracts that readily lend themselves to being governed by the domestic laws of the host country, such as provisions relating to domestic supply and consumption of oil and gas products and use of domestic resources, there are some aspects of the contract that are better managed and enforced through the application of foreign laws. More specifically, those aspects dealing with technology are better governed by foreign laws such as the laws of the United States or Canada.

Accordingly, in some cases where international oil companies operate in emerging economies with inadequate environmental laws and technological advancement, 'good oilfield practices' have been largely adopted to cater to these deficiencies.[76] There are clauses in upstream oil and gas contracts that refer to 'good oilfield practices', 'best practices', 'best international practices', 'best practices of the oil industry' or other similar phrases. These clauses mainly relate to methods of operations; avoidance of damage to the producing structure; protection of the environment; and the health and safety of host communities.[77]

The Petroleum (Submerged Lands) Act 1967 of Australia provides a definition that confines good oil-field practice to "…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

[74] *Ibid.*
[75] Evaristus Oshionebo, "Stabilization Cluases in Natural Resource Extraction Contracts: Legal, Economic and Social Implications for Developing Countries" (2010) 10 Asper Rev Int'l Bus & Trade L 1 at 1.
[76] Wawryk, *supra* note 73.
[77] R E S Argyle, "Governmental Powers over Petroleum Recovery Rates - Offshore Western Australia" (1983) 15 U W Austl L Rev 14 at 22.

petroleum, as the case may be".[78] Although this provision requires good practices in most cases, some scholars claim that it would be better if the 'best oilfield practices' were applied.[79]

The above-mentioned clauses relating to 'good oilfield practice' govern specific portions of oil and gas contracts including the exploration and production of petroleum. Accordingly, where a contract requires the adoption of 'good oilfield practices' issues relating to the adequacy of the production techniques adopted by a company are resolved by applying the international practices in the oil and gas industry. The effect is that those issues are no longer under the governance of the applicable domestic law of the contract.

For instance, the Brazilian model concession contract 2013 requires oil and gas companies to adopt the "best practices of oil the industry"[80] and it 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."[81]

[78] *Petroleum (Submerged Lands) Act 1967*, Act No 118 of 1967-81 (Cth) Canberra, Australia, art 5(1).
[79] Emmanuel B Kasimbazi, "Environmental Regulation of Oil and Gas Exploration and Production in Uganda" (2012) 30 J Energy & Nat Resources L 185 at 217.
[80] Model Concession Contract for Exploration and Production of Oil and Natural Gas, Federative Republic of Brazil Ministry of Mines and Energy, Brazil, 2013, art 5.3, art 5.9, art 9.10.1, art 10.3.1, art 10.10, art 11.2, art 11.14, art 12.7, art 12.11, art 14.10, art 14.12, art 14.17, art 18.6, art 20.2, art 21.1, art 33.9.
[81] *Ibid.*

While this model contract requires the adoption of "practices and procedures generally employed in the oil industry" with regard to operations, the contract determines Brazilian law as the applicable law to govern other aspects of the contract.[82]

These situations where there are upstream oil and gas contracts containing clauses that require the application of good practices in the oil and gas industry could be considered as cases where the theory of Dépeçage has been practically applied. The principles of 'good oilfield practices' which have been widely used in upstream petroleum industry will be applied to the relevant portions of the contract, while the remaining parts of the contract are subject to the main applicable governing law of the contract.

The following are additional examples of upstream oil and gas contracts which contain clauses related to 'good oilfield practices'.

1. Article 20.2 of the Production Sharing Contract between the Timor-Leste Autoridade National de Petroleo, and Eni JPDA, INPEX Offshore Timor-Leste and Timor Gap PSC[83] provides that the laws of England are the applicable laws.[84] However, other articles in this agreement require the application of good oilfield practices to specific parts of the contract. For example, article 4.2 of this agreement requires the performance of the exploration work program in accordance with good oilfield practices.[85] According to this article:

> "(b) Unless otherwise agreed by the Designated Authority, any well which forms part of the Exploration Work Program and Budget provided for in this article 4 shall be drilled to such depth as is necessary for the evaluation of the geological formation established by the available data as the target formation and which Good Oilfield Practices would require the contractor to attain unless before reaching such depth: (i) A formation stratigraphically older than the deepest target formation is encountered; (ii) basement is

[82] *Ibid*, art 33.1.
[83] *Production Sharing Contract for the Joint Petroleum Development Area*, Contract Area - JPDA 11-106, Between the Timor-Leste Autoridade National dn Petroleo as the Designated Authority established under the Treaty AND Eni JPDA 11-106 B.V. a corporation organized and existing under the laws of the Netherlands; INPEX Offshore Timor-Leste, LTD. a corporation organized and existing under the laws of Japan: and TIMOR GAP PSC 11-106, Unipessoal, Limited a corporation organized and existing under the laws of Timor-Leste, 13 April 2013.
[84] *Ibid*, art 20.2: "This Agreement shall be governed by and constructed in accordance with the laws of England."
[85] *Ibid*, art 4.2.

> encountered; (iii) further drilling would present an obvious danger, such as but not limited to the presence of abnormal pressure or excessive losses of drilling mud; (iv) impenetrable formations are encountered; (v) petroleum bearing formations are encountered which require protecting, thereby preventing planned depths from being reached; (vi) the Contractor and the Designated Authority agree to terminate the drilling operation; or (vii) the Designated Authority confirms that the drilling operations has been fellfield. In such circumstances the drilling of any such well may be terminated at the lesser depth and shall be deemed to have satisfied the Contractor obligations in respect of that well."[86]

Moreover, article 4.9 of this contract which covers issues relating to development plan states that:

> "(C) A Development Plan will be assessed on the basis of whether it would be undertaken by the person seeking diligently to develop and exploit (in accordance with this Agreement) the Petroleum in the development Area in accordance with Good Oilfield practice and in a way, that promotes further investment and contribute to the long-term development of Timor-Leste and Australia."[87]

In addition, article 7.3 of this agreement which governs the lifting of petroleum products expresses that:

> "(a) Subject to this Agreement, the Contractor may lift, dispose and export from the JPDA its share of Petroleum and retain the proceeds from the sale or other disposition of that share. (b) The contractor and the designated Authority shall, from time to time, make such agreements between them as are reasonably necessary, in accordance with Good Oil Field Practice and the commercial practices of international petroleum industry, for the separate lifting of their shares of petroleum."[88]

Accordingly, although English law governs this contract at a general level, specific issues relating to the performance of the exploration work; the implementation of the development plan; and the lifting of petroleum products are governed by good oilfield practices. Thus, the respective rights and duties of the parties regarding these specific aspects of the contract are based on good commercial practices of international petroleum industries rather than English Law which governs other aspects of the contract. This scenario illustrates a practical application of the theory of Dépeçage.

[86] *Ibid,* art 4.2(b).
[87] *Ibid,* art 4.9(c).
[88] *Ibid,* art 7.3.

2. Clause 33 of the Model Petroleum Agreement of Namibia (1998)[89] 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".[90] Article 11 of this model contract which relates to environmental protection, requires oil and gas companies to adopt 'good oilfield practices' in exploration and production activities in order to minimize environmental damages to the license area and adjoining or neighboring lands.[91]

The model agreement goes on to provide in Article 1.1(y) that the term 'good oilfield practices' "has the meaning assigned to it in section 1(1) of the Petroleum Act."[92] 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."[93]

The effect of this provision is that, while disputes regarding the model agreement are to be resolved in accordance with the laws of Namibia, any issue revolving around whether or not a company adopted 'good oilfield practices' must be resolved in accordance with the laws of foreign countries. In other words, Namibian law is the governing law for the model agreement, but foreign law governs 'good oilfield practices' under the agreement.

3. Another example of a clause relating to good oilfield techniques can be found in the contract between Portugal and Mohave Oil and Gas Corporation.[94] According to article 4(6) of

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[89] *Model Petroleum Agreement*, The government of Namibia (Minster of Mines and Energy), 1998 , online: http://www.mme.gov.na/pdf/model_petroleum_agreement_1998.pdf, (Accessed 22 October 2017).
[90] *Ibid*, art 33.
[91] *Ibid*, art 11.
[92] *Ibid*, art 1.1(y).
[93] *Petroleum (Exploration and Production Act*, Government Gazette of the Republic of Namibia, 9 April 1991, (Act 2 of 1991), section 1(1).
[94] *Concession Contract for Petroleum Exploration, Development and Production Rights*, between the State and Mohave Oil and Gas Corporation, in the Concession Area Denominated Peniche, Portugal, 2012.

this contract, "the Concessionaire shall execute its work in a regular and continuous way, in accordance to good oil field techniques and in compliance with any technical regulations that may be established."[95] However, article 22 of this contract determines Portuguese legislation as the applicable law.[96] Therefore, the practical use of the theory of Dépeçage through the application of a local governing law along with a foreign or international law to specific parts of the contract can be found in this case as well.

4. The Petroleum Contract between China National Offshore Oil Corporation, Primeline Energy China Limited, and Primeline Petroleum Corporation of 15 June 2012 is another example.[97] While the contract states that Chinese law shall govern the validity, interpretation, and implementation of the contract, it also provides that where Chinese law fails to cater to any issue as to the interpretation or implementation of any aspect of the contract, the law applicable to any such issue shall be the "laws widely used in petroleum resources countries".[98] Article 28.1 of this contract reads as follow:

> "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."[99]

Simultaneously, this contract explicitly mentions "International Petroleum Industry Practice" with respect to environmental protection and safety of the People's Republic of China.[100] In this case, there is an explicit use of the theory of Dépeçage through the application of the principles of the applicable laws widely used in petroleum resources countries to specific

[95] *Ibid,* art 4(6).
[96] *Ibid,* art 22.
[97] *Petroleum Contract between China National Offshore Oil Corporation, and Primeline Energy China Limited and Primeline Petroleum Corporation,* Contract Area 33/07 in the East China Sea of the People's Republic of China, 15 June 2012.
[98] *Ibid,* art 28.1.
[99] *Ibid.*
[100] *Ibid,* art 8.6.

portions of the contract, while the laws of the People's Republic of China apply to the rest of contract.

5. Potential Approaches to the Application of Dépeçage in Upstream Oil and Gas Contracts

Parties often select the laws governing upstream oil and gas contracts. This could enable them to apply the theory Dépeçage and choose more than one applicable governing law. Beside this selective application of Dépeçage, judges and arbitrators might also be able to apply this theory. This section analyzes different approaches to the theory of Dépeçage. Selective application of this theory is presented in the first part, followed by a study of its judicial application in the second part.

a. Selective Application of Dépeçage in Upstream Oil and Gas Contracts

The selective applicable law refers to a situation where the contracting parties mention their choice-of-law in an upstream oil and gas contract. This selective application occurs when parties to an upstream oil and gas contract determine the applicable governing law either at the time of entering into the contract or later. In this section, the advantages of the selective application of Dépeçage and its potentials are discussed.

i. Possibility of Selective Application of Dépeçage in Upstream Oil and Gas Contracts

Parties to a contract have a right to freely choose their desired or preferred governing law.[101] However, conventions, jurisdictions and internationally accepted rules need to be considered to determine the possibility of selective application of Dépeçage. Parties' autonomy

[101] Vita Food Products Inc v Unus Shipping Co, [1939] AC 277 (PC).

is a generally accepted principle of private law, which allows parties to choose the applicable governing law for the contract.[102] Based on the parties' autonomy, it can be said that parties also have the right to select more than one applicable governing law. Therefore, they can agree on the application of a particular legal system to a specific portion of their contract and select a different governing law for the remaining parts.[103]

The Rome Convention states the applicable law with regard to contractual obligations in European Union countries as follows:

> "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."[104]

According to the Rome Convention, the parties to a contract shall determine a governing law and they would be able to select the applicable law for the whole or only a portion of the contract.[105] Thus, although article 3(1) of the Rome Convention does not expressly mention the term Dépeçage,[106] it encompasses the theory of Dépeçage because it states that the parties' choice-of-law could be applied to the whole or a portion of the contract.[107]

Furthermore, Article 7(1) of The Hague Convention of 22 December 1986 on *the Law Applicable to Contracts for the International Sale of Goods*[108] recognizes the parties' ability to

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[102] Mohammad Reza Baniassadi, "Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration" (1992) 10 Intl Tax & Bus L 59 at 63, online: http://scholarship.law.berkeley.edu/bjil/vol10/iss1/2.
[103] Nike Informatic System Ltd v Avac Systems Ltd, [1979] BJC No 1277.
[104] *Rome Convention on the Law Applicable to the Contractual Obligations*, 19 June 1980, 80/934/EEC, 1605 UNTS 59, art 3(1), online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41980A0934.
[105] *Ibid*, art 3.
[106] *Ibid* art 3(1).
[107] Rome Convention on the Law Applicable to the Contractual Obligations, *supra note 104*, art 3(1): "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."
[108] *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods*, 22 December 1986, online: http://www.hcch.net/index_en.php?act=conventions.status&cid=59.

choose the applicable law of the contract and express their desired governing law.[109] According to this article, "such a choice may be limited to a part of the contract". [110] Therefore, this article provides permission for the application of Dépeçage. Moreover, Article 7(2) provides parties the ability to apply a governing law to the whole or part of the contract, even though Dépeçage has not been mentioned in the contract.[111]

Some authors argue that it is not necessary for the parties to expressly provide for the application of Dépeçage and that it can be applied as an implied term of the contract.[112] For example, Article 7 of Inter-American Convention states that the applicable law that has been expressly selected by parties shall govern the contract and in the absence of parties' express agreement, the governing law "must be evident from the parties' behavior and from the clauses of the contract, considered as a whole."[113]

According to this article, the "said selection may relate to the entire contract or to a part of same."[114] The fact that this convention allows parties to select the governing law to apply to a part of their contract implicitly enables parties to apply the theory of Dépeçage. In other words, this article recognizes the selective application of the theory of Dépeçage.

Nevertheless, others have argued against the application of Dépeçage as an implied term. Contractual stipulations in some countries may prevent the application of Dépeçage where the parties do not expressly provide for its application. Therefore, only the expressed

[109] *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."
[110] *Ibid.*
[111] *Ibid*, art 7(2): "(2) The 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. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties."
[112] Duaso Cales, *supra* note 34 at 6.
[113] Inter-American Convention on the Law Applicable to International Contracts, *supra* note 23, art 7.
[114] *Ibid*.

intention of the parties to apply Dépeçage would be allowed.[115] The last statement conforms to the recognized attitude under the civil code of Québec.[116]

Consequently, there could be two situations for selective application of Dépeçage and the main difference becomes apparent in the use of this theory by judges and arbitrators. The first is when parties expressly provide for the application of the theory of Dépeçage in their contract. The second is when parties practically apply the theory without mentioning or stipulating it in their contract. Parties' expression regarding the application of the theory of Dépeçage in their contracts would grant dispute resolution tribunals the ability to apply the theory when it is beneficial. However, without such expression, the application of this theory by judges would be difficult but, based on the parties' intention, not impossible.

ii. Advantages of Selective Application of Dépeçage in Upstream Oil and Gas Contracts

Parties to international contracts can provide predictability and certainty in their contractual relationships by including choice-of-law provisions and choice of jurisdiction clauses in their contracts.[117] Through choice-of-law clauses, which are prevalent in international ventures, parties agree on the governing law and the tribunal where disputes will be resolved.

The rules of conflicts of law are different among jurisdictions in the process of dispute resolution. In the case that parties have not provided choice-of-law clauses in their contract,

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[115] Gérald Goldstein, "Les Régles Générales du Statut des Obligations Contractuelles dans le Droit International Privé du Nouveau Code Civil du Québec" (1993) 53 R du B at 2.

[116] Civil Code of Quebec, c 64, I N 2014-05-01, art 3111: "A juridical act, whether or not it contains any foreign element, is governed by the law expressly designated in the act or whose designation may be inferred with certainty from the terms of the act. Where a juridical act contains no foreign element, it remains nevertheless subject to the mandatory provisions of the law of the State which would apply in the absence of a designation. The law may be expressly designated as applicable to the whole or to only part of a juridical act.", online: http://ccq.lexum.com/w/ccq/en#!fragment/sec3111/KGhhc2g6KGNodW5rxIVhbsSHb3JUZXh0OnNlYzMxxJspLG5vdGVzUXVlcnk6Jycsc2Nyb2xsQ8SIxIo6IW7ErGVhcsSHxKTEpsSoxKrEucS7xIdTxJB0QsSoUkVMRVZBTkNFLHRhYjp0b2MpKQ==

[117] Antle & Choi, *supra* note 18.

they cannot be sure about the rules of conflict of laws that would be applied. Accordingly, the parties' desired certainty of contract cannot be achieved without determination of the governing law. [118] Therefore, parties would be able to avoid the application of conflict of law rules by providing choice-of-law clauses in their contracts.[119] Furthermore, application of conflict of law rules to find the applicable law for the contract by judges and arbitrators is a time-consuming process that may prolong the dispute resolution.[120]

The ability of contracting parties to select the applicable governing law for the contract is not limited to the time of entering into the contract. They might be able to choose the applicable governing law later, even if they have not expressly selected and mentioned that in the contract.[121] This change usually affects the parties' rights and obligation from the time of expression of the new governing law. The exception to the effective date is where parties have clearly stated that the effect of the change is retroactive. [122]

Consequently, article 3(2) of the Rome Convention provides that:

> "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties."[123]

Moreover, article 8 of the Inter-American Convention[124] confirms this position. According to this article, the formal validity of a contract and third parties' rights shall not be

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[118] Redfern & Hunter, *supra* note 37 at 94.
[119] Craig M Gertz, "The Selection of Choice-of-law Provisions in International Commercial Arbitration: A Case for Contractual Dépeçage" (1991-1992) 12 Nw J Intl L & Bus 163 at 173, online: http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1332&context=njilb.
[120] Vitek Danielowicz, "The Choice of Applicable Law in International Arbitration" (1988) 101 Harv L Rev 1816 at 1818.
[121] Antle & Choi, *supra* note 18 at 4.
[122] *Ibid*.
[123] Rome Convention on the Law Applicable to the Contractual Obligations, *supra* note 104, art 3(2).
[124] Inter-American Convention on the Law Applicable to International Contracts, *supra* note 23, art 8: "The parties may at any time agree that the contract shall, in whole or in part, be subject to a law other than that to which it was previously subject, whether or not that law was chosen by the parties. Nevertheless, that modification shall not affect the formal validity of the original contract nor the rights of third parties."

affected by the change of applicable governing law.[125] Considering the advantages of the selective application of choice-of-law on one hand and the benefits of application of the theory of Dépeçage on the other hand, it would be beneficial for the parties to apply this theory selectively. To benefit from the application of this theory, parties should consider the criteria for its usage to avoid its disadvantages.

b. Potential Application of Dépeçage in Upstream Oil and Gas Contracts by Judges and Arbitrators

Upstream oil and gas contracts are significant agreements; thus, parties are often aware of the importance of the applicable governing law. Therefore, in most upstream oil and gas contracts, parties select the applicable governing law(s) at the time of their agreement. However, there are cases where parties to the contract have not expressly determined the applicable governing law. To resolve the disputes in these cases, the competent courts, arbitrators or other tribunals must identify the applicable governing law.[126]

When parties do not express their desired governing law, judges or arbitrators attempt to find an implicit agreement between the parties on the applicable law.[127] 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. [128] Here, the judges and arbitrators can possibly apply the theory of Dépeçage in their choice-of-law analyses.

In some circumstances that the parties to upstream oil and gas contracts have chosen the governing law, issues might arise at the time of dispute resolution which affect the application of the selected governing law. In other words, in some situations, applying the

[125] *Ibid.*
[126] Antle & Choi, *supra* note 18.
[127] *Ibid.*
[128] *Ibid.*

parties' selected governing law to the whole or a part of the contract may not be possible. For example, related parts of the law chosen by parties might have been repealed or the application of selected foreign law may become forbidden according to the mandatory rules of the host country. Hence, there would be a need for a judicial decision on choice-of-law for the contract. Therefore, there is a possibility of application of the theory of Dépeçage by judges and arbitrators when they must identify the applicable governing law.

Additionally, there might be other cases where the theory of Dépeçage could be applied by judges and arbitrators even if parties have determined the applicable governing law. Following are three appropriate instances of judicial application of the theory of Dépeçage, both when there is selected governing law and in the absence of selected governing law:

i. Parties' Benefit

In situations where parties to an upstream oil and gas contracts have implicitly agreed on the applicable governing law, an interpretation issue could arise. If there are references to more than one governing law in a contract, judges or arbitrators must determine which one shall be applied. [129] Choosing any of these different legal systems might affect the parties' obligations and benefits. For example, at the time of dispute resolution, the application of one governing law may grant more advantages to one party than the other. Hence, in these cases, the theory of Dépeçage would grant a tool to judges and arbitrators to choose more than one applicable governing law for the contract to maintain both parties' benefits and satisfaction. In other words, the application of the theory of Dépeçage enables judges and arbitrators to reach fair and just results.

[129] *Ibid* at 4.

ii. Resolving the Conflict of Law

In the absence of a choice law clause in a contract, the governing law has to be chosen by dispute resolution tribunals based on the presumed intention of the parties. There are some factors that judges and arbitrators consider in determining the law with the closest connection to the contract in the case of upstream oil and gas agreements. These factors include the place of contract; the place of negotiations; the place of natural resource or oil and gas reservoir which is the subject-matter of the contract; the parties' residence; the place of the insurer; the language of the contract; the law governing any related contact; the form and the legal concepts that the contract represents; the currency used for obligations in the contract; and the place where any debt or loan is repayable.[130]

In some situations, there might be more than one governing law that has been impliedly mentioned by the parties or has a close relationship with the contract. Application of the theory of Dépeçage could play a significant role in resolving this issue to the satisfaction of both parties. Accordingly, each part of the contract would be governed by the law that has the closest and most real relationship with that part of the contract. Article 4 of the Rome Convention envisages this separation as well as the application of different governing laws to different parts of the same contract. According to this article:

> "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, 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."[131]

Moreover, article 9 of the Inter-American Convention states that:

> "If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international

[130] *Ibid* at 6.
[131] Rome Convention on the Law Applicable to the Contractual Obligations, *supra note 104*, art 4(1).

> organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract."[132]

Therefore, the Inter-American Convention implicitly permits the application of the theory of Dépeçage when there is more than one governing law which has a close relationship with a contract and where parts of the contract are separable from the rest of the contract.

iii. Mandatory Rules and Public Policies

Despite the general rule regarding parties' autonomy, in some cases, courts and tribunals may apply related local laws regardless of the parties' choice-of-law. [133] This situation occurs when there is the mandatory application of local law to an upstream oil and gas contract due to mandatory rules and public policies. Mandatory rules are laws that have to be applied regardless of the parties' selected governing law or any other agreements.[134] In other words, they are binding provisions and it is not possible to derogate from them.[135]

Mandatory rules may be procedural or substantive.[136] Nationalization and confiscation, tax law, securities regulation, import and export law, blockade or boycott law, currency control, and competition law are some examples of mandatory rules related to oil and gas contracts.[137] This subject will be further discussed in section 6(a) of this chapter.

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[132] Inter-American Convention on the Law Applicable to International Contracts, *supra* note 23, art 9.
[133] Antle & Choi, *supra* note 18 at 2.
[134] Pierre Mayer, "Mandatory Rules of Law in International Arbitration" (1986) 2 Arb Intl 274 at 275.
[135] Simona Travnickova, "Limitation of Choice of Law; Mandatory Rules and Internationally Mandatory Rules, (2009) Právnická fakulta Masarykovy university, Česká republika, at 2, online: https://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/travnickova.pdf, (Accessed 15 December 2016).
[136] Andrew Barraclough & Jeff Waincymer, "Mandatory Rules of Law in International Commercial Arbitration" (2005) 6(2) Melbourne J Intl L 205 at 3.
[137] Ludwig Von Zumbusch, "Arbitrability of Antitrust Claims under US., German, and EEC Law: The International Transaction, Criterion and Public Policy" (1987) 22 Tex Intl LJ 291 at 304.

In general, mandatory rules are considered as instruments to protect the economic, political and social interests of the host country.[138] Therefore, the application of these rules to protect society must not be left to the discretion of the parties.[139] Although these laws are usually derived from economic foundations,[140] criminal law norms[141] can be considered as mandatory rules as well.[142] Moreover, the national law of the host country in upstream oil and gas contract has control over some significant subjects such as grant of concessions, ratifications of agreements, and enforcement of all other constitutional law issues.[143]

Article 3(3) of the Rome Convention defines mandatory rules as follows:

> "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'."[144]

Considering the fact that mandatory rules are related to public policies, these rules are binding even in cases where the parties did not expressly mention the rules as the applicable law of the contract.[145] Significant problems arise in situations where mandatory rules are not derived from the applicable legal system for the contract.[146] Article 7(2) of the Rome Convention 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."[147]

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[138] Marc Blessing, "Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts" (1999) at 5; R Van Rooij, "Conflict of Laws and Public Policy" (1986) Netherlands Reports to the Twelfth International Congress of Comparative Law 175 at 177.
[139] Albert Dicey & John H Morris, "The Conflict of Laws" (1980) 792 at 795.
[140] Vladimir Pavic, "Bribery and international commercial arbitration - the role of mandatory rules and public policy" (2012) 43:4 VUWLR 661 at 675.
[141] Dragor Hiber & Vladimir Pavic, "Arbitration and Crime" (2008) 25 J Intl Arb 461 at 469.
[142] Alexis Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator" (2006) 22 Arb Intl 95 at 99.
[143] Baniassadi, *supra* note 102.
[144] Rome Convention on the Law Applicable to the Contractual Obligations, *supra note 104*, art 3(3).
[145] Mayer, *supra* note 134 at 274.
[146] Baniassadi, *supra* note 102 at 68.
[147] Rome Convention on the Law Applicable to the Contractual Obligations, *supra note 104*, art 7(2).

Furthermore, article 16 of this Convention, after recognizing and protecting the application of the governing law of the contract selected by the parties, mentions public policies as an exception to this rule. According to this article, "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 public policy ("ordre public") of the forum."[148]

Dépeçage applies interest analysis not on a case-by-case basis, but rather on an issue-by-issue basis.[149] Interest analysis would help competing concerns and provide a fair balance between them.[150] This would allow public policies crucial to the choice-of-law rule and other significant concepts to be considered simultaneously.[151] The application of the theory of Dépeçage can play a significant role in solving this conflict by satisfying parties' expectations and honoring the application of mandatory rules. In other words, judicial application of the theory of Dépeçage not only supports the parties' autonomy but also protects their desires. Article 7(1) of Rome Convention states that:

> "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."[152]

This article does not expressly mention the theory of Dépeçage; however, the practical result of its application accords with the theory of Dépeçage in the case of conflict between applicable governing law and mandatory rules. As an example, article 28.10 of the Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania

[148] *Ibid,* art 16.
[149] Frances Hamilton & Lauren Clayton-Helm, "Same-Sex Relationships, Choice of Law and the Continued Recognised Relationship Theory" (2016) 3 J Intl & Comp L 1 at 14.
[150] Alan Reed, "Essential Validity of Marriage: The Application of Interest Analysis and Dépeçage to Anglo-American Choice of Law Rule" (2000) 20 NYL Sch J Intl & Comp L 387 at 390.
[151] *Ibid*.
[152] Rome Convention on the Law Applicable to the Contractual Obligations, *supra note 104*, Article 7(1).

Petroleum Development Corporation, and PanAfrican Energy Tanzania Limited is related to the severability of the contract. According to this article,

> "If any term or provision of this Agreement is held by a court or other authority of competent jurisdiction to be invalid, void, unenforceable or against the public policy, the rest of the Agreement will remain in full force and effect and will in no way be adversely affected; provided, however, that the severance of such term or provision does not render the performance of a Party's material obligations impracticable or impossible."[153]

In other words, when an applicable governing law for an upstream oil and gas contract conflicts with the mandatory rules applicable to the contract, judges and arbitrators can apply the theory of Dépeçage. Therefore, they would partially apply the mandatory rules to the contract with regards to issues covered by the mandatory rules and preserve the parties' selected governing law for the rest of the contract. This will also increase the certainty of contracts since parties would not need to worry about overall changes driven by the mandatory rules.

6. Obstacles to the Application of Dépeçage in Upstream Oil and Gas Contracts

Dépeçage is inapplicable where the forum jurisdiction excludes the applications of foreign law which is contrary to public policy,[154] penal law,[155] revenue law,[156] blocking statute,[157] or other public law.[158] In such cases, the application of the theory of Dépeçage will be prohibited in favour of the sole application of the forum law. The two concepts of penal law

[153] Production Sharing Agreement between the Government of the United Republic of Tanzania, Tanzania Petroleum Development Corporation and PanAfrican Energy Tanzania Limited, Relating to the Songo Gas Field, Dar es Salam, *supra* note 62, art 28.10 at 83.
[154] Stephen G A Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) at 30.
[155] *Ibid* at 33.
[156] *Ibid* at 37.
[157] A blocking statute, prohibiting to communicate the information and documents (even as evidence) concerning the economic, commercial or technical order to foreign natural or legal persons, aims to provide a legal jurisdiction for not complying with an otherwise applicable foreign law. The root of this institution is the law 68-678 dated 26 June 1968 as modified by the law 80-538 dated 16 July 1980 named in French language "loi de blocage" meaning blocking statute. Blocking statute have been adopted to balance the discovery power of documents. In fact, in other countries in other countries like France, judges can obligate defendant to produce a certain determined document.
[158] Pitel & Rafferty, *supra note* 154 at 39.

and revenue law have been clearly defined in international private law, but "public policy" and "mandatory rules" are unclear concepts and need to have a conceptual clarification, as discussed in section (a) below. The second obstacle is related to the power of judges to exclude one of the laws determined by the parties, due to its irrelevancy or unsuitability, in the cases that will reduce the number of governing law from more than one applicable law to one (section b).

a. Contradiction with Mandatory Rules and Public Policy

Within the framework of a particular legal system, internal mandatory rules are binding provisions that cannot be derogated from.[159] Mandatory rules are fundamental rules of a legal system that apply regardless of any other choice-of-law provisions or applicable laws.[160] However, this definition only applies at the general level and it is more complicated when dealing with international transactions. At the international level, there is a difference between basic mandatory rules, overriding mandatory rules, and/or super-mandatory rules. [161]

Parties can exclude the basic mandatory rules by choosing a different applicable governing law.[162] These rules include typical provisions of private law, governed by contract law. Some examples of these basic mandatory rules include essential elements in certain types of contract; the details related to offer and acceptance; the validity and invalidity of legal acts; and the discharge or recognition of obligations.[163]

[159] Travnickova, *supra* note 135.
[160] Pitel & Rafferty, supra note 154 at 298.
[161] Monika Pauknerová, "Mandatory rules and public policy in international contract law" (2010) 11 ERA Forum 29 at 30.
[162] *Ibid*.
[163] *Ibid*.

On the contrary, overriding mandatory rules are rules that are fundamental for the economic, social, and political objectives of the host country.[164] These rules require strict implementation regardless of the results.[165] These mandatory rules cannot be contracted out by parties' choice-of-law. [166]

According to article 9(1) of Regulation on the Law Applicable to Contractual Obligations (Rome I) [167]:

> "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic 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."[168]

This article states further that "nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum".[169] This position has been generally accepted by practitioners of international private law on the matter of conflict of law as well.

Furthermore, "overriding mandatory rules"[170] should be distinguished from "public policy".[171] The overriding effect exists in principles of public policy as well as mandatory rules. In both situations, the law determined by the conflict rule or choice-of-law clauses will not be applied. However, a public order reservation is of a defensive nature and it only prevents the

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[164] Ph Francescakis, "Quelques Precisions sur les "Lois d'Application Immediate" et Leurs Rapports avec les Règles de Conflits de Lois" (1966) Rev Crit Dr Int Privé 1 at 13.
[165] Naciye Yilmaz, "Overriding Mandatory Rules in Private International Law" (2015) at 1, online: http://www.erdem-erdem.av.tr/publications/law-post/overriding-mandatory-rules-in-private-international-law/
[166] 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.
[167] Official Journal of the European Union, Regulation on the Law Applicable to Contractual Obligations (Rome I), Regulation (EC) No 593/2008, 17 June 2008, art 9.
[168] *Ibid*, art 9(1).
[169] *Ibid*, art 9(2).
[170] Lois de police.
[171] Ordre public.

application of particular rules.[172] Despite the public policy, overriding mandatory rules will take the place of the law chosen by the parties.[173]

In spite of the clarity of theoretical definitions of mandatory rules, some problems may arise in practice. There are some provisions that have been clearly categorized as overriding mandatory rules by the legislative body.[174] For instance, section 27(2) of the United Kingdom's Unfair Contract Terms Act 1977[175] states 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."[176] However, in some instances, legal provisions are vague, and it is unclear whether these provisions are mandatory. In these cases, courts and arbitrators may undertake a case-by-case analysis to determine the mandatory rules.[177]

A comparison of the judicial decisions in two similar cases (*Ingmar* and *Allium*) demonstrates the difficulty in determining whether rules are mandatory. In the first case (*Ingmar v Eaton*), the principal, "Eaton", was incorporated in California and the agreement was expressly governed by the law of California.[178] However, on 9th of November 2000, 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 (a company incorporated in the United Kingdom) as a commercial agent.[179]

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[172] Pauknerová, *supra note* 161.
[173] Andrew Dickinson, "The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts" (2012) Sydney Law School, Legal Studies Research Paper No. 12/81 at 5.
[174] Pitel & Rafferty, supra note 154 at 299.
[175] *Unfair Contract Terms Act*, United Kingdom, 1977, Chapter 50, art 27(2): This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both) (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 imposing it to evade the operation of this Act; or (b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.
[176] *Ibid*.
[177] Pitel & Rafferty, supra note 154 at 299.
[178] *Ingmar GB Ltd v Eaton Leonard Technologies Inc*, Case C-381/98, 2000 E.C.R. I-9305.
[179] *Ibid*.

However, in a similar case, the French Cour de Cassation delivered an opposite decision. In this case (*Sté Allium c Sté Alfin et Sté Groupe Inter Parfums*), Alfin, a New York company agreed on exclusive representation with the French company, Allium, for the distribution of American perfumes in France.[180] The parties selected the laws 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).[181] The Cour de Cassation explicitly refused to consider the provisions of the French Commercial Code which implements Directive 86/653/EEC as overriding mandatory rules in this case.[182]

There could be a conflict between overriding mandatory rules or public policy and the applicable law in upstream oil and gas contracts. Parties to upstream oil and gas contracts might determine more than one applicable law to govern their contracts and this could lead to the application of the theory of Dépeçage. However, at the international level, parties cannot contract out of any overriding mandatory rules. Hence, in these cases, judges and arbitrators will not apply the portions of the applicable law that are contrary to mandatory rules of the forum law. The limitation caused by the existence of mandatory rules may reduce the number of governing laws to one applicable law. Therefore, this would automatically terminate the application of the theory of Dépeçage.

b. Irrelevancy or Unsuitability of One of the Chosen Laws

One of the disadvantages of Dépeçage is the possibility of providing an escape device to strict choice-of-law determinations.[183] It is considered an inappropriate use of Dépeçage to choose a different governing law which is irrelevant or unsuitable for the portion

[180] *Sté Allium c Sté Alfin et Sté Groupe Inter Parfums*, Cour de cassation, chambre commerciale, 28 novembre 2000, 98-11335.
[181] *Ibid.*
[182] *Ibid.*
[183] Eric H. Gaston, "Reassessing Connecticut's Eclectic Choice of Law Methodology: Time for (Another) New Direction" (1999) 73 Conn Bar J 462 at 466.

of the contract in question. It would amount to favouring one governing law over another one regarding the same issue without any justification. Doing so will undermine the equilibrium of the two laws and the policies related to the chosen governing law.[184]

In other words, each issue has to relate to the applicable law with the greatest concern and if there are no interests in determining specific governing laws, the theory of Dépeçage shall not be applied.[185] Dépeçage should function to effectuate the purpose of each of the applied laws and bring choice-of-law values to serve the desired purpose.[186]

[184] Symeon C Symeonides, "Issue-by-issue Analysis and Dépeçage in Choice-of-law: Cause and Effect" (2013) 45 University of Toledo L Rev 45 at 56.
[185] Reese, *supra* note 27 at 64.
[186] Reese, *supra* note 27 at 60.

Conclusions

Determination of the applicable law in upstream oil and gas contracts plays an important role with regards to the parties' rights and liabilities. The applicable governing law also enables parties to have control over the fundamental issues of the contract such as validity and performance. Another significance of the governing law is defining the way that dispute-resolving tribunals must interpret the contract. Moreover, it helps to determine whether contractual obligations have been discharged by breach, frustration, or completion of the obligations.

There are various approaches regarding the choice of applicable law and different theories have been expressed relating to choice-of-law provisions. This research explores one of these theories called Dépeçage in private international law and conflict of law. The application of this theory to upstream oil and gas contracts may have a strong impact in satisfying the parties' intentions in relation to the governing law.

The theory of Dépeçage is a concept in private international law that refers to the process of cutting a case into individual issues whereby each issue is constrained to a different applicable choice-of-law analysis. Tort law and specifically aviation litigations were the first areas that this theory was applied. The reason was that because of their nature traditional rules of choice-of-law were not suitable for tort law anymore. The theory of Dépeçage has also been applied in other areas of law such as marriage law, consumer contracts, and international commercial arbitration as well.

Federalism in the United States has an important role in the development of Dépeçage and the United States has become one of the countries with a strong literature on this theory in relation to tort law and conflicts of laws. The growing number of international contracts in which the parties have different preferred law, the increasing competition for foreign investments, advocacy, and forum shopping could be considered as factors that led to

the development of Dépeçage. Subsequently, other countries adopted this theory and started to apply it in different areas of law.

A proper application of the theory of Dépeçage grants some advantages. For example, Dépeçage helps solve complex international problems; grants more justice; and enables judges to consider the social consequences of a judicial decision. Moreover, in some situation such as contrariety with mandatory rules that prevent the complete application of parties' desirable governing law, Dépeçage could help to maintain parties' interests. In addition, applying the theory of Dépeçage can increase foreign investments since the parties to international contracts would be able to select their preferred governing law. Dépeçage also emphasizes the law most related to a given issue and assists to resolve what seems to be a legal impossibility.

Nevertheless, some scholars claim that the application of the theory of Dépeçage might bring some disadvantages, including adding complexity to cases. Here, the nature of upstream oil and gas contracts must be considered. Upstream oil and gas contracts are inherently complex, and the complexity is not the result of the application of Dépeçage. Yet, the application of Dépeçage would help simplify the analysis of these contracts by splitting them into different parts.

Another expressed disadvantage of the application of Dépeçage is that it provides an escape tool from choice-of-law determinations and it could affect the neutrality of judges and arbitrators by giving them more freedom. In response to that, it has been stated that the use of Dépeçage by judges must be reasonable and they must provide the reasons for choosing each law. Prolonging the process of dispute resolution and the high cost of negotiations are other disadvantages of the application of Dépeçage. In addition, this theory is not able to function while there is no preference. Moreover, the application of this theory may lead to the destruction of legislative intention.

This research shows that although there are some disadvantages arising from the application of the theory of Dépeçage, its advantages outweigh the disadvantages. Thus, where the criteria for the application of Dépeçage are satisfied, the application of Dépeçage may have a beneficial result for the parties. This is the reason that the theory of Dépeçage has been applied in different areas of law such as marriage law, consumer law, and international commercial arbitration. Although the existing legal literature on this topic does not cover all aspects of the application of Dépeçage, it is a good starting point and it lays the foundation for the application of Dépeçage to upstream oil and gas contracts.

To investigate the possibility of the application of the theory of Dépeçage in upstream oil and gas contracts, its special features have been studied in the second chapter. Complexity is one of the most significant features of upstream oil and gas contracts. Upstream oil and gas contracts are particularly complicated because they contain different contractual components. Here, one applicable law may not be able to address all the component parts of the contract. Hence, the theory of Dépeçage would enable parties to apply more than one governing law to different parts of their contract. Moreover, various contractual frameworks and complicated taxation systems add to the complexity of upstream oil and gas contracts; hence there might be a need for special consideration regarding the applicable governing law.

The capacity to be severable is the other important feature of upstream oil and gas contracts. Some examples of these separable parts are operation, engineering, construction, installation, hand-over, international transportation, insurance, accounting, dispute resolution, safety, and environmental issues. Despite their separability, they need to work as a unified body in order for the contract to be effective. However, exclusive application of a particular governing law might not help parties to achieve their goals. The application of the theory of Dépeçage assists the parties to apply more than one governing law, thus making the contract more adaptable to their needs.

Since the petroleum industry involves time-consuming projects, upstream oil and gas agreements are long-term contracts that take long periods such as twenty-five years. Due to this long-term feature of upstream oil and gas, the specific governing law that had been chosen at the time of entering into the contract may change over time and may no longer be in the interest of all parties. Here, parties would be able to change the governing law for all or parts of their contract to their desired one, by the application of the theory of Dépeçage.

Another feature of upstream oil and gas contracts is their international nature. These agreements usually involve parties from different countries that might have different preferred applicable laws. The application of Dépeçage would grant them the ability to come to an agreement by choosing different governing laws. Another special feature of upstream petroleum agreements is that they create a legal relationship between the host country and the foreign investor. The necessity of considering domestic consumption, and the requirement of using domestic resources, such as workforce and supplies, lead to this close relationship between foreign investors and the host country.

Moreover, the fluid nature of consideration in upstream oil and gas contracts due to the undetermined product of sale and the floating rate of crude oil or natural gas can be considered as one of their special features. In some legal systems, uncertainty with regards to consideration leads to the invalidity of the contract. Having a different law to govern this part of the contract, based on the application of the theory of Dépeçage, will help to maintain the validity of agreements.

Analyzing the theoretical foundation of Dépeçage as well as the nature of upstream oil and gas contracts has shown that this theory could find its place in these types of agreements. In fact, Dépeçage has been previously used in a practical and partial manner in upstream oil and gas contracts via arbitration clauses.

Foreign investors usually will not agree to resolve their disputes in the courts of host governments as they fear the influence possessed by the government, and they view this as compromising to the impartiality of the courts. Therefore, international commercial arbitration is the main dispute resolution mechanism in international trade, especially in upstream oil and gas contracts. Arbitration as a dispute resolution option has more advantages in comparison to litigation in domestic courts, such as speeding up the resolution process; using experts with knowledge or experience; and reducing uncertainties and complexities arising from litigation.

Due to these reasons, arbitration clauses are often included in upstream oil and gas agreements. These existing arbitration clauses have their own different governing law, such as the ICC rules, while the remainder of the contract is governed by the laws of the host country. In other words, despite the existence of a determined law to govern upstream oil and gas agreements, the arbitration clauses may provide that the rules and regulations of a different jurisdiction shall apply to any arbitration arising from the contracts. This can be considered as a practical and partial use of the theory of Dépeçage in upstream oil and gas contracts.

Another example of the application of Dépeçage in upstream oil and gas agreements is the clause relating to good oilfield practices. Oil and gas exploration and production may cause severe damage to the physical environment as well as the health, economic, and social structure of host communities. This is particularly so because environmental regulation in developing countries is often inadequate, and there are insufficient means to enforce environmental laws. Moreover, host countries of upstream oil and gas projects, in most cases, do not have the required legal background in technology and expertise related to the oil and gas industry.

There are clauses in upstream oil and gas contracts that refer to the adoption of ‘good oilfield practices’ in the oil and gas industry. These clauses could be considered as the practical application of the theory of Dépeçage. In other words, the principles of good oilfield practices

which have been widely used in oil-producing countries will be applied to the related portions of the contract, while the main applicable governing law of the contract will govern the rest of the contract.

There are two different approaches to the application of the theory of Dépeçage in upstream oil and gas contract. The first is selective application of this theory by the contracting parties. Parties can and almost certainly will choose the applicable law of the contract at the time of entering into an upstream oil and gas agreement. According to the Rome Convention,[1] The Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods,[2] and the Inter-American Convention,[3] parties' choice-of-law could be applied to the entire contract or to a portion of the contract. This could be considered as legal authorization for the application of the theory Dépeçage.

Judicial application of the theory Dépeçage is another approach to the application of this theory. In some cases, judges and arbitrators could apply the theory of Dépeçage even without parties' stipulation. This could be done in order to maintain both of the parties' benefits, and resolve the conflict of law issues arising from the contract.

Furthermore, some mandatory rules and public policies may arise at the time of execution of a contract which might be contrary to the applicable governing law chosen by parties. Judicial application of the theory of Dépeçage can help to resolve this conflict by applying the mandatory rules to the requisite portions while maintaining the applicable governing law for the rest of the contract. This will lead to a satisfaction of the parties' expectations while at the same time honoring the mandatory rules.

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[1] *Rome Convention on the Law Applicable to the Contractual Obligations,* 19 June 1980, 80/934/EEC, 1605 UNTS 59, online: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41980A0934.

[2] *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,* 22 December 1986, online: http://www.hcch.net/index_en.php?act=conventions.status&cid=59.

[3] Inter-American Convention on the Law Applicable to International Contracts, 17 March 1994, Organization of American States, 33 ILM 732.

Nevertheless, mandatory rules could impede the adoption of this theory in upstream oil and gas contracts. For example, some mandatory rules might lead to the elimination of one or more governing law for specific parts of the contract. Where mandatory rules limit the number of applicable laws to one governing law, such rules effectively prevent the application of the theory of Dépeçage. In addition, irrelevancy or unsuitability of one of the chosen laws could liquidate the application of Dépeçage.

In conclusion, there is an opportunity to gain many advantages by the application of the theory of Dépeçage in upstream oil and gas contract. However, adopting this theory ought to be treated with caution due to its disadvantages and the issues it may cause if not applied within a specific framework. Therefore, Dépeçage should be applied only if it meets certain criteria such as protecting parties' justified expectations and maintaining parties' interests. Also, this theory shall not be applied in cases that lead to dissatisfaction of parties, destruction of legislative intention, or invalidation of a contract.

Moreover, the applicable law that has the greatest concern for each issue must be applied to effectuate the purpose of each of the applied rules. In other words, choice-of-law values are significant principles for the application of Dépeçage. Lastly, judges and arbitrators must provide criteria and legal reasons for the application of Dépeçage in upstream oil and gas contract during the dispute resolution process.

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