The master service agreement (MSA) is a useful tool for parties who regularly conduct business together in situations allowing little advance time to negotiate the terms of a new agreement. MSAs allow parties to quickly execute simple work orders incorporating, by reference, more extensive provisions contained within previously negotiated and executed agreements. Thereby, MSAs facilitate ease and speed of contracting while ensuring control by a carefully designed contractual scheme. In situations involving a unique service, or even a relatively routine service with unique characteristics (e.g., some drilling contracts, casing programs, directional services, and other arrangements), it might not be prudent to rely heavily on an MSA, though the parties might still use an existing contractual template and agree to project specific terms and conditions to supplement the basic template.

The ability to prenegotiate and draft a complex agreement without having an immediate need for a contract, and therefore afforded the luxury of time, allows both parties to carefully consider a range of important issues. This benefits both parties by avoiding the “patchwork”/“cut-and-paste” contracts that are commonly thrown together in a rush, ink ing a contract—any contract—due to operational urgency.

**ENVIRONMENT COMMONLY FOSTERING DISPUTES**

With all of the advantages associated with MSAs, why do so many foreseeable disputes escalate to costly litigation? Part of the answer lies in the simple truth that while the MSA concept provides many contractual advantages, MSAs are often inadequately prepared, used in applications for which they were not designed, and kept in service beyond their useful life.

An example of an inadequately prepared MSA is the cut-and-paste contract, commonly referred to as the “Frankenstein contract,” and, like its namesake, it can have horrifying consequences. These patchwork agreements greatly increase the probability of a dispute because the parties fail to mutually understand how the relationship will work. In certain scenarios, the language actually contradicts foreseeable circumstances.

Failure to take into account relevant legal requirements and operational necessities can result in a contract that fails to guide the parties through foreseeable difficulties. Of course, the parties might successfully work together under such a contract without a dispute arising—for a time. This can lead to a false sense of confidence in the contract—it worked well once, so why not use it again, right? Wrong. Once a bad contract, always a bad contract. Such poorly crafted agreements can remain in a company’s contractual portfolio like a ticking bomb waiting to go off, with management unaware of the danger until a dispute arises.
Similarly, the MSA that fails to address certain geographic locations and services, and related jurisdictional differences, can also create an environment conducive to disputes. A common example of this is a contract containing indemnity provisions and/or additional insurance provisions that fail to comply with the controlling law where the work is being performed.

**COMMON DISPUTES AND RISKS**

Examples of common disputes that should be considered when negotiating and drafting an MSA include the following:

- Personal injury and wrongful death
- Property damage or loss
- Incident resulting in consequential damages (e.g., business interruption, lost profits, and other disadvantages)
- Failure to provide timely or good and workmanlike services
- Defect in services
- Payment for services and/or reimbursement of expenses
- Inability of one or both parties to perform
- Failure to provide adequate or accurate information needed for performance

In addition to being aware of the general type and nature of disputes that the parties might experience, the parties should also consider the following issues:

- When the MSA controls and how to designate
- Term limits
- Modifications and ratifications
- Interested parties (e.g., contractor and company “groups”)
- Identifying and notifying the other party of a dispute
- Dispute resolution
- Controlling law (for the contract and/or dispute)
- Location of dispute resolution (i.e., for court or alternative dispute resolution)
- Allowed and excluded remedies
- Risk shifting and to what extent
- Insurance and subrogation
- Possible extra-MSA terms (e.g., work orders/job tickets)
- Assignment

- Potential conflicts between terms or with other contracts
- Terms requiring definition

When designing an MSA, it is important to integrate the right personnel and drafting team, thereby drawing upon a cross-section of training, experience, and responsibility in order to proactively address these potential contractual traps.

**MSA DESIGN AND DRAFTING TEAM**

The design/drafting should include a broad cross-section of training, experience, and responsibility, not only to afford the drafting process with a practical perspective, but also to take advantage of the collective/institutional knowledge of the group. The maxim “been stung once” has merit. A manager (or lawyer for that matter) who has already experienced pain caused by a poorly considered or worded contract is less likely to repeat the mistake.

It is also wise to consult diverse disciplines, thereby serving to moderate extremes in all camps. For example, the partnership of legal counsel and management is critical, recognizing that while lawyers can sometimes “kill the deal,” managers can sometimes “agree to the deal that kills.”

**While lawyers can sometimes “kill the deal,” managers can sometimes “agree to the deal that kills.”**

The following areas of specialization should be consulted:

- **Operations** (providing expertise involved in the services to be received or rendered under the MSA)
- **Risk Management** (can help ensure that the MSA does not conflict with some broader company strategy or position)
- **Contract Procurement and Compliance** (a good source of institutional knowledge of contracting experience)
- **Legal** (working together, legal and management can better balance the often-competing goals of getting the deal done versus drafting the best contract)

**MSA DESIGN PROCESS**

The design and drafting team should consider the following steps:
1. **Service(s).** Identify the nature of the service (e.g., drilling, perforating, fraccing, casing, tank gauging, or other services), geographic area where the services will likely be performed, regularity of the service, manner of requesting and receiving the service, and relative financial benefits, costs, and risks associated with the service.

2. **Service(s) compatible with the MSA.** Some situations involving unique service-specific requirements might not be compatible to an MSA simply because the drafters will not be able to adequately take into account all key operational and risk-related events and requirements.

3. **Contractual provisions addressing risks.** Advance contractual template diagramming can help connect the risk with the contractual solution, thereby allowing management to assess whether the risk warrants the solution.

4. **Likely complainant and respondent.** Determining which party will most likely be the party complaining of noncompliance or the party responding to a complaint can have a direct bearing on what type of dispute-resolution provision to employ.

5. **Term.** In order to avoid outdated contracts remaining in service, consider how long the contract should stay in effect without further review to ensure compliance with changing legal and operational requirements.

6. **Activation of the MSA.** At times, it might be necessary to deviate from the MSA, and therefore flexibility is necessary. At other times, the MSA might fit perfectly but one or both parties fail to adequately reference back to the MSA, thereby creating a situation where the MSA terms cannot be enforced for a particular project. This is a common occurrence. Again, it is a matter of balancing between competing needs.

7. **Training and Awareness.** Key personnel should be made aware of contractual requirements. For example, many MSAs have specific notice requirements, dispute-resolution protocols, and other provisions that require close monitoring and precise adherence.

8. **MSA Summary Checklist.** A contractual checklist identifying key contractual groupings and provisions can be helpful. This summary should also identify contractual deadlines, notice requirements, and other compliance-sensitive actions. The checklist is not a substitute for reviewing the contract, but instead is a useful reference guide. Each checklist should identify the specific contract number and version being referenced.

9. **Troubleshooting.** The design and drafting team should review the agreement (before and after execution) to troubleshoot how the contract will work under certain “test” scenarios. Even a flaw discovered after execution might be capable of redress.

The contract design and drafting team should be distinguished from the negotiating team. One has the primary purpose of protecting the company’s interest and ensuring a favorable, or at least an acceptable agreement, while the other is sometimes preoccupied with getting the deal done.

**KEY PROVISIONS**

Below are examples of common provisions impacting disputes and the resolution of disputes.

**Dispute Resolution**

Dispute-resolution provisions allow parties to specify how they will resolve future disputes. When drafted properly, dispute-resolution provisions can provide the following benefits:

- Lessen the risk of extended litigation by incrementally requiring phased negotiation
- **Potentially** control costs and distraction (contrary to myth, arbitration can be more expensive than litigation if poorly structured and administered)
- Avoid the delay and costs of appeal (losing appellate rights can also be a con)
- Possibly provide a more predictable outcome. Many practitioners contest this point. However, use of appropriately qualified arbitrator(s) can increase predictability.
- Define the scope of arbitration. Care should be given to defining the scope of disputes subject to arbitration (e.g., “any and all disputes arising from or connected to the negotiation, construction or performance of the contract or which otherwise . . .”).

There are many templates for arbitration provisions including those provided by the Institute for Conflict Prevention & Resolution and the American Arbitration Association. While these templates provide excellent foundations to choose from, tailor-crafted provisions are often preferred. Details to consider are the following:
Indemnification

Generally stated, indemnity is a promise by an indemnitor to safeguard or hold an indemnitee harmless against either existing and/or future loss liability. Indemnity provisions are subject to common law limitations (e.g., fair notice requirements) and, in some instances, including when working with contracts in the oil and gas industry, various statutory limitations such as the so-called anti-indemnity statutes.

Fair Notice Requirement

Several states require “fair notice” in contractual indemnity provisions, whereby the indemnitee is shifting the liability and risk for its own negligent conduct to the indemnitor. Indemnity is seen as an extraordinary shifting of risk by courts and is not generally favored. Accordingly, in many jurisdictions, the indemnity provision must be expressly stated (i.e., the intent to indemnify another party even for that party’s own negligence must be expressly stated in the contract) and the language must be conspicuous within the body of the contract (e.g., bolded or underlined).

Oilfield Anti-Indemnity Statutes

Some states have adopted statutes that wholly or partially void indemnity agreements contained in certain contracts in the oil and gas industry. Consider, for example, the Texas Oilfield Indemnity Act (TOIA). Similar in concept, the Texas and Louisiana statutes—Louisiana’s is the Oilfield Indemnity Act (LOIA)—are actually substantially different. For example, the Louisiana statute voids all indemnity agreements (and waiver of subrogation) in applicable contracts, while the Texas statute allows these provisions if properly drafted and if the contract requires the indemnitor’s indemnity obligation to be supported by insurance. Also, while the Texas statute applies to claims and losses related to personal injury, death, and property damage, the Louisiana statute applies only to claims arising out of personal injury and death. In some states, indemnification is controlled primarily by common law.

Additional Insured Status

The TOIA does not prohibit additional insured provisions requiring a party to name another as an additional insured on its insurance policies. However, the LOIA does void additional insured provisions contained in applicable contracts. Despite the existence of the LOIA, federal courts have enforced agreements requiring an independent contractor to have its insurers name the operator as a co-insured under the independent contractor’s insurance policy, if the operator bears a material part of the cost of insurance.

General Maritime Law

A contract is generally considered to be maritime in nature if a vessel is involved, the contract serves the basic function of the vessel, and the situs of the work (i.e., where performance takes place) is upon navigable waters. Maritime law generally recognizes indemnity agreements if the parties’ intent is clearly stated. The parties should also consider the possible restrictions under the Longshore and Harbor Workers’ Compensation Act (LHWCA).

Release

Unlike an indemnity provision, a release is a simple agreement extinguishing any actual or potential claim the releasor may have against the releasee without regard to the releasee’s liability to third parties.

Limitation of Liability Provisions

One of the ways parties seek to limit and manage their risk is to contractually limit liability between themselves. This is frequently used to specifically exclude liability for extemporary, consequential, and indirect damages including business interruption, lost profits, and other specified damages.

Choice of Law

There are obvious advantages to selecting the law that will govern the contract and disputes
under the contract, the most obvious of which is an increase in certainty of interpretation and meaning. Very generally, choice-of-law provisions are enforced if the chosen law bears a reasonable relation to the parties or performance of the contract. If the selected law is against the public policy of the law of the situs, however, then the provision might not be enforced. There are also mandatory choice-of-law rules that can preempt the parties’ agreement (e.g., when services are being performed on the Outer Continental Shelf and General Maritime Law does not control, the Outer Continental Shelf Lands Act adopts the law of the “adjacent state” as the surrogate federal law).

**Choice of Forum**

Choice-of-forum provisions are commonly used, whereby the parties agree in advance where a matter can be filed (permissive) or where it must be filed (mandatory). While these provisions are generally enforceable, they can come under attack, as with the choice-of-law provision, if against public policy of the state in which the services are performed.

**Integration/Merger/Entire Agreement Clauses**

An integration clause (sometimes referred to as a merger or entire agreement clause) is typically placed toward the end of the contract and declares the contract to be the complete and final agreement between the parties, superseding prior written or oral agreements and representations. When working with an MSA, it is important for the integration clause to specifically recognize work orders or service tickets if contemplated by the parties.

**Work Order or Service Ticket**

Work orders or service tickets are commonly used by parties to initiate work under the MSA. It is good practice to expressly state that the terms of the MSA control over the terms of a work order in the event of any conflict. This is sometimes accomplished via a primacy clause specifying which agreements have priority.

**Severability/Savings Clauses**

This clause allows for the terms of the contract to be independent of one another, so that if a term is unenforceable, the contract as a whole will not necessarily be deemed unenforceable.

**Force Majeure**

Parties should expressly define what circumstance constitutes a force majeure event and under what circumstances it excuses contractual performance (e.g., must it actually prevent performance and be insurmountable or must it merely hinder performance). Additionally, the parties need to clearly state the consequences of a failure to perform under force majeure, especially an extended force majeure.

**CONCLUSION**

As with any other contractual form, an MSA is subject to success or failure depending upon the care exercised in its creation. The likelihood of designing a successful MSA is greatly enhanced when companies employ a few simple processes, including identifying potential problems and allowing sufficient time to design and test a contractual scheme to address these potential problems. While an MSA should always be monitored for necessary updates, the MSA concept allows a company to design and draft an agreement one time with methodical deliberation, thereafter employing the MSA template in other relationships. Not only is the template a valuable work product, but the process of developing it can also be very beneficial by further developing the company’s management of risk.

**NOTES**

2. See also, generally, Wyo. Stat. 30-1-131 (a), and N.M. Stat. Ann. 56-7-2 (applying to personal injury, death, and property damage), 15 Okl. St. § 221, and Miss. Code Ann. § 31-5-41 (broadly applying to construction agreements).
3. See, e.g., Royal Ins. Co. of America v. Whitaker Contracting Co., 824 So.2d 747 (Ala 2002) (indemnity agreements must clearly establish a mutual intent to create an indemnity relationship before the agreement will be enforced).
5. See Rogers v. Sameden Oil Corp., 308 F.3d 477 (5th Cir. 2002); Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); Patterson v. Conoco, Inc., 670 F. Supp. 182 (W.D. La. 1987), but also see Amoco Prod. Co. v. Lexington Ins. Co., 745 So.2d 676 (La. App. 1 Cir. 9/24/99), writ denied, 1999–3553 (La. 2/25/00) 755 So.2d 253 (applying Marcel and Patterson, the court held that the operator failed to pay a material part of the premium by paying $500 for primary and $1,500 for excess for $11 million in coverage).
6. Longshore and Harbor Workers’ Compensation Act 33 USC §§ 901–950 (2010) (subject to exception, the LHWCA can void indemnity claims by a vessel against the employer of an insured longshoreman).