
OFFSHORE TECHNOLOGY CONFERENCE 2007

DOING BUSINESS IN THE LONE STAR STATE

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by Elizabeth Carey and Brad Chambers*

I. ESTABLISHING A BUSINESS PRESENCE IN TEXAS

Foreign companies are attracted to Texas because its geographic location provides access to a variety of raw materials and parts used in manufacturing, allowing companies to pay lower costs for transportation and materials than if the goods were manufactured overseas for the North American Market. Texas also has major land, air, and sea links to the global marketplace.

A Norwegian company planning to conduct business in Texas should either form a Texas entity or obtain a certificate of authority from the Texas Secretary of State authorizing a foreign corporation or limited liability company to do business in Texas. No foreign corporation has the right to transact business in Texas until it has obtained a certificate of authority from the Texas Secretary of State. Once it obtains a certificate of authority, a foreign corporation has the same rights and privileges as a domestic corporation.

“Transacting business” means engaging in intrastate transactions on a recurring basis. Until a foreign corporation has obtained a certificate of authority to conduct business in Texas, it may not bring suit in Texas courts on any cause arising out of the transaction of business in Texas.

The Texas Business Corporation Act provides the legal requirements for establishing a business entity in Texas. However, other Texas or federal laws may be implicated depending on the type of business.

A. FORM OF BUSINESS ENTITY (e.g., Inc., LLC, LP)

Many foreign corporations create a subsidiary or a branch office in another state or foreign country as a strategic decision to expand their company. The decision of what type of entity to form is generally based on tax considerations, the ability to limit liability and the nature of the activity to be conducted.

1. Different Types of Business Entities

- (a) ***Sole Proprietorship*** – a single individual operates a business owning all assets, maintains personal liability for all debts and the business ownership is non-transferable.
- (b) ***General Partnership*** – two or more individuals or businesses join to operate a business.
- (c) ***Limited Partnership (LP)*** – two or more persons or entities, one or more general partners and one or more limited partners.

* This paper is intended to be a broad overview of conducting business in the State of Texas. Nothing in this paper should be used by the reader as a source of legal advice or as a substitute for legal counsel. You should consult an attorney to address any specific issues or problems that may arise in your business practice.

- (d) **Registered Limited Liability Partnership (LLP)**—a general partnership registered with the Texas Secretary of State.
- (e) **Corporation (Subchapter C or S)**—one or more individuals, partnerships, or entities that join together to form a separate entity for the purpose of operating a business.
- (f) **Limited Liability Company (LLC)**—unincorporated entity sharing some aspects of a Subchapter S corporation and limited partnership (see chart below).

Many companies choose to operate as a limited partnership with an LLC as a general partner to minimize state franchise taxes. The general partner generally has a minimal interest (1% or less). As a result, the LLC is taxed for state franchise tax purposes on its fraction of the profits, while the majority of the profits are allowed pass-through taxation status under state franchise taxes to the limited partners.

2. Advantages and Disadvantages of Each Type

<i>Entity</i>	<i>Advantages</i>	<i>Disadvantages</i>
Sole Proprietorship	<ul style="list-style-type: none"> -Easiest and least expensive form of ownership to organize -Limited to life of the individual proprietor -Owner receives all income generated to keep or reinvest -Does not require a separate income tax return -Not subject to state franchise taxes -Easy to dissolve 	<ul style="list-style-type: none"> -Unlimited liability -Personally liable for all debts -No legal distinction between personal and business debts -Business ownership is non transferable
General Partnership	<ul style="list-style-type: none"> -Relatively easy to establish -No organization costs -A separate legal entity exists -General partners share equally in assets, liabilities, and management -Pass-through taxation 	<ul style="list-style-type: none"> -Unlimited liability -General partners share equally in assets, liabilities, and management -Partners are jointly and individually liable for the actions of other partners -Creditors can still look to partners' personal assets -Disputes between partners may arise
Limited Partnership (LP)	<ul style="list-style-type: none"> -General partners share equally in assets and debts -Limited partners have limited liability -Do not pay taxes, but must file a return for informational purposes -Partners report share of profits and losses on personal tax returns 	<ul style="list-style-type: none"> -General partners have unlimited liability -Has a duration of one year/must file annual renewal application
Registered Limited Liability Partnership (LLP)	<ul style="list-style-type: none"> -A partner is not individually liable, under some circumstances, for debts and obligations of the partnership -Partners report their share of profits and losses on personal tax returns 	<ul style="list-style-type: none"> -\$100,000 of insurance or reserve funds required

<i>Entity</i>	<i>Advantages</i>	<i>Disadvantages</i>
Corporation	<ul style="list-style-type: none"> -Has its own legal identity, separate from its owners -All shareholders have limited liability protection from debts or judgments against corporation -Does not dissolve when ownership change -Can raise funds through sale of stock 	<ul style="list-style-type: none"> -Subject to state franchise taxes -Process of incorporation requires more time and money -More paperwork to comply with regulations -Could result in higher overall taxes -Must observe corporate formalities
(C Corporation)	<ul style="list-style-type: none"> -Owners are not taxed personally for profits 	<ul style="list-style-type: none"> -Taxed at a higher rate than an individual -More restricted in ability to issue equity for property other than cash because transaction is taxable -Shareholders may not deduct any of corporation's losses -Owners pay personal taxes on salaries and dividends -Corporation taxed on dividends
(S Corporation)-a tax election only	<ul style="list-style-type: none"> -Avoid double taxation of C Corporation -Income flows through to shareholders for reporting on individual tax returns -Owners may personally deduct losses (similar to partnership) -Offers alternative methods for distributing income to owners 	<ul style="list-style-type: none"> -Limited to U.S. residents and citizens of certain U.S. trusts
Limited Liability Companies (LLC)	<ul style="list-style-type: none"> -More flexibility than traditional business entities -All members have limited liability protection from debts (like corporation) -Provides pass-through tax advantages to owners (like partnership) -May exercise option of being taxed as corporation or partnership -Do not have stock 	<ul style="list-style-type: none"> -Formation is more complex than that of a general partnership -Subject to state franchise taxes

3. Taxes. A new business needs to determine its federal, state, and local tax obligations.

- (a) Federal Income Tax. Depending on individual income, the tax ranges from zero to 35% of one's taxable income.
- (b) Social Security Tax. This contribution or tax is 6.2% of an employee's income paid by the employer, and 6.2% paid by the employee.
- (c) Medicare Tax. Funds a health insurance program for elderly and disabled. 1.45% of employee income is paid by employer, and 1.45% is paid by the employee.
- (d) Franchise Tax. The Texas franchise tax applies to corporations, limited liability companies, banking corporations and other

financial institutions. The Texas franchise tax is the greater of the tax on net taxable capital (net taxable capital each year, multiplied by .25%) or the tax on earned surplus (total earned surplus calculated in accordance with the Texas rules, multiplied by 4.5%).

- (e) Sales & Use Tax. Tax is imposed on all retail sales, leases and rentals of most goods, as well as taxable services.
- (f) Unemployment Taxes. All employers are subject to the tax and must register with the Texas Workforce Commission.
- (g) Property Taxes. If the business owns tangible personal property that is used to produce income, the property must be reported on a rendition form to the local county appraisal district. Business owners must report all inventories, equipment, and machinery.
- (h) State Income Tax. There is no state income tax in Texas.

4. **Formation Requirements**

- (a) Business Name—must be registered with the county clerk’s office and/or the Texas Secretary of State. The name must not include words or phrases which imply a business purpose not contained within the articles of incorporation. Further it cannot be deceptively similar to an existing corporation in the state. The name must show the business is incorporated.

A sole proprietorship and general partnership need to file an Assumed Name Certificate or d/b/a (doing business as) for each name that will be used with the clerk of the county where the principal office and registered office are located.

A corporation, LP, or LLP must provide the name to the Secretary of State. If a different name will be used, an Assumed Name Certificate must be filed with the Secretary of State and in each county in which the business will have a registered or principal office.

- (b) Registration & Licenses—all limited partnerships, registered limited liability partnerships, limited liability companies, and corporations must register with the Texas Secretary of State.
- (c) Articles of Incorporation
 - (1) The fee for filing articles of incorporation with the Secretary of State is \$300. The corporation acquires its existence upon the date of the issuance of the “certificate of incorporation.”

- (2) The articles of incorporation must contain the following:
 - Name of corporation

- Proposed duration
- Corporate purpose
- Name and address of registered office/agent
- Names and address of directors serving on the initial board
- Name and address of incorporator
- Information about shares
- Statement that the corporation will not perform any business until it has received consideration of the value of at least \$1,000 for the issuance of shares
- Any provision limiting or denying to shareholders the right to acquire additional or treasury shares of the corporation

(d) Certificate of Authority

- (1) A foreign corporation, not establishing a domestic subsidiary corporation, must obtain a certificate of authority from the Secretary of State. The filing fee is \$750.
- (2) The requisite information on a certificate of authority is as follows:
 - Corporate name and assumed name (if corporate name is not available)
 - Jurisdiction of incorporation
 - Name and address of registered office/agent
 - Address of principal office
 - Business purpose
 - Names and addresses of officers and directors
 - Information about shares
 - Amount of stated capital

(e) Registered agent

- (1) A registered agent is a business or individual designated to receive service of process when a business entity is a party in a legal action. Additionally, registered agents receive license renewals, franchise tax notices, annual reports, and other notices for the organization.
- (2) All corporations, limited liability companies, and registered limited partnerships doing business in Texas must have a registered agent with a legal Texas address.

(f) Maintain Legal Status/Observe Corporate Formalities

- (1) Pay Franchise Taxes

- (2) Identify limited liability status
 - (3) Observe the separateness of the entity (bank accounts, phone numbers, post office boxes, etc.)
 - (4) Applying appropriate designations at end of company's name in all public documents (Inc., Corp., LLC, LP, etc.)
 - (5) Issue stock certificates
 - (6) Hold annual meetings
 - (7) Formally elect officers, directors, or managers
 - (8) Record board or manager meetings with minutes
- (g) Other legal requirements may include:
- (1) Obtaining an employer identification number
 - (2) U.S. Customs law 31 C.F.R. §103.23 (declaration necessary if funds exceed \$10,000 at one time into U.S.)
 - (3) Obtain a state unemployment tax account number from the Texas Workforce Commission
 - (4) Determine with the Comptroller of Public Accounts if required to pay franchise taxes
 - (5) Federal, state and local environmental laws and regulations
 - (6) The Texas Department of Economic Development offers a Comprehensive Application Form that may be used where multiple state permits may be required

B. FORM A RELATIONSHIP WITH A PARTNER/DISTRIBUTOR IN TEXAS

1. Joint Venture

Another method of establishing a presence in Texas is to form a joint venture with a U.S. firm. A joint venture is a legal organization that takes the form of a short term partnership in which the entities jointly undertake a transaction for mutual profit. Generally, each entity contributes assets and shares risks. Joint ventures can be used by companies to gain entrance into foreign markets. The foreign companies generally bring new technologies, products, or services into the joint venture, while the domestic companies already have an established business system in place. International joint ventures are generally used in a wide variety of manufacturing, mining, and service industries and frequently involve technology licensing by the U.S. firm to the joint venture. Joint ventures are subject to international trade laws.

- (a) Advantage of taking this option

- Potentially good partner-like option to obtain foreign trade income
 - Help spread high costs and risks frequently associated with foreign operations
 - Established distribution network
 - Host company knowledge of the customs and tastes of customers
 - Valuable business and political contacts
 - Lessen “foreigner” image
 - Treated like a partnership for Federal Income Tax purposes
- (b) Disadvantages of taking this option
- Possible loss of effective managerial control which can result in reduced profits, increased operating costs, inferior product quality, exposure to product liability, and environmental litigation and fines
 - Can raise U.S. anti-trust issues in certain circumstances
 - Complex legal issues surrounding creation of joint venture

2. **Licensing to Domestic Company**

This is the lowest-cost, lowest-risk route to conducting international business. The foreign company would enter into a contractual agreement in which the licensor’s patents, trademarks, service marks, copyrights, trade secrets, or other intellectual property may be sold by a licensee. The compensation or royalties may be paid in a lump sum or paid based on volume of production. This arrangement usually enables a foreign firm to enter the U.S. market quickly and poses fewer financial and legal risks than other alternatives. Licensing also permits foreign companies to overcome many of the tariff and nontariff barriers. This process can result in unforeseen control and management issues and may require more work than may initially be apparent. Further, licensing usually produces fewer profits than exporting actual goods or services.

C. **INTELLECTUAL PROPERTY (IMMATERIAL RIGHTS)**

1. **Trademarks/Service marks** – any distinctive word or group of words, symbols, design, number(s), series of letters, name, color or combination thereof used to identify and distinguish products and services from each other. Additionally, it is used to provide the source of products or services. The company should do the following: clear the mark prior to use, protect the mark by federal registration, prevent misuse of your mark by a third party, and protect the mark in foreign jurisdictions when distributing your product internationally. Federal registration of the mark is recommended if a business is using or intends to use a trademark in interstate commerce. Federal registration provides presumption of validity

of the mark, the exclusive right to use the mark in connection with the goods or services, constructive notice of the claim of ownership of the mark, and could act as basis for obtaining registration in foreign countries.

2. **Copyrights** – protection provided to original works of authorship, whether published or unpublished. Manuals, publications, advertising and marketing brochures, graphics, and artwork included in advertising materials, software programs and Internet web sites are examples of materials that may be copyrighted. Under the terms of The Berne Convention, of which the U.S. is a signatory, a copyright notice or registration with the U.S. copyright office is not required under current law in order to obtain copyright protection. However, registration of a copyright is a prerequisite to filing a lawsuit in the U.S. for copyright infringement.
3. **Trade Secrets** – can consist of any information, including formulas, patterns, software, compilations, devices or processes, not generally known to others which confers an economic advantage on the business, provided that it is the subject of reasonable efforts to maintain its secrecy. A company can secure confidentiality agreements, an assignment of the invention, and non-solicitation covenants to protect its interests.
4. **Patents** – property rights granted to an inventor by the U.S. Patent and Trademark Office (USPTO). The inventor must file a patent application within one year of the first public disclosure, sale, or offer for sale of the invention. The USPTO grants three types of patents: utility patents, design patents, and plant patents. The U.S. is a party to two major international treaties relating to patents: The Paris Convention Treaty and the Patent Cooperation Treaty. The Paris Convention Treaty provides that the earliest filing date of a patent application filed in a treaty country outside the U.S. will be considered as the earliest filing date of the U.S. application.

II. GENERAL BUSINESS ISSUES

A. PERSONAL RELATIONSHIPS - *Business on a Handshake*

1. Importance of your company's reputation and the power of word of mouth (one bad deal can destroy a reputation).
2. Treat people fairly and honestly.
3. However, don't be misled, a handshake will not adequately protect your interests. Make sure all deals are confirmed in writing.

B. COMPLIANCE WITH U.S. LAW

1. **Employment**

- (a) Fair Labor Standards Act, requires the following:
 - (1) 40 hour work week and overtime pay
 - (2) Minimum wage
- (b) Workers' Compensation Insurance – Texas is one of only 2 states where participation is voluntary; however, if your company elects not to participate, then make sure you fully weigh all of the benefits and consequences before doing so.
- (c) Employment-at-Will – Absent contract provisions to the contrary, Texas follows the “employment-at-will” doctrine. Thus, if there is no specific agreement that either sets the duration of employment to a specific period of time or restricts termination to good cause only, then either the employer or the employee may change or end the employment at any time for any reason that is not unlawful (e.g., discriminatory purposes)

2. **Immigration**

- (a) Ensure all employees working in the United States are employed under legal visas, such as an H-1B.
- (b) There are many visas available depending on the position and skill set of the individual working in the United States.
- (c) Plan ahead. Current processing times for obtaining work visas are long; thus, make sure you allocate adequate time to obtain the proper paperwork.

3. **Environmental**

- (a) Clean Air Act – Federal law that regulates air emissions by setting maximum pollutant standards.
- (b) Clean Water Act – Federal law that regulates the discharge of pollutants into the waters of the United States.
- (c) Hazardous Waste – Must be stored, handled and disposed of properly to avoid federal prosecution.
- (d) Occupational Safety and Health Act (OSHA) – Standards imposed in the workplace to make sure employers provide their workers a place of employment free from recognized hazards to the safety and health of their employees.
- (e) Oil Pollution Act (OPA) – The goal of the OPA is to prevent and respond to catastrophic oil spills by requiring oil storage facilities and vessels to submit to the federal government plans detailing how they will respond to large discharges.
- (f) Toxic Substances Control Act (TSCA) – Federal law that allows the government to track, test, and require reporting regarding the 75,000 industrial chemicals currently produced or imported into the United States. If a chemical is deemed to pose an unreasonable

risk to human health, the government may ban the chemical pursuant to this act.

4. **International**

- (a) NAFTA – North American Free Trade Agreement (effective since 1994)
 - (1) Agreement between US, Canada and Mexico for transnational access for goods, investments, services, government procurement and persons.
 - (2) Things to keep in mind for a foreign investor: benefits may be derived based on where the product is manufactured, i.e., if a product is manufactured in Mexico or Texas, it may qualify for additional benefits under NAFTA. However, not all of the benefits of NAFTA will apply to citizens from non-NAFTA nations.
- (b) Import/Export – Be mindful of laws affecting import and export of goods.

5. **Federal Reporting Requirements**

- (a) Federal reporting requirements exist if a foreign company owns or has a 10% voting interest in a US business enterprise.
- (b) Make sure that before you acquire or establish a company in Texas, all prerequisites are completed to make the transition smooth.

C. **PREVENTING LITIGATION: ESTABLISHING GOOD BUSINESS PRACTICES**

1. **Contracts**

- (a) Deals are recorded in contracts for protection when things don't go as planned and prevents someone from forgetting or changing the story later. This will also preserve relationships because all of the terms are clearly spelled out and prevents future breakdown of business relationships.
- (b) Always get in writing. Most agreements must be in writing to be enforceable—i.e., agreement for the sale of goods valued at more than \$500.00.
- (c) Is a Lawyer necessary? Yes, especially if there is a lot at stake or if the matter is complex. This is the best defense against future problems with the contract.
- (d) Always read before you sign. *Don't just sign to get the deal finished.*
- (e) Consider pre-approved standard terms & conditions customized for your business.

- (f) Specific Contract Clauses to Consider:
- (1) Choice of law - what law will apply
 - (i) Under U.S. law, the Uniform Commercial Code would apply to goods, but not services.
 - (ii) Foreign – You can also contract to have the law of your home country apply.
 - (iii) Also, be mindful of the United Nations Sales Convention on Contracts for the International Sale of Goods. There are approximately 67 countries, including the U.S. and Norway, that have ratified the convention. According to the convention, the provisions will apply to a contract involving the purchase and sale of goods between parties located in countries that are signatories, unless the parties to the contract expressly exclude its applicability.
 - (iv) Absent a choice of law clause, Texas courts will look to the subject matter of the contract and determine which state has the most significant relationship after evaluating many factors including:
 - Place of performance of all or part of the contract (one of the most important factors);
 - Domicile of a party
 - Where contract was signed
 - (2) Arbitration/litigation. Evaluate whether you would prefer to have any contract disputes resolved through litigation or through other alternative dispute resolution methods, such as arbitration.
 - (3) Forum selection clauses – where to sue. Not only can you contract to apply a particular law, but you can also limit the place where a lawsuit may be filed.
 - (4) Warranties
- (g) Contracts are construed against the drafter; therefore, it is important to draft all-inclusive, non-ambiguous contracts.
- (h) Keep in mind that every purchase order is a contract. Thus, while you may be more cautious to protect your interest in the “major” deals, don’t forget special rules apply to the invoices and other small matters not covered by a contract (Uniform Commercial Code would probably apply).

2. Document Retention Policy

- (a) Set up the company’s policies now; don’t wait until a problem arises.
- (b) Make sure your employees are clear on the company’s policies.
- (c) Electronic documents – incorporate e-mails and voicemail into your company’s document retention policy.

3. Corporate Formalities

- (a) Make sure to maintain corporate formalities to protect shareholders, the parent company, subsidiaries and other affiliated companies.
- (b) Keep companies separate. This includes keeping the finances, board meetings, products, books, etc. separated.
- (c) Make sure that related companies are not viewed as one single business

4. Insurance

- (a) The best protection against unforeseen events is insurance, especially in the offshore oil industry, where the drilling rigs and other related equipment/materials are tested under extreme conditions and unpredictable events, such as hurricanes.
- (b) Types of coverage:
 - (1) Worker's compensation insurance
 - (2) General liability
 - (3) Product liability
 - (4) Criminal insurance – protect your property from theft and malicious damages
 - (5) Business interruption insurance
 - (6) Key person insurance – this type of coverage is usually life insurance that names the corporation as a beneficiary if an essential person dies or is disabled
 - (7) Malpractice insurance

5. Collections

- (a) Secured Claims
 - (1) Make sure you protect your investments by obtaining a security interest in any goods purchased
 - (2) “Security interest” – property interest in personal or moveable property that secures payment or performance of an obligation
 - (3) Other names for a security interest found outside the United States:
 - (i) Pledges
 - (ii) Charges
 - (iii) Conditional sale arrangements with retained title
 - (iv) Equipment trusts
 - (v) Chattel mortgages
- (b) Unsecured Claims – Without a security interest, the creditor would be an unsecured creditor and may not be able to fully satisfy its claims in the event of default.
- (c) Bankruptcy – If a company files for bankruptcy protection, you must file a proof of claim to protect your interest. Those who have a secured claim will be paid first. The types of bankruptcy include:

- (1) Liquidation (Chapter 7 of the Bankruptcy Code). This is the most common type of bankruptcy case and involves liquidation of the debtor's assets by a trustee to pay creditors' claims. Individual debtors (consumers, sole proprietors, etc.) usually have their debts discharged, while liquidation for a corporation or partnership results in the termination of a business.
 - (2) Reorganization (Chapter 11 of the Bankruptcy Code). Filing for bankruptcy under this chapter is designed to help the debtor rehabilitate his failing business by extending, reducing or otherwise adjusting debts and reorganizing the business. Thus, debtors filing under Chapter 11 usually remain in possession of their assets, avoid liquidation and are able to continue operating.
- (d) Collection through the court system:
- (1) Suit on Sworn Account – debt is based on invoices or an open account with a creditor
 - (2) Writ of Garnishment – provides a means of gaining possession of property that is owned by or owed to the defendant but is in the possession of a third party.
 - (3) Writ of Sequestration – seizure of property by a sheriff
 - (4) Writ of Attachment – filed after suit but before judgment and allows petitioner to take possession of property that may be sold in the event the creditor wins a judgment in its favor

III. THE U.S. LEGAL SYSTEM – A GENERAL FRAMEWORK

A. DIFFERENCES BETWEEN THE LEGAL SYSTEMS OF THE UNITED STATES AND NORWAY

1. Common Law vs. Civil Law

- (a) The U.S. legal system was adopted from the English common law. Norway's legal system was adopted from Roman civil law.
- (b) Civil law (or continental law) is the predominant system of law in the world. It differs from common law in that common law draws abstract rules from specific cases, whereas civil law starts with abstract rules, which judges must then apply to the various cases before them.
- (c) The difference between civil law and common law lies in the methodological approach to codes and statutes. In civil law countries, legislation is the primary source of law. By default, courts base their judgments on the provisions of codes and statutes, from which solutions in particular cases are derived. Courts thus have to reason extensively on the basis of general rules and principles of the code, often drawing analogies from statutory provisions to fill

lacunae and to achieve coherence. By contrast, in the common law system, cases are the primary source of law, while statutes are only seen as incursions into the common law and thus interpreted narrowly.

2. **U.S. Constitution.** The U.S. Constitution is the supreme law of the land in the United States. It creates a national government and divides power among three branches: Legislative (Article 1); Executive (Article 2); and Judicial (Article 3). The separation of power creates a system of checks and balances intended to lessen the possibility of tyrannical rule.

B. FEDERALISM: STATE COURTS VS. FEDERAL COURTS

1. The American judicial system is actually made up of two separate court systems: the federal court system and the state court systems.
2. The U.S. Constitution created a governmental structure for the United States known as federalism. Federalism refers to a sharing of powers between the national government and the state governments. *The Constitution gives certain powers to the federal government and reserves the rest for the states.* Therefore, while the Constitution states that the federal government is supreme with regard to those powers expressly or implicitly delegated to it, the states remain supreme in matters reserved to them. This supremacy of each government in its own sphere means each government is sovereign in its own right.

3. Is it better to stay in state court (Texas court) or federal court?

- (a) The answer to this question depends on who is asked. A plaintiff filing a lawsuit might believe a state court will most likely rule in his favor, while a defendant might believe otherwise.
- (b) In the American judicial system, typically a plaintiff has a choice of venue (i.e., a plaintiff is given the choice of which court to file the lawsuit). However, a defendant has the ability, in some situations, to either change the venue or to move the case from state court to federal court.

4. What is the typical length of litigation?

It depends. A case filed in a civil county court at law, for example, will move faster than a case filed in a civil district court. A rule of thumb is that typically litigation can last from 9 to 18 months in state court, and may move faster in a federal court.

5. Elected vs. Appointed Judges

In Texas state courts, judges are elected, while in federal courts judges are appointed. As such, state courts are highly political because state judges need to stay in good favor with the citizens who can elect their replacements.

6. Jurisdiction

(a) Jurisdiction of the Federal Courts. The jurisdiction of the federal courts is spelled out in Article III, Section 2, of the United States Constitution. Federal courts are courts of limited jurisdiction because they can hear only two main types of cases:

(1) *Diversity of Citizenship.* Federal courts can have jurisdiction over a case of a civil nature when parties are residents of different states and the amount in question exceeds the amount set by federal law (currently \$75,000); however, federal courts are often required to apply state law when the issues concern matters of state law. The fact that the parties are from different states and that the amount in question is high enough to catapult such cases into federal court.

(2) *Federal Question.* Federal courts have jurisdiction over cases that arise under the U.S. Constitution, the laws of the United States, and the treaties made under the authority of the United States. These issues are the sole prerogative of the federal courts and include the following types of cases:

- (i) Suits between states
- (ii) Cases involving ambassadors and other high-ranking public figures
- (iii) Federal crimes
- (iv) Bankruptcy
- (v) Patent, copyright and trademark cases
- (vi) Admiralty
- (vii) Antitrust
- (viii) Securities and banking regulation
- (ix) Other cases specified by federal statute

(b) Jurisdiction of the State Courts. The jurisdiction of the state courts extends to basically any type of case that does not fall within the exclusive jurisdiction of the federal courts.

C. FOREIGN COMPANIES ARE SUBJECT TO LITIGATION IN TEXAS

1. Jurisdiction

- (a) In order for a foreign company to be subject to a lawsuit in the State of Texas, the court must have power to hear and determine a case—a power referred to as “jurisdiction.” More specifically, in order for a court to have jurisdiction over a foreign company the court must have both 1) personal jurisdiction and 2) subject matter jurisdiction.
- (b) Personal Jurisdiction – Personal jurisdiction is nothing more than a court’s power over an individual or company. This can arise in one of two forms: 1) specific jurisdiction or 2) general jurisdiction.
 - (1) *Specific Jurisdiction* – This is jurisdiction of a claim arising out of a single, specific act. As such, the defendant is only subject to jurisdiction for claims arising out of that specific conduct.
 - (2) *General Jurisdiction* – Occurs when a foreign company’s activities in Texas are so substantial and continuous that it would expect to be subject to suit on ANY claim and would suffer no inconvenience from defending suit in Texas (e.g., a foreign company that has a factory in Texas).
 - (3) *Minimum Contacts* – The Supreme Court held that the courts of a state may exercise personal jurisdiction over a defendant if it has such minimum contacts with the state that it would be fair to require it to return and defend a lawsuit in that state.
 - (4) A corporation that chooses to conduct activities within a state accepts (implicitly, of course) a reciprocal duty to answer for its in-state activities in the local courts. The defendant who deliberately chooses to take advantage of the “benefits and protections of the laws” (referred to as “purposeful availment”) of a state will not be heard to cry “foul” when that state holds the company to account in its courts for its in-state acts.

	Decreasing Contacts ←			Increasing Contacts →	
Extent of Contacts	No Contacts	Casual or Isolated	Single Act	Continuous but limited	Substantial or Pervasive
Jurisdictional Consequences	No Jurisdiction	No Jurisdiction	Specific Jurisdiction	Specific Jurisdiction	General Jurisdiction

- (5) *Stream of Commerce Test* – This test is used when trying to determine if a foreign company can be held accountable in a Texas court for its products that wind up in the State of Texas, even though the foreign company did not directly sell to the State of Texas (e.g., Norwegian company sells to buyer in the U.K., who then sells the product to a company in Texas).
- (6) Under this test, the court asks whether a manufacturer has purposefully availed itself of the State of Texas. Mere awareness that a product may wind up in Texas is not enough. However, evidence that a manufacturer seeks to serve the market (e.g., advertisements directed at Texas, designs product specifically for Texas market) or when goods are sent to Texas in substantial quantities, a court may find that a manufacturer has purposefully availed itself to Texas, such that it should be subject to its jurisdiction. *Rationale:* The foreign company/manufacturer both foresees and benefits from sales to Texas.
- (7) *Texas Long Arm Statute* – Gives authority to Texas courts to exercise personal jurisdiction to the limits of due process. This means that the specific categories of jurisdiction conveyed by the long-arm statute are to be interpreted as liberally as the due process clause will allow.

(c) Subject Matter Jurisdiction – Subject Matter Jurisdiction deals with the competency of a court to hear a particular category of case. Two defining characteristics of cases are the amount in controversy (the amount of money in dispute) and the type of case (family, probate, etc.). Thus, each court may have “subject matter jurisdiction” of a certain type or types of case with disputes within a certain monetary amount.

2. **Venue** – This essentially involves the location (i.e., the particular Texas county) in which to file suit. In Texas, the plaintiff is given the choice of venue; however, in certain circumstances a venue change is mandatory and/or permitted upon request by the party sued.

D. ADMIRALTY AND MARITIME LAW

1. **Generally:** Maritime Law regulates the activity of carrying cargo and passengers over water. Both state courts and federal courts may have jurisdiction over admiralty claims. There are exceptions, of course, where Congress has given federal courts *exclusive* jurisdiction over certain matters.

2. Admiralty issues that may arise in offshore drilling

- (a) Liens on Maritime Property – Includes liens on Cargo and Vessels.
- (b) Worker Injury Claims
 - (1) *Negligence: The Jones Act* – The Jones Act provides a seaman a cause of action against his employer for the negligence of a co-employee, the captain or the ship owner. It is liberally construed and an effective method of recovery for work-related injuries.
 - (i) The Jones Act applies only to a claim by a seaman against his or her employer. Bear in mind that a Jones Act employer need not own or operate the vessel on which its employee serves as a member of the crew.
 - (ii) The Jones Act applies only if the employee is injured or killed during the course of his/her employment.
 - (iii) Statute of Limitations: All claims must be brought within three years of the date of injury for Jones Act claims.
 - (iv) *Litigation Prevention*: Employers are required to provide a safe work environment for their employees.
 - (2) *Longshore and Harbor Workers' Compensation Act* – The nonseaman maritime worker's recovery against the employer ordinarily is through the Longshore and Harbor Workers' Compensation Act (LHWCA), a traditional worker's compensation scheme.
 - (i) The LHWCA is a federal act that covers employees in occupations having a traditional relationship to maritime employment. In 1984, Congress substantially amended the LHWCA in an attempt to give all longshore and harbor workers the same type of protection. Coverage is determined under the LHWCA based on the location where the employee was working and on whether the type of work performed had a traditional relationship to maritime employment.
 - (ii) An employer subject to the LHWCA must either obtain insurance or by qualify as a self-insurer. If the employer does not, the employee has the option of seeking compensation benefits or pursuing a personal injury lawsuit against the employer. If the employee files suit, the employer may not claim assumption of risk, contributory negligence defenses or that a co-worker was responsible.

- (iii) Platform Injuries – An injury occurring on offshore platforms ordinarily will be governed by state law unless there is some applicable federal law. For example, the Admiralty Extension Act applies only if the injury was “caused by a vessel on navigable waters” and has a “maritime flavor.” Similarly, a wrongful death occurring in connection with a platform may fall under the Death on the High Seas Act, if the wrongful act occurs on the high seas and, perhaps, has “maritime flavor.”
- (iv) Otherwise, injuries occurring on a platform ordinarily do not fall within maritime tort jurisdiction because the maritime common law treats the platform as an “extension of the land” and deems exploration for oil and gas from fixed platforms as lacking in ‘maritime flavor.’” Accordingly, state law usually governs the resolution of injury claims that arise from activities on fixed platforms. When state law governs, the litigants take that law in its entirety, including a state statute of limitations, which may be shorter than the federal maritime statute.

E. ALTERNATIVE DISPUTE RESOLUTION

1. **Alternative Dispute Resolution (“ADR”)** – This includes other alternate means by which parties can resolve their disputes without resorting to a trial in a state or federal court. ADR is a broad term that incorporates, among other things, mediation (a non-binding form of dispute resolution) and arbitration (which may be either binding or non-binding). Mediation and arbitration are the two most popular forms of ADR.
2. **Arbitration Clause** - An arbitration clause is a commonly used clause in a contract that requires the parties to resolve their disputes through an arbitration process. Such a clause may or may not specify that arbitration occur within a specific jurisdiction and may or may not be binding; however, most contracts that contain an arbitration clause provide that the arbitration is binding to avoid later litigation.