The development of knock-for-knock clauses in the last 15 years

Chapter 2: The Development of Knock for Knock Clauses and their usage in the oil and gas industry

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Abstract

"Knock-for-knock" clauses or indemnities (hereinafter K4K) form part of the liability allocation model frequently found in contracts for the oil and gas industry. Historically, K4K indemnity principles have provided certainty and clarity as to the responsibilities and liabilities of the parties from a risk and insurance perspective. In these arrangements, each party obtains insurance, or self-insures, against the risks related to injury to its personnel or damage to its property. This chapter provides a historical overview of the concept of K4K clauses, and of the evolution of their meaning and functionality in the sectors of shipping and oil and gas. It also specifically explores their historical application in high-risk offshore drilling operations, whereby such clauses have been used to protect both contractors and clients from exposure to complex liability.

1. Introduction

1.1. Definition

Fundamentally, knock for knock (hereinafter K4K) clauses provide that both parties will cover their own losses, i.e., the "knocks", that are suffered by their respective property or personnel. As such, neither party can sue the other for the loss suffered. This arrangement minimizes the costs that such "knocks" would otherwise incur, by saving the parties the valuable time and money that would typically be spent litigating fault-contingent liability.

1.2. Essential Meaning of a K4K Clause

Under a K4K scheme, the loss lies where it falls, irrespective of fault and without recourse to other parties. [1] It is accompanied by a series of mutual indemnity clauses, wherein parties agree to indemnify the other contracting parties against injury to, or death of, their own personnel, loss or damage to their property, and any other specified losses. The primary advantage of K4K clauses is that liability is predetermined, thus saving insurance costs and time in attributing fault, from both a factual and legal perspective. This leads to faster compensation to injured parties, which makes K4K clauses very attractive to industry, especially where multiple parties are involved.

Essentially, K4K clauses underpin a simple, consensual scheme of mutual risk-allocation. Moreover, they function in part as contractual exclusion clauses, with each party seeking: (a) to exclude its own liability, even if caused by its own fault; and (b) to obtain an indemnity from other parties for any liability to which it may be exposed.[2] Hence the need for their terms to be reciprocal, and to cover similar liabilities, as many jurisdictions prohibit one-way liability exclusions, most notably US maritime law.[2] In part they also confirm liability.[3] However, indemnities are not always exclusions of liability.

[1] A. McCooke, Shipowners: The False Economy of Amending Knock for Knock Clauses, https://www.shipownersclub.com/the-false-economy-of-amending-knock-for-knock-clauses/ **Error! Hyperlink reference not valid.**accessed 10.2.2021

[2] ibid.

[3] E.g., by saying X will take liability for X's personnel and property.

1.3. Historical Genesis of the K4K Clause

The phrase, and general meaning of, "knock for knock" originated in the U.S. car insurance industry during the early 1900s.[4] Early automobile-insurers commonly found themselves trapped in the non-ideal position of having to pay for their customers' car repairs first, and then having to engage in costly, drawn-out litigation, sometimes spending years arguing as to which party was at fault. To avoid losing the time and money required to litigate, they began to enter agreements with one another that, after a collision, each insurer would simply pay their policyholder's losses and seize the continuation of the claim. K4K clauses were effectively devised and designed as a contractual tool to limit the uncertainty of liability exposure stemming from inherently hazardous activities.[5]

Additionally, K4K was brought into the maritime insurance context in the U.K. during World War II as a mechanism for reducing litigation costs arising from frequent naval accidents.[6] Responding to the threat of German submarines, English ships sailed in the dark, with all lights switched off, in a very tight cluster. This tactic reduced their exposure to German submarines, but increased the overall rate of collisions, hence the parties decided to subject themselves to the K4K principle, essentially agreeing that each party will bear its own costs.[7]

K4K clauses entered the energy sectors in the 1960s with the commencement of oil and gas exploration in the North Sea. [8] Such clauses were to be found in both maritime and energy contracts in the 1960s and resulted in modern times to be inserted in most maritime and offshore oil and gas contracts either in the form of standard industry wording or as a clause in standard form contracts.[9]

This method of risk allocation was also common in towage agreements in the US, contractually restricting the allocation of liability between the two parties.[10] Each party, i.e., the tug and the tow, would bear their own risk arising from the towing operation. Additionally, such a contract formulation was viewed as more likely to be able to be relied upon in court.[11] By the 1970s, K4K clauses were being used in some ocean or international towage agreements, the evolution of which is what has been known as the standard-form towage agreements, TOWCON and TOWHIRE of the 1980s. Indeed, in 1985, BIMCO, one of the largest international shipping organizations, and an authority on industry best-practices, released two standard-form towage agreements, TOWCON and TOWHIRE, with K4K at the heart of their liability regime. Moreover, SUPPLYTIME, a BIMCO-drafted time-charterparty contract designed for supply vessel and offshore work, had a K4K clause added as standard in its 1989 revision. Other standard-form contracts used in the offshore industry, and many charterers' in-house

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[4] P. Saraceni, N Summers, "Reviewing Knock for Knock Indemnities: Risk allocation in Maritime and Offishore Oil and Gas Contracts", (2016) 30 ANZ Mar LJ, 28-43, 28.

[5] ibid.

[6] G. Parchomovsky, E. Stanvag, " Contracting Around Tort Defaults: The Knock-For-Knock Principle and Accident Costs, 4-7, CREE Institute, University of Oslo, Norway, https://www.cree.uio.no/publications/CREE_working_papers/pdf_2013/knock_for_knock_stavang_cree_wp_14_2013.pdf accessed 13.1.2021.

[7] ibid.

[8] P. Saraceni, N Summers, "Reviewing Knock for Knock Indemnities: Risk allocation in Maritime and Offishore Oil and Gas Contracts", (2016) 30 ANZ Mar LJ, 28-43, 28; See also *Bell Assurance Association v Licenses & General Insurance Corporation & Guarantee Fund Ltd* (1923) 17 Lloyd's Rep. 100.

[9] ibid; S. Rainey, "The Construction of Mutual Indemnities and Knock-for-Knock Clauses" 68-107*f*, in: B. Soyer and A Tettenborn (Eds) (2014) Offshore Contracts and Liabilities, Informa Law.

[10] A. McCooke, Shipowners: The False Economy of Amending Knock for Knock Clauses, https://www.shipownersclub.com/the-false-economy-of-amending-knock-for-knock-clauses/ **Error! Hyperlink reference not valid.**accessed 10.2.2021

[11] ibid.

charterparties, also apply a K4K allocation of liabilities. This industrywide use, along with widespread judicial acknowledgement of its enforceability, has effectuated the K4K clause's predominance as a mechanism by which coventurers can streamline the allocation of risk and liability in offshore operations.[12]

2. Issues in Using, Implementing, and Enforcing K4K Clauses

In accordance with general professional liability standards, under both contract and tort, negligent performance of a professional service typically leads to liability for damages on behalf of the negligent party. The main issue in connection with the K4K regime is whether the professional liability for negligently conducted or omitted provisions of service – this being the fundamental obligation of a contract for services – can be limited, or exempted, by an indemnity clause and, if so, to what extent.

The effect of a contractual K4K scheme is to reverse the commonly accepted principle whereby the at-fault party is held liable for the ensuing damage. As the K4K provision creates a novel legal relationship, departing from centuries of default tort law, the contract absolving parties of this liability must do so properly, or it may not be readily enforceable. As a general matter, courts do not typically favour standard-form contracts, or worse, contracts of adhesion, and will interpret such provisions against the drafting party, under contra proferentem.[13] Nevertheless, K4K clauses are regularly included in standard-form contracts in the maritime law domain, in various types of charterparties and offshore contracts. [14] Such ubiquitous use of K4K clauses in the wider maritime sector makes logical and economic sense to firms, as they limit the parties' exposure to unpredictable liability.[15] Furthermore, participants in the oil and gas industry, specifically, regularly choose to contract out of standard tort liability, suspending the rules of negligence and strict liability in their dealings with one another, and embrace the K4K rule instead. The industry's adoption of K4K eliminates liability for harms incurred through the course of their *inter-se* relationships, as this lowers operation costs, however, it has been suggested that this is only possible if the private cost savings generated are greater than the increase in the rate and severity of accidents that incur as a result of such an adoption by the industry. To achieve an optimal use of K4K clause, parties internalize the cost of the harms they may suffer at the hands of other contractual parties. As for insurance, K4K operates in terms of first-party insurance, an intriguing feature that runs contrary to contemporary theory and practice.[16] The desirability of K4K clauses depends on the risks to which they are prone and expose each other and the public; so long as the risks are independent there is no reason to oppose K4K clauses if first-party insurance is contained in the contract. If there is a high risk of interdependence between the risks to other contractual parties and the public, the use of K4K clauses is questioned and cautioned by lawmakers.[17]

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[12] ibid.
[13] https://www.skuld.com/topics/legal/pi-and-defence/k4k/ accessed 29.4.2022
[14] See eg *Caledonia North Sea Ltd v London Bridge Engineering Ltd and Others (The Piper Alpha)* [2002] UKHL 4; [2002] 1 Lloyd's Rep 553 (HL).
[15] M. Mudrić, (2015). "The Guardcon contract, knock-for- knock clauses, DCFR and unfair terms (Part I).", JIML 21 (2015) ; 51-62, 55.
[16] G. Parchomovsky, E. Stanvag, " Contracting Around Tort Defaults: The Knock-For-Knock Principle and Accident Costs, 4-7, CREE Institute, University of Oslo, Norway, https://www.cree.uio.no/publications/CREE_working_papers/pdf_2013/knock_for_knock_stavang_cree_wp_14_2013.pdf accessed 13.1.2021
[17] ibid.

3. Various Uses

3.1. SUPPLYTIME 2005

K4K clauses express the parties' contractual language. Clause 14 of the SUPPLYTIME 2005 charter party excludes from the K4K indemnity any undeclared dangerous cargo or hazardous or noxious substances shipped by the charterers on board the vessel; any pollution claims; any general average. Such claims must be resolved under traditional fault-based liability regimes. As such clauses are exclusion clauses, there must be unambiguous wording to exclude one's liability. The scope of K4K clauses extends to protect the indemnified party from gross negligence, wilful misconduct, material breach of contract, statutory or strict liability, consequential loss and proportionate and concurrent liability.[18]

3.2. Insurance and P & I Clubs

In the insurance sector, P&I Clubs will often review and, if appropriate, approve K4K clauses if they are balanced and mutual; and so long as the P&I Club-member has not waived any right to limit liability under any applicable law. Unbalanced K4K provisions are not "poolable" in respect to any liabilities of which the member would not have been exposed in the absence of the contract. Also, for the K4K liabilities to be "poolable", they must incorporate indemnities, protecting members if they are sued by a third party who is not bound by the contract, and members must contract on terms that do not expose them to disproportionate liabilities.[19]

K4K clauses are a fundamental part of the maritime and offshore oil and gas sectors. Recognised in English and Australian jurisprudence, as well as in other legal systems, and in various bodies of caselaw, such hold-harmless and indemnity clauses play a significant role in commercial operations within those sectors. Also, courts carefully examine the wording of K4K clauses in an effort to determine their meaning, scope, operation and efficiency; hence, clarity in drafting such clauses is absolutely necessary to make sure that they serve the scope for which they have been drafted.[20]

3.3. Use in Off-Shore Contracts

The arrangement provided by K4K clauses has been used extensively in upstream oil exploration activities, as such operations typically involve many contractors and subcontractors. Furthermore, in the case of a potential loss – e.g., the *Deepwater Horizon* incident in the Gulf of Mexico in 2010 – multiple potential defendants would be involved. To avoid such complexities, the parties agree to accept responsibility for loss or damage to their own property and for injury or death to their own employees, irrespective of blame. Such arrangements were described by Lord Bingham in the *Piper Alpha*[21] case as a market practice that has developed in order to accommodate the peculiar features of offshore operations. Additionally, K4K clauses are often used in downstream oil and gas contracts, as the parties to such contracts are also usually parties to the contracts upstream, or are subcontractors who serve in the same role that they serve in the upstream contracts. BIMCO has produced a series of specialised charter forms that are designed to cater for the specialised requirements of the offshore industry such as HEAVYCON, BARGEHIRE, PROJECTCON, TOWCON,

[18] P. Saraceni, N Summers, "Reviewing Knock for Knock Indemnities: Risk allocation in Maritime and Offishore Oil and Gas Contracts", (2016) 30 ANZ Mar LJ, 28-43, 32-33.
[19] ibid, 41.
[20] ibid, 43.
[21] *Caledonia North Sea Ltd* v. *London Bridge Engineering Ltd and Others* (*The Piper Alpha*) [2002]1 Lloyd's Rep 553 (HL).

TOWHIRE and SUPPLYTIME, all of which contain K4K clauses, the commercial purpose of which is to make it clear who is to bear the risk.[22]

4. Modern Use

Today, the K4K principle is acknowledged as being at the very core of the SUPPLYTIME form-contract, and K4K clauses in SUPPLYTIME mean that each party should bear responsibility for any damage or loss to its own property, or injury to its own personnel, even if the damage, loss or personal injury is caused by the act, neglect or breach of duty (whether statutory or otherwise) of the other party. When the other party compensates the claimant, even if the loss of compensation filed by the claimant is caused by the other party's act, neglect or breach of duty – be it statutory or otherwise, the party shall still indemnify the other party for the compensation submitted by the claimant, and the compensation made by the party against the other party shall be called K4K indemnity. Again, the essence of K4K clauses is that the parties, based on simple apportionment of risks and liabilities, replace the original fault liability by mutual agreement for several exempted and non-exempted items.[23]

4.1. The BIMCO SUPPLYTIME 2017

In 2017, the Documentary Committee of BIMCO adopted the revised SUPPLYTIME 2017, bringing it more in line with current practices in the offshore sector. The objective of BIMCO's 2017 revision of SUPPLYTIME was to better balance the interests of the owners, and the interests of the charterers, in relation to the K4K liability regime. Apart from that, there were also several smaller changes from the previous iteration of the contract. In relation to the K4K Clause (Clause 14) and the liability regime, this has been strengthened in the 2017 edition, because the definitions of the "Charterers' Group" and of the "Owners' Group", which affect the operation of the K4K liability regime, have been improved and moved to the "Definitions" section, so that the usage is consistent throughout the charterparty. Subclause 14(a)(i) describes the losses that fall on the owner, as any loss or damage to property belonging to the Owners' Group, or personal injury and death of anyone in the Owners' Group, are to be borne by the owners, even if they are caused by, the negligence or default of the Charterers' Group, subject to three exceptions stated in subclauses 9(e), 14(c) and 18(c). Subclause 14(a)(ii) describes the losses that fall on the charterers. It is not identical to the subclause governing the owners, and this is due to the differences in their respective obligations. Nevertheless, there is an equivalent strengthening of the K4K regime for charterers, subject to two exceptions in subclause 9(c) and 16. Notably, the description of the included causes of loss has been expanded to include any loss "arising out of, or in any way connected with, the performance or non-performance of this Charter Party whatsoever, and in any circumstances, even if such loss, damage, or personal injury or death is caused wholly or partially by the act, neglect, breach of duty, be it statutory or otherwise". Hence, SUPPLYTIME 2017 has retained the key features that made this particular standard-form one of the most popular in the offshore sector, while making several changes to modernise it, and to ensure that it keeps up with the changing market practice; strengthening the K4K liability regime by balancing liabilities and indemnities, and by reducing of the number of exceptions to the regime.[24]

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[22] R. Williams, "Knock for Knock Clauses in Offshore Contracts: The Fundamental Principles," 53-67, in: B. Soyer, A. Tettenborn, (Eds) (2014) Offshore Contracts and Liabilities, Informa Law.

[23] Y. Han, "On Knock-for-Knock Principle: Analysis of SUPPLYTIME 2017 Clause 14(a)," 2019 China Oceans L. Rev. (2019)4, 128-149, 128; S. Rainey, "The Construction of Mutual Indemnities and Knock-for-knock Clauses" 68-107, 70-71, in: B. Soyer, A. Tettenborn, (Eds) (2014) Offshore Contracts and Liabilities, Informa Law.

[24] Kennedys Law, "Notes from the bar: BIMCO SUPPLYTIME 2017, 18.10.2017

5. A Historical Encounter of the K4K Clauses in the Shipping and in the Offshore Oil and Gas Sectors

Early on, K4K flourished in contracts for the shipping industry, and the offshore oil and gas industry, in exploring the North Sea. With time, certain risks were excluded from the K4K regime, as evidenced by the evolution of the BIMCO SUPPLYTIME form. When first published in 1975, the form represented a contract where all the particular features of the sector were therein depicted, and as a result, many aspects of the regime favoured owners, especially in regard to a charterer's liability for loss or damage negligently caused to the vessel, or to her owners, whilst later the provisions were amended to favour all parties involved. Such provisions were only looked upon and amended in 1989, when the SUPPLYTIME form was redrafted to encompass fairer provisions, and to achieve balance between the interests involved. The K4K regime provisions for mutual risk allocation were popular in the offshore industry forms of contract such as HEAVYCON, TOWCON and TOWHIRE, drafted by BIMCO; the LOGIC Construction Contract; and the Norwegian Subsea Contract 05 (known as NSC 05), etc. Under those contracts, K4K operates fairly, as liability and indemnity provisions are balanced.

As oil-and-gas activities involve risky undertakings at virtually all stages, the use of the clause has become popular for a number of reasons. Fault, though traceable through the traditional allocation of liability under the common law, becomes a matter of contractual stipulation for who bears the burden under K4K. Allocation of liability therefore becomes simpler.

The commercial or economic imperative for mutual indemnification was indeed recognised in the case of *Caledonia North Sea Ltd v London Bridge Engineering Ltd. (London Bridge).*[25] There, Lord President Rodger noted as relevant evidence from one of the witnesses, that the practice is fundamental economics of the business, and thus, to the North Sea operation. The use of the clause, however, is not a fool-proof guard against litigation for the purpose of tracing which party is liable in the event of damage or loss, as experience indicates. A possible corollary is that parties could assess risk and accept liabilities more easily. Indemnity clauses also reduce the scope and cost of insurance available for parties. The extent of possible risk instances that may occur, e.g., in an oil platform due to the act or omission of a contractor, is infinite.[26]

6. The Evolution of K4K Clauses in Standard Contracts and in English Case Law

In cases where contracts contain a K4K regime which either adopts standard industry wording or forms part of a standard form contract, courts have shown a willingness to give effect to the object and purpose of K4K clauses. By conforming to a K4K clause in offshore contracts, in the event of loss and damage to respective parties' property, or the subsequent death of employees, companies uphold personal liabilities.[27] Under the BIMCO SUPPLYTIME revisions of 1989 and 2005 formats, and the revised HEAVYCON 2007 contract, in the event

https://kennedyslaw.com/thought-leadership/article/notes-from-the-bar-bimco-supplytime-2017/

[25] *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2000] S.L.T. 1123 at 1150 (*London Bridge*).

[26] C. Ugwuanyi, *Examining the exclusionary nature of oil and gas contract mutual indemnity hold harmless clauses*, I.E.L.R. 2012, 4, 136-146.

[27] A. Iyer, "Excluding 'Consequential Loss' in Offshore Contracts", October 23, 2020 https://www.iylegal.com/excluding-lsquo-consequential-loss-rsquo-in-offshore-contracts

of "consequential loss", the exclusion clause becomes a provision of the K4K clause. The term "consequential loss" is to be perceived as meaning that the normal loss encompasses the market value of the property, as the money or services that the claimant should have received under the contract, less either the market value of what he does receive or the market value of what he would have transferred, but for the breach having occurred.[28] Indeed, consequential losses have been perceived to encompass anything beyond such a normal measure, e.g., profits lost, or expenses incurred, through the breach, and they are recoverable if not too remote. Because misassumption in the classification of losses has instigated contractual difficulties in energy construction and supply offshore contracts, a solution was sought. Recoverable losses in contracts were started from the "limb one" and "limb two" categories of losses established by the rules adopted in the seminal case *of Hadley v Baxendale*.[29] The English court rejected the mill's loss of profit claim for late delivery of a mill part, because of the lack of clarity in the mill's subsequent loss of profit in the event of a late restart in production. Following this case, the ruling was re-stated in *Victoria Laundry v Newman*[30] and in *Czamikow v Koufos*[31] for which the *Victoria Laundry* ruling[32] explained the type of knowledge that parties must possess in order to recover losses. It has been stated that knowledge "possessed" is of two kinds, one imputed, and the other actual, and that the reasonable person is taken to know the ordinary course of things and, consequently, what loss is likely to result from a breach of contract in that ordinary course. Indeed, this was taken to be the subject matter of the "first rule" in *Hadley v. Baxendale*[33] or any other case containing knowledge of special circumstances outside the ordinary course of things, such that a breach given those special circumstances would be likely to cause more loss. Finally, it was remarked that such a case instigated a "second rule" such that additional losses are recoverable. Recoverable indirect losses, or "limb two" losses, under English law, must stem from the breaching party's actual knowledge of the loss, independent of the scale, which the party was aware of at the time of contract that such a loss would result from a breach. The difficulty is that this distinction between consequential losses and all other losses, is not the same as the distinction between the "first" and "second" "limbs" in the *Hadley v. Baxendale*[34] rule; as consequential loss may well fall within the "first limb", as a direct loss which was a natural consequence of the breach. Hence, it may not be entirely accurate to say that the *Hadley v. Baxendale*[35] "second limb" covers only, or every, consequential loss.

Under English law, the scope of certain K4K clauses can turn upon the interpretation of the term "consequential loss" provided in exclusion clauses. In offshore contracts, wherein a loss is deemed to be incurred as a "direct loss" following a breach of contract, the parties can still be found liable to meet any number of "consequential losses". An example of such could be a loss of profit. English courts will construe exclusion and limitation clauses strictly against the party seeking to rely upon them, pursuant to the *contra proferentem* rule, which may - in the context of consequential loss clauses in offshore contracts - bring other consequences.[36]

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[28] https://cms.law/en/media/expert-guides/files-for-expert-guides/consequential-loss-clauses-in-the-energy-sector accessed 29.4.2022
[29] *Hadley v Baxendale* (1854) 9 Exch 341.
[30] *Victoria Laundry v Newman* [1949] 2 K.B. 528
[31] *Czamikow v Koufos* [1969] 1 A.C. 350
[32] *Victoria Laundry v Newman* [1949] 2 K.B. 528
[33] *Hadley v Baxendale* (1854) 9 Exch 341.
[34] ibid.
[35] ibid.
[36] A. Iyer, "Excluding 'Consequential Loss' in Offshore Contracts", October 23, 2020 https://www.iylegal.com/excluding-lsquo-consequential-loss-rsquo-in-offshore-contracts

The widely-cited case, *Croudace v Cawoods*,[37] determined that the use of the word "consequential" did not cover any loss which directly and naturally resulted in the ordinary course of events from late delivery; and in *Addax v Acadia*,[38] non-consequential losses associated with incurred "hedging costs" were found recoverable as "direct" losses. In *British Sugar Plc v NEI Power Projects*,[39] regarding increased production costs and loss of profits for the claimant, it was held that since the faulty power station equipment supplied by the defendant had directly led to such losses, those losses would not be encompassed within an exclusion of liability for "consequential" losses, and could thus be recovered as direct losses.

By itself, inserting the term "consequential losses" into the exclusion clause of an offshore contract may be insufficient to protect the owner from costly claims for loss of profit, production or business interruption. Nevertheless, the main hiring contracts [TUGHIRE, TOWCON, SUPPLYTIME 89 (and revised 05) and HEAVYCON 07], each have consequential loss provisions which purport to protect the parties from claims for "consequential losses" specifically.

Clause 23 of the 2007 revision of HEAVYCON (HEAVYCON 07) marked the first introduction of a consequential damages clause into HEAVYCON, identical to clause 14(c) of SUPPLYTIME 05. In interpreting the language of such a clause, courts may likely rule that all loss of profit, whether foreseeable or not, must necessarily include losses falling within the first limb of *Hadley v Baxendale*[40] as well as those falling within the "second limb", and that the lack of any reference to any other direct losses would tend towards such an interpretation. However, there is still a risk that, if the specific term used in those clauses is "consequential loss", courts may interpret the clause as excluding only any "second limb" losses and not any losses falling under "limb one", assuming they are "direct" or "natural losses".[41]

A distinction also appears to be drawn between the construction of exclusion clauses on the one hand, and limitation clauses on the other. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*,[42] the House of Lords held that a limitation clause need not be construed in accordance with the same principles that apply to exclusion or indemnity clauses, and that the actual absence of a reference to negligence in the limitation clause did not prevent it from protecting against the contractor's liability for negligence. However, in *E. E. Caledonia Ltd v Orbit Valve Co Europe*,[43] wherein the indemnity clause was expressed generally and without reference to negligence, the court found that the parties' right to sue each other for negligence had been preserved. For K4K to operate, an indemnity clause should expressly and clearly refer to negligence; as this was not the case in *Orbit Valve*, the K4K regime did not extend to liability caused by a party's own negligence.[44]

6.1. The Significance of the *Piper Alpha* Litigation

[37] *Croudace v Cawoods* [1978] 2 Lloyd's Rep 55
[38] *Addax v Acadia* [2000] 1 Loyd's Rep 493.
[39] *British Sugar Plc v NEI Power Projects* (1998) 87 BLR 42 CA
[40] *Hadley v Baxendale* (1854) 9 Exch 341.
[41] A. Iyer, "Excluding 'Consequential Loss' in Offshore Contracts", October 23, 2020 https://www.iylegal.com/excluding-lsquo-consequential-loss-rsquo-in-offshore-contracts
[42] *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*, [1983] 1 WLR 964.
[43] *E. E. Caledonia Ltd v Orbit Valve Co Europe*, [1994] 1 WLR 221.
[44] P. Saraceni, N Summers, "Reviewing Knock for Knock Indemnities: Risk allocation in Maritime and Offshore Oil and Gas Contracts", (2016) 30 ANZ Mar LJ, 28-43, 30-31.

The basis of "mutual-hold-harmless" or K4K clauses, can be seen in the House of Lords' landmark decision in the case of the *Piper Alpha* litigation.[45] The Piper Alpha disaster of 6th July 1988 resulted in 167 dead, 62 injured, and total destruction of the Piper Alpha oil platform off the coast of Scotland. The operator of the platform, Caledonia North Sea Ltd (formerly Occidental Petroleum (Caledonia) Ltd), along with its co-venturers', and its insurers, settled the fatal accident and personal injury claims using a formula agreed upon within months of the disaster. In the House of Lords' decision, Lord Mackay reinforced the view in relation to primary liability on the contract in this case, by stating that this was not entirely typical, as the relevant clause required the contractor to indemnify the operator in respect of injury to or death of persons employed by the contractor, irrespective of any contributory negligence, whether active or passive, of the party to be indemnified; unless such injury, death, damage, loss or destruction was caused by the sole negligence or wilful misconduct of the party which would otherwise be indemnified. This case demonstrates that an operator may voluntarily choose to insure against claims for which it has a contractual right of indemnity, and that choice will not operate to the advantage of the party contractually obliged to pay the indemnity.[46] Accordingly, this case is notable for its contribution to the emergence of the mutual hold-harmless indemnity regime. The fact that the operators had indemnity did not stop the court from holding the contractors responsible for indemnification of their staff and crew members. Hence, coming to this point in law, where there is contributory negligence - versus sole negligence on the part of the operator, the contractor needs to apply its own share of indemnity, regardless of the operator's contributory negligence.[47] The insurers', therefore, would have been subrogated to the claims of the operator against the contractors; as the House of Lords upheld in the previous judgment. The indemnity was to have applied in favour of the operator, regardless of any negligence in the part of the operator; and death or injury to the contractor's employees was to be covered by the mutual hold-harmless regime, rather than the standard fault-based regime.

7. The Contribution of Other Jurisprudence to the Historical Evolution of K4K Clauses

7.1. U.S. Jurisprudence

K4K clauses, when present in an oilfield agreement, must be balanced and comprehensive for several reasons, as, but for their existence, it would be extremely difficult to determine who holds fault in drilling site accidents.[48] Some states in the USA (e.g., Louisiana, Texas, New Mexico and Wyoming) have Limitation Acts prohibiting certain indemnity agreements. This means that any contractual clause that liberates the contractor or the indemnified party from taking responsibility for loss or damages caused by its own negligence or fault, such as K4K, is to be considered void. Some American courts have also issued rulings rejecting contractual exculpation from responsibility for loss or damage caused by gross negligence or willful misconduct.[49] However, it remains a question as to how exactly the K4K regime works out in jurisdictions that are weary of broad liability limitation, as it may not be a practical insurance tool in on-shore operations, where there is more clarity in terms of potential risks as compared

[45] *Caledonia North Sea Ltd* v. *London Bridge Engineering Ltd and Others* (*The Piper Alpha*) [2002]1 Lloyd's Rep 553 (HL).
[46] T. Hewitt, "Who is to Blame? Allocating Liability in Upstream Project Contracts," Journal of Energy & Natural Resources Law, 26:2, 177-206.
[47] *Caledonia North Sea Ltd v London Bridge Engineering* Ltd [2002] UKHL 32; [2002] 1 Lloyd's Rep 562, 563, HL.
[48] T. Middis, "Knock for knock indemnities – are they appropriate for on-shore infrastructure projects?" May 7, 2015, Addisons, 1-3.
[49] ibid.

to off-shore sites.[50] Pursuant to such terms, K4K clauses need to specify when laying out health and safety guidelines, and each party's responsibilities and liabilities in light of those guidelines. There also should be no carve out for "gross negligence" or "willful misconduct" as they can lead to less certainty in allocation of liabilities unless such clause is thoroughly defined. The K4K regime must also apply to all the parties involved, such as other contractors and subcontractors, to promote fairness and equality in the legal treatment provided.[51] In some American states, e.g., Texas and Louisiana, the anti-indemnity legislation is widely seen as a reaction to oil companies' attempts to force local service and product providers to accept all liabilities, even if the loss stems from the oil company's fault. However, an enforceable K4K clause in an oil or drilling contract can be achieved, despite such statutory limitations, given that the language of the contract is well-constructed and clear. Summarily, contractual agreements including K4K clauses are generally enforceable in the United States, absent any statutory or judicial precedent to the contrary.[52]

Deepwater Horizon.

On 20 April 2010, the Macondo exploratory well in the was being drilled offshore by the Deepwater Horizon platform when it suffered a blowout, causing a fire, and resulting in five million barrels of oil spilled into the Gulf of Mexico. Thousands of legal suits were filed against BP, and on 20 May 2015, BP settled the multi-billion-dollar lawsuits with its co-venturers; Transocean, Halliburton and Cameron. Importantly, Transocean and its contractors relied on K4K clauses in the respective contracts to exclude their liability for loss and damage other than to their own employees and property.[53]

7.2. Brazil.

In Brazil, contractual terms in the offshore sector would fall under two main contractual regimes; (a) international contract forms, such as BIMCO standard charter contracts, incorporating the K4K clause principle; or (b) Petróleo Brasileiro SA (Petrobras). The latter, a Brazilian state oil contract representing 95% of Brazilian offshore contracts, instigates its own contractual terms under the Brazilian Civil Code. Pursuant to Brazilian civil law, Petrobras contracts avoid K4K indemnity through provisions limiting indemnification amounts; and excluding indirect damages or loss of earnings. A basic principle of Brazilian civil law is that any person who causes damage, whether through employees or subcontractors, to another must indemnify the aggrieved party in a form proportional to the damage suffered. Under Section 927 of the Brazilian Civil Code, this obligation arises regardless of fault, in the circumstances specified by the Code; or when the activity that caused the damage included a risk to the environment, or to third parties. Nevertheless, under Brazilian law, the addition of a K4K clause is possible since terms and conditions of contracts and clauses are negotiable between parties so long as they do not contravene public order and third-party interests. For example, a limitation of liability clause under a contract of carriage is considered by the Brazilian courts as contrary to Brazilian law and therefore null and void. It must be noted that in the context of carriage of goods contracts, for instance in relation to standard bills of lading, the Brazilian courts' interpretation, and position on the limitation of liability clause included in the bill of lading, is considered as onerous to the receiver and thus, not valid. Also, considering the nature of offshore contracts in the oil sector - the equal bargaining strength, and flexibility for more

[50] ibid.
[51] ibid.
[52] L. Lambert, "Knock-for-Knock Contracts Are Enforceable in the US", Standard Bulletin: Offshore Special Edition, November 2011.
[53] P. Saraceni, N Summers, "Reviewing Knock for Knock Indemnities: Risk allocation in Maritime and Offshore Oil and Gas Contracts", (2016) 30 ANZ Mar LJ, 28-43, 30-31.

open and reciprocal negotiation of contractual terms, dissipates the Brazilian civil courts' position regarding the potential for unfair offshore contracts, and thus could potentially yield to the inclusion of a K4K clause. Such a clause has yet to be challenged in a Brazilian court, which consider the clauses an adaptation of foreign law and jurisdiction regulations.[54]

7.3. Germany

The growth in recent years of offshore wind farm projects in the Exclusive Economic Zone (EEZ) of Germany has given rise to the possibility of potential disputes related to their underlying contracts in German courts and arbitral tribunals. German courts generally lack practical experience in interpreting contractual forms such as the BIMCO SUPPLYTIME 2005 or 2017, the BIMCO WINDTIME or LOGIC contracts, all of which have been developed against the background of English law. The validity of K4K clauses under German law would depend on the court's evaluation of whether: a) the clause is part of general terms and conditions; b) it can be considered reasonable; and c) irrespective of general terms and conditions, whether it contains specific liability exclusions disallowed under German Law. Under German law, K4K clauses in standard form industry contracts, such as BIMCO SUPPLYTIME, will be considered as general terms and conditions unless the particular clause has been individually negotiated between parties. The term "negotiating" as per the German Civil Code requires the user of general terms and conditions to allow the contractual partner to actively protect his own interests and demonstrate his willingness to negotiate terms in principle. Previously, "rider clauses", pursuant to a contractual agreement, including a reasonable and fair allocation of rights and duties, and highlighting the known nature of every clause as part of the individual negotiations were accepted in German jurisprudence. Later caselaw shows an understanding in the German Federal Courts that the inclusion of a rider clause does not automatically prevent a contract from still being regarded as general terms and conditions, because whether a contract is agreed on the basis of general terms and conditions or individually is a question of fact, which cannot be contractually regulated by the parties; hence such a rider may still be considered to be part of the general terms and conditions.[55]

The liability regime of a K4K clause is contrary to any German civil liability regime and thus considered foreign by many courts. Such contracts containing a K4K clause must ensure fairness between the parties to keep these particular clauses from being invalidated by German courts. The main deterring factor in a court's decision would be the consideration of the practices and customs that apply in general German business dealings, for which the offshore wind industry's rather young "*status quo"* would likely not be a determinative factor. Hence, it is likely that a German court or arbitral tribunal will render a K4K clause invalid, if it attempts to exclude liability for damages arising from personal injury to life and body or health, wilful or intentional misconduct and/or gross negligence. Consequentially, in such circumstances, a court or arbitral tribunal may not only consider the K4K clause, but rather the entire clause to be invalid, even if only a part of such clause is affected. In effect, in case of any damage or loss, as per the German statutory liability regime of the German Civil Code (which adopts a fault-based liability regime), the party claiming damages would be entitled to damages without any limitation, provided the other party was at fault. Under German law, certain restrictions apply to all contract clauses, providing for the provision on civil liabilities. If the exclusion of liability is for damages resulting from wilful or intentional misconduct, even if the clause has

[54] G. Mendes Vianna, J.Furtado Senna, "Knock for knock clauses under Brazilian Law" (offshore charter contracts) Standard Bulletin: Offshore Special Edition, November 2011.

[55] E. Volz, A. Waldmann, "Knock-for-knock liability - Does it work in the German market?",3 September 2019 https://www.clydeco.com/en/insights/2019/09/knock-for-knock-liability-does-it-work-in-the-germ accessed 13.1.2021

been individually negotiated, the clause will be invalidated, unless a "carve-out" regarding exclusions and limitations of liability is in place to be used for this particular type of damages.[56]

7.4. Australia

In Australia, in commercial contracts, K4K clauses are construed in accordance with ordinary rules of contractual construction. In *Darlington Futures Ltd v Delco Australia Pty Ltd Ltd*,[57] the High Court of Australia held that an exclusion clause is to be construed according to its "natural and ordinary" meaning; and in *Andar Transport Pty Ltd v Brambles Ltd,*[58] the High Court applied the traditional rule of construction: that indemnities should be construed strictly against the guarantor.

7.5. Nordic Countries - The History and Validity of K4K Clauses from a Comparative Perspective

In Nordic countries, the validity of K4K clauses, and the liability exclusions that they contain, is often analysed comparatively, between the law of their tradition of origin, i.e. common law, especially English law; and Nordic civil law, especially Norwegian and Danish law, where such agreements are also frequently used, namely in the context of oil extraction activities in the North Sea.[59] The subjective characteristics of any K4K arrangement depends on each jurisdiction's respective stance, hence this becomes one of the most important issues for the contracting parties during their contractual negotiations, as the establishment of which national law applies will also determine the applicability parameters of the contracts, and the extent and treatment of liability. Standard K4K clauses often establish that the K4K liability allocation applies unless the party causing the loss has acted with gross negligence or wilful misconduct. Furthermore, the insurer might be able to exclude such qualified forms of faulty behaviour from the offered coverage, so that the party causing the damage is contractually exempted from liability but cannot recover its loss from the insurer or require the claiming party to first pay a deductible.[60] Also, certain types of damages, such as pollution damages, may warrant exclusion from the K4K regime, and may simply be governed by the usual principles of tort liability, since allocation of liability for those certain types of damages is imposed by mandatory law. [61]

Contract validity is dependent on whether the parties had intended that a certain behaviour of the responsible party, or a certain type of loss, is to be covered by the exclusion. Furthermore, the liability exclusion or limitation must be compatible with statute and public policy. English courts have traditionally assumed that, unless the contract contains clear wording to the contrary, an exclusion or limitation of liability does not cover negligence, and have ruled that it is "…established that indemnity will not lie in respect of loss due to a person's own negligence or that of his servants unless adequate and clear words are used or unless the

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[56] ibid.

[57] *Darlington Futures Ltd v Delco Australia Pty Ltd Ltd,* (1986) 161 CLR 500.

[58] *Andar Transport Pty Ltd v Brambles Ltd,* (2004) 217 CLR 424.

[59] S. Cavaleri, "The Validity of Knock-for-Knock Clauses in Comparative Perspective" (October 3, 2017). European Review of Private Law, Vol. 25, 2017, University of Copenhagen Faculty of Law Research Paper No. 2017-50, <https://ssrn.com/abstract=3063280> accessed 27.5.2021

[60] G. Parchomovsky, E. Stavang, *"Contracting Around Tort Defaults: The Knock-for-Knock Principle and Accident Costs"* (Oslo: CREE – Centre for Research on Environmentally Friendly Energy 2013), 16-17, <https://www.cree.uio.no/publications/CREE_working_papers/pdf_2013/knock_for_knock_stavang_cree_wp_14_2013.pdf> accessed 27.5.2021

[61] T-L. Wilhelmsen, **"**Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle", SIMPLY 2012, 88.

indemnity could have no reasonable meaning or application unless so applied."[62] In *Canada Steamship v R*[63], Lord Morton developed a three-step contract interpretation test in determining the criteria for parties to be relieved of their negligence or the negligence of their "servants." The applicability of this three-step test was later confirmed by the Queen's Bench Division of the High Court of England and Wales in their interpretation of the offshore indemnity clauses in *EE Caledonia Ltd v Orbit Valve Co Europe*.[64] This case concerned the question of whether a contract containing a mutual indemnity clause entitled the operators of an oil platform to an indemnity for the compensation paid to the descendants of an engineer who had died because of a fire on the platform caused, at least in part, by the negligence of the platform operators. The court held that the operators were not entitled to indemnification, because the indemnity clause did not include a reference to negligence or any similar word, and that the mere reference in the disputed clause to "any" claim or liability was not sufficient. In Danish law, with regards to liability exclusions and limitations, the validity of a contract depends on a court's interpretation of four contractual factors a) whether a clause has not been validly adopted by the parties[65]; b) whether a clause is restrictively interpreted, sometimes to the effect that the clause does not apply at all - e.g. *contra proferentem*, wherein the party who drafted the clause must suffer the consequence of its lack of clarity [66]; c) whether the theory dictating the consequence of fundamental changes of circumstances ("*forudsætningslære*") applies; and d) whether circumstances justifying the application of the clause are no longer present, or that it would be contrary to the parties' expectations to apply the clause in accordance with its wording.[67] The Danish Product Liability Act contains a prohibition against clauses purporting to exclude or reduce liability for death or personal injuries falling within the scope of application of this Act, i.e. caused by products within the meaning of the Act. Furthermore, common to all Nordic countries, a clause can be invalidated on the ground of unreasonableness pursuant to § 36 (the "general clause") of the Contract Act (CA) which states that a contract can be modified or set aside, in whole or in part, if it would be unreasonable or incompatible with the principle of good faith to enforce it.[68] The validity of a clause, and the gravity of the fault leading to damage (gross negligence or intentional breach), are the main focus of relevant Danish court decisions; whereas Norwegian court decisions also place an emphasis on the hierarchical position of the person who caused the damage, as gross negligence by a member of management can be treated differently than similar behaviour by a subordinate employee.[69]

7.6. Later Judicial Trends

Especially from the early-2010s, oilfield operators have shown a real tendency to chisel away at the K4K indemnity model, or abandon it all together, to allocate more responsibility to the involved service companies for all sorts of well damages, e.g., pollution, blowouts/wild well events, loss of oil/gas, etc., to the extent that such damages are caused by the negligence of the service company. Arguably, one way to do this, i.e., to expand the range of service companies' liabilities, is to embed a "gross negligence" exception provision in mutual hold-harmless

[62] *Alderslade v Hendon Laundry* [1945] KB 189 at 192; see also *Walters v. Whessoe Ltd and Shell Refining Co Ltd.* [1968] 2 *All ER (All England Law Reports)* 816 per Sellers SJ
[63] *Canada Steamship Lines v Regem* [1952] 1 *All ER* 305, § 16 to 19.
[64] *E.E. Caledonia Ltd v Orbit Valve Co. Europe,* 1994] 1 *WLR (Weekly Law Reports)* 221.
[65] B. Gomard, "Obligationsret" 2. del, 4th ed., 2011, 311-312; MB. Andersen, J. Lookofsky, "Lærebog i obligationsret I", 4th ed, 2015, 411.
[66] B. Gomard, "Obligationsret" 2. del, 4th ed., 2011, 313-314; MB. Andersen, J. Lookofsky, "Lærebog i obligationsret I", 4th ed, 2015, 411.
[67] MB. Andersen, J. Lookofsky, "Lærebog i obligationsret I", 4th ed, 2015, 413-15; V. Hagstrom, "Obligasjonsrett", Universitetsforlag, 2nd ed. 2011, 658.
[68] § 36, section 1 of the Danish Contract Act (*Aftaleloven*), free translation.
[69] V. Hagstrom, "Obligasjonsrett", Universitetsforlag, 2nd ed. 2011, 658.

indemnity agreements.[70] In terms of contracts, many industry players use model form contracts produced by non-for-profit industry associations such as the LOGIC standard form model contract. LOGIC publishes a set of 'standard' contracts, and in most of these contract models, the "mutual hold harmless" clause is incorporated.[71] Often, the "mutual hold harmless" clause and the allocation of liability varies between different types of contacts, and may serve one party more than the other, depending on the circumstances under which the contract terms were negotiated. International and state oil companies usually have certain global policies for insurance in place, which exceed the minimum requirements set by applicable jurisdictions. However, the benefits of such "mutual hold harmless" clauses are, as there is a clearer and simpler allocation of liability in K4K, liability becomes a matter of contract. Moreover, there is no need for an investigation or assignment of fault, allowing parties to avoid lengthy litigation. In the absence of such a regime, each contractor will need to insure against all risks, e.g., destroying the whole facility or injuring each one of the personnel. Often, one aspect to consider while drafting the "mutual hold harmless" indemnity clause is to define whose property is intended to be covered is, i.e., whether it is property or equipment rented to the operator by the contractor, or if it is under the contractor's or supervisor's control but it is operated by the employees of the contractor.[72]

As of late, the "mutual hold harmless" regime is less commonly-used due to changes in the infrastructure of oil and gas operations, and developments in insurance attempting to adapt to the complexity of oilfield operations and their inherent risks. Historically, a key factor in the emergence of the mutual indemnity regime has been access to insurance. Previously, insurance policies were not well-suited for the complexity and risks associated with oil and gas exploitation. However, as the insurance market developed a deeper understanding of the oil and gas industry, insurance policies became more comprehensive, and as a result, affected the industry's preferred allocation of liability. Moreover, the recent shift in collaboration between operators and contractors has led to the necessity for a different approach to risk and liability allocations. With collaborative projects, tasks are tackled through bringing in specific skilled contractors, and if using a different reward system, rather than basic reimbursement, allocation of liability would be different. Cases such as *Transocean Drilling UK Ltd v Providence Resources PLC*[73] highlight the importance of tailoring the indemnity regime to a specific project, rather than using a standardized version of the liability system in use.[74] This is to say that it is noted that by incorporating several different such provisions, effectively the parties exclude any liability for damages in the event of a breach, thus limiting their indemnity width of coverage and such a practice also makes it difficult for courts to not follow such agreements.[75] This was clearly the view of the Court of Appeal in *Transocean Drilling UK Ltd v Providence Resources PLC*.[76]

7.7. The Way Forward

[70] S. Johanson, "Is It Really Knock-for-Knock?" June 21, 2019. Boyar Miller. https://www.boyarmiller.com/is-it-really-knock-for-knock/ accessed 27.5.2021
[71] ibid.
[72] ibid.
[73] *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372
[74] P. Murray, "Is it time for 'knock-for-knock' to be knocked out?" May 12, 2018 | News and Views | Ledingham Chalmers Solicitors
[75] C. Kumarasinghe, "Case Update: Transocean v Providence", May 2016, HFW, https://www.hfw.com/Transocean-Drilling-UK-Ltd-v-Providence-Resources-PLC-May-2016 accessed 27.5.2021
[76] *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372

The 2016 Court of Appeal (EWCA) decision in *Transocean Drilling UK Ltd v Providence Resources PLC*[77] brought about significant discussion on K4K provisions in oil and gas contracts. The case turned on the interpretation of the mutual indemnity provisions, covering third party losses, and consequential loss carve-outs within the contract. The provisions in dispute were relatively typical in such contracts and have been used in the offshore industry for well over 25 years. Originally, these contracts were used in recognition of the fact that costs from certain loss events, such as the destruction of an entire oil platform, could not be borne by a single contractor. In addition, the manner in which offshore work has been carried out, historically, has meant a significant overlapping of roles and responsibilities among groups of contractors. Furthermore, a key justification in introducing mutual indemnity provisions was the availability of insurance, and where such insurable risks lay. In April 2011, Providence had contracted with rig owner Transocean for the hire of a semi-submersible drilling rig to be deployed in the Barryroe Field, Ireland to drill an appraisal well. The High Court held that the rig had not been delivered in good working condition, and that Transocean was in breach of contract for the resulting delays. Transocean's appeal, however, focused solely on the High Court's decision to allow Providence to recover the 'spread costs' incurred as a result of the delay, which were the usual wasted costs of third-party personnel, equipment and services. Transocean contended that their liability for such costs was excluded under the contract's standard consequential loss clause. The Court of Appeal reviewed the risk management and liability provisions in the contract, focusing on the complexity of the series of indemnities, noting that such provisions were clearly designed to complement each other and were effectively a detailed and sophisticated scheme for apportioning responsibility for loss and damage of all kinds, backed by insurance. The Court also closely examined the wording of the disputed language, including critical words such as "loss of use" (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontracts of every tier or by third parties). The Court also found that the use of the phrase "without limitation" twice within the clause clearly indicated the parties' intention to emphasise the width of the limitation, and that this wording was "plainly apt" to cover the "spread costs" claimed by Providence. The Court of Appeal disagreed with the High Court's reasoning in reaching its decision and went on to note that a court can reinterpret the contract, so long as the parties' intent is preserved, giving the words that they have used their ordinary and natural meaning. In so ruling, the court repeatedly emphasized the choice of the parties to accept responsibility for losses that might have otherwise been recoverable as damages for breach of contract. In viewing the contract as a whole, the court stated that, in their view, there is no reason to ***not*** give effect to the agreement. The Court of Appeal reaffirmed that parties can be rightfully bound by properly executed K4K agreements. As a consequence, parties must be prepared to accept that, by the operation of these contracts, claims which may have otherwise been recoverable at law may well be excluded, as was the matter in this case.[78] It is also important to note that over the last few years, there have been significant changes in the ownership of key pipelines and terminals, moving to independent ownership. Consequentially, there has been a shift in operators' willingness to undertake certain risks with some commentators predicting the end of the K4K regime. However, this demise will likely not happen anytime soon, and K4K clauses remain

[77] *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372
[78] C. Kumarasinghe, "Case Update: Transocean v Providence", May 2016, HFW, https://www.hfw.com/Transocean-Drilling-UK-Ltd-v-Providence-Resources-PLC-May-2016 accessed 27.5.2021

viable, so long as proper drafting and insurance arrangements can be made between parties, negotiating in good faith.[79]

8. Conclusive Critique

It is an established rule that clauses which tend to exclude liability must be clear and precise; courts can also hold that such clauses, where they are exclusionary, must employ specific and express terms. Limitation clauses are distinguishable from exclusion clausesco footnote 116 17, and so should indemnity clauses be too, even if backed by emphatic words, but especially where there is established usage/practice. The word "indemnify" logically suggests initial liability, usually to a third party. "Hold harmless" goes further; an explicit statement of what the party obliged to indemnify the party at loss is to do (hold them harmless). This paper is meant to highlight the concept of mutual indemnification in the UK offshore oil industry contracts. The use of indemnity clauses has become underscored with words such as "save", "defend", "hold harmless" etc. Nevertheless, it is the position argued here that the meaning of the clause among industry parties remains - the reciprocal indemnification of liability in accordance with contract terms. This becomes more important when the interests of a third party to the contract are involved. Where parties intend to exclude liability, then none exists ab initio; fault will lie where it falls, and there will be no need to employ the word "indemnify".[80]

The contractual practice of knock for knock indemnities has been reviewed by the English courts. Although the K4K indemnity structure is produced by contract parties, it has been noticed by the courts within the context of offshore drilling contracts. In *Caledonia North Sea Ltd v London Bridge Engineering Ltd*,[81] the court accepted this as an industry practice which was known to, and accepted by, the courts. In essence, the House of Lords noted that the indemnity said nothing about requiring the contractors to be liable to their employees in order for the indemnity to operate; and that it imposed a general liability to indemnify, with an exception only in cases where the accident was attributable to the sole negligence or wilful misconduct of the operator. Otherwise, courts have had little difficulty in upholding indemnity provisions which were clearly worded, and in which the parties had made express provisions for the allocation of liability. In justifying this position, the court approached the mutual indemnity structure, not just as a risk allocation mechanism, but also as a tool through which the real intentions of the contract parties could be discerned, and upheld, especially when the wording of the indemnity provisions is clear and unambiguous.[82]

It is also noted that the wording of indemnity clauses is notoriously uncertain with respect to their enforceability. Insurance can also be inadequate or even non-existent. The result is that substantial residual liability can rest with the contractor. The insurance market post-*Deepwater Horizon* appears to be nervous about perceived contractor liability risk, especially for gross negligence, and capacity is below $1 billion and increasingly expensive. Insurance also carries general exclusions for catastrophic risks from the well, such as blowout and pollution, which are traditionally viewed as operator risks, indemnified to the contractor.

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[79] P. Murray, "Is it time for 'knock-for-knock' to be knocked out?" May 12, 2018 | News and Views | Ledingham Chalmers Solicitors

[80] C. Ugwuanyi, *Examining the exclusionary nature of oil and gas contract mutual indemnity hold harmless clauses*, I.E.L.R. 2012, 4, 136-146

[81] ibid.

[82] P. Cameron, *Liability for Catastrophic Risk in the Oil and Gas Industry*, I.E.L.R. 2012, 6, 207-219

With regards to the oil and gas industry, in practice, the latter has what is essentially a global template for the allocation of liability, evident in much of the standard documentation in the industry, e.g., LOGIC and IADC standard contracts. Many internationally operating oil companies have Master Services Agreements with contractors, which can often be global in character. The principal exception to this is the practices of National Oil Companies (NOCs). Such model contract templates provide a balance between risk and reward and "command and control" realities. However, it is of note that recent regulatory actions against contractors are throwing this balance substantially off.[83]

[83] ibid.

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