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Contractual allocation of risk vs. statutory liability regulation of risk in upstream oil and gas under the Norwegian Petroleum Act Chapter 7.

Kristoffer SVENSEN

1 Introduction

The oil and gas industry is an inherently hazardous industry to people, property and the environment, which level of physical risk to these groups by an acute accident is heightened when oil and gas reserves are located offshore – as is the case in Norway. This article came about as a result of studying the statutory regulation of liability for pollution damage caused by petroleum spills from offshore installations in Norway and Russia the last five years,¹ and discussions at the 38th Petroleum Law Symposium in Bergen.² Legislation, mainly Chapter 7 of the Norwegian Petroleum Act,³ strictly regulate liability and compensation for pollution damage caused by petroleum spills from offshore installations. The Chapter 7 approach is not mirrored in the contractual allocation of risk in model oil and gas contracts used in the Norwegian Continental Shelf (further ‘NCS’), which contractual structure appears *prima facie* to be in direct breach of Chapter 7.

This article examines the interaction between the allocation of risk in oil and gas contracts achieved through the use of certain types of contractual clauses and the statutory regulation of liability for damage or loss caused by petroleum spills from offshore installations, as set forth in Chapter 7. The article first sets forth the liability regime under Chapter 7, then examines the contractual allocation of risk in model oil and gas contracts used on the NCS, before determining the validity of said clauses and its effects when interacting with Chapter 7

· Dr. Kristoffer Svendsen, LL.B. (Bond), LL.M. (Bond), LL.M. (MGIMO-University of MFA), and Ph.D. (UiT – the Arctic University of Norway) is a post doctoral fellow at the K. G. Jebsen Centre for the Law of the Sea, Faculty of Law, UiT – the Arctic University of Norway, Guest researcher of Human Sea Programme, University of Nantes: The development of human activities at sea? “For a new Maritime Law”, ERC (European Research Council) 2013 Advanced Grant, SP2-Ideas, FP7 (Seventh Framework Programme) of the European Union (2007-2013) Agreement No. 340770, in June 2017 and 2018, and an Associate Member at the Aberdeen University Centre for Energy Law

¹ Kristoffer Svendsen, Compensable damage ex delicto as a result of harm in the Barents Sea caused by petroleum spills from offshore installations. A Norwegian and Russian comparative legal analysis of conflict of laws, the concept of harm, losses suffered by third parties, and environmental damage and its valuation and calculation, caused by petroleum spills from offshore oil rigs and installations in the Barents Sea (2015) Tromsø Ph.D. in law, Faculty of Law, UiT - Arctic University of Norway).

² Det 38. bergenske petroleumstrettsymposium, 1-3 December 2015, Solstrand (2015).

³ Lov om petroleumsvirksomhet (29 November 1996 Nr. 72).

liability. It is important however to remember that these contractual clauses cover many more situations than just possible Chapter 7 pollution damage. In other words, situations arising under Chapter 7 of the Petroleum Act are only a part of what these risk allocation clauses cover.

2 Statutory regulation of risk under Chapter 7 of the Norwegian Petroleum Act

2.1 Introduction

The Norwegian authorities started examining delict liability for pollution damage caused by oil spills from offshore installations as early as 1970, which resulted in a committee report in 1973.⁴ The Norwegian Government's work on the issue was temporarily halted due to a belief that the work leading up to and the finalized *Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources*⁵ would take effect. When the convention did not receive necessary backing from important countries, such as the United Kingdom, the Norwegian Government appointed another committee to suggest regulation for compensation of pollution damage from offshore installations. The committee gave its report in 1981,⁶ which was affirmed, with minor changes, in Chapter 7 of the Norwegian *Petroleum Act*.⁷ The first edition of the *Petroleum Act* came into force in 1985⁸ and received an overhaul in 1996⁹. The *Petroleum Act* of 1996 is currently in force and only minor changes took place in Chapter 7 of the 1996 edition.

The *Petroleum Act* contains four liability regimes exclusively dealing with petroleum activities. Chapter 7 of the *Petroleum Act* is the main legislation regulating liability for petroleum pollution damage.¹⁰ Chapter 8 regulates compensation of financial losses suffered by Norwegian fishermen as a result of the petroleum activities occupying fishing, causing pollution and waste, or inflicting damage by a facility or actions in connection with the placing of a facility.¹¹ The regulation of Chapter 8 damages does not apply to petroleum pollution damage under Chapter 7. Section 5-4 of the *Petroleum Act* regulates liability in the abandonment phase, while section 10-9 of the *Petroleum Act* regulates liability of the licensee for damage caused by a legal entity of physical person who performs work for the licensee. Section 10-9 does not however apply to losses resulting from petroleum pollution damage under Chapter 7 or losses suffered by Norwegian fishermen as a result of petroleum activities under Chapter 8.

The chapter focuses on the effect of Chapter 7 on contractual risk allocation. The *Maritime Code*¹² defines the outer limits of Chapter 7, and more generally the *Petroleum Act*. The Code mainly regulates various aspects of vessels and shipping, and includes provisions on liability of oil pollution from vessels, among others. Importantly, the *Maritime Code* regulates 'drilling platforms and similar mobile constructions' when these units are in motion and therefore categorized as vessels.¹³

⁴ Fleischer Committee, NOU: Erstatningsansvar for forurensingsskader. Om erstatningsansvar m.v. for forurensingsskader i forbindelse med undersøkelse etter og utvinning av undersjøiske naturforekomster. (1973:8).

⁵ Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, London. London (1 May 1977).

⁶ Petroleum Committee, NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. (1981:33).

⁷ Ministry of Petroleum and Energy, Ot. prp.nr. 72. Lov om petroleumsvirksomhet. (1982-1983).

⁸ Lov om petroleumsvirksomhet (repealed) (22 March 1985 nr 11).

⁹ Lov om petroleumsvirksomhet (29 November 1996 Nr. 72).

¹⁰ Id at §7-1.

¹¹ Id at §8-1.

¹² Lov om sjøfarten The Norwegian Maritime Code is translated into English in MarIus No 393. (24 June 1994 No. 39).

¹³ Id at §507

The *Pollution Control Act*¹⁴ also assists in defining the outer limits of Chapter 7, and the *Petroleum Act*. The *Pollution Control Act* regulates compensation for pollution damage, unless regulated by other legislation, contract, or other things.¹⁵ The *Pollution Control Act* does not apply to situations specifically regulated by Chapter 7 of the *Petroleum Act*.¹⁶ However, Chapter 7 is not exhaustive regarding the definitions of pollution damage, which is seen below.¹⁷ Finally, the general rules, *lex generalis*, of delict law apply when the special rules, *lex specialis*, of delict law come short.¹⁸

2.2 Liability for petroleum pollution damage

2.2.1 Unlimited no-fault liability

The *Petroleum Act* places unlimited no-fault liability on the licensee for pollution damage caused by petroleum spills from offshore installations.¹⁹ Usually there are several licensees under a license, of which one is the operator. In these situations, claims for compensation should be directed to the operator. If the operator does not pay claims when due, the licensee pays the claims according to their participating interest in the license.²⁰ If a licensee fails to pay its share, that share is allocated proportionally between the remaining licensees. Interestingly, the Act continues with a very practical approach to the procedural aspect of mass claims requiring the operator without undue delay, by public announcement, to provide information regarding the party to whom claims for compensation for pollution damage should be directed and of the period of limitation.²¹ The Ministry of Petroleum and Energy decides where actions should be brought when questions of venue arises.²²

The Act places unlimited no-fault liability on the licensee because the licensee has the authorization to conduct the activity, the final say, obtains the profits from the activity (high financial reward), holds bargaining power (insurance, contracts, etc.), and therefore should hold the risk and the consequences of oil pollution damage.²³ The equitable policy

¹⁴ Lov om vern mot forurensninger og om avfall (Forurensningsloven) (13 March 1981 Nr 06).

¹⁵ Id at §53.

¹⁶ The preparatory works states that the *Pollution Act* supplements or complements the special rules 'as far as the rules fit'. Ministry of Justice and Public Security, Ot.prp.nr.33 (1988-1989) Om lov om endringer i lov 13 mars 1981 nr 6 om vern mot forurensninger og om avfall (forurensningsloven) m.v (Erstatningsansvar ved forurensningsskade) ((1988-1989)). pp. 99-100 and 104. See also a discussion in this topic in HANS CHRISTIAN BUGGE, FORURENSNINGSANSVARET (Tano Aschehoug, Oslo. 1999). paragraph 6.3.2.2.

¹⁷ The *Pollution Act* covers all non-petroleum pollution damage such as other chemicals and waste-related petroleum pollution damage. Bugge states that it is reasonable to apply the *Pollution Control Act* to supplement and complement the *Petroleum Act* a) for damages suffered by other groups of people than Norwegian fishermen as a result of other types of pollution than for petroleum pollution, and b) in situations where other types of pollution than petroleum pollution inflict personal harm on Norwegian fishermen or a reduction in fishing abilities. BUGGE, Forurensningsansvaret. 1999. paragraph 6.3.2.2, p. 263-264.

¹⁸ The general rules of the law of compensation are compiled in the *Damages Compensation Act (Lov om skadeserstatning (13 June 1969 Nr 26))* as well as in case law, preparatory works, legal theory, and by applying and balancing the equitable policy considerations (*reelle hensyn*).

¹⁹ Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §7-3.

²⁰ Id at §7-3.

²¹ Id at §7-7.

²² Id at §7-8. The Ministry decides where the action shall be brought if: a) the effluence or discharge has taken place or the damage has been caused outside the area of any court district. b) it cannot be demonstrated within which court district the effluence or discharge has taken place or damage has been caused. c) the effluence or discharge has taken place in one court district and the damage is caused in another court district. d) damage has been caused in more than one court district.

²³ Committee, NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. 1981:33. P. 21. Generally, the operator designs the well in accordance with the geological conditions of the prospect once a drilling permit is secured. Then, the operator selects

consideration ‘prevention’ is also used to justify strict liability, based on which the licensee will take better precautions to hinder an accident as he has a direct financial interest in the matter.²⁴ Furthermore, the licensee must obtain liability insurance, of which the Ministry of Petroleum and Energy receives summaries every year and ensure that appropriate insurances are maintained.²⁵ The average insured amount appears to be 250 million USD for each licensee covering its *pro rata* share of the liability.²⁶

The geographical scope of Chapter 7 is subject to a special regulation in §7-2, which is different from all other liability regimes. The section applies *lex loci damni* when pollution damage ‘...occurs in Norway or inside the outer limits of the Norwegian continental shelf or affects a Norwegian vessel, Norwegian hunting or catching equipment or Norwegian facility in adjacent sea areas.’²⁷ The consequence of the scope of Chapter 7 is a unilateral extension of protection in delict law to Norwegian interests harmed outside of Norway. This privilege has resulted in discrimination against only Russian interests, which do not receive any judicial remedy on pollution damage caused by a Norwegian operator suffering an oil spill on the Norwegian side of the sea border in the Barents Sea, and that oil spill inflicts pollution damage on the Russian side of the sea border in the Barents Sea. A Russian injured party forced to pursue a legal claim against a Norwegian licensee without assets in Russia may receive no compensation, because there is no agreement about recognition and enforcement of foreign court judgments between Norway and Russia.²⁸

2.2.2 Pollution damage

The term ‘pollution damage’ is defined as ‘...damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from a facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures.’²⁹ Damage includes personal injury,³⁰ and damage to

various contractors to perform specific procedures, such as: ‘drilling, cementing, well monitoring, vessel support services, and other well-related tasks’, after which the operator manages these contractors in their performance. ‘The operator has the final authority and responsibility to make decisions throughout the design, cementing, testing, and final temporary abandonment phases of drilling the well.’ Transocean, Macondo Well Incident: Transocean Investigation Report, Volume I (June 2011). Para. 1.1. To illustrate, BP had onshore personnel in Houston which managed the operations of the well and six offshore personnel. BP had two offshore well site leaders, which ‘exercised BP’s authority on the rig, directed and supervised operations, coordinated the activities of contractors, and reported to BP’s shore-based team.’ Transocean provided the rig and personnel to operate the rig. Halliburton provided BP with specialist cementing services, expertise, and support to BP personnel onshore and on the rig as a contractor. Sperry Sun installed a sophisticated well monitoring system on the rig as a contractor. BP also contracted M-I SWACO to provide specialised drilling mud and mud engineering services on the rig. Schlumberger was contracted to provide specialised well and cement logging services on the rig, equipment and personnel. BP contracted Weatherford to provide casting accessories, such as the float collar used at the well, and Tidewater Marine to provide the offshore supply vessel used. The blowout preventer (BOP) was made and delivered by Cameron. See para. 1.2 and 3.4 of the report.

²⁴ Committee, NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. 1981:33. P. 25.

²⁵ Erik Røsæg, *The Norwegian perspective with regard to liability regimes concerning oil rigs and installations*, in OFFSHORE CONTRACTS AND LIABILITIES (Baris Soyer & Andrew Tettenborn eds., 2015). P. 281.

²⁶ Id at p. 281.

²⁷ Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §7-2.

²⁸ No other sea bordering countries to Norway are affected due to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano (30 October 2007).

²⁹ Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §7-1. Petroleum is defined as ‘all liquid and gaseous hydrocarbons existing in their natural state in the subsoil, as well as other substances produced in association with such hydrocarbons.’ §1-6a). Facility is defined as ‘facility, installation, plant and other equipment for petroleum activities, however not the supply and support vessels or ships

fishermen.³¹ Chapter 7 does not cover discharge of petroleum from vessels transporting petroleum, which is covered by Chapter 10 of the *Maritime Code*.

The Act defines ‘pollution damage’ in relation to events for which liability under chapter 7 of the Act may arise; but does not assist in defining compensable damage. The main delict statute, the *Compensation for Damages Act*³², and other delict legislation do not notably assist much in defining compensable damage.³³ The preparatory works give examples of certain types of damage that would qualify as pollution damage, such as harm inflicted to wildlife in the sea and on land, the soiling of beaches and fishing gear, the closure of a water area as an obstacle for fishing and shipping, the soiling of real estate and objects, and costs incurred by the public or others for cleaning up soiled beaches.³⁴ The preparatory works confirm that compensable pollution damage must fulfill the prerequisites for every type of damage compensable in delict law.³⁵

§6 of the *Pollution Control Act* defines pollution through four sentences. The first sentence qualifying for pollution is ‘the introduction of solids, liquids or gases to air, water or ground’³⁶. Effluence or discharge of petroleum would be within the wording of §6. The final part of each of the four sentences is: ‘which cause or may cause damage or nuisance to the environment.’³⁷ The wording ‘damage or loss caused by pollution’ in §7-1 fulfills the final part of the first sentence of §6. Thus, the definition of pollution in the *Pollution Control Act* defines ‘pollution’ in §7-1,³⁸ while the *Petroleum Act* defines petroleum³⁹, effluence and discharge⁴⁰, and facility⁴¹.

that transport petroleum in bulk. Facility also comprises pipelines and cables unless otherwise provided.’ §1-6d).

³⁰ Energy, Ot. prp.nr. 72. Lov om petroleumsvirksomhet. 1982-1983. P.70.

³¹ Chapter 8 damage (different from Chapter 7 damage) is specific damage to Norwegian fishermen caused by petroleum activities (and maybe non-petroleum substances). Norwegian fishermen may be compensated for their economic loss caused by pollution damage or waste from petroleum activities. Compensation includes loss of fishing opportunities and equipment due to the aforementioned pollution. Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §8-1.

³² Lov om skadeserstatning (13 June 1969 Nr 26).

³³ Sören Koch, *Det erstatningsrettslige skadebegrepet – en sammenligning mellom tysk og norsk rett*, TIDSSKRIFT FOR ERSTATNINGSRETT, FORSIKRINGSRETT OG VELFERDSRETT pp. 250-281 (2010). P. 255. Koch summarises the understanding of damage in legal literature on pages 256-261.

³⁴ Committee, NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. 1981:33. P. 35.

³⁵ Id at p. 35 agreeing with Committee, NOU: Erstatningsansvar for forurensningsskader. Om erstatningsansvar m.v. for forurensningsskader i forbindelse med undersøkelse etter og utvinning av undersjøiske naturforekomster. 1973:8.

³⁶ Lov om vern mot forurensninger og om avfall (Forurensningsloven) (13 March 1981 Nr 06). §6 1.

³⁷ Id at §6.

³⁸ U. HAMMER, et al., *PETROLEUMSLOVEN* (Universitetsforlaget, Oslo. 2009). p. 532.

³⁹ The definition of petroleum in §1-6 a) of the *Petroleum Act* includes crude oil and natural gas: ‘all liquid and gaseous hydrocarbons existing in their natural state in the subsoil, as well as other substances produced in association with such hydrocarbons.’ The liquids and gaseous hydrocarbons must exist in their natural state in the subsoil. Thus, all refined products are excluded from the definition of petroleum. Bunker oil, drilling fluid, and chemicals are excluded from the definition of petroleum under §1-6 a).

⁴⁰ The effluence of oil from an offshore installation due to a blowout is within the wording effluence or discharge. Even though the preparatory works to the *Petroleum Act* do not expressly distinguish between “effluence” (*utstrømming*) and “discharge” (*utslipp*), it must be assumed that the oil spill scenarios are what the legislator intended to cover. The legislator uses the word “effluence” when describing a leak from an oil pipeline. The legal textbook *Commentary on the Act* states that “effluence” ‘covers naturally a situation where an uncontrolled blow-out of petroleum takes place from a well, while “discharge” naturally covers uncontrolled leaks from a platform and pipelines.’ Controlled discharges of production water, etc., which may contain oil and chemicals, are not covered by the

2.2.3 Channelling liability to the licensee and licensee's recourse

The *Petroleum Act* channels unlimited liability for pollution damage to the licensee. The courts have discretionary power to reduce this unlimited liability partly or completely upon: 1) an inevitable event of nature, 2) act of war, 3) exercise of public authority, or 4) a similar force majeure event has contributed to a considerable degree to the damage or its extent under circumstances, which are beyond the control of the liable party.⁴² Liability can only be reduced to the extent it is reasonable, with particular consideration to the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides.⁴³

The channeling provisions in section 7-4 bar claims for petroleum pollution damage to be directed towards licensee's contractors, manufacturers or suppliers of equipment, anyone who undertakes measures to avert or limit pollution damage,⁴⁴ and employees of the licensee or employees of any of the above groups.⁴⁵ The same parties shielded from liability in section 7-4 are shielded from indemnity in section 7-5. The licensee can only seek recourse from the parties listed in section 7-4, if '...the person in question or someone in his service has acted willfully or by gross negligence.'⁴⁶ Similarly, a shipowner is also strictly liable for oil pollution damage, with a similar group⁴⁷ protected through channeling of liability except when a person caused damage with intent or through gross negligence, and with the knowledge that such damage would probably result.⁴⁸ In summary, injured parties cannot direct claims towards these parties, and the licensee cannot demand that these parties accept liability for pollution damage, unless intent or gross negligence. This begs the question whether licensees on the NCS are solid enough to carry the liability of a potential oil spill?

Petroleum Act, but by the *Pollution Control Act*. Energy, Ot. prp.nr. 72. Lov om petroleumsvirksomhet. 1982-1983. P. 70. HAMMER, et al., *Petroleumsløven*. 2009. P. 532.

⁴¹ Uncontrolled blowouts from wells are specifically mentioned as within the definition of §7-1. The *Petroleum Act* does not make any distinctions between the types of wells. The installations or facilities engaged in petroleum activities, from which oil spills are: 'Installation, plant and other equipment for petroleum activities [defined in section 1-6c)], however not supply and support vessels or ships that transport petroleum in bulk. Facility also comprises pipeline and cable unless otherwise provided.' Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §1-6d). The legislator emphasizes that a drilling ship is used for stationary drilling when the ship is situated on the drilling location and attached to the drilling hole through the pipes into which the drilling stem is injected. The Act includes discharges or effluence during connection and disconnection of drilling ships; otherwise the *Norwegian Maritime Code* applies. Thus, leaks, blowout, etc. from drilling platforms, production platforms, loading buoys, storage facilities and pipelines, drilling vessels, and storage vessels are covered by Chapter 7. HAMMER, et al., *Petroleumsløven*. 2009. P. 529

⁴² Lov om petroleumsvirksomhet (29 November 1996 Nr. 72). §7-3.

⁴³ Id at §7-3.

⁴⁴ The full text reads 'anyone who undertakes measures to avert or limit pollution damage, or to save life or rescue values which have been endangered in connection with the petroleum activities, unless the measures are performed in conflict with prohibitions imposed by public authorities or are performed by someone other than public authorities in spite of express prohibition by the operator or the owner of the values threatened.' id. at. §7-5(c).

⁴⁵ Id at §7-4.

⁴⁶ Id at §7-5.

⁴⁷ a) the servants or agents of the owner or the members of the crew, b) the pilot or any other person who performs services for the ship, c) the ship operator (reder) or manager or operator of the ship, the charterer, the consignor, shipper, owner of cargo or consignee, d) any person performing salvage operations with the consent of the owner or on the instructions of the public authority; e) any person taking preventive measures; f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e).

⁴⁸ Lov om sjøfarten The *Norwegian Maritime Code* is translated into English in MarLus No 393. (24 June 1994 No. 39). §193.

Importantly for our current discussion, section 7-5 states that ‘**Any agreement on further recourse in respect of those against whom liability cannot be claimed pursuant to Section 7-4, second paragraph, shall be invalid.**’ The parties can however further limit access to recourse,⁴⁹ but not extend recourse in contravention with section 7-5. This would indicate that the shielded parties could contractually be protected against pollution damage inflicted by them through for example gross negligence. It is however doubtful in Norwegian legal theory whether a party can contractually agree to avoid liability for gross negligence.⁵⁰

3 Contractual allocation of risk on oil and gas contracts in Norway

3.1 Introduction

The contractual allocation of risk in oil and gas contracts is often achieved through the careful wording of clauses describing which parties should pay which parties for damage or harm arising out of different situations as a result of physical risks materializing. *Gordon* describes three vehicles used to regulate and manage these physical risks in the oil and gas industry: 1) indemnity and hold harmless clauses, 2) clauses which exclude or limit liability for “consequential losses”, and 3) overall limitations of liability.⁵¹ *Gordon* thoroughly and skillfully explains the clauses and their individual characteristics in his book chapter. This part of the chapter looks at the main risk allocation clause used in model oil and gas contracts in Norway.

3.2 Industry-negotiated model contracts

The NCS is well-known for the wide use of industry-negotiated model contracts (also called agreed documents) setting forth a set of standard conditions developed for contracting on the NCS. These model contracts are not mandatory to use, but widely used in engineering, procurement and construction on the NCS. The following contracts are the main industry-negotiated model contracts:

- The Norwegian Total Contract of 2015⁵² (further ‘NTC 15’),
- The Norwegian Total Contract of 2015 Modification⁵³ (further ‘NTC 15 Mod’),
- The Norwegian Total Contract of 2015 for module and modification (modification with single delivery of the entire contract object)⁵⁴,
- The Norwegian Total Contract of 2015 for module and modification (modifications with separate delivery of module, prefabricated items and offshore permanent works)⁵⁵,
- The Norwegian Fabrication Contract of 2015⁵⁶ (further ‘NFC 15’), and

⁴⁹ Committee, NOU: Erstatningsansvar for forurensningsskade som følge av petroleumsvirksomhet på norsk kontinentalsokkel. 1981:33. P. 41.

⁵⁰ Viggo Hagstrøm, *Om grensene for ansvarsfraskrivelse, særlig i næringsforhold*, 1996 TIDSSKRIFT FOR RETTSVITENSKAP pp. 421-518 (1996). Trine-Lise Wilhelmsen, *Liability and insurance clauses in contracts for vessel services in the Norwegian offshore sector - the knock for knock principle*, SIMPLY 2012 (SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK) pp. 81-111 (2012); Knut Kaasen, *Ansvarsbegrensning i fabrikkasjonskontrakter*, in INDUSTRIBYGGING OG RETTSUTVIKLING. JURIDISK FESTSKRIFT I ANLEDNING HYDROS 100-ÅRSJUBILEUM 2005 (Odd Ivar Biller, et al. eds., 2005).

⁵¹ Greg Gordon, *Chapter 14 Risk Allocation in Oil and Gas Contracts*, in OIL AND GAS LAW: CURRENT PRACTICE & EMERGING TRENDS (Greg Gordon, et al. eds., 2011). #14.2 ff.

⁵² The contract can be retrieved at

<https://www.norskindustri.no/contentassets/69b36f82c6f341a68c1aa7691e4f5e06/versjoner-lagt-inn-des.-2017/norsk-totalkontrakt-2015.pdf>

⁵³ The contract can be retrieved at

<https://www.norskindustri.no/contentassets/69b36f82c6f341a68c1aa7691e4f5e06/versjoner-lagt-inn-des.-2017/norsk-totalkontrakt-2015-modifikasjon.pdf>

⁵⁴ The contract can be retrieved at

<https://www.norskindustri.no/contentassets/69b36f82c6f341a68c1aa7691e4f5e06/versjoner-lagt-inn-des.-2017/norsk-totalkontrakt-2015-modul-og-modifikasjon---samlet-levering.pdf>

⁵⁵ The contract can be retrieved at

<https://www.norskindustri.no/contentassets/69b36f82c6f341a68c1aa7691e4f5e06/versjoner-lagt-inn-des.-2017/norsk-totalkontrakt-2015-modul-og-modifikasjon---separat-levering.pdf>

- The Norwegian Subsea Contract of 2005⁵⁷ (further ‘NSC 05’).

The NTC 15 is recommended to regulate contracts for the delivery of larger components for production of hydrocarbons on the NCS where the contractor is responsible for engineering, procurement, construction and possibly installation (EPC(I)). NTC 15 Mod is recommended to regulate contracts for larger modifications of platforms on the NCS where the contractor is responsible for EPC(I). The NTC 15 for module and modifications are recommended when the delivery also includes as new module, and the contractor is responsible for EPC(I). This standard contract is issued in two versions, the first version for which the contract object is delivered collectively, while the second version caters for separate delivery of the module, prefabricated items and offshore permanent works. The NFC 15 is recommended for larger contracts for delivery of fabrication, such as machinery and mechanical equipment, to the NCS. Finally, the NSC 05 is intended to regulate contracts covering ‘...marine operations such as installation of pipelines, cables, umbilicals and other subsea structures and related subsea construction work where the use of vessels is involved.’⁵⁸ The NSC 05 captures both installation-only-contracts as well as full EPC(I) type contracts and addresses specific risks in connection with subsea work and the operation of vessels.⁵⁹

Large industrial actors, namely the predecessor of the Federation of Norwegian Industries (Mechanical Industry Association) and the Norwegian Union of Iron and Metalworkers (now part of the Norwegian United Federation of Trade Unions) started the negotiations of these model contracts, the NTC and the NFC, in the 1970s, with the first draft presented in 1983. Other large industrial parties, such as Hydro, Statoil and Saga, joined in and the first edition of the model contract was presented in 1987.⁶⁰ The current editions are a result of efforts between the Federation of Norwegian Industries, the Norwegian Oil and Gas Association, and companies in the industry. The predecessor of the Norwegian Oil and Gas Association, OLF, initiated the preparation of the model contract NSC 05 with participation of Statoil, Stolt Offshore, Subsea 7 and Technip Offshore Norge.

3.3 The risk allocation clause

These model contracts were negotiated to implement a standard for a developing industry to rely on, even the commercial playing field through balancing commercial contracting provisions, effectively train staff, and minimize transactional costs. In all the model contracts above, article 30 contains the provision titled ‘Exclusion of liability. Indemnification’, which is the preferred method of the industry to allocate physical risk.

All the above-mentioned model contracts, except for a couple of words in the NSC 05, contain the exact same wording of their exclusion of liability and indemnification clause. This in itself is not particularly strange as exclusion of liability and indemnification work best in the contractual chain when all parties use the same clause, “back-to-back”.

Article 30 of the above-mentioned contracts sets forth a mutual indemnity clause⁶¹ for loss or damage to Contractor and Company Group, Contractor’s indemnification obligation for third

⁵⁶ The contract can be retrieved at <https://www.norskindustri.no/contentassets/69b36f82c6f341a68c1aa7691e4f5e06/versjoner-lagt-inn-des.-2017/norsk-fabrikasjonskontrakt-2015.pdf>

⁵⁷ The contract can be retrieved at <https://www.norskoljeoggass.no/drift/publikasjoner/hms-og-drift/norwegian-subsea-contract/>

⁵⁸ See OLF, Norwegian Subsea Contract, NSC 05, Conditions of Contract (2005). ‘Introduction to NSC 05.’

⁵⁹ Id. at.

⁶⁰ KNUT KAASEN, PETROLEUMSKONTRAKTER MED KOMMENTAR TIL NF 05 OG NTK 05 (Universitetsforlaget, Oslo. 2006). P. 23 ff.

⁶¹ A mutual indemnity is also called ‘reciprocal indemnity’, ‘cross indemnity’, or a ‘knock for knock’ indemnity. Gordon, Chapter 14 Risk Allocation in Oil and Gas Contracts. 2011. #14.5.

party claims and its limitation, indemnification for industrial property infringements, and notification procedures. In other words, article 30 consists of a combination of *Gordon's* three vehicles.

An mutual indemnity clause means ‘...a contractual device where the parties with the one hand give and with the other hand take an indemnity in respect of a species of loss which, if the indemnity is to avoid circularity, must not be identical to each other, but which are usually closely related.’⁶² Articles 30.1 and 30.2 set forth a mutual indemnity clause for personal injury, death, and loss of or damage to property in relation to the subject matter of the contract applying when suffered by the parties to the contract, the Contractor and the Company Group. The identical mutual indemnity clause between the Contractor and Company Group reads as follows (identical in the NSC 05):

30.1 Contractor shall indemnify Company Group from and against any claim concerning:

a) personal injury to or loss of life of any employee of Contractor Group, and

b) loss of or damage to any property of Contractor Group, and arising out of or in connection with the Work or caused by the Contract Object in its lifetime. This applies regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Company Group.

Contractor shall, as far as practicable, ensure that other companies in Contractor Group waive their right to make any claim against Company Group when such claims are covered by Contractor's obligation to indemnify under the provisions of this Art. 30.1.⁶³

30.2 Company shall indemnify Contractor Group from and against any claim concerning:

a) personal injury to or loss of life of any employee of Company Group, and

b) loss of or damage to any property of Company Group, except as stated in Art. 29,

and arising out of or in connection with the Work or caused by the Contract Object in its lifetime. This applies regardless of any form of liability whether strict or by negligence, in whatever form, on the part of Contractor Group.

Company shall, as far as practicable, ensure that other companies in Company Group waive their right to make any claim against Contractor Group when such claims are covered by Company's obligation to indemnify under the provisions of this art. 30.2.⁶⁴

The parties, the company group and the contractor, agree to indemnify each other from and against any claim concerning their own employees' personal injury or death and loss of and damage to any of their own property. The wording ‘from and against any claim’ would mean a loss or damage independent of amount and injured party.⁶⁵ Articles 30.1 and 30.2 apply to the internal relationship among the contracting parties. In article 30.3 however the contracting parties regulate their interaction with public authorities and third parties. Article 30.3 reads:

Until the issue of the Acceptance Certificate, Contractor shall indemnify Company Group from:

⁶² Id at #14.5.

⁶³ The wording of the NFC 15.

⁶⁴ Id.

⁶⁵ HANS JACOB BULL, *TREDJEMANNSDEKNINGER I FORSIKRINGSFORHOLD: EN STUDIE AV DEKNINGSMODELLER, MED BASIS I SJØFORSIKRINGSRETTE OG I PETROLEUMSKONTRAKTENES ANSVARS- OG FORSIKRINGSREGULERING* (Sjørettsfondet, Oslo. 1988). p. 394.

- a) costs resulting from the requirements of public authorities in connection with the removal of wrecks, or pollution from vessels or other floating devices provided by Contractor Group for use in connection with the Work, and
 - b) claims arising out of loss or damage suffered by anyone other than Contractor Group and Company Group in connection with the Work or caused by the Contract Object,
- even if the loss or damage is the result of any form of liability, whether strict or by negligence in whatever form by Company Group.

The Acceptance Certificate is a document issued by Company when the work has been completed according to the contract.⁶⁶ Article 23 discusses, amongst other things, the Acceptance Certificate and requires the Company to the Acceptance Certificate when the work has been completed under the contract, deeming the certificate to be issued 30 days after either the guarantee period has ended.⁶⁷

This part of article 30.3 does move a possible heavy financial burden over on the Contractor as the Company Group requires unilateral indemnity from the Contractor for removal and pollution expenses from vessels or other floating devices provided by the Contractor Group for use in connection with the Work. More importantly is the sub-paragraph b) of article 30.3 requiring the Contractor to unilaterally indemnify the Company Group from third party claims for loss or damage suffered in connection with the Contractor's work or caused by the object of the contract, even if the loss or damage is the result of any form of liability, whether strict or by negligence in whatever form by Company Group. Sub-paragraph b) is in direct breach of the articles 7-4 and 7-5 of the *Petroleum Act*, which expressly shields the contractor from liability for petroleum pollution damage and bans the licensee from seeking any indemnity from the contractor.

Continuing in article 30.3, a separate limitation of contractor's liability follows this paragraph:

Contractor's liability for loss or damage arising out of each accident shall be limited to NOKmillion. This does not apply to Contractor's liability for loss or damage for each accident covered by insurances provided in accordance with Art. 31.2.a) and b), where Contractor's liability extends to the sum recovered under the insurance for the loss or damage.

Company shall indemnify Contractor Group from and against claims mentioned in the first paragraph above, to the extent that they exceed the limitations of liability mentioned above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

After issue of the Acceptance Certificate, Company shall indemnify Contractor Group from and against any claims of the kind mentioned in the first paragraph above, regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Contractor Group.

This limitation of contractor's "third party liability" to a set amount does not negate article 30.3's infringement on articles 7-4 and 7-5 of the *Petroleum Act*. Previous editions of this part of article 30.3 contained a specific amount of million NOK, which have increased through negotiation rounds throughout the years. The latest being 5 million NOK (approx. 530 000 EUR) in the 2007 edition.⁶⁸ The current edition's ability to set your own limitation might increase the licensee's risk of having to cover a certain amount of money for petroleum

⁶⁶ See Norwegian Fabrication Contract 2007 (NF 07). Art. 1.10.

⁶⁷ Id art. 23.5.

⁶⁸ See Norwegian Fabrication Contract 2007 (NF 07).

pollution damage without the amount being insured. That said, many companies self-insure so the insurance aspect might be a non-issue.⁶⁹

It is interesting to note that the Contractor in article 30.3, and the contracting parties in articles 30.1 and 30.2, is obligated to indemnify the Company Group ‘...regardless of any form of liability, whether strict or by negligence, in whatever form...’ on the part of any of these two parties. This means that article 30 applies to, amongst other, no-fault liability for petroleum pollution damage.

According to Norwegian contract law, a party cannot contractually avoid liability for intent, but can arguably avoid liability for gross negligence.

4 Summary - Contractual allocation of risk breaches with Chapter 7

The contracts consist of three main elements: 1) the parties to the contract waive the ability to claim compensation from each other even if the elements to claim compensation is fulfilled; 2) the parties to the contract waive the ability to claim recourse from each other when a third party damage or a damage to own employees are covered according to the agreement, even though a recourse action could take place; and 3) the parties commit to hold the other party harmless, even though one party might have to pay a third party claim or an employee claim that should not have been paid by the party in another legal sense.⁷⁰

The Norwegian model contract contains a mutual indemnity clause for damage or loss among the contracting parties, a unilateral indemnity clause for third party damage to the benefit of the Company Group, and a fix-amount limitation of this unilateral indemnity obligation left to the contracting parties to decide.

Norwegian law does not allow for an indemnity clause shifting the liability for pollution damage away from the licensee or creating a risk allocation model different from the statutory regulation of liability for pollution damage in Chapter 7. Thus, mutual indemnity clauses would be invalid for pollution damage under Chapter 7.

⁶⁹ Neil A. Doherty & Clifford W. Smith Jr., *Corporate Insurance Strategy: the case of British Petroleum*, 6 (3) JOURNAL OF APPLIED CORPORATE FINANCE pp. 4-15 (1993).

⁷⁰ Knut Kaasen, *Ansvarsbegrensning i fabrikkkontrakter*, in INDUSTRIBYGGING OG RETTSUTVIKLING. JURIDISK FESTSKRIFT I ANLEDNING HYDROS 100-ÅRSJUBILEUM 2005 (Odd Ivar Biller, et al. eds., 2005). P. 241.