"THE USE/IMPACT OF MODEL FORM OIL SERVICE/CONSTRUCTION CONTRACTS IN INTERNATIONAL PRACTICE - SOME THOUGHTS ARISING FROM A KNOCK-FOR-KNOCK DISPUTE"

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I. INTRODUCTION TO CASE AND LEGAL ISSUES

1. Opening Facts

Last year (2023), I (through my consultancy company VassPetro Limited) was instructed by international law firm Trowers & Hamlins LLP to act as an expert witness in an international arbitration (the **LCIA Case**) between an oil company "**Company A**" and a downhole services provider "**Company B**". VassPetro Limited was hired to testify for Company A. At issue was the proper interpretation of a "knock-for-knock" (**K4K**) clause found in a downhole services contract (**Downhole Services Contract**). The Downhole Services Contract was subject to English law as well "as by principles and practice generally accepted in the international petroleum industry". Under the facts at issue, Company A also contracted with a drilling company (**Company C**) which employed a certain individual (**X**). Due to the alleged fault of Company B, X was tragically killed. The estate of X reached a settlement with Company B. For further development of the facts of the LCIA Case, see Points 5 and 6 below, and also see the chart attached as Annex A.

When I use the abbreviation "**E&P**" for "exploration and production", I am referring to projects, like Licence operations, which are carried out by oil companies, or to contracts, such as joint operating agreements, which are entered into between oil companies. This is to be contrasted with oil service/construction contracts or supply chain contracts which are entered into between an oil company (operator) and an oil service company.

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2. Knock-for-Knock Indemnities

A K4K clause is a provision ubiquitously found in oil service/construction contracts, in which the oil company "**Company**" and the oil services contractor "**Contractor**" agree to "indemnify and hold harmless" each other for each indemnifying party's "own" property and personal loss arising from the indemnified party's performance of the contract. The signatories to the contract will naturally only be Company and Contractor, but the Company will indemnify and hold harmless a much larger "**Contractor Group**" for damages caused to a much larger "**Company Group**" The Contractor will extend a similar indemnity to Company Group for damages caused to a much larger Contractor Group.[1] The Contractor Group will almost always include Contractor, Contractor's directors, officers, and employees, Contractor's affiliates, and Contractors sub-contractors and their directors, officers and employees to all levels. A potentially large number of companies and individuals who fall under "Contractor Group" will, therefore, need to be third-party beneficiaries in order to benefit from Company's indemnify and hold harmless commitment. The much more contentious scope of "**Company Group**", which in large part is the subject of this article, is discussed below.

The reasoning behind K4K clauses is extensively discussed in the new book "**Knock-for-Knock Indemnities and the Law**", edited by Svendson, Stavang and Gordon (informa law 2023) (see also Chapter 6 of this book, on "**The Effect of Choice-of-Law on Knock-for-Knock Clauses**", written by myself (Uisdean Vass) and referred to as the "**Vass Chapter**").[2]

[1] It will be seen that the terms "Company Group" and "Contractor Group" serve two roles, depending on who (Company or Contractor) is the *indemnifying party.* If Company is the *indemnifying party*, then Contractor Group is the *indemnified group* (who cause the damage) and Company Group is the *triggering group* (who suffer the damage). The reverse is the case when Contractor is the *indemnifying party*. In the case of the IADC model form contracts (see discussion below) the indemnified group is not always the same as the triggering group and in that case the "Company Group" and "Contractor Group" cognates are not used or not used in the same way.

[2] In addition to the book cited above, there is a wide legal literature on K4K clauses. See for example: Beyers, "*Drilling and Service Contracts*" in "**Oil and Gas Contracts: Principles and Practice**" ed.Roberts (3rd edition, 2022); Nadorff & Gomes, "*Look before you leap: Are your oil patch liability clauses enforceable?: (An analysis under civil law jurisdictions with emphasis on Brazil)*", 14 Journal of World Energy Law and Business 49 (2021); Gordon, "*Risk Allocation in Oil and Gas Service Contracts*", in "**UK Oil and Gas Law: Current Practice and Emerging Trends – Volume II: Commercial and Contract Law Issues**". (3rd Edition 2017), II-6; Clifford Chance, Briefing Note, "*Reviewing Knock-for-Knock indemnities: Risk allocation in maritime and offshore oil and gas contracts*", Oct 2015; "Santopinto, "*Knock-for-Knock Indemnities and their application in Oil and Gas Contacts in Argentina*" International In-House Counsel Journal Vol. 7, No. 28, Summer, 2014; Cameron, "*Liability for Catastrophic Risk in the Oil and Gas Industry*" 2012 I.E.L.T.R., Issue 6, 2027 (2012); Hewitt, "*Who is to Blame? Allocating Liability in Upstream Project Contracts*" 26 Journal of Energy & Nat. Resources L. 177 (2008). The K4K modality, as it applies in the oil industry, is also recognized by courts all over the world. Perhaps the best judicial discussion of the concept appears in *Caledonian North Sea Limited v British Telecommunications plc* [2002] 1 Lloyd's Rep. 553.

There are some commercial situations, like upstream oil and gas operational sites, which are inherently dangerous, which take place within a narrowly defined physical locus (such as an offshore rig), and which involve multiple contracting parties (usually companies) and their employees. Most of these multiple parties will only have a few direct contractual relationships on the site. In such situations, where the factual cause of any damage (whether personal or property-related) is often unclear, and where liability theories may be strict-liability based, delictual or contractual in nature, it is arguably better for contracting parties to bear their "own"[3] personal and property loss at least to the extent that this can be insured. This avoids excessive over-contracting of insurance by each site party, and potentially costly, lengthy and confusing cross-litigation. But under K4K, an *innocent party* often ends up bearing the loss despite the cause of the loss, which could easily be the negligence or worse of another party.[4] That rule can be counter-intuitive on one level but makes perfect sense in practice. In any event, the upstream oil and gas community is strongly in favour of K4K clauses, and they are an unquestionable worldwide reality.[5]

3. Third-party Indemnities.

On the other hand, it is normal that if a Contractor *negligently* damages someone who is on onsite but who is *not* a member of either Company Group or Contractor Group, then the Contractor will indemnify and hold harmless the Company Group for any damages arising from that act. The converse is also true, with the Company extending the same courtesy to Contractor Group. This is called a "third-party" indemnity.

[3] Here we are speaking somewhat figuratively, as companies, strictly speaking, cannot experience "personal injury" but their employees may do so.

[4] It should be noted that it is very important to thoughtfully define parameters to the scope of K4K clauses. Firstly, these will not traditionally cover acts of wilful misconduct (but see Legal & Commercial Analysis Point 15 below) and sometimes, not even gross negligence. These **conduct** limitations are sometimes called "**carve-outs**" which should be adequately defined as neither wilful misconduct nor gross negligence have any accepted legal meaning under English law. See useful discussion of this topic in Pickavance & Bowling, "*Exclusions from Immunity: Gross Negligence and Wilful Misconduct*" (a paper presented to the Society of Construction Law at a meeting in London on 5 Sept. 2017). Additionally, in the context of oil service/construction contracting there will invariably be **activity** limitations**:** to give two common examples, a Contractor will generally not, absent wilful misconduct, be liable for damages arising from reservoir damage, or from pollution not deriving from its own equipment**.**

[5] It is important to grasp that with one **exception** explained below, a member of Contractor Group can only call on Company's indemnify and mutual hold harmless commitment if a member of Company Group has successfully alleged that it (or he or she) had been damaged by the act of Contractor Group. This is what is called a "**pure**" **indemnity** situation, i.e. Company would be compensating a Contractor Group member for a successful claim by a party being a member of Company Group in its triggering capacity. The referenced exception is where the Contractor Group member causes direct property damage to Company. In that case "indemnify and hold harmless" operates not as an indemnity but as a **waiver**. It is well established in English case-law that the words "indemnify and hold harmless" will usually cover both the indemnity and the waiver situations.

4. An Example of K4K and Third-Party Indemnities.

A good example of K4K and third-party indemnities, (given by Contractor)[6] can be found in LOGIC Well Services Edition 2 (March 2011) (**LOGIC Well Services**) Clause 19.1, which is as follows:

> 19.1 The CONTRACTOR shall be responsible for and shall save, indemnify, defend and hold harmless the COMPANY GROUP from all claims, losses, damages, costs (including legal costs) expenses and liabilities in respect of:
>
> (a) subject to Clause 19.5, loss of or damage to property of the CONTRACTOR GROUP whether owned, hired, leased or otherwise provided by the CONRACTOR GROUP arising from or relating to the performance of the CONTRACT; and
>
> (b) personal injury including death or disease to any person employed by the CONTRACTOR GROUP arising from or relating to the performance of the CONTRACT; and
>
> (c) subject to any express provision of the CONTRACT, personal injury including death or disease or loss of or damage to the property of any third-party to the extent that any such injury, loss or damage is caused by the negligence or breach of duty (whether statutory or otherwise) of the CONTRACTOR GROUP. For purposes of this Clause 19.1(c) "third-party" shall mean any party which is not a member of the COMPANY GROUP or the CONTRACTOR GROUP

5. Further Explanation of the Facts in the LCIA Case

Under the facts of the LCIA Case, X fell under the definition of Company Group and also under the definition of "third-party".

This gave rise to interesting arguments available to the parties. Company A arguably had to indemnify and hold harmless Company B for the damage it had suffered through the accident causing X's death (X being a member of Company Group), while Company B had to indemnify and hold harmless Company A for any losses it might incur (including satisfying an indemnity obligation) because of Company B's alleged negligent act towards X, who was a third-party? Accordingly, the indemnities might have been read to cancel one another out. Or was X's third-party designation simply a mistake? How was the Downhole Services Contract to be interpreted?

[6] The parallel and largely similar K4K and third-party indemnities which are given by Company in favour of Contractor Group can be found in LOGIC Well Services Clause 19.2.

6. Arguments of the Parties

6.1 Company B's Arguments

On the facts of the LCIA Case, the Company Group, (excluding Contractor Group, naturally) included all of Company's onsite sub-contractors and their employees at all levels. This is termed a "**big family**" K4K arrangement, as in that case the Company will effectively indemnify and hold harmless the Contractor Group for all damages to any other contracting party on the site. ***In the case of a big family K4K arrangement, it is envisaged that each contracting company in all the various contracting chains onsite will have "back-to-back" K4K clauses and that will lead to the ultimate "right" party "bearing" their own personal and property loss.[7] In the "big family" case, there would normatively be no parties working on site who would qualify as "third parties", as all such active site parties would either be in Contractor Group or Company Group.*** In such a scenario, third parties onsite would in most cases be restricted to being occasional visitors, or transient persons such as fishermen or nomads. In support of such a "big family" position being normative, one could look to rely on the provisions of various of the International Association of Drilling Contractors (**IADC**) model form contracts and the Association of International Energy Contractors (**AIEN**) International Offshore Drilling Contract (2020) which arguably have a "big family" K4K arrangement. ***The "big family" K4K arrangement it was argued by Company B, is thus normative and accordingly, X's status as a "third-party" was anomalous.***

6.2 Company A's Arguments

Alternatively, it could be argued that while it is indeed common in international contracting for Company Group to include Company's other contractors to all

[7]It might be added that contracting parties in vertical onsite contracting chains are likely to be concerned that their K4K arrangements are compatible up and down the line. Hence, for example, if a "big family" K4K arrangement is utilised between Company and Contractor, and Contractor is able to call on Company's indemnify and hold harmless commitment to Contractor for damage occasioned to a subcontractor who falls under "Company Group" then it will be vital that Company will be able to rely on equivalent K4K principles in its contract with the relevant sub-contractor (or perhaps, the intermediate contractor above the relevant sub-contractor) and so on. This contractual compatibility may not exist if the carve-outs are different in different contracts at different levels of the contracting chains. This is a strong reason why oil companies are reluctant to enter into "big family" K4K arrangements because it means that they may need to "police" contractual provisions at different contracting levels. See discussion in Gordon, *supra* note 2, at II-6.57, page 219 ("Thus the problem of multiple parties [in the case of "big family" arrangements] was dealt with by the operator acting as a fulcrum in the contractual arrangements. This provided a workable solution to the problem. However, the practice was difficult and time-consuming for operators to administer. It was also risky; if, for some reason, the back-to-back provisions broke down, then the operator would commonly find itself responsible for a greater degree of liability than it had anticipated or intended")

levels[8] it is also common for Company Group not to include such other contractors. This is called a "**small family**" K4K arrangement. ***In that case, Company Group will be limited in scope to the Company and its directors, officers and employees, and all site contractors not in Contractor Group will be third parties. Accordingly, many if not most contracting parties onsite will be third parties.*** If any of these parties sue members of Contractor Group for damages, there will be no-one to indemnify Contractor Group. This, of course, is favourable for Company. ***If a "small family" K4K arrangement is normative or is merely one of a number of possible K4K arrangements, then it could be argued for Company A that X's status as a "third-party" was not anomalous***.

This is also a third alternative, which is that Company Group may not include Company's other contractors to all levels, but that there may be an industry mutual hold harmless (**IMHH**) regime in force between all contractors onsite.[9] Further the likes of the AIEN Drilling Contract includes optionality for a small or large family arrangement at Article 13.1.2 and thus could favour either side of the argument. Moreover, the LOGIC model form contracts have significant international application, and these squarely support a "small family" position.

In conclusion, there was per Company A arguably no conflict in the Downhole Services Contract. X's dual classification as being both "Company Group" and "third-party" was simply a commercial compromise.

6.3 No Final LCIA Conclusion

The LCIA Case ended in a settlement and no final arbitral resolution of these contractual issues was reached. What was very interesting was that both parties appealed to the provisions of the IADC, AIEN and LOGIC model form contracts as being persuasive or dispositive regarding whether "big family" or "small family" K4K arrangements are ubiquitous or not in international oil service/construction contracting.

My reflections on these matters are as follows:

[8] This is very favourable for Contractor Group as they can rely on being indemnified by Company, often a large and (crucially) known entity.

[9] An IMHH scheme is a means of requiring contractors at all onsite levels to indemnify and hold harmless any other contractor who has damaged its property or people. This can be created by a special onsite contract which creates privity between all contractors for this limited K4K purpose, or there can be a jurisdiction-wide scheme such as the Leading Oil & Gas Industry Competitiveness (**LOGIC**) Industry Mutual Hold Harmless Deed (**IMHHD**). See https://logic-energy.org/imhh/ This latter scheme covers signatory oil service/construction companies in the UK and Republic of Ireland for operations in the respective offshore areas of these countries. Alternatively, a provision like LOGIC Well Services Clause 19.13 attempts to create an onsite IMHH regime by way of a special contractual clause.

II. LEGAL & COMMERCIAL ANALYSIS

1. What do we mean by "international" or "worldwide"? We are not thinking of highly developed petroleum regimes which will use their own standard forms. These developed jurisdictions would include, for instance, Brazil (for Petrobras contracting), Canada, Norway, UK, and USA. We are thinking of the many international jurisdictions which allow English law (or other foreign law) to govern oil service/construction contracting.

2. There are three main types of model oil service/construction contracts[10] which have an important role on a worldwide basis. As mentioned, these are the IADC, the AIEN and LOGIC model contracts.[11] Before going into detail on these kinds of contracts it is important to stand back and reflect on some oil and gas model form contracts which are unquestionably ubiquitous and massively influential. Undoubtedly the best example is the ever-evolving AIEN Joint Operating Agreement (**JOA**) (latest edition 2023) which has been used in every international E&P project which I can ever remember seeing. In the UK, the Offshore Energies UK Joint Operating Agreement is ubiquitous for UKCS E&P projects. These model form contracts literally choose themselves. It is evident that there is no model form international oil service/construction contract that has anything like the influence of these model form JOAs.

3. Where a model form contract is not as ubiquitous as the JOAs mentioned above it is difficult to be certain of how widely used it may be. Inevitably, one does tend to draw on one's own experience or the experience of trusted colleagues. To some extent therefore, the factual "state-of-play" analysis below is anecdotal in nature.

4. The reality is that many if not most international oil companies and oil service companies have their own standard or near standard forms. They are also likely to have important and often binding internal guidance on acceptable contractual terms. But that still leaves scope for the use of model forms to a greater or lesser extent. Among the corporate (as opposed to model) standard forms which have been published and are publicly available, the Shell standard clauses squarely

[10] I do not consider contracts for vessel hire to be "oil service/construction contracts" for purposes of this analysis. Such vessels are not part of a static petroleum workplace. Hewitt in "*An Asian Perspective on Model Oil and Gas Services Contracts*", 28 Journal of Energy and Natural Resources Law 331 (2010) reviews maritime model contracts which are used in vessel support activities such as the BIMCO suite of contracts. Hewitt, at 344 – 348.

[11] A fourth important organisation in this respect is the International Marine Contractors Association (**IMCA**). The IMCA has issued a Marine Construction Contract which is based on LOGIC Marine Construction and also various contracting principles. I have not been able to review these contracts and principles because they are available only for paid-up members of IMCA. In 2023, the IMCA issued the world's first model form contract for transportation and installation (**T&I**) works in offshore windfarms.

support a "small family K4K arrangement.[12] By way of persistent anecdote, this approach would seem to be generally supported by operators.

5. ***What do we mean when we say that a particular model form contract has a major international impact or is influential internationally?*** We mean, in my view, one or more of four things: (a) that the relevant model form contract is routinely used as a template, which means that the form is commonly used virtually in its entirety with parties' names, commercial deal information added (this is the strong sense in which the AIEN JOA is used);or, (b) significant language/clauses from the given model form (perhaps especially the liabilities & indemnities language) is used in a contract otherwise prepared by one or either of the parties according to its own needs and background; (c) or, the contract between the parties does not closely follow language in the model form but it does embody the principles or some of the key principles of the model form; and/or (d) during the drafting and negotiation of the contract one of the parties appeals to the model form provisions as authority/justification for including terms favourable to it. Additionally, we should always remember that model forms have an important teaching function (which is perhaps neglected).

6. The IADC is a trade association which is enormously active and very influential in many areas. Above all it represents the worldwide drilling industry. There are eight IADC model form contracts, many of which have been updated last year (2023). All eight relate exclusively to drilling and not to other activities. Four out of the eight are expressly for use in the USA and a fifth, the International Offshore Daywork Drilling Contract is subject to the General Maritime Law of the USA even though it is designed for international use. The remaining three contracts, the Model Turnkey Contract, the Master Service Contract, and the International Land Daywork Contract can possibly be subject to foreign law and foreign courts, even though the former two contracts have explicit references to US legislation. Overall, these contracts have a distinctly American flavour and are written by drillers for drillers, which is very understandable. But as Lorna Dawson writes, IADC contracts are *"... not normally accepted by operators without significant amendments"*.[13] The IADC forms do envisage a "big family" K4K arrangement and do not have "third-party" indemnities.

7. The AIEN, in contrast to the IADC, can be classified as a purely professional association for those in any way involved in negotiating/interested in international petroleum contracts. The emphasis of the AIEN is heavily on the upstream E&P sector rather than the supply chain. However, there are supply chain companies

[12] Please see link to a webpage with the contracting terms and conditions for Shell contractors and suppliers, in which the "small family" approach is clearly followed: qatar-25-november-2022-po-form-complete.pdf (shell.com)

[13] Dawson, "*Contractual Standardisation and the LOGIC Standard Contracts*", in "**UK Oil and Gas Law: Current Practice and Emerging Trends – Volume II: Commercial and Contract Law Issues**". 3rd Edition 2017), II-5, page 171.

involved in the AIEN. The AIEN has the largest range of international model form oil and gas contracts in the world but only four of these relate specifically to the supply chain. Three date from 2002 and include a Well Services Agreement, a Seismic Acquisition Agreement and a Master Service Agreement. The flagship supply chain AIEN model form contract, however, is the 2020 International Model Offshore Drilling Contract which is heavily based on the 2002 Well Services Agreement. As is usual with AIEN model form contracts, the AIEN Offshore Drilling Contract contains extensive optionality which allows parties to adopt language which is suitable for their negotiating positions. The AIEN Offshore Drilling Contract is not drafted to be subject to any particular law, but it should be said that there is optionality which allows it to be made fairly easily subject to English law. As noted, the AIEN Drilling Contract embodies optionality which would allow for either a big family or a small family K4K arrangement.

8. LOGIC is a not-for-profit subsidiary of industry trade association Offshore Energies UK which covers the E&P, oil and gas supply chain and offshore renewables sectors. LOGIC's model form contracts represent by far the largest suite of oil and gas service/construction contracts which might have a worldwide application ranging from Marine Construction and Construction, to Drilling, to Well Services to Design to Offshore Services and much beside. These LOGIC model form contracts are certainly designed for the UKCS, which was a point strongly made by Company B. However, what is more important is that they are specifically designed for English law and English courts, and hence can be used with little adaption in every jurisdiction in which English law can be used as a choice-of-law. LOGIC contracts all support a small family K4K arrangement.

9. Since LOGIC is the only suite of model form oil service/construction contracts which are explicitly written under English law, and since LOGIC represents by far and away the largest variety of such model form supply chain contracts, and since English law is the preferred choice-of-law for the international oil industry it would make sense that LOGIC model forms would have a major role in international supply chain contracting. In fact, this conclusion is bolstered by the fact that so many industry professionals are either UK nationals or have otherwise studied in the UK or worked in the UK industry.[14] Furthermore, UK

[14] By way of personal experience, in 2003 to 2004 I led the worldwide due diligence on some sixty contracts and hard prospects (the great majority of which were international) of a major subsea contractor when it was being taken over. As part of the contract assessment process, we adopted key parameters of what was then CRINE (now LOGIC) as our "reasonableness" benchmark. In the same time period, I used a LOGIC Design template for a client involved in the rig refurbishment of a vessel located in Esbjerg, Denmark. More recently, I have been consulted by a Brazilian oil company on how insurance costs are paid and accounted for under LOGIC Marine Construction Edition 3, May 2021 (**LOGIC Marine Construction**) I have only once ever used an IADC model form contract and that was the Model Turnkey Contract which is the only international Model Turnkey Contract in existence. Horses for courses? See also for a broad discussion of the wide range of national and international model form petroleum contracts of all types (whether E&P or supply chain in nature) Martin and Park, "*Global petroleum industry model contracts revisited: Higher, faster, stronger*" Journal of World Energy Law & Business 2010, Vol.3, 4.

cultural influence has been and remains strong in much of Africa, the Middle East, the Indian sub-continent, and the Far East. The irony is that LOGIC itself makes no explicit attempt to internationalise its model form contracts.

10. The legal literature is not exactly overflowing with material specifically on the extent of the use of supply chain model contracts in the international realm, but in an article focusing on the (general construction) FIDIC model form contract, White & Case lawyers Baker, Lavers and Major state: "*The FIDIC contracts are the pre-eminent standard forms in the international construction market. Although there are individual sectors where other standard forms rival this supremacy such as the LOGIC contracts in the Offshore Oil and Gas industry …….*".[15] And Hewitt considers that AIEN (then AIPN) and LOGIC model form supply chain contracts are the leading model form oil service/construction contracts used in Asia.[16]

11. Furthermore, Lorna Dawson, in an interesting turn of phrase, states the following:

> "*The governing law of all of the LOGIC Standard Contracts is English law – any practitioner should bear this in mind when using the contracts. The author has seen the LOGIC terms transposed to other legal jurisdictions, with a new governing law clause slotted in as a Special Condition, without thought as to whether the provisions will be enforceable in those jurisdictions (of particular concern here would be the indemnity provisions".*[17]

Firstly, this is excellent legal advice, as LOGIC contracts are certainly written under English law and if literally transposed into a foreign jurisdiction and made subject to foreign law would be quite inadequate under systems like Brazil, Norway and the main oil producing US States.[18] But beyond this, the quoted language from Lorna Dawson suggests that LOGIC clauses are commonly used in foreign jurisdictions (hopefully under English law governed contracts!).

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[15] Baker, Lavers and Major, "*Introduction to the FIDIC Suite of Contracts*", "**The Guide to Construction Arbitration**" (GAR. 4th, 2021).
[16] See generally Hewitt, supra note 10 and also specifically at pages 375-376.
[17] Dawson, supra note 13, at II-5.29, page 161. See also discussion of K4K clauses under Brazilian and Angola law in Nadorff & Gomes, supra note 2; and discussion of K4K clauses in Argentina, Santopinto supra note 2.
[18] The general point of the Vass Chapter cited above at page 2 is that English law is uniquely suitable for international oil service/construction contracts. LOGIC contracts depend on the fact that the undefined word "negligence" has a widely accepted legal meaning under English law which is that it covers all acts of negligence from the mildest type to the type of negligence often termed "gross". There is little doubt that indemnities and waivers in English K4K clauses are valid and binding so long as the clause is part of a contract between companies (and not individuals) and expressly covers negligence. This is not the case in every jurisdiction. Additionally, English law, unlike many American state jurisdictions, has no anti-indemnity statutes and the clear contractual intention of sophisticated commercial parties will generally be respected and enforced by the courts. Additionally, the validity of indemnities and exclusions is not conditioned by the existence (or not) of insurance.

12. My overall conclusion is that oil companies and oil service companies involved in international operations generally do their own thing on contracting and are not "bound" in any way by model form contracts. Such contracts may rarely be used as full templates. However, model form oil service/construction contracts sometimes play an important international role, providing clauses and ethos and negotiation validation. Given the preference for English choice-of-law, it is likely that LOGIC plays the leading role and the IADC the least. I would like to see the excellent AIEN model form oil service contracts, which embody so much useful optionality, get even more traction. Successful model form contracts are usually arrived at, as in the cases of the AIEN and LOGIC, through long consideration of interested parties with diverse industry objectives and viewpoints.

13. How does LOGIC "jive" with IMMHD on the UKCS? I think it is important to note that not all UKCS contractors are signed up to IMHHD and the relatively basic provisions of IMHHD can always be varied by contract. Additionally, many LOGIC model form contracts date from well before 2002 when the IMHHD came into force originally.[19] Lastly, a small family K4K arrangement with IMHHD does not equate (as Company B tried to suggest in the LCIA Case), for purposes of Contractors, to a big family K4K arrangement. In the case of a big family K4K arrangement, Contractor Group members will always be able to rely on the indemnify and hold harmless commitment of the Company in respect of any damages which anyone in Contractor Group may cause any member of an expansive Company Group (covering every contracting party onsite outside of Contractor Group). In the case of a small family K4K arrangement with IMHHD by contrast, each onsite Contractor, of whatever level, has limited K4K rights against the Contractor which it has damaged.[20] The damaged Contractor may be a small and impecunious company who may not be able to fund the associated indemnity obligation.

14. It is my view that it is incorrect to conclude that a big family K4K arrangement is somehow a necessary condition or in some way inherent to workable international K4K schemes. This will always be a matter of commercial negotiation between the parties. Small family K4K arrangements are quite a common option. It is one thing to say that there is a *universal* contracting practice in the international oil and gas business. In that sense, we can say that all

[19] However, it is LOGIC's position that the best way to deal with Contractors' discontent with the LOGIC small family K4K arrangement is via the IMHHD. See e.g. Guidance Notes to LOGIC Marine Construction Explanatory Note 2.24 ("…. [IMHHD is] … the most appropriate way of dealing with the allocation of liability for injury to persons, damage to property and consequential loss between the Company's contractors and [LOGIC] strongly encourages all contractors to join the ... [IMHHD] ... scheme.")

[20] In the IMMHD, the Contractors are referred to as "Signatories". Each Signatory has a "Group" which includes its affiliates, employees and others but NOT its subcontractors to any level. Each Signatory must indemnify and hold harmless all other Signatories (and their Groups) for the usual damages suffered by the indemnifying Signatory and its Group.

international JOAs have "sole risk" clauses. This is the undoubted practice. It is another thing to say that it is *common* (but very far from *universal*) for international JOAs to have "no consent" clauses. ***"No consent" clauses, like big family K4K arrangements, are a common practice but not <u>the universal</u> practice***.

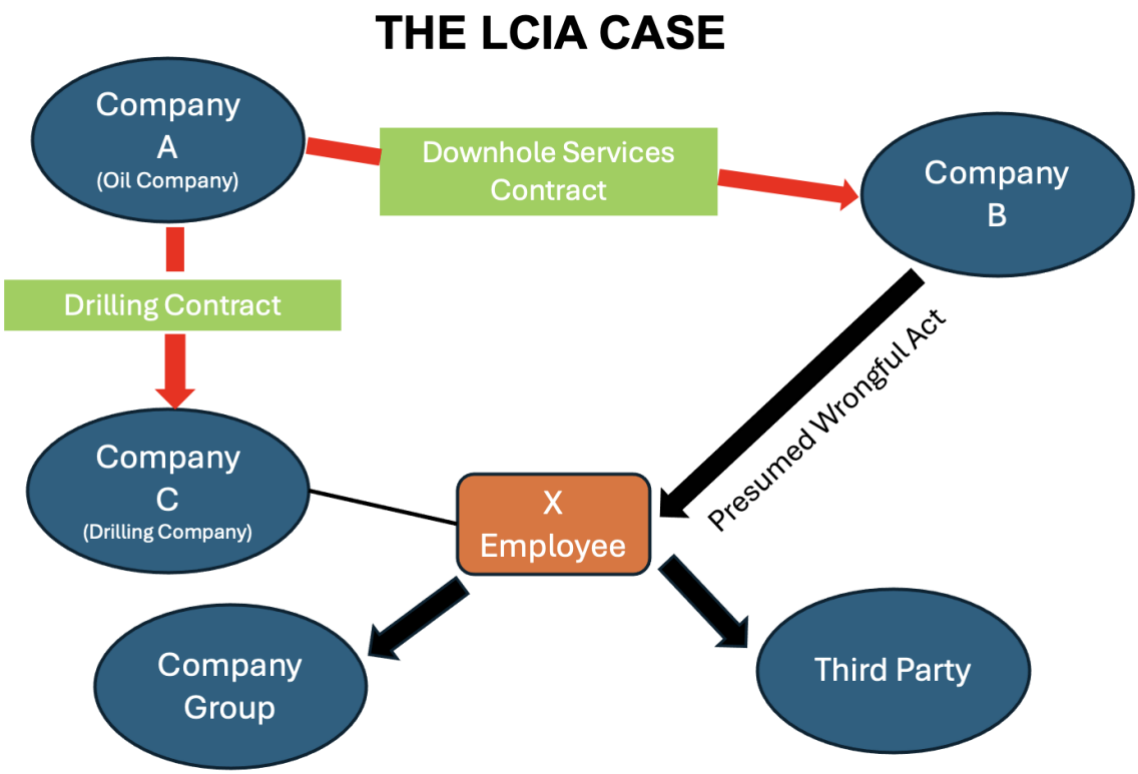
15. I would note that while no international model oil service/construction contract has a carve-in for wilful misconduct,[21] I am seeing a trend whereby wilful misconduct is appearing as a carve-in in K4K clauses. The K4K clause in the LCIA Case had a carve-in for wilful misconduct (though nothing turned on it). An American colleague of mine recently shared that the same trend is being seen in America. The reason seemingly is that oil service companies are uncomfortable with courts deciding on what the fine line is between gross negligence and wilful misconduct. This poses issues of what an acceptable definition of wilful misconduct *as a carve-in* might be, where the *contra bonos mores* limits of such a concept, if any, may be, and what impact there may be on insurance? Much of the analysis of wilful misconduct in case law and commentary is in the context of wilful misconduct being a carve-out. Perhaps that needs to change, and I hope soon to focus on that issue in subsequent academic endeavours.

16. In the wake of my writing the Vass Chapter and then going on to provide expert witness testimony in the LCIA Case, very interesting oil and gas supply chain contractual issues have been raised. Are K4K arrangements some kind of uniform scheme which is the same in all jurisdictions or is the essential modality ("bear your own loss") highly variable on a case-by-case basis, depending on jurisdiction, governing law, contracting parties and economic conditions? Hopefully, this article has supplied my answer to that question. And how useful/important are international model form oil service/construction contracts? I think that these contracts are very useful, for all the reasons specified in Legal & Commercial Analysis Point 5 above. I also think that the model contracts are important, but they are not dispositive. Ultimately, it comes down to what each contracting party wants and how strong their negotiating leverage is

[21] It should be noted, however, that the Offshore Energies UK model form JOA requires non-operators (Participants) to "indemnify and hold the Operator harmless" for Consequential Loss caused by the Operator **even** if caused by the Operator's Wilful Misconduct. See Offshore Energies UK model form JOA Clause 6.2.4. Capitalised terms used in this note are those defined in the JOA. The definition of "Wilful Misconduct" in the Offshore Energies UK JOA is as follows:

> means an intentional or reckless disregard by Senior Managerial Personnel of Good Oilfield Practice or any of the terms of this Agreement in utter disregard of avoidable and harmful consequences but shall not include any act, omission, error of judgement or mistake made in the exercise in good faith of any function, authority or discretion vested in or exercisable by such Senior Managerial Personnel and which in the exercise of such good faith is justifiable by special circumstances, including safeguarding of life, property or the environment and other emergencies.

ANNEX A



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Uisdean Vass has over 40 years' experience practicing oil and gas law in the UK and throughout the World. He is qualified to practice in Scotland and in Louisiana and has worked in many different aspects of the oil business. Mr. Vass is involved in giving advice on the new MER regime in the UK and he also advises governments on regulatory matters. The heart of his practice lies in advising oil companies on licencing and doing deals, whether through farmouts, assets sales or company sales.