

Knock-for-knock in onshore construction contracts

**A study of a different liability regime and the
implementation thereof**

Sacha Beer Stephansen



's-Gravenhage - 2020

1^e druk

ISBN 978-94-6315-059-0

NUR 822

© 2020, Sacha Beer Stephansen

Alle rechten voorbehouden. Niets uit deze uitgave mag worden verveelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand, of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgeverij. Voor zover het maken van kopieën uit deze uitgave is toegestaan op grond van artikel 16h tot en met 16m Auteurswet 1912 jo. het Besluit van 27 november 2002, Stb. 2002, 575, dient men de daarvoor wettelijk verschuldigde vergoedingen te voldoen aan de Stichting Reprorecht (Postbus 3060, 2130 KB Hoofddorp). Voor het overnemen van gedeelte(n) uit deze uitgave in bloemlezingen, readers en andere compilatiewerken dient men zich tot de Stichting Instituut voor Bouwrecht te wenden.

No part of this book may be reproduced in any form, by print, photo print, microfilm or any other means without written permission from the publisher.

Deze uitgave is ook online beschikbaar op <www.ibrtracker.nl>. Voor meer informatie, zie: <www.ibr.nl/publicaties>.

Foreword

For the purpose of the ESCL thesis competition, this thesis has been reduced from a total word count of 31,019 words when submitted to Copenhagen University to 23,339 words (excluding appendixes, 14,880 words). The thesis was handed in to Copenhagen University in 2018, and received the highest grade.

This thesis seeks to describe a contract clause taken from the offshore industry and the possibilities of implementing it in an onshore construction contract. It examines the validity of a knock-for-knock clause implemented in an onshore construction contract under the applicable laws of Denmark, Norway and England.

I very much hope that this thesis will inspire questions to the standard contracts which are commonly used today. Can it be done cheaper, smarter, better, simpler? And curiosity into how similar industry's handle similar subjects.

Sacha Beer Stephansen

Tølløse, 2019

Table of Content

Foreword		v
1	Introduction	
1.1	Subject	1
1.2	Research Question	1
1.3	Methodology	2
1.4	Civil and Common Law Traditions	2
1.5	Interviews	3
2	Knock for knock	
2.1	Fault	5
2.2	The Offshore Industry	6
2.3	The Use of Knock-for-knock	7
2.4	The Knock-for-knock Clause	8
2.4.1	Company Group and Contractor Group	10
2.4.1.1	Nuclear Family	12
2.4.1.2	Extended Family	13
2.4.2	Insurance	13
2.4.3	Carve-outs	14
2.4.4	Allocation of third party claims	14
2.5	Advantages and Disadvantages	15
2.5.1	The Insurance scheme	15
2.5.2	Disputes	15
2.5.3	The Hazardous Effect	16
2.6	The Clause in an Onshore Setting	16
3	Validity	
3.1	Freedom of Contract	19
3.2	English Law	19
3.2.1	Negligence	19
3.2.2	Wilful Misconduct	22
3.2.3	The Unfair Contract Terms Act	25
3.3	Danish Law	27
3.3.1	Gross Negligence	27
3.3.2	DL 5-1-2	29
3.3.3	Contract Act § 36	30
3.3.4	Failed Assumptions	33

3.4	Norwegian Law	34
3.4.1	Gross Negligence	34
3.4.2	NL 5-1-2	35
3.4.3	Contracts Act § 36	36
3.4.4	Failed Assumptions	39
3.5	Lack of Insurance Coverage	40
4	Findings	
4.1	Conclusion	43
4.2	Perspectives	44
	References	47
	Judgements	53
	Appendix I	55
	Appendix II	61
	Appendix III	65
	Appendix IV	67
	Appendix V	71