



KLUGE

GCE Subsea Kontraktsskole

23. oktober 2018 og 6. november 2018



Kluge at a glance



- Full service law firm
 - 130 lawyers - offices in Oslo, Stavanger and Bergen
- One of the largest oil and energy practice groups in Norway
 - 15 lawyers in Stavanger, Oslo and Bergen dedicated to oil and gas
- Legal 500 2017: *"very solution oriented and conscious of the practical considerations of the clients, allowing it to provide full and comprehensive support across the full spectrum of the field"*
- Legal 500 2016: *'proactive and pragmatic with clear and thorough legal analysis from knowledgeable and experienced lawyers'.*
- Chambers 2016 on Kluge's Energy Department: *"seamless and result-oriented service," "always available and always efficient." "very quick and proactive in their approach; they can always see the next step."*



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- Samuel Skrunes
 - Samuel.Skrunes@kluge.no
 - Fredrik Næss
 - Fredrik.noss@kluge.no

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- Day 1: October 23, 2018
 - Contract understanding and interpretation of contracts
 - Contract and negotiation strategy
 - Changes
 - Day 2: November 6, 2018
 - Knock for Knock
 - Limitation of liability
 - IPR

Contract understanding and interpretation

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- Why is this important – legal risk management
 - Strategy
 - Understanding the risks
 - Managing the risks (upsides/downsides)



- Main subjects:
 - What is a contract?
 - When is a contract binding?
 - How to read a contract – interpretation.

What is a contract?

- Rights and obligations
 - Monetary obligations
 - Performance
- The basis for any contract – the individual freedom of a legal person
- The parties choose to enter into contracts
- The parties choose the extent of their obligations
 - Also legal to enter into very bad contracts.....
- Oral agreements as binding as written?
- Offshore contracts are normally extensive documents

What is a contract? (II)

- Normally several documents:
 - Contract document
 - General conditions
 - Scope of Work
 - Compensation
 - Schedule
 - Administrative requirements, business ethics etc.

Contracts are binding – Practical consequences

- Contracts are to be fulfilled as they were agreed.
- Changes need to be negotiated – unless the contracts include VO-regime.
- Assumptions:
 - Costs
 - Cost of materials
 - Efficiency
 - Scope?
 - Access?
 - Utilities?
 - CPIs?
- Regulated in the contract – Risk is allocated by the contract
- Contract is silent – Each party carries the risk for his own assumptions

When is a contract binding?

- Agreement
 - NB; Contracts may be binding before all terms are agreed
 - Agreement on “substantial issues”.
 - Scope and Contract price
- May be regulated prior to entering into negotiations
 - Formal procedures
 - Signing
 - Reservations
 - Condition precedents
- Letter of Intent
 - The parties declare that they have the intention to enter into an agreement.
 - The LOI has to be interpreted
 - NB – a LOI may be an agreement with a misleading name

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- Whereas the parties have negotiated a contract regarding delivery of
- The parties have agreed that:
 - - the final contract shall be based on the following documents:
 -
- Upon receipt of this LOI the Contractor shall start the Work.
- The Parties intend to sign the final contract within [date]
- What if the contract is never signed?
- What if the Company wants to contract another bidder instead?

*"Heng ham ikke, vent til
jeg kommer..."*



*"Heng ham, ikke vent til
jeg kommer..."*

Interpretation of a contract?

- Can a common understanding be established?
 - The qualification log
 - Conclusive behavior
- If no: The purpose is to find the «objective reasonable meaning of the contract terms»
- The normal understanding of the words in the relevant field of business.
- The objective meaning of the wording is especially important in commercial contracts.
- Rt. 2002-1155:
 - «At prinsippet om **objektiv fortolkning** har **særlig styrke** i avtaler mellom næringsdrivende, understrekes av forretningslivets behov for **sikkerhet** og **forutberegnelighet**, som åpenbart fremmes best av en tolkning basert på **objektive, tilgjengelige elementer**. Jeg antar også at det er riktig, som fremholdt av den ankende part, at betydningen av en fortolkning basert på avtalens ordlyd kan være økende. Det forekommer formentlig ofte at **tredjeparter** må forholde seg til avtalte rettigheter, enten i forbindelse med garanti- eller sikkerhetsstillelse eller ved overdragelser, for eksempel av fast eiendom med tilknyttete utleieavtaler. Hensynet til tredjeparter taler for en objektiv fortolkning basert på **avtalens tekst**.»

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- The contract contains the following clause – (the contract contains four options of three years):
 - In case Company exercises an option Contractor shall pay an amount of 5 MUSD to Company for each option, meaning a total payment 20 MUSD, provided that all four options are exercised.
 - Any problems with the understanding of this clause?
 - Theoretical?

How to interpret a contract – practical consequences

- THE STARTING POINT (and often the end):
 - What is written will normally prevail
 - “My assumption was...” has often little value
 - If something is important for you – you need to get it into the contract – state your assumptions
 - Focus on negotiations

However, sometimes the contract is ambiguous:

Other elements of interpretation:

- Background may affect the words
- What happened in the negotiations
- Consistency
- Operationality
- Purpose
- The acts of the parties

Other aspects

- Reasonable and fair solutions, ("reelle hensyn")
 - Balance
- Background law
- Bad faith rule
- The author rule

- Hierarchy:
 - “In the event of any conflict between the provisions of the contract documents listed in Art. 2.1, they shall apply in the following order of priority:
 - ..
 - ..”
- Battle of forms
 - Offer states that the Contractor’s general delivery terms shall apply
 - PO states that the Company’s general terms shall apply

The outer limit

- Law of Contracts Art. 36 – unreasonable agreements
- Frustration/breach of assumptions
- Very difficult to win.

Negotiation strategy/Contract strategy

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Before negotiations commence:

- Framework:
 - Competition
 - Single source
 - Your and counterparty's BATNA
- Frame agreement:
 - Exclusive
 - Any commitment?
 - How to handle estimates?
 - Options
 - Area of operation
- Governing law and Dispute resolution
- All these issues should be considered
- Understand the full contract structure – back-to-back contracting does not necessarily mean that the same contract should be used

- Are there room for deviations – if so how many deviations should be presented?
- How to respond when /if you are instructed to withdraw all deviations?
- Identify the “must haves” and the “nice to haves”
- Keep some “nice to haves”?
- How to handle a claim for management approvals?
- Specific problems related to anti-corruption?
 - CSR?
 - Ethics?
 - Are these too sensitive issues to negotiate?
- Progress
 - KEEP TIME-LIMITS – rather before than after
- Deviations – impact on price
 - Find a middle ground

The negotiation:

- Act professionally
- Build trust
- Get over defeats on one issue
- Try to understand your counterparty
- Do not lie
- Make sure actions are distributed
- Make sure all competent resources are available (but not necessarily in the meeting)

The negotiation – case – you are on the Company side and receive these deviations:

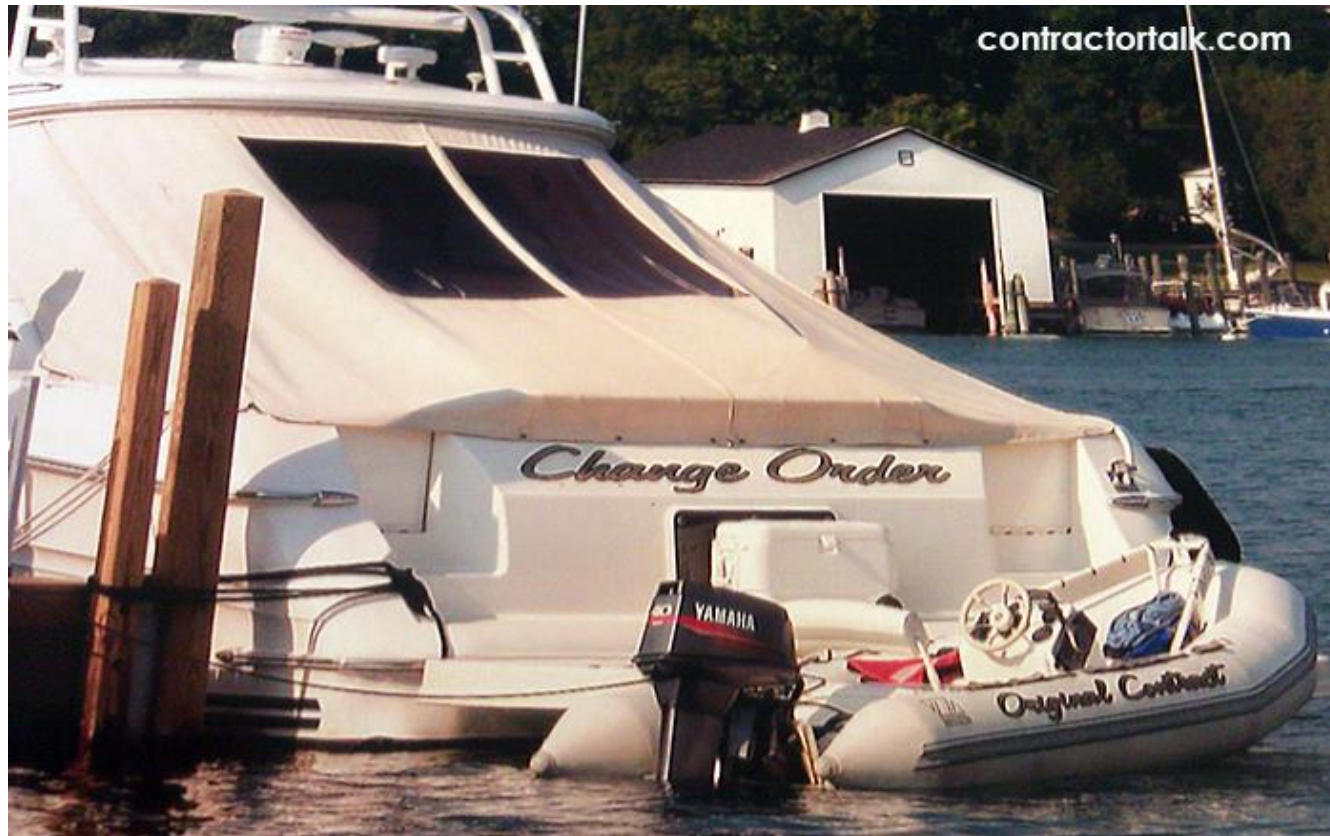
- Where laws and regulations as stated in the first paragraph item a) have been adopted and requirements or orders as stated in the first paragraph item b) are issued, after **the offer has been submitted** ~~signature of the Contractor~~ and necessitate Variations to the Work or its execution, ~~and~~ **or** this affects Contractor's costs or progress, ~~either party~~ **Contractor** may demand a change in the Contract Price or Contract Schedule reflecting the effect of such decisions, requirements or orders. Changes in the way in which public authorities apply laws and regulations mentioned in the first paragraph item a) above **and orders as stated in the first paragraph item b)** shall be dealt with in the same way. ~~The provisions in Art. 12 to 16 apply accordingly, provided that the time limit for presenting a Variation Order Request is 21 Days from the time the circumstances on which the request is based became or ought to have become known to Contractor.~~
- The change from and to or is very important
 - Explanation given: we want to be compensated if the NOX fee increases – this does not “necessitate Variations to the Work”
- Does it include change in e.g. corporate tax?
- Keep control of the log – do not copy the full clause with the reservation into the contract –not all changes proposed are necessarily marked

Contract award:

- QC the contract towards the qualification log – THE WORDING OF THE CONTRACT WILL APPLY
- Now the real work begins:
 - Continue to build trust
 - Build a relationship, but do not be a doormat
 - Be professional in dispute

Variations





- What is a variation?
- The need may vary
 - Long term?
 - Complexity
 - Maturity of Scope
 - Schedule
 - Payment structure
- Delivery of goods of the shelf or full EPC.

Variations – key questions

- May the Company instruct variations?
 - Which variations?
- What is the consequences of a Variation?
 - Price
 - Schedule
- Do the Parties need to agree on price/Schedule?
- What if the Parties do not agree?
- Is there any deadline for claiming that something is a Variation?
- What if the Parties disagree whether something is a Variation?

- Formal starting point – contracts are binding:
 - A variation to the contract has to be negotiated, scope, price etc.
- Contracts may have formal procedures:
 - “All amendments shall be in writing.”
 - “signed by the Parties’ representatives”
- Also some “standard contracts” lack VO –regime, ORGALIME
- The normal situation: Offshore contracts have a VO regime
 - NB – VO-regime are often used wrong

- VO regime: Many offshore contracts have “simplified” terms on variations, often inspired by the NTK.

- **Read the contract!**

- Service-agreement for certain valves on Gullfaks, originally delivered by Contractor. Scope include refurbishment when necessary.
- Standard VO – provision:
- “Company has the right to order such Variations to the Work as in Company's opinion are desirable.

Variations to the Work may include an increase or decrease in the quantity, or a change in character, quality, kind or execution of the Work or any part thereof, as well as changes to Appendix C.

Nevertheless, Company has no right to order Variations to the Work which cumulatively exceeds that which the parties could reasonably have expected when the Contract was entered into.”

- 1. Company wants to modify some of the valves
- 2. Company wants to replace some of the valves with Contractor’s new updated valves
- 3. Company wants to modify some of the same valves at Statfjord.

Variations – the NTK/NF system

Art. 12	Right to vary the Work
Art. 13	Effects of a Variation to the Work
Art. 14	Issue of Variation Orders
Art. 15	Consequences of Variation Orders – Disputes about Consequences
Art. 16	Dispute as to whether a Variation to the Work exists. Disputed Variation Order
Art. 17	Cancellation
Art. 18	Company's Right to Temporary Suspension of the Work

Variations the NTK/NF-system; Company's right to instruct

- Art. 12.1
- Company has the right to order such Variations to the Work as in Company's opinion are desirable.

Variations to the Work may include an **increase** or **decrease** in the quantity, or a change in **character, quality, kind** or **execution** of the Work or any part thereof, as well as changes to **Appendix C**.

Nevertheless, Company has no right to order Variations to the Work which **cumulatively exceeds that which the parties could reasonably have expected** when the Contract was entered into.

- Art. 14.1
- All Variations to the Work shall be made by means of a **Variation Order** issued by Company in accordance with the provisions of this Article.
- Art. 14.2
- A Variation Order shall be expressly **identified as such** and be submitted on a **prescribed form**. The original version of the Variation Order shall at least contain a **description** of what the variation work consists of. The effects on time and price and weight, if any, which are not set out in the original version, shall be stated in the final version of the Variation Order.

- Art. 13.1
- All of **Contractor's obligations** under the Contract also apply to Variations to the Work, unless otherwise agreed.
- Art. 13.2 - price
 - Norms and rates in the contract, ..., adjusted norms and rates
 - Other operations: general pricing level of the contract
- Art. 13.4 – schedule
 - Agreed on the individual VO to the extent possible.
 - Special rules on accumulated effects

- Disputes about consequences
- 15.1
- On receipt of a Variation Order or an instruction as set out in Art. 16.1, Contractor shall **implement** it without undue delay, **even** if the effects of the Variation Order or the instruction have **not yet been set out**.
- 15.2
- If the parties agree that there is a Variation to the Work, but disagree as to the effects on the Contract Price, then Company shall pay Contractor **provisional compensation** calculated in accordance with Art. 13.2.
- Unless the payment for the variation work has been submitted to **arbitration within six months** of the issue by Company of the Variation Order containing price consequences, the compensation set out therein shall be considered **final**.

- Art. 16.1
- Company's Representative may, by **written instruction** or by **minutes of meetings** signed by or confirmed in writing by him, require the **performance** of a specific piece of work. If the work so required in the opinion of Contractor is **not part of his obligations** under the Contract, then Contractor shall submit a **Variation Order Request** to Company and as soon as possible thereafter prepare an estimate in accordance with Art. 12.2.

If Contractor has not presented a Variation Order Request within **21 Days** after Company has required such work to be performed in the manner prescribed in the first paragraph, then he **loses the right** to claim that the work is a Variation to the Work.

- A Variation Order Request shall be **expressly identified** as such and be presented on a **prescribed form**. It shall contain a specified **description** of the work the request concerns and a **reference** to the instruction upon which Contractor considers the request to be based.

- Art. 16.2
- If Contractor within the time limit has made a request as stated in Art. 16.1, Company shall, within **21 Days** after receiving the request, either issue a **Variation Order** in accordance with the provisions of Art. 14 or a **Disputed Variation Order**. If Company is of the opinion that this work is **a part of the Work**, a Disputed Variation Order shall be issued. If Company will claim that Contractor's request is **submitted too late**, this must be notified within 21 Days after receipt of the Variation Order Request.
- Upon receiving a Disputed Variation Order, Contractor shall **implement it without undue delay**.
- Provisional payment towards a guarantee

- 16.3
- Each of the parties may request that the question as to whether the work covered by a Disputed Variation Order is a **part of the Work** or whether the **deadline** in Art. 16.1 has been complied with, shall be provisionally decided by an **expert**.
- 16.4
- If the decision has not been submitted to arbitration within six months after the date of the provisional decision, then that decision shall become final.
- 16.5
- If neither of the parties have requested a decision under Art. 16.3 nor submitted the matter to **arbitration** within **eight months** after the issue of the Disputed Variation Order, it shall be recorded on the Disputed Variation Order that it is deemed to be a part of the Work.

Other grounds for a VOR

- Art. 3.3 – Impediments by Company personnel
- Art. 4.3 – Other Contractors performing work on the Contract Object
- Art. 5.1 – Change of laws, requirements, trade union agreements
- Art. 6.4 – defects, discrepancies and inconsistencies discovered in documents or materials
- Art. 8.3/8.4 – Subsupplies
- Art. 11.2 – delay due to Company risk
- Art. 11.4 – Forsering
- Art. 18.3 - Suspension
- Art. 27.1 – Breach of contract/defective fulfillment of Company's obligations
- Art. 28.3 – Force Majeure

- Very formalistic system – both parties need a follow-up system and clear internal procedures
- Make sure the people administering the contract has the necessary understanding of the system – especially important regarding notice.
- Use of internal contract specialists?
- Use the agreed system!
- For Contractors:
 - Know the contract!
 - Submit the VOR immediately – do not wait until the consequences are established.
 - Make sure that you have control!
 - Consider having a full log, also including – «potential VORs» - but make sure to send the VOR, not only the PVOR.
- For Company:
 - Use the DVO-mechanism
 - Use the VO system.
 - A VOR is not a declaration of war

- Service-agreement for certain valves on Gullfaks, originally delivered by Contractor. Scope include refurbishment when necessary.
- Standard VO – provision:
- “Company has the right to order such Variations to the Work as in Company's opinion are desirable.

Variations to the Work may include an increase or decrease in the quantity, or a change in character, quality, kind or execution of the Work or any part thereof, as well as changes to Appendix C.

Nevertheless, Company has no right to order Variations to the Work which cumulatively exceeds that which the parties could reasonably have expected when the Contract was entered into.”

- 1. Company wants to replace some of the valves with Contractor’s new updated valves
- 2. Company wants Contractor to perform service on some valves at Gullfaks that is not delivered by Contractor
- 3. Company wants Contractor to modify some of the same valves at Statfjord.

Indemnities (knock for knock)

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-
- Sunshine AS has delivered high-tech equipment to Snake Oil AS. The equipment is delivered to the Mongstad base and the value of the equipment is 200 MNOK. Snake Oil AS is to transport the equipment to the Snurrebass field for installation. The ownership is transferred when it is fully installed by Sunshine AS and accepted by Snake Oil AS.
 - When loading the equipment onto the platform, the crane fails and the equipment is lost at sea.
 - Who carries the loss?

The knock-for-knock – distribution of loss

- Fundamentally different from ordinary regulations related to liability and loss
 - Main reasons for use:
 - Insurance
 - Prevent disputes
- Typically used in all offshore contracts
- The knock-for-knock as a concept is not very complicated (unlike other indemnity provisions)
- Small difference in wording could have significant impact on risk
- Important clauses are:
 - The knock-for-knock clause
 - The «Company Group» definition
 - The «Contractor Group» definition
 - The «Claims» definition (if any – not in the NTK)
 - Loss of or Damages to the Deliverables or Company's Materials (article 29 of the NTK)
 - Insurance clause

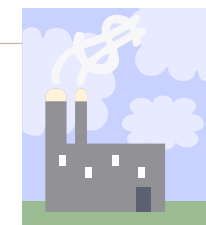
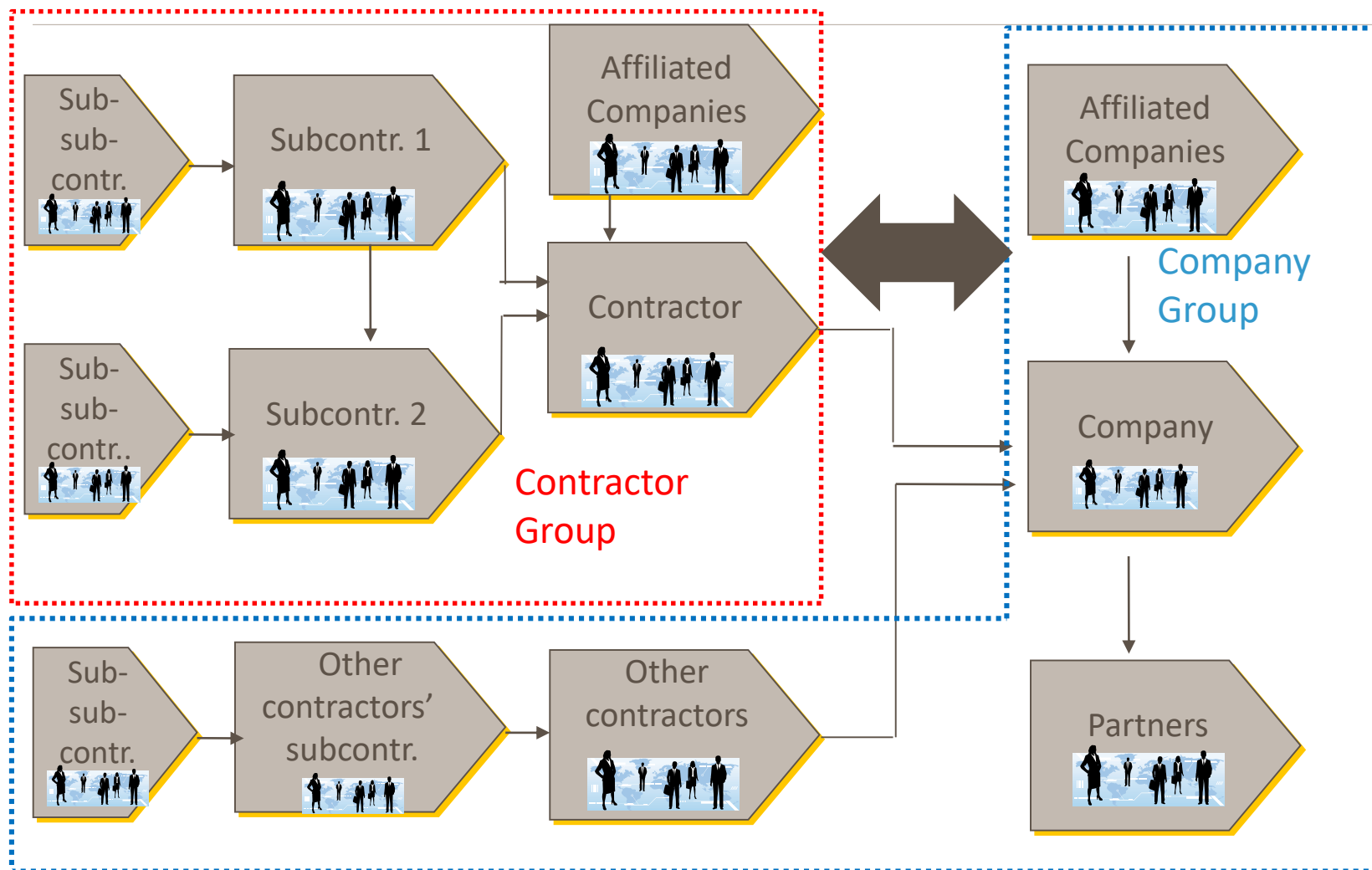
What does "indemnification" imply?

- Under Norwegian law no difference between "indemnify from" and "save, indemnify, defend and hold harmless from"
- The indemnifying party agrees that the indemnified party shall be without liability \Rightarrow can therefore not present any claim or invoice covering "indemnified costs"
- The indemnifying party must to the extent possible/practical ensure that members of his own liability group waive the right to present claims to the indemnified party covering "indemnified costs" to the extent possible/practical \Rightarrow indemnification provisions are therefore often passed on "back to back"
- If the indemnified party receives a claim from a member or the indemnifying party's group and has to pay compensation to that member, the indemnifying party will have to refund the costs to the indemnified party \Rightarrow often contract provisions entitling the indemnifying party to take over the treatment of such claims

The knock-for-knock – Company and Contractor Group definition

- Contractor Group means Contractor, Affiliated Companies participating in the Work, Subcontractors and their contractors and subcontractors, participating companies in an enterprise established for the performance of the Work, and the employees of the aforementioned corporate entities.
- Company Group means the Group, each of the participants therein, their Affiliated Companies, Company's contractors and their contractors and subcontractors, to the extent they are involved in the project and the employees of the aforementioned corporate entities and others whose services are used by Company.

"Knock-for-knock" as defined in NTK



"Other third parties"



Knock-for-knock in brief:

- Indemnification between Contractor Group and Company Group with respect to damage to or loss of property or personnel belonging to own "Group"

“Big” or “small” Company Group

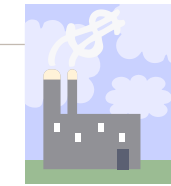
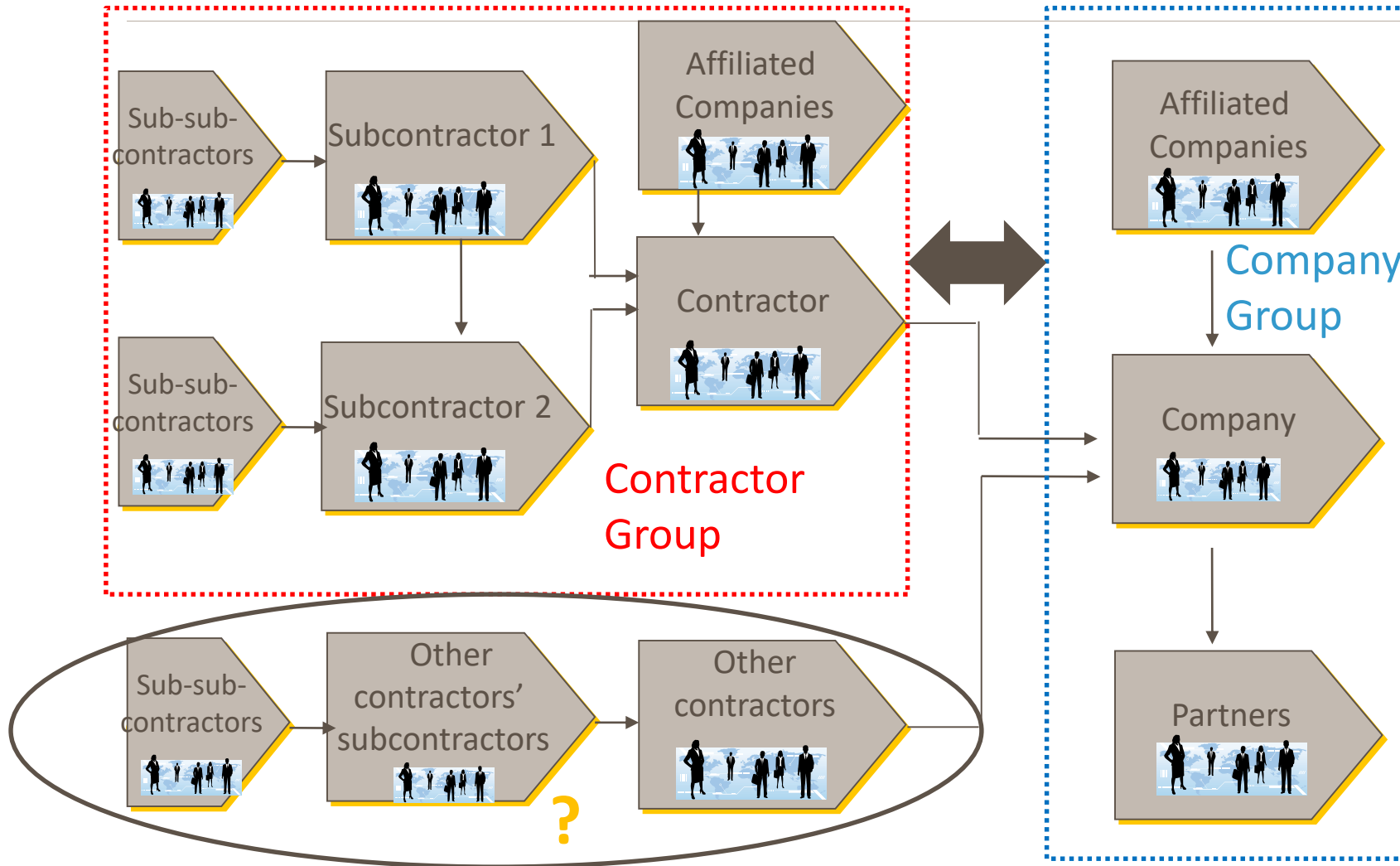
Big Company Group, e.g. NTK

- 1.24 Company Group means the Group, each of the participants therein, their Affiliated Companies, Company's contractors and **their contractors and subcontractors, in as much as the abovementioned are involved in the project**, and the employees of the aforementioned companies and others whose services are used by Company,

Small Company Group, e.g. CRINE LOGIC Construction, edition 2:

- 1.2 “COMPANY GROUP” shall mean the COMPANY, its CO-VENTURERS, its and their respective AFFILIATES and its and their respective directors, officers and employees (including agency personnel), but shall not include any member of the CONTRACTOR GROUP.

Knock-for-knock with small Company Group



"Other third parties"



- Without other regulation Company's other contractors and their subcontractors fall outside the liability scheme and remain just "other third parties"
- Solution 1: Extensive MHH (Mutual Hold Harmless) agreements need to be in place between Contractor and all other contractors
- Solution 2: 'Conditional Pass Through' regulations whereby Contractors indemnities in favour of other contractors only apply if they have given similar indemnifications in favour of Contractor in their contracts with Company.

- Insurance:
- Article 31.1 of NTK
 - The policies shall state that Company Group and Contractor Group are co-insured, and the insurers shall waive any right of subrogation against Contractor Group.
- Article 31.2 of NTK:
 - The policies shall state that the insurers waive all rights of subrogation against Company Group.
- Concept of subrogation

The knock-for-knock – the clause

- 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 which might arise in connection with the Work or be caused by the Deliverables in their 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.

- 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 which might arise in connection with the Work or be caused by the Deliverables in their 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.

The knock-for-knock – the clause

- Are there any limitations in the wording of the knock-for-knock clause?
 - “This applies regardless of any form of liability, whether strict or by negligence, in whatever form, on the part of Company Group” ref article 30.1.
 - “This applies regardless of any form of liability whether strict or by negligence, in whatever form, on the part of Contractor Group” ref. article 30.2.
- Does background law impose any limitations of the knock-for-knock clause?

Damage to the Contract Object and CPI, special regulation

29.1 If loss of or damage to the Contract Object occurs between the start of the Work until the time when the Delivery Protocol has been signed or should have been signed in accordance with Art. 19.1 and 19.2, Contractor shall carry out necessary measures to ensure that the Work is completed in accordance with the Contract. The same applies if any loss of or damage to Materials or Company Provided Items occurs while they are at Site under Contractor Group's safekeeping and control.

(...)

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,**

Is Knock-for-knock always the correct approach?

- Always the correct approach?
 - Rental
 - Downhole equipment
 - Contracts where (there is a possibility that) transfer of title and delivery of goods do not take place at the same time. Special conditions regulating damage to the goods needed.
 - Contracts involving "Company Provided Items" other items owned by Company but used or temporarily held by Contractor ref article 29 of NTK
 - Contracts concerning transportation of Company's goods and/or personnel
 - Rectification of defects – knock-for-knock to apply?

- Third party loss – who's risk?
- Blow out – Company risk (not in the NTK)
- Infringement of patent or other industrial property rights – Contractor risk unless:
 - such an infringement results from the use of Company's Documents, Company's Materials, Frame Agreements that Contractor is instructed to use, process licences nominated by Company from Third Parties or is the result of compliance with an instruction from Company
- Obligation to notify if it receives a claim that the other party is obliged to indemnify and the other party shall take over treatment of the claim.

- Sunshine AS has delivered high-tech equipment to Snake Oil AS. The equipment is delivered to the Mongstad base and value of the equipment is 200 MNOK. Snake Oil AS is to transport the equipment to the Snurrebass field for installation. The ownership is transferred when it is fully installed and accepted by Snake Oil AS. When loading the equipment onto the platform, the operation fails and the equipment is lost at sea.
 - Who carries the loss when?
- The fault of the accident is due to negligent fault by the Snake Oil AS' employee when lifting the equipment on board the platform?
- The fault of the accident is due to negligent fault by the Crane supplier during modification of the crane?
- The fault of the accident is due to the Snake Oil AS' employee on purpose dumping the equipment at sea when lifting the equipment on board the platform?
- The fault of the accident is due to the Snake Oil AS' employee upon instruction from CEO Montgomery Snake to dump the equipment at sea when lifting the equipment on board the platform?

Limitation of liability

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Limitation of liability – Do you need it??



-
- Delayed delivery
 - Defects
 - Damages
 - The other party's property
 - Third Party property
 - Contract object
 - Pollution
 - Financial loss
 - Lost profit
 - Other indirect costs.
 - Which risks will you accept?

- Background:
 - A small delay may cause substantial loss for Client
 - A substantial delay may cause no loss for Client
 - LDs will cap the liability, but also cover loss that may not have occurred
- Key questions
 - LD per day
 - Grace period
 - % of Contract Price or delayed item
 - Cap
 - Gross negligence/willful misconduct
 - Sole remedy

- **NTK 15**

- *Er Arbeidet **forsinket** i forhold til de **dagmulftsanksjonerte milepæler** som er fastsatt i Vedlegg C, skal Leverandøren betale dagmulkt til Selskapet **som fastsatt i Vedlegg B**. Contractor's cumulative liability for liquidated damages under the Contract is limited to **[10]% of the Contract Price**. However, the cumulative liability for liquidated damages shall **never exceed** NOK Million. The provisions set out in Art. 11, 24 and 26 are Company's **sole remedies** against Contractor's delay.*

- **Oil-Comp. standard**

- *If CONTRACTOR is in delay, CONTRACTOR shall pay liquidated damages to COMPANY. The daily liquidated damages for not meeting a milestone specifically defined in the CONTRACT as a **penalty milestone** shall be **0,3% per DAY** of the **PURCHASE ORDER value** unless otherwise defined in Appendix B – Compensation. Unless otherwise agreed, the date of completion of the WORK or specific part thereof under each PURCHASE ORDER shall be considered penalty milestones irrespective of whether they are specifically defined as such or not.*
- *CONTRACTOR's cumulative liability for liquidated damages is **limited to twenty per cent** (20%) of the **PURCHASE ORDER value**.*
- *If the delay is caused by **gross negligence or wilful misconduct** on the part of **CONTRACTOR** or **someone for whom CONTRACTOR is responsible**, COMPANY may, instead of the liquidated damages claim compensation*

- Types of liability
 - Rectification
 - Cost of rectification by others
 - Damages
- Key questions
 - Limitation of certain costs
 - Dismantling
 - Board and lodging
 - Transport
 - Heavy lift, diving...
 - Limitation of the Client's right to rectify at Contractor's cost
 - General cap on liability for defects?
 - Gross negligence/willful misconduct
- Liability for errors in Company's documents

- NTK 15 pkt. 25.4
- Contractor's liability for rectification work after the Delivery Protocol has been concluded and for damages under Art. 25.3, shall **under no circumstances include** costs relating to: a) **dismantling** of other objects than the Contract Object to provide access to the Contract Object, or b) **board and lodging offshore**, or c) **transport** to, from and at the offshore location, or d) **heavy lift operations offshore**, or e) extra costs associated with **guarantee work performed below the water line**

Liability for the other party's people and property

- Knock for knock – separate part of the presentation

Damage to the Contract object (separate part of presentation)

- Starting point: Contractor's risk until delivery
- Contracts with Company provided CAR-insurance may have other solutions
 - Often relevant with project deliveries

- Normally no provisions
 - Background law – negligence based liability
- Special risks should be regulated:
 - Pipelines
 - Third party installations
 - NSC 05 art. 30.3 fourth paragraph “Company shall **indemnify** Contractor Group from and against any **loss or damage** to **property** of anyone other than Contractor Group and Company Group **on which** Contractor according to the Contract shall perform part of the Work, including crossing of umbilicals, cables and pipelines, if any.”

- Background:
 - Some losses are to indirect – hard to foresee and the risk is hard to price
 - Better for the parties to consider insuring the losses
- “Company shall indemnify **Contractor Group** from Company Group's own **indirect losses**, and Contractor shall indemnify Company Group from Contractor Group's own indirect losses. This applies **regardless of any liability**, whether strict or by negligence, in whatever form, on the part of either group and - except as stated in Art. **17.3 and 24.2** - regardless of any other provisions of the Contract.
- Indirect losses according to this provision include but are not limited to loss of **earnings**, loss of **profit**, loss due to **pollution** and loss of **production**.”

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- “When all else fails”
 - Limiting the total exposure under the contract
 - NB – does not limit the obligation to perform contractually
 - NB – make sure it covers what you want.

- **NTK 32.2**
- Contractor's total liability for **breach of contract**, including liability in accordance with Art. 24, 25 and 26, and regardless of whether the Contract is terminated or not, shall be limited to [25]% of the **Contract Price**. However, this global liability shall not under any circumstance exceed **NOK million**.

30. LIMITATIONS OF LIABILITY

30.1 Limitations of Liability

(a) Limitation of Liability before completion of the WORK

Subject to the CONTRACTOR having used all reasonable endeavours to complete the WORK and to comply with its obligations under the CONTRACT, the CONTRACTOR's total cumulative liability to the COMPANY, including any liability arising as a result of suspension under Clause 14 and/or termination under Clause 26 arising out of or related to the performance of the CONTRACT shall be limited to the sum specified in Appendix 1 to Section I – Form of Agreement or in absence of any such sum, the CONTRACT PRICE.

(b) Limitation after the date of completion of the WORK

After the date of completion of the WORK, the CONTRACTOR's total cumulative liability to the COMPANY arising out of or related to the performance of the CONTRACT shall be limited to the sum specified in Appendix 1 to Section I – Form of Agreement or in the absence of such sum the CONTRACT PRICE.

Provided however, that the above limitations under Clause 30.1(a) and Clause 30.1(b) above shall not apply to any liabilities assumed by the CONTRACTOR under Clauses 16, 18, 20, 21, 24 and 28 and the limitation under 30.1(b) shall not apply to any costs arising from any cause of action of the COMPANY notified to the CONTRACTOR before the date of completion of the WORK.

- Must haves:
 - Total cap – limitation of liability
 - LDs – Cap and sole remedy
 - Indemnity for indirect loss, including pollution
 - Knock for knock?
- Nice to have
 - Cap on defect liability
 - But some restriction on certain costs may be a must have.
 - Liability for errors in Company's Documents

IPR-clauses

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- What is IPR?
 - Ntk15 terms: “Commercial and technical information, including drawings, documents and computer programs regardless of method of storage, and copies thereof”
- For a technology based company, this is very important
- When and why is this important?
- What is important to customer – what is important to seller?
 - Know which information you want to protect
- Increasingly important due to focus on sharing?

- Key parts of a standard IPR-clause
 - Ownership to pre-existing IPR – each party should own its pre-existing IPR
 - Always?
 - Ownership to inventions developed during the performance of the contract – pay attention to this
 - Customers license to use suppliers IPR – pay attention to this

- Ownership to pre-existing IPR
 - Company's IPR: Commercial and technical information, including drawings, documents and computer programs regardless of method of storage, and copies thereof, provided by Company to Contractor shall be the property of Company. The same applies to information developed by Contractor mainly on the basis of information provided by Company.
 - Contractor's IPR: Commercial and technical information, including drawings, documents and computer programs regardless of method of storage, and copies thereof, provided by Contractor to Company shall be the property of Contractor. The same applies to information developed by Contractor mainly on the basis of such information and all other information developed by Contractor Group in connection with the Work and which is not comprised by Art. 33.1.

- Ownership developed during the performance of the contract
 - Inventions made by Contractor during the performance of the Work mainly based on such information as stated in the first paragraph shall also be the property of Company. This shall, however, not apply, if the rights of a Third Party prevent it and Contractor has made reasonable efforts to obtain the right.
 - Contractor shall notify Company of such inventions which shall be Company's property. Contractor shall provide the necessary assistance to enable Company to acquire the patents to the inventions. Company shall pay Contractor for all reasonable costs in connection with such assistance, including compensation to Contractor's employees or others, in accordance with applicable law or general agreements concerning compensation for inventions.
 - Such information as stated in the first paragraph and inventions as stated in the second paragraph shall not be used by Contractor other than for the purpose of the Work. All documentation, all computer programs and copies shall be returned to Company at the expiry of the Contract, unless otherwise agreed.
 - Inventions not comprised of the above shall be Contractor's property

- Customers license to use suppliers IPR:
 - Contractor shall give Company an irrevocable, royalty-free, non-exclusive right to use information mentioned in the first paragraph and inventions mentioned in the second paragraph to the extent necessary in connection with the operation, repair, modification, extension, rebuilding and maintenance of the Contract Object.
 - Contractor shall give **Company Group** an irrevocable, royalty-free, non-exclusive, **transferrable** right to use **(and have used)** information mentioned in the first paragraph and inventions mentioned in the second paragraph to the extent necessary in connection with the operation, **sale**, repair, modification, extension, rebuilding and maintenance of the Contract Object.

- CONTRACTOR, warranting that it is entitled to do so, grants to COMPANY GROUP the irrevocable, non-exclusive, perpetual, worldwide, royalty-free right and licence, with the right to grant sub-licences, to possess, and use any of CONTRACTOR's IP RIGHTS embodied in SCOPE, including the right to import, export, operate, sell, maintain, modify and repair SCOPE.
- CONTRACTOR, warranting that it is entitled to do so, grants to COMPANY the irrevocable, non-exclusive, perpetual, worldwide, royalty-free right and licence necessary to operate, maintain and repair SCOPE.

- Contractor shall indemnify Company Group from claims resulting from infringement of patent or other industrial property rights in connection with the Work, or Company's use of the Deliverables. However, this does not apply where such an infringement results from the use of Company's Documents, Company's Materials, Frame Agreements that Contractor is instructed to use, process licences nominated by Company from Third Parties or is the result of compliance with an instruction from Company. In such cases Company shall correspondingly indemnify Contractor Group.
- If infringements of patent or other industrial property rights that Contractor is to indemnify Company from are discovered, then Contractor shall, for his own account and without undue delay, provide the necessary licence rights to enable Company to utilise the Deliverables for the purpose for which they were intended. If Contractor does not provide such licence rights at the latest one month after he was notified of such infringements, he shall, without undue delay and for his own account, make the necessary modifications of the Deliverables in order to ensure that Company's continued use is not in contravention of the rights of a Third Party.
- Contractor's liability shall be limited to infringements in the country in which the Deliverables, in accordance with the Contract, are to be used, and in the countries in which the Site(s) are located.

That's it😊



- Takk for oppmerksomheten😊





KLUGE