

# KNOCK-FOR-KNOCK CLAUSES UNDER BRAZILIAN LAW



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Knock-for-knock indemnity clauses are common in the offshore sector and are largely adopted by most international contract forms, such as BIMCO standard charter contracts. Traditional knock-for-knock indemnity principles provide certainty and make the responsibilities and liabilities of the parties clear and simple from a risk and insurance perspective. Each party will obtain insurance or self-insure the risks related to injury to its personnel and damage to its property.

## COMMON CONTRACTUAL TERMS IN BRAZIL

In Brazil, there are two main contractual regimes adopted by the offshore sector. International oil companies adopt their own contract terms or the traditional standard forms (such as BIMCO), usually subject to foreign law and jurisdiction and incorporating the knock-for-knock principle. Alternatively, *Petróleo Brasileiro SA* (Petrobras), a Brazilian state oil major, adopts its own contract terms, subject to Brazilian law and jurisdiction. Petrobras represented over 95% of the chartering activities in the Brazilian offshore sector according to the 2010 statistics published by the Brazilian Waterway Transportation Agency. Petrobras contract terms do not provide for knock-for-knock indemnities, but instead, incorporate the Brazilian civil code rules subject to limited indemnity amounts and exclusion of indirect damages and loss of earnings.

## BRAZILIAN CIVIL LAW

Brazilian law is based on civil rules, and indemnities are governed by the Brazilian civil code. A basic principle of Brazilian civil law is that any person who causes damage to another must indemnify the aggrieved party in a form proportional to the damage suffered. Additionally, the Brazilian civil code provides that each party shall be fully responsible for the acts of its employees and subcontractors.

Under section 927 of the Brazilian civil code, a party may be under an obligation to repair the damage, regardless of fault, in the circumstances specified by the code or when the activity that caused the damage included a risk to the environment or to third parties. By virtue of the above legal provisions, service providers may be fully liable for the damages suffered by their clients, the only exception being damages caused by an act of God.

## ACCEPTANCE OF KNOCK-FOR-KNOCK?

It will be clear from the above that the principles adopted by Brazilian law are quite different from the principles set out in the standard knock-for-knock clauses. Notwithstanding this, Brazilian law accepts freedom of contract, which means that the parties are free to establish the clauses and conditions of the contracts as long as such terms and conditions do not contradict matters of public order or affect third parties' interests.

Although the Brazilian courts could find a knock-for-knock clause to be valid if the contract was freely negotiated between the parties, the clause could contradict matters of public order or affect third parties' interests. For example, a limitation of liability clause under a contract of carriage is considered by the Brazilian courts as contrary to Brazilian law and therefore null and void.

The commercial and operational context of a contract of carriage for goods are of course quite different from the usual practice of offshore charter contracts, insofar as contracts for the carriage for goods, such as standard bills of lading, will frequently not be freely negotiated/agreed by the parties. The Brazilian courts have considered that the limitation of liability clause included in a bill of lading is onerous to the receiver and therefore not valid.

Offshore contractors and oil companies have a more even bargaining strength and despite the existence of the spot market, the charter contracts are usually fixed on a mid to long-term basis and have a more open and reciprocal capacity for negotiating the contractual conditions. It therefore appears to be unlikely that the Brazilian courts would consider an offshore contract to be unfair due to a lack of bargaining strength. It is important to note however that the Brazilian courts have never been asked to consider a knock-for-knock clause, as international offshore contracts, in which such clauses are included, usually adopt foreign law and jurisdiction regulations.

## CONCLUSION

There is a significant and immediate need for offshore equipment and services in Brazil, which cannot be satisfied by domestic Brazilian companies alone. The number of foreign companies working in the Brazilian offshore market will continue to increase for the foreseeable future, bringing with them internationally recognised contractual terms that will likely include knock-for-knock liability regimes. We therefore expect that knock-for-knock clauses will be duly considered by the Brazilian courts in the future and endorsed as a valid and efficient condition to regulate offshore contracts in Brazil.