

KNOCK-FOR-KNOCK CONTRACTS ARE ENFORCEABLE IN THE US



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In the Standard Club's New York office, we occasionally hear from colleagues and members abroad that courts in the US will not enforce provisions in a contract that purport to relieve one party for the consequences of its fault/negligence. It is correct that courts in the US generally interpret such clauses strictly and resolve any ambiguities against the party seeking to relieve itself of liability for the consequences of its own actions. However, US courts will enforce properly worded and unambiguous commercial contracts that achieve this result, absent a statutory or judicial precedent to the contrary. This is especially the case when the language is mutual and in favour of both parties, as they are in 'knock-for-knock' agreements common in the offshore industry.

The source of this confusion relating to 'knock-for-knock' contracts in the US is not clear. It likely stems in part from judicial rulings in towage cases, which hold that a clause in a towing contract purporting to release the tug from liability for the tug's negligence is invalid and unenforceable. This remains the case in towage contracts; however, parties now invariably achieve a similar result by arranging for cross-insurance endorsements in which the tug is named as an additional insured and subrogation is waived. Courts in the US have upheld such insurance arrangements in contracts.

'Anti-indemnity' statutes passed by some states, notably Texas and Louisiana, the home of much of the offshore oil exploration industry in the US, are another source of concern. These statutes are a consequence of attempts by major oil companies to contractually require local providers of supplies and services in the oil industry to assume all liabilities, even if caused by the fault of the oil company. In effect, the oil companies were asking the local suppliers to indemnify the oil company even if the oil company's fault caused the damage. These 'anti-indemnity' statutes apply to contracts relating to oil and gas drilling activities and give rise to technical legal issues about whether they apply to maritime contracts and whether the party invoking the contract is entitled to its protection. While these statutes can doubtless be a trap for the unwary, parties active in the US offshore oil and gas industry, and their lawyers, are now well aware of them. Proper drafting and insurance arrangements can be made between parties negotiating in good faith such that a 'knock-for-knock' result can be achieved in a given case that is fair to all concerned.

Despite the *Deepwater Horizon* tragedy, the offshore oil industry in the Gulf of Mexico, and other coasts in the US for that matter, is not going away anytime soon. The world's need for oil and natural gas as well as the availability of oil and natural gas in the Gulf of Mexico and other US offshore waters is simply too large. Whatever operational concerns a member may have about operating in the US, a member need not have legal and insurance concerns. With proper advice and attention to detail, the legal and insurance risks are manageable.