Knock-for-knock – recent developments in Norway

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In a recent decision, the Norwegian Court of Appeal has refused to uphold contractual provisions regulating liability where the party seeking to rely on such provisions has been 'grossly negligent'. This article looks at the case concerned in more detail and the potential implications.

- Norwegian courts appear to be increasingly prone to set aside clauses that regulate liability on the basis of gross negligence.
- We cannot rule out that courts in other non-UK jurisdictions would not reach the same conclusion.

Case study
The case involved a collision between a shuttle tanker *(Navion Hispania)* and a Floating Storage Offtake unit *(Njord Bravo,* which services the Njord field in the North Sea). The collision was caused by a reported failure of the shuttle tanker's dynamic positioning system, which resulted in oil production on the Njord field being shut down.

Statoil Petroleum AS (Statoil), as the field operator, had entered into sales agreements to purchase oil from most of the licensees of the Njord field. These agreements were on FOB terms, which meant that Statoil was responsible for arranging transportation from the field, and they contained a standard exclusion of liability for consequential losses.

Statoil chartered in shuttle tankers, including the *Navion Hispania,* to transport the oil from the Njord field and several other fields in the North Sea under a contract of affreightment (COA). The COA contained a knock-for-knock clause stating that the owner and Statoil, as charterer, would each indemnify the other for all claims in respect of damage to their own property as well as indirect and consequential losses from members in their respective owner's or charterer's group.

The licensees of the Njord field, as the owners of the *Njord Bravo*, brought an action in tort against the owner of the *Navion Hispania* for losses arising out of the collision, who in turn claimed an indemnity from Statoil under the knock-for-knock clause in the COA on the grounds that the licensees of the Njord field were included in the term "*its Licensees*" within the definition of the "Charterer's Group". Statoil argued that "*its Licensees*" referred to licensees on fields where Statoil itself was a licensee (Statoil was not itself a licensee of the Njord field when the incident occurred).

There were two main issues that were considered by the court:

1. Did the exclusion for consequential losses contained in the sales agreements protect the *Navion Hispania* on the basis that it was a subcontractor of Statoil under these agreements?
2. Were the licensees included in the term "Charterer's Group" under the COA? If so, Statoil would be obliged to indemnify the *Navion Hispania* for the claim from the licensees.

Court's decision

The court found that the owner of the *Navion Hispania* acted as Statoil's subcontractor under the sales agreements, so the exclusion for consequential losses applied. However, the court considered that they had been grossly negligent and were therefore prevented from relying upon the exclusion of liability clause.

Although gross negligence was not argued in detail during the hearing, the court placed significant weight on an internal incident report issued by the *Navion Hispania* interests following the incident. The report identified a number of deficiencies with the shuttle tanker and its procedures that the court considered amounted to a grossly negligent breach of their general duty of care.

As regards the indemnity, the court found that the licensees were not part of the "Charterer's Group" on the basis that Statoil was not itself a licensee of the Njord field. Consequently, Statoil was not obliged to indemnify the *Navion Hispania* in accordance with the knock-for-knock clause.

Interestingly, the court set out that even if the licensees had been part of "Charterer's Group", the *Navion Hispania* could not have relied on the knock-for-knock because it had been grossly negligent in respect of the collision.

Implications

Norwegian courts appear to be increasingly prone to set aside clauses that regulate liability on the basis of gross negligence. We cannot rule out that courts in other non-UK jurisdictions would not reach the same conclusion.

Expressly stating that knock-for-knock indemnities will apply regardless of negligence or gross negligence will go some way to help, but the scope for knock-for-knock clauses to be overruled in the event of gross negligence remains uncertain.