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Company's Breach of EPCI Contracts

An investigation of Company's interference as breach of Contract in particular

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1 Introduction

1.1 Introductory Remarks

This thesis will mainly be an accountancy for breach of Contract by the part of Company, interference in particular, in relationships that are executed by means of the Norwegian Total Contract 2007 (NTK 07), as of now referred to as “The Contract”. A significant amount of the deliveries and components on existing installations and provisions of new structures on the Norwegian continental shelf are to a large degree contracted on the basis of either the Norwegian Fabrication contract 2007 (NF 07) or the Norwegian Total Contract 2007 (NTK 07). Said standards are used by Statoil who is the dominant operation on the Norwegian shelf and by several other Operators as well. This means that the standards in question is used to a large extent in Norwegian sector and thus very applicable for EPCI projects which is the main reason for using the documents for basis in this thesis.

The purchaser in the standard contract is typically a Operator acting on behalf of a production license hereinafter called “Company” while the other party whom are supplying the services and/or goods to the Company hereinafter are called “Contractor”.

The scope of work under an EPCI contract contains Engineering, Procurement, Construction and Installation. This normally means a long-term commitment for the parties that are involved, and a certainty of variations throughout the commitment. For that reason, projects that are under an EPCI Contract require a detail regulated Contract, as well as flexibility in relation to the performance of the work. None the less, unforeseen occurrences will take place and in spite of detailed contracts, disputes can arise when one of the Contract parties is unable to fulfill its Contractual obligations.

1.2 Scope of thesis

The scope of this thesis is to give an overview of Company's main- and side obligations under the Contract and an assessment of the consequences of Company's breach thereof, with a particular evaluation of Company's unwanted interference in the project.

2 Sources of Law

2.1 Overview

The main basis and focus for the scope mentioned above will be NTK, although other Standard-form Contracts¹ and Background rules of Norwegian Contract law² will be used in section 8: *Various forms of Company's breach* in order to get a broader prospective on the topic. In the following there will be a brief introduction of the legal sources that will be used in this thesis.

2.2 Pre- agreed Standard

NTK 07 will be used throughout the thesis as the main legal source. The reason for that is that the Contract is rather detailed in its regulations leaving a limited number of legal questions to be solved by background law. However, according to NTK Art. 38 the Contract "...shall be governed and interpreted in accordance with Norwegian law." which among others mean that it is to be subject to and interpreted in accordance with Norwegian mandatory Contract rules and principles of interpretation³, as well as Norwegian background rules of law. This also means that there are no rules of interpretation particularly for the agreed documents⁴, and the parties are obliged to interpret the Contract in accordance with the general Norwegian principles of interpretation. This of course, does not mean that there is no room for characteristic features that these types of Contracts have. Examples of such

¹ NTK, LOGIC,

² The Norwegian Sales of Goods Act= Kjøpsloven; LOV-1988-05-13-27, ref. www.clue.no

³ "Principles of interpretation= tolkningsprinsipper, ref. www.clue.no

⁴ *Agreed documents*= Standard Contract

characteristics are that they are comprehensive agreed documents, regarding large and complex performances etc.⁵ In addition it is rather important to note that the Contract contain an order of priority in Art.2.3 whereby it is decided that the conditions of Contract shall be superior to the Appendixes, while the Appendixes shall have priority in the listed order, in case of conflict.

Under the Norwegian contract tradition the undisputed starting point for the interpretation of a Contract will be the actual wording of the document.⁶ This has been established by Norwegian courts, first by a statement in a court ruling by the Supreme Court⁷ in 2003, followed by several court rulings to establish the principle⁸. In Rt. 2003 page 1132, the Supreme Court has stated that subjective aspects to the interpretation in commercial contracts may lead to another understanding than that which was intended in the wording of the contract. However, in the event of an established mutual understanding between the Contract parties, which clearly deviates from the common usage of the wording or expression, such understanding shall be the basis for the interpretation.⁹ It may thus be concluded that under Norwegian contract tradition the main target in relation to interpretation of contract wording will be to identify the parties joint intent and understanding of the wording, even if such joint understanding is in conflict with the common understanding of the wording or expression. However, if no so joint deviating understanding is found the interpretation will be based on a common use and understanding.

⁵ Kaasen (2006) p. 872

⁶ The wording of the Contract= Kontraktens objective ordlyd, ref. www.clue.no

⁷ Supreme Court= Høyesterett, ref. www.clue.no

⁸ See Rt. 2000 s. 806, Rt. 2002 s. 1155, Rt. 2003 s. 1132 and Rt. 2010 s. 1345

⁹ The Supreme Court has in Rt 2003 p. 1132 on page 1138 stated that: *Subjektive momenter ved fortolkningen kan imidlertid...I næringslivets kontrakter føre til en annen forståelse enn det som følger av kontraktens ordlyd. I de tilfeller det kan påvises at kontraktspartene har hatt en felles forståelse som avviker fra en naturlig forståelse av kontrakten, må den omforente forståelse legges til grunn. Det kreves i slike tilfeller relativt klare holdepunkter for at partene har vært enige om en avvikende forståelse.»*

It should be noted that the parties under an EPCI contract normally are a professional party, which means that it is expected that they actually check all parts of the Contract, including its appendixes prior to its signature of the document. It is in this context normally expected that the wording used is clear and that they express any motives that they regard as important in the contract.

Another element which is important to notice in connection with the interpretation of an EPCI contract is that normally the Contract is a product of a long, thorough and well documented tender process.

Normally the operator issue an “invitation to tender” to all applicable contractors for an EPCI project. Such invitation is normally based on a pre-engineering study (FEED) performed by a separate contractor prior to the invitation to tender. The FEED and other technical and geological information of the field forms the basis for the general technical solution that the operator foresee at the initial phase (often mentioned as Company Provided Documentation).

In an EPCI project the Contractor will normally be requested to suggest a solution based on the Company Provided Documents and tender a solution which often is down to functional requirements dictated in the invitation to tender in combination with a Lump-sum price. It should in this context be mentioned that a large part of the general engineering and all detailed design and engineering shall be done by Contractor after Contract award.

In broad terms it may be argued that the situation is; a premature project, tender commit to and promise of functional result of his work at a firm price, but when making his commitments Contractor does not really know what he actually has committed to deliver as this will depend and result from the detailed design and engineering which is yet to be performed. It is on this background not to wonder that disputes arise in EPCI projects.

The result of above situation is normally a lot of technical questions and clarifications are made during the tender phase. Further the “instruction to tender” part of the invitation to tender normally dictates that tender shall list all its legal, technical and commercial exceptions, clarifications or qualifications in a pre-agreed form. This form will normally be updated as the clarification and negotiations proceed and may together with other pre-contract documentation such as the actual tender from Contractor play a very important part of interpretation and disputes under EPCI contracts.

2.3 Background Law

NTK 07 consists of a set of contract terms that are comprehensive and detailed. This means that most legal disputes will be clarified by such. In addition and almost without exception the Contract will in addition to the Conditions of Contract consist of the Appendixes listed in Art.2.1 which is:

Appendix A: Scope of Work

Appendix B: Compensation

Appendix C: Contract Schedule

Appendix D: Administration Requirements

Appendix E: Company's Documents

Appendix F: Company's Deliveries

Appendix G: Company's Insurance

Appendix H: Subcontractors

Appendix I; Contractor's Specification

Appendix J: Standard Forms of Guarantees

Normally all the abovementioned sections of the Contract are very detailed meaning that a lot of information and answers normally are to be found in the contract documents themselves, or in the pre-contract documents, however in the event it is not addressed therein, the questions must be answered by means of Norwegian background Law.

The Norwegian Sale of Goods Act, The Norwegian Contract Act¹⁰ and to a certain extent the Norwegian Petroleum Act is the most likely legal source from the background rules of law. The Norwegian Sale of Goods Act is a non-mandatory Law, but can be used to solve a legal dispute between Company and Contractor because the relationship between the parties is of a professional kind, and the Contract Object is to be manufactured by Contractor—especially for Company.

Another key element that has to be in place in order for the Sales Act to function as a legal source is that: Contractor can not be providing a significant amount of the materials used for Contractor's production of the Contract Object. If that is the case, the Norwegian Sale of Goods Act cannot be applied as a legal basis¹¹. The thought behind this requirement is that if Contractor provides a significant amount of the materials, the “sales” aspect of the affair is non-present. The Sales Act is to apply for affairs regarding sales and purchasing of objects, not contracting relationships. This means that the decisive for the Sales Act to apply as background law under NTK is whether or not Company is supplying a significant amount of the materials or not.

Very often material and products have a long lead time which means that Company will often have to place order on components and material which are to be included in the Contract Item prior to the award of the EPCI Contract. However, the extent of the provided materials varies between projects. In order to determine if Company is supplying a significant amount or not it has been suggested that an assessment of essentiality has to be made, based on a collective assessment of the value of the materials as well as their importance for the function of the Contract Object.¹² Although such an assessment has to be made in each Contractual relationship, the main opinion on this has been that Company does not provide a significant amount of the materials and the law can be applied as background

¹⁰ The Norwegian Contract Act= Avtale loven

¹¹ See the Norwegian Sales of Goods Act Section 2 (1) 1. period: “skaffe en vesentlig del av materialet”

¹² See Kaasen (2006) p. 52

rules of law. However, this is only the case if the Contract, other agreements, established custom between the parties and binding commercial practice allow it to apply.¹³ Having said this, the Act was not made for Offshore- Contracts like NTK, and it would be a fair statement to say that its system and solutions are better suited for the traditional commodity trade.

2.4 Case Law

Legal decisions regarding NTK are mainly expert decisions or solved by arbitrations, more so than ordinary Court rulings. This is because the parties in these types of Contractual relationships often agree that legal issues will be settled by arbitration and not in Court. NTK, Art. 38.2 say that:

“Disputes arising in connection with or as a result of the Contract, and which are not resolved by mutual agreement, shall be settled by arbitration unless the parties agree otherwise...”

2.4.1 Arbitrations

Although far more disputes are solved by arbitrations than court rulings in relation to the Contract, the Supreme – and ordinary court rulings, which exists, will still be of interest as case law. However, their value as a legal source will depend on the similarities between the situation, which the court ruling was made on, and the situation it is intended to influence. If the situations are very different the court rulings value may decrease.

Case law as a legal source is a bit tricky because only a limited number of the rulings made by arbitrations are published. This means that it’s difficult to determinate if the published collection shows a accurate picture of the legal situation. This again can mean that arbitration rulings have little value as a legal source. According to legal theory, the published ar-

¹³ See The Norwegian Sales of Goods Act (kjøpsloven) Section 3.

bitration rulings should have the same importance as a lower court ruling.¹⁴ In this thesis, arbitration decisions will be used in order to illustrate problems and legal solutions.

2.4.2 Expert decisions

The established expert procedure in NTK means that Contractor can require an expert decision on whether or not an issued work requirement (Disputed Variation Order) is regarded as a variation to his Contractual Commitment.¹⁵ The Expert decision is provisional, and will not be final until six months after the date of the provisional decision¹⁶. Although such expert decisions should not be weighty in regard to the traditional structure of the sources of law, they may be useful with regard to interpretation related to the scope of work. It is however important to notice that the scope of the expert evaluation is limited to decide “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”. The expert shall not consider issues like price or schedule impact, nor any other legal or commercial issues under the Contract.

2.5 Other Standard-form Contracts

Other standard form Contracts will be used in this thesis as a way of showing a broader perspective on how Company’s Breach is governed in other standard-form Contracts. This may vary between various standard-forms Contract, depending on the field of industry as well as the influence of different countries established law and principles. In this thesis, the standard form Contracts, LOGIC and NS8405 will be used. LOGIC is the UK standard contract which has a wide range of offshore standards related to for example drilling, sub-sea and other offshore related areas including the EPCI area. NS8405 is a Norwegian on-shore total Contract, which build on NTK.

¹⁴ See Hagstrøm (2004) p. 56

¹⁵ See NTK 07 Art. 16.3

¹⁶ See NTK 07 Art. 16.4 3rd paragraph

2.5.1 LOGIC

LOGIC Contracts have been around since 1999 (The first addition of these model contracts were published in 1997, as” CRINE” contracts) for oil and gas operations. LOGIC stands for *Leading Oil and Gas Industry Competitiveness*, and is a set of agreed documents, applicable for EPCI situations. The model form contracts were conceived at a time when oil-prices were much lower than today, and the agenda was an initiative to save costs.

The model form contracts have a lot of similarities to the NF; *Norwegian Fabrication Contract*, but are different in some areas, particularly with regard to the definitions of COMPANY GROUP and CONTRACT GROUP. The NF standard definitions are including “the large family” consisting of licence participants, affiliated companies, Company’s contractors and their subcontractors and their employees in addition to Company it selves. The major difference is that the UK definition of COMPANY GROUP does not include Company’s other Contractors and Subcontractors working on the site. Instead the Crine/LOGIC system have introduced a Mutual Hold Harmless Deed (IMHH) whereby the UK based contractors sign up by means of granting a receiving a mutual hold harmless arrangement towards all other contractors that have entered the arrangement with regard to loss or damage to its property and injury or death to its personnel. This leads to the same knock for knock arrangement as under the NF system provided that the involved contractors have signed up to the system. It should be noted that some of the foreign based Operators have introduced the Logic contracts to the Norwegian shelf with the result that there is a hole in the indemnity system as the IMHH arrangement only apply for UK. To a certain extend this may be arranged by means of a project specific Mutual Hold Harmless arrangement between all contractors working on the project in question.

2.5.2 NS8405

NS 8405 was introduced in 2004 as the last” link” in the standardization of the Norwegian Onshore construction field. This Standard-form Contract is like NTK¹⁷ also inspired by NF 87¹⁸, and although The NS-standard and NTK-standard apply to different fields, they are similar in many ways. For instance, both Contracts are designed to apply to long-term and highly expensive projects. They are also adjusted to the situation where one Contract party is constructing an object on the terms of the other parties’ requirements. Timing is also crucial in both fields, and there’s a high risk of delays in projects both onshore and offshore.

Another resemblance between the Contracts is that they both have an established Variation Order system to handle the challenges that may occur in such a long-term project. The same system also handles Company’s / proprietors breach and establishes a duty for Contractor/ developers to inspect/ give notice of Company’s/proprietors performance. In this thesis, NS8405 will be used to give a broader prospective on Company’s breach.

2.6 Legal Theory

One of the main sources from legal theory used in this thesis is the book: “*Petroleumskontrakter, med kommentarer til NF 05 og NTK 05*”, written by Knut Kaasen, and published in 2006. As well as that the books: “*Obligasjonsrett*”, by Viggo Hagstrøm, published in 2003/ 2nd edition published in 2011. These books will be used as legal theory throughout the thesis. For further information on the various articles, books used as legal theory, please see the “*Complete Table of Reference*”, section 11.2.

¹⁷ See Section 5.2 *How NTK was made*

¹⁸ See Kaasen (2006) p. 47

3 Terminology

3.1 Overview

The meaning of a word or terminology can fluctuate between fields of industry and nations. In order to be precise and correct in statements and assumptions, it is important to understand the correct meaning of a term- especially when interpreting Contracts. This is especially important because the wording of the Contract is the primary legal source for interpretation. Although the presentation of some of the terms in the following may seem obvious, they are defined for the sake of the completeness.

3.2 Company

Company is in this relation the Contractual part that purchases the service/goods/object, which means that Company is Contractors Contract party.¹⁹

3.3 Company Group

Company Group is in NTK used as a term in relation to liability, indemnification and insurances,²⁰ in order to define and allocate the area and risk for such between Contractor and Company²¹ Company group means Company, participants in the license, affiliates thereof, all other contractors of Company working on the project and any tier thereof and the employees of the abovementioned and others whose services are used by Company.²²

¹⁹ See NTK Art. 1.24 and Kaasen (2006) p. 73

²⁰ NTK Art. 30 and 31

²¹ Company is in this relation identified with company group ref Art. 1.24

²² See NTK Art. 1.26 and Kaasen (2006) p. 74

3.4 Contractor/Contractor Group

Contractor means the contractual part that is supplying the service/goods to Company ref Art.1.15. Contractor Group is defined in Art.1.16 and means Contractor, affiliated companies, subcontractors and tier thereof and any employees of the abovementioned.

3.5 Scope of Work

According to Article 1.1, "Work" means "... all work which Contractor shall perform or cause to be performed in accordance with the Contract." The "Scope" or "Scope of Work" is a term that describe the work that Company require, which Contractor according to the Contract shall provide. Art. 2.1 Appendix A: Scope of Work, is a separate form of agreement which hold the necessary information on this.

3.6 Variation

The term "Variation" is used for any changes made to the original scope of work. This includes any adjustment that is done by Company and Contractor throughout the project, through the Variation Order system. According to the Contract, such variations are "legal change" of the Work.²³

3.7 Interference

There is no definition of the term "interference" in the Contract. This is because it is variations to the work that are made on the side of the Variation Order system, or are for some reason not captured by the VO- system. Such variations will often not be recognized as interference until Contractor begins to have trouble delivering in accordance with Schedule or within the agreed Contract price.

²³ See the Contract Part IV Art.12-16 for Variations.

The understanding of interference in this thesis is such actions or passive behavior on Company's account, that for some reason are not governed by the VO-system. This can be simple variations to the work, which are based on comments from Company.

Any Variation to the Work should by Contract be processed by issuing a Variation order²⁴. However, in practice this is not always the case, and when Variations are made without a VO, the proper compensation for Contractor, i.e. an increase in the Contract price or time schedule is not made. When such variations, on the side of the VO-track are made in large numbers, they can cause a lot of delay, extra cost etc. for Contractor.

Passive behavior on Company's behalf can also cause delays/ extra cost/ a stand still for Contractor. It is thought that passive behavior as such can be interference, but in this thesis, active involvement as interference will be the main focus of investigation.

According to the Contract; Art. 11.1 ref. Art 2. Appendix C, Company has to reply to communication with Contractor/make decisions etc. within an agreed period of time. If such is not done, this may be breach of Contract. Interference is interesting where Company is not in breach of such, but has by repeating slow response made problems for Contractor.

3.8 Breach of Contract

Breach of Contract is a term used when a Contract Party fail to fulfill its Contractual Obligations²⁵, and it can not be proved that such is due to circumstances which, the other Party can be held accounted for.²⁶ According to Article 27.1 this is characterized as “*defective fulfillment*” of obligations.

²⁴ As of now referred to as a VO/ see Art.14

²⁵ See Kaasen (2006) p. 581

²⁶ *Breach of Contract*= kontraktsbrudd/ mislighold, my translation in accordance with the wording in NTK Art. 27.1 and 28.1

4 Further Structure and method

The following part of the thesis will be an introduction to NTK and its relation to EPCI projects. There will also be an account for the Variation Order system as this is the Contracts “tool” for handling any variation or breach of Contract.

The next part of the thesis is an introduction to the parties Contractual Obligations. It is considered logical to introduce the parties’ obligations before accounting for breach of such. This way of structuring will allow the reader to fully understand the main part of the thesis.

Company’s breach is the first section of the main part of the thesis. This will be a review of various relevant forms of breach of Contract by Company. The investigation will mainly be on NTK, although legal grounds such as The Norwegian Sale of Goods Act and other Standard- form Contracts will be of comparison to get a broader view on the topic.

The second section of the main part is Company’s interference as breach of Contract. This will be accountancy of the term and investigation of its existence and if so weather or not such form of breach is governed by NTK. There will also be made some closing remarks on if and why interference is a current problem in the offshore petroleum sector.

5 NTK and EPCI

5.1 Starting point

In an EPCI project, both parties have several obligations in addition to the main obligations. For Company, such side-obligations are, obtaining governmental approvals and permits , approving Contractor’s drawings/specifications/procedures, providing Company information such as soil-conditions, map showing existing installations, pipelines and umbilical’s, provision of Company provided items ,consent of Contractor’s election of Sub-contractors , approve replacement of personnel/assets , issue Variation Orders , issued

delivery protocol/delivery certificate, completion certificate , acceptance certificate , provision of insurance (Builder All Risk) etc.

In order to structure and govern various issues that may occur in a long-term project, a detailed set of procedures and rules are required. NTK govern a wide range of circumstances, as its pre-agreed documents are designed with this type of project in mind. It is considered appropriate to introduce NTK in light of EPCI in this section of the thesis.

5.2 General information on NTK and EPCI

5.2.1 How NTK was made

NTK 07 is today the latest edition to the development of agreed documents that began in the late 1970s. The Contract builds on NF 07; *Norwegian Fabrication Contract 2007*, and there are still a lot of similarities between the two. The NF-standard was first formally presented in 1987, and revised in 1992 before NTK came about in 2000 parallel with NF 2000.

Although the NF standard had been established for fabrication of large components to the petroleum industry on the Norwegian continental shelf, there was a change in the development projects in the 19 hundreds. Contractors began to undertake the responsibility for larger deliveries, with the value up to several billion NOK. This required more fundamental and comprehensive designing and procurement by Contractor. Along with other factors the result was a more premature Contractual foundation and a larger risk for pricing, as well as more risk resulted from Contractor undertaking more of the project management.²⁷

As a result of some difficult negotiations, Statoil Hydro and TBL achieved a new set of agreed documents for EPC contracts agreed on more premature contractual grounds as well

²⁷ See Kaasen (2006) p. 23-18

as with the installation element; an EPCI Contract (Engineering, Procurement, Construction, installation).

5.2.2 The Structure of NTK

The contract consists of 38 Articles²⁸, written in both Norwegian and English. This is considered the main document of the contract. As well as the articles, the parties also signed a protocol concerning acceptance and usage of the contract. This protocol has five annexes to it, which contains various requirements and a list of agreed experts and arbitrators.

The protocols also mention areas where the contract is considered suitable, as well as “agreed documents”, and the parties’ obligation to use the contract. It is also worth mentioning that the permission to make contractual changes is expressed in the protocols, as well as the correct procedure when a Contract party does not wish to use the standard in accordance to the protocols content²⁹.

In addition to the documents mentioned above, there are various appendixes that specify and regulate important matters, such as Scope of work, compensation and contract schedule. These documents are not standard documents, but its users have developed a pattern of structure. The complete list of appendixes can be found in the contracts Art. 2.1, but any further mentioning here is considered off topic³⁰.

²⁸ Available on: <http://norskindustri.no>

²⁹ Kaasen (2006) p. 31-41

³⁰ 5.4: *The Commercial frames of the Contract* has further information on «Appendix B: Compensation»

5.2.3 The Commercial frames of the Contract

5.2.3.1 Article 2.1 Appendix B

In accordance with Article 20.1; “Company shall pay the Contract price to Contractor within the time limits and in accordance with the provisions stated in this Article and elsewhere in the Contract...”

Further information on the Contracts commercial frames is drawn up in Art 2.1; “The contract consists of these Conditions of Contract, a separate form of agreement, if drawn up and the following appendices:” “Appendix B: Compensation”. The prices in the contract will vary, but are commonly divided into two categories: Lump Sum and Provisional Sum.³¹

Lump Sum consists of a firm price for a particular defined part of the work. A Lump Sum regime will from a principal point of view imply that the Contractor carries the risk for cost over spending, but enjoys the benefit from reduced cost.³²

A Provisional Sum regime imply that the work will be paid on the basis of fixed rates³³ or reimbursed on the basis of Contractor’s cost plus a margin.

The decision of which price regime that shall apply is decided/defined by the Company in the Invitation to Tender. The strategy of which regime that shall be used depends on various circumstances such as the marked and the maturity of the work³⁴. Changes to the Work

³¹ Kaasen (2006) p.85

³² I.e. firm price – lower cost = increased profit

³³ E.g. A markup fee to cover internal cost and a profit i.e. cost + markup = price

³⁴ Is the statement of work (SOW) clearly defined or will it be developed in the preparation phase after an award of the EPCI Contract etc. Company will in many cases split the SOW and request Contractor to quote its bid partly based on Lump Sum and partly Provisional Sum

are in most cases reimbursed based on Provisional Sum, but can be subject to negotiations between Company and Contractor.³⁵

5.2.3.2 Output Obligations and Input Obligations³⁶

Contractor has in an EPCI relationship committed to deliver an object with specific qualifications, often called “functional requirements”. How these requirements are met is up to Contractor to decide. Contractor is free to choose how the object is made, as long as the requirements in the scope are complied with. Such functional requirements are also often referred to as “output obligations”.

In the opposite range of contract we will find the contracts whereby Contractor has an “input obligation”. A good example of such contracts are Charter Parties whereby the vessel owner has an obligation to provide a vessel with crew (without crew called Bareboat) whereby the charterer will utilize the vessel to perform various operations and activities. Whether or not the result of such offshore activities are successful or not is completely to the account of charterer, he will still have to pay for the vessel excepting only if the failure is due to breakdown of the vessel itself or other default on the part of vessel owner. In other words, vessel owner has a “input obligation” and not a “output obligation”.

The distinction of the terms mentioned above is very important in order to understand why Company interference becomes an issue for Contractor. Contractor’s freedom to choose how the scope is met is vital for its ability to meet the demands of the scope.

How Contractor has built its price offer is also worth mentioning in this context. Ideally the pricing will be agreed on a reimbursable basis in the event of a premature scope of work meaning that the Lump Sum agreements in relation to premature projects. The pricing

³⁵ See Sandvik (1966) for further information

³⁶ Output Obligations and input obligations= resultatsforpliktelse og innsats forpliktelse

is based on its choice of meeting the specifications, which concept, amount of engineering etc. When Company interferes, it could imply unforeseen issues by way of increased cost, and subsequently loss of profit on the hand of Contractor. It simply has to be that way for the relationship to work efficiently.

Company requires an object that has specific qualifications (functional requirements), e.g. the fabrication of a pipe that has the capacity of transporting 1000 liter of oil per hour, shall keep a temperature of 70 degrees C during transportation. Provided that the pipe fulfills the agreed requirements, Contractor normally has the freedom to choose e.g. type of material, type of coating, how the pipe shall be welded etc. How the pipe is made is of no interest for Company. This is because Company does not have the qualifications to know how this can be done best. Contractor's task is to use his special competence to engineer, procure the necessary materials, construct and in some times install the object. If Contractors "agreed" freedom is limited it can cause a lot of problems and make it difficult to deliver the object on time and within the agreed frames of cost.

5.2.3.3 Contractors Obligation to follow instruction- Company's right to instruct

In the beginning of the development phase of an oil field, it could be the case that Company does not have the information and qualifications required to know and describe how the finished object should look etc. Hence, in some cases, Company has not been possible to develop the scope properly prior to the contract award, and consequently it is very premature defined when the Contract is signed. In such cases the scope is not properly descriptive in the contract, and it therefore exists a large potential of developments of the scope, which will be required to be developed after the contract award and thus during the project phase.

When Company issues a Variation Order in accordance with Art. 12.1, Contractor has a duty to follow these according to NTK. Art 15.1, which states that: "Contractor shall implement it without undue delay" This is important to mention because; "contractual variations", by means of a Variation Order cannot be considered as interference. It must be noted that Art. 12.1 also provide restrictions on which Variation Orders Company are allowed

to order, whereby the general condition in Art. 12.1 states that Company cannot order a Variation Order, “Which cumulatively exceeds that which the parties could reasonably have expected when the Contract was entered into”.

NTK clearly states that both parties have to accept variations that are considered to be reasonable. The fact that the Contract contains the articles mentioned above also means that both Contractor and Company can expect changes, and a rather high fence needs to be jumped in order to successfully claim that the variations exceed what the parties reasonably expected”. This means that it’s rather difficult to claim that a variation constitutes an interference.

5.2.3.4 The parties Obligations and applicable provisions

As briefly mentioned in the introduction, Company’s main obligation in an EPCI relationship is to pay the Contract Price, and Contractors’ main obligation is to deliver the Contract Object. As well as that, there are other side obligations, which both parties also have to address, regulated in the Conditions of Contract.³⁷

If the parties fail to act in accordance with the side obligations, the consequences are also regulated in the Conditions of Contract. Does potential failure on the part of Company with regard to fulfilling such requirements constitute Interference? If the answer is yes; what consequences can be identified there of? The answer to the questions above is not regulated by the Contract, but section 10 *Company’s interference as breach of Contract* will investigate if such answers can be given by other legal sources.

³⁷ NTK 07: «Conditions of Contract» Consist of Part I-XI, the main document of the Contract. (In some Contracts known as “Terms and Conditions of Contract (T&Cs)”, In addition there are several appendixes that regulate various terms and conditions.

Company is obliged to approve Contractors' sketches in order for them to be included in the Contract. The sketches will often be changed or added to by Contractor, and Company has to approve the changes and new sketches. The parties typically agree a certain process to be followed, by way of a review cycles, e.g. within a certain date Contractor shall issue a particular procedure. Company is given 10 days to review and submit comments. Contractor shall revise the procedure, based on Company's comments within 5 days, and send it back to Company for final approval³⁸ Company shall provide the final approval within 3 days after received. If Company fails to do so, or take a long time to give its approval; the consequence can be that the Contractor is unable to continue the process until such approval has been made. This may have impact on schedule and cost.

As well as approve sketches; Company is also obliged to deliver sketches and procedures to Contractor. Contractor will not be able to continue the work if this is not done.

Another side obligation that Company has to see to is to respond to correspondence with Contractor. Because the work description in the scope is so brief when the parties enter the contract, a lot of questions will need to be answered and variations made as the work proceeds. In order for this to run smoothly, Company has to respond to such correspondence as well as approve and accept various matters.

There is also an obligation to participate in various tests and meetings regarding the process of the project. Once again, in order for the project to evolve it is important that these side obligations are held.

³⁸ Various kinds of processes are agreed for certain kind of documents

6 The Variation Order system

6.1 General information on the VO-system

The need for flexibility in the contract regarding variations is met by a specific system: The Variation Order system. This system secures the contracts predictability for both parties, by replacing a revision of the contract when a variation occurs. As well as that, it saves a lot of time that the parties would have spent on re- negotiating various matters through the project³⁹. NTK Article 14.1 governs that “*All Variations to the work shall be made by means of a Variation Order issued by Company...*”⁴⁰

The VO system, is the “tool” to use when Contractor via contract is entitled to adjusting the contract price, but more importantly here; when Company wishes to vary the work that they originally wanted done by Contractor. Company’s ability to make such demands through a VO, and Contractors obligation to act when such is received, is by many regarded as the core of “dynamic Contract law”. It is the key to secure a constant flow in the project. According to the contract, such changes can be demanded within a wide frame⁴¹. All variations and discussions go through this system, a separate track from the work process of the project it self. This secures the dynamics of the project⁴².

³⁹ Kaasen (2006) p. 271-272

⁴⁰ See NTK Art. 12-16 on variations

⁴¹ See NTK Art. 12.1 «Right to vary the work»

⁴² See Kaasen (2006) p. 269-270

7 The parties Contractual Obligations

7.1.1 The Distinction between main obligations and side obligations

Under an EPCI project, Company's main obligation is to pay the Contract Price, and Contractors main obligation is to provide the Contract Object on time. There are however several side-obligations⁴³ which Company and Contractor has to execute under a standard EPCI contract. One of the characteristics with NTK is its wide-ranging governing of conditions that do not strictly administer what Contractor shall supply, and what price Company shall pay. Some of these side-obligations affect the main obligations, although it is assumed that the Contract direct several side-obligations to the parties, which are not strictly affiliated to what is thought to be its primary aim of governing.⁴⁴ A brief presentation of both Company and Contractors obligations under NTK is considered appropriate, in the light of Company's Breach.

7.1.2 Company's Obligations

7.1.2.1 Payment of the Contract price

As set out in the above, Company's main obligation under the Contract is to "... *pay the Contract price to Contractor within the time limits...*"⁴⁵ Article 20.1 is a principal rule regarding payment of the Contract price. It can be regarded as the counterpart to art.4.1,1st period, concerning Contractors obligation to execute the Work in accordance with the Contract.⁴⁶

Company shall pay the Contract price in accordance with art. 20.1- 20.5 and appendix B-Compensation. The full Contract price, as well as its components and the payment schedule

⁴³ Side-obligations= biforpliktelser

⁴⁴ Kaasen (2006) p. 578

⁴⁵ NTK Art. 20.1

⁴⁶ Kaasen (2006) p. 503

can be found in appendix B- Compensation. Having said this however, “*Company is not obliged to undertake a payment until Contractor has provided a guarantee as set forth in Art. 20.2*”⁴⁷

7.1.2.2 Providing materials/equipment- “Company provided items”

Due to the fact that the Contract Object often constitute a part of a large development project, it is practical that Company provide specific materials and equipment⁴⁸, which has certain specifications. Such materials often form vital components that will constitute a part of the Contract Object- “Company provided items”.⁴⁹

As a starting point there will be no obligation on Company to provide Company Provided Items (CPI) and in order to maintain a clear delivery and performance responsibility on the part of Contractor, Company will normally seek to avoid provision of (CPI) if possible. However, often the various components needs to be ordered upfront in order to be delivered during the project execution phase, the situation is furthermore that often Company is of such a large size that it will obtain better prices in the market that Contractor would due to volume, and often Company want to secure same components on all its fields in order to be efficient with regard to future back-up, spare-parts and maintenance – whatever the reason – normally Company will provide Materials and other CPI on an EPCI project.

When Company has committed to do so, such Materials and items have to be provided within the agreed time-frame. Specifics regarding what Materials/items Company is providing, the amount, and at what time they will provide such, is usually governed in a separate agreement between Company and Contractor. Such agreement, if it exists, will

⁴⁷ Quote: NTK Art. 20.1 2nd paragraph

⁴⁸ See NTK Art. 1.27-Company’s Materials

⁴⁹ Askheim (1983) p.195

also be the basis for evaluation of whether or not Company has fulfilled their obligations in regard to such.

It is pertinent at this point to mention that the original agreement regarding Company's Materials may have been revised in the time after the formation of Contract. It is not uncommon for a long-term Contract, subjected to NTK to undergo consecutive variations.⁵⁰ Company may wish to adjust the specifications, laws and regulations which are relevant may change, Company wishes to incorporate other contractors etc. The main objective of the Variation rules is to adjust Contractors obligations- not Company's. Adjusting Contractors obligations can however mean that Company's obligations are adjusted too⁵¹. This means that in order to determine Company's obligations, one has to take consideration of variations that may have adjusted such. According to Norwegian Contract principles⁵², time of evaluation is when Company provides the Materials to Contractor. It should also be mentioned that instead of provision of Company provided Materials or other CPI the Company may wish to use its right under Art.8.3 and instruct Contractor to use existing Frame Agreements, which Company has, in place.

7.1.2.3 Feedback/injunction/decision-making/obtaining & maintaining approvals

During the Project, Company has an obligation to participate in communication with Contractor. It is expected that Contractor is given feedback on various matters regarding the performance of the work and the Contract object. This is mainly because Company has to make several final decisions during the project, in order for Contractor to continue the Work, Company is obliged to participate in Correspondence with Contractor, as well as

⁵⁰ See NTK art. 12-16 reg. variations

⁵¹ Kaasen (2006)p. 579

⁵² Hagstrøm (2004) p. 135

feedback and decision making within a time-frame⁵³ set out in the article or Contract document that direct the obligation in question.

According to Article 4.5, Company shall “...make such decisions as it is obliged to under the Contract within the time-limits set out in the Contract and otherwise within reasonable time if no such time-limits have been provided”. The article was introduced in NTK 2000, acknowledged as a general obligation on the part of Company respond and react during the life of the project.⁵⁴ From a legal view it may be questioned if the article is of much significance. This is because the various Articles in the Contract that govern Obligations of Company, direct a duty for Company to “provide such deliverables and make such decisions as it is obliged to”.

It has been argued that one would most likely come to the Conclusion of an obligation for Company to do such within “reasonable time” (if a time-limit is not set out in the Article in question), without the direction of Art. 4.5.⁵⁵ That being said however, it seems orderly to include an Article regarding Obligations of Company in Article 4, not only Obligations of Contractor. It also means that there is no doubt that when no time- limit is set out in the Contract, “reasonable time” is what has to be interpreted to set a time frame.

When necessary, Company has an obligation to issue a variation Order to vary the Work or Contractors Obligations.⁵⁶ When Variations have to be made in order for Contractor to provide a Contract Object, which meets Company’s requirements, Company is obliged to issue a Variation Order so that a duty to apply such variations/ changes to Contractors obligations is set in to motion.

⁵³ Or “reasonable time, see next paragraph regarding Art 4.5

⁵⁴ According to the title of NTK Art 4: “Obligations of Contractor and Company- Main Rules”

⁵⁵ Kaasen (2006) p. 117

⁵⁶ Such injunction on Contractor has to be made in accordance with Art. 12-16.

As a side obligation, Company is also obliged to “*obtain and maintain*”⁵⁷ all the approvals concerning the Work, which only can be obtained in Company’s name. Although Contractor is obligated to obtain and maintain approvals and permits that is required for the work⁵⁸, Company is obliged to maintain all those that Contractor can not obtain.

7.1.3 Contractors Obligations

In this section of the thesis, there will be a brief presentation of Contractors Obligations as directed in the Contract. Although Company is the Contract party under investigation, an introduction to Contractors obligations will allow the reader to have a better understanding of Company’s breach and what affects company’s breach as well as interference has for Contractor.

7.1.3.1 Delivering the Contract Object on time and in accordance with the Contract requirements

Contractor’s main obligation in an EPCI relationship is to deliver the Contract Object to Company in accordance with the agreed time-frame and Contract requirements. Obligations that secure such are directed several places in the Contract, both in relation to Contract schedule, personnel and Contract object.⁵⁹ Such side obligations will be accounted for below.

⁵⁷ See NTK Art. 5.2, second paragraph

⁵⁸ See NTK Art. 5.2

⁵⁹ See NTK Art. 4 on Contract Object and personnel and Art.2 ref. Appendix C- Contract Schedule

7.1.3.2 Usage of required supply of labor/subcontractors and Communication with other Contractors

In accordance with NTK Art.8,⁶⁰ Contractor has an obligation to acquire permission from Company before entering”... *into any Contract for supply concerning parts of the Work...*”⁶¹ There is also an obligation on Contractor to “...*make use of the Frame Agreements...*”⁶² listed in Appendix E- *Company’s Documents*. This means that Company decides what subcontractors shall be used, either in Appendix C- *Company’s Documents* or by communication with Contractor or by answering a request of such usage. The pendant to this is an Obligation on Contractor to use required or supplied subcontractors and labor.

As well as obligation of usage, Contractor is also obliged to communicate and cooperate with Company as well as other contractors. This obligation is to ensure that “...*all activities on site are carried out efficiently and without delay*”.⁶³ Contractor is also obliged to “cooperate with Company’s Representative and persons appointed by him in accordance with Art.3”⁶⁴

7.1.3.3 Quality Control and completing project milestones

As mentioned in the above, there are several side obligations directed in NTK⁶⁵. Some of which are to be carried out in the time before delivering the Contract object.⁶⁶ Contractor’s obligation to Quality Control throughout the project can be seen in relation to The Norwegian petroleum Act⁶⁷, and its administrative regulations regarding an obligation of internal

⁶⁰ NTK Art 8.1-8.6

⁶¹ NTK Art. 8.1

⁶² NTK Art. 8.1, second paragraph

⁶³ See NTK Art. 4.3

⁶⁴ NTK Art. 4.1- b

⁶⁵ See section 7.1.1- *The Distinction between main obligations and side obligations*

⁶⁶ Kaasen (2006) p. 103

⁶⁷ The Norwegian Petroleum Act

control for the operator and licensee. As Contractor is performing the Work, such obligation has been directed to Contractor by Contract.⁶⁸

Contractor also has an obligation to complete the pre-agreed project milestones, as set out in Appendix C of the Contract documents. It is important to Company that such milestones are completed on time through out the project as small delays may lead to delays of significance later on. The progress in Contractors Work is for that reason Vital for Company, especially considering that such milestones often cross-over Work that are under other contracts.

7.1.3.4 Duty to comply with Company's Variations to Contractors Contractual Obligations

The obligations that are associated with Company's right to vary the Work are Characteristic to an EPCI relationship. Such obligations to comply with variations⁶⁹ to its contractual obligations, is arguably the most important liability Contractor has, aside from delivery the Contract Object on time. This is because it secures flexibility within the Contractual relationship. The Variation Order system is the tool to successfully complete this, as well as the pendant to Contractors obligation to comply with variations is Company's Obligation to Compensate such variations with an increase in Contract price and/or extended schedule.⁷⁰

An obligation on Contractor to Comply with Variations issued by Company is regulated in NTK Art. 15.1: "Contractor shall implement without undue delay".⁷¹

⁶⁸ See NTK Art. 10.1

⁶⁹ "Contractor's duty/obligation to comply with variations to the Work"= "Leverandørens hoppeplikt"

⁷⁰ Kaasen (2006) p. 301

⁷¹ See NTK Art. 16.2 second paragraph for Duty to Comply with DVO and Company's right to Vary the Work and restrictions to such ref. Art. 12.1

7.1.4 Mutual Obligations

As well as individual Obligations for Company and Contractor, there are mutual obligations directed in the Contract. Such obligations are often not specific to the Contract Objects as such, all though based on experience it has been incorporated in to the Contract. Such mutual obligations are for example that; both parties shall indemnify the Contract party for certain claims and losses, secure an adequate insurance cover, conceal assured information and give the other party access to necessary data and inventions. There will be a brief introduction to such obligations here.

7.1.4.1 Indemnity clause

It is a known principle in the offshore oil and gas industry, that Contractor and Company are each responsible for any damage to them, and/or the persons and companies which are connected to their “group⁷²”.

The underlying principles of a “knock for knock” scheme are well established, and are directed in NTK Article 30.1 and 30.2. Both Contract parties are obliged to save, indemnify and hold harmless the other, their affiliates and other group members against any claims or liabilities arising in respect of: (i) damage to property owned, hired or leased by it; and (ii) injury to any of its personnel. Although this is not expressly stated, the effect will be to exclude any liability on the part of the Contractor for damage or injury caused to Company Group property and personnel and vice versa. This means that both parties have an obligation to carry any such loss caused by the other party, also when other applicable rules of liability could have been a legal ground for claims.⁷³

⁷² *Company Group and Contractor Group*

⁷³ See Kaasen (2006) p. 773-796

7.1.4.2 Insurance

A mutual obligation for both Company and Contractor to obtain insurance is connected to the principle of indemnification as set out in the above. NTK Art. 31.1⁷⁴ and 31.2⁷⁵, direct what type of insurance the parties are obliged to obtain, at what time such has to be established and what position each parties group shall have in the insurance. Although there is a lot more that can be said about insurance, the purpose here is to illustrate that there is a mutual obligation for both parties to obtain such.⁷⁶

The main reason for such obligation is to assure that both parties are covered if damage occurs. This of course is very important due to the indemnity clause, which means that each party will have to take not only loss caused by them selves but also by the other party. Such loss can be of a large scale, and an insurance clause will secure that both parties are able to carry such losses. Another imperative thought behind the obligation to hold insurance is that the risk of entering an expensive and valuable project will be much smaller when a “knock on knock” regime with insurances as substitute for loss claims is carried out. This is especially vital for the often much smaller operators and Contractors. A loss claim by the other party could ruin the other party as the value of objects and time are very high. In this connection it should be mentioned that the insurers will have to waive any right of subrogation against the other party, otherwise full indemnity would not be obtained for the damaging party, ref Art 31.1 last section and Art 31.2 third section as examples of this.

7.1.4.3 Duty of confidentiality

Another mutual obligation for Company and Contractor is a duty to treat all information that has been exchanged between the parties as confidential.⁷⁷ As a basis this means all information shared between the parties, with the exception of that listed in NTK art. 34.1

⁷⁴ See NTK Art. 31.1 for Company’s insurances

⁷⁵ See NTK Art. 31.2 for Contractors insurances

⁷⁶ Kaasen (2006) p. 804-815

⁷⁷ See NTK Art. 34.1

letter (a) to (d) and art.34.3. This implies that the information shall not be forwarded to any other person.^{78 79}

7.1.4.4 Mutual beneficial right to data and inventions

Both parties shall give the other access to information such as drawings, documents and computer programs.⁸⁰The obligation to allow such access only stretches in period of the project. This means that there is a new mutual obligation for both parties to return such property when the project ends.

8 Location of risk

8.1.1 Starting point

Divergence and defects in relation to Company's obligations will often lead to negative consequences on Contractors behalf- in relation to time and cost. Contractor's Contractual obligations under an EPCI project are usually output obligations. This means that Contractor has committed to produce a certain result.⁸¹ Defects in Company's obligations may further have impact on Contractor's commitments to achieve such. The Contractual Commitments and the requirements and specifications related to the commitments are directed by the Contract. This involves overcoming potential difficulties that may occur throughout the process leading up to the Contractual result-no matter the Costs.

⁷⁸ See the definition of «Third Party» in art. 1.29

⁷⁹ See Kaasen (2006) p. 850-856

⁸⁰ See NTK Art. 33.1 For Contractors right of use and 33.2 for Company's right of use. It can be noted that the articles direct both each parties' rights to the information/inventions as well as the other parties right to use such during the project.

⁸¹ See Hagstrøm, (2011) p.126

Having said this, Contractor has to achieve such Contractual Commitments in order to be entitled to Compensation. It is not sufficient that Contractor did “his best” if the Contractual result has not been achieved. This does not always mean that Contractor is liable for any obstacle or defect. The Variation Order system⁸² will compensate Contractor for Costs due to Company’s breach⁸³. However, one must first of all determine who originally is liable for the defects caused by Company.

Company’s breach can (i)cause a lot of problems for Contractor, as his contribution is a premise for Contractor’s Contractual result, and/or (ii) Cause delayed delivery and/or increase in Cost for Company. For Company, delayed delivery may lead to unwanted consequences for other projects as well. This is because the Contract Object often fit in as a component in a much larger project. This involves other potential Contracts with a synchronized delivery date that will assure that the objects are delivered according to when they are needed in the project. This means that if one object is late it may have impact on other objects schedule. Locating the risk as set out in the above is very important in order to determine who is liable for potential defects and the adequate consequences to such.

8.1.2 The concept of “risk” in EPCI relation

The Concept of “risk” can fluctuate from a legal point of view. The most common practice to consider risk is risk in relation to compensation. Some key questions are: Is Contractor entitled to compensation due to Company’s failure to perform in accordance with Company’s Contractual obligations? Should non-performance by a Contract party in a contractual relationship influence the other party’s obligation to fulfill its mutual consideration?⁸⁴The questions have to be answered by an interpretation of the party’s contractual obligations as listed in the Contract, and the compensation related to breach of such. Having said this,

⁸² NTK art 12-16

⁸³ See section 6 *The Variation Order system*

⁸⁴ See Hagstrøm, (2011) p.40

locating the risk when under an EPCI Contract, is not as simple as locating who caused the default, nor is it always easy to determine a clear point in time when a risk will pass from one party to the other. As section 8.2.3 will illustrate, location of risk is often pre-agreed in EPCI relationships, although this does not necessarily mean that the other party is not entitled to compensation.

As an interesting comparative, Common sale obligations can be pointed out. Risk related to compensation in such commitments, are specifically expressed in the Norwegian Sale of Goods Act Art. 13.⁸⁵ The article clearly states when the risk transfers from the vendor to the buyer. In regard to EPCI Contracts however, the Contract object is a result of several cooperative factors between Company and Contractor. This means that governing a specific point in time for such risk to transfer from one party to the other would not be an adequate solution to locating the risk related to compensation.⁸⁶

8.1.3 The extent of risk/liability

As a general principle in the traditional fabrication contracts, such as NF 07, Company is liable for divergence and defects' regarding Company's engineering/design and Company's provided materials/ items.⁸⁷ Such liability is related to Company's obligation to engineering/design in these Contracts. Company providing certain equipment/materials/items, is also common for EPCI Contracts. This of course means that Company holds the risk for such items/materials. However, a significant distinction from the fabrication Contracts is that in an EPCI Contract, Contractor often takes on the responsibility for the so-called "interface(s)".⁸⁸

⁸⁵ See The Norwegian sale of Goods Act *Art. 13*

⁸⁶ However, a transfer of liability governs risk of loss at the time when the Delivery Protocol has been concluded. See NTK Art. 29

⁸⁷ See 8.2.3 *Functional liability*

⁸⁸ Interface(s)= "grensesnitt"

“Interfaces” means the delimitation between the various suppliers’ scope of work, including his own scope of work. This involves that Contractor not only take on the responsibility to coordinate and “follow up” his own organization, but at the same time commit to coordinate and follow up on the other project related supplier’s work of scope. Consequently, Contractor is liable for the risk of such.

In the traditional fabrication Contracts however, Company is responsible for the engineering, Coordinating his and the other suppliers’ scope of work, and he will also be liable for the risk related to the work scopes and the schedule.⁸⁹ This means that the extent of the risk is wider in an EPCI Contract than a traditional fabrication contract. Furthermore, a key question is: what “frames” are agreed upon by Contractor in an EPCI- contract? In other words; is Contractor given the freedom that the EPCI- concept requires?⁹⁰ A further debate on the questions as set out in the above will be made in *section 10 Company’s interference as breach of Contract*.

The same comparison can be done to onshore Construction area and the NS 3431/NS 8405/NS8407 documents, and they differ as well. The proprietor is responsible for sketches/ documents/calculations that he has supplied the Contractor.⁹¹

When Company is providing materials/equipment, the effect in relation to liability and location of risk of such items is that Contractor cannot be held liable for such materials/equipment to the same extent as if provided by Contractor it selves.⁹² By committing to supplying certain materials, Company is therefore responsible for defects in regard to quali-

⁸⁹ See Seim (article) *section 4. Nærmere om karakteristiske trek ved EPCI-kontraktene*

⁹⁰ Seim (article) *section 3. Kontraktskonsept*

⁹¹ See Rt. 1917 s.673 (Monierfabrikken) and *section 8.1.4 Functional liability*

⁹² Kaasen (2006) p. 579/ Company will as a result of this often make an attempt to transfer his agreed contracts regarding materials and equipment to Contractor, to make them his subcontracts. This would imply responsibility and risk on Contractor’s behalf instead of Company’s ref. NTK Art. 8.2. See *Mestad* p.246 for further information on this.

ty, functionality, quantity, as well as any other agreed specification.⁹³ The same principle will apply for with regard to design and drawings provided by Company. . Any defect, delay or other failure with respect to Company's provisions of the above will be regarded as Breach of Contract on the part of Company, provided that Contractor has performed the necessary search for defects, discrepancies and inconsistencies in Company's Documents as per Art. 6.1 and performed inspections and examinations upon receipt of Company's Materials as per Art 6.2 and notified Company of any such findings.⁹⁴

8.1.4 Functional liability

8.1.4.1 General information

The principle involves that the parties are liable for risk related to their own function area. The reason for the principle is that each party is in control of the work related to their own Function area, and risk should furthermore adequately relate to them.

The principle of Functional liability as a legal interpretation principle was initially expressed by the Norwegian Supreme Court in a court ruling in the early nineteen hundreds, concerning a contractor which was taken to court by the proprietor after a building sunk. The contractor was according to the Supreme Court not responsible for the damages because they were a result of defective design, not poor construction.⁹⁵ The supreme judgment involved a placement of risk to the one which it was adequate to, and is today a general excepted principle of risk location in the onshore construction field.⁹⁶

Company's liability with risk related to Company provided materials/equipment is a product of functional liability.

⁹³ See NTK Art. 27

⁹⁴ Unless he can plead force majeure, see NTK Art. 28

⁹⁵ See Rt.1917 s.673 (Monierfabrikken)

⁹⁶ See Hagstrøm (2011) p 333

8.1.4.2 Does Functional liability apply for NTK?

Functional liability for the Contract parties is not directed by the Contract by a specific article. There are however areas where the principle of functional liability is expressed, such as NTK Art. 27, concerning Company's obligations regarding provision, and Art.29 concerning Contractor's obligation in relation to loss of or damage to the Contract Object.

Interesting comparisons can be made to the Norwegian onshore Construction field. One of the most commonly used pre- agreed standard Contracts; NS 8405 direct the principle of functional liability in section 19.1, second paragraph. The paragraph clearly states that the proprietor owns the risk for defects, divergence and insufficient guidance in relation to the contract documents and sketches, specifications and calculations which he has provided. In other words, the article direct the principle of functional liability, that each of the contract parties carry the risk related to defects or perfidy connected to their function area. The same principle for proprietor provided materials/products is directed by Article 19.4; Proprietor Carry the risk for quality and applicability for the materials/products he has provided.

The reason behind functional liability is as mentioned that the risk should be placed with the party that is the closest connected to/ in control of the object at risk. An EPCI- Contractor will normally be in physical control of the Contract Object until installation/supplying has been completed. This means that he is closely connected to the Contract object and should for that reason carry the risk until the contractual commitments of delivery is completed.

That being said, in a lot of EPCI- supplies, the (main) Contractor is not in (physical) possession of the Contract Object throughout the project. This especially applies for the more comprehensive EPCI- contracts. An EPCI contract will normally direct a right for Company or Company's' contractors to perform Work on the Contract Object, but this raises interface questions as well.

The majority of the legal theory that has been developed on "allocation of risk" in accordance with the principle of functional liability is in the Norwegian onshore Construction

field. A significant amount of this theory also applies for the offshore EPCI- contracts. This is because the risk related to manufacture Objects,⁹⁷ should be placed in a similar way to in onshore Construction projects.⁹⁸ In both Construction Contracts and sales regarding manufactured objects, the buyer and the producer are more united than in common sales obligations, as well as functional distribution of the parties' obligations. In relation to NTK, this means that Company carries the risk for defects in relation to/ failure to fulfill his contributions. Considering that NTK does not have a specific article that direct functional liability, it has been said that the absence of an article, which imply the opposite, suggests that the principle of functional liability for allocation of risk must apply for NF 07.⁹⁹ This may imply that the principle also apply for NTK- Contracts.

8.1.4.3 Distinctive transmission of risk- directed by the Contract

Although as a starting point, Company carries the risk related to Company provided materials/equipment etc., this is not always the case. An EPCI Contract can direct the responsibility onto the Contractor by two difference means: (i) Loss of right for Contractor to adjustment of the schedule and/or Contract Price. (ii) Contractors' failure to comply with obligation to examine/search for/ inspect company's Documents and Materials without undue delay notify Company of defects/discrepancies/inconsistencies.

As illustrated above, a transfer of the risk in an EPCI contract, is usually in favor of Company.¹⁰⁰ It has in Norwegian legal theory been said that a variation to the allocation of risk can be made through contractual governing¹⁰¹, although the Norwegian Superior Court has

⁹⁷ Manufactured objects= tilvirknings objekter/ tilvirkningskjøp

⁹⁸ Hagstrøm (2011) p. 335

⁹⁹ Askheim (1983) p. 196

¹⁰⁰ See Brannstein (2005)

¹⁰¹ Hagstrøm (1997) p. 82

indicated that clear indications have to exist before one can confirm that a Contractual transformation of risk has been made.¹⁰²

For EPCI contracts with NTK as an example, this can as set out in the above first of all be done by a loss of right for Contractor to an adjustment to the schedule and/or Contract Price. The reason for this is that Contractor can be affected by a time-barred obligation to require a Variation Order, as directed by NTK Art. 27.1. ref. Art.16.1 second paragraph. Secondly a failure to examine/search for/inspect Company's Documents and Materials as well as notify him without *undue delay* ref. NTK Art.6 can imply that Contractor has "contributed" to the increase in Schedule/cost as a result of a final result that is in breach of Contract. That being said, it can be speculated in how far the obligation to examine/inspect etc. stretch for Contractor as well as what *undue delay* means. For further information on this see section 9.7 NTK Article 6.

9 Company's breach

9.1 Introductory remarks

In any Contractual relationship, it is a fundamental expectation that all parties act in accordance with their Contractual obligations. The significance of such behavior of course varies, depending on the object in query, value and further adequate consequences. In an EPCI Project, the Contract Object is usually very costly due to materials and labor used in the manufacturing process. As well as that, it is not uncommon for the Contract object to be a component made to fit in to a much larger construction. This means that the value at risk is very high, and the consequences of breach of Contract will often mean big financial losses and further complication for some parties.

¹⁰² See Rt.1917 s.673

Contractor and Company have different expectations in regard to what they wish to gain from the project. For Contractor, payment of the Contract Price is the main aim, while Company wishes to receive the Contract Object in due time. This of course means that breach of Contractual obligations and the applicable consequences are tailored to meet both party's needs.

This section of the thesis will be accountancy of various forms of Company's breach, and some of the issues related to such. The structure of the topic in query will be a separate accountancy of (i) The payment obligation and (ii) Company's side obligations. This way of structuring is thought to be logical due to the fact that Company's Obligations can be divided into such groups. Another reason for separating them is that the penal provisions for breach of the payment obligation are different to the penal provisions for breach of the side obligations as set out in the Contract.

9.2 Breach of Company's main obligation

9.2.1 Default of the payment obligation

Company's obligation to pay the Contract price on time is of course its main Contractual obligation¹⁰³. The obligation initially concerns the ordinary contractual work, although temporary payments¹⁰⁴ on variations to the Work throughout the project also constitute a part of the payment obligation.¹⁰⁵

¹⁰³ See Section 7.1.2.1 *Payment of the Contract price*

¹⁰⁴ See NTK Art. 15.2 on temporary payments for variations

¹⁰⁵ See NTK Art. 20 ref. appendix B/ Knut Kaasen «petroleums kontrakter, med kommentarer til NF 05 og NTK 05» p. 701

Breach of payment, means that Company is late in making payments as set out in the Contracts agreed time limits.¹⁰⁶ Having said this, there are a few factors that have to be established in order to verify Company's breach of payment.

In order for Contractor to be entitled to payment, he has to provide a guarantee as directed in NTK Art.20.1 second paragraph ref. Art. 20.2. Such guarantee has to be obtained by Contractor, at his own cost, by an institution in accordance with Appendix B or institution approved by Company. The amount of the guarantee is a pre-agreed percentage of *the Contract Price at the conclusion of the Contract*.¹⁰⁷ The pendant to this is that delay of payment by Company is not breach of Contract if a guarantee in accordance with the requirements as set out in the above is not provided.

The obligation to pay is also depending on Contractors rightful and due invoice. In order for a delayed payment to be considered breach, Contractor has to send an invoice to Company. The invoice should be issued to Company on a pre-agreed point in time, as well as cover work, purchases for a pre-agreed period of time. Payment date is usually within 30 days after receiving a valid invoice. However, in order for the invoice to be valid, the invoice documentation has to be substantiated in accordance with such specifics as agreed upon in NTK Art. 2.1 appendix B- Compensation, otherwise the provisions applied in Art.20.1 apply.

If an invoice is issued in accordance with the requirements, a delayed payment from Company will be breach of contract. That being said, it is also breach on Company's behalf if payment of an insufficient invoice is delayed, unless Company has notified Contractor of this without "*undue delay*".¹⁰⁸

¹⁰⁶ NTK Art 20 ref Appendix B- Compensation

¹⁰⁷ See NTK Art. 20.2

¹⁰⁸ See NTK Art. 27.3

9.2.2 Requirements and reason for governing

It is not difficult to see why it is important for Contractor that Company's obligation to pay in accordance with the agreed time schedule is directed by the Contract. The reason, of course, is to secure that Company's main contribution in the Contractual relationship is governed. Contractor wants to know when and how much money he will receive in return for his work.

As for the agreed time schedule, one of the main requirements for governing such is the consideration to predictability for both parties. There are a lot of elements in an EPCI project that require flexibility, especially in consideration to the Scope of Work and variation to such, as well as the Contract Object. That being said, the need for some set elements are still a necessity in order for the parties to dare enter into such a comprehensive and long-lasting Contract. Contractor is committed to perform certain work within a set point in time. The counterpart to such obligation is that Company is bound to pay parts of the contract price within an agreed point in time throughout the project.

9.2.3 Penal provisions

9.2.3.1 Interest on overdue payment

When Company defaults the payment obligation as set out in the above, the penal provision as directed in the Contract¹⁰⁹ is interest on overdue payment in accordance with The Norwegian Act- "*Interest on overdue payment*"¹¹⁰, section 3. This means that an interest rate decided yearly by the Finance Ministry¹¹¹ will start running from the date of payment.¹¹² The decisive will be the amount that was falling due in the invoice.¹¹³

¹⁰⁹ See NTK Art.27.3 ref. Art.20

¹¹⁰ The Norwegian Interest on overdue payment Act

¹¹¹ Finance Ministry= Finansdepartementet

¹¹² See NTK Art. 27.3 ref. The Norwegian Interest on overdue payment Act Section 3

9.2.3.2 Alternate penal provisions

The Contract does not govern any alternate penal provisions to penalty interest. Having said this, the Contract does not specify that penal interest on overdue payment is the only penal provision that can apply. Other remedies from general Contract principles may for that reason be applicable.¹¹⁴

It is assumed that Contractor has the right to cancel the Contract due to a substantial default of the payment obligation by Company.¹¹⁵ Exactly when such penal provision is activated is not clear and will have to be assessed on a case by case basis. On that remark, the payment default has to be substantial and represent a material breach of contract to be activated. Another element that supports such an interpretation of the wording is that the Contract does not under any circumstance direct a right for Contractor to Cancel the Contract. NTK is a very detailed Contract, and although not flawless, it governs a lot of elements, including Company's right to cancel the Contract. On the other side, if breach of the payment obligation is substantial, Contractor should be able to cancel the Contract.

9.3 Breach of Company's side obligations

9.3.1 Overview

As mentioned in section 7.1.2.2 of the thesis, there is no obligation on Company in an EPCI Contract to provide materials/equipment/items. Furthermore, Company commits to do so, there is a risk involved as set out in section 8. This part of the thesis will illustrate that the conclusion of Breach of company's' obligation by defective performance regarding provision of Company provided materials/equipment/ items (as of know referred to as:

¹¹³ According to NTK Art.20.3 i.f., Company may have a right to withhold parts of the payment. If such right is used this is done at Company's own risk. It will also not affect the amount of which the penalty interest is set on.

¹¹⁴ Kaasen (2006) p. 703

¹¹⁵ "*Substantial default of the payment obligation*" = "*vesentlig betalingsmislighold*"

“company’s Items”) as well as Company provided documentation/specification or engineering (as of know referred to as company’s documents”) has to be made on the basis of an assessment of default.

Prior to the assessment of default it should be mentioned that an EPCI Contract generally will govern “Company provided items” and “Company provided documentation” by a detailed list of what they are. This means that separate documents in Appendix E and F will specify the documents and deliverables that are to be provided by Company on the project. Abovementioned Appendices will normally form the main legal basis for the assessment of potential default in the provision of company’s items. It should however be noted that very often the specifications and descriptions in abovementioned Appendices very often are subject to change and variations post Contract execution.¹¹⁶This suggests that the time for the assessment will be when Company actually delivers the object/documents to Contractor. It is at this time the content of Company’s provision will be assessed. At this point EPCI Contracts differ from other Contract, and implements a greater risk on Contractor regarding what Company in the reality will provide.

9.3.2 Defective performance regarding provision of materials/equipment- “Company provided items

9.3.2.1 An assessment of default

According to unwritten Norwegian Contract law¹¹⁷, an obligation directed by a contract means that the Contract is the primary legal ground for an assessment of default, furthermore an interpretation of such.¹¹⁸This involves an interpretation of the wording of the Contract¹¹⁹. It is the “common understanding”¹²⁰of the wording that has to be the base of the

¹¹⁶ See for instance NTK Art. 12-16

¹¹⁷ Unwritten Norwegian Contract law= Obligasjonsrettslige prinsipper

¹¹⁸ Hagstrøm (2011) p. 135

¹¹⁹ The wording of the contract= avtalens ordlyd

assessment, and according to Norwegian legal theory one requires “weighty”¹²¹ reasons for an alternate approach. An example to illustrate the “common understanding” of the wording in an EPCI relation is if Company has committed to provide components made out of a rustproof material, and provide the components in a material that will rust. This involves breach of Contract on Company’s behalf.

Although the assessment of default should be made on the basis of common understanding of the wording of the Contract, this is not always possible. The reason for this is that the Contract may not always specify what Company has committed to provide, or the wording is unfortunate or lacking. An example to illustrate is if Company has an obligation to provide the deck of an oil or gas platform with certain dimensions, and the weight of the deck is far heavier than Contractor had anticipated due to a change of materials by Company to reduce cost. The deck is provided, but the weight means an increase in cost for Contractor to secure that the undercarriage (which he shall provide) will hold the deck. In this situation an interpretation of the “usual understanding” of the Contract wording will most likely not be sufficient, and an attempt has to be made to “supplement”¹²² the wording of the Contract.

9.3.2.2 An “abstract” assessment of default¹²³

An “Abstract” assessment of default implements a more general assessment than the standard assessment as set out above in section 9.3.2.2, whether or not there is room for an assessment of this kind has to be answered by an interpretation of the contract in question.¹²⁴ NTK for instance, does not direct Company’s obligations regarding the specifications and requirements related to Company provided Material, and the deliberation in the following will be made on the assumption of an insufficient governing of Company’s items.

¹²⁰ «Common understanding»= naturlige forståelse

¹²¹ Weighty= sterke

¹²² «Supplement»= utfylle

¹²³ An abstract assessment of error= Abstrakt mangelsvurdering

¹²⁴ See Hagstrøm (2011) p 166-173 for more information

It can be claimed that an abstract assessment of default has to be made in the example where Company provided a deck that had a much bigger weight than Contractor assumed it would have. This is because there is a choice for Company to provide the item in its choice of materials. Although the choice of materials may have been uncommon for the item is not sufficient to say that the item is in breach of contract. However; if Company has specified their usage of material it becomes more dubious. This is because Company specifications and documents, which Company has provided, have to be correct. If Contractor based his calculations of weight on information that Company has provided, it is easier to think that a change of such is in breach of Contract. There is no clear answer to how this should be solved. It has to be an assessment of the Contract at question.

NTK does not direct a clear solution to problems as set out in the above. According to on the Norwegian onshore Construction area, more precisely NS 8405 Section 19.4 second paragraph Company holds the risk for the “quality and the “applicability” for the materials he has provided. To what extent this can be applied, as a legal source in an EPCI Contract is hard to say. It is reasonable to say that Company is responsible for the “quality” of his items as set out in the agreement. Does this also involve a general “quality”? If the answer to the question is yes, this could implement an obligation on Company that is far wider ranging than his intention as the understanding of words fluctuate between fields of industry, nations and persons. What would be the correct understanding? It has been said in legal theory that if not agreed upon by the Contract parties, the assessment should be done in accordance with “Common standard demands in the field of industry”.¹²⁵ Although this still leaves the parties with a difficult task.

The requirement that the item has to be “applicable” raises difficulties as well. When used in relation to the “Company provision of the Oil/gas platform deck” example, this would

¹²⁵ Marthinussen (2006) p. 272

mean Company breach due to the fact that the deck is not applicable for Contractors Object; the undercarriage.

The conclusion has to be made on an interpretation of the actual Wording of the Contract. If that is not possible, one should take into consideration “the parties’ intentions”. Furthermore, it is pertinent at this point to mention that the parties in an EPCI Contract rely on detailed documented set of specifications not specified in the Contract. For this reason it is difficult to see that the parties can be in breach, and the basis for the assessment has to be that “what is there is what was intended to be there”.

9.3.3 Defects/delay in regard to Company provided documentation/specification or engineering- an assessment of default

9.3.3.1 Overview

Company provided documentation/specification and engineering are documents that Company has agreed to provide Contractor. In a general Fabrication Contract, it is common that Company provide a substantial amount of drawings, specifications etc. regarding the engineering of the Contract Object, as Company is heavily involved in the engineering work. This involves; constructing/designing/describing the Contract Object that Company shall provide. When Company is responsible for all- or the majority of the engineering, such documents become a Contractual basis instead of a Contractual Obligation.¹²⁶

In an EPCI Contract however, Contractor is the one that perform the majority of the Construction/designing. Furthermore it becomes a Contractual Obligation on Contractors behalf. Having said this, it is very common that the Company have awarded a prior engineering contract were general engineering and principle solution for the project often is decided (FEED Study). The FEED is very often given as a part of the EPCI tender together with other information of existing installations, survey information etc. from Company as Com-

¹²⁶ Sandvik (1977) p.111/ Kaasen (2006) p.138

pany's Documents as per Appendix E. It has however been noted that Company on occasions do not follow the set-up in the contract and instead issue various documentation "for information only, tenderer may use this information at its own risk". One must assume that if Contractor elects to base his tender on such "for information only" documentation it will as a professional party be regarded to have accepted to carry the risk for any failure etc in the documentation given by Company, even if such way forward by Company is on the side of the set-up in the Contract. In order to be on the safe side Contractor will have to base his tender on information received and defined as Company's Documents and Deliveries as per Appendixes E and F and disregard any other information given "for information only" etc.

9.3.3.2 The Contract as legal source for interpretation

In regard to Contractor's provided documentation, NTK Art.23.1 paragraph letter c) direct an obligation for Contractor's engineering to be " *suitable for the purpose and use for which, according to the Contract, it is intended.*" However, the Contract does not direct such an obligation to Company in relation to the party's documents. Furthermore, an interpretation of the Contract has to be made in order to determine if Company's performance regarding provision of documentation is defective.

An interpretation of the Contract may be difficult because the Contract it self usually does not direct specific requirements for the documents. An interpretation of the "wording of the Contract" may therefor not give an answer as the Contract usually only direct the point in time which the documents shall be provided. This means that for delayed provision of documents it is easier to determine who in fact is liable. When Company Provide documents later than the agreed date; it is delayed. This of course means that Contractor is entitled to compensation/more time adequately related to the delay. The dynamics of this is as for defective materials solved through the VO-system.

It has been said in legal theory that it is Company's obligation to provide Contractor with sufficient documents and specification.¹²⁷ Furthermore, a defective sketch can cause a lot of trouble for Contractor. If Contractor due to Company provided documents rely on information and specification that is faulty, it can imply a defective Contract Object/ increase in Cost and/or delayed delivery. The assessment has to be as for Company provided materials; Insufficient sketches that lead to delay/increase in Cost for Contractor has to be on Company's behalf. Contractor will furthermore be entitled to compensation/ extra time through the VO-system.

Having said this, an assessment has to be made in order to determine when a document is in fact insufficient/defective. Once again, the Contract does not specify such requirements. It has in legal theory been said that in relation to Company's Engineering in Fabrication Contract that; It is up to Company to decide what Contractor shall Construct/Fabricate, and there is no requirement for Company's engineering to be optimal.¹²⁸ This thought is of course on a different type of Contract where the Norm is that Company performs the majority or all of the engineering. In an EPCI Contract however, Contractor is responsible for the engineering. If Company however chooses to provide documents; such documents have to be correct. The correct understanding due to the parties intentions has to be that Company is in fact liable for error/defective documents and the adequate consequences to such.

9.3.4 Lack of feedback/ injunction/decision- making

As set out in section 7.1.2.3 *Feedback/injunction/decision-making/obtaining & maintaining approvals*, there is an obligation on Company to participate in Correspondence with Contractor as well as make decisions throughout the project. If Company fail to do so, it can mean that Contractor can't continue Work until the required decisions/ answers are made.

¹²⁷ Kaasen (2006) p.139

¹²⁸ Borchsenius (1989) p.695

Furthermore, a lack of feedback/injunction/decision- making on Company's behalf can imply a stand still for Contractor and result in delayed delivery and/or increased cost.

In order to determine if Company is in breach of such obligation, one has to interpret the Contract at query. NTK does not direct specific requirements on Company in such relation,¹²⁹ and one has to interpret the various documents in the Contracts' appendixes in order to determine whether or not Company is in breach of its obligation. If the appendixes do not direct a time frame for Company to make such decisions etc., it is thought that this should be done within a "reasonable time".¹³⁰ This means that an interpretation will depend on the facts and be determined on a project by project basis.

9.3.5 Penal provisions

9.3.5.1 Contractor's right to an adjustment of the Contract Schedule and/or Contract Price

If Company fails to act in accordance with the Contract regarding its side- obligations as set out in the above, this will be determined to constitute a breach of Contract. NTK Art.27.1-27-3 directs this. The effects when Company is late in providing deliverables, making decisions etc. and this leads to delays for Contractor is "*an adjustment of the contract Schedule and/or Contract Price in accordance with the provisions of Art.12 to 16*"¹³¹. Furthermore the effects are an "*adjustment of the Contract Schedule and an increase in the Contract Price*" when there is a delay or increase in Cost for Contractor due to defective fulfillment of his obligations under the Contract.

¹²⁹ Although NTK Art. 4.5 say that Company shall "...make such decisions as it is obliged to under the Contract within the time-limits set out in the Contract and otherwise within reasonable time if no such time-limits have been provided" see Section 7.1.2.3 for further information

¹³⁰ See for instance NTK art. 4.5

¹³¹ See Art.27.1 first paragraph.

Regardless of the above, Company breach in this relation does not entitle Contractor to rightfully demand that Company perform his obligations in natural. The reason for this is Company's almost unconditional right to cancel the Contract.¹³²

9.3.5.2 Time- barred

Contractor has an obligation to make a Variation Order request when he has discovered breach of Contract. NTK Art.27.2 directs an obligation for Contractor to do so "*without undue delay after discovering the breach of Contract*". If a Variation Order is not requested without undue delay, Contractor loses his right to make a Variation Order, subsequently his right to adjustment of the Contract Schedule and/or Contract Price after Art.21.1. This means that the Time-barred requirement decide where the liability for the breach shall be placed: with Company as set out by the principle of Functional liability¹³³, or with Contractor as a result of a delayed/ lack of Variation Order request.

According to Art.27.2, the term "without undue delay" starts running at the time Contractor discover the breach of Contract. The question is: when did Contractor discover the breach? The answer has to be given by an objective assessment of when Contractor in fact was aware of the breach. In order to answer the question, it has been said in legal theory that one can use the same legal sources as those to debate Art.16.1 second paragraph.¹³⁴

It is assumed that it is a requirement that Contractor in fact is aware of the breach.¹³⁵ What this means, has to be assessed in each individual EPCI Contract. It is difficult to say what indications are required, but the wording of the Contract suggests that it is not sufficient to say that Contractor "should have known". There has to be indications that clearly support his awareness.

¹³² See NTK Art.17

¹³³ See Section 8.1.4 *Functional liability*

¹³⁴ Kaasen (2006) p.699/700 reff his assessment of the time-barred art.16.1

¹³⁵ Kaasen (2006) p.699

Furthermore, the requirement is without “undue” delay. This means that it is not unthinkable that there can in fact be some delay, as long as this is not “without undue”. The term suggests that delay that has a valid cause can in fact be accepted. The assessment has to be strict due to the fact that the time-barred article exists in order to make Contractor act on the breach as soon as possible, in order to solve the issue as soon as possible. Legal theory also suggests that the only time-consuming acceptable reasons are communication between the parties.¹³⁶

9.3.5.3 Indemnification for Contractor

As set out in the above, a delay or failure for Contractor to request a Variation Order without “undue delay” leads to Contractor’s liability regarding Company breach. For Contractor, this involves that the right to indemnification no longer stands. Contractor is liable for delays/ additional cost that Company should have been liable for. As well as that, Contractor’s obligation to provide the Contract Object in accordance with the Contract still stands. This means that he then has to carry the additional cost/consequences, which the Company breach has caused.

An interesting Comparison can be made to the notification requirements in the Norwegian Sale of Goods Act, in order to make claims in standard sales-relations.¹³⁷

¹³⁶ See Kassen (2006) p.700

¹³⁷ See The Norwegian Sale of Goods Act (reglene om reklamasjon)

9.4 Contractors' obligation to perform a visual inspection-and notification: NTK Art.6

9.4.1 Overview

Penal provisions as set out in Art.27.1 will only apply if Contractor requests a variation order as a result of the Company breach in due time. A delayed request or no requests will for Contractor mean a loss of his right to “adjustment to the Contract Schedule and/or Contract price”. As well as with regard to the time-barred provisions, Company has also an obligation to “*search for defects, discrepancies and inconsistencies in Company Documents*” according to NTK Art.6.1 (as of now the term “defects” will be used for defects, discrepancies and inconsistencies) as well as to perform an “*immediate visual inspection*” of Company’s materials upon receipt of such, as directed by NTK Art.6.2. Furthermore, Contractor shall notify Company of defects that has been discovered regarding Company Documents “*without undue delay*”. Defects regarding Company materials have to be notified within 48 hours of their receipt.¹³⁸

If Contractor fails to act in Accordance with Art.6, this will lead to two consequences for Contractor: (i) a loss of the right to adjustment of the Contract Schedule and/or Contract Price (ii) liability for extra costs in connection with the Work ref.Art.6.3. Having said this, the consequences for delayed notification/ absence of notification, as set out in Art 6 does not mean that Contractor loses his right to issue a claim for Company’s breach.¹³⁹

9.4.2 Contractors obligation to search for defects in Company’s Documents and to give notification to Company thereof

In relation to Contractors obligation to search for defects regarding Company’s documents, two key questions can be asked: (i) how wide is Contractors obligation to search for defects

¹³⁸ See NTK Art.6.1-6.2

¹³⁹ In regard to Art.27 where Contractor loses his right to issue a claim after Art.27 if the criteria of requesting a variation order is not met on time.

on Company's documents? (ii) When is Contractor in breach of the time- barred: "without undue delay" regarding notification of defects?

The two questions have to be answered by an interpretation of the Contract. First of all there will be a debate on the obligation to "*search for defects*".

It has been said in legal theory, that the obligation to search for defects etc. continues throughout the project, and because there is not a time-barred in the Contract for when this should take place, it is thought that Contractor can wait to perform the search until upon a natural point of time of the work.¹⁴⁰ Having said that, it is not clear at what point in time this should be, and an assessment has to be made of each individual EPCI Contract.

The Article directs a responsibility for Contractor to search through "*Contractors Documents*". This means all documents in the Contracts appendix E: "*Contractors Documents*". All of Contractors documents are included: The original documents from the time of agreement of Contract- and the variations that have been made.

Furthermore, the term "search for defects" implies that Contractor has to perform a physical act. It is a contractual commitment to take some time to look for possible defects on Company's Documents. Having said this, it is difficult to say exactly how thorough this search should be, although the term "search" suggests that Contractor has to have a good look through the documents to determine if there are any defects. On the other side; one can ask how well suited Contractor in fact is to unveil defects regarding Company's Documents, and what defects Contractor in fact is expected to discover? The Contract does not clarify such expectations, and once again this has to be evaluated in each individual EPCI project. Having said that, it seems logical to assume that Contractor cannot be expected to un-cover minor defects in Company's Documents, as Contractor has not been involved in

¹⁴⁰ Kaasen (2006) p.148

making them. On the other side, Contractor may be expected to detect defects that do not match with verbal instructions and/or other documents.

The term: “*without undue delay*” has been covered in section 9.3.5.2: *time-barred* of the thesis. Although it is not certain that the term has the same meaning here, it is thought that the interpretation of the term to some degree will clarify what it means in this relation as well. For this reason there will not be another debate on the term at this point in the thesis. Contractor is obliged to request a Variation Order “*without undue delay*” after discovering the interference as breach of Contract.

9.4.3 Contractors obligation to perform a visual inspection- and notification of defects regarding Company’s materials

In accordance with NTK Art 6.2, Contractor is obligated to make an “*immediate visual inspection*” after receiving Company’s materials and notify Company of any defects discovered by the inspection within 48 hours. The requirements regarding at what time the inspection has to be made is very clear by the wording: “*immediate*”, which suggests that a delay of such inspection is not accepted. Furthermore, a breach of the obligations will lead to the same consequences for Contractor as set out above in section 9.4.2 *Contractors obligation to search for defects- and notification regarding Company’s Documents*.¹⁴¹

The question is how wide Contractors obligation to search for defect is- how comprehensive it has to be. The question has to be answered by an interpretation of the term: “*visual inspection*”:

Contractor is obliged to perform a “*visual*” inspection, which means that he has to view it. He is not obliged to perform any further tests or actions to verify that there are no defects. The term “*inspection*”, suggests that it is not enough that Contractor simply look at the

¹⁴¹ Ref NTK Art.6.3

materials- he has to inspect them and have a good look at it to see that there are no defects. This means that Contractor should detect any obvious defects. How wide Contractors obligation to perform a “*visual inspection*” of Company’s materials is has to be debated in each individual EPCI project. There is however no requirement for him to “*actively search*” for defects, but there has to be a minimum expectation that he has a good look and inspect the materials.

10 Company’s interference as breach of Contract

10.1 Introductory remarks

The term “Company interference” is in some degree known in the oil and gas sector, but is yet to get a more precise content and commercial frame in Norwegian offshore contract tradition. The main purpose of this part of the thesis is to try and determine the frames of Company interference, as well as the settlement of such as the main cause of Contractors’ failure to deliver within the conditions of the contract. This will normally mean delayed execution of the Work and consequently breach of schedule obligations (delivery/completion date(s) milestone(s), or increase in cost due to the interference.

10.2 What is Company interference?

Company’s interference is in this relation an unwanted degree of involvement by Company with regard to Contractor’s performance of the Work. On the other hand, an involvement from Company by Correspondence /decision-making is not only wanted by Contractor, but an obligation for Company. However, Contractor’s “independence” is a requirement for an EPCI relationship to work, and expected by Contractor. It is vital that Contractor has the freedom to perform the Work, in accordance with his own plan and methods, without constant involvement from Company. Furthermore, from a legal perspective it seems evident that involvement from Company at a certain degree will be regarded as undue interference. This can for instance be in the form of active involvement, such as asking a lot of time consuming questions such as questioning Contractor’s established plans and methods, ask Contractor to evaluate alternative plans and methods and introduce discussions around al-

ternative ways to perform the Work etc. The problem with such involvement on the part of Company is that it will normally lead to time-consuming activities, which may have both a schedule and cost impact, but which may not lead to any changes to the work is performed as one elect to follow the initial plans and methods. Often such interference by Company is not followed up by the necessary measures through the Variation Order system with the result that Contract does not seem to have any contractual right for adjustment of schedule or price.

10.3 Problem to be addressed

What is the legal situation when Company interferes in Contractors work performance-without doing so through the Variation Order system? The situation might be that Company have served only minor but several comments and suggestions which in total represent an interference in relation to the Contractor. The interference may also be of a more passive nature where Company may fail to or does not respond to Contractor in due time in accordance with the Contract. Issues such as set out above are not regulated in the Contract, but commonly occur in relation to these projects.

The question is what is the legal situation if Company fails to act in accordance with the side obligations as set out above? To a certain degree, it is thought that the answer is directed by NTK Article 27 regarding Company's breach of contract, which directs the issue to be solved by the Variation Order system, provided for in Article 12 to 16. This is however not determined.

10.4 The fine line between anticipated involvement and interference

As a main rule in EPCI Contracts, Contractor can expect that Company is more or less absent from the detail planning of the project, and is more focused on whether the finished product will meet the Contracts function requirements.

Although Company in an EPCI Contract shall make most decisions within the frames of the Contract; involvement in details on a large scale will lead to a much longer and more challenging decision-making process. The more detailed demands/requirements that may occur throughout the project will normally be solved through the VO-system. However, it may be that Contractor evaluates advice and questioning from Company to lead to minor consequences on the Contract Schedule and/or Contract Cost, and for this reason choose not to require a Variation Order. If repeated throughout the project, such behavior may as a whole lead to delays and additional cost for Contractor. This fine line between anticipated involvement on one side, and interference on the other side makes Company Interference as breach of Contract an interesting but difficult subject.

It may also be the case that Company's general behavior in regard to the VO-system is to demand changes and requirements on the side of such, as well as is actively involved with the detail planning. The bottom line is that Contractor should be very careful when acting on Company "advice" or communication without requiring a Variation Order. The reason for this is that Contractor by Contract is not entitled to compensation/extended schedule unless the issuing of a Variation Order makes such requests. In practice this is easier said than done mainly for these reasons: (i) The Communication between Contractor and Company is an obligation and an expectation. It is difficult to determine when the communication has interrupted Contractors expected freedom. (ii) The Contract does not direct an Obligation for Contractor to allow Contractor the freedom that he has expected when agreeing to the Terms and Conditions of the EPCI Contract. (iii) It may at the time be difficult for Contractor to fully see the consequences of the interference. This makes it easy to continue the project Work until the sum of unwanted communication from Company has lead to delays/ additional cost for Contractor.

10.5 Various forms of interference

10.5.1 Overview

In this thesis the term: "interference" is used for active involvement and lack of communication-omission by Company. This is however not necessarily a complete use of the term.

The distinction between the various possible forms of interference is not the task at question, nor does it matter when determining whether or not and if so- when interference by Company is in fact breach of a Contractual obligation and the consequences of such. Having said that, it seems appropriate to say a few words about two of the forms of interference that may occur in an EPCI Contract.

10.5.2 Active involvement

It is thought that active involvement on a large scale can become interference at some point. Contractor has many “deadlines” throughout an EPCI project, and if they are not reached this can imply breach of Contract on Contractor’s behalf. When Company becomes actively involved in the detailed planning of an EPCI project, it becomes difficult for Contractor to perform the work within the agreed time- frames. The reason for this is simple: Contractor has based its acceptance of schedule on the premises of a certain extent of freedom. Such freedom is one of the characteristics of an EPCI Contract. On the other side, it is a Contractual Obligation that Company respond to correspondence and makes certain decisions etc. This fact makes the determination of interference difficult. On one side there is an obligation for active involvement, and if Company fail to comply with such it may be breach of Contract- on the other side it is thought that such involvement can in fact become breach of Contract.

10.5.3 Lack of Communication- omission

Lack of communication/ feedback/decision- making by Company is breach of Contract when not in accordance with the time-bar as set out in the various Contract documents (appendixes) or when not made within “reasonable time”¹⁴² Having said that, due to the fact that the Contract or its documents rarely specify such obligations, it is difficult to determine when such actions are in fact breach of contract. Ongoing late replies from Contractor can

¹⁴² See section 9.3.4 *Lack of feedback/injunction/decision-making*

consequently mean delays for Contractor. It is thought that an ongoing lack or time-consuming communication may at some point in time “qualify” as interference.

10.6 The consequences interference has for Contractor

As set out in section 5.2.3.2 *Output Obligations and Input Obligations*, freedom for Contractor to perform the work without Company involvement on detail matters is an expectation in most EPCI projects. This involves that Contractor base his schedule and Contract price on such practice. It is a fundamental expectation in any Contractual relationship that the parties act in accordance with their Contractual obligations. When such actions fail, it is only fair that the failing party is liable for the adequate consequence of such actions. Having said that, determining what such obligations are can often be difficult because it involves an interpretation of the Contract. It is of course very important as such actions can implement comprehensive consequences for a contract party.

Company interference can for Contractor have the same consequences as with breach of side obligations in general: delay and/or additional cost. This is because the interference is time consuming, which means that Contractor is spending valuable time on issues that he did not expect to spend time on. This can be illustrated with excessive correspondence with Company regarding detail planning. Company may be questioning Contractor’s procedures or details regarding the Contract Object such as why the color red is chosen and not blue. Several time-consuming correspondences throughout the project will subsequently lead to a burst in schedule on Contractor’s behalf. This can consequently mean that Contractor is in breach of Contract because he has committed to the schedule.

As well as delayed delivery, interference can lead to additional cost for Contractor. In relation to variations, this is solved by the VO-system, and Contractor is entitled to compensation. The requirements are that: the parties, as well as Contractor issuing a variation order, agree on the fact that it is a variation to the work. Having said that, it is not certain that Contractor at the time is aware of the consequence that the interference will have, and for this reason does not issue a variation order. This is because the consequences of interfer-

ence may be a result of several small discussions/time consuming correspondence with Company. It may be that the consequences of delay and additional cost in fact presents itself at a later point of time in the project. This issue will be debated later on in the thesis.

10.7 Does NTK Article 27 govern Interference?

10.7.1 Overview

The consequences for Company's breach of Contract, as well as the entitlements for Contractor are directed by the Contract. An interpretation of NTK Art.27 has to be made in order to determine whether or not Interference is governed by such. A reproduction of Art.27.1 will be made here, as it is the legal base for the interpretation:

If Company is late in providing deliverables, in making decisions or in performing other of his obligations under the Contract, the Contractor shall be entitled to an adjustment of the Contract Schedule and/or Contract Price in accordance with the provisions of Art.12 to 16. Such adjustments shall reflect the consequences of the delay caused to Contractor by Company's breach of Contract.

Contractor has a corresponding right to adjustment of the Contract Schedule and an increase in the Contract Price with respect to delays and increased costs caused by defective fulfilment of Company's obligations under the Contract. Nevertheless, such adjustment shall not be made to the extent that such delay is due to Contractor's non-fulfilment of his obligations under Art.6.

10.7.2 Requirements and reason for article 27.1

Art.27.1 governs the effects of Company's breach of side obligations.¹⁴³ In order for a "normal" execution of the Contract, it is highly important that Company perform his obli-

¹⁴³ Art.27.1 does not govern Company's breach of payment of the Contract Price. This is directed by Art. 27.3

gations in accordance with the Contract. When this fails, the consequences for Contractor are thought to be comprehensive. This means that the effects of the breach have been directed by the Contract. This section of the thesis will debate whether or not interference is directed by Art.27.1.

The requirements for Art.27.1 are: (i) Company's breach of a Contractual side obligation. (ii) Company's breach lead to a delay and/or increase in cost for Contractor. An interpretation of the requirements is in order.

10.7.2.1 Is Company interference breach of Contract?

In order to determine whether or not Company interference is breach of Contract, one question has to be answered: Is Company Interference breach of a side obligation?

The answer to the question has to be given by an interpretation of the Contract. If Company's actions are in breach of an Obligation directed by the Contract, he is in breach of Contract and one of the requirements as set out in Art.27 is fulfilled. The term "interference" does not appear in NTK. This means that there is no description of the requirements for interference as breach of Contract. One has to debate Company's actions to find out whether or not such actions are in breach of Contract. In order to illustrate this it is assumed that Company has had repetitive and excessive involvement in detailed planning. The question is: Is an excessive involvement in detailed planning in breach of Company's Contractual obligations? In NTK, there is an obligation for Company to give feedback, decision making etc. in Art.4.5.¹⁴⁴ If Company does not act in accordance with such obligations; he is in breach of Contract. It is thought that the Article directs an obligation for Company to participate in correspondence with Contractor. However, there are no further specifications as to what amount of correspondence is expected, or when the amount is below or has exceeded the expected amount.

¹⁴⁴ See section 7.1.2.3 *Feedback/injunction/decision-making/obtaining & maintaining approvals*

Due to the fact that the wording of the Contract does not specify what amount of correspondence is expected, this has to be determined by an interpretation of the EPCI Contract at query. It is a fact that Contractor relies on Company's decisions throughout the project, and it is for this reason clear that there has to be a minimum amount of involvement from Company for it to be within the expectations of the side obligation. Having said that, an excessive involvement may as set out in the above lead to unwanted consequences for Contractor. The interpretation has to be based on an evaluation of such consequences, to determine when Contractor has exceeded his obligation to participate in correspondence. It is a difficult task to rightfully say that Company is in breach of his Obligation to participate in communication with Contractor by "excessive participation". The reason for Art. 4.5 is to secure a minimum contribution by Company to communicate throughout the project. It may for this reason be difficult to claim that Company can be in breach of such obligation by "excessive communication".

There is no obligation for Company to "stay out of Contractor's detailed planning", or to "not ask to many time consuming questions". Such obligations would be very difficult to direct as the expected degree of involvement vary between each EPCI project. A distinct variation has been made to Art.27 since its original wording, and it is today different from the original text and the Fabrication Contract. One distinction is that Company's obligations- which suggests breach of Contract, has a more general wording than Art.27 in NF07. The terms "deliverables", "making decisions" and "other of his obligations"¹⁴⁵ suggests that it is not only the obligations that are specifies in the Terms and Conditions of Contract or are connected to the appendixes that Company can be in breach of. The terms are in relation to Company breach by delay as they are listed in the first paragraph. There is however a "*corresponding right*" for Contractor to adjustment of the Contract Schedule and an increase in the Contract price due to "*defective fulfilment of Company's obligations under the Contract*". There is no reason why such obligations have to be clearly specified in the Con-

¹⁴⁵ See NTK Art 27 first paragraph

tract or in the Contract documents/appendixes. Company should also act in accordance with general obligations in an EPCI Contract. It is in this relation an established principle that Contractor's "output obligation"¹⁴⁶ involves a certain amount of freedom. Such freedom is for Contractor a premise when entering into an EPCI Contract. When interfered, such actions are in breach of Contractor's expectations, and possibly Company's Contractual Obligations.

10.7.2.2 Does Company interference lead to a delay and/or increase in cost for Contractor?

As well as Company's breach, there is a requirement that the breach has led to consequences for Contractor. This involves that the interference has caused delays and/or an increase in cost for Contractor. Art.27 direct both Company's breach as delayed deliverables and defective fulfillment of Company's obligations under the Contract. In relation to Company's interference, Art.27 second paragraph concerning defective fulfillment of Company's obligations may be applicable.

It is a requirement that the interference has led to delays and/or additional cost for Contractor. The difficult task is to adequately show that it was in fact the interference that caused the negative consequences for Contractor. This is because interference often accumulates over time: by several smaller involvements from Company. Each individual involvement may not prove to lead to sufficient- if any consequences for Contractor. However, as a whole they have led to delays/ and or additional cost for Contractor. It is difficult to say when Company interference has led to consequences for Contractor. A minimum requirement will have to be that due to interference, Company is delayed and/or has additional cost. How many days he has to be delayed and/or what sum of additional cost is required will have to be evaluated in each EPCI Contract. Art.27.1 does not require that the conse-

¹⁴⁶ See section 5.2.3.2 *Output Obligations and Input Obligations*

quences are “adequate” or of a certain percentage/size etc. This suggests that it is sufficient that the interference has led to consequences for Contractor.

10.7.3 Time- barred due date for a claim subsequent to Article 27.1

In the assumption that NTK Art.27.1 does govern Company interference, there is a time-barred due date for a claim subsequent to such.¹⁴⁷

In regard to Company interference as breach and the time-barred obligation, there is an issue that should be addressed: At what point in time does the requirement “without undue delay” start running? To a certain degree the answer is directed by Art.27.2 because Contractor should do so without undue delay “*after discovering*” the interference. Having said this, it is difficult for Contractor to know when Company involvement in fact becomes interference. This is because the consequences often appear at a later stage in the project. It may very well be the case that Contractor was aware of Company’s involvement earlier on, but did not realize what consequences the behavior would have until later on in the project. Does the time-barred due date start running at the time Contractor was aware of Companies behavior?

The answer has to be that it was not until Contractor was aware of the consequences that interference was “discovered”, and the time-barred due date begin at that point in time, not at the time that Contractor was aware of the involvement it self. This assumption seems logical, as the involvements do not become breach of contract until the total sum leads to consequences for Contractor. It is for this reason at that time that the time-barred due date will be activated.

¹⁴⁷ See section 9.3.5.2 *Time-barred*

10.8 When Interference is “using of” Contractors “float”

10.8.1 What is “float”?

The term “float” is used in the offshore industry for a margin that Contractor often supplements to his schedule, also called contingency. An example that can illustrate such is: Contractor has agreed to perform an installation that he knows will take ten days to complete. He then agrees with Company to complete the installation within fifteen days. This leaves him with a contingency of five days to cover any unforeseen issues that may occur during the installation period. Contractors “float” will help prevent that Contractor is unable to perform his Contractual Obligations on time.

10.8.2 Problem to be addressed

In order for Contractor to raise a claim after NTK Art.27, there is a requirement that the interference has led to one or more consequence(s) for Contractor.¹⁴⁸ Such consequences will be delays and/or additional cost for Contractor. An issue that should be addressed is when Company interference is “using of” Contractors’ “float”. This means that Contractor is able to provide within the agreed milestones and Contract Price because the interference is only using of Contractors “float”. There are therefore no actual delays and/or additional cost consequently to the interference.

Furthermore this can cause problems for Contractor at a later stage in the project, because he then has less- or no “float” left. If he is unable to reach milestones/ provide the Contract Object on time and/or has exceeded the agreed Contract Price, he will be liable for the consequences. The question is: Can Contractor rightfully claim that Company compensates his loss of “float”? The answer to the question is not clear, although there will be a debate of the issues of: no financial loss and/or no direct cause for delayed delivery in the next part of the thesis.

¹⁴⁸ See section 10.7 *Does NTK article 27 govern interference?*

10.8.3 No financial loss or direct cause for delayed delivery

10.8.3.1 Overview

In regard to a claim for lost “float” there is no actual financial loss adequate to Company’s interference. He still may be able to provide the Contract Object on time and within the agreed Contract Price. In order for Company to raise a claim after Art.27, there has to be at least *one* consequence for Contractor as a result of Company’s interference. The issue with a claim for lost “float” is that the consequences this has for Contractor as delays and/or increase in cost will appear at a later stage of the project.

A loss of “float” can lead to two plausible outcomes for Contractor: (i) he fails to complete the Contract within his obligations, because there are complications at a later stage in the project, and due to the fact that he has “lost” parts of/ or all of his “float” he is unable to deliver the Contract object on time and/or has additional costs. (ii) he completes the Contract within his obligations because there are no later complications, and Company’s interference *only* lead to a loss of “float”. The two plausible outcomes will be debated in regard to the requirement of consequence(s) in Art.27.

10.8.3.2 Contractor fails to perform his contractual obligations on time and/or within the agreed Contract Price due to his “loss” of “float”

The first plausible outcome for Contractor due to Company’s interference resulting in a “loss” of “float” for Contractor is when this leads to breach of Contractual obligations for Contractor. The situation is: Company’s interference is “using” of Contractor’s float, which means that there are no immediate Consequences for Contractor after the interference. However, at a later stage in the project, there are Contractor complications that lead to delays and/or additional Cost for Contractor. The question is: Can Contractor claim his “loss” of “float” caused by Company interference after Art.27? The answer has to be given by an interpretation of Art.27 and the requirement of consequences of the interference as breach:

It is a requirement that the consequences have to be caused by Company's interference. This means that Contractor is liable for the consequences of complications that were not caused by Company's breach. As a starting point, Contractor is liable for the complications that occurred at a later stage in the project. The question is: Can Contractor rightfully claim that Company is still liable for such consequences, due to the fact that the previous interference "used" his "float"? The answer has to be that he can transfer the liability onto Company-providing that it is clear that Contractor would have been able to perform within the conditions of Contract if the "float" was still in tact. The reason for this is that the consequences of the interference "using" the "float" is in fact consequently delays and/or additional cost for Contractor. Having said this, there is the issue of the time-barred due date as directed by Art.27.2.

There is no time-barred due date for when the consequences of the breach has to appear. This means that it is not a requirement that the consequences of the interference emerge within a certain time of the interference. Furthermore a claim can still be made on a consequence due to the interference if this develops at a later stage in the project. Having said that, there is still an obligation on Contractor to request a Variation Order "*without undue delay*" after discovering the interference.¹⁴⁹ If this time-barred due date begins at the time that he discovered that the interference was "using" of his "float", Contractor can still be liable for the consequence of the interference if the request of a Variation Order was not issued in accordance with Art.27.2.

As directed by Art.27.2, the time-barred due date begins at the time that Contractor discovered the "*breach of Contract*". This means that if Contractor discovered the interference as breach of Contract at the time that he was "using" his "float", the time-barred due date is activated at that time and he will lose his right to make a variation order request and once again be liable for the consequences that the complications have caused if this is not done "*without undue delay*". Having said this, it may be that Contractor in fact was not aware

¹⁴⁹ See NTK Art.27.2

of the interference as breach until the later complications occurred. If this is the case, the time-barred due date will not be activated at that point in time and Contractor is obliged to request a variation order “*without undue delay*” of that point in time. It is uncertain if the “loss” of “float” is a consequence of the interference as directed by article 27.1. Providing that it is not a sufficient consequence, this means that Contractor cannot issue a claim for his “loss” of “float” after Article 27. There will be a debate on the issue in the below.

10.8.3.3 Contractor is able to perform his contractual obligations on time and/or within the agreed Contract Price in spite of his “loss” of “float”

The question is: Can Contractor request his “loss” of “float” compensated by Company due to Company Interference? The answer has to be given by an interpretation of the requirement of “*consequences*” as directed by Art.27.1:

In accordance with Art.27.1: Contractor is entitled to “*an adjustment of the Contract Schedule and/or Contract Price*” if Company’s interference as breach of Contract has led to consequences for Contractor. The question is if Contractor’s “loss” of “float” is a consequence as set out in Art.27.1.

It has been established that consequences means delays and/or increase in cost for Contractor.¹⁵⁰ The issue with a “loss” of Contractor’s “float” situation is that there is no actual delay and/or increase in cost until all of it has been “used”. For instance: The interference has “used” four of five days of “float”, which means that Contractor will still be able to perform his contractual obligations on time and without additional cost.¹⁵¹ Can he still require that Company compensate his “loss” of “float”?

¹⁵⁰ See NTK Art 27.1 / section 10.7.2.2 *Does Company interference lead to delay and/or increase in cost for Contractor?*

¹⁵¹ *Providing that there are no later complications. See section 10.8.3.2 Contractor fails perform his contractual obligations on time and/or within the agreed Contract Price due to his “loss” of “float”*

The answer has to be that Contractor's "float" is not a part of the Contract between the parties, but is an independent calculation that Contractor has made as a margin that will help him perform within the obligations of the Contract. For this reason, the consequences of the breach should be viewed in accordance with the agreed schedule and Contract Price. This does not include the "float", and the consequences are therefor delays and/or increase in Contract Price. There are other issues such as the fact that this means can lead to a "gain" for Contractor instead of a delay or increase in cost if the "float" does not have to be "used". Having said that, there is no room for a further debate on such issues in this thesis. The answer has to be that the "float" should not be implemented in the Contractual Conditions, which Company has agreed to. Company's interference as breach should be viewed in accordance with the agreed Contract Schedule and Contract Price. Furthermore if the interference leads to delays and/or increase in Cost for Contractor he can rightfully claim a compensation for such in accordance with Art.27.

10.9 Interference as a theoretical term vs. Interference in practice

10.9.1 Few sources of law- why?

Although the issue of Company Interference seems to be a current problem in the Norwegian offshore Oil and Gas industry, there is a limited selection of legal sources on the subject. A majority of the Norwegian legal theory on NTK is "borrowed" from the onshore Construction field, and these sources are not always suitable for offshore Contracts due to the fact that the environment and risks to such are very different. Although NTK and its documents are highly detailed, there seem to be issues that are not specified- such as the issue of Company Interference. Having said that, it would be impossible for a EPCI Contract such as NTK to specify every issue that may occur throughout the course of each individual project.

The "Common wording of the Contract" is the key to interpreting a Norwegian Contract, which is why it is highly important to direct the parties' obligations as well as the issues of

breach and solutions to such. When an issue is not clearly directed by the Contract it may prove difficult for the parties to come to an agreement on how the issue should be solved. When the wording of a written law is unclear, there are often other legal sources such as “superior court rulings¹⁵²” and “the intentions for the law”¹⁵³ to assist in the attempt of interpretation. However, in regard to interpretation of an EPCI Contract, the disputes are usually settled by arbitration, which are often confidential. As well as that it may be difficult to understand the “parties intentions” in a correct and fair way. These issues suggest that a detailed governing is very important in EPCI Contracts.

11 Concluding remarks

11.1 Comments

In connection with the investigations and evaluations made in association with this thesis it has been identified a somewhat unbalanced arrangement with regard to the provision to be made by each Party. Contractor carries full responsibility for all deliveries and performance to be made by Contractor Group while Company’s responsibility for it’s provision of Documents and Deliveries always will be subject to Contractor’s search, inspection and notification obligations as per Art. 6.1. There are good reasons for such difference in obligations, first, Contractor’s deliveries and performance under the contract is to be regarded as his main obligation while Company’s obligation of same is to be regarded as side-obligations. It is also in line with the unwritten Norwegian contract principle of loyalty between contract parties to expect that Contractor whom normally are to be regarded as the expert in connection with the work shall seek for errors and advise Company if any such errors are detected.

It is furthermore identified that the Contract’s Variation Order System contains some for-

¹⁵² Høyesteretts praksis

¹⁵³ Lovens formål/ forarbeider

mal requirements whereby Contractor will lose its right to adjustment of Schedule and Price consequences if he has failed to maintain the applicable requirements even if it is evident that a variation has taken place. There are good reasons for this arrangement as well however there is no doubt that the two arrangements introduce a risk-exposure whereby he ends up with carrying the consequences of an event introduced by Company.

It may however be argued that the abovementioned risk of carrying the risk for an initial event caused by Company is within Contractor's own control as he can simply fulfil his obligations under the Contract. This is however not the situation with regard to Company's interference under the Contract which is to be regarded as more out of Contractor's control due to the fact that the Contract does not in detail provide for how to handle such interference on the part of Company.

The investigation has moreover shown that Company's interference under an EPCI project is rather common than rare. It seems to happen quite often that Company is suggesting or requesting Contractor to make alternatives to its plan and methods. Furthermore as Company normally does not regard this as any variation to the work, Company will normally not proceed with any of the actions necessary to bring the matter under the Variation Order system. The result of this is that Contractor is left with a rather weak and unclear contractual basis for any claim he may have as a result of Company's interference.

Given that interference from Company takes place rather often and due to the fact that Contractor may be left with for him quite serious consequences resulting thereof the conclusion is that Company's Interference is an issue which the parties in the industry should try to agree and provide for in the standard contracts.

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