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Summary:

The companies working in the petroleum industry often take advantage of the services of contract logistics provided by forwarding agents. Contract logistics is when a firm provides multiple logistic services to a company by using outsourced logistic services for some or all of their supply chain management functions. Kuehne+Nagel As are such a firm and also provide ship's agent- services. They're role is to arrange transportation and storage, as a mediator by arranging the contracts between the companies and a third person, or by arranging the actual transportation as a "subcontractor carrier." For a firm like Kuehne+Nagel it is necessary to minimize their liability in the contracts, especially in such a dynamic industry where they deal with very large costs and high risks. This industry requires tailor-made solutions and -contracts, however the companies use standard construction contracts which are not fit for the services provided by Kuehne+Nagel. Their Nordic transportation contracts are based on the Nordic standard, NSAB 2000, which is tailor-made for the services of a forwarding agent. However, their international contracts are not regulated by the same liability-limitations in this standard and deviate from the "ideal". Kuehne+Nagel were interested in knowing what the deviations were and if there is a trend in these deviations. In this thesis a comparative analysis was performed regarding liability, by analyzing three international contracts with different scope of work handed to Kuehne+Nagel from three different companies, A-C. These contracts were compared to the NSAB 2000 and theory based on Norwegian rules and regulations.

The results from the analysis revealed that the international contracts deviated more from the NSAB 2000 than from theory on general petroleum contracts. This is because the contracts were based on standard contracts not fit for the services provided by forwarding agents, also revealing that there is a lack of relevant theory for the services of a forwarding agent. Today's theory is more contractor-based and there is a need for new theory more focused on the transportation.

These contracts were all, in some degree, based in the "knock for knock"-principle. This principle is not included in the NSAB 2000 because it does benefit the forwarding agent arranging either transportation or arranging a contract between two Parties. By having the role of a "middleman", the forwarding agent should not hold the risk of conditions he can

not affect, nor be liable and indemnify for losses inflicted on his Contract contributors or “Subcontractors”. Contract A and B was very similar regarding the “knock for knock”-principle, however Contract B had the necessary limitation that held Kuehne+Nagel liable for the Cargo while it was in his custody for the role as a subcontractor carrier. Contract C used the “knock for knock”-principle for Company C’s benefit, where he was the only one with the right to be held Harmless. None of the international contracts matched the NSAB 2000 regarding the liability for third persons or “Subcontractors”. Theory and the contracts did not distinguish between the forwarding agent and these. All the contracts held Kuehne+Nagel liable for their “Subcontractors”, which only match the NSAB if the forwarding agent acts as a subcontractor carrier, but contradicts with the NSAB regarding their role as a mediator. Regardless of the role of the forwarding agent, the NSAB never require the forwarding agent to indemnify any loss, damage or delay inflicted by any third person. He shall only file a complaint and assist the Company in his claims against this third person. This contradicts with the requirements in all the contracts.

There was some trend in the deviations from the NSAB, despite the fact that the contracts being analyzed involved different types of services. The use of the “knock for knock liability limitations” was such a trend, because it was included in some degree in all the contracts. The reason for this is that this principle is included in the general standard petroleum contracts often used as the basis in the logistic contracts. Another trend was the subject of “subcontracts” and the liability. This also matched theory, but not the NSAB 2000 which only require that the forwarding agent pays indemnity for any loss, damage or delay due to their own neglect, not for their “subcontractor’s” neglect. The lack of distinction between the Contractor and the Subcontractors in the contracts was present in all the contracts. These contracts did not take into account the role of the forwarding agent being a “middleman”, holding more liability than he should.

It was clear that contract C involving the ship’s agent-service held Kuehne+Nagel liable for too much. This is probably because there are no regulations or conventions for this type of service. There is obviously a need for this. It was also clear that there is a need for tailor-made logistic contracts.

The NSAB 2000 is a good standard for regulating the liability of the forwarding agent and should also be used in the international contracts. However, it should include more specific rules on the Liability for “third persons” and Third Parties, the rules for payment, and insurance-requirements.

Preface:

This thesis is written in connection with the completion of an “Industrial Economics”-study over two years. After six years of studying at the University of Stavanger it feels good to finally finalize my education. This thesis was a challenge and it required a lot of time-consuming work. The process of reading and learning the basic concepts and the theory on the subjects took more time than I thought. It was a new and challenging experience to analyze complicated and long contracts and identifying the problem-areas in the different statements. It was also challenging to interpret the meaning of the statements in the contracts and link these to the thesis, as well as writing the thesis in English. It has been a difficult and challenging thesis to write, but also a learning experience I do not regret having. I found the subject interesting and if I had more time and the scope of this thesis was bigger, I would have wanted to do more research on regulations and conventions that could be used for forwarding agents.

First of all I would like to thank my mentors, Sigurd Ur and Atle Øglend. The guidance and mentoring from Sigurd Ur with Kuehne+Naagel AS was extremely helpful regarding the understanding of the concepts and regarding the interpretation of the contracts. Sigurd Ur gave me this thesis, and I am grateful he took the time to assist me. He was always easy to reach if I needed help, and he provided me with an office at their office at Tananger. Atle Øglend was my mentor at school, and helped me with the structure of this thesis.

Finally, I would like to thank my classmates! These two years at “Industrial Economics” have been the best time of my life, and I will always treasure the good times. They have been a true motivation! Thank you to my dear boyfriend, Trond Håland, who has been a big support in this process and endured me at stressful times. And thank you to my family and friends who has comforted me in the process of this thesis.

1.Introduction:

The Companies working in the petroleum industry often use forwarding agents to transport and storage their goods. Contract logistics is when a firm provides multiple logistic services to a company by using outsourced logistic services for some or all of their supply chain management functions. These firms provide services as transportation, warehousing, cross-docking, inventory management, packaging, and freight forwarding, and the services are preferably integrated in each other. Kuehne+Nagel AS provide such services and their role is to arrange the transportations or the transportation-contracts. They also provide maritime support-services. The physical performance of the services is done by other companies hired by Kuehne+Nagel.

Performing logistic services in the petroleum industry provides more challenges different from other more stable and predictable industries. The items being transported and the services are more advanced, and the companies are required to handle a dynamic and unpredictable market. This requires tailor-made contracts and solutions that all parties can benefit from. The large oil & gas- companies will have more capacity to hold the risks in a contract, compared to their contractors who may not have the same economic advantage and security. However, in the contract the oil & gas- companies will often try to shift the risk over to his contractors and suppliers.

For a firm like Kuehne+Nagel it is necessary to minimize their liability in the contracts, especially in such a dynamic industry where they deal with very large costs and high risks. If they are not careful on which contracts they enter into regarding liability, they might be stuck with these risks. The forwarding agent's main challenge is the responsibility for the contractual item *in his custody* while the goods are being transported and possibly stored. However, in the contracts they might be liable for conditions outside of their control. Another challenge in the contracts is the principal being more concerned with *the value* of the item being transported. The forwarding agent does not consider this in the contract, his concern is only *the weight* to be transported, and he will assume the same relationship between volume and density as related items. This shows that the two parties often have very different aspects of the deal, which also influence the contracts.

There are no standard contracts for logistic-services or ship's agent-services, and their principals normally prepare the contracts on the basis of standard construction contracts. These standards are not always fit for the services provided by Kuehne+Nagel, nor is there much room for changes or adaptations. As mentioned previously, the contracts should be tailor-made for services in the petroleum industry as well as tailor-made for the service Kuehne+Nagel provide.

The international contracts are prepared on the basis of other rules and regulations than the Norwegian contracts, giving the forwarding agent and the ship's agent more liability. For some of Kuehne+Nagel's services, like the ship's agent-service, there are no conventions or regulations balancing this liability. Also, these contracts impose Kuehne+Nagel to obtain different types of additional insurances to minimize their liability. In *Nordic logistic contracts for transportation*, the NSAB 2000 is used to regulate the relationship between the forwarding agent and its principals, along with the standard forwarding agent-insurance, which together cover the agent's risks in an ideal matter. This is not the case for their *international contracts*.

Because of the liability-limitations in the NSAB 2000, Kuehne+Nagel also want their *international contracts* to be based on this regulation because it is tailor-made for the transportation services they provide. Kuehne+Nagel are interested in knowing what the deviations are from the NSAB 2000 and if there is a trend in these deviations. In this thesis a contractual analysis will be performed, with a comparison of Kuehne+Nagel's international contracts with the NSAB 2000 and theory based on Norwegian rules and regulations, to reveal these deviations.

2.Method:

Kuehne+Nagel offer *a range of logistic services* within supply chain management. The international firms who want to take advantage of their services are often large companies, who in different degrees move the risks of the mission over to Kuehne+Nagel. If these companies would base their transportation-contracts on the NSAB 2000, it would be more beneficial for the forwarding agent and also their clients. However, the NSAB 2000 is only used by Nordic freight forwarders. Kuehne+Nagel's ship's agent-service has no conventions or regulations regulating the responsibilities of the parties in the contracts. The question is how these international contracts deviate from the ideal, the NSAB 2000 and our theory (based on Norwegian rules and regulations), when you focus on the liability? The main goal is for Kuehne+Nagel to not have any liability they should not have.

A general research method submitted by the University of Oslo as a presentation in the course "MEVIT 1310-Mediebruk, makt og samfunn" from 2005 has been used to approach the problem in this thesis. [8]

2.1. Research method: Exploratory design:

Exploratory design means the way the research is organized and performed when it comes to the collection of information and the analysis of this information. [15] In a research process, different choices are made to find an appropriate way to solve a problem. The following must be selected and established:

- the theme and to define the problem
- the method for collecting data and information
- the data or information need to be limited
- the technique for the analysis
- the way the research is presented [8]

2.1.1.The research process:

In this thesis, the theme and the problem was selected and provided by Kuehne+Nagel. They also provided the documents to be analyzed. The method for collecting other information

was to use libraries and study books on the subject, as well as doing research on the internet.

In this case there are several things affecting the contracts and its liabilities:

- 1) The contracts are from companies with business within the *petroleum industry*.
- 2) The international contracts are based on rules and regulation *other than Norwegian*.
- 3) The contracts are often prepared from standard contracts *not fit* for this dynamic industry or the services Kuehne+Nagel provide (logistics).
- 4) Kuehne+Nagel receive contracts requiring *different parts of the services* they provide.

In this case a qualitative method was a chosen method to find out how these international contracts deviate from “the ideal”. The analysis is based on a comparative analysis, which means a comparison between one or more units. A comparison of the NSAB 2000 to known general theory based on Norwegian rules and regulations is interesting in order to investigate the Nordic standard which is regarded as the ideal. The NSAB 2000 has been handed out by Kuehne+Nagel, and the theory has been collected from literature on similar subject. For the analysis in this thesis, a selection of international contracts handed to Kuehne+Nagel are interpreted and then compared to the NSAB 2000 and our theory.

2.2. Selection of theory:

The selection of theory for this thesis was a challenge, because there was no contractual theory on the exact service Kuehne+Nagel provide. Since the focus of this thesis is on the liability in the contracts, theory on general Petroleum Contracts has been used in the analysis. The reason for this choice is that the regulation of the liability is meant for the same dynamic industry as Kuehne+Nagel operate in. However, the challenge was also to use the type of theory that was not tailor-made for Kuehne+Nagel’s service. The theory was used to supplement the NSAB 2000, but with caution since it was not fit for the purpose of the logistic services or Kuehne+Nagels’ role as a mediator.

2.3. Selection of material:

The units in a qualitative method are the subjects being analyzed, and in this case there are three different contracts, the NSAB 2000 and theory. The representativeness of these contracts can be questioned; do they cover accurately what we want to investigate? The choice of interpreting only three contracts is due to the time-limitations in such a thesis. Also, to cover the range of services K+N provide and because the type of mission may affect K+N's liability in the contracts, three contracts with various scope of work has been selected:

- 1) Transportation contract/forwarding agent
- 2) A combination of a ship's agent- and transportation contract.
- 3) A ship's agent contract.

The variables in a qualitative method are the unit's properties, or in this case the contracts properties. In this thesis the units are the statements matching or deviating in content from the NSAB 2000 and the theory. To achieve a good result in a document analysis, it is important to interpret the content of the units correctly, and especially in this case where there are contractual statements which are often written in a complicated way, it is important that they are interpreted in the way the person writing the contract (Company A-C) meant it.

2.4. Limitation of the thesis:

It was very important to limit the scope of this thesis, regarding "liability" which is a very wide theme. In order to do so, a few subjects have been excluded or only been mentioned. However, it is recognized that "Insurance" is a very important factor to limit the liability of the parties in a contract. Also, "Warranty" has only been mentioned in the theory and the different statements.

The choice of which subjects to include in this thesis was a challenge. The choice fell on subjects important for the service of Kuehne+Nagel. Because of the focus of this thesis, the general distribution of liability between the Parties in the Contract has been the major concern. Since Kuehne+Nagel's services include the use of transporters and other

Subcontractors, the focus has also been on Kuehne+Nagel's responsibility for "Subcontractors". Also, "Indemnity", "Loss" and the consequences of breach of contract has been included. Since Kuehne+Nagel's fulfillment of the contract is the "payment" and the risk of not being paid will have large consequences in such an industry, this has also been included.

3.Theory: [2]

As mentioned previously, there was no literature on *contract logistics* that could be used for the purpose of this thesis. However, for general offshore contracts in the petroleum industry information could be found in a book called “Petroleumskontrakter” by Knut Kaasen [2], which is based on Norwegian rules and regulations. This theory takes into account the dynamics in this type of industry and regulates the same high risks as Kuehne+Nagel AS are exposed to. The following information has been taken from this book reference [2], and applies to general petroleum contracts:

3.1. Risks in the Petroleum Industry: [2]

The petroleum industry involves comprehensive and long-term projects, and large costs and risks are related to the Work often performed at sea. Such an industry will in fact involve minor and larger incidents, and a minor incident or delay in this business might have very large financial consequences for the Parties involved. The oil & gas-companies might suffer a delay in the start of production, which result in a significant economic loss. For a company working within logistics, such as Kuehne+Nagel AS, there will be many challenges due to the risks of such incidents and losses.

The Contracts in the Petroleum industry will contain obvious risks, for both personal injury and damages on items or property, and there is a need to regulate the liability of the Parties involved in the Contract. The Parties involved are mainly the Company (Kuehne+Nagel’s Principal) and the Contractor (Kuehne+Nagel). The Contractor is the one which is most likely to cause damage during the Contract period, since he is the one performing most of the Work involving the largest risks. He also holds the risk of damaging the Contractual Item before delivery. If the Company suffers any loss due to the Contractor’s failure to follow the obligations specified in the Contract, the economic consequence for this loss is often too comprehensive for the Contractor to handle and it would not be fair to hold him liable for the additional expenses *without limitations*. Even if the Company should have the right to be held Harmless for loss due to the Contractor’s breach of Contract, it is not possible for the Contractor to cover all the expenses. Therefore, there is a need to calculate and regulate the risks in a project, which is done by regulations in the Contract.

The Parties involved do not have total control over the Claims due to damages to people. However, they can regulate *the final distribution* of liability of such losses. They can also calculate the risks of damages on *items*, the liability and the possible uncovered losses. The Contractor will often distribute a significant part of the work to Subcontractors, and also these may damage the Contractual Item. Third Parties that are outsiders can cause damage to the people or the items relating to the Contractual Work, or suffer damages due to the Work. The risks are distributed with respect to which of Parties have suffered the damage. The term is that the damage has a close specified objective and timely connection to the Contractual Work. The damage can be suffered by one of the Parties, by someone else (one of the Party's personnel, or someone directly or indirectly connected in a contract with the Parties), or by a Third Party on the outside.

3.2. The Company's and the Contractor's Liability:

A short presentation of the duties, responsibilities and the risks of the Parties involved in a Petroleum Contract are presented in this chapter. The distribution and handling of the risks are based on Norwegian rules and regulations.

3.2.1. The Contractors duty of care and custody:

The Contractor will have a general duty while the Contractual Item is in its custody:

"The Contractor shall take good care of the contractual item, the Company's supplies and materials, and shall ensure that it is in good order and condition. Without special consent from the Company, the Contractor has no right to use the Company's supplies and materials that is to be incorporated in the contractual item in any other way than to complete the Contract. The Company can forbid any temporary use of the Company's supplies." [2, art 4.2]

In the contracts this is a normal statement on the responsibility of Kuehne+Nagel for the Cargo being transported. However, the transportation is only arranged by Kuehne+Nagel and physically performed by other companies hired for the Work owning their own transportation vessels and using their own personnel. Therefore, Kuehne+Nagel will comply with this duty by arranging the transportation with due diligence, and ensure that there is no reason to suspect the chosen companies performing the work will not comply with this duty.

The Contractor also has a duty to cooperate with the Company, and also with other contractors in relation to the Contractual Work if this is stated in the Contract. The Company has the right to instruct, involve and control the performance of the work within the limits of the Contract. However, this will have an effect on the liability-distribution. This is discussed later.

3.2.2. Payment:

The payment is a very important part of the deal. The Company will naturally be more concerned with the physical fulfillment of the Contract: receiving the right Item or Work, to the right time and place. However, the Contractor's fulfillment is the actual *payment* for the Work. The following apply for payments:

“When the Company has received an invoice that satisfies the requirements in art.20.2, he shall pay the amount that the Contractor is entitled to according to the invoice within 30 days. Unless otherwise stated by this Contract, the following can be excluded in the payment:

- a) any previous account-payment of the Contractor which relate to or directly relate to the Work in the invoice,*
- b) those parts of the invoiced amount which are inadequately documented or in other ways are disputed, as long as the Company, as soon as possible and no later than the time of payment, specifies what the lack of documentation consist of and/or what the dispute is about,*
- c) all the amounts the Company is entitled to make the Contractor and deductions according to the current law.*

Section b above gives the Contractor *a chance to provide the documentation* necessary to get paid or at least relieve some of the dispute. The Contractor may have the *right to be held Harmless for any loss* he may suffer, due to the Company's *failure to notify in time* of any lack of documentation in the invoice. [2]

If it is later established that the Company had a *duty to pay any withheld* amount, the Company shall pay *default interests* according to the Interest Act, “Forsinkelsesrenteloven”, calculated from the invoice's due date”. [2, art.20.3]

The Company has a *duty to pay* the invoiced amount, on two terms:

- 1) He has received an invoice from the Contractor, and
- 2) The invoice satisfies the requirements. These requirements are not included in this thesis.

If these terms are not met, the Company *can withhold the payment*. However, as mentioned

above, he is required to pay default interests from the invoice's due date if it is later established that the invoice was in accordance with the requirements. The Contract does not give the Contractor the right to claim temporary liquidity-benefits of an amount he is not entitled to. The Company can withhold a payment on any grounds, but with a risk of having to pay default interests.

It there is a *delay in the Company's payment*, the Company is also required to *pay default interests*.

3.2.3. Breach of Contract:

A breach of Contract is when one of the Parties involved in the Contract do not fulfill its obligations according to the Contract, and without providing evidence that the other party is liable for the breach. If there is a breach, which is very likely in this industry, the suffering Party may have the right to *withhold his performance, require a price-reduction, cancellation of the contract, liquidated damages, repairs or indemnity*. Therefore it is necessary to have tools to help manage the consequences due to the breach.

A good tool to regulate the dynamics in this type of industry is the rules of Change, by the use of *Variation Orders*. The rules for changing an order are the basis for establishing each Party's final duties, and they also regulate the consequences of force majeure and the Company's breach of Contract.

The Company's breach should have consequences which hold the Contractor economic Harmless, and the Contractor's breach should have consequences to secure a minimum negative impact on the Company's right for "the correct delivery". The Contractor has a need to calculate the scope of a possible breach and take this risk into account in the Work Scheme and the Contractual Price.

3.2.3.1. The Company's breach of Contract:

"When the Company does not perform its obligations as agreed in the Contract, the Company shall compensate the Contractor for the consequences due to the Company's failure. However, the Contractor has a duty to investigate and notify on any neglect, failure of error to minimize these consequences. The Company's liability is modified if the Contractor does not perform this duty of notifying Company, and if he has not done so, the Contractor shall also be liable for and indemnify the Company's loss due to the neglect of Contractor, if the error should have been discovered by him. The Contractor is also required to notify any delays in the Company's performance, regardless of the assumed reason for the delay. The delay is deemed to be a breach of contract, and the Contractor can require a Variation Order. The VO is the basis to claim compensation for the consequences of the delay. The Company's penalty of exceeding a deadline is that he loses his right to be held Harmless. "[2]

The Company breaches the Contract if he neglects to pay any invoiced documented Work or does not use the rules of Change correctly. If the Company does not fulfill its payment-obligations he shall have to *pay default interests*, unless the delay is due to a lack of documentation in the invoice and that the Company, without undue delay, has notified to the Contractor about this lack of documentation.

"If the Company's delivery of Supply, Drawings, Specifications or other duties according to the Contract is delayed, the Contractor has the right for an adjustment of the Work Schedule and/or the Contractual Price. Such an adjustment shall reflect the consequences of the delay caused by the Company's breach/neglect/default.

The Contractor has the similar right when there is a delay due to any defects or errors in the Company's delivery, Drawings or Specifications. Such an adjustment shall still not be done if the delay is caused by the Contractor's failure in fulfilling its obligations." [2, art.27.1]

"The Company shall issue a VO regarding any adjustments in the Work Schedule and other consequences due to the Company's breach. If the Contractor has not issued a requirement for a VO without undue delay after discovering the breach, the Contractor loses his right for a VO." [2, art.27.2]

Any type of change in the scope of the Work shall be imposed by a Variation Order from the Company. Otherwise the Contractor is not obligated to deviate from the Contract. If the Contractor issues a VO he has the *right to be held Harmless*. However, this right is modified

if the Contractor neglects his *duty to investigate and notify, within a time limit after he discovered or should have discovered, any defects in the Company's deliveries* not in accordance with the Contract. If he does not fulfill this duty, he might lose his right for Harmlessness.

3.2.3.2. The Contractor's breach of Contract:

The Contractor holds, within wide limits, the risk of the economic feasibility of the Contractual duties he takes on. He is also in the position to potentially cause damage to the Contractual Item or delay in the Work, which might have significant financial consequences for the Company. The physical fulfillment of the Contract is essential for the Company, and an economic compensation can normally not hold the Company Harmless if the fulfillment of the Contract has not taken place. Also it would not be able to satisfy the Company's basic need for fulfillment. Therefore, there is a need to regulate the liability of the Contractor, to protect him from the risk of being responsible for loss he does not have the economic capacity to cover and to secure that the Company achieves, as far as possible, his physical fulfillment of the Contract.

A general rule for all breaches of Contract by the Contractor is that the Contractor is required to notify on any delay or defect immediately after it is discovered or come to the Contractor's knowledge. The Contractor's total liability is limited to 25% of the Contractual Price. The Contractor will also not be liable for the Company's indirect loss. These liability-limitations apply for both the amount and the type of cost.

3.2.3.2.1. Defects and incomplete delivery:

"If the Contractual Item has a defect when it is delivered to the Company, or a defect occurs which the Contractor has a warranty-responsibility for, the Contractor is liable for the defect, according to the rules in this article.

The Contractor is still only liable for the defect notified by the Company without undue delay after the defect is discovered or should have been discovered. Such notice shall be given within the warranty-period. If the notification is regarding a defect on warranty-work, it has to be notified within this special warranty-time.

The notification shall contain a specific description of the defect. " [2, art.25.1]

There is a *defect* if the Contractual Item is not according to the Contract when it is delivered or through the warranty-period. A defect is only *relevant after* delivery. If the Work has not been performed as agreed within the time of delivery and the Work is incomplete, the Company has the right to claim liquidated damages, to withhold disputed payment and to impose accelerating measures.

When there is a defect, the Company can either choose to accept the delivery or not. The Company has a *duty to accept* if “there are only minor parts of the Work not completed” and when these parts “have no practical meaning” for the use of or further use of the Contractual Item. The Company can also *claim the incomplete item delivered*, regardless of its defects. The consequences of the choices are stated in 1)-3) below:

1) If the Company chooses *not to accept* the delivery, there is a *delay*, and the Company has the right to claim *liquidated damages* and other remedies.

2) If the Company chooses to *accept*, the Contractor is liable (on certain terms) for the defects on the Contractual Item, regardless of what time the defects are discovered. The Company can either *require repair at the Contractor’s expense*, or *claim indemnity* from the Contractor for the parts of the Company’s additional expenses by having other contractors finalizing the Work. The Company can also require to be *indemnified for his loss* due to the defects.

3) When there is an incomplete delivery, the Contractor has the normal warranty-responsibility for the complete part of the Contractual Item and also a delay-responsibility (liquidated damages) for the parts he does not deliver. These liquidated damages are also calculated on the basis of the assumed delay that would have occurred if the Contractor would finalize the Work.

“If there is any loss or damage to the Contractual Item within the period from start of the Work until a Delivery Protocol is established or should have been established, the Contractor shall perform the necessary measures to secure that the Work is finalized according to the Contract. This also applies when there is any loss or damage to Materials or the Company’s delivery while it is in the Contractor’s custody and control.

The Contractor's duty to perform measures applies regardless of any liability-conditions from the Company's side." [2, art.29.1]

"If the Contractor is liable for a defect, he shall immediately repair the defect at his own expense. The Contractor shall notify the Company on the measures he plans to initiate, as well as the time of the repair. The Company shall, without undue delay, give the Contractor notice on his opinion of the Contractor's plans for repair. The Company shall not, unreasonably, prevent the Contractor from conducting the repair as planned." [2, art.25.2]

The Contractor has a *duty to repair or correct the defect* and fulfill his obligation to perform according to the Contract, regardless of the defect. However, this is only a duty, but *not his unconditional right*. The Company might choose to do the repair himself or let other contractors repair it:

- 1) If the Company refuses to let the Contractor do the repair, the Contractor's liability is limited to the amount it would cost him to do the repair himself.
- 2) If he is allowed to do the repair himself, he has to hold the additional costs and expenses with it. He will also be given a certain time-limit for the repair, and if he fails to finalize the repair within this time, he is required to cover the Company's additional costs to use other contractors for the repair.
- 3) If the Company chose to engage another contractor for the repair, the Contractor shall pay for it with limitations, provided that the Company proceeds in a reasonable manner.

"If the repair is done by anyone other than the Contractor or is not done at all, the Contractor is no longer liable for the repair or the lack of repair and the causes of this." [2, art.25.3]

The Contractor can also be required to indemnify any loss of the Company, due to the defect. Regardless of whether the Contractor does the repair or not, he is required to indemnify, according to law, the Company's direct loss due to the defect. The Contractor's *liability for repair is limited according to type of expenses and the total amount*. This liability for repairs and indemnity regarding defects is limited to a maximum of 15% of the Contractual Price.

The Company has the right to cancel the Contract when there is a defect. If the Company chooses to cancel the Contract, the Contractor has no risk of paying any compensation for the incomplete delivery. The period for complaint and warranty for the Company is important regarding the Contractor's responsibility for any defects. If the Company does not notify the Contractor about the defect within the warranty-period, which is normally within two years after the delivery for offshore contracts, the Contractor's liability will cease. The Company has to notify without undue delay.

3.2.3.2.2. Delay:

"There is a delay if the Work provided by the Work Schedule is not performed according to the Contract at the time of a defined milestone with a penalty of delay attached to it. According to the delivery date or the time of delivery, the delivery shall be deemed to have taken place at the time a Delivery Protocol is established or should have been established." [2, art.24.1]

"If the Work is delayed compared to the penalty sanctioned milestones stated in the Work Schedule, the Contractor shall pay liquidated damages to the Company. If the terms of delivery exist at time of delivery, the Company's right for liquidated damages for delay at any earlier penalty sanctioned milestones ceases, except for the case where the Company can provide proof that he has suffered any loss due to such earlier delays. " [2,art.24.2]

Since the payment of a Contract is normally paid according to *the progression*, the practical consequence of a delay is that the Contractor may not earn any claim for compensation. If there is a delay in the Contractor's delivery, the Company has the *right to claim liquidated damages* from the Contractor, regardless of whether or not the Company suffers any actual loss from the delay. The liquidated damages are liability-limitations pr. day and are maximized to a certain percentage of the contractual Price for all the delays under the Contract. The Contractor's liability for delay is maximized to 0,15% of the Contractual Price pr. Day delay, and never exceeds more than 10% of the Contractual Price. This amount may often be higher than the actual loss of the Company from the delay.

When the Contractor's Work is delayed and not finalized at the time specified in the Contract, Work Order or Purchase Order, the Contractor has a duty to rectify and finalize the Work. However, he does not have *the right* to finalize it. The Company may chose to either

finalize the Work himself or let another contractor complete the Work. The Company also has the right to accept the Work in its incomplete condition. If he chooses to do so, the following apply:

“...Simultaneously with such a delivery the parties shall establish a Delivery Protocol which shall set:

- a) that the Contractual Item is not completed at the date of delivery in the Company’s opinion.*
- b) each party’s opinion of what percentage of the item is not finished and contractually completed.*
- c) each party’s opinion on which parts of the Contractual Item is incomplete and unsatisfactory performed.*
- d) the date and the time of delivery.*

If the Company has requires such a delivery, he shall not pay for the incomplete part of the Work. The Company can require liquidated damages calculated from the number of days past the date of delivery it is assumed to have been a delay if the Contractor was to finalize the Contractual Item. Otherwise, the Company has no other requirements due to the delay of the Work not performed by the Contractor.

The Company shall also issue a Completion Certificate which reflects the Delivery Protocol.” [2, art. 24.3]

When the Contractor has not fulfilled the Work at time of delivery, the Compensation is reduced according to the incomplete part. This is done as a percentage reduction according to the percentage of defect.

If the Company chooses to cancel the Contract, the Contractor keep the already paid part of the Contractual Price, and the Company has the right to take over the contractual Item as it is (in its unfinished form). The Company has title to it.

3.2.3.2.2.1. Measures against progression problem and delays:

(Most of the sections in this chapter are taken directly from “Petroleumskontrakter” by Knut Kaasen”)

In order to prevent or minimize any delay and its consequences, there are some rules on how to handle progression problems and balance the liability of the Parties involved. In this type of industry, failure to deliver in time might lead to for example postponement of production of oil and gas, causing big economic losses. Minor delays can lead to larger time-offsets because for certain installations at sea can only be done within certain time-periods

of the year. It is also important for the Company that the Contractor withholds the agreed milestones during the contract period. A delay can affect other parts of the project, even if the final delivery date is met. The rules aim to avoid or repair any breaches caused by Contractor (delay) or breaches caused by Company (failure in delivering material or equipment, lack-full engineering, or other deviations from Contract). [2]

The schedule shall be complied as much as possible as originally established. However, in real life these schedules are rarely withheld. Because of the importance of avoiding delays in this industry, the Company put some pressure on the Contractor so that Contractor will alert and notify Company as early as possible. Company also wants to have a say in the choice of measure to prevent or minimize the delay: [2]

The Contractor is required to notify any defects or faults in the Company's delivery or engineering, and also to notify if he is affected by Force Majeure. He shall also notify if he means he is required to be held Harmless due to any imposed variation-work, any changed laws or regulations, on any intrusive interventions or breaches of Contract from the Company.[2] By maintaining reports on the progression and get an overview of the contractual Work, he can discover progression problems before they cause a delay.

If the delay is due to the Contractor's failure, it is his duty to take measures to prevent or minimize the delay. If the Company is responsible for the progression-problem, the Contractor has no such duty. However, the measures should be initiated before the cause of the delay has been identified, which causes a problem with the determination of which party is liable for taking the necessary measures. Compared to the Company, the Contractor has the best practical insight to foresee a problem and its possible cause. Therefore the Contract forces the Contractor to take a stand and make a choice on who is responsible for the progression-problem. This choice controls the further handling of the problem, by either pretending that the problem is caused by conditions which are Company's risk, or not to claim this. The Company may choose to agree or disagree in this pretention. Whether or not the Company disagrees or if this pretention turns out to be false, the problem shall be solved with a Variation Order. The Contractor can choose to require a VO or not. If the Contractor does require a VO, he can be held Harmless for the risks the Company is liable for. The VO is the Company's acknowledgement that they hold the risk of the delay.

To place the progress-problem with one of the parties, the tool is the Contractor's requirement for a Variation Order (VOR). The Contractor's choice can lead to three different situations:

a) The Contractor does not require a Variation Order within the time limits to do so. If this is the case, the Contractor is stuck with the risk of the progression-problem, regardless of who was liable for it.

b) The Contractor requires a Variation Order, and the Company admits to hold the risk of the progression problem and issues the Variation Order. The Contractor is imposed to take measures to minimize or obtain the delay, and is compensated for the stress of the delay, through adjustments on the time schedule and/or the contractual price.

c) The Contractor requires a Variation Order, but the Company does not admit to hold the risk of the progression-problem and issues a Disputed Variation Order (DVO). This means a formalized disagreement between the parties with respect to which party holds the risk for the conditions that lead to the delay. Until it is established whether or not the Contractor is required a plain VO, there is a dispute on who holds the risk of the delay and who shall determine and pay for the acceleration-measures.

The Contractor has neither the right nor the duty to take measures or suggest measures without orders from the Company. The Company is required to instruct the measure through the VO, and only then the Contractor has a duty to take action.

The Contractor has to require a Variation Order in time to be held Harmless for any delay caused by the Company. However, this VO and the rights it would have led to can be cancelled when the Company gives an amorphous instruction to take acceleration-measures. The Contractor is required to perform the imposed measure on its own expense, but if he believes the Company's instruction goes beyond his contractual duties, he shall present a requirement for a Variation Order. Regardless of the cancellation of the first VO, the Contractor shall be compensated for the consequences arising, independently of the measure.

When the Contractor holds the risk of the delay, he is encouraged to take measures to fulfill his contractual duty to withhold the work schedule. It is up to the Contractor to choose measures, within the limits of the Contract. There are no limits to the expenses the Contractor might get from taking measures against a possible delay he is liable for. And if he is unsuccessful he might be held responsible for the delay and have to pay Liquidated Damages of maximum 10% of the contractual price. If the Contractor has deliberately not taken any measures he might be exposed, without limitation, to cover all direct losses of the Company due to the delay. The Company *can not* impose the Contractor to accelerate in order to fulfill the Contract in time. The Company can only maintain the requirement on delivery, which implies that he has the right to claim indemnity from the Contractor if there is a delay in the performance. The Contractor has the choice of either taking accelerating measures or postponing the responsibility for the delay.

If the Contractor holds the risk of a progression-problem, he has a general contractual duty to take the necessary measures to withhold the Work Schedule. It is his right and duty to choose the measures, under the threat of holding the risk of a delay if the measures are not successful. However, if the Company gives instructions on which measures the Contractor shall take, he intervenes with the Contractor's right to choose, which will alter the Contractor's position under the Contract. The Contractor has the grounds to require/issue a VO as a result of the instruction. This requirement can't be rejected just by referring to the Contractor's risk of the progression-problem. The requirement must be received, because the Company has intervened in the Contractor's freedom of choice. If the instruction was successful and the progression-problem was overcome, the Contractor has taken adequate measures and the responsibility for a delay does not occur. However, the expenses of the measure can be greater than the expenses from the Contractor's chosen measure. The Company's instructions inflicted additional expenses on the Contractor, and the Contractor shall be required additional compensation to be held Harmless for the instruction. If the instruction was not successful and this results in an actual delay, the alternatives have to be investigated: "Which alternative would the Contractor have initiated if he had the freedom of choice, and would it succeed?" The Company might be stuck with the significant risk of the delay, which used to belong to the Contractor, if the Contractor's choice would have chosen the better option. However, if the Contractor's choice would not have been better,

the Company's unfit instruction has not done any difference for the outcome (except for the possible additional costs the Contractor has suffered or avoided). Therefore, it is risky for the Company to interfere with instructions when they are under a threat of a delay. However, it can also be risky not to interfere in a progression-problem when the Contractor is initiating unfit measures.

3.2.3.3. Relief from liability: to be held Harmless:

"The Company shall hold the Contractor Group Harmless from the Company's own indirect losses, and the Contractor shall hold the Company Group Harmless from the Contractor's own indirect losses. This applies regardless of any liability-conditions of any kind from any group, and-besides from art.17.3 and 24.2-regardless of what might follow from other regulations in the Contract."

"Indirect losses include, but are not limited to loss of income, lost profit, losses due to pollution and lost production." [2, art.32.1]

Both parties shall *not be liable* for the other party's indirect losses regardless of any indemnity-conditions. Also, if a Party suffers force majeure, he shall not be deemed to have breached the contractual duties he could not fulfill because of the force majeure. Each party has to cover their own expenses caused by the force majeure. However, if the Contractor suffers force majeure, he is entitled to a deadline extension.

The Company and the Contractor shall hold each other Harmless for certain Claims and losses. The Parties involved are the Company Group and the Contractor Group, identified as the Company or the Contractor, with their mother-, daughter- and sister-companies, including their own employees and the employees of these companies. The Contractor Group also includes his Subcontractors and their sub-subcontractors, and the employees of these companies. The Company Group also includes his suppliers and contractors, and their sub-suppliers and sub-contractors, and the employees of these companies.

For the Contractor's liability for damages to the Contractor Group, the following apply:

"The Contractor shall hold the Company Group Harmless from any Claim relating to:

- a) personal injury or loss of human life among the personnel of the Contractor Group,*
- b) loss of or damage to any property of the Contractor Group, which may arise in connection with the Work or is caused by the Contractual Item in its lifetime. This shall apply regardless of any liability-*

conditions of any kind from the Company Group's side.

The Contractor shall, as far as practically possible, make sure that other companies in the Contractor Group disclaim the right to make any Claims which are the Contractor's duty, according to art.30.1."
[2, art.30.1]

For the Company's liability for damages on the Company Group, the following apply:

"The Company shall hold the Contractor Group Harmless from any claim relating to:

- a) personal injury or loss of human life among the personnel of the Company Group,*
- b) loss of or damage to any property of the Company Group, which may arise in connection with the Work or is caused by the Contractual Item in its lifetime. This shall apply regardless of any liability-conditions of any kind from the Company Group's side.*

The Company shall, as far as practically possible, make sure that other companies in the Company Group disclaim the right to make any Claims which are the Company's duty, according to art.30.2."
[2, art.30.2]

This principle of holding each party liable for their own is also called the "Knock for Knock Indemnity Principle":

"Each party shall assume responsibility for the personnel and property within its own Party Group and shall indemnify the other Party accordingly, irrespective of cause or circumstances, and irrespective of gross negligence or willful misconduct."

"Party Groups shall be properly defined to include the respective Party's Affiliates, other Contractors, Subcontractors and Clients of any tier, and all of their personnel, officers, directors, etc. as may be applicable and related to the Contract. [2] & [9]

3.3. Subcontracting:

Kuehne+Nagel use “Contract Contributors” or third persons in their services and the Companies will have certain requirements on the subject which are stated in the different contracts. In this thesis there third persons are often called “Subcontractors”, because that is what they are referred to in the theory and in the contracts.

According to theory on contracts in the petroleum industry, the following shall apply:

3.3.1. Contractor’s right to use subcontractors:

“The Contractor shall not enter into a Subcontract for parts of the work without the Company’s previous written approval. The Company shall give the Contractor notice about his decision within seven days after the Contractor has asked for it. Consent is still not needed for subcontracting mentioned in Annex H- Subcontractors, minor purchases and the use of hired labor to a limited extent.” [2, art.8.1]

There are some *exceptions* to this requirement. The Contractor does not need an approval if Company already has given its consent to use subcontractors. This can be done by having a list of different types of *pre-approved subcontractors* with several alternatives for each group, and with an approval from Company to sign such a subcontract with these groups or specific subcontractors. Another exception is with *minor purchases*, where “minor purchases” are purchases of standard goods. However, it is hard to distinguish what a “minor” purchase is. In an unclear situation one should compare the value of the purchase to the Contractor’s obligations and investigate how critical the purchase is for the Contractor to fulfill its obligations. The last exception is for *some smaller subcontracts* like hiring vessels for transportation or installation, or hiring labor. However, this is only for hired labor to “a limited extent” and for key personnel for the Contract. The Contractor needs Company’s approval if this type of outsourced personnel dominates the contractual work. [2]

The *process of approval* might take some time and may affect the Contractor’s progress, all at *Contractor’s risk*. It is up to the Contractor to ask for the approval of a subcontractor in good time to reduce the risk of delay. The Company has *seven days to respond* to Contractor. If Company gives a rejection, a second process of approval is also at Contractor’s risk if Company had reasonable grounds to reject the subcontractor. [2]

If the Contractor receives an approval from Company and concludes a subcontract, *Contractor is not required to do any follow-up on the Subcontractor*. However, he is encouraged to maintain some kind of control and documentation of its Subcontractor's performance. *The Company is to have no direct contact with the Subcontractor: all control, inspection and communication goes through Contractor. The Subcontractor is the Contractor's responsibility.*

If the Contractor signs a subcontract *without the Company's approval*, the Company can demand a restoration of the contract which leads to a reversal of the Subcontractor's duties to the Contractor. However, the Company needs *reasonable grounds* to do so. The Contractor is then required to *indemnify the loss* he caused the Company by engaging a subcontractor without approval.

3.3.2 Responsibility for Subcontractor:

The main rule:

"The Contractor is responsible under the Contract for Subcontracting." [2, art.8.2]

The exceptions when using a Frame Agreement:

"If the Company enter into a Frame Agreement with one or more subcontractors and these are assigned to the Contractor, the Contractor's direct additional expenditures is to be carried by the Company if the Contractor can document that the Subcontractor, according to the Frame Agreement, can't deliver within the time-limits set in the agreement, or if there are no set time-limits in the agreement and the Contractor can document that the delivery can't be used in the Contractor's fabrication within the fixed schedule. These determinations can still not be used if it has been proven that the delay is caused by conditions on the Contractor's side...." [2, art 8.2]

The exceptions when transferring or designating a Subcontract:

"If the Company, after entering into a Contract, transfer a Subcontract to the Contractor or designates a Subcontractor, and the terms for the subcontracting was not known for the Contractor when the Contract was signed, the Contractor's responsibility for damages, loss or delays caused by conditions on Subcontractors side, is limited to the responsibility the Subcontractor has according to the contract transferred to the Contractor. If the Subcontractor goes bankrupt and the Subcontract is disregarded, the Contractor can require adjustments on the schedule and the contract price according to the rules in art.12-16." [2, art 8.2]

3.3.2.1. The main rule:

The main rule states that the Contractor is *responsible for all subcontracting*, also the ones that do not require the Company's written approval. The Contractor is responsible for the performance of the Contract and that it is not affected by the Subcontracting. If the Subcontractor neglects his obligations stated in the Subcontract and this causes any damages, loss, delay or other breaches of the contract, *the Contractor is deemed to be responsible for this*. [2] The Contractor is also fully responsible for the Subcontract if the Subcontractor was designated or transferred to him *before the Contract was concluded*, because the risk of the Subcontract can be calculated and included in the contractual price. However, if the Subcontract is imposed or transferred from the Company to the Contractor *after conclusion of the Contract*, the exceptions in the second and third section apply.

The exceptions to the Contractor's responsibility state the consequences of the *Company's involvement in the subcontracting*. There is a distinction between these exceptions: the use of a *Frame Agreement* and other cases of *control from the Company*. If the Company controls the terms of the Subcontract, the Contractor's liability decrease. For the Contractor, there should always be a balance between the freedom to choose a subcontractor and the risk of not having that choice. Since the Contractor can't reject the chosen Subcontractor, the Company has to hold some risk if the Subcontractor fails. However, these modifications of the responsibility for Subcontracts only account if the defect or the delay under the Contract, is *due to conditions solely of the Subcontractors responsibility*. It is hard for the Contractor to avoid any fault and responsibility. He has to prove he has done sufficient follow-up and documentation on the Subcontractor to avoid any responsibility.

3.3.2.2. Exception 1: Transfer of Frame Agreement:

The second section is about when a *Frame Agreement is transferred* to Contractor *after the Contract* has been concluded. The Contractor's unconditional liability for Subcontracts is limited by the use of a Frame Agreement. If the Company enters a Frame Agreement in advance, he makes preparations for the use of Subcontracts. In a Frame Agreement the scope of work and the time of delivery have not been specified, and it is up to Contractor to administrate the Subcontracts he need within the limits of the terms in the Frame

Agreement. The terms in a Frame Agreement can be such as quality, price and certain terms of delivery. *The Contractor is exposed for the risk of not being able to fulfill its own obligations under the Frame Agreement, for the risk of Subcontractor not performing according to the Frame Agreement and for the risk of the terms in the Frame Agreement not being fit for the Contractor's purpose.* The Contractor's liability is often limited to the liability of the Subcontractor in the Frame Agreement. However, if the Subcontract is delayed compared to the Contractor's requirements, the second section often give the Contractor an additional right to be held Harmless for the additional expenses he suffers. This right is *not limited* to the cases where the Frame Agreement is *transferred* to the Contractor after the Contract has been concluded. However the right for limitation of the liability of breach of contract *only applies* when the Subcontract is transferred after conclusion of the Contract.

There are two alternative terms for the *Contractor's right to be held Harmless*:

- 1) The Contractor can document that the Subcontractor *can not deliver*, according to a Frame Agreement, within the given time-limits in the Frame Agreement,
- 2) The Contractor can document that the *delivery can not be used* in the Contractor's fabrication within the fixed schedule.

These terms applies on the grounds that *"no time of delivery has been specified in the Frame Agreement."*

If the delivery is on time, but the performance was not in accordance to the Frame Agreement and any repair or redoing will cause a delay, the Contractor does not have the right to be held Harmless. However, he is required for some limitation on his liability for breach of contract.

If the Contractor has Claims against the Company, the Company shall hold the Contractor's *direct extra expenses*. However, the term for this is that there has to be a close connection between the cause (Subcontractor's delay) and its direct consequence (additional expenses). The Contractor is entitled to coverage of all documented expenses, regardless of the expenses being higher or lower than the corresponding rates and prices in the Contract. Any delay from the Subcontractor can cause Contractor to pay Liquidated Damages to the Company, and these can't be claimed reimbursed. However, if the Liquidated Damages was due to delay caused solely by the Contractor, the Contractor's exposure is limited to the liability of the Subcontractor in the Frame Agreement. Normally, the Contractor has no right

to claim adjustments on the schedule, has no right to be compensated for the Liquidated Damages, and the *Contractor has to take measures so that the Subcontractor's delay does not affect the Contract*.

If the Subcontractor goes bankrupt, the Contractor is exposed to the Contract, as a consequence of the Subcontractors breach. According to the first section, this would be the Contractors risk. However, in the second and third section (here), the Contractor has no control on the choice of the Subcontractor, and this rule is unreasonable. The Subcontract can be cancelled, and the Contractor has a right for adjustment on the Work Schedule and the Contractual Price, and the Contractor is compensated through a VO for the consequences of the cancellation.

3.3.2.3 Exception 2: Designation or transfer of Subcontract:

The third section is about the transfer or the designation of a Subcontractor from the Company to the Contractor *after the conclusion of the Contract*, when the transfer or the designation was *not informed* to the Contractor at the time of the conclusion. There is a distinction between two different situations that are reasons to limit the Contractor's liability of the Subcontract:

- 1) The Company transfers a Subcontract to the Contractor. The Company has concluded a Subcontract and then puts the Contractor in its place, so the Contractor has not had any influence on the Subcontract.
- 2) The Company designates a Subcontractor. The Contractor has, in principle, had influence on the conditions of the Subcontract. However, the Contractor has no control over the risk in the choice of the specific Subcontractor.

If this is the case, the Contractor's liability for delays or defects caused by Subcontractor is *limited to the liability the Subcontractor has under the Subcontract*, or in other words *to the amount* the Subcontractor is required to pay under the Subcontract. If the Subcontractor goes bankrupt, the Contractor is not liable for this.

If the designation of a Subcontract is outside the limits of the Contract, then there is a change in the Contractors contractual duties and the Company has to instruct this through a Variation Order (VO). This may affect the contractual price and the progress. The effects of

an unpredicted imposed Subcontract on the costs are determined by the VO giving the order. *The Contractor is responsible for the Subcontract* (except for the cases in the second and third section), and all of the Contractors obligations according to the Contract also apply *when there is a Variation Order*.

3.4. Third Parties:

(The sections in this chapter are mainly taken directly from “Petroleumskontrakter” by Knut Kaasen)

There can also be damages caused by or to parties not directly involved in the Contract. Such Third Parties are in direct or indirect relation to one of the Parties in the Contract. When such damage occurs, the claims for indemnity from the Third Party can be distributed between the Company and the Contractor. The Contract can hold one of the Parties responsible for indemnity on the basis of applicable law, and the distribution of such losses is agreed in advance.

Damage to Third Parties:

“Until the certificate of Approval is issued, the Contractor shall hold Company Group Harmless from:

a) expenses in connection with claims from any public authority in connection to the removal of wreckage by or pollution from any vessels or other floating structures which are provided by the Contractor to be used in connection to the Work, or

b) claims which are connected to any loss or damage suffered by all other than the Contractor Group and the Company Group in connection to the Work or the Contractual Item, regardless of whether or not the loss or the damage is caused by liability conditions in any form from the Company Group’s side.

The Contractor’s liability for losses or damages for each incident shall be limited to NOK 2,000,000,-. This does not apply for the Contractor’s liability for losses or damages on each incident covered by the insurance in art.31.2a) and b), where the Contractor’s liability shall include the amount insured which is paid for the loss or the damage.

The Company shall hold the Contractor Harmless from all claims mentioned in art.30.1, first section, to the extent they may exceed the liability-limitations above, regardless of any liability-conditions of any kind from the Contractor Group's side. "

After the Certificate of Approval has been issued, the Company shall hold the Contractor Group Harmless from any claim mentioned in art.31.3 first section, regardless of any liability-conditions of any kind from the Contractor Group's side. "[2, art.30.3]

The distribution of this liability is based on two criteria:

- 1) *when* the Claim is made,
- 2) what the *scope* of the damage is.

This distribution is done regardless of whether the damage is caused by the other Party, also called the "knock for knock"-principle, as mentioned earlier in this thesis. Each Party gives up their rights to claim indemnity from each other, and agree to cover damages of any Third Party or damages on personnel. They also promise to hold the other Party Harmless when he is required to cover any Third Party's claim which according to the Contract is not to be covered by him.

3.5. Conclusion of theory:

The theory was mainly based on the services of a contractor which match the Contracts provided by Kuehne+Nagel. This is an interesting fact, because there is clearly a need for more relevant theory for the services of a forwarding agent. However, this theory will be used in the analysis to see how theory deviates from the NSAB 2000 and the Contracts because the theory is based on Norwegian rules and regulations.

4.Regulations on liability:

As mentioned previously, Kuehne+Nagel AS have difficulties with the standard contracts their customers use, holding them responsible for more than they should. There are several written “guidelines” in use today to help the parties regulate the liability in a contract. When negotiating contracts involving transportation, Kuehne+Nagel want to take advantage of the liability-limitations set by NSAB 2000, but this is a Nordic agreement and is hard to integrate in larger contracts that often encompasses globally. Also the INCOTERMS are used when preparing these contractual conditions to balance the liability, but they do not cover the role of the forwarding agent:

4.1. INCOTERMS – obligations, costs and risks:

INCOTERMS is about *when* the parties in a trade *take on the risk of the item* while it is in forwarders custody, or in other words when the risk passes on to the buyer. These are international and alternative delivery terms between the two parties; the *seller* and the *buyer*, and both parties have ownerships of the Goods at different times, depending on if the delivery or payment has taken place. The INCOTERMS’s main function is to establishing the *time of delivery*. The forwarding agent is the link between these parties, and never *owns* any of the Goods. His job is to handle the *transportation* between them. So for Kuehne+Nagel the INCOTERMS does not really apply as a measure to reduce their liability, but still they are normally used to give a picture on their customer’s risks. [7]

INCOTERMS also has several secondary functions, for example arranging the transport, cost-distribution, payment of the delivery, issue licenses and customs documents, arrange controls, duty to inform, packaging and transport-insurance. [7]

4.2. NSAB 2000:

The NSAB 2000 regulate *the relationship* between the forwarding agent and his customers and has been prepared through negotiations and from agreements between “ The Nordic freight forwarding agents” and the “The Nordic transportation organizations”. These regulations apply to forwarding agents in Denmark, Norway, Finland and Sweden., and the agreements give their customer, in minimum, the security followed from FIATAs rules for Freight Forwarding Services (version 1996). [1]

The freight forwarders and the principal’s duties and rights are stated in the NSAB, as well as the forwarders responsibility according to different conventions of transport (for example CIM, CMR, Haag-Visby-rules and the Warszawaconvention). [1]

According to Kuehne+Nagel, the NSAB 2000 is “the ideal” basis for a transportation-contract. It was prepared because of the lack of regulation on the relationship between the “owner” of the Cargo and the forwarding agent transporting arranging the transport. The NSAB 2000 takes care of the forwarding agents interests and limits his liability in a matter that is fair to both parties involved. The NSAB 2000 is prepared for the roles of the “owner” of the Cargo and the party transporting the Cargo.

5. NSAB 2000 versus Theory:

The NSAB 2000 is tailor-made for the services of a forwarding agent. However it does not include all subjects, and in this thesis theory has to supplement the comparison of the contracts to “the ideal”. In this chapter a comparison between the NSAB 2000 and theory is presented. It is interesting to see the deviation in liability between the tailor-made regulation and the more general regulation, and also to see which subjects that are not covered by the NSAB 2000. The theory covers the more general aspect of a Contract in the petroleum industry, for all services. Even if there was no theory on contract logistics, these two aspects together cover the main parts of such a contract. Kuehne+Nagel provide services where they organize and manage transportations and ship’s agent-services. However, they never perform any transportation themselves, and they use other company’s services for most of the practical and physical performance of the Work. This has to be taken into account when comparing the contracts to both theory and the NSAB 2000, and the following subjects are important to evaluate.

5.1. The forwarding agents general Liability:

NSAB 2000:

Kuehne+Nagel do not use their own transportation vessels or their own personnel in the execution of the Work, they hire other companies to perform the Work. The following apply regarding their responsibilities:

“A forwarding agent is liable as a *transporter* when he has undertaken the responsibility for the transport, either when he issues a transport document in his own name, when he has given his own price for the transport or in other ways where there is no doubt that he is responsible for the transportation. Otherwise he is liable as a *mediator*.” [1]

Liability as a transporter or a subcontractor carrier:

The forwarding agent is liable for loss, defects or damage on the Cargo occurring from the time he takes over the custody of the Cargo for transportation until it is delivered. He is also responsible for any delay. This responsibility shall cease within 15 days after notice on the delivery has been given.

Liability as a *mediator*:

The forwarding agent is liable for damages due to his lack of due diligence in the performance of the mission, and he is required to demonstrate that he has met his principals interests. The mediator's liability is limited to SDR 50 000 for each mission. However, "the indemnity can never exceed:

a) when delay: the agreed remuneration for the mission

b) when loss, depreciation or damage to the Cargo: SDR 8,33 per kilo gross weight for the part of the Cargo that is lost, depreciated or damaged. " [1]

Theory:

Theory states that the Contractor shall take good care of the contractual item, the Company's supplies and materials, and shall ensure that it is in good order and condition. The Contractor's total liability is limited to 25% of the Contractual Price.

Conclusion:

Theory only mentioned the general duty of care and custody. However, the NSAB 2000, which is written for this type of service, has more definitions and limitations on the liability. Also theory does not distinguish between the different roles of the forwarding agent and their different responsibilities. Kuehne+Nagel can have the role of a subcontractor carrier or a mediator, and the responsibilities are not the same for these two roles. These liabilities are discussed later in this chapter. Theory does not cover the different responsibilities as well as the NSAB 2000.

When Kuehne+Nagel takes on a transportation-mission they are not interested in the "value" of the Contractual Item, but the "weight" to be transported. Therefore, the liability-limitation in the NSAB 2000, which is tailor-made for their services, is stated as SDR/kg rather than an amount. The general contractual theory based the liability-limitation on the Contractual Price. This shows the different aspects of a Contract, which might cause some conflicts when determining the liability of Kuehne+Nagel.

5.2. Liability for Subcontractors and Third Parties:

NSAB 2000:

The NSAB 2000 only mentions “Contract contributors” and “third persons.” The following apply for the different roles of the forwarding agent:

The forwarding agent is liable for those used to carry out the mission, or in other words his “Contract contributors”, when he is responsible as a *transporter* or when he has incurred responsibility for the services at his own expense. Otherwise, the forwarding agent is not liable for other than his own personnel. The Contract contributors have the same responsibilities as the forwarding agent. [1]

For the role of a *mediator*, the NSAB 2000 also states that “the forwarding agent is not responsible for a third person’s actions or neglects while performing any transportation, loading or unloading, delivery, custom clearance, storage, debt collection, or other services provided by the forwarding agent.” [1]

When a third person cause any damage, delay or loss due to his lack of due diligence in the execution of the Work, the forwarding agent has a duty to file a complaint. He shall notify the Company and they shall cooperate in determining the necessary measures to ensure that the Company right to claim indemnity from this third person. If it is required by the Company, the forwarding agent shall assist the Company as a mediator. [NSAB]

Theory on Subcontractors:

Theory states that the Contractor is fully liable for his Subcontractor if the Subcontracting was at Contractors knowledge at the time of signing the Contract or if he chose the Subcontractor. The Contractor is *not fully liable* for the Subcontractor if the Company has interfered in the choice of Subcontractor:

- the Company has transferred or imposed the Subcontract on to the Contractor
- The Company had a frame agreement with the Subcontractor which was transferred to Contractor after the Contract was concluded.

If there is a Subcontract is transferred to Contractor after the Contract has been concluded, then the Contractors liability for the Subcontractor is limited to the Subcontractors liability

under the Frame Agreement. If a Subcontractor is imposed on the Contractor, the Contractor's liability for the Subcontractor is limited to the liability of the Subcontractor under the Subcontract.

Theory on Third Parties:

Third Parties that are in direct or indirect relation to one of the Parties, but are not involved in the Contract, can also suffer damage or loss. When such damage occurs, the claims for indemnity from the Third Party are distributed between the Company and the Contractor, regardless of whether the damage is caused by the other Party, by the "knock for knock" - principle. Each Party gives up their rights to claim indemnity from each other, and agree to cover damages of any Third Party or damages on personnel. They also promise to hold the other Party Harmless when he is required to cover any Third Party's claim which according to the Contract is not to be covered by him. This limitation of the liability on breach of Contract only benefits the Contractor. However, the Parties release each other from the damages they might cause each other, or a Third Party. This is not really an effective balance, when the Contractor's Group of practical reasons is most likely to cause damage on the Company Group's personnel and items.

Conclusion:

In the NSAB 2000, the "Contract contributors" is interpreted to include all Subcontractors of Kuehne+Nagel. The "third person" in the NSAB 2000 means any person or party other than the two Parties directly involved in the contract. This will also include any subcontractor or any sub-subcontractor. If it is interpreted that a Third Party is included in the meaning of a "third person", the NSAB 2000 says nothing direct about liability for damage to personnel or property of such a Third Party. The NSAB 2000 only include the liability-limitation for "third person's actions or neglects while performing any transportation, loading or unloading, delivery, custom clearance, storage, debt collection, or other services provided by the forwarding agent," and a Third Party would not perform these services. Therefore, the meaning of a "third person" is interpreted to *not include* Third Parties, but members of Contractor Group.

Unlike theory, the NSAB distinguished between Subcontractor and Contractor when the forwarding agent has the role of a mediator. When he has the role of a subcontractor carrier arranging the transport he is liable for his subcontractors, which match theory. However, Kuehne+Nagel should not have any responsibility for conditions outside their control. When the forwarding agent has the role of a mediator the liability is very different from the subcontractor carrier's liability. This liability does not match theory.

According to the NSAB, if the Subcontractor cause or suffer any loss, the forwarding agent is not liable to indemnify for this loss. But because of the forwarding agent's liability, regardless of whether or not he is responsible as a mediator or a transporter, he shall file a complaint to the subcontractor, but it is up to the Company to claim indemnity from subcontractor. Kuehne+Nagel shall only assist the Company if they choose to do so. Kuehne+Nagel shall not hold any risk they can not affect. This contradicts with theory, which does not distinguish between the forwarding agent and his subcontractors. If there is any loss, damage or delay due to his Subcontractors neglect, the Contractor shall be liable for it.

5.3. Liability for loss, defects, incomplete delivery and delay:

NSAB 2000:

The NSAB 2000 claims that the Contractor shall only be liable for delay or losses inflicted from Contractor's neglect while the Cargo is in his custody, and when such loss or delay came from conditions he could affect, and when that he did not perform his obligations with due diligence. [1]

Theory:

Theory states that he shall also be liable for his Subcontractors, not only for damages or delays due to conditions he can affect.

Conclusion:

As mentioned previously, Kuehne+Nagel's liability should vary depending on their role in the Contract. As a subcontractor carrier arranging the transport, the forwarding agent is responsible for his Subcontractors and the NSAB 2000 match theory. However, if the

forwarding agent is a mediator arranging the contract, he shall not be liable for the party performing the transportation.

5.3.1. Damages and defects:

NSAB 2000:

The following apply for indemnity, regardless of which role the forwarding agent has (transporter or mediator):

Loss or depreciation of Cargo:

-“Indemnity or compensation is calculated according to the invoice value, if there is no proof that the market price for similar cargo, at the time and place the forwarding agent acquires the title of the cargo, is different than the invoice value.” [1]

-“No compensation will be provided for any antique value, sentimental value or other special value on the Cargo.”

-“Freight charges, customs duties and other expenses in connection with the freight or the lost Cargo shall be indemnified or compensated.”

-“Beyond this, the forwarding agent is not required to indemnify lost profits, loss of market or any other loss of any kind caused by the loss or depreciation.” [1]

Damage on Cargo:

-“Indemnity for damage on Cargo shall be paid with an amount that reflects/corresponds to the depreciation in value of the Cargo. The degree or the percentage of damage on the Cargo shall equal the percentage depreciation in value, and this shall be the amount to be indemnified. “

-“Beyond the statements on “loss or depreciation of Cargo”, no other damages shall be indemnified by the forwarding agent.” [1]

Theory:

The Contractor is only liable for the defect notified by the Company without undue delay after the defect is discovered or should have been discovered. Such notice shall be given within the warranty-period. If the notification is regarding a defect on warranty-work, it has to be notified within this special warranty-time. The Contractor can also be required to indemnify any loss of the Company, due to the defect. Regardless of whether the Contractor

does the repair or not, he is required to indemnify, according to law, the Company's direct loss due to the defect. If the Contractor is allowed to repair a defect, he will also be given a certain time-limit for the repair. If he fails to finalize the repair within this time, he is required to cover the Company's additional costs to use other contractors for the repair.

The Contractors *liability for repair is limited according to type of expenses and the total amount*. The Contractor's total liability for repairs and indemnity regarding defects is limited to a maximum of 15% of the Contractual Price, and certain expenses, such as special expenses for the type of delivery, he is never responsible for within this limit.

If the Company chooses to *accept* the delivery with a defect, the Contractor is liable (on certain terms) for the defects on the Contractual Item, regardless of what time the defects are discovered. The Company can either *require repair at the Contractor's expense*, or *claim indemnity* from the Contractor for the parts of the Company's additional expenses by having other contractors finalizing the Work. The Company can also require to be *indemnified for his loss* due to the defects.

Conclusion:

The NSAB 2000 says nothing about any duty to repair any defects or damages on the Cargo, because it is tailor-made for freight forwarding services. They can only indemnify all direct losses due to a defect on the Cargo caused by their neglect.

The main difference between theory and NSAB 2000 regarding losses, damages or defects are the type of compensation or penalty. The NSAB 2000 is focused on the invoiced price of the item being lost, and only requires indemnity for this and the cost of the freight charges, the custom duties or other expenses that were necessary in connection with the transportation and paid by the Company. Also if there is a defect or damage, the degree of damage is to be indemnified. However, theory imposes a duty to pay for the repair damages or defects at Contractor's cost as a penalty, regardless of whether Contractor performs the repair or this is done by someone else. If there is a delay and any incomplete Work, the Contractor shall also pay for the finalizing of the Work, regardless of whether or not he is the one finalizing it. For any delay due to the defects, damages or incomplete Work, the Company can claim liquidated damages from the Contractor. All direct losses due to the

defects or damages shall be indemnified by Contractor. Theory also states that Contractor shall not indemnify any loss, defect or delay if the Company does not give notice on defect within the warranty-period. The conclusion of this chapter is that this theory does not match the NSAB 2000. It is based on a Contractor's services, not a forwarding agent's service, and there is a need for new theory. The forwarding agent does not have a warranty-period or a duty to repair defects, because he does not produce anything. He only transports the Cargo.

5.3.2. Indirect and consequential loss:

NSAB 2000:

The following apply for indemnity, regardless of which role the forwarding agent has (transporter or mediator):

The NSAB 2000 says that if Kuehne+Nagel has agreed to a *time guarantee*, either in writing as "special time-guaranteed transportation" or accepted in the deal, and there is a delay, they have to indemnify such consequential loss caused by the delay. They shall only indemnify such loss that could be predicted at the time the agreement was signed as likely due to the delay.

-“Beyond this, the forwarding agent is not required to indemnify lost profits, loss of market or any other loss of any kind caused by the loss or depreciation.” [1]

-“Beyond the statements on “loss or depreciation of Cargo”, no other damages shall be indemnified by the forwarding agent.” [1]

Theory:

The Contractor will also not be liable for the Company's indirect loss. These liability-limitations apply for both the amount and the type of cost.

Conclusion:

NSAB 2000 and theory same statements on indirect or consequential loss.

5.3.3. Delay:

NSAB 2000:

“If a time of delivery has been agreed on, and the Cargo is delivered after this specified time-guarantee, the forwarding agent shall indemnify its principal direct and reasonable charges that, on the time of signing the Agreement, could be predicted as a likely result of the delay.” [1]

If a time of delivery was specified and agreed to, the Company has the right to claim indemnity for consequential loss.

Theory:

“If the Work is delayed compared to the penalty sanctioned milestones stated in the Work Schedule, the Contractor shall pay liquidated damages to the Company. If the terms of delivery exist at time of delivery, the Company’s right for liquidated damages for delay at any earlier penalty sanctioned milestones ceases, except for the case where the Company can provide proof that he has suffered any loss due to such earlier delays. “ [2, art.24.2]

The liquidated damages are liability-limitations pr. day and are maximized to a certain percentage of the contractual Price for all the delays under the Contract. The Contractor’s liability for delay is maximized to 0,15% of the Contractual Price pr. Day delay, and never exceeds more than 10% of the Contractual Price.

When the Contractor’s Work is delayed and not finalized at the time specified in the Contract, Work Order or Purchase Order, the Contractor has a duty to rectify and finalize the Work. However, he does not have *the right* to finalize it. If the Company has required an incomplete delivery, he shall *not pay for the incomplete part* of the Work. The Company can *require liquidated damages calculated from the number of days past the date of delivery it is assumed* to have been a delay if the Contractor was to finalize the Contractual Item.

The Compensation is reduced according to the incomplete part. This is done either as a percentage reduction according to the percentage of defect. If the Company chooses to cancel the Contract, the Contractor keep the already paid part of the Contractual Price, and the Company

has the right to take over the contractual Item as it is (in its unfinished form). The Company has title to it.

Conclusion:

Theory has some limitations to the liability of delay, as percentages of the contractual price. The downside with this is that these amounts might be higher than the actual loss of the Company. The NSAB 2000 only states that Contractor shall indemnify the predictable direct losses (and indirect/consequential losses if time-guarantee was specified) due to a delay caused by Kuehne+Nagel's neglect. Also, when there is a delay there might be an incomplete delivery. According to theory, the same rules as mentioned earlier in this chapter for repair and finalizing the Work apply. However, the NSAB 2000 does not mention this, only that Kuehne+Nagel is required to indemnify the loss. As mentioned previously, the theory is very focused on construction!

5.4. Subjects not included in the NSAB 2000:

The NSAB 2000 is written for the purpose of the logistic service provided by forwarding agents. However, since the contracts are not based on this Nordic standard, there are some subjects included in the contracts and theory, but not in the NSAB 2000. Presented below is a list of subjects which probably should be included in this Nordic standard:

- 1) Company's requirements to the forwarding agents knowledge on their business
- 2) Company's right to reject any work not performed according to the specifications in the Contract,
- 3) Company's right to demand removing Contractor's unfit personnel or materials,
- 4) Payments and the handling of disputed invoices,
- 5) Insurance-requirements,
- 6) The use of prior written approvals on subcontractors,
- 7) Duty to notify on any progression problems
- 8) Duty to take measures against progression problems,
- 9) Liability for damage to Third Party

5.5. Conclusion:

There are some differences between the NSAB 2000 and the general theory on petroleum contracts. According to the NSAB, the responsibility of the forwarding agent is more limited in the role of a mediator. When the forwarding agent has the role of a transporter or a subcontractor carrier, the responsibility was more similar to the Contractor's responsibility according to theory. Regarding the forwarding agent's responsibility for "Contract contributors" or third persons, this also depended on whether the role was a transporter or a mediator. Again, this responsibility was similar for the transporter according to the NSAB 2000 and the responsibility in the theory. However, the NSAB 2000 did not distinguish between the rules of indemnity for the mediator and the transporter. The types of penalties for any loss, damage, defect or delay was very different from theory.

The NSAB 2000 is the ideal standard for logistic contracts, but there is a need to supplement with theory on the subjects not included in this standard. However, there is a lack of theory on the forwarding-service. The present theory is mainly focused on construction.

6.Kuehne+Nagel AS:

Kuehne+Nagel AS provide logistic services within the petroleum industry in Norway and Internationally. These services are for companies who need help in managing the complex supply chains arising from such a dynamic and complex market. They provide logistic- and supply chain-consulting, international freight forwarding services by sea, air, rail and road, customs services, domestic transport, warehousing, distribution and special project logistics. These are a range of integrated services and they include all aspects of logistic planning, control and execution; from point of origin to consumption. Kuehne+Nagel also provide *maritime support* (ship's agent-services).

For the petroleum industry both oil & gas logistics and maritime logistics are included. Because of K+N's ability to support unique industry requirements, oil & gas companies turn to Kuehne+Nagel for help with managing their logistics strategy and operation. These services include order management, transportation, physical distribution and supply chain security. Kuehne+Nagel has specialized their competence for the petroleum industry.

Kuehne+Nagel have the role of a forwarding agent, and arrange either freight forwarding-services or ship's agent-services. They do not physically perform any of the transportation or ship's agent-service, but use other logistic companies in the execution of the Work.

Kuehne+Nagel can have the role of a mediator or a subcontractor carrier. As a mediator, the principal might have found a suitable transportation vessel for a transport and Kuehne+Nagel arranges the contract between the principal and the owner of the vessel. As a subcontractor carrier, the principal only needs to transport Cargo and it is up to Kuehne+Nagel to arrange the transport (not just the contract). In this case they can give a price for the Work, and use other logistic companies in the execution, holding the risk of the vessel.

7.Three international contracts:

Companies involved in the oil and gas industry often require different types of services from K+N. Their customers are often large companies involved in different parts of the petroleum industry, ranging from production companies to service companies. Some only require their transportation services, some want them as a partner helping them with parts of or all of their supply chain management, and some companies only require their maritime support services. The contracts will therefore vary in scopes of work. Because they are international and not prepared on the basis of NSAB 2000 or Norwegian regulations, Kuehne+Nagel's obligations and liability will also vary from contract to contract, so in order to see if there is a trend in the deviations from the NSAB 2000 and theory, three contracts requiring different services from K+N are considered in an attempt to cover all parts of their business.

The observations presented in this chapter have been selected from the contracts due to their relevance in this thesis.

7.1.Contract A: transportation:

Company A is a very large international Energy company, and their business is to search for and recover/produce oil and gas. Worldwide Company A is the sixth largest energy-company owned by state and the fifth largest within refining.

This frame-agreement is about K+N's transportation services, both foreign and domestic. The Company requires services as shipment of equipment and materials to different sites worldwide, which include freight by land, air and ocean transportation, including shipment documentation, export compliance regulations and possible importation/nationalization of foreign equipment. [12]

7.1.1. Observations: [12]

In this contract, Kuehne+Nagel is referred to as “Contractor” and Company A is referred to as “Company.”

Definitions set in the contract:

“*Company Group* means:

- a) Company and its Affiliates who are involved in the project for which the Work is provided;
- b) the Coventurers;
- c) Company’s contractors (other than Contractor) and their subcontractors of any tier, and its and their Affiliates, that are engaged to provide goods or services for the project for which the Work is provided; and
- d) the respective employees, officers, directors and agents of all the foregoing.” [contract A]

“*Contractor Group* means:

- a) Contractor, and any of its Affiliates that are involved in the Work,
- b) the participating companies in any joint venture with Contractor for providing part or all of the Work,
- c) Contractor’s Subcontractors, and its Affiliates, involved in all or part of the Work, and
- d) the employees, officers, directors and agents of all the foregoing. “[contract A]

“*Subcontractor* means any person or persons, firm, partnership, corporation or combination thereof engaged by Contractor or any of Contractor’s subcontractors of any tier to perform any part of the Work.”

“*Third Party* means any party not a member of Company Group or Contractor Group.”

This distinction between Company’s Group and Contractor’s Group is normal when using the “knock for knock”-principle in a contract. This principle is about separating each party’s responsibility, and both Parties are liable for their own group.

Statements: [12]

Statement 1: payment:

“Payment shall not be construed as acceptance or evidence of approval of any part of the work.”

Statement 2: payment:

“If Company disputes any invoice in whole or in part, Company shall promptly Notify Contractor of the dispute and request a credit note to allow payment of the undisputed portion. Company and Contractor shall endeavour to settle and adjust any disputed amount forthwith.”

Statement 3: Liens and Claims:

“Contractor shall defend, indemnify and hold harmless Company Group from and against all liens and other encumbrances (and any Claim in connection with such liens or encumbrances) against Company’s or its Coventurer’s and its and their Affiliates’ property on account of debts or Claims alleged to be due from Contractor or any member of its Group to any person, including debts to its Subcontractors.”

Statement 4: risk structure:

“Company shall defend, indemnify and hold harmless Contractor Group from and against any and all Claims incurred by Contractor Group that result from (a) damage to or loss of Company Group’s Property and/or (b) Personal Injury if any Company Group personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Contractor Group.”

Statement 5: risk structure:

“Contractor shall defend, indemnify and hold harmless Company Group from and against any and all Claims incurred by Company Group that results from (a) damage to or loss of Contractor Group’s Property and/or (b) Personal Injury of any of Contractor Group’s Personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Company Group.”

Statement 6: consequential loss:

“Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Company be liable to Contractor Group for Consequential Loss suffered by any member of Contractor Group. Contractor shall defend, indemnify and hold harmless Company Group from any and all Claims resulting from such Consequential Loss.”

Statement 7: consequential loss:

Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Contractor be liable to Company Group for Consequential Loss suffered by any member of Company Group. Company shall defend, indemnify and hold harmless Contractor Group from any and all Claims resulting from such Consequential Loss.”

Statement 8: personnel and property of Third Parties:

“Each member of Contractor Group and Company Group shall be responsible for and shall assume its legal liability for incidents arising out of or in any way connected with the performance of the Work which results in loss, damage or personal injury suffered by any Third Party provided.... Contractor and Company shall hold harmless and indemnify Company Group and Contractor Group respectively, for all Claims for which Contractor Group or Company Group respectively, are responsible in accordance with this Article 3.10.11.”

Statement 9: Subcontracts:

“Contractor may not subcontract any part of the Work without Company’s prior Approval.”

Statement 10: Subcontracts:

“No subcontract shall create a contractual relationship between Company and the Subcontractor.”

7.2.Contract B: combination: ship's agent and transportation:

Company B is a seabed-to surface engineering and construction company of the offshore oil and gas industry worldwide, and they plan, design and deliver projects. Their main focus is on the engineering, integration and completion of seabed-to surface-projects, and also maintenance and repair. This company has many large customers in the petroleum industry.

In this non-exclusive frame agreement K+N is to provide a combination of different services, transportation- and ship's agent-services. The contract obligates K+N to provide services as freight forwarding and customs clearance. Freight forwarding will be obligations as providing shipping plans or -proposals, booking of shipping space, procurement and payment of the transportation and/or freight services and providing road/air/sea transport as ordered and requested by Company (here Contractor). Also K+N is to provide storage areas, handle materials and equipment as requested by Company B, carry out Marine Logistics and Port Agency Services (clearance in and out, arranging pilots and their transport, customs, basic support and harbor personnel, and attendance with arrival/departure of crew and vessel), and crew handling. [13] & [11]

7.2.1. Observations: [13]

Kuehne+Nagel is referred as the "Subcontractor" and Company B is referred to as "Contractor" in this contract. This is also a construction contract not fit for the purpose of a ship's agent and transport-contract.

Statements: [13]

Statement 1: programme:

...."It shall be the responsibility of the Subcontractor to *inform and report* to the Contractor forthwith upon occurrence, any event or circumstance which may, immediately or in the future, impede the proper and timely execution of the Subcontract Works. *Notice* must be given to Contractor with reasons for the *delay* and/or potential delay and *actions to be taken to overcome or minimize the delay* or its future affects". The Contractor reserves the right to review and approve such actions or instruct the appropriate action to be taken."

Statement 2: payment:

“Should the Contractor *dispute* any item of any invoice, in whole or in part, the Subcontractor shall, without prejudice to its position, issue a *credit note for the disputed part* and the Contractor shall then pay the undisputed portion of that invoice. Upon resolution of the disputed part a new invoice shall be submitted for the resolved amount, if any, for payment at same time as original invoice:”

Statement 3: indemnity:

“For interpreting of this article 10, the term “Contractor’s Group” shall include Contractor, its affiliates and their other subcontractors and suppliers (but always excluding Subcontractor) and the officers, employees (including agency personnel), agents, directors and successors of any of them, the term “Subcontractor’s Group” shall include Subcontractor and its Sub-subcontractors and suppliers and the officers, employees (including agency personnel), agents, directors and successors of any of them and the term “Third Party” shall mean any party which is not a member of the Contractor’s Group or Subcontractor’s Group.”

Statement 4: indemnity:

“Subcontractor shall be responsible for and shall indemnify and hold Contractor’s Group harmless from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by *negligence or breach of duty of Contractor’s Group*, related to:

-*Disease of or injury to or death* of any person employed or provided by Subcontractor’s Group

-*Damage to or loss* of Subcontractor’s Group’s provided *materials and/or equipment*.”

Statement 5: indemnity:

“Except as provided in article 13.5 Contractor shall be responsible for and shall indemnify and hold harmless Subcontractor’s Group from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by *negligence or breach of duty of Subcontractor’s Group*, related to:

-*Disease or injury to or death* of any person employed or provided by Contractor’s Group

-*Damage to or loss* of Contractor’s Group’s provided *materials and/or equipment*.”

Statement 6: indemnity:

"All Contractor supplied materials, equipment or documentation shall at all times remain the sole and unencumbered property of Contractor and shall not be used by Subcontractor for any other purpose other than that which Contractor intended....However duty of care and risk remains with the Subcontractor until such time as Contractor takes actual custody or completion of the Subcontract."

Statement 7: indemnity:

"Each party shall bear its responsibility towards Third Parties according to applicable law."

Statement 8: Liens and Claims:

"Subcontractor shall protect, indemnify and hold Contractor and Client harmless from all liens, claims, suits, and judgements, which may arise out of, or in connection with this Subcontract."

Statement 9: Liens and Claims:

"Subcontractor agrees to waive any rights to exercise a lien to make claim or seek a judgement or award against the Services and/or Goods or part of at any time. Subcontractor acknowledges that its sole right in the event of failure by Contractor to perform any of its obligations under the Subcontract is to seek financial relief in respect thereof."

Statement 10: Consequential loss:

"Unless otherwise expressed within this Subcontract, neither party shall be liable in respect of any indirect or consequential loss or damages of any nature whatsoever suffered by the members of the other party's group including, but not limited to, loss of profit or revenue, loss of use, loss of product or business interruptions."

7.3.Contract C: ship's agent:

In this frame-contract the Company is in the business of providing seismic acquisition and processing services, and they help their customers find oil and gas reserves offshore worldwide. Their products include seismic and electromagnetic services, data acquisition, processing, reservoir analysis/interpretation and multi-client library data. This is a large company with offices in over 25 countries, and should have a great ability to bear risk.

Company C wants to take advantage of Kuehne+Nagels service as a ship's agent, or in other words "Maritime support". These services are administrative and other support services for when the transportation-ships arrive and while staying in port. A ship's agent coordinates anything a ship needs while in port. The agent prepares the documents required for cargoes to be transported, deals with insurance matters, handles the unloading and offloading of cargo, arranges shipping space, crew changes, inspection and repairs, and can also schedule tugs and line service. The mission also includes taking care of vessel and personnel clearance, immigration clearance, customs clearance, and quantity & quality determination of fuel deliveries. In this contract company C also needed K+N to perform some freight forwarding of their seismic tapes from recording spot to their offices, and provide some supplies and provisions (ships shares or share parts). [14] & [11]

7.3.1. Observations: [14]

There are no conventions, rules or regulations for maritime support-services, which affect the degree of liability on the ship's agent in the contracts. This contract is mostly compared to the theory based on Norwegian rules and regulations, but also since this contract had some degree of freight forwarding- and supply-services, these sections could also be compared to the NSAB 2000. This contract was not approved by Kuehne+Nagel AS because of its high risk profile.

Kuehne+Nagel is referred to as "Contractor" and Company C is referred to as "Company" in this contract.

Statements: [14]

Statement 1: obligations and warranties:

The contract states that insurance is *“the sole responsibility of the Contractor, and shall be timely obtained and maintained at Contractor’s sole cost, risk and expense”*.

Statement 2: Services: Shipments & Cargo/Freight Forwarding:

“The contractor shall assume full responsibility and liability for all Cargo transported on behalf of the Company while the Cargo, as applicable, is in the care, custody, control, possession or direction of the Contractor or its Subcontractors(s)”.

Statement 3: Services: Shipments & Cargo/Freight Forwarding:

The contract requires that the Contractor shall be responsible for indemnity on claims from their Subcontractors in the event the Subcontractor has not received the Company’s prior written approval.

Statement 4: Shipments and Cargo/Freight Forwarding :

“Contractor shall be liable for, and hereby releases Company Group from, all liability for and shall protect, defend, indemnify and hold Company Group harmless from and against any and all Claims of whatsoever nature including, but not limited to, direct, indirect, incidental and consequential and any and all other losses arising out of pertaining to the Contractor or its Subcontractor’s failure to comply with any provisions of this Article 4”.

Statement 5: Shipments and Cargo/Freight Forwarding:

“Contractor shall be liable for.....direct, indirect, incidental and consequential and any and all other losses arising out of or pertaining to the delay of Company’s operations due to the failure of Contractor or its Subcontractor(s) to follow the requirements of this Agreement...”.

Statement 6: Shipments and Cargo/Freight Forwarding:

“Regardless of the limits of the insurance in place, the Contractor shall compensate the Company and its affiliates, for the full replacement value of all lost, damaged or destroyed Cargo while under the care, custody, control, possession or direction of the Contractors or its Subcontractor(s). Furthermore, the Company shall be entitled to claim from the

Contractor all direct and indirect (including incidental and consequential) losses and damages suffered by the Company or its affiliates in connection with the reacquisition of any such lost or damaged or destroyed Cargo”.

Statement 7: Shipments and Cargo/Freight Forwarding:

“Failure to follow custodial procedures in this respect shall be considered a breach of this Agreement which entitles the Company to *withhold payment(s)* hereunder until the breach is remedied to the satisfaction of the Company...”

Statement 8: Shipments and Cargo/Freight Forwarding:

“Contractors liability...shall be limited to United States Five Million dollars (US\$5,000,000) for each calendar year in which this Agreement is in effect”.

Statement 9: independent contractor:

“Company shall not have the right to control or direct the manner or method of the Services performed by Contractor”.

Statement 10: Subcontractor(s):

In the event the Contractor engages a subcontractor to perform all or any part of the Services, “*the performance of such Services by such Subcontractor shall be the sole responsibility of the Contractor* and the Contractor shall ensure that all the terms and provisions of this Agreement are communicated to and fully performed by such Subcontractor, ...”

Statement 11: Subcontractor(s):

“Any failure of any Subcontractor to timely deliver and provide the Services shall be deemed to be the failure of the Contractor for all purposes under this Agreement. The Contractor shall remain fully responsible to the Company for the Services performed by the Subcontractor and Contractor shall be liable for.....all acts and omissions of the Subcontractor”.

Statement 12: Subcontractor(s):

“To that end any claim(s) or dispute(s) between the Contractor and its Subcontractor regarding the provisions of any Services under this Agreement shall remain solely a dispute

between them and the Contractor shall ensure that its Subcontractor does not take any action against any member(s) of the Company Group the Contractor shall be liable for....”

Statement 13: terms of payment:

“No payment will be made for expenses incurred which have not been previously authorized by a Work Order”.

Statement 14: terms of payment:

If the Company disputes an invoice, “the Company shall be entitled to *withhold payment (without interest) of the disputed portions* of such invoice from *future* payments until such dispute is resolved”.

Statement 15: indemnity:

The Contractor shall be liable for, indemnify and protect Company Group from, *all Claims* from Contractor Group, when the Claim arises directly or indirectly from statements in the Agreement and are caused by any kind of negligence, fault or strict liability of any member of Company Group.

Statement 16: indemnity:

1: “Contractor shall indemnify, hold harmless and defend Company Group from and against all Claims by third parties in respect of the injury to or death or illness of any third party or the damage to or loss or destruction of any third party property which may arise out of this Agreement, any Work Order or any Service to the extent of negligence, fault, or strict liability of any member of the Contractor Group”.

2: “Company shall indemnifydefend Contractor Group from.....by any third parties in respect to injury to or death or illness of any third party or the damage...to the extent of the negligence, fault or strict liability of any member of Company Group”.

8. Analysis:

In this chapter the observed statements concerning liability are analyzed and compared to the NSAB 2000 and theory.

8.1. Comparison to the NSAB 2000:

8.1.1. Contract A:

Contract A only involved transportation, and could be compared to the NSAB in total. However, this contract deviated very much from the NSAB because it was based on the “knock for knock”-principle and international regulations.

“No subcontract shall create a contractual relationship between Company and the Subcontractor,”
[12]

Contract A clearly distinguishes between the Company and the Subcontractor. According to the NSAB 2000, this distinction depends on the role of the forwarding agent. If he is a transporter or a “Subcontractor Carrier”, the forwarding agent is responsible for the “Subcontractor”. However, if he is a mediator, the agent only arranges the contract between the Company and the “Subcontractor”, but has no responsibility for him. Regardless of this role, the forwarding agent *shall not* indemnify any loss, damage, delay or personal injury arising if his subcontractor does not fulfill or neglects his obligations. K+N’s obligation is to file a complaint and also to assist Company A if company needs to make any claims towards “subcontractors”.

“Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Company be liable to Contractor Group for Consequential Loss suffered by any member of Contractor Group. Contractor shall defend, indemnify and hold harmless Company Group from any and all Claims resulting from such Consequential Loss.” [12]

Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Contractor be liable to Company Group for Consequential Loss suffered by any member of Company Group. Company shall defend, indemnify and hold harmless Contractor Group from any and all Claims resulting from such Consequential Loss.” [12]

If there is a delay the NSAB 2000 says that if the forwarding agent has agreed to a *time guarantee*, either in writing as “special time-guaranteed transportation” or agreed to in the contract, they have to indemnify such consequential loss caused by the delay. They shall only indemnify such loss that could be predicted at the time the agreement was signed as likely due to the delay. This time guarantee is required to be in writing.

“Company shall defend, indemnify and hold harmless Contractor Group from and against any and all Claims incurred by Contractor Group that result from (a) damage to or loss of Company Group’s Property and/or (b) Personal Injury if any Company Group personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Contractor Group.” [12]

“Contractor shall defend, indemnify and hold harmless Company Group from and against any and all Claims incurred by Company Group that results from (a) damage to or loss of Contractor Group’s Property and/or (b) Personal Injury of any of Contractor Group’s Personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Company Group.” [12]

These statements are based on the “knock for knock”-principle which is not included in the NSAB 2000. According to contract A, each Party shall be liable for, indemnify and hold the other party harmless from any claims from the other Party’s Group. However, the NSAB 2000 states that the forwarding agent shall not indemnify for any loss due to any third person’s breach of duty. Also, he shall not indemnify for any loss caused by the Company.

In Contract A there were many statements on subjects not mentioned in the NSAB 2000. The NSAB does not mention any requirements on Kuehne+Nagel’s knowledge, not Company’s right to demand removing Contractor’s unfit personnel or materials, nothing about Company’s right to reject the Contractual work, Payments and the rules on payment of disputed invoices, insurance-requirements or prior written approvals on subcontractors. These subjects will be compared to theory. The contract also included statements on rental equipment and goods and tools and equipment in the borehole. These are subjects not relevant for this type of mission, and should not have been in the contract. Kuehne+Nagel do not rent anything, nor do they have anything in the borehole. These statements were not included in this thesis, but they are mentioned to show that the contract was not fit for the purpose of Kuehne+Nagel’s services.

8.1.2. Contract B:

The mission in Contract B involved some freight forwarding/transportation which allowed some comparison to the NSAB 2000. This contract also deviated a great deal from the NSAB because it was *partly* based on the “knock for knock”-principle. However, it has some liability-limitations which could be compared to the limitations in the NSAB 2000.

“Subcontractor shall be responsible for and shall indemnify and hold Contractor’s Group harmless from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by negligence or breach of duty of Contractor’s Group, related to:

- Disease of or injury to or death of any person employed or provided by Subcontractor’s Group*
- Damage to or loss of Subcontractor’s Group’s provided materials and/or equipment.” [13]*

“Except as provided in article 13.5 Contractor shall be responsible for and shall indemnify and hold harmless Subcontractor’s Group from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by negligence or breach of duty of Subcontractor’s Group, related to:

- Disease or injury to or death of any person employed or provided by Contractor’s Group*
- Damage to or loss of Contractor’s Group’s provided materials and/or equipment:” [13]*

“Each party shall bear its responsibility towards Third Parties according to applicable law.” [13]

Contract B stated that each party was liable and responsible for their own party and each should hold responsibility for their Third Parties. This is clearly based on the “knock for knock”-principle, which is not included in the NSAB 2000 as mentioned previously. The responsibility for Third Parties is not included in the NSAB 2000, only a “third person” which is interpreted to include “Contract contributors” or “Sub-subcontractors”. The “knock for knock” liability limitations do not match the responsibility stated in the NSAB 2000.

Included in these “knock for knock” statements, Kuehne+Nagel are required to *indemnify* all such loss in their own Group. According to the NSAB 2000, the forwarding agent shall never indemnify any loss caused by Company B or any third person’s breach of duty.

“All Contractor supplied materials, equipment or documentation shall at all times remain the sole and unencumbered property of Contractor and shall not be used by Subcontractor for any other purpose other than that which Contractor intended....However duty of care and risk remains with the Subcontractor until such time as Contractor takes actual custody or completion of the Subcontract.”
[13]

Contract B states that Kuehne+Nagel should hold the duty, care and risk of all Contractor supplied (“contractor” is here Company B) materials, equipment and documentation while it is in K+N’s custody. This does match the NSAB 2000 if the forwarding agent has the role of a Subcontractor Carrier and arranges the transport, but not if he is a mediator and only arrange the contract. The mediator is only responsible for damage resulting from their lack of due diligence in the performance of the contract. Also the NSAB 2000 states that Kuehne+Nagel hold the responsibility if they use their own transportation vessels or their own transportation personnel, which is not the case.

“Unless otherwise expressed within this Subcontract, neither party shall be liable in respect of any indirect or consequential loss or damages of any nature whatsoever suffered by the members of the other party’s group including, but not limited to, loss of profit or revenue, loss of use, loss of product or business interruptions.” [13]

Contract B also states that neither party shall have to pay for the other party’s indirect or consequential loss, and since the NSAB 2000 is not in use here Kuehne+Nagel does not have to pay for any delay, even if a time-guarantee has been agreed to in writing.

In contract B there were also a lot of statements not mentioned in the NSAB 2000, in this contract this is ok since this was not just a transportation-contract, but a combination of a ship’s agent and a transportation contract. These subjects will be compared to theory. Contract B was also based on a standard construction contract not fit for this purpose. It mentioned statements on free Issue items and returnable tools and equipment, however Kuehne+Nagel does not rent any tools, equipment or free issue items from the Company.

8.1.3. Contracts C:

Contract C also contained some freight forwarding, and some parts of the contract could be compared to the NSAB 2000.

“The contractor shall assume full responsibility and liability for all Cargo transported on behalf of the Company while the Cargo, as applicable, is in the care, custody, control, possession or direction of the Contractor or its Subcontractors(s)”. [14]

Contract C states that Kuehne+Nagel is responsible for all Cargo transported while in his care, custody, control, direction or possession. According to the NSAB 2000, he is responsible for the Cargo in his custody when he has the role of a Subcontractor Carrier. However, if he has the role of a mediator, the NSAB 2000 states that the forwarding agent is only responsible for damages caused if his performance was not with due diligence according to the contract. Since K+N only *arrange* the contract they do not have the same responsibility as they would have had if they would arrange the transport as a Subcontractor Carrier through their Subcontractors, or when there is no doubt he has undertaken the responsibility of the transport. As a mediator, the “subcontractor” holds the responsibility for the Cargo during the transportation, and Kuehne+Nagel are only liable for the choice of “Subcontractor”.

In the event the Contractor engages a subcontractor to perform all or any part of the Services, “the performance of such Services by such Subcontractor shall be the sole responsibility of the Contractor and the Contractor shall ensure that all the terms and provisions of this Agreement are communicated to and fully performed by such Subcontractor, ...” [14]

“Any failure of any Subcontractor to timely deliver and provide the Services shall be deemed to be the failure of the Contractor for all purposes under this Agreement. The Contractor shall remain fully responsible to the Company for the Services performed by the Subcontractor and Contractor shall be liable for.....all acts and omissions of the Subcontractor”. [14]

“To that end any claim(s) or dispute(s) between the Contractor and its Subcontractor regarding the provisions of any Services under this Agreement shall remain solely a dispute between them and the Contractor shall ensure that its Subcontractor does not take any action against any member(s) of the Company Group the Contractor shall be liable for....” [14]

Contract C stated that Kuehne+Nagel (Contractor) was liable for the Subcontractor's performance, for all direct, indirect, incidental and consequential losses arising from any failure of Subcontractor failure to follow its obligations. Contract C also stated that if there are any disputes between K+N and "Subcontractor", Company C would be held harmless and not be included in this dispute nor have any actions or receive any Claims against him arising from this dispute. The contract did not distinguish between the Subcontractor and Kuehne+Nagel and all liability was pushed upon K+N. As mentioned previously in this chapter, the NSAB distinguished between Subcontractor and Contractor if the forwarding agent has the role of a mediator. If he is a transporter or a Subcontractor Carrier he is responsible for his "subcontractor", but he is never liable for any indemnity for any loss due to "subcontractor's" delay, damage or loss. Contractor shall have no responsibility for things he can not affect, including Subcontractors failure to follow its obligations according to the Agreement. The NSAB 2000 states that "the mediator is not responsible for a third person's actions or neglects while performing any transportation, loading or unloading, delivery, custom clearance, storage, debt collection, or other services provided by the forwarding agent." [NSAB 2000]

"Contractor shall be liable for, and hereby releases Company Group from, all liability for and shall protect, defend, indemnify and hold Company Group harmless from and against any and all Claims of whatsoever nature including, but not limited to, direct, indirect, incidental and consequential and any and all other losses arising out of pertaining to the Contractor or its Subcontractor's failure to comply with any provisions of this Article 4". [14]

"Contractor shall be liable for.....direct, indirect, incidental and consequential and any and all other losses arising out of or pertaining to the delay of Company's operations due to the failure of Contractor or its Subcontractor(s) to follow the requirements of this Agreement...". [14]

Contract C had many statements on "losses" caused by Contractor's or Subcontractor's failure or neglect to follow its custodial obligations according to the Agreement or caused by Contractors delay. The contract stated that Contractor would be liable for *all* losses: direct, indirect, incidental and consequential, and should indemnify the *full replacement value* of damaged, lost or destroyed cargo and *also pay for all losses due to the reacquisition* of such loss. The NSAB 2000 claims that Contractor shall only indemnify for losses or delay inflicted

from Contractor's neglect while the Cargo is in his custody, that such loss or delay came from conditions he could affect, and that he did not perform his obligations with due diligence, and never to indemnify for any third person's neglect. If the loss or delay is inflicted by Contractor, the following apply according to the NSAB 2000:

Loss or depreciation of Cargo:

-“Indemnity or compensation is calculated according to the invoice value, if there is no proof that the market price for similar cargo, at the time and place the forwarding agent acquires the title of the cargo, is different than the invoice value.” [1]

-“No compensation will be provided for any antique value, sentimental value or other special value on the Cargo.”

-“Freight charges, customs duties and other expenses in connection with the freight of the lost Cargo shall be indemnified or compensated.”

-“Beyond this, the forwarding agent is not required to indemnify lost profits, loss of market or any other loss of any kind caused by the loss or depreciation.” [1]

Damage on Cargo:

-“Indemnity for damage on Cargo shall be paid with an amount that reflects/corresponds to the depreciation in value of the Cargo. The degree or the percentage of damage on the Cargo shall equal the percentage depreciation in value, and this shall be the amount to be indemnified. “

-“Beyond the statements on “loss or depreciation of Cargo”, no other damages shall be indemnified by the forwarding agent.” [1]

Delay:

-“If a time of delivery has been agreed on, and the Cargo is delivered after this specified time-guarantee, the forwarding agent shall indemnify its principal direct and reasonable charges that, on the time of signing the Agreement, could be predicted as a likely result of the delay.” (Consequential loss when time of delivery has been specified). [1]

Contract C also stated that K+N should indemnify and hold Company C harmless from all Claims arising from Company C's neglect or failure in fulfilling its obligations. The NSAB states that K+N shall only indemnify for their own neglect and failure while Cargo is in their custody or the neglect is done by any of K+N's personnel.

“Contractors liability...shall be limited to United States Five Million dollars (US\$5,000,000) for each calendar year in which this Agreement is in effect”. [14]

Kuehne+Nagel are more concerned about the weight of the cargo, not the value and the NSAB 2000 states that the forwarding agent’s responsibility/liability is limited to SDR 50 000 for each mission. However, “the indemnity can never exceed:

a)when delay: the agreed remuneration for the mission

b)when loss, depreciation or damage to the Cargo: SDR 8,33 per kilo gross weight for the part of the Cargo that is lost, depreciated or damaged. “ [1]

This causes some complications when the parties have two very different concerns on the Cargo.

1:“Contractor shall indemnify, hold harmless and defend Company Group from and against all Claims by third parties in respect of the injury to or death or illness of any third party or the damage to or loss or destruction of any third party property which may arise out of this Agreement, any Work Order or any Service to the extent of negligence, fault, or strict liability of any member of the Contractor Group”. [14]

2: “Company shall indemnifydefend Contractor Group from.....by any third parties in respect to injury to or death or illness of any third party or the damage...to the extent of the negligence, fault or strict liability of any member of Company Group”. [22.4]

The NSAB 2000 does not include Third Parties.

8.2. Comparison to theory:

8.2.1. Contract A:

Contract A was clearly based on the “knock for knock”-principle, and was not very beneficial for Company A. Since contract A only involved Kuehne+Nagel’s transportation-service, most of the contract could be compared to the NSAB 2000. However, since the NSAB 2000 does not include the “knock for knock”-principle, a comparison to theory is also necessary to see if the liability deviates from the liability of general petroleum contracts. Since subjects such as “payment”, “duty to notify”, “consequential loss”, is not included in the NSAB 2000, these are only compared to theory.

“If Company disputes any invoice in whole or in part, Company shall promptly Notify Contractor of the dispute and request a credit note to allow payment of the undisputed portion. Company and Contractor shall endeavour to settle and adjust any disputed amount forthwith.” [12]

Theory on payments requires that the Company notifies the Contractor if there is any inadequate documentation or in other ways a dispute on parts of the invoice issued by the Contractor. This requirement is to give the Contractor a chance to provide the documentation. If the Company does not fulfill his duty to notify, the Contractor may have the right to be held harmless for any loss he may have suffered due to the lack of notification. The Contractor shall adjust the disputed payment through a credit note, but the Company is required to pay the undisputed payment.

“Contractor shall defend, indemnify and hold harmless Company Group from and against all liens and other encumbrances (and any Claim in connection with such liens or encumbrances) against Company’s or its Coventurer’s and its and their Affiliates’ property on account of debts or Claims alleged to be due from Contractor or any member of its Group to any person, including debts to its Subcontractors.” [12]

“Company shall defend, indemnify and hold harmless Contractor Group from and against any and all Claims incurred by Contractor Group that result from (a) damage to or loss of Company Group’s Property and/or (b) Personal Injury if any Company Group personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Contractor Group.” [12]

“Contractor shall defend, indemnify and hold harmless Company Group from and against any and all Claims incurred by Company Group that result from (a) damage to or loss of Contractor Group’s Property and/or (b) Personal Injury of any of Contractor Group’s Personnel; irrespective of whether any such damage, loss or Personal Injury is caused by Company Group.” [12]

These statements match theory, and this is quite normal for petroleum contracts, to limit each Party’s liabilities for claims from the other Party’s Group. This is clearly the “knock for knock”-principle, where the Company and the Contractor release the each other from the risk of being exposed to any Claims for loss due to the other Group’s failure to perform their obligations according to the Contract. Each party has the risk and responsibility and is to indemnify their group’s negligence and breach of duty when resulting in death, injury or disease of the other party’s personnel or damage to or loss of the other party’s materials or equipment. However, these statements did not include any limitations and did not give Kuehne+Nagel any liability for damage or loss during the transportation while the Cargo is in their custody and care. However, Kuehne+Nagel should be liable for loss due to conditions they can affect. This contract basically stated that if any Group suffers any loss, the Contractor is liable for all losses on Contractor Group, and the Company is liable for all losses on Company Group, regardless of who caused the loss or damage. If the Contractor damages any of the Company’s Cargo, the Company shall indemnify for the loss himself. This is clearly not beneficial for Company A, because of the lack of liability-limitation. The principle of “knock for knock” contradicts with the NSAB 2000, so this contract was clearly based on the general petroleum contracts, not tailor-made for the service of Kuehne+Nagel. The “knock for knock”-principle is not included in the NSAB 2000.

“Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Company be liable to Contractor Group for Consequential Loss suffered by any member of Contractor Group. Contractor shall defend, indemnify and hold harmless Company Group from any and all Claims resulting from such Consequential Loss.” [12]

“Under no circumstances whatsoever whether by reason of any negligence, breach of duty or strict liability shall Contractor be liable to Company Group for Consequential Loss suffered by any member of Company Group. Company shall defend, indemnify and hold harmless Contractor Group from any and all Claims resulting from such Consequential Loss.” [12]

In theory, consequential loss was referred to as “indirect loss”. Theory stated that no Party should be indemnify and be liable for any indirect losses to the other Party’s Group. This is very “knock for knock” and also a very bad deal for Company. This contradicts with the NSAB 2000, which requires that Kuehne+Nagel shall indemnify consequential loss due to his neglect if there is a delay and there was specified a time of delivery. The Contractor shall then indemnify all direct and reasonable expenses that could be predicted at the time of signing the contract as a likely consequence of the delay.

“Each member of Contractor Group and Company Group shall be responsible for and shall assume its legal liability for incidents arising out of or in any way connected with the performance of the Work which results in loss, damage or personal injury suffered by any Third Party provided personnel or.... Contractor and Company shall hold harmless and indemnify Company Group and Contractor Group respectively, for all Claims for which Contractor Group or Company Group respectively, is responsible in accordance with this Article 3.10.11.” [12]

This statement match theory, which states that until the Certificate of Approval is issued by the Company, the Contractor shall hold the Company harmless from claims which are connected to any loss or damage suffered by all other than the Contractor Group and the Company Group in connection to the Work or the Contractual Item, regardless of whether or not the loss or the damage is caused by liability conditions in any form from the Company Group’s side. The Contractor’s liability for any Third Party is limited to NOK 2,000,000,- for each incident, otherwise the Company is liable. Theory also states that the Company shall hold the Contractor harmless for the cases mentioned above regarding “Harmlessness” for Third Party’s loss. The Parties release each other from the damages they might cause a Third Party. Each Party gives up their rights to claim indemnity from each other, and agree to cover damages of any Third Party or damages on personnel. They also promise to hold the other Party Harmless when he is required to cover any Third Party’s claim which according to the Contract is not to be covered by him. According to theory this is not really an effective balance, when the Contractor’s Group of practical reasons is most likely to cause damage on the Company Group’s personnel, items, and Third Parties. This is clearly the “knock for knock”-principle where the Company is stuck with too much liability. The NSAB 2000 does not mention Third Parties.

“Contractor may not subcontract any part of the Work without Company’s prior Approval.” [12]

This statement matches theory, which also states that the Contractor shall not enter into a Subcontract for parts of the work without the Company’s previous written approval. If the Contractor fails to do so, the Company can demand, if he has reasonable grounds, a restoration of the contract which leads to a reversal of the Subcontractor’s duties to the Contractor. The Contractor is then required to indemnify the loss he caused the Company by engaging a subcontractor without approval. Consent is not needed if subcontract involves only minor purchases or hired labor to a limited extent. Prior written approval is not mentioned in the NSAB 2000. However, when Kuehne+Nagel answer a bid, they provide a presentation of the Subcontractors they intend to use for the performance in the Contract. If the Company approves the bid, they accept the use of the Subcontractors.

“No subcontract shall create a contractual relationship between Company and the Subcontractor.” [12]

According to theory, the Contractor is liable for its Subcontractors if they were chosen by him or he was aware of the Subcontracting at the time of signing the Contract. This matches theory, and is based on the “knock for knock”-principle. This did not match the NSAB 2000. The NSAB 2000 states that for Kuehne+Nagel’s service as a mediator release him from any liability for conditions he can not affect, like his Subcontractors. However, he has to prove his choice of Subcontractor is justified and with due diligence.

8.2.2. Contract B:

Contract B required a combination of a ship's agent-service and a transportation service. Since there are no regulations for the ship's agent-service, the comparison has to be made with theory on the general petroleum contracts. Some parts of the contract could be compared to the NSAB 2000, since it involved some freight forwarding. However, this contract was also based on the "knock for knock"-principle with some limitations of the Company's liability, and some comparison to theory was necessary. This contract was the one most beneficial for both parties regarding liability and took care of Company B and Kuehne+Nagel's interests and limits each party's liability in a good way.

Company B is referred to as "Contractor" and Kuehne+Nagel is referred to as "Subcontractor" in the statements. In the remaining text, Kuehne+Nagel is referred to as "Contractor" and Company B is referred to as "Company".

"...It shall be the responsibility of the Subcontractor to inform and report to the Contractor forthwith upon occurrence, any event or circumstance which may, immediately or in the future, impede the proper and timely execution of the Subcontract Works. Notice must be given to Contractor with reasons for the delay and/or potential delay and actions to be taken to overcome or minimize the delay or its future affects". The Contractor reserves the right to review and approve such actions or instruct the appropriate action to be taken. [13]

The contract matches theory regarding notification of progression-problems and measures. Because the Contractor has the best practical insight to foresee a problem and its cause, he has a duty to maintain reports and do follow-up in order to control the progression of the Work and to discover any progression-problems as early as possible. The Contractor is required to notify any defects or faults in the Company's delivery or engineering, and also to notify if he is affected by Force Majeure. The Contractor has neither the right nor the duty to take measures or suggest measures without orders from the Company. The Company is required to instruct the measure through the VO, and only then the Contractor has a duty to take action. According to theory, the contract forces the Contractor to take a stand on who is liable for the delay. If the delay is due to the Contractor's failure, it is his duty to take measures to prevent or minimize the delay. If the Company is responsible for the progression-problem, the Contractor has no such duty. However, it is the Contractor's duty

to withhold the Work Schedule. Therefore, if the Contractor thinks the Company is liable for the progression-problem, he has to issue a Variation Order from the Company to be held Harmless for any delay. Then the Company has to instruct an appropriate measure to avoid or minimize the delay, regardless of whether he agrees or disagrees with being liable. If the Contractor is liable for the delay, he shall in fact take the necessary measure to prevent the delay at its own cost and expense. There are no limits to the expenses the Contractor might get from taking measures against a possible delay he is liable for. And if he is not successful he might be held responsible for the delay and have to pay Liquidated Damages of maximum 10% of the contractual price. If the Contractor has deliberately not taken any measures he might be exposed, without limitation, to cover all direct losses of the Company due to the delay.

The NSAB 2000 does not mention this duty to notify and take measures. For Kuehne+Nagel the “progression” is transportation. In practice, depending on the scope of the potential delay, Kuehne+Nagel only inform the Company on the progression problem and suggest a proper measure, but they rarely have the time to wait for the acceptance from the Company. This is to avoid further delay of the transportation. Also, the use of variation orders is not relevant for Kuehne+Nagel.

“Should the Contractor dispute any item of any invoice, in whole or in part, the Subcontractor shall, without prejudice to its position, issue a credit note for the disputed part and the Contractor shall then pay the undisputed portion of that invoice. Upon resolution of the disputed part a new invoice shall be submitted for the resolved amount, if any, for payment at same time as original invoice:” [13]

This statement matches theory. As mentioned in the analysis of Contract A, the Company is required to give notice on any faults or lacks in the invoice, and the disputed part of the invoice has to be adjusted by Kuehne+Nagel through a credit note. However, the undisputed part of the invoice can't be withheld by the Company. The NSAB 2000 does not mention this.

*“Subcontractor shall be responsible for and shall indemnify and hold Contractor’s Group harmless from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by negligence or breach of duty of Contractor’s Group, related to:
-Disease of or injury to or death of any person employed or provided by Subcontractor’s Group
-Damage to or loss of Subcontractor’s Group’s provided materials and/or equipment.” [13]*

*“Except as provided in article 13.5 Contractor shall be responsible for and shall indemnify and hold harmless Subcontractor’s Group from and against all claims, losses, damages, costs (including legal costs), expenses and liabilities howsoever arising, including by negligence or breach of duty of Subcontractor’s Group, related to:
-Disease or injury to or death of any person employed or provided by Contractor’s Group
-Damage to or loss of Contractor’s Group’s provided materials and/or equipment:” [13]*

These two statements match theory, and are the standard “knock for knock” liability limitations. Each Party holds the other Party’s Group harmless from all liability for losses inflicted by the other Party. These statements match the statements in Contract A. However, Contract B had the limitation that was missing in Contract A:

“...However duty of care and risk remains with the Subcontractor until such time as Contractor takes actual custody or completion of the Subcontract.” [13]

This liability limitation for the Company states that Kuehne+Nagel are liable for the Company’s materials, equipment and documentation while they are in Kuehne+Nagel’s custody. This matches theory, which states that Contractor is liable while it is in his care and custody, and this includes while it is in its Subcontractor’s custody. However, it contradicts the “knock for knock”-principle. The NSAB 2000 states that Kuehne+Nagel shall not hold the risk if it is under conditions that they can not affect, and this liability is more limited.

"Subcontractor agrees to waive any rights to exercise a lien to make claim or seek a judgement or award against the Services and/or Goods or part of at any time. Subcontractor acknowledges that its sole right in the event of failure by Contractor to perform any of its obligations under the Subcontract is to seek financial relief in respect thereof." [13]

This section shows that this contract is not fully based on the knock-for-knock principle. Subcontractor can only claim financial relief when an employee of Contractor fails to perform according to the contract. For example, they can't get the person guilty of the failure convicted. This is not mentioned in the NSAB 2000.

"Each party shall bear its responsibility towards Third Parties according to applicable law." [13]

As mentioned in the analysis of Contract A, this matches theory. This is clearly based on the "knock for knock"-principle. For example if Company B receives damaged Goods transported by any of K+N's transporters (Subcontractors), K+N can't just blame the transporter and let this be an issue between Company B and Subcontractor. K+N have to pay for these damages and then claim indemnity from the transporter. Third Parties are not mentioned in the NSAB.

"Unless otherwise expressed within this Subcontract, neither party shall be liable in respect of any indirect or consequential loss or damages of any nature whatsoever suffered by the members of the other party's group including, but not limited to, loss of profit or revenue, loss of use, loss of product or business interruptions." [13]

This statement matches theory, which states that no Party shall be liable for the other Party's indirect or consequential loss, regardless of who caused the loss. As mentioned previously, the NSAB 2000 only requires Kuehne+Nagel to pay for consequential loss if there is a delay in the transportation and there was specified a time of delivery. However, in this contract they are released from this duty since the NSAB 2000 was not used.

8.2.3. Contract C:

Contract C required Kuehne+Nagel's ship's agent service. Since there are no regulations on this service, the contract was not based on any guidelines and did not have the same liability-limitations as the previous contracts. The major part of the analysis is regarding the freight forwarding since there was some degree of transportation required by Kuehne+Nagel, and it could be compared to the NSAB 2000. However, a comparison to theory is also necessary here since the contract is not based on the NSAB 2000, and has no basic principles of liability-limitation.

"The contractor shall assume full responsibility and liability for all Cargo transported on behalf of the Company while the Cargo, as applicable, is in the care, custody, control, possession or direction of the Contractor or its Subcontractors(s)". [14]

This matches theory, which states that the Contractor is liable for the Cargo while it is in his care, custody and control. However the "direction" of the Contractor or its Subcontractors can cause some confusion. If this means when the Cargo is being transported to the place of pick-up by some other contractor hired by the Company, this is not relevant. As mentioned earlier, this contradicts with the NSAB 2000. K+N's role as a freight forwarder only makes them fully responsible and liable for their own mistakes, but not its Subcontractor's mistakes. According to the NSAB 2000, he shall only issue a complaint to Subcontractor and to assist Company C if he needs to make claims against Subcontractor. The term of this liability-limitation is that Kuehne+Nagel can justify his choice of Subcontractor.

"The contract requires that the Contractor shall be responsible for indemnity on claims from their Subcontractors in the event the Subcontractor has not received the Company's prior written approval. [14]

Theory states that the Contractor shall not engage a Subcontractor without the Company's approval. In practice this is a normal requirement in many contracts. According to the NSAB 2000, the Kuehne+Nagel is not responsible for its Subcontractors if he can justify his choice and performed his obligation as a mediator with due diligence.

“Contractor shall be liable for, and hereby releases Company Group from, all liability for and shall protect, defend, indemnify and hold Company Group harmless from and against any and all Claims of whatsoever nature including, but not limited to, direct, indirect, incidental and consequential and any and all other losses arising out of pertaining to the Contractor or its Subcontractor’s failure to comply with any provisions of this Article 4”. [14]

In theory the Contractor is only required to hold Company Group harmless from and indemnify for any direct loss due to his own or his subcontractors failure to perform its duty with due diligence. Theory does not require any party to indemnify any indirect or consequential loss. This statement was very “knock for knock”, but it only applied for the Company’s right to be held harmless. The Contractor did not have this liability-limitation. According to the NSAB 2000, Kuehne+Nagel is only to indemnify the costs and expenses of the freight. Direct and indirect losses are outside the freight, as well as incidental and consequential losses which are for example loss of income, etc. However, if there has been given a time-guarantee (a specified time of delivery) for the delivery agreed separately on paper, the Contractor should pay consequential indemnity. This requirement was unacceptable for K+N. Kuehne+Nagel shall not indemnify any losses due to his Subcontractor’s neglect or breach of contract.

“The Contractor shall be liable for, indemnify and protect Company Group from, all Claims from Contractor Group, when the Claim arises directly or indirectly from statements in the Agreement and are caused by any kind of negligence, fault or strict liability of any member of Company Group.” [14]

The statement requires that Kuehne+Nagel shall hold Company C harmless from *all claims* arising from any losses, regardless of whether or not the loss is caused by the Company’s failure to perform its obligations according to the Contract. However, this release from responsibility only applies for the Company, not for the Contractor. According to theory, Contractor shall not be liable for any of Company Groups breach of contract, only for their own breach of contract. This is clearly based on the “knock for knock”-principle, but in a different matter than in the previous contracts. In the previous contractors the “knock for knock” only applied for the Company Group or the Contractor Group suffering personal injury or damage to property or material and equipment. In this contract the principle has been used for *all types of losses*, which does not match neither theory nor the NSAB 2000.

The knock for knock is not included in the NSAB 2000, which states that Kuehne+Nagel shall only be responsible for the claims arising from their own neglect.

“Contractor shall be liable for.....direct, indirect, incidental and consequential and any and all other losses arising out of or pertaining to the delay of Company’s operations due to the failure of Contractor or its Subcontractor(s) to follow the requirements of this Agreement...”. [14]

This statement does not match theory regarding the types of loss Contractor shall be liable for, but it did match regarding liability for its Subcontractors. The contract states that he shall be liable for all types of losses (direct, indirect, incidental and consequential, and any and all other losses) due to a delay caused by Contractor or Subcontractor, but in theory the Contractor shall only be liable for the direct losses arising from delay caused by his own and his Subcontractors neglect. No Party shall ever be liable for indirect losses. The statement did not match the NSAB 2000 regarding the types of loss the Contractor shall be liable for, not regarding his liability for his Subcontractors. The NSAB 2000 states that Kuehne+Nagel shall not be liable for their transporters causing a delay, when this is outside of their control.

“Regardless of the limits of the insurance in place, the Contractor shall compensate the Company and its affiliates, for the full replacement value of all lost, damaged or destroyed Cargo while under the care, custody, control, possession or direction of the Contractors or its Subcontractor(s). Furthermore, the Company shall be entitled to claim from the Contractor all direct and indirect (including incidental and consequential) losses and damages suffered by the Company or its affiliates in connection with the reacquisition of any such lost or damaged or destroyed Cargo”. [14]

The first sentence in this section is acceptable. The only change K+N wanted here was to add the expression:“all mandatory insurances”. The Contractor shall in fact compensate the Company for losses inflicted by them (not for its Subcontractors).

The second sentence is not acceptable according to either NSAB or theory. Nothing more than the cost of the freight is to be indemnified.

“Contractors liability...shall be limited to United States Five Million dollars (US\$5,000,000) for each calendar year in which this Agreement is in effect”. [14]

According to theory, the total liability for the Contractor shall be maximum 25% of the Contractual Price. Theory and the Contract match regarding that both limits are according to the value of the Work. This does not match the NSAB 2000, which considers that when Kuehne+Nagel arrange a transport they deal with *weight* and *not value* on the Goods. They will always assume a normal volume/density-relationship if nothing else is specified. Therefore, to give a liability-limit in USD is not acceptable for a freight forwarder.

“In the event the Contractor engages a subcontractor to perform all or any part of the Services, “the performance of such Services by such Subcontractor shall be the sole responsibility of the Contractor and the Contractor shall ensure that all the terms and provisions of this Agreement are communicated to and fully performed by such Subcontractor, ...” [14]

“Any failure of any Subcontractor to timely deliver and provide the Services shall be deemed to be the failure of the Contractor for all purposes under this Agreement. The Contractor shall remain fully responsible to the Company for the Services performed by the Subcontractor and Contractor shall be liable for.....all acts and omissions of the Subcontractor”. [14]

Theory states that if Contractor engage a Subcontractor without involvement from the Company, the Contractor is responsible and liable for this Subcontractor's performance. He is also responsible for his delay and shall pay Liquidated Damages for the delay. This does not match the NSAB 2000. As a mediator the forwarding agent is not responsible for his “Subcontractor” if he proves his choice on engaging him was with due diligence. As a Subcontractor Carrier he is responsible for his “Contract contributors” or in other words his “subcontractors. Kuehne+Nagel shall not be liable for the conditions outside of their control. If there is a delay due to Subcontractor's failure, he is responsible for this. However he shall not indemnify any loss due to this delay, only file a complaint to the Subcontractor and assist the Company in assuring the Company's right to Claim indemnity.

"To that end any claim(s) or dispute(s) between the Contractor and its Subcontractor regarding the provisions of any Services under this Agreement shall remain solely a dispute between them and the Contractor shall ensure that its Subcontractor does not take any action against any member(s) of the Company Group the Contractor shall be liable for...." [14]

This matches theory, which does not distinguish between the Contractor and the Subcontractor and states that: "the Company is to have no direct contact with the Subcontractor: all control, inspection and communication goes through Contractor. The Subcontractor is the Contractor's responsibility."

"Failure to follow custodial procedures in this respect shall be considered a breach of this Agreement which entitles the Company to withhold payment(s) hereunder until the breach is remedied to the satisfaction of the Company..." [14]

If the Company disputes an invoice, "the Company shall be entitled to withhold payment (without interest) of the disputed portions of such invoice from future payments until such dispute is resolved". [14]

In theory the Company can withhold the payment that is disputed, but *all other payments* shall be paid. For the disputed part of an invoice, a credit note has to be issued and the Contractor shall adjust the amount. Payment is not mentioned in the NSAB 2000.

1:"Contractor shall indemnify, hold harmless and defend Company Group from and against all Claims by third parties in respect of the injury to or death or illness of any third party or the damage to or loss or destruction of any third party property which may arise out of this Agreement, any Work Order or any Service to the extent of negligence, fault, or strict liability of any member of the Contractor Group". [14]

2: "Company shall indemnifydefend Contractor Group from.....by any third parties in respect to injury to or death or illness of any third party or the damage...to the extent of the negligence, fault or strict liability of any member of Company Group". [14]

According to theory, no Party shall be liable for any indirect loss (consequential loss) caused by the other party. However, the statement on third party is based on the “knock for knock”-principle which matches theory. As mentioned previously, the NSAB 2000 also only requires Contractor to pay for consequential loss of its principal if there has been a delay when a time-guarantee was specified and agreed to. The NSAB 2000 does not mention Third Parties.

9. Result:

In this chapter a summary of Contract A, B and C is presented to give a better overview on the deviation and similarities between the different Contracts with their different missions.

9.1. General Overview:

A general overview of the analysis of the contracts is presented below.

	Contract A (Transportation):	Contract B (combination):	Contract C (ship's agent):
Basis	Construction-contract	Construction-contract	Construction-contract
Comparison with:	NSAB in total and theory	Partly NSAB, mostly theory	Some NSAB, mostly theory
Are there regulations for the service?	Yes	Partly	No
Which party has more liability?	Principal	Almost a fair balance, due to the knock for knock	Kuehne+Nagel
Was the contract accepted?	Yes	Yes	No
K+N liable for Subcontractors?	Yes	Yes	Yes
K+N liable for damages to Third Parties?	No knock for knock	No knock for knock	No knock for knock

K+N's responsibility for loss:	None on Company's personnel and materials, Goods or equipment, only for K+N's own property.	None for Company's personnel and materials, only for K+N's own property and Goods while in their care	For everything, direct, indirect, incidental and consequential, personnel and material
K+N's responsibility when delay:	Notify, and take necessary measures, but not mentioned if they forget to notify!	Notify and pay for any direct loss!	Notify and pay all losses due to the delay..?
Indemnity-principle:	"knock-for-knock" without limitations	"knock-for-knock" with limitations	K+N shall indemnify everything, also when company neglects its obligations
Payment:	Withhold disputed part of payment, K+N write a credit note	Withhold disputed part of payment, K+N write a credit note	Withhold all payments until dispute is resolved

Table 1: General overview of the contracts.

Contract A was clearly based on the "knock for knock"-principle, but without the necessary limitations to the forwarding agents right to be held Harmless for damages on the Cargo while in his custody. If Kuehne+Nagel would be responsible for any damages to the Goods during the transportation, the Company would be liable for these expenses and the loss. This contract was not fit for this purpose.

Contract B was also based on the "knock for knock"-principle, but with the liability-limitations set in statement 8 and statement 9, stating Kuehne+Nagel's responsibility for the Goods while in their custody. This contract takes care of Company B and Kuehne+Nagel's

interests and limits each party's liability in an ok way. However the contract was clearly not fit for the purpose of Kuehne+Nagel's service.

Contract C was not approved by Kuehne+Nagel due to the high risks. Kuehne+Nagel was required to indemnify and hold Company Group harmless from everything that could possibly go wrong, regardless of who was responsible for any loss, damage, personal injury or delay. This contract was only taking care of Company C's interests.

9.2. Deviations from the NSAB 2000 and theory:

The results from the analysis of the Contracts compared to the NSAB 2000 and theory is presented in this chapter.

9.2.1. Deviations from the NSAB 2000:

	Contract A (transportation):	Contract B (combination):	Contract C (ship's agent):
NSAB 2000	<ul style="list-style-type: none"> • Liability for Subcontractor (mediator). • Indemnity for Subcontractor's breach of Contract • Indemnity for all of Contractor Group's loss • Harmlessness for Company and Contractor (knock for knock) • Indemnity for indirect loss, (time guarantee) 	<ul style="list-style-type: none"> • Liability for Subcontractor (mediator) • Indemnity for Subcontractor's breach of Contract • Indemnity for all of Contractor Group's loss • Harmlessness for Company and Contractor (knock for knock) • Liability for Cargo as a mediator • Indemnity for indirect loss, time guarantee 	<ul style="list-style-type: none"> • Liability for Subcontractor (mediator) • Indemnity for <i>all losses</i>, regardless of who is responsible • Harmlessness for Company (knock for knock) • Liability for Cargo • Indemnity for indirect and consequential loss, time guarantee • <i>value</i> (not weight)

Table 2: Deviations from the NSAB 2000.

The contracts deviated from the NSAB 2000 on similar subjects as presented in the overview-table:

Contract C had the most extensive deviation, holding Kuehne+Nagel liable for any indemnity for *all types of loss*, including indirect and consequential loss, regardless of who inflicted this loss. Contract A and Contract B limited this indemnity to *direct loss*, which also deviates from the NSAB 2000 stating that only the costs in connection to the freight shall be indemnified if they are caused by conditions within Kuehne+Nagel's control.

Contract A and B also stated that no indirect or consequential loss should be indemnified by Contractor, and contract C stated that all indirect and consequential loss should be indemnified by Contractor. All contracts deviated from the NSAB 2000, which state that Kuehne+Nagel is to indemnify consequential loss if they cause a delay and a time guarantee has been specified and agreed to.

All the contracts made Kuehne+Nagel liable for his "Subcontractors" and did not distinguish between the responsibilities of these two Parties. The contracts also imposed Kuehne+Nagel to indemnify any loss caused by the "Subcontractor", which is not in accordance with the NSAB 2000. If the forwarding agent has the role of a mediator, the NSAB 2000 states that the forwarding agent is not responsible for the "Subcontractors" or third persons.

The use of the "knock for knock" liability-limitations with the right to be held Harmless was present in all the Contracts in different degrees. This principle is not included in the NSAB 2000.

9.2.2. Deviations from theory:

	Contract A (transportation):	Contract B (combination):	Contract C (ship's agent):
Theory	<ul style="list-style-type: none"> No Liability for Cargo 		<ul style="list-style-type: none"> Harmlessness only for Company Indirect and consequential loss Withholding of payments other than disputed payments

Table 3: Deviations from Theory.

The contracts did not deviate from theory to the same extent as they deviated from the NSAB 2000:

These contracts were based on general standard contracts not fit for the services of a forwarding agent. The “knock for knock”-principle is the main reason for the deviation between the contracts and the NSAB 2000, however this principle is included in the general theory on petroleum contracts.

Contract B did not deviate from theory. Contract A only deviated due to the lack of limitation in the “knock for knock”-principle, releasing Kuehne+Nagel from all responsibility for the Cargo. If the forwarding agent has the role of a Subcontractor Carrier, he is liable for the Cargo while it is in his custody.

Contract C had the highest risk-profile, and deviated most from both the NSAB 2000 and theory. Contract C required Kuehne+Nagel to indemnify indirect and consequential loss,

which contradicts the NSAB 2000 as long as no time of delivery has been specified. Contract C also used the “knock for knock”-principle halfway, only giving the Company the right to be held Harmless. Regarding payments, contract C was the only contract giving the Company the right to withhold any payment, not only disputed payments.

10. Conclusion:

The international contracts deviated more from the NSAB 2000 than from theory on general petroleum contracts. This is because the contracts were based in standard contracts not fit for the services provided by Kuehne+Nagel, and also the theory was very focused on construction. There is clearly a lack on theory on liability in the services of forwarding agents and guidelines to balance this liability between the “owner” of the Cargo and the forwarding agent arranging the transportation or the transportation-contracts.

These contracts were all, in some degree, based in the “knock for knock”-principle. This principle is not included in the NSAB 2000 because it does benefit the forwarding agent arranging either transportation or arranging a contract between two Parties. By having the role of a “middleman”, the forwarding agent should not hold the risk of conditions he can not affect, nor be liable and indemnify for losses inflicted on his Contract contributors or “Subcontractors”. Contract A and B was very similar regarding the “knock for knock”-principle, however Contract B has the necessary limitation that held Kuehne+Nagel liable for the Cargo while it was in his custody for the role as a Subcontractor Carrier. Contract C used the “knock for knock”-principle for Company C’s benefit, where he was the only one with the right to be held Harmless.

None of the international contracts matched the NSAB 2000 regarding the liability for third persons or “Subcontractors”. Theory and the contracts did not distinguish between the forwarding agent and these. All the contracts held Kuehne+Nagel liable for their “Subcontractors”, which only match the NSAB if the forwarding agent acts as a Subcontractor Carrier, but contradicts with the NSAB regarding their role as a mediator. Regardless of the role of the forwarding agent, the NSAB never require him to indemnify any loss, damage or delay inflicted by any third person. He shall only file a complaint and assist the Company in his claims against this third person. This contradicts with the requirements in all the contracts.

There was some trend in the deviations from the NSAB, despite the fact that the contracts being analyzed involved different types of services. The use of the “knock for knock liability

limitations” was such a trend, because it was included in some degree in all the contracts. The reason for this is that this principle is included in the general standard petroleum contracts often used as the basis in the logistic contracts. Another trend was the subject of “subcontracts” and the liability. This also matched theory, but not the NSAB 2000 which only require Kuehne+Nagel to pay indemnity for any loss, damage or delay due to their own neglect, not for their “subcontractor’s” neglect. The lack of distinction between the Contractor and the Subcontractors in the contracts was present in all the contracts. These contracts did not take into account the role of the forwarding agent, being a “middleman” and holding more liability than he should.

It was clear that contract C involving the ship’s agent-service held Kuehne+Nagel liable for too much. This is probably because there are no regulations or conventions for this type of service. There is obviously a need for this. It was also clear that there is a need for tailor-made logistic contracts.

The NSAB 2000 is a good standard for regulating the liability of the forwarding agent and should also be used in the international contracts. However, it should include more specific rules on the Liability for “third persons” and Third Parties, the rules for payment, and insurance-requirements.

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