The Development of Norwegian Standard Form Contracts in the North Sea and their Utilisation in other related Business Sectors

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This article presents some main features of the Norwegian Standard Form Contracts used in the offshore petroleum sector for services, and their feasibility for utilisation in related type of services, such as, for instance, various types of onshore construction projects. The aim of establishing these Standard Form Contracts in the first place was to regulate a long standing, expensive and high risk development project. The projects are often characterised by extensive development of the scope of work during the project period. To regulate such a “dynamic element” of a project, an advanced variation order system, which regulates both intended and not intended events with an impact on the execution during the course of the contract, was developed. This variation order system is more elaborated and formalised than in comparable standard form contracts for construction work and similar. Another important feature of the Standard Form Contracts is the distribution of risks and liabilities, which is based on a mutual indemnification system.

An important element when working out the two abovementioned features was the balance between extensively elaborated contractual mechanisms on the one hand and arranging for a contract administration system not too cumbersome on the other. The Norwegian Standard Form Contracts have to a large degree been successful in finding such a balance as evidenced by its wide application in the business, and one might say the features of the variation order system and the distribution of risks and liabilities in many ways capture the essence of the Standard Form Contracts.

1 Introduction

Development of Standard Form Contracts

During the development of the exploration and production of oil and gas in the North Sea in Norway, the branch organisations of the oil companies and the oil service companies developed a set of standard form contracts to provide a balanced contractual framework between the oil companies on the one hand and the oil service companies on the other (the Norwegian standard form contracts in the offshore petroleum sector for services are hereinafter referred to as NSFC). The driving forces in the work were the oil companies Statoil and Hydro on the side of oil companies, while an association of oil service companies (Teknologibedriftenes Landsforening) on the other. The first version of a NSFC was finalised in 1987 (NF 87) and was intended to be used for fabrication of

Oil service companies typically provide services like engineering, procurement, construction and marine services. The oil service companies in the North Sea have to a large extent contributed to the technology developments in the offshore exploration and production industry. These are typically engineering houses or so-called EPC contractors (EPC is an abbreviation for Engineering, Procurement and Construction).
platform modules in yards. The development of the NSFC may also be compared to the LOGIC contracts developed in UK for construction and various services in the petroleum sector, as well as to FIDIC. The NSFC use the term “Company” to denominate the oil company and “Contractor” to denominate the oil service company, terms which will also be used in this article.

The Considerations behind the Development of the NSFC

The need for developing a set of standard form contracts was caused by the fact that the field development in the North Sea demanded huge technology investments and innovative designs and methods due to harsh climate and deep water. The projects involved a multitude of risks, large up-front investments, considerable co-operation between the parties and a high degree of development of the scope of work during the life of the contract, which often could endure several years. Owing to the latter, the standard form contracts had to allow for such a “dynamic element”, which led to the development of an advanced variation order system to efficiently deal with unknown future challenges, risks and variations, and based on a comprehensive distribution of risks and liabilities with mutual indemnifications. Another aim of developing the NSFC was as well, as in most cases where standard form contracts are developed, to ease and simplify the contracting process, negotiation and contract administration for both parties. Furthermore, and evenly important, the NSFC represent agreed documents with a balanced distribution of risks between the contractor on the one side and the operating companies on the other, as well as seeking to keep the commercial balance throughout the course of the contract. The fact that the NSFC represent a balanced distribution of risks and liabilities allow parties engaging in contracts for related type of work, even if not petroleum-related, to turn an eye to NSFC as a point of reference ensuring a reasonable balance of risks and liabilities between the parties, even if the NSFC themselves are not used as such. Using them as a reference and negotiation tool in this way will be in particular practical if one of the parties is in a distinctively weaker position than the other or less experienced in contracting such type of work.

The various Contract Types of NSFC

Today, there are three main NSFC, all being developed in several editions in the past 20 years. First there is the Norwegian Total Contract (NTK), which is intended to be used on large Engineering, Procurement and Construction projects (EPC(I)). Second, the Norwegian Fabrication Contract (NF), which is intended for fabrication work, typically of modules that are to be assembled offshore. Third, the Norwegian Subsea Contract (NSC), which is intended for subsea fabrication and installations. The latest versions are called NTK 07, NF 07 and NSC 05 respectively, where the subsequent number refers to the year of issue. The further focus will be on NF and NTK rather than NSC. NF and NTK have a similar build-up, so when articles are referred to without denomination of contract type, it refers to same article in both NF and NTK.

2 See http://www.logic-oil.com/ and http://www.fidic.org/ for further information. Further comparison is, however, outside the scope of this article.

3 Where a contractor is awarded the full development including assembly of modules and installation for, say, the topside construction of a platform, the contract is a so called EPCI contract (engineering, procurement, construction and installation), to which the NTK will apply. See n 1 accordingly.
Besides the terms and conditions of the principal document, there are several appendices which adhere to it and which regulate the execution work in more detail. These are typical:

Appendix A: Scope of Work
Appendix B: Compensation
Appendix C: Contract Schedule
Appendix D: Administration Requirements
Appendix E: Company's Documents
Appendix F: Company's Deliverables
Appendix G: Company's Insurances
Appendix H: Subcontractors approved by Company
Appendix I: Technical Specification
Appendix J: Standard Forms of Guarantees

**Governing Law and Language**

The NSFC are bilingual with English and Norwegian clauses running side-by-side. Article 37 NF / 38 NTK states that the Norwegian version shall prevail in the event of inconsistencies between the languages (this may, naturally, be changed by the parties if desirable).

The NSFC stipulate that they shall be interpreted in accordance with Norwegian law (Article 37.1 NF and 38.1 NTK). Norwegian contract law is characterised by allowing for a broader based interpretation of the parties intention (objectively determined) than what normally is done under English contract law, taking into consideration also prior negotiations, correspondence, undertakings etc. This fact should be noted in the event one wishes to use NSFC under another jurisdiction, or the parties are used to English law but allowing the NSFC to be governed by Norwegian law. If one wishes to include an “entire agreement” clause, limiting the interpretation to the “four corners” of the contract, this will still be enforceable under Norwegian law. It should be mentioned as well that the NSFC are made with an aim to be generally adaptable as well outside of the Norwegian jurisdiction and, thus, any Norwegian contract law “peculiarities” is not present, nor contain provisions that would conflict with most Western type of contract law.

**2 The Distribution of Risks and Liabilities**

When it comes to the NSFC system of distribution of liabilities and risks (and adherent limitations of liabilities), NSFC utilises a mutual indemnification system, often referred to as “knock for knock” (this system is for the most part regulated in NTK/NF Part VIII and IX (Articles 29-32, see in particular Article 31.1)). The “knock for knock” system originates from shipping practice that was developed during the World War II, when ships in the convoys tended to dent into each other. Instead of turning to the ordinary rules pertaining to claim for damages, a system of mutual indemnification agreement was
introduced. The essence of the system is that each contract party takes responsibility for damage to or loss of own property, and injuries/death of its employees, and, furthermore, shall indemnify the other for such incidents, even if the other party caused the event by his negligence. When parties enter into such a mutual indemnification agreement, potential liability is established at the time of contract for both parties through the contract. As in most standard form contracts that include “knock for knock” regulation, the definition of “parties” in relation to risks distribution includes their subcontractors, employees and their affected relatives, and affiliated companies (“Company Group” and “Contractor Group”). It should be noted that in order to have a proper flow-down of the liabilities and risks to subcontractors, the subcontracts should be back-to-back with the Company contract. Hence, if for instance, an accident occurs causing an injury to an employee of either party, the parties can avoid disputes between themselves regarding their relative responsibility for the accident. As between the two parties to the contract, the mutual indemnification system will have already established liability – Contractor will be responsible for all claims made by its employees, and Company will be responsible for all claims made by its employees - regardless of who is at fault. In comparison with regular negligence based claim for damages, the outcome of a negligence assessment will often be hard to predict and measured. The parties can, thus, avoid costs that might otherwise be incurred to establish their respective responsibility, as well as helping to strengthen the relationship between the two contracting parties, rather than working against each other.

The mutual indemnification system also regulates third party damages (e.i. outside Contractor Group and Company Group), in which case the party responsible for the damage shall hold the other party indemnified for such a third party claim for damages. This indemnification clause becomes effective when, for instance, a third party sues Company instead of Contractor, in belief that Company was causing the damage when in fact it was Contractor.

As the liabilities of risks are predetermined in this way, it also makes it easier to insure the risks. The applicable insurances are obligatory under the contract, pursuant to Article 31. The insurance of risks is an integrated and necessary part of the distribution of risks and liabilities system. As the NSFC involve high risks projects, the Contractor, which is more exposed to accidents than the Company, will have a greater need for limitations of liability and defined risks zones, which then may be insured. The Company on his side will have a Construction All Risks (CAR) insurance that covers all the fabrications that are undertaken under the Field Development Project itself, which includes the contract object of any particular Contractor engaged in the Project, and the NSFC assume and even oblige that a CAR insurance is present. The insurances must include a non-recourse clause to prevent that the insurer may address a recourse claim to the actual tort-feasor on the basis of his negligence. Otherwise it would jeopardise the system of mutual indemnifications.

The mutual indemnification system has, however, some modifications owing to the fact that Company is in a considerable stronger financial position to take on risks than the Contractor and possesses CAR insurance. The most important modifications are the caps

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4 For some easy accessible information on internet on mutual indemnification clauses, see for instance: http://findarticles.com/p/articles/mi_hb6661/is_201004/ai_n53509037/, http://www.jus.uio.no/ipf/forskning/prosjekter/anglo/publikasjoner/essay/bjerketveit_abstract.pdf

5 In this way, the system also represents an exception from regular damages in contract law, where in these types of contracts liability usually depends on appearance of negligence.
on liability for Contractor, without which most contractors would never engage in this high risk type of work. Worth mentioning are the following caps on liability: Contractor’s accumulated maximum liability under the contract is capped to 25% of the contract price (“global cap”), which comprises all liabilities, including any incurred costs he is responsible for due to third party claims (Article 32.2); after issue of the Completion Certificate by Company (delivery of contract object, ref Article 19), Company takes on all risks that may occur as a result of Contractor’s deficient work and Contractor’s liability for deficient work is only limited to re-work; and in the event of delay, Contractor is charged with liquidated damages of 0.15% per day, capped to a maximum of 10% of the contract price (ref Article 24). This is Company’s sole remedy in case of delay. Whether Contractor is in delay is determined by the milestone schedule in Appendix C Schedule. Importantly to note when it comes to limitations of liability is that Article 29 includes a carve-out from the indemnification of the other party for loss of or damage to own property with regard to the contract object itself and Company deliverables (materials) which is the possession of Contractor (e.i. prior to final delivery of the contract object to Company). Here Contractor is liable up to the insurance deductible of the CAR. The consideration behind this rule is that the contract object is after all in Contractor’s possession and, thus, must take some responsibility in case there are damages, and, moreover, he is protected against the big losses by means of the cap up to the insurance deductible value.

In the event that the NSFC are used outside of their traditional scope of application and for contracts with a lower degree of risks, the limitations of liabilities should probably be reassessed as the reasons to protect Contractor will not be justified to the same extent.

The mutual indemnification system applies “regardless of whether negligence in any form has been shown” by Company Group or Contractor Group. The wording itself suggests that also intentionally breach of contract is included, ref “any form”. Under Norwegian contract law, as in most Western legislation, intentional breach of contract will result in invalidation of limitations on liability. As this is imperative law, in an event of intentional breach of contract and although not expressively stated in the NSFC, such intentional breach of contract or intentionally causing of damages will result in invalidation of the limitations of liability. When it comes to gross negligence, no judgements are made to clarify whether or not the limitations of liability can be upheld. The question of invalidation of clauses concerning limitations of liability will only be raised when the matter concerns intentional/gross negligent breach of contract or damages caused by the company’s upper management or the Projects’ upper management team. Thus, subcontractors’ or regular employees’ intentionally misconduct/gross negligence will not penetrate the limitations on liability.

Finally, the “knock for knock” system makes the risks easier to quantify, predict and insure. Combined with the limitations on liabilities Contractor is provided, this allows Contractor to take on high-risk, long standing and complex contracts, which he might not

6 This wording is used several places where negligence shall not apply, see for instance Article 29.1.
7 Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer, 31.05.1918 No. 4 Section 36. (Act relating to Conclusion of Agreements and Validity of Contracts (hereinafter Act on Conclusion of Agreements, etc)). The Act is identical to the other Scandinavian countries’ act on contracts, owing to the common Scandinavian private law system. Cf. also UNIDROIT Principles of International Commercial Contracts 2010, Article 1.7. Under English law, the Unfair Contract Terms Act 1977 would apply to this matter.
8 See for further guidance Knut Kaasen “Petroleumskontrakter” Universitetsforlaget 2006pp. 597-609 discussing this question.
been able to take on under other terms. This system may also be applied outside its traditional scope where the project in question features some of the same characteristics of risks and complexity.

3 Regulation of the “Dynamic Element” – the Variation Order System

The variation order system is essential for regulating and controlling the “dynamic element”.\(^9\) The variation order system regulates adjustments to contractual rights and obligations when one of the parties asserts that these should be adjusted in one way or another. This might relate to changed circumstances for the execution of work, such as an instruction by Company for additional work or a force majeure situation.

A variation order system, which provides the Company with a right to vary the scope of work and adherent regulation of the execution of the contract, is present in many similar standard forms contracts.\(^10\) The NSCP go, however, further and expand the application of the variation order system not only to regulate the traditional types of variations where Company imposes variations to work, but to almost all types of changes to the contractual rights and obligations. Thus, NSFC use the variation order system also for a wide range of situations where variations were not intended by the Company, and in which the Company shall keep the contractor harmless (e.g. when a risk which Company is responsible for is materialised, breach of contract by Company, force majeure, etc). This application of the variation order system will be referred to below as the variation order system outside its original scope. In the next section, after some general remarks below, the traditional area of the variation order system is treated, and thereafter the usage of the variation system to deal with other circumstances outside its original scope.

The variation order system rests upon the following considerations (which also should be borne in mind when using the NSFC for other types of projects than for which originally intended): The Company has a need to vary the specifications during the course of the contract making the contract object in accordance with his needs on the time of delivery. This flexibility is necessary due to variations in public requirements, new technology, more information about the reservoir, etc. Moreover, Company is often not complete with all engineering and projecting prior to commencement of construction and detail engineering, due to time restraints caused by large up-front investments and external financing. Moreover, often the contract is merely one of several long lead contracts in the very Field Development Project, where there are interfaces with other contractors and there is a necessity to execute installations within weather windows on pre-ordered timeslots. The wide flexibility for Company to impose variations will naturally make the work less predictable to Contractor, who has a need to plan his business, such as planning his manning and work for other customers at the yard/construction site, as well as maintaining an efficient cost control. The Contractor must therefore be indemnified by the variations, which is also the solution set forth in Article 13.2 and 13.4, stating that Contractor shall be compensated for the net effect of the accumulated variations. In this way, the NSFC seek to on the one hand provide the Company with a wide access to vary the scope of work and schedule, while on the other hand maintain the original commercial balance for the Contractor.

The variation order system is based on two sets of rules. First, the material and procedural conditions that must be satisfied in order to issue a variation order (hereinafter referred to as VO) along with the rules regulating a dispute on whether a variation is

\(^9\) Much of the inspiration for this discussion on the change system, as well as the systematic approach to it is owed to Kaasen “Petroleumskontrakter”.

\(^10\) LOGIC, FIDIC, shipbuilding 2000 and others.
present or not. Secondly, the consequences the variation order shall have, i.e. measuring the cost and schedule impact. Articles 12-16 regulate the variation order system, where Article 12 regulates the right to vary the work; Article 13 regulates the effects of a variation to the work; Article 14 the procedural issue of a VO; Article 15 the obligation of contractor to implement the VO without undue delay and how to deal with disputes concerning the consequences of the variation order; and Article 16 disputes as to whether a variation to the work exists and the issue of a disputed variation order (hereinafter referred to as DVO).

The traditional application of VO
Prerequisites for issue of a VO

Article 12.1 states that “Company has the right to order such Variations to the Work as in Company's opinion are desirable” (first paragraph), and it may include “increase or decrease in the quantity, character, quality, kind or execution of the Work or any part thereof, as well as variations to the Appendix C Schedule” (second paragraph). The latter paragraph lists the typical situations where variations may occur. The third paragraph, however, goes further and sets forth the limitation for Company’s variations to what “cumulatively exceeds that which the parties could reasonably have expected when the Contract was entered into”. The clause provides the Company with considerable leeway to order variations.

The VO can only concern variations to “work” (or changes to contractual rights and obligations concerning the execution of work, e.g. when, what, how and how much, which is regulated by the appendices to the principal document of the contract), which imply that the Company is, naturally, not entitled to vary any of the terms and conditions of the principal document or the commercial balance and price level as expressed in Appendix B. Otherwise, a one-sided right to change the legal and commercial position in the favour of the Company would make the contracts not applicable to the business, as well as in conflict with basic principles of reasonability in contracts. In the event that the parties desire to change the terms and conditions, an amendment to the articles of the principal document should be made – not a VO.

Not all changes to work require a VO to be let, as not all are being considered variations to work as such. For instance, new revisions or corrections of drawings and specifications from Company that does not have costs or schedule impact for Contractor will not require a VO. This also applies to quantity updates for material, provided they are compensated for on unit-rate basis.

VOs may as well be used to reduce work - a negative VO. However, a negative variation which in effect cancels the remaining work is not considered a variation under the system of the contract, but as a cancellation, which is regulated by Article 17. The Company is entitled to cancel the remaining work against a cancellation fee and payment for work already performed. Temporarily suspension of work by Company is also specifically regulated by Article 18, and effectuated by a suspension notice from Company.

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11 It should be noted that disputes arising from contracts on the NSFC mal have very rarely found their way to the courts. To the extent disputes have been addressed to the dispute mechanism in Article 37 NF and Article 38 NTK, these are resolved by private and confidential arbitration. Therefore, there is not much guidance in court practice in the event disputes concerning the interpretation of NSFC occur.
During the course of the contract Company usually makes lots of instructions and requests to the Contractor within the current scope of work and schedule. However, Contractor may not always agree to that all such instructions and requests do not represent a variation to work. As the issue of a VO in most cases entails additional costs for the Company, it has an interest to push the limits of its right to give instructions within the present scope of work and/or schedule. Therefore and as a protection for Contractor, Article 16.1 first paragraph, furnishes Contractor with a right to issue a variation order request (VOR) in the event he is of the opinion that the instructions given by Company is not a part of the present obligations of the contract and, thus, represents a variation to the work. In order to issue a VOR, this must be done within the time-bar set by Article 16.1 first paragraph, which bar the right to issue a VOR if it has not been issued “without undue delay after Company has requested such work to be performed”. Hence, although the instruction from Company indeed represents a variation to work, of which Contractor should be indemnified by adjusting price and/or schedule, Contractor has to bear such costs himself if the VOR is not duly submitted.\(^\text{12}\) The time-bar may seem rigid for the Contractor, which requires a competent contract administration system that enables him to discover and act accordingly to preserve his rights. The main consideration for this rule is to force identification of variations and possible conflicts as they appear along the road, instead of ending up in a grand settlement of claims and conflicts upon the time of delivery, which may have originated years ahead and, hence, will be much more difficult to resolve. Moreover, disputes on whether a variation is present may be swiftly resolved, at least temporarily, by the expert system (dispute board) as provided for in Article 16.3.

In the event that contractor in duly time submits his VOR, Company may not agree that his instructions are outside of the existing scope of work. In such a dispute, Contractor is not entitled to cease work in order to put pressure on the Company. Contractor has to comply with the schedule. Therefore, a separate dispute mechanism for conflict on whether a variation is present or not is provided in Article 16.3. This Article states that if Company does not agree with the VOR, he has to issue a Disputed Variation Order (DVO), which shall describe the disputed variation, and which Contractor is obliged to implement without undue delay. Since the Contractor is cut off from the remedy to lay down the work while a dispute is ongoing, he is indemnified by temporary solutions such as keeping the Contractor’s cash-flow positive or neutral until final settlement, ref Article 16.2 third paragraph. The mechanism of DVO provides Company with the protection against a Contractor unwilling to perform work due to ongoing disputes, as well as providing Contractor with temporary commercial indemnification, and, evenly important, the DVO preserves both parties’ position for later settlement or settlement according to Article 16.3 and the expert system. The dispute mechanism of the expert system may resolve the question on whether a variation is present or not on the request of one of the parties.

As also other changes to the rights and obligations of the contract than changes to the work and schedule are to be channelized through the variation order, the dispute mechanism of Article 16.3 covers an extensive area of possible disputes. The expert system consists of a predetermined by the contract third party which will provisionally resolve the dispute on approximately 40 days after the DVO was issued, following the procedural provisions in article 16. The expert system is by far more cost efficient and

\(^{12}\) The time between the instruction and the time-bar starts to run from the time of receipt of the instructions, as laid down in the Act on Conclusion of Agreements etc, Sections 2.1 and 3.1.
expedient than resorting to ordinary courts or arbitration proceedings, which are provided in the regular dispute mechanism of Article 37.2.\textsuperscript{13} If arbitration proceedings have not commenced within 6 months after the resolution by the expert, his ruling becomes final.

\textit{The effects of a issue of VO}

When Company orders a Variation Order, Contractor shall without undue delay submit an estimate to Company. Company may require the submission of such estimate prior to issuing a Variation Order, ref Article 12.2. When a VO is issued, it becomes an integral part of the contract and binding upon the Contractor.

To ensure the commercial balance for Contractor, he is entitled to be fully compensated and that the schedule is revised accordingly. Article 13 sets forth some general principles for regulating the contract price as to the implications of the VO, and goes rather far in describing how the variation costs shall be calculated. Article 13.2 prerequisites a comprehensive schedule of rates in Appendix B to be applied and that the costs shall reflect the general price level. An aim of article 13.2 is to make the parties foreseeing possible variations and make the Appendix B Compensation comprehensive enough to be easily applied for future variations.

It is the net effect on Contractor that shall be compensated. If Contractor believes that the variation will have a schedule impact, but Company has only allowed for additional costs for extra work in the VO, it is important that Contractor enquires whether Company will extent the time schedule. In this case, Contractor has to present a new VOR without undue delay after the first VO is issued (i.e. the VO that does not allow schedule adjustments) in order to preserve his right to schedule adjustment. The same is valid in the opposite situation where schedule adjustment is allowed, but the VO does not include allowance for extra costs. It is Company’s right, however, to choose whether the variation shall have a schedule impact instead of cost impact if the situation allows choosing between the two with mutual exclusion.

If the parties agree that there is a Variation to the Work, but disagree as to the variation's effect on the Contract Price, then Company shall pay Contractor a provisional compensation calculated in accordance with Article 13.2. The provisional compensation for the variation work shall be considered final unless, within six months after the issue of the VO, arbitration proceedings have not been commenced by one of the parties in accordance with Article 37 NF / 38 NTK. The expert system does only apply to disputes on the effects of the variation – only on whether a variation is present or not. The parties’ disagreement shall be recorded on the Variation Order.

\textbf{VO System outside their traditional scope of application}

\textit{Application and conditions of VO}

The variation order system was developed to formalise intentional variations to the contract object. The NSFC extend this system to formally regulate events as a result of non-intentional variations as well, i.e. in all cases where Company is to indemnify

\textsuperscript{13} There is an international trend to a larger degree utilise dispute boards, such as the expert system in NSFC, to resolve conflicts instead of resorting to arbitration, as this is more cost efficient and expedient. Several banks such as The World Bank, the European Bank for Reconstruction and Development and the Asian Development Bank now insist to include dispute boards in contracts for project funded by them. The International Chamber of Commerce also recommends their utilisation. FIDIC has incorporated provisions for dispute boards in the 1999 version (see clause 20) of their standard forms of construction contract.
Contractor. Typical examples are situations that under general contract law would entitle Contractor to revise the contract (suspend or adjust obligations), such as a force majeure situation or where Company is in breach of contract (typically specifications, drawings or materials are delayed or erroneously delivered by Company). Using the variation order system also implies that Contractor has to observe the time-bar for proposing VOR. Article 12.4 lists all the provisions that furnish to Contractor a right to apply the variation order system, which are Articles 3.3, 4.3, 5.1, 6.4, 7, 8.3, 8.4, 11.2, 11.4, 16.1, 18.3, 21.6, 27.1, 28.3, 28.4 and 28.6. In the following, the most notable provisions are explained in more detail:

- Where Contractor is of the opinion that the progress of the Work is impeded by the presence of Company's Representatives (Article 3.3)
- Where legislation increases the economic burden on Contractor (for instance new safety regulations pertinent to the operation of the contract object) (Article 5.1)
- Where a particular Subcontractor is assigned to Contractor by Company and the subcontractor goes into liquidation, then Contractor is entitled to an adjustment in the Contract Schedule and Contract Price, by issue of VOR (Article 8.2)
- Where Company is in breach of contract (27.2)
- In the event of force majeure (Article 28)
- In case of frustration of the contract or other grounds for discharge of contractual duties. If in the contractor’s opinion there have occurred events that frustrates the contract, or at the time of award where present excusable misassumptions with regard to the work that may serve as a ground for adjustment of the Contract, Contractor may raise a VOR.\(^{14}\) For instance, he used a welding method that was originally perceived as satisfying by the market, but which subsequently proves to have shortcomings forcing Contractor to revise the execution method of all steel work.\(^{15}\) In such an event, Contractor has to raise a VOR to get indemnified by Company. The time-bar will commence from the time Contractor became aware of the facts that constitute frustration and the basis for the VOR.

The dispute mechanism for the listed situations is the same as for traditional variations and pursuant to Article 16. Company has to issue a DVO and the parties may address the question of whether a variation is present or not to the expert system.

The expansion of the formalised procedure of the variation order system covering said situations that represent grounds for adjustment of rights and obligations of the parties may seem rigid. Particularly when consider Contractor’s time-bar to raise the VOR. The alternative, however, is to not regulate it and leave it to arbitration to resolve the matter,

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\(^{14}\) Under Norwegian Law, the doctrine of excusable misassumptions (bristende forutsetninger), which in many ways is today comprised by the Act on Conclusion of Agreements, etc Section 36, may be, to some extent, comparable to the Doctrine of Frustration under English law.

\(^{15}\) An example of such an event in Norwegian court practice is the “Bridge of Salhus”, published in **Rettstidende** 1999 p. 922. Here the Contractor had based his execution method for welding on acceptable criteria at the time, but towards the end of the contract period, the method proved to have shortcomings with regard to the intended use of the steel. On this basis Contractor claimed to be entitled to additional compensation. The underlying consideration by the courts is whether there are circumstances that make it “unreasonable” to uphold the contract obligations as originally stated, cf. Act on Conclusion of Agreements, etc, Section 36.
which hardly would represent a step forward. Moreover, in principle there is no reason to formally distinguish between a situation where Company has delivered erroneous drawings, whereby Contractor demands adjustment of time schedule, and a situation where Contractor demands adjusted schedule due to regular variation orders for additional/change of work.

**Effect of the issue of VO**

The principle for regulating effects of the VO for the “non-traditional area” is the same as for regular variation, namely to hold Contractor indemnified for the variation, as stated in Article 13.2. The effects in these situations, however, can be harder to agree on, in particular in the event of frustration. If the parties do not agree, they have to resort to the general dispute mechanism provided in Article 37.2 NF / 38.2 NTK.

**4 Conclusion**

In conclusion, both the mutual indemnification system and the extended application of the variation order system as appearing in the NSFC together with the expert system (dispute resolution) are mechanisms that might be appropriate to use for wider construction purposes. The mutual indemnification system is already widely used in various standard form contracts for construction and contracting work, while the extended application of the variation order system has yet not found a broader use. The most apparent types of business where such a system might find a broader use is in the construction and contracting business where the parties desire to more exhaustively and formally regulate the risks and unexpected events, and where the development of the contract object comprises a dynamic element over a longer period of time.

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