

# KNOCK-FOR-KNOCK: AS APPLIED IN AUSTRALIA

*AOG CONFERENCE*

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# Points that will be covered

1. Indemnities and indemnity regimes
2. The purpose and features of a knock-for-knock indemnity regime
3. Common exclusions
4. Knock-for-knock between contractors

***Indemnity** = an undertaking by one person to meet a specific potential legal liability of another. Security or exemption from legal responsibility for one's actions*

- An indemnity regime allocates responsibility for risks (typically risk of loss and damage)
- Contracts contain indemnity regimes because disputes and insurance requirements are reduced where contractual indemnities clearly allocate risks

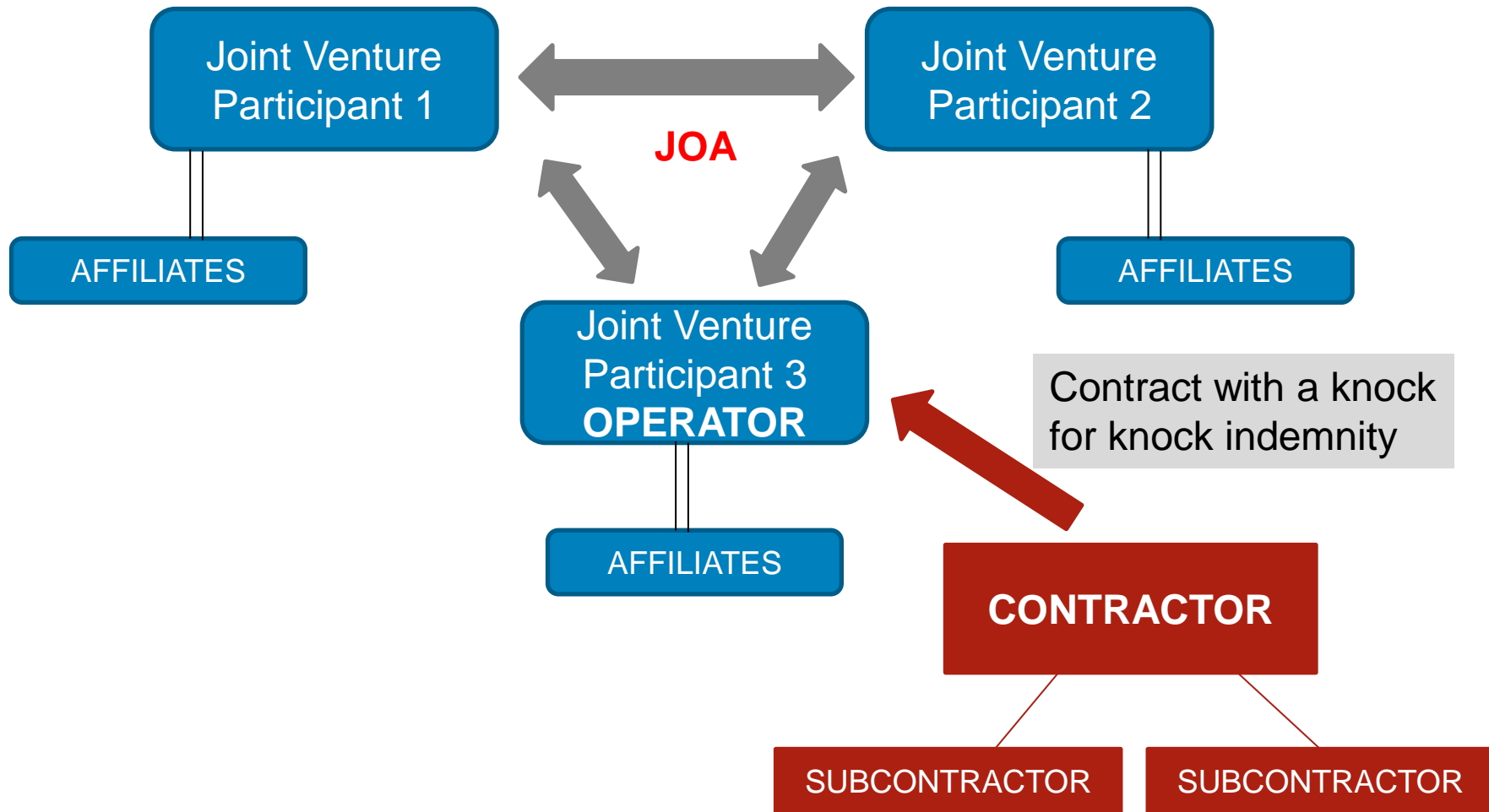
- Differences between on-shore -vs- offshore / oil & gas and other industries
  
- Alternatives to K4K include:
  - a) fault-based (i.e. "guilty party" pays); or
  - b) no contractual indemnities for loss (relevant laws of negligence will determine who is legally responsible for loss)
  
- For offshore work the alternatives are impractical because:
  - Offshore work involves potentially huge financial losses for individual contractors  increased disputes when loss occurs   
increased costs as each party will take out insurance to cover potential losses

At its most basic:

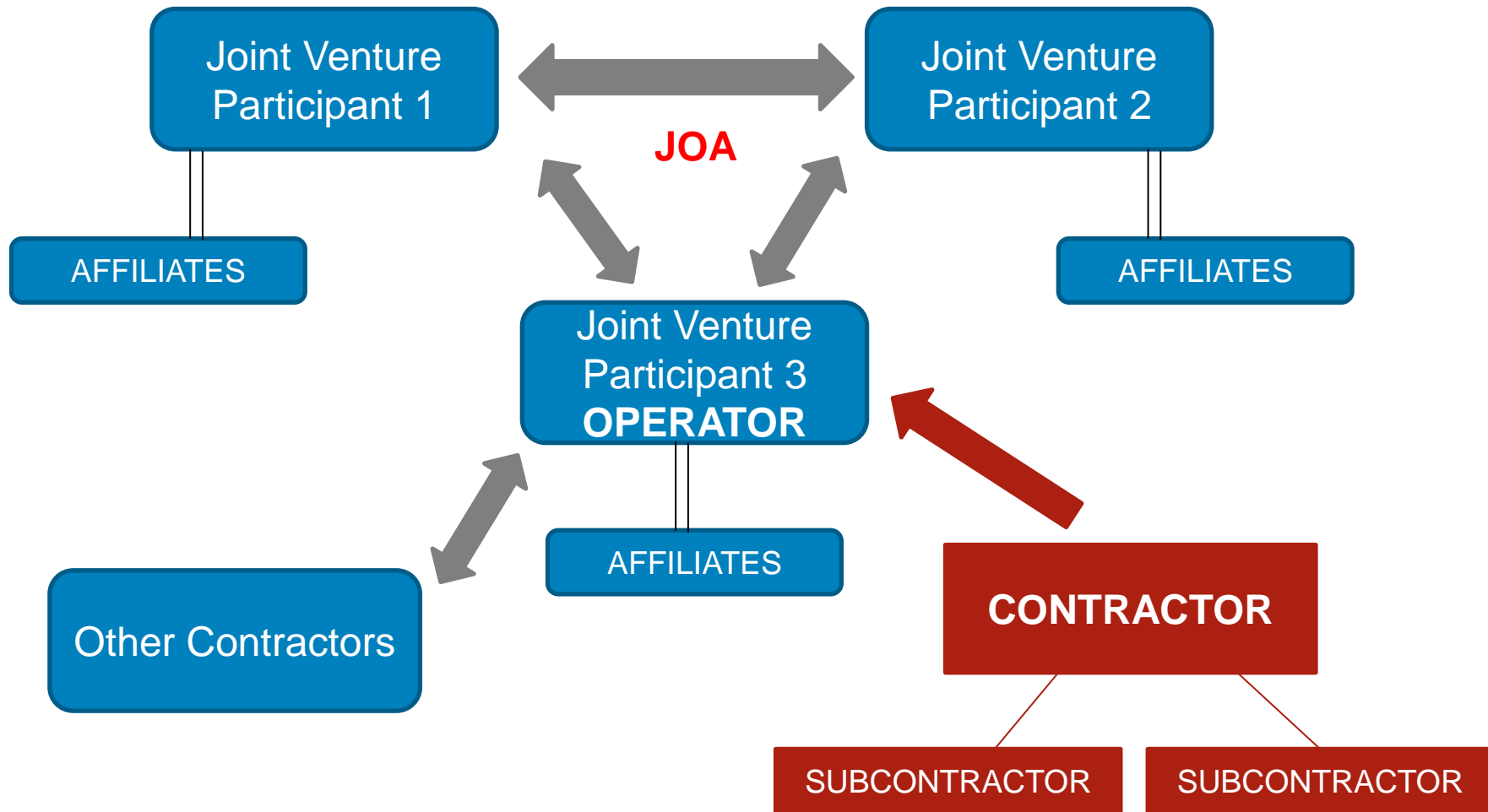
1. Party A (eg, an operator) indemnifies party B (eg, a subsea contractor) against claims in respect of any:
  - a) death of, or personal injury to, party A's employees;
  - b) loss of, or damage to, party A's property (but, with regard to K4K indemnities given under construction contracts, excluding loss of, or damage to, the works being constructed); and
  - c) Consequential loss
2. K4K makes clear the responsibilities of each party (i.e. only their own people & property)
3. K4K avoids multiple overlapping insurances and high insurance premiums

1. The indemnities are reciprocal (Party B provides the same indemnities to Party A, in return)
2. The indemnities apply *regardless of cause* and operate even when loss is caused by the negligence of the party who is indemnified
3. The indemnities typically extend to include the personnel and property of each party's "group"
4. Effectively reverse the legal position in most jurisdictions, which is that the party that causes damage is liable

# Knock-for-Knock – Overview

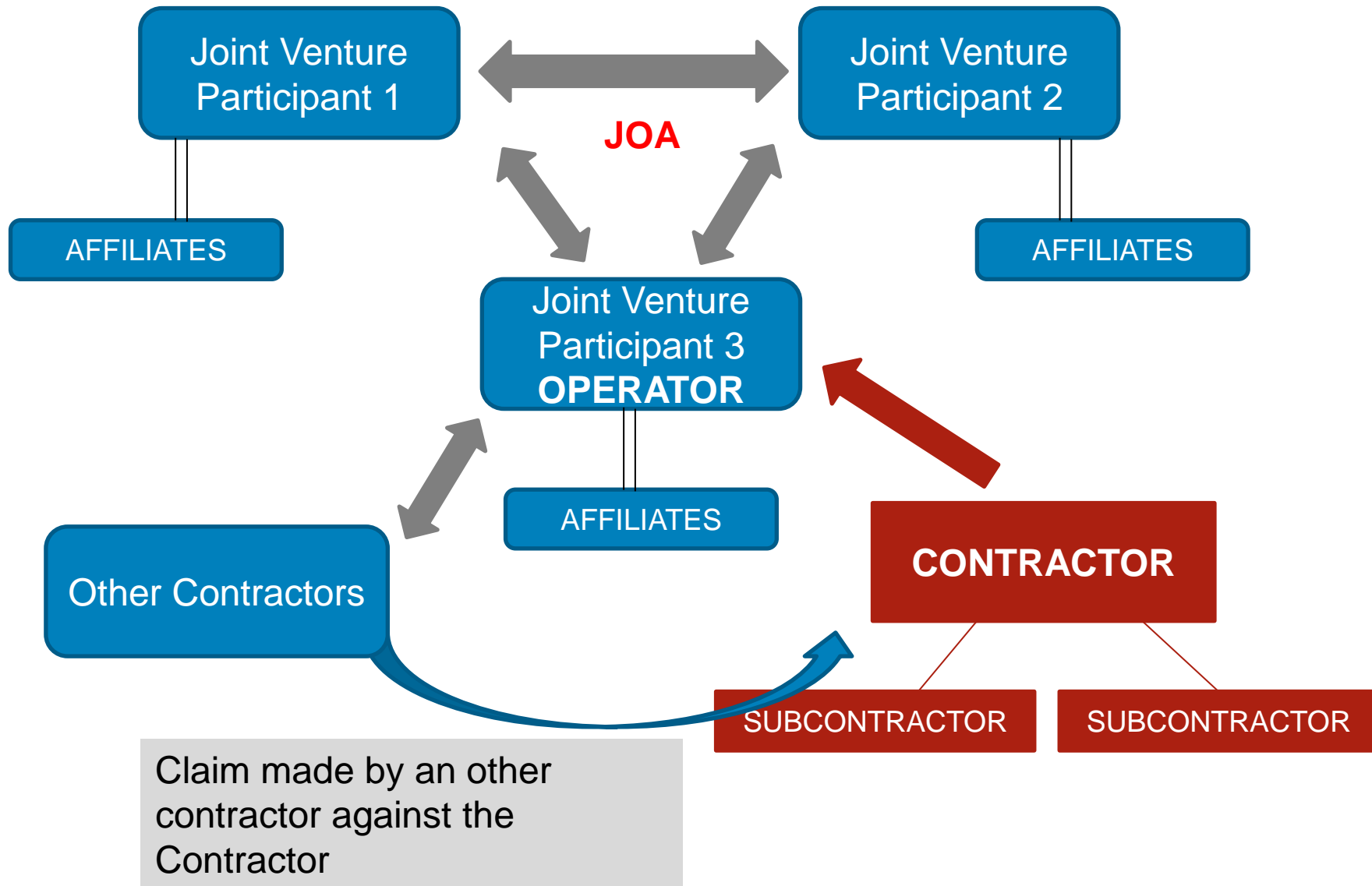


# Scenario 1: Other contractors within Company Group

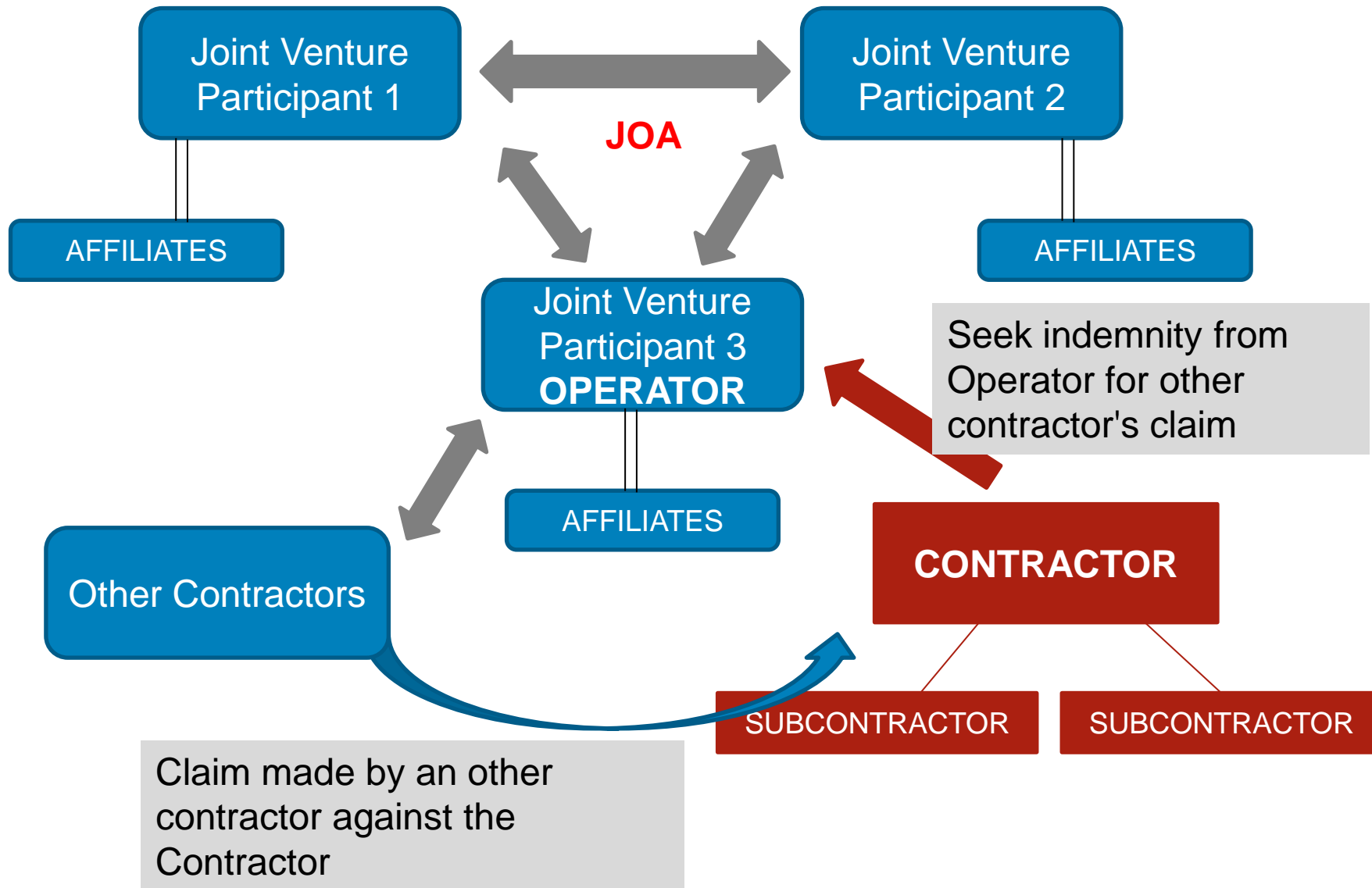




# Knock-for-Knock – Dealing with claims under K4K



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- Interplay between indemnity obligations and insurance (indemnity is stand alone obligation)
- Interpretation issues:
  - a) Liability and exclusion clauses, where ambiguity arises, strict construction required (*contra proferentem*)
  - b) Negligence must be specifically mentioned to apply (i.e. applying the general rule that applies to exclusion clauses which is they are read narrowly)
- Consequential loss is generally excluded as between the parties and usually included as part of K4K (but not always)
- Most operators are reluctant to adopt "full" K4K


## 1. Common exclusions:

- a) Damage to Operator's property up to a cap (eg, Contractor liable for first \$500,000 of damage caused to Operator's property)
- b) Down-hole tools (Operator indemnifies Contractor for property damage caused below rotary table)

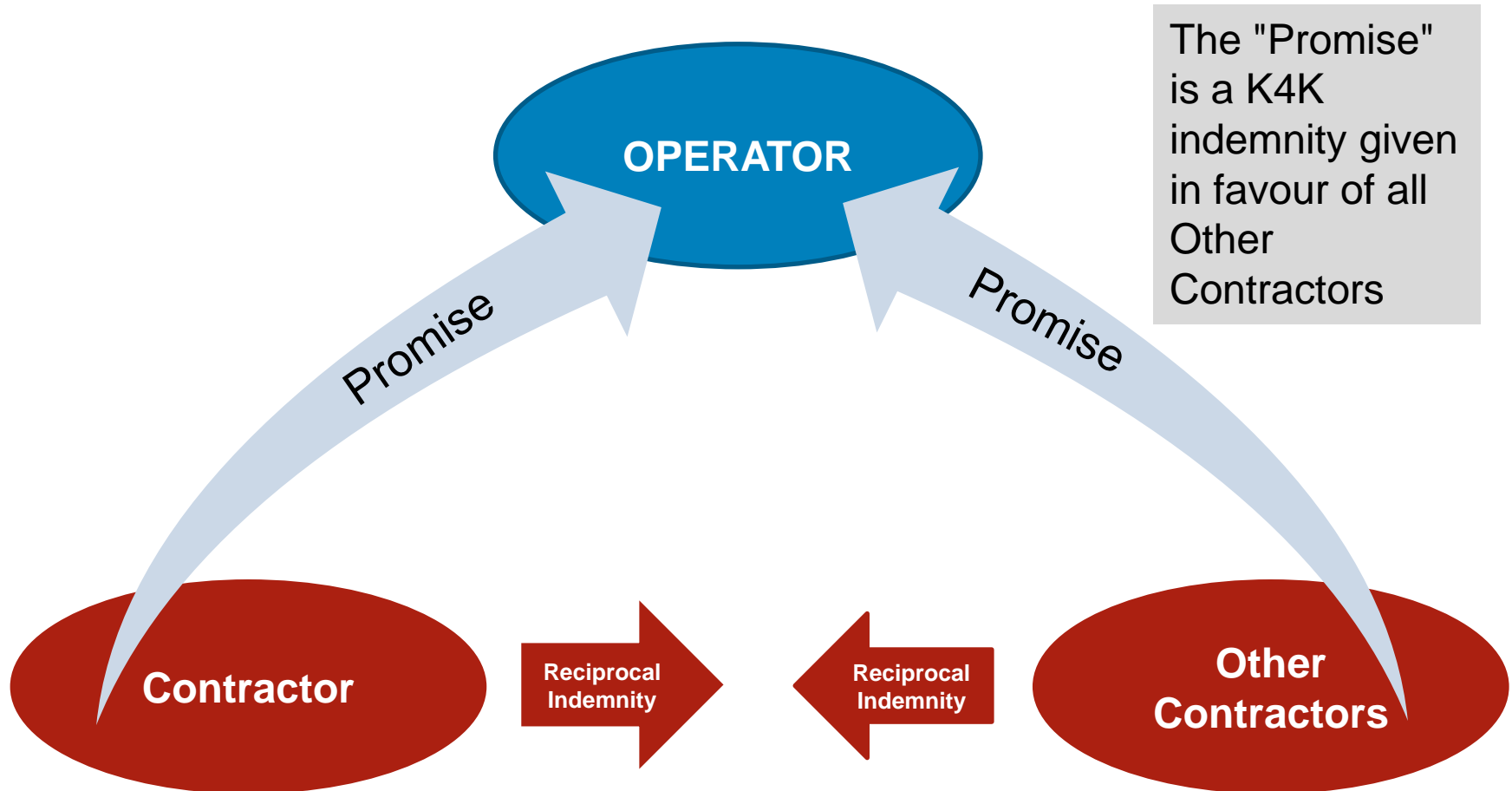
## 2. Less common (though becoming more common) exclusions:

- a) Wilful Misconduct
- b) Gross Negligence
  - These exclusions are problematic because the integrity of K4K is lost. Also, under English law:

*“The term “gross negligence”, although often found in commercial documents, has never been accepted by English civil law as a concept distinct from simple negligence”.*

- Contracts between Operator and Contractor address risks via a vertical contractual relationship
- Where an Operator's other contractors are not in the "Company Group", other contractors will be a third party  contractual gap between contractors working offshore
- UK – Industry Mutual Hold Harmless Deed
  - Predictable and transparent arrangement between offshore contractors
  - Parties can join the scheme at any time
- WA – Each Operator has their own approach
  - Some require contractors/subcontractors to sign a Deed of Mutual Indemnity and Waiver of Recourse
  - Mutual waiver and indemnities given to Operator for the benefit of "other contractors" (referred to as "Released Contractors" in some Operator's contracts)

# Scenario 2: Mutual Indemnities



## Key Points

1. Never been tested in court but probably enforceable
2. Contractor does not know which Other/Released Contractors have given the Mutual Indemnities
  - "A "Released Contractor" means a contractor that has entered a contract with the Operator that includes indemnity provisions substantially similar to those set out in this contract."
3. Mutual Indemnities need to be the same in order to be enforceable, but each Operator has their own form of wording
  - A certain Operator's contracts only deal with personal injury and property damage. Another also deal with consequential loss. One Operator deals with personal injury, property damage, consequential loss and pollution
4. Some uncertainty of how K4K applies between contractors offshore

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