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**ENFORCEABILITY OF KNOCK-FOR-KNOCK INDEMNITIES IN
OILFIELD SERVICE CONTRACTS IN THAILAND**

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ABSTRACT

This research addresses the issue of enforceability of mutual indemnity and hold harmless clauses (MIHH) pertaining to bodily injury and death in oilfield service contracts in Thailand. Thai Unfair Contract Terms Act B.E. 2540 (A.D. 1997) (“TUCTA”) prohibits a contracting party to restrict or exclude liabilities pertaining to bodily injury and death arising from his negligence. This restriction might be thought to have an effect of hampering the risk allocation. Similar restriction contains under the Unfair Contract Terms Act 1977 (“UCTA”). However, by virtue of the Supreme Court decision in *Farstad Supply A/S VS Enviroco Ltd* [2011] UKSC 16, the MIHH could be enforceable despite the restriction. Nevertheless, the IMHH will be subject to the reasonableness test under UCTA. Thus, it could be argued that in spite of the restriction under TUCTA, the IMHH in standard form oilfield service contracts e.g., LOGIC could still be enforceable in Thailand, subject to certain limitations.

KEY WORDS: Oilfield service contracts, oil and gas, law, Thailand

INTRODUCTION

The oil and gas industry has developed model forms of contracts which address the allocation of risk among the common participants of offshore projects (Andrade, 2011). The principal major hazard risks in the oil and gas industry have caused the death of many offshore workers that were triggered by fire and explosion associated with hydrocarbon releases and loss of structural integrity and stability especially in dealing with construction works (“Offshore Oil & Gas Sector Strategy 2014 to 2017,” 2014). Therefore, the model form offers certain options of standard provisions that regulate the project parties’ liabilities in a way that achieves fair but most importantly, efficient practical results.

In the LOGIC standard forms of contracts for the oil and gas industry, reciprocal indemnity is simply referred to as “Indemnities” (Network, 1997). In this arrangement, each of the party will agree to bear the liability respectively with regards to the death or personal injury of its own personnel and the damages of the party’s property, regardless of

the tortious act which has been committed or the breach of contractual duty by the other party, except in the event of wilful misconduct or sole negligence of the indemnitee (W. Williams, 2014). Such arrangement is called reciprocal indemnities and mutual hold harmless. It is also well known in the oil and gas industry as the knock-for-knock regime.

RESEARCH METHODOLOGY

The methodology employed in this research will be a comparative analysis which will be carried out in a descriptive, analytic and prescriptive manner.

LOGIC STANDARD FORMS

LOGIC stands for Leading Oil & Gas Industry Competitiveness, is a non-profit subsidiary of Oil & Gas UK and its objective is to promote United Kingdom Continental Shelf (UKCS) competitiveness remains current and was carried forward into the work of the PILOT Taskforce, a collaborative partnership of oil and gas industry operators, suppliers and the UK Government (LOGIC, 2016). LOGIC publishes several standard forms of contracts to be used in marine construction contracts within the petroleum industry (Martin & Park, 2010). For construction contracts, LOGIC has produced a set of General Conditions for Marine Construction (the 'Model Construction Contract'), 2004 Edition.

The Model Construction Contract is intended for use in an offshore context and specifically for pipe laying, offshore installation, subsea construction and inspection, repair and maintenance operations. It is similar in overall form and content to Engineering, Procurement, Construction and Installation (EPCI) contracts, which are frequently used by operators in South/Southeast Asia to deliver 'turnkey' solutions for offshore infrastructure projects and could be used as a basis for these with appropriate amendments (Hewitt, 2010).

Knock-for-Knock Indemnities

Under the LOGIC model forms, the allocation of liability is set out by the knock-for-knock regime. Knock-for-knock indemnities or reciprocal indemnity or sometimes known as mutual hold harmless provisions are believed to represent the best and most efficient model of risk allocation and liability distribution for construction contracts and oilfield services contracts (Ligon & Thistle, 2005). Provisions of this kind have also been incorporated into most model forms developed by independent associations and major players in both industries in the recent years. The adoption of this common approach to risk allocation is highly desirable as it simplifies contract negotiation, facilitates the administration of contracts and ultimately contributes to cost savings (Franklin, 2005). It is not an unusual practice under this contractual arrangement that both parties take out insurance in order to compensate the risks which have been assumed by each party as well as to diminish and eliminate the prospect of any claims resulted from negligence (Franklin, 2005). According to Hewitt (2010).

The knock-for-knock regime has also been widely adopted in South/ South East Asia. Each party to the contract agrees to take responsibility for, and to indemnify the other against, injury and loss to its own personnel and property and its own consequential losses. These cross-indemnities are usually intended to be effective even if the losses arose because of the negligence, breach of statutory duty or breach of contract of the party receiving the benefit of the indemnity. It is also common in standard contracts for each party to indemnify the other not only against its own losses but also against those of members of its 'group', which is usually defined to include, in the case of the contractor group, the contractor's employees, affiliates, agents and subcontractors and, in the case of the company, the company's employees, affiliates, co-venturers and other contractors engaged by the company to provide services in relation to the relevant area of operations.

(Hewitt, 2010)

Since the LOGIC standard form is widely used in Southeast Asia, such as Indonesia, Malaysia, Thailand and Vietnam, therefore it is necessary to look into how the national law of these regions reacts to the knock-for-knock regime. However, this paper focuses only on Thai law. It is also important to consider the English law in the discussion since LOGIC standard form was established and widely used in the UK. In this respect, the experience of English law dealing with the knock-for-knock regime will be considered as a reference to hypothetical events.

A COMPARATIVE ANALYSIS: ENFORCEABILITY OF KNOCK-FOR-KNOCK INDEMNITIES IN THAILAND AND UNITED KINGDOM

Enforceability of Knock-for-Knock Indemnities in Thailand

Section 4 of the Thai Unfair Contract Terms Act B.E. 2540 (A.D. 1997) ("TUCTA") provides that the terms of a standard form contract which render the party prescribing the standard form contract an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. This research addresses the issue of enforceability of knock-for-knock regime of the LOGIC model forms under Thai law.

Hewitt (2010) maintains that TUCTA makes an exemption of liability clauses are void in so far as they restrict or exclude liability for personal injury or death caused deliberately or negligently, and are otherwise valid only in so far as is fair and reasonable in all the circumstances. In this regard, section 8 of TUCTA limits the use of exclusion clauses. The section provides that any contractual terms which exclude or restrict liability for tort or breach of contract respecting the loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms shall not be raised as an exclusion or restriction of the liability. Additionally, section 8 of TUCTA also makes that any terms which exclude or restricts the liability, in any case, other than the preceding which are not void shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

Enforceability of Knock-for-Knock Indemnities in United Kingdom

In the UK, there is a similar statute which is akin to TUCTA known as UK Unfair Contract Terms Act 1977 (“UCTA”). Section 2 of UCTA provides that:

1. A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
2. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

Meanwhile, section 3 of UCTA provides that the section applies as between contracting parties where one of them on the other’s written standard terms of business. Since LOGIC is a contract under standard terms of business, the terms will be governed by UCTA (Zulhafiz, 2015).

The scope and restriction of UCTA and TUCTA, which relate to indemnity and hold harmless clauses, are set out in the table below:

UCTAT and UCTA

Scope of the Act

Section 3.

Liability Arising in Contract

1. This section applies as between contracting parties where one of them deals as consumer or on the other’s written standard terms of business.

Section 1.

The terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

Restriction on Exclusion of Liability

Section 1

3. In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—

(a) from things done or to be done by a person in the course of a business (whether his own business or another's).

Section 8

The terms, announcement or notice made in advance to exclude or restrict liability for tort or breach of contract respecting loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms, announcement or notice or by other person for which the person making the terms, announcement or notice shall also be liable, shall not be raised as an exclusion or restriction of the liability.

The terms, announcement or notice made in advance to exclude or restrict the liability in any case other than that mentioned in paragraph one which is not void shall only be enforceable to the extent that they are fair and reasonable according to the circumstances.

Section 2.

Negligence Liability.

1. A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
2. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

DISCUSSION

In the English case of *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16, it has been argued that the Supreme Court's decision in that case has implications towards the application of indemnity clauses in oil and gas contracts (Gordon, 2011). The reason is that, according to Lord Mance in *Farstad*.

[t]he language therefore operates as a series of indemnities against third party exposure combined with exclusions of direct exposure to the other contracting party. This is both what the heading of clause 33 and what common commercial sense would lead one to expect under a scheme clearly intended to divide risk between the contracting parties.

On this point, Gordon (2011) explains that the most obvious potential consequence would appear to be that the Unfair Contract Terms Act 1977 ("UCTA") will now become engaged. UCTA had hitherto been largely overlooked by the oil and gas industry as the restrictions imposed upon the use of indemnity clauses apply only when the indemnifying party deals as a consumer. However, as indemnity and hold harmless clauses would now appear to function as exclusion clauses when they operate in the context of 'direct exposure to the other contracting party', the various restrictions imposed by UCTA now need to be considered. Thus, if a party wishes to rely upon an indemnity and hold harmless clause to regulate losses which, in Lord Mance's formulation, fall into the category of

direct exposure to the other contracting party, it will have to demonstrate that the provision satisfies UCTA's requirements. (Gordon, 2011).

Based on the above discussion, it is important to note that, indemnity and hold harmless clauses pertaining to bodily injury and death could be enforceable in the UK despite the restriction under section 2 of UCTA. This is because the clauses pertaining to bodily injury and death are to be operated in its original function as indemnities against third party exposure. Hence, UCTA is not applicable.

In contrast, any part of the clauses which deals with the operator's property or the property of the contractor, for instance, damage to property owned by that party or consequential loss suffered by it, would be considered as exclusion clauses in the context of direct exposure to the other contracting party (Zulhafiz, 2015). Therefore, the parties must ensure that such clause should have fulfilled the reasonableness test under Section 3 of UCTA.

Applying the above scenario into the context of Thai law, it could be argued that indemnity and hold harmless clauses pertaining to bodily injury and death could be enforceable in Thailand despite the restriction under section 8 of TUCTA. It is worth noting that, even though section 8 of TUCTA provides that 'any contractual terms which exclude or restrict liability for tort or breach of contract respecting loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms shall not be raised as an exclusion or restriction of the liability', according to the Farstad, the clauses should be treated as indemnity clauses and not exclusion clause. In this case, TUCTA will not be applicable. Thus, knock-for-knock indemnities pertaining to bodily injury and death could be enforceable in Thailand.

On the other hand, it could be argued that indemnity and hold harmless clauses which deal with the operator's property or the property of the contractor will only be enforceable, subject to certain limitations. The reason is that, under section 8 of TUCTA, it also provides any terms which excludes or restricts the liability in any case other than loss of life, body or health of another person as a result of an action deliberately or negligently committed by the person making the terms, which are not void shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. In other words, it could be said that in order for indemnity and hold harmless clauses pertaining to loss and damage to property to be enforceable in Thailand, these clauses have to pass the requirements of 'fair and reasonable' under section 8 of TUCTA.

That said, it could also be argued that the knock-for-knock indemnity clauses could be regarded as 'fair.' This is because, the clauses provide mutual indemnities to contracting parties. Additionally, it can also be seen as 'reasonable' since the knock-for-knock indemnities reflect the practice of the oil and gas (Cameron, 2012). For example, in the UK, the House of Lord in the English case of *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2002] 1 Lloyd's Rep 553 acknowledged the popularity and enforceability of the offshore industry practice of the knock-for-knock regime. Therefore, it could be argued that the knock-for-knock indemnity is 'fair and reasonable' under section 8 of TUCTA. Besides, it may also be argued that since LOGIC is the standard form of contract, which the terms provide reciprocal indemnities, it could be said these clauses do not have an element of 'unreasonable advantage over the other party' under section 4 of TUCTA.

Despite the above arguments, it is important to note that, unlike the English legal system which is based on the common law, the Thai legal system is based on the civil law. Under the civil law, judges make decisions in a particular case based on the relevant statutes, in which case law are persuasive and not binding. That said, the Supreme Court's decision in Farstad is noteworthy since it affects the practice of knock-for-knock indemnity in the oil and gas industry. In this regard, the Thai Court may learn from the result of that case.

Indemnity and hold harmless clauses should not be treated as exclusion clauses. It could be argued that it is inappropriate for the court to go beyond that and treat indemnity and hold harmless clauses in the same way as exclusion clauses. The reason for this is that, indemnity clauses are used by the parties to oilfield service contracts to allocate risk. This is true for knock-for-knock indemnities, in which parties do not use the mutual indemnity and hold harmless clauses to entirely exclude risk. Instead, the parties may use the clauses to partly eliminate the risk.

Therefore, the difference between an exclusion clause and an indemnity clause is that the exclusion clause may entirely remove liability for the party who seeks for such exclusion. Moreover, the effectiveness of exclusion clause does not depend on the financial position of the other party (Koffman & Macdonald, 2010).

CONCLUSION

In a nutshell, according to Farstad, the knock-for-knock indemnity would be enforceable in Thailand. The enforceability, however, is subject to certain limitations. Any part of indemnity and hold harmless clauses pertaining to bodily injury and death would be enforceable since the clause was regarded to operate in its own original function. On the other hand, any part of the clauses that pertain to loss and damage to property was considered to serve as an exclusion clause. Therefore, for the clause to be enforceable, it will be subject to the requirement of 'fair and reasonable' under TUCTA.

Even though the Farstad is not directly relevant to Thai law; the case can be said to represent a hypothetical situation where indemnity and hold harmless clauses in oil and gas contracts can be operated as exclusion clauses. As a result, the provisions will be caught by general statutes, such as UCTA and TUCTA. That said, it is important to note that an actual outcome of whether the knock-for-knock indemnities are enforceable in Thailand can only be seen after a real case has been tested in the Thai court.

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