A Comparative Analysis on the Enforceability of Knock-for-Knock Indemnities in Thailand and the United Kingdom

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I. INTRODUCTION

The standard form of oilfield service contracts, such as the Leading Oil and Gas Competitiveness (LOGIC) model, is widely used in Southeast Asia including Thailand. Under the LOGIC model form, the allocation of risk is set out by way of knock-for-knock indemnities where each party will indemnify the other for bodily injury or death of his employees and loss or damage to his property, regardless of negligence. However, under the Thai Unfair Contract Terms Act B.E. 2540 (A.D. 1997) (TUCTA), a contracting party is not allowed to restrict or exclude liabilities pertaining to bodily injury and death arising from his negligence. This restriction appears to be an attempt to hamper risk allocation in oilfield service contracts. On the other hand, the UK Unfair Contract Terms Act 1977 (UCTA) has a similar restriction. However, by virtue of the Supreme Court decision in *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16, the knock-for-knock indemnities could be enforceable despite the restriction. Nevertheless, the knock-for-knock indemnities will be subject to the reasonableness test under UCTA. Thus, it could be argued that in spite of the restriction under TUCTA, the knock-for-knock indemnities in standard form oilfield service contracts e.g. LOGIC could still be enforceable in Thailand, subject to certain limitations. This note addresses the issue of enforceability of knock-for-knock indemnities pertaining to bodily injury and death in oilfield service contracts in Thailand. The methodology employed in this research will be a comparative analysis which will be carried out in a descriptive, analytic and prescriptive manner.

II. OIL FIELD SERVICE CONTRACTS

The term 'service contract' or 'service agreement' is used in two different contexts within the petroleum industry.[1] The definition of service contract that is used for the purpose

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[1] Timothy Martin, "Model Contracts: A Survey of the Global Petroleum Industry", *J.Energy & Nat.Resources L.*, 2004, Vol. 22, p. 281.

of the discussion in this article is thus: an agreement entered into between petroleum project parties and various contractors to provide specialised services throughout the lifecycle of a project development. This includes contracts for the activities of seismic survey, maintenance, drilling, well-resting, design, from-end engineering, construction, installation of major facilities, removal, decommissioning, and standby vessels.[2] Smith elaborates on this further and writes that -

> [t]he typical service contract is simply an agreement in which a company agrees to perform certain service for a monetary payment … For example, an oil company that has an oil and gas lease on a tract of land may contract with a seismic company to do geophysical exploration on the land. After analysing the results of the seismic survey, the oil company may enter into an agreement with a drilling contractor who agrees to drill a well at a specified location to a specified depth. If the drilling is successful, still another company may be hired to operate the well.[3]

The main parties to oilfield service contracts are typically an operating oil company (the operator), and a service company (the oilfield service contractor). Sometimes sub-contractors are involved. The following chart illustrates the relationship between the parties:

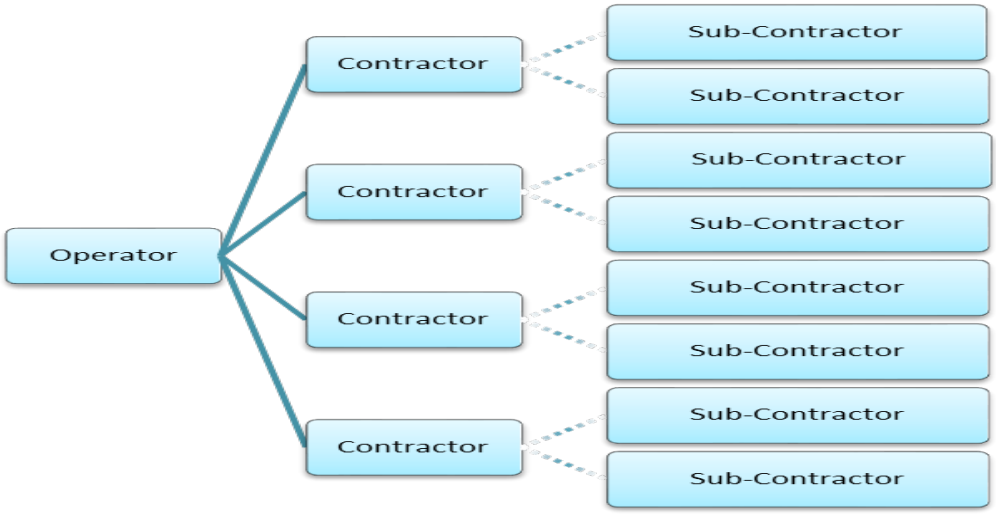

Figure A[4] - Relationship between parties in Oilfield Service Contracts

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2 Joseph E Aigboduwa and Michael D Oisamoje, "Promoting Small and Medium Enterprises in The Nigerian Oil and Gas Industry", *E.Sci.J.*, 2012, Vol. 9 at 244, p. 45; KW Putt, "Secondary Industries and Value Added Activities Study", *Mackenzie Valley Secondary Industry Report*, 2008, p. 45 <http://www.iti.gov.nt.ca/sites/default/files/Mac_Valley_Secondary_Industry_2008.pdf> Site accessed 6 August 2015; Norman J Smith, *The Sea of Lost Opportunity: North Sea Oil and Gas, British Industry and the Offshore Supplies Office*, Vol. 7, Elsevier, 2011, p. 40.

3 Ernest E Smith, "Service Contracts, Technology Transfers and Related Issues", *Int'l Petro. Trans*., 2000, Vol. 2, p. 480.

4 Greg Gordon, "Risk Allocation in Oil and Gas Contracts", Greg Gordon, John Paterson and Emre Usenmez (eds.), *Oil and Gas Law: Current Practice & Emerging Trends*, Vol. 2, Dundee University Press, 2011, p. 481.

The oil and gas industry has developed model forms of contracts which address the allocation of risk among the common participants of offshore projects.[5] The principal major hazard risks in the oil and gas industry have caused the death of many offshore workers. These are often triggered by fire and explosion associated with hydrocarbon releases and the loss of structural integrity and stability; especially so when dealing with construction works.[6] Therefore, the model form offers certain options of standard provisions that regulate the project parties' liabilities in a way that achieves fair and (more importantly) efficient practical results.

III. LOGIC STANDARD FORMS

LOGIC is a non-profit subsidiary of Oil & Gas United Kingdom that aims to oversee projects across the sector and to enhance the working practice efficacy in the United Kingdom Continental Shelf (UKCS).[7] LOGIC publishes several standard forms of contracts to be used in marine construction contracts within the petroleum industry.[8] 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.[9]

In the LOGIC standard forms of contract for the oil and gas industry, reciprocal indemnity is simply referred to as "indemnities".[10] In this arrangement, each party will agree to bear the liability respectively with regards to the death or personal injury of its own personnel and the damages to 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.[11] 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.

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5 Maria Manuela Andrade, "Knock for Knock Indemnities: Contract Practices and Enforceability Issues", *Oil, Gas & Energy Law Journal (OGEL)*, 2001, Vol.9, p. 1.

6 'Offshore Oil & Gas Sector Strategy 2014 to 2017' (2014) 1 <http://www.hse.gov.uk/offshore/offshore-oil-and-gas.pdf> Site accessed 1 March 2016.

7 LOGIC, 'LOGIC' (*Oil & Gas UK*, 2017) <http://www.logic-oil.com/> Site accessed 7 May 2017. LOGIC

8 Martin, *Supra* n1, at p. 281.

9 Toby Hewitt, "An Asian Perspective on Model Oil and Gas Services Contracts", *Journal of Energy & Natural Resources Law*, 2010, Vol. 28, p. 331.

10 CRINE Network, *Guidance Notes for General Conditions of Contract for Construction*, Vol. 1 (1st Ed), Leading Oil & Gas Industry Competitiveness (LOGIC) 1997 [2.12].

11 Richard W. Williams, "Knock-for-Knock Clauses in Offshore Contracts: The Fundamental Principles", Baris Soyer and Andrew Tettenborn (eds.), *Offshore Contracts and Liabilities,* Informa Law, Routledge, 2014.

A. Knock-for-Knock Indemnities

Knock-for-knock indemnities are believed to represent the best and most efficient model of risk allocation and liability distribution for construction contracts and oilfield services contracts.[12] Provisions of this kind have also been incorporated into most model forms developed by independent associations and major players in both industries in 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.[13] 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 resulting from negligence.[14] According to Professor Hewitt -

> 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.[15]

Since the LOGIC standard form is widely used in Southeast Asia, such as Indonesia, Malaysia, Thailand and Vietnam, it is therefore necessary to look into how the national law of these countries react to the knock-for-knock regime. However, this note 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 in dealing with the knock-for-knock regime will be considered as a reference to hypothetical events.

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12 James A Ligon and Paul D Thistle, "The Formation of Mutual Insurers in Markets with Adverse Selection", *Journal of Business*, 2005, Vol. 78, p. 529.

13 Helen Franklin, "Irretrievable Breakdown? A Review of Operator/Contractor Relationships in the Offshore Oil and Gas Industry", *Journal of Energy & Natural Resources Law,* 2005, Vol. 23, p. 1.

14 *Ibid.*

15 Hewitt, *Supra* n 9, at p. 333.

IV. THE KNOCK-FOR-KNOCK INDEMNITIES IN THAILAND AND THE UK

A. 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. There have been a number of cases where the Thai courts held that section 4 of TUCTA also applies to a business-to-business contract such as oilfield service contracts.[16] This note addresses the issue of enforceability of knock-for-knock regime of the LOGIC model forms under Thai law.

Professor Hewitt maintains that TUCTA makes the exemption of liability clauses void insofar as they restrict or exclude liability for personal injury or death caused deliberately or negligently, and are otherwise valid only insofar as it is fair and reasonable in all the circumstances.[17] In this regard, section 8 of TUCTA limits the use of exclusion clauses. The section provides that any contractual term which exclude or restricts liability for tort or breach of contract in respect of 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 term, shall not be raised as an exclusion or restriction of the liability.

Additionally, section 8 of TUCTA also states that any exclusion clause shall only be enforceable to the extent that they are fair and reasonable according to the circumstances. Such enforceability is based on the principles of 'autonomy of will' and 'freedom of contract'. In this regards –

> The Unfair Contract Terms Act 1997 has been enacted to uphold legal principles in relation to juristic acts and those contracts which are based on principle of sacredness of declaration of intention. It consists of 15 sections with its main justification to combat unfairness in their society. Since the law of contract in Thailand is based on the principle of 'autonomy of will' and 'freedom of contract', the objective of this Act is to protect the contracting parties from any deviation from these two principles.[18]

Therefore, where a contract term is enforceable because it falls outside the scope of section 8 of the TUCTA, such a term is enforceable as a result of section 151 of the

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16 Tjakie Naude, "The Use of Black and Grey Lists in Unfair Contract Terms Legislation: A Comparative Perspective" *South African Law Journal,* 2007, Vol. 124, p. 128.

17 Hewitt, *Supra* n 9.

18 Azimon Abdul Aziz and others, "Standard Form Contracts in Consumer Transactions: A Comparative Study of Selected Asian Countries", *Malaysian Journal of Consumer and Family Economics*, 2012, Vol. 15, p. 21, <https://www.researchgate.net/publication/287524704_Standard_form_contracts_in_consumer_transactions_A_comparative_study_of_selected_Asian_countries> Site accessed 10 May 2017 at p. 15.

Thai Civil and Commercial Code. The said section provides that 'an act is not void on account of its differing from a provision of any law if such law does not relate to public order or good moral.'[19]

B. Enforceability of Knock-for-Knock Indemnities in the United Kingdom

In the UK, there is a similar statute which is akin to TUCTA, the 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 such conditions are applicable to any contract made under standard terms of business. Since LOGIC is a contract under standard terms of business, the terms will be governed by UCTA.[20] The scope and restriction of UCTA and TUCTA, which relate to indemnity and hold harmless clauses, are set out in the table below:

	UCTA	**TUCTA**
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 4* *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.*

[19] Section 151 of the Thai Civil and Commercial Code.

[20] Wan Zulhafiz, "Unfair Contract Terms Act 1977: Does It Provide a Good Model in Regulating Risk Allocation Provisions in Oilfield Contracts in Malaysia?", *International Journal of Trade & Global Market,* 2015, Vol. 8, p. 3.

	UCTA	**TUCTA**
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.*	

V. ANALYSIS AND DISCUSSION

In the English case of *Farstad Supply A/S v Enviroco Ltd*,[21] it has been argued that the Supreme Court's decision in that case has implications for the application of indemnity clauses in oil and gas contracts.[22] 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

[21] [2011] UKSC 16.

> sense would lead one to expect under a scheme clearly intended to divide risk between the contracting parties.

On this point, Greg Gordon explains that -

> The most obvious potential consequence would appear to be that the 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.[23]

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.[24] 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 *Farstad*, the clauses should be treated as indemnity clauses and not exclusion clauses. In this case, TUCTA will not be applicable. Thus, knock-for-knock indemnities pertaining to bodily injury and death could be enforceable in Thailand.

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22 Greg Gordon, "Contribution, Indemnification and Exclusion: Farstad in the Supreme Court", *Edinburgh Law Review,* 2011, Vol. 15, p. 259.

23 *Ibid,* at p. 264.

24 Zulhafiz, *Supra* n 20.

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 exclude or restrict 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 industry.[25] For example, in the UK, the House of Lords in the English case of *Caledonia North Sea Ltd v London Bridge Engineering Ltd*[26] 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, where the terms provide reciprocal indemnities, it could be said that 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 as such case laws 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 in 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.[27]

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[25] Peter Cameron, "Liability for Catastrophic Risk in the Oil and Gas Industry", *International Energy Law Review*, 2012, p. 207.

[26] [2002] 1 Lloyd's Rep 553.

[27] Laurence Koffman and Elizabeth Macdonald, *The Law of Contract,* Oxford University Press, 2010.

VI. 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 clause 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. The provisions will be caught by general statutes, such as UCTA and TUCTA.

Even though *Farstad* is not directly relevant to Thai laws 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. This is because, Thailand is not a common law country and case law is not binding. It is not like some other common law countries in Southeast Asia (such as Singapore or Malaysia) where the courts may make reference to English cases. However, the English decision may still be applied in Thailand, as a "general principle of law", or as a source of law, provided under section 4 of the Thai Civil and Commercial Code. Despite Thailand being a civil law country, as a matter of reference, the Thai courts may look into other jurisdiction such as the UK, when interpreting or when giving meaning to TUCTA, particularly on matters pertaining to the knock-for-knock indemnities in oilfield service contracts and may have recourse to the application of *Farstad*. 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 courts.