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Gross Negligence in Knock for Knock

The concept of knock for knock is well recognised in the offshore oil and gas industry, yet such clauses continue to attract controversy both during negotiations and when losses occur. One of the most contentious issues is that of gross negligence, a concept that is not recognised under English civil law.

Traditionally, it was considered that the purpose of knock for knock clauses is to allocate risk irrespective of fault. Drafters often attempt to achieve this by expressing the indemnity to apply "*howsoever caused*" or "*howsoever caused and irrespective of negligence*". However, the scope of such broadly drafted indemnities remains imprecise. Whilst the literal meaning is clear, the Courts have rejected literalism in the interpretation of knock for knock clauses.

The matter is often further complicated by the issue of whether to introduce an exception to an indemnity clause where the damage was caused as a result of gross negligence. However, even without such express carve outs, issues can arise in situations where the conduct contributing to the loss extends beyond (simple) negligence.

The question to ask in each case is whether, on the correct construction of the indemnity clause, it is intended to apply in the circumstances of the particular case. The question cannot be answered without a careful review of the relevant clauses in the context of the contract as a whole and within the relevant factual matrix. Some guidance on the correct construction can however be provided:

1. Absent an express reference in the contract to gross negligence, the English Courts are unlikely to find that gross negligence is a distinct concept to negligence. A claim under an indemnity clause that responds in circumstances of negligence could not normally be defended simply by arguing the offending party was seriously or grossly negligent. Something more would be required to defend the claim.
2. If there is an express reference to gross negligence in the indemnity clause, then the Court is likely to try to give effect to the intention of the parties as expressed in the clause. There is no rule of English law that prevents a party being indemnified against the consequences of its own gross negligence, if that is what the parties have agreed. Further, if the parties have agreed a carve-out in respect of gross negligence, then this would also be enforced by the English Courts.
3. If the parties have made an express reference to gross negligence and defined gross negligence then the Court will apply the parties' definition. Subject to the parties using clear language the correct construction should be straightforward.
4. However, if there is no agreed definition, there would be considerable scope for a dispute on the meaning of the term gross negligence and whether, on the facts of the particular case, the relevant threshold had been reached. The Court would have regard to previous case law in order to find a definition. Such case law is not well developed or established in England but includes, by way of illustration only:
    a) Red Sea Tankers Ltd and others v Papachristidis and others (The Hellespont Ardent) [1997] 2 Lloyd's Rep 547, where Mance J. (as he then was) stated: *"'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence; but, as a matter of ordinary language and general impression, the concept of gross negligence seemed to be capable of embracing not only conduct undertaken with actual appreciation of*

the risks involved, but also serious disregard of or indifference to an obvious risk."

b) Criminal law cases in the context of manslaughter by gross negligence. In essence, the position there is that breach of a duty of care will amount to manslaughter if its seriousness in all the circumstances is such that a jury considers that it should be categorised as a crime. By analogy, the test in the offshore context would be whether the negligence was so serious that the party should not be able to bring a claim under the indemnity clause.

5. Whether the definition of gross negligence is agreed in the contract or determined by the Court in the context of a dispute, there will still be fine lines on which the judge will have to make a call. That judgment call will typically be made with the benefit of hindsight and ample time for consideration; a stark contrast to the position of those whose decisions are being judged who are undertaking the operations offshore in challenging conditions.

The way forward

Where the parties draw the line on what is covered by the indemnity and what is not, is a matter for the parties. Opinions and interests diverge and bargaining positions change over time. Our role as lawyers is to help ensure the contract accurately reflects our client's intentions and to make the best out of a difficult situation if there is a loss.

In terms of drafting:

1. Where the term gross negligence is used in the context of a carve out from an indemnity clause, the definition should include reference to whose conduct is relevant. Whether the carve out applies to only senior onshore management or all employees may make a crucial difference to the outcome, particularly when one considers the significant time pressure, technical challenges and risks involved for those actually conducting the operations offshore.

2. The parties should also consider the potentially negative implications of including carve outs, namely:

   a) The objective of knock for knock clauses is often stated to be the allocation of risk, irrespective of fault, thereby avoiding the costs of double insurance and the time and expense of litigation. The more numerous and broader the carve outs, the greater the risk of this objective being undermined.

   b) Including carve outs for gross negligence can encourage allegations of such at the time of the loss. This can have insurance implications, as many insurance policies include conditions which exclude cover in the event of gross negligence or wilful misconduct. The result may be that not only is the party exposed to the loss but the insurers are on notice that at least one party in the project considers the loss to be due to a cause that may not be insured.

The ultimate question in respect of each carve out under consideration, is whether the price is worth paying. That is more of a commercial question than a legal one.

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Simon specialises in contentious and non-contentious matters in the offshore oil and gas and insurance industries.

He has advised on offshore oil and gas projects and conducted litigation and arbitration around the world. Projects Simon has acted on include, Kwame Nkrumah FPSO (Ghana), Benguela-Belize CPT (Angola), BP Thunder Horse (GoM), BP Mad Dog (GoM), BP Mad Dog 2 (GoM), Agbami FPSO (Nigeria), Usan FPSO (Nigeria), Senje Berge FPSO (Nigeria), Akpo FPSO (Nigeria), Coral FLNG (Mozambique), Pazflor FPSO (Angola), Frade FPSO (Brazil), Icthys FPSO (Australia) and Balder FPSO (North Sea).

Simon successfully acted for the underwriters in the marine insurance case the "*B Atlantic*" before the UK Supreme Court in May 2018 and was awarded the Solicitor of the Year Award (Private Practice) by the Law Society in October 2018.

Simon is co-author of the leading text on law and practice relating to design and construction of vessels for offshore oil & gas: Offshore Construction Law and Practice, published by Informa Law for Routledge.

Simon also authored the Decommissioning Contracts chapter in the text, Oil and Gas Decommissioning: law policy and comparative practice (Second Edition), published by Globe Law and Business.