

Wilful Misconduct

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The concept of wilful misconduct is often used within knock for knock clauses as an exception to the principal way the risk is allocated. Even where the term is not used, the concept is relevant to the extent to which knock for knock clauses will be enforceable in the event of a loss.

Definition of Wilful Misconduct

If the parties define the term wilful misconduct in the contract, the court would apply the parties' definition. Absent a contractually agreed definition, the courts would have regard to previous case law. There is a long line of relevant cases but in the 2007 case of TNT Global the Court of Appeal provided the following definition, which we consider to be a good working definition:

"... either (1) an intention to do something which the actor knows to be wrong or (2) a

reckless act in the sense that the actor is aware that loss may result from this act and yet does not care whether loss will result or not".

By Whom?

The definition provided by TNT Global does not clarify by whom the relevant wilful misconduct needs to have been undertaken. For instance, is a contractor guilty of wilful misconduct if one of its mid-level offshore employees acts in a way that he/she knew to be wrong (such as deliberately failing to undertake the planned maintenance to a crane's safety system and simply recording that the work had been done)? This issue would be determined as a matter of the correct construction of the contract but given the contract is often silent on the point the Court would have regard to common law principles of vicarious liability.

Generally an employer is vicariously liable for the wilful misconduct of its own employees, irrespective of their seniority, committed in the course of their employment.

Accordingly, there is a strong argument that the wilful misconduct of even a junior member of staff may be sufficient. Where there is intentional wrongdoing, the question whether the wrongful act was sufficiently closely connected with the employment can leave scope for a dispute.

Application of Wilful Misconduct in Knock for Knock

Looking beyond the definition and issues of vicarious liability, certain principles may be derived from case law:

1. Absent an express reference to wilful misconduct in an indemnity clause, the Courts would be unlikely to interpret the indemnity to cover wilful misconduct, even if broad generic language such as "howsoever caused" was used.
2. There is no stand-alone English law principle that would prevent the parties allocating loss irrespective of either party's wilful misconduct. In the Court of Appeal case of The Cap Palos, Lord Justice Atkin stated:

> "I am far from saying that a contractor may not make a valid contract, that he is not to be liable for any failure to perform his contract, including even wilful default; but he must use very clear words to express that purpose which I do not find here."

It is possible that the English courts would refuse to enforce an indemnity clause covering wilful misconduct, even if robustly drafted, if to do so would be contrary to public policy. For instance, if a party was seeking an indemnity against the consequences of its own criminal acts or fraudulent conduct, the Courts would invoke public policy grounds to prevent recovery under the indemnity clause.

Practical Considerations

Whether the definition of wilful misconduct is agreed in the contract or determined by the Court in the context of a dispute, ultimately there will be question of fine lines, upon which the judge must make a call. In making that judgement call, the judge will need to consider the relevant person(s) state of mind (did they know there actions were wrong or were they reckless and did not care?). That judgement is typically being made with the benefit of hindsight, ample time and potentially following extensive cross examination in a court room; a stark contrast to the position of those operating the equipment offshore at the time of the incident.

Conclusions/ Recommendations

How to allocate the risk of wilful misconduct is a question for the parties but staying silent on the point and relying on broad "howsoever caused" language is unlikely to provide adequate protection or certainty. If protection is sought against the consequences of a party's own employees' wilful misconduct, then the term should be used and the parties' intentions made clear. Robust language is needed to provide such protection.

More commonly, the language is used in carve outs. As with any carve out, the parties should also consider the potentially negative implications, namely:

1. 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.

2. Including carve outs for wilful misconduct may encourage such allegations at the time of the loss. This can have insurance implications, as most insurance policies will not respond if the cause of the loss is the wilful misconduct of the insured.

Finally, whilst it is counter-intuitive, including a carveout with a narrow definition of wilful misconduct may provide more robust protection than a typical "howsoever caused" indemnity that is silent on the point. The reasons for this are: (a) a typical "howsoever caused" indemnity is most unlikely to cover circumstances of wilful misconduct in any event; (b) it should prevent arguments regarding the meaning of the term; (c) it may be used to narrow the meaning of the term; and, importantly, (d) it can be used to confirm and narrow the scope of persons whose conduct is relevant.

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