Knock for Knock Clauses - No Protection Against Refusal to Perform

In Kudos Catering (UK) v Manchester Central Convention Complex [2013] EWCA Civ 38, the Court of Appeal considered whether the provisions of a "knock-for-knock" clause protected one party from a claim for failing to perform a contract.

A 'knock-for-knock' clause in a contract is usually included with the intention that each party should bear responsibility for any damage or loss to its own property, or accident or injury to its own staff, without making a claim against the other party, even if the other party is at fault.

The practice originated in the motor insurance business, where it was considered impractical and uneconomical for motor insurers to negotiate and dispute large numbers of relatively small road traffic accident claims between insurers. Similar arrangements became commonplace in the offshore oil & gas industry, where parties involved in an exploration or production project could potentially enter into complex and long-term contracts, and where knock-for-knock clauses are intended to avoid complex litigation between the parties, and to simplify insurance arrangements.

Knock-for-knock clauses have been incorporated into some standard charterparties, such as Binco's Supplytime 2005 (clause 14(b)), Towcon 2008 (clause 29) and Towire 2008 (clause 23).

English courts have recognised knock-for-knock clauses as being a market practice in offshore operations and in other industries, and have given full effect to such clauses in a number of English court decisions.

In 2006, the Admiralty Court decided that a knock-for-knock clause in a Towcon contract did protect the tug owner from a claim in the region of $200 million for the loss of a tow.

The rig "A Turtle" was to be towed from Brazil to Singapore, under a Towcon contract made with the owners of the tug "Mighty Deliverer", a 26 year-old tug which had been built in the USA for use in tug/barge combination units. Owners had estimated that the tug and tow would achieve 3 to 4 knots, but it only achieved less than 2 knots and on some days the weather and current was carrying the tow backwards towards Brazil. 55 days after leaving Brazil, the tug was more than 1,000 miles from both South Africa and Brazil, with only 5.3 tonnes of diesel fuel remaining on board. The Master decided to let go of the tow, and later lost touch with it. Two weeks later the rig was found hard aground on a remote part of Tristan da Cunha Island. Her owners and insurers sued the tug owner for the loss of the rig, and the costs of an expensive wreck removal operation.

The Court held that the knock-for-knock clause of the Towcon charterparty exempted the tug owners from liability for the loss of the rig, even where the judge found that the tug owners had breached the Towcon contract by failing to exercise due diligence to ensure that the tug had sufficient fuel, such that the tug was unsuitable for the intended voyage. He held that the knock-for-knock provisions of the Towcon contract continued to apply "so long as the tug owners are actually performing their obligations under the TOWCON, albeit not to the required standard."

The recent case Kudos Catering (UK) v Manchester Central Convention Complex [2013] EWCA Civ 38 did not involve a shipping dispute, but did consider a contract with a knock-for-knock provision.

The Convention Complex terminated Kudos Catering’s five-year catering and hospitality services contract after only three years. Kudos Catering asserted that the termination was wrongful and unreasonably and claimed damages for breach of contract.

The contract had an ‘indemnity and insurance’ clause, similar to a knock-for-knock clause, including “The Contractor hereby acknowledges and agrees that the company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits... suffered by the Contractor or any third party in relation to this Agreement...” The Convention Complex argued that this clause protected them from Kudos Catering’s claim.

The Court held that this wording had to be considered in the context of the whole clause and contract, and that this exclusion “…related to defective performance of the Agreement, not to a refusal or to a disabling inability to perform it.”

Under English jurisdiction, it appears that, depending on the wording and exact circumstances, a knock-for-knock clause might protect a party who is performing a contract badly, but it might not protect a party who does not perform the contract at all unless there is very clear wording in the contract to state that this is what the parties have agreed to.

It should be noted that English courts or arbitration tribunals will examine the exact wording of a particular clause very carefully, and the parties need to be very careful in drafting and agreeing a knock-for-knock clause to ensure that it does give the precise result that they intend.

Also note that while English courts will give full effect to knock-for-knock clauses in contracts drawn up in accordance to English law, such clauses might not be enforceable, or might not serve to protect a contract party under other legal systems or in other jurisdictions.