The Companies Act 2016: Key Changes and Challenges

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I. INTRODUCTION

The Companies Act 2016 (2016 Act) has been brought into force in stages starting from 31 January 2017.[1] To date all the provisions of the 2016 Act have come into force except for section 241 contained in Division 8 Part III of the 2016 Act on the registration of company secretaries and the corporate rescue mechanisms. The 2016 Act is a culmination of more than 10 years of Malaysia's corporate law reform process. While there have been piecemeal amendments to the old Companies Act 1965 (1965 Act), the 2016 Act represents a fresh start and a modernisation of Malaysia's corporate law framework.

Before delving into the key changes contained in the 2016 Act, it is useful to look back at the corporate law reform process which led to the enactment of the 2016 Act.

II. CORPORATE LAW REFORM PROCESS

In December 2003, the Companies Commission of Malaysia (CCM) established the Corporate Law Reform Committee (CLRC) to undertake a review of existing corporate laws and to propose amendments to the 1965 Act in order to align it with international standards of good corporate governance.[2]

In 2004, the CLRC issued 12 Consultation Documents to receive feedback from all stakeholders. From this consultation process, the CLRC released its Final Report in 2008 consisting of 188 recommendations, addressed to the Minister of Domestic Trade and Consumer Affairs.[3]

In July 2013, CCM issued its Consultation Document on the proposed Companies Bill.[4] This consultation document explained the underlying 19 policy statements and the proposed Companies Bill. The proposed provisions to be included in the Companies Bill were based on the CLRC's Final Report and recommendations made by the Accounting

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1 P.U.(B) 50/2017.

2 See https://www.ssm.com.my/en/clrc/history . Site accessed on 20 April 2017.

3 See http://www.maicsa.org.my/download/technical/technical_clr_final_report.pdf . Site accessed on 20 April 2017.

4 See https://www.ssm.com.my/sites/default/files/announcement/PC%20Companies%20Bill.pdf. Site accessed on 20 April 2017.

Issues Consultative Committee. In addition, the-then proposed Companies Bill also reflected recommendations made by regulatory authorities, professional bodies, the World Bank's 2012 Malaysia Report of the Observance of Standards and Codes on Accounting and Audit Oversight, the World Bank's Ease of Doing Business Report and the report issued by the Organisation for Economic Co-operation and Development (OECD) Peer Review Group of the Global Forum on Transparency and Exchange of Information for Tax Purposes on Malaysia.

After this round of public consultations, the Companies Bill 2015 was tabled in Parliament and passed in 2016.

III. KEY CHANGES UNDER THE COMPANIES ACT 2016

The 2016 Act spans 620 sections containing 13 Schedules. This note sets out ten of the key changes contained in the 2016 Act.

A. Constitution Replaces the Memorandum and Articles of Association

Firstly, the memorandum and the articles of association will now be replaced by a single document called the constitution. Under section 34(c) of the 2016 Act, the memorandum and articles of association of an existing company incorporated under the 1965 Act will be deemed to be the constitution.[5]

Secondly, section 31(1) of the 2016 Act makes it optional for a company to have a constitution. A company limited by guarantee however, must have a constitution.[6]

Thirdly, the new 2016 Act provides a comprehensive list of the rights, power, duties and obligations of the company, for each director and each member of the company. The constitution will allow for a variation from the default provisions under the 2016 Act but only to the extent that the 2016 Act permits such variation.[7] The constitution would have no effect if its provisions contravenes or is inconsistent with the provisions of the 2016 Act.[8] Where a company does not have a constitution, the default provisions under the 2016 Act will govern such rights, power, duties and obligations.[9]

In short, a company incorporated under the 1965 Act could have its memorandum and articles of association deemed to be the constitution. Such a company should ensure that the provisions in its constitution do not contravene the 2016 Act and note that the constitution can adequately vary or opt out of the default provisions of the 2016 Act.

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5 Section 34(c) will be read together with section 619(3) of the 2016 Act: "*The memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act, and the provisions of Table A under the Fourth Schedule of the Companies Act 1965 if adopted as all or part of the articles of association of a company at the commencement of this Act, shall have effect as if made or adopted under this Act, unless otherwise resolved by the company*."

6 Section 38(1) of the 2016 Act.

7 Section 31(2) of the 2016 Act.

8 Section 32(2) of the 2016 Act.

9 Section 31(3) of the 2016 Act.

B. Incorporation of a Single-Member Single-Director Company

A company may now be incorporated with only a single member. This is evident from section 9 of the 2016 Act which provides that a company shall have "*one or more members*". In addition, a private company will only require a minimum of one director.[10] While a public company can have a single member, it will still require a minimum of two directors.[11]

This change would make it more attractive for individuals to incorporate a private limited company. Instead of operating a business through a sole proprietorship, the incorporation of a company would allow the individual to be the sole member and the sole director of the company. This theme of making the company vehicle more business-friendly continues in the next change in relation to the abolition of the annual general meeting requirement for private companies.

C. No Annual General Meeting for Private Companies

In helping to reduce the compliance costs of running a company, private companies are no longer required to hold annual general meetings. The requirement to hold an annual general meeting has only been maintained for a public company.[12] With the absence of an annual general meeting for a private company, there are certain consequential changes that flow from this. Firstly, all companies shall now lodge its annual return for each calendar year within 30 days from the anniversary of its incorporation date.[13] Therefore, the lodgement of the annual return is no longer pegged to the holding of any annual general meeting of the company.

Secondly, a private company shall now circulate its financial statements and reports to its members within six months from its financial year end.[14] Within 30 days of circulation, the private company shall lodge the financial statements and reports with the Registrar of Companies.[15] These provisions introduce an easier process of circulating such financial statements instead of having to present such statements before the members in an annual general meeting. Thirdly, auditors of a private company would essentially be deemed re-appointed every year unless certain exceptions occur.[16] For instance, one exception is where the members exercise their right under section 270 of the 2016 Act to prevent the re-appointment of the auditor. Finally, it is up to a company to determine the retirement of its directors.[17]

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10 Section 196(1)(a) of the 2016 Act.
11 Section 196(1)(b) of the 2016 Act.
12 Section 340 of the 2016 Act.
13 Section 68(1) of the 2016 Act.
14 Section 258(1)(a) of the 2016 Act.
15 Section 259(1)(a) of the 2016 Act.
16 Section 269(3) of the 2016 Act.
17 Section 205 of the 2016 Act.

D. Written Resolutions for Private Companies

For private companies, the resolutions of its members can be passed by way of the written resolution mechanism under the 2016 Act.[18] Such written resolutions cannot be utilised to remove a director before the expiration of his term of office[19] or to remove an auditor before the expiration of his term of office.[20] There is no longer a requirement to pass a unanimous written resolution of the members,[21] as the written resolution shall be passed when the required majority of eligible members have signified their agreement to the written resolution.[22]

E. Corporate Documents

We will see changes to corporate-related documents. Firstly, it is optional for a company to have a common seal.[23] Secondly, upon incorporation under the 2016 Act, the Registrar of Companies will issue a notice of registration.[24] Under the 1965 Act, a certificate of incorporation would have been issued instead.[25] Nonetheless, a company can still apply to the Registrar of Companies for the issuance of a certificate of incorporation.[26]

Thirdly, it is not compulsory for a company to issue a share certificate. A shareholder would have to apply for a certificate relating to the shareholder's shares in the company or the constitution may provide for the requirement to issue a share certificate.[27] The new company forms will now have to be lodged with the Registrar of Companies. The old form numbers under the 1965 Act are no longer applicable and with the lodging of forms eventually moving into a completely electronic filing process.

F. Dividends and Solvency

The term 'dividend' is now used interchangeably with the term 'distribution'. Section 101(2) of the 2016 Act refers to the registered shareholder having the right to receive a distribution in respect of the share. A company may now only make a distribution to the shareholders out of the profits of the company available if the company is solvent.[28] This is a welcomed move in terms of ensuring that the creditors of the company are protected. Shareholders should not gain the benefit of receiving distribution if there is the risk that the creditors' debts are not paid.

There is now a requirement on the directors to ensure that the company will be solvent immediately after the distribution is made.[29] The test for solvency for the purposes

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18 Sections 297 to 308 of the 2016 Act.
19 Section 297(2)(a) of the 2016 Act.
20 Section 297(2)(b) of the 2016 Act.
21 Section 152A of the 1965 Act.
22 Section 306(4) of the 2016 Act.
23 Section 61(1) of the 2016 Act.
24 Section 15(c) of the 2016 Act.
25 Section 16(4) of the 1965 Act.
26 Section 17 of the 2016 Act.
27 Section 97 of the 2016 Act.
28 Section 131 of the 2016 Act.
29 Section 132 of the 2016 Act.

of distribution is whether the company is able to pay its debts as and when the debts become due within 12 months immediately after the distribution is made.[30] Where the distribution has exceeded the level where the distribution could have been properly made, the company can recover the distribution from the shareholder[31] or hold the director or manager of the company liable.[32]

There is also potential criminal liability. Every director or officer who wilfully pays or permits to be paid or authorises the payment of any improper or unlawful distribution may now face a maximum of five years' imprisonment and RM3 million fine or both.[33]

G. Solvency Statement

In line with this emphasis on solvency, there is a new requirement for a solvency statement when a company undertakes certain activities that may impact on the capital of the company. These requirements for solvency are to ensure that creditors' interests are also safeguarded. The directors are required to sign a solvency statement when a company carries out the following transactions:

(i) redemption of preference shares out of capital;
(ii) capital reduction by way of a solvency statement;
(iii) financial assistance; and
(iv) share buyback.

A solvency statement in relation to a transaction is a statement that each director making the statement has formed the opinion that the company has satisfied the solvency test in relation to the transaction.[34] In forming such an opinion, a director must inquire into the company's state of affairs and prospects and take into account all the liabilities of the company.[35] The directors should note that there are different solvency tests for different transactions.[36]

H. No Par Value Regime

The 2016 Act has ushered in the no par value regime. All shares issued before or upon the commencement of the 2016 Act shall have no par or nominal value.[37] This brings Malaysia in line with other countries like Australia, Singapore and Hong Kong that have also adopted the no par value regime.

The rationale for this change is that the concept of par value for shares is archaic. Par value does not necessarily indicate the real value of the shares and can be misleading.

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30 Section 132(3) of the 2016 Act.
31 Section 133(1) of the 2016 Act.
32 Section 133(3) of the 2016 Act.
33 Section 132(5) of the 2016 Act.
34 Section 113(3) of the 2016 Act.
35 Section 113(4) of the 2016 Act.
36 Section 112 of the 2016 Act.
37 Section 74 of the 2016 Act.

With a move to the no par value regime, a company will have more flexibility in the raising of capital and in determining the pricing of the shares.

There are a number of effects the move to no par value will engender, one of which is that there will no longer be restriction on the discount to the par value of shares.[38] Next, the concept of authorised share capital would also be abolished. Finally, the share premium account and capital redemption reserve would be abolished and the amounts standing in credit in the share premium account and capital redemption reserve shall become part of the share capital.[39]

I. Greater Directors' Accountability to the Members

There is an increase in accountability by ensuring directors are made more accountable and transparent to members of the company.

Firstly, the 2016 Act stipulates that all payment of fees and benefits payable to the directors, including any compensation for the loss of employment of a director or former director require approval by the members in a general meeting. This applies to public companies and listed companies and its subsidiaries.[40] This ensures that the shareholders have a greater say in the general remuneration of the directors.

For private companies, the directors may, subject to the constitution, approve the fees and benefits payable to the directors.[41] However, there are disclosure requirements. This approval must be recorded in the minutes of the directors' meeting and shall be notified to the members within 14 days from the date of the approval.[42] Members holding at least 10% of the voting rights, who consider that the fee or benefit was not fair to the company, may require the company to pass a resolution to approve the said fees and benefits before it is payable.[43] Hence, members of a private company have the final say in the approval of such fees and benefits payable to the directors.

Secondly, the directors' service contracts with a public company and its subsidiaries shall be made available for inspection to the members.[44] A copy of such contracts shall be made available for inspection for at least one year from the date of termination or expiry of the contract.[45] Also, the 2016 Act allows for more flexibility for directors to enjoy the benefit of an indemnity from the company and for the company to effect insurance for the directors.[46] But this is coupled with the requirement for the directors to disclose the particulars of the indemnity and insurance in the directors' report of the company's financial statements.[47] This ensures greater transparency when the financial statements are provided to the members.

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38 Section 59 of the 1965 Act had set out the restrictions on the issuance of shares at a discount.
39 Section 618(2) of the 2016 Act.
40 Section 230(1) of the 2016 Act.
41 Section 230(2) of the 2016 Act.
42 Section 230(3) of the 2016 Act.
43 Section 230(4) of the 2016 Act.
44 Section 232(1) of the 2016 Act.
45 Section 232(3) of the 2016 Act.
46 Section 289 of the 2016 Act.
47 Section 289(7) of the 2016 Act.

Finally, the 2016 Act introduces a new concept: the member's right to review the management decisions of directors.[48] The chairperson of a meeting of the shareholders shall allow a reasonable opportunity for members at the meeting to question, discuss, comment or make recommendations on the management of the company.[49] Next, a meeting of members may pass a resolution which makes recommendations to the board of directors on matters affecting the management of the company.[50] These steps allow the members to voice their views and to express their concerns to the directors, and where the directors can take into account these views and recommendations made to them. Further, the recommendation by the members could be binding on the board of directors. This occurs when the recommendation is in the best interest of the company and where the right to make recommendations is in the constitution or where the recommendation is passed as a special resolution.[51]

J. Strengthening Insolvency Laws

The final area of change to be discussed is the strengthening of insolvency-related laws, through improvements added to the laws of receivership, schemes of arrangement and winding up.

On receivership, the 2016 Act has codified many of the rights and procedures making it easier to carry out a receivership process. Examples would include the clear provisions on the appointment of a receiver or receiver and manager,[52] added clarity to the powers of a receiver or receiver and manager if the company is to be wound up,[53] and added obligations on the company and its directors to provide information to the receiver or receiver and manager.[54]

The provisions on schemes of arrangement have set a limit on the maximum duration of a restraining order[55] and the court now has the power to appoint an approved liquidator to assess the viability of the proposed scheme.[56] These changes aim to ensure that the creditors' interests are safeguarded.

Finally, the winding up framework has been improved. For example, there is a new minimum threshold of RM10 000[57] for the issuance of the statutory demand leading to the filing of the winding up petition.[58] The powers of the liquidator have also been further clarified and expanded on[59] and there is now a new provision allowing the court to order the termination of a winding up.[60]

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48 Section 195 of the 2016 Act.
49 Section 195(1) of the 2016 Act.
50 Section 195(2) of the 2016 Act.
51 Section 195(3) of the 2016 Act.
52 Sections 374 to 376 of the 2016 Act.
53 Section 386 of the 2016 Act.
54 Section 389 of the 2016 Act.
55 Section 368(2) of the 2016 Act.
56 Section 367 of the 2016 Act.
57 P.U. (B) 58/2017.
58 Section 466(1)(a) of the 2016 Act.
59 Section 486 and the Twelfth Schedule of the 2016 Act.
60 Section 493 of the 2016 Act.

So while there are changes making it easier to incorporate and to continue the operation of companies, the new winding up laws are also aimed at streamlining the processes that bring an end to a company.

IV. SOME AREAS OF UNCERTAINTY

While the 2016 Act has ushered in sweeping changes, some of the provisions may present a number of challenges as well. There may be some uncertainties in the interpretation of certain sections. Part IV lists three examples of the challenges and uncertainties facing any interpretation of the 2016 Act.

A. Invalid Execution of Documents

There are concerns on the wording contained in section 66(2) of the 2016 Act. This section states that a document is validly executed by a company if it is signed on behalf of the company "*by at least two authorised officers, one of whom shall be a director … or … in the case of a sole director, by that director in the presence of a witness who attests the signature*."

The question arises whether section 66(2) of the 2016 Act is the *only* way for a company to validly execute a document or whether it is meant to be merely *one* way for the valid execution of documents. The term 'document' has the meaning assigned to it in the Evidence Act 1950[61] which covers a very wide category of written and electronic material.[62]

This uncertainty is also seen in section 66(1) of the 2016 Act which may be interpreted to mean that a document may only be executed by a company through the affixing of its common seal[63] or by signature in accordance with section 66 of the 2016 Act.[64]

On the other hand, section 64 of the 2016 Act preserves the general principle of law that a contract may be made on behalf of a company by a person acting under an express or implied authority.[65] This suggests that a single authorised person can still validly execute a contract on behalf of a company. There is uncertainty how section 64 will be interpreted with the wider provision set out in section 66(2) of the 2016 Act on the valid execution of a document.

It would be extremely cumbersome, if not almost impossible, to have a director sign on every document in order to ensure that it is validly executed by the company.

A partial solution may be found through an application of section 67(3) of the 2016 Act which states: *"… a company may, by instrument executed as a deed, empower a person … to execute deeds or other documents on its behalf*." The deed executed by the

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61 Section 2 of the 2016 Act.
62 Section 3 of the Evidence Act 1950.
63 Section 66(1)(a) of the 2016 Act.
64 Section 66(1)(b) of the 2016 Act.
65 Section 64(1)(b) of the 2016 Act.

company[66] would likely have to comply with the requirements of a common seal or a signature in accordance with section 66 of the 2016 Act. This deed will then empower the authorised person to execute documents on behalf of the company.

This would still be a convoluted mechanism. The company would be forced to execute a deed to empower a set list of persons to execute documents, and having to constantly execute fresh deeds to update the list of persons authorised to execute documents. Documents could extend to email communications, purchase orders, receipts, and invoices.

The added uncertainty is that it is not entirely clear how to draft such a deed and what requirements should be contained in such a deed. For example, the question arises whether such a deed would require consideration. As a result, section 66 of the 2016 may have a very wide impact on all commercial transactions and documentation. There will undoubtedly be uncertainty whether a document is validly executed or not.

B. Winding up

There are certain areas of uncertainty in the winding up provisions of the 2016 Act.

Firstly, the Companies (Winding-Up) Rules 1972 ("Winding Up Rules") enacted under the 1965 Act have not yet been amended to be consistent with the 2016 Act. The Winding Up Rules still refer to the section numbers of the 1965 Act. However, it is likely that section 35(2) of the Interpretation Act 1948 and 1967 can be applied. This particular provision provides that where any written law is repealed and re-enacted, references in any other written law to the law so repealed shall be construed as references to the re-enacted law.

Nonetheless, the existing Winding Up Rules may not be comprehensive enough to cater for all the winding up provisions of the 2016 Act. For example, section 454 of the 2016 Act states that for every voluntary winding up, a liquidator shall be entitled to receive salary or remuneration as prescribed in the rules.

This is a change from the position under the 1965 Act. In the case of a member's voluntary winding up under the 1965 Act, the company in a general meeting may fix the remuneration of the liquidator.[67] In a creditor's voluntary winding up under the 1965 Act, the committee of inspection (or, if there is no such committee, the creditors) may fix the remuneration of the liquidator.[68] The Winding Up Rules do not presently contain provisions for the remuneration of a liquidator in a voluntary winding up. This leaves such a liquidator uncertain on how to receive remuneration.

Secondly, there may be uncertainty whether a liquidator appointed under the 1965 Act would then be subject to the provisions of the 1965 Act or the 2016 Act. For instance, a liquidator appointed under the 1965 Act may wish to utilise some of the wider powers of a liquidator under the 2016 Act.[69] The transitional provision in section 619 of the 2016 Act

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66 Section 67(1) of the 2016 Act.
67 Section 258 of the 1965 Act.
68 Section 261(3) of the 1965 Act.
69 For example, the powers of a liquidator in a winding up by the court in the Twelfth Schedule of the 2016 Act.

may provide different possible interpretations. The liquidator appointed under the 1965 Act may be deemed as continuing in office as if he had been appointed under the 2016 Act.[70] That may suggest that the liquidator may now exercise powers under the 2016 Act.

However, all winding up proceedings commenced before the commencement of the 2016 Act shall be deemed to have commenced and may be continued under the 1965 Act.[71] Similarly, a company which is in the course of winding up immediately before the commencement of the 2016 Act shall continue to be wound up under the 1965 Act.[72] That may suggest that all the winding up proceedings, including the powers of the liquidator, continue to be governed by the 1965 Act.

Similarly, if a company had been wound up under the 1965 Act, it is not clear whether the winding up can be terminated under the new provisions of the 2016 Act.[73] This is a new right that only exists under the 2016 Act.

C. Capital Reduction Through the Solvency Statement

The 2016 Act has introduced an additional method for capital reduction through the solvency statement route. Under the 1965 Act, a capital reduction could only be effected by way of a court order[74] and where the capital could be reduced "*in any way*". The phrase "*in any way*" is extremely wide and general[75] and has allowed a court order to approve a capital reduction in different ways. For instance, there can be the court order for a selective capital reduction,[76] a reduction of capital to nil and with a simultaneous issuance of shares,[77] and a capital reduction with a distribution of assets in specie.[78]

However, the 2016 Act has omitted the words "*in any way*" for a capital reduction through the solvency statement route. Sections 115 and 117 of the 2016 Act do not make clear whether the solvency statement would allow for all the different methods of capital reduction. The words "*in any way*" have only been retained in section 116 of the 2016 for a reduction in capital by the court. This is compared with other jurisdictions that have allowed a solvency statement route for capital reduction. Hong Kong[79] and Singapore[80] make it clear that the solvency statement would allow for a capital reduction "*in any way*".

Secondly, the Companies (Reduction of Capital) Rules 1972 ("Reduction of Capital Rules") were enacted under the 1965 Act. The Reduction of Capital Rules have not been amended to be consistent with the provisions of the 2016 Act. Similar to the Winding Up Rules, during the interim period, it is possible to apply section 35(2) of the Interpretation Act 1948 and 1967 to read the Reduction of Capital Rules consistently with the 2016 Act.

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70 Section 619(1) of the 2016 Act.
71 Section 619(4) of the 2016 Act.
72 Section 619(6) of the 2016 Act.
73 Section 493 of the 2016 Act.
74 Section 64 of the 2016 Act.
75 *Poole v National Bank of China* [1907] AC 229, HL.
76 *Re Ann Joo Steel Berhad* [2009] 1 CLJ 935, HC.
77 *Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors* [2012] 1 CLJ 176, FC.
78 *Ex Parte Westburn Sugar Refineries* [1951] AC 625, HL.
79 Section 210 of the Hong Kong Companies Ordinance.
80 Sections 78A and 78B of the Singapore Companies Act.

However, it may still be necessary to amend the Reduction of Capital Rules in order to cater for the new solvency statement route for capital reduction.

V. CONCLUSION

The 2016 Act brought about long-awaited changes and improvements to the law. Regardless, certain issues may arise during the transition phase. Nonetheless, the 2016 Act will undoubtedly serve as a harbinger to a more modern corporate landscape.

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.