

Contract laws of Asia


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Indemnities

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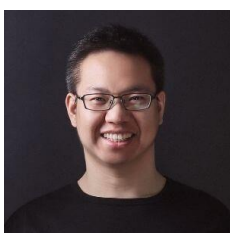
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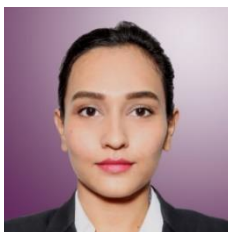
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ABLI also extends its gratitude to Cameron Ford and Ramrueben John Lachmana for assisting with the scoping and development of this project.

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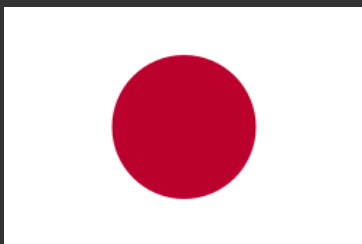
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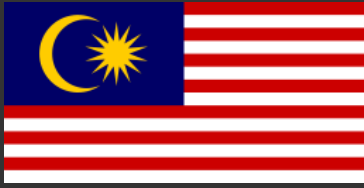
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Australia

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Definition and purpose

An indemnity clause is in effect a contractual transfer of risks between two contractual parties to prevent, or compensate for, loss which may occur as a result of a specified event that occurs during the performance of the contract. Typically, in Australia, the person providing the indemnity agrees to reimburse or compensate the counterparty to the contract in respect of the loss suffered. The person seeking the indemnity will usually seek protection to the greatest possible extent against losses or liabilities arising from the actions of the other party.

The person who provides the indemnity is known as the “indemnifier”, while the person who is covered by or receives the benefit of the indemnity is known as the “indemnified party” or “beneficiary”.

Indemnities can fall into two categories:

- **"Hold harmless"**. This is where one party agrees to hold the other party harmless against loss as a result of a claim by a third party; and
- **"Make good"**. This is where one party agrees to make the other party good for any loss they suffer.

In the case of the “hold harmless” obligation, the party giving the indemnity will be liable under the indemnity as soon as the indemnified party suffers any loss or damage. On the other hand, the “make good” obligation gives the indemnified party the right to claim under the indemnity when they suffer loss or damage such that the party giving the indemnity will not be obliged to do anything until it is requested to do so by the indemnified party.

Types of indemnity clauses

Indemnity clauses are a common feature of many different commercial contracts including insurance policies, settlement deeds, professional services contracts, financing and lending agreements and more.

There are several types of indemnity clauses, depending on the scope and terms of the indemnity:

- **Bare indemnity**. This is where the indemnifier provides blanket protection against the beneficiary for loss or liability incurred in particular circumstances, often without setting any specific limitations.
- **Party/party indemnity**. This is where each party to a contract indemnifies each other for losses incurred by the indemnifier's breach of contract.
- **Proportionate indemnity**. This is where the indemnifier indemnifies the beneficiary against losses except those incurred because of any act or omission of the beneficiary. These types of indemnities often include exclusions or carve-outs for indemnification of unilateral or bilateral claims such as claims arising from the negligence, fraud or intentional or wrongful conduct of the party seeking indemnification.
- **Reverse (or “reflexive”) indemnity**. This is where the indemnifier indemnifies the beneficiary against losses incurred by the beneficiary because of the beneficiary's own acts and/or negligence.
- **Third-party indemnity**. This is where the indemnifier indemnifies the beneficiary against liabilities to a third party.

Trigger events

Depending on how the indemnity clause is drafted, the liability of the indemnifier to compensate the beneficiary generally occurs on the occurrence of an event, called a “trigger event”. Common trigger events include:

- **Claims by third parties.** The indemnifier is liable to compensate the beneficiary for a claim made against the beneficiary by a non-party to the contract. This type of trigger event is a feature of a “third-party indemnity”.
- **Breach of contract by the indemnifier.** The indemnifier is liable to compensate the beneficiary for all losses caused by a breach of contract by the indemnifier. This type of trigger event is a feature of a “party/party indemnity”.
- **Non-contractual wrongdoing by the indemnifier.** The indemnifier is liable to compensate the beneficiary for losses incurred as a result of the beneficiary's own acts or omissions. This type of trigger event is a feature of “reverse” indemnities.
- **Event unrelated to indemnifier or beneficiary.** The indemnifier is liable to compensate the beneficiary for losses incurred as a result of an external event that causes the beneficiary to incur a loss. For example, where the indemnifier has agreed to compensate a beneficiary for costs associated with any regulatory investigation related to the contract. This type of trigger event is a feature of a “bare indemnity”.

Related parties

A common feature of indemnity clauses is to extend the benefit of the indemnity to related parties of either the indemnifier or the beneficiary. For instance, the indemnifier could agree to indemnify for any losses incurred by the beneficiary and the beneficiary's related parties.

Alternatively, the indemnifier could agree to indemnify for any losses caused by either the indemnifier or the indemnifier's related parties. Issues can arise as to the enforceability of such indemnities by related parties, who are not typically a party to the contract. In those circumstances, it is recommended that the contracts are executed as a deed poll.

The parties will ordinarily define the meaning of “related party” in their contract if they want the benefit, or the burden, of an indemnity to extend to non-parties to the contract. The term “related party” is commonly defined by reference to the definition in the Corporations Act 2001 (Cth) which for a corporation may include the corporation's directors, officers, employees, agents and advisers, and also a subsidiary or parent company.

Restrictions

Australian law imposes certain prohibitions and restrictions on companies giving indemnities to their officers and auditors in particular circumstances.

Common carve-outs

If a party wishes to exclude loss arising from certain types of conduct, such as fraud or gross negligence, the indemnity should be drafted to expressly carve out such conduct. However, where the beneficiary has acted fraudulently or unconscionably in either obtaining or enforcing the indemnity, the Court may refuse to enforce the indemnity under the equitable concept of unconscionable conduct.

For example, because it is firmly within the beneficiary's control to avoid engaging in conduct that is either fraudulent or amounts to gross negligence or wilful misconduct, it is common for an indemnifier to carve out such conduct from an indemnity clause.

This can be accomplished by way of a “proportionate” indemnity clause, where the indemnity is reduced proportionally to the extent that the indemnified party caused or contributed to the loss. A properly drafted “proportionate” indemnity clause will effectively exclude loss arising from the indemnified party’s negligence, breach of contract, wilful misconduct, fraud and/or illegal conduct without having to expressly list each of these liabilities.

Benefits of indemnities

Under Australian law, common law and statutory rights of recovery for loss or damage can be extensive. However, there are some general limitations on the type of loss or damage that is recoverable. For example, damages may not be recoverable from a party in respect of a breach of contract if they are too remote. A party’s liability may also be reduced to the extent that a concurrent wrongdoer is also liable for the loss or damage and proportionate liability legislation applies. A party who suffers a loss may also need to take steps to mitigate their loss. If they do not, their rights of recovery may be impacted. Additionally, statutory limitation periods bring to an end causes of action to recover loss. Indemnities can alter these existing positions under common law and statute.

Remoteness

Liability under an indemnity may extend to cover loss or damage that is not ordinarily recoverable for breach of contract because of the rule that damages are not recoverable in respect of a breach of contract if the damages are too remote. That is, loss or damage which does not usually flow from a breach of contract, or which was not contemplated by the parties at the time the contract was entered into, may be recoverable under an indemnity. Whether an indemnity is effective at overcoming the “rule of remoteness” will depend on the wording of the indemnity.

Causation

Particularly in the case of indemnity clauses that compensate for a beneficiary's related parties, an indemnity can avoid difficulties associated with proving that the loss suffered by the beneficiary's related party (who would not be a party to the contract) was caused by the indemnifier.

Extending the limitation period

The statutory limitation period that would ordinarily apply in respect of cause of action can, in effect, be extended under a contractual indemnity. If there is an indemnity under which the party who breaches the contract is obliged to indemnify the other party for losses incurred because of the breach (that is, the “trigger event” is a breach of contract), the rights of that other party under the indemnity will continue for as long as the indemnity remains in force. If the party in breach refuses to honour its obligations under the indemnity, there will be a cause of action for breach of the obligation to indemnify. The limitation period will begin to run from the time of the refusal to indemnify, which may occur long after the original breach of contract.

No obligation to mitigate

Ordinarily a party to a contract has an obligation to mitigate any loss suffered because of a breach of contract. That is, the party claiming breach must take steps to reduce the loss it has suffered or will suffer because of the breach of contract. If the party claiming breach fails to mitigate its loss, it cannot recover that “unmitigated” loss from the party in breach.

However, this obligation is unlikely to apply to a party claiming under an indemnity (unless the indemnity expressly requires the beneficiary to mitigate its losses). This is because the obligation to mitigate arises in respect of damages following a breach of contract. In the case of an indemnity, the relevant breach of contract will be the refusal to indemnify, rather than the event giving rise to the right to claim under the indemnity in the first place. In this context, it could be said that a party with a claim for breach of an indemnity cannot be expected to mitigate its loss, where that loss represents the very amount for which it should be indemnified.

Interpretation

Interpreted strictly

Australian courts usually apply a strict interpretation to indemnity clauses so that they extend to protect against only those liabilities that are reasonably incurred. Accordingly, the wording used in indemnity clauses should be as clear as possible to avoid any disputes as to the interpretation and construction of the clauses. Similarly, any terms referred to in an indemnity clause, such as loss or claim, should be clearly defined.

Ambiguity resolved in favour of the indemnifier

Australian courts have ruled¹ that if there is any doubt as to the interpretation of an indemnity, that doubt should be resolved in favour of the indemnifier.

Requirements

While there are no specific requirements for a valid and enforceable indemnity clause (beyond the requirements for a legally enforceable contract), the following matters should be considered in drafting any indemnity clause.

Regulation by statute

The parties should consider whether their contract is regulated by the following Australian statutes:

The Australian Consumer Law

The Australian Consumer Law (**ACL**) comprises uniform legislation for the protection of consumers. It applies as a law of the Commonwealth of Australia and is incorporated into each of Australia's states and territories. The ACL is contained in Schedule 2 to Australia's Competition and Consumer Act. The Competition and Consumer Act, in turn, is the principal legislation regulating competition law in Australia.

The Competition and Consumer Act (including the ACL) is administered jointly by Australia's chief competition regulator, the Australian Competition and Consumer Commission (**ACCC**), and the consumer protection agencies of Australia's states and territories.

Among other things, the ACL states that a manufacturer of goods is liable to indemnify a supplier who supplies the goods to a consumer in certain circumstances.

The ACL also renders unenforceable unfair contract terms (including indemnity clauses) in standard form "consumer" and "small business" contracts for the supply of goods or services (or the sale or grant of an interest in land).

¹ *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269; [2009] HCA 44 (13 October 2009) (High Court of Australia) [¶ : ¶ : *], citing with approval *Andar Transport Pty Ltd v Brambles* (2004) 217 CLR 424; [2004] HCA 28 (15 June 2004) (High Court of Australia) [¶ : ¶ : *]. See also David Gerber and Craig Hine, "What sets a contract of insurance apart from other contracts?" *Clayton Utz*, 28 April 2016.

The Australian Securities and Investments Commission Act

The Australian Securities and Investments Commission Act (**ASIC Act**) regulates the provision of financial services or financial products in Australia. The ASIC Act is administered by Australia's corporate regulator, the Australian Securities and Investments Commission (**ASIC**).

The ASIC Act also renders unenforceable unfair contract terms (including indemnity clauses) in standard form "consumer" and "small business" contracts for financial products or contracts for the supply, or possible supply, of services that are financial services.

The Corporations Act

The Corporations Act is the principal legislation regulating companies in Australia. The Corporations Act is administered by ASIC. Among other things, the Corporations Act prohibits companies from indemnifying company directors and officers in certain circumstances.

Writing not required

Generally, there is no requirement that indemnities must be evidenced in writing. That is, an indemnity may be verbal. Also, an indemnity may be implied. However, it would be prudent practice to ensure any indemnity is documented.

Implied indemnity

Indemnities may be implied in certain circumstances in the absence of a contractual obligation or agreement to confer a benefit on the indemnified. An indemnity may be implied as a result of the circumstances surrounding the relationship between two parties such that the law recognises that one party, who is acting on behalf of the other, should be indemnified for any losses arising from that role. For example, where there is a trustee and beneficiary relationship, the beneficiary has an implied obligation to indemnify the trustee for any loss that arises from the trustee's execution of the trust, and the trustee has an implied obligation to indemnify the beneficiary for any loss arising from the trustee's failure to act in the best interests of the beneficiary.

Terminology

In written indemnities, there is no specific requirement to use the word "indemnity" or "indemnify" when drafting an indemnity clause in Australia. The most important tip for drafting an effective indemnity is to ensure that the clause is clearly worded to give effect to the particular circumstances and agreement of the contracting parties. If there is a dispute about the operation of a contractual indemnity, the balance of the contract may help to identify how the indemnity operates. However, pursuant to the rule of *contra proferentem*, any ambiguous contractual term may be construed against the party that relies on it.

Restrictions

Indemnification of officers and auditors

Prohibited indemnities for liabilities

Australian law prohibits a company (or a [related body corporate](#)) from indemnifying a person against certain liabilities incurred by that person as an officer or auditor of the company. Those liabilities are:²

- a liability owed to the company (or a [related body corporate](#));
- a liability for a pecuniary penalty order;³
- a liability for certain compensation orders;⁴ and
- a liability that is owed to someone other than the company (or a [related body corporate](#)) and did not arise out of conduct in good faith.

Prohibited indemnities for legal costs

Australian law prohibits a company (or a [related body corporate](#)) from indemnifying a person against legal costs incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:⁵

- in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified because of the above prohibitions;
- in defending or resisting criminal proceedings in which the person is found guilty;
- in defending or resisting proceedings brought by the ASIC or a liquidator for a court order if the grounds for making the order are found by the Court to have been established; and
- in connection with proceedings for relief to the person under Australia's Corporations Act in which the Court denies the relief.

"Related body corporate"

Australian law deems the following entities to be "related bodies corporate" of each other:⁶

- a holding company and its subsidiaries;
- a parent company and its subsidiaries; and
- a subsidiary of an (intermediate) holding company and the parent of that (intermediate) holding company.

² Corporations Act 2001 (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] section 199A(2).

³ Australian courts are empowered to make a person pay to the Commonwealth of Australia a "pecuniary penalty" in relation to the contravention of a "civil penalty provision" in certain circumstances: Corporations Act 2001 (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] section 1317G. The "civil penalty provisions" are listed in Corporations Act 2001 (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] section 1317E.

⁴ Specifically, compensation orders under Corporations Act (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] sections 961M, 1317H, 1317HA, 1317HB, 1317HC and 1317HE.

⁵ Corporations Act 2001 (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] section 199A(3).

⁶ Corporations Act 2001 (Act No 51 of 1974) (Cth) [[🔗](#) : [✖](#)] section 50.

Indemnification of related parties of public companies

To protect the shareholders (called “members”) of public companies, Australian law requires that a public company’s members approve the giving, by the public company (or an entity that the public company controls), of “financial benefits”⁷ to “related parties” that could endanger the members’ interests.⁸

But approval of the public company’s members is *not* required if:⁹

- the benefit is for a “related party”¹⁰ who is an officer of the public company or entity; and
- the benefit is:
 - an indemnity (or an exemption or insurance premium) in respect of a liability incurred as an officer of the public company or entity; or
 - an agreement to give an indemnity (or an exemption, or to pay an insurance premium) in respect of a liability incurred as an officer of the public company or entity; and
- to give the benefit would be reasonable in the circumstances of the public company or entity giving the benefit.

“Related parties”

Under Australian law, the “related parties” of a public company comprise:¹¹

- **Controlling entities.** Any entity that controls the public company¹² (or, if the entity is not a body corporate, each of the persons making up the controlling entity).¹³
- **Directors.** The directors of the public company¹⁴ and the directors of any entity that controls the public company.¹⁵
- **Spouses.** The spouses of:¹⁶
 - the directors of the public company; and
 - the directors of any entity that controls the public company (or, if the entity is not a body corporate, the people making up the controlling entity).

⁷ See Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 229.

⁸ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 207.

⁹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 212(1).

¹⁰ See Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228.

¹¹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228.

¹² Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228(1).

¹³ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228(2)(c).

¹⁴ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228(2)(a).

¹⁵ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228(2)(b).

¹⁶ Corporations Act 2001 (Act No 51 of 1974) (Cth) [👉 : ✖] section 228(2)(d).

- **Relatives of directors and spouses.** The parents and children of:¹⁷
 - the directors of the public company;
 - the directors of any entity that controls the public company (or, if the entity is not a body corporate, the people making up the controlling entity); and
 - spouses (referred to above).

Entities controlled by related parties

An entity controlled by a related party of a public company is a related party of that public company, unless the entity is also controlled by a public company.¹⁸

Entities that act in concert with related parties

An entity is a “related party” of a public company if the entity acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.¹⁹

Time frame

An entity is a “related party” of a public company at a particular time if the entity was a related party of the public company at any time within the previous six months.²⁰

An entity is also a “related party” of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the public company at any time in the future.²¹

Indemnification by body corporates of officers against pecuniary penalties imposed for contraventions of the Australian Consumer Law

Australian law imposes²² pecuniary penalties for contraventions of the ACL, such as the prohibitions against unconscionable conduct²³ and unfair practices.²⁴

¹⁷ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 228(3).

¹⁸ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 228(4).

¹⁹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 228(7).

²⁰ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 228(5).

²¹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 228(6).

²² Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 5 (“Enforcement and Remedies”), Part 5-2 (“Remedies”), Division 1 (“Pecuniary Penalties”) section 224.

²³ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 2 (“General protections”), Part 2-2 (“Unconscionable conduct”).

²⁴ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 3 (“Specific protections”), Part 3-1 (“Unfair practices”).

It is an offence for a “body corporate” (or a body corporate related to the first body corporate) to indemnify a person against liability, incurred as an officer of the body corporate, to pay those pecuniary penalties and the legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.²⁵ The penalty imposed for the commission of this offence is currently AUD \$2,750.²⁶

Australian law also renders void anything (such as a provision of contract) that purports to indemnify a person against such liability.²⁷

Indemnification of debenture trustees against liability for breach of duty

Australian law²⁸ renders void (subject to some limited exceptions²⁹) any clause of a debenture, trust deed or contract with holders of debentures secured by a trust deed that indemnifies the trustee against liability for breach of its duty to exercise due care and diligence.³⁰

Indemnification of members of a managed investment scheme’s compliance committee

Australian law regulates “managed investment schemes”.³¹ Managed investment schemes are known as “managed funds”, “pooled investments” or “collective investments”.³²

A fund manager (called a “responsible entity”) operates the scheme on behalf of the scheme’s investors (called the scheme’s “members”).³³ The responsible entity of the scheme must be a public company that holds an Australian financial services licence authorising it to operate a scheme.³⁴

²⁵ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 5 (“Enforcement and Remedies”), Part 5-2 (“Remedies”), Division 1 (“Pecuniary Penalties”) section 229.

²⁶ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 5 (“Enforcement and Remedies”), Part 5-2 (“Remedies”), Division 1 (“Pecuniary Penalties”) section 229.

²⁷ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), Chapter 5 (“Enforcement and Remedies”), Part 5-2 (“Remedies”), Division 1 (“Pecuniary Penalties”) section 230(2).

²⁸ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 283DB(1)(b)

²⁹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 283DB(1)(c) and (d).

³⁰ The trustee’s duties are set out in Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 283DA.

³¹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖], Chapter 5C (“Managed Investment Schemes”).

³² Australian Securities and Investments Commission, “Managed Investment Schemes”, last updated 8 September 2021.

³³ Australian Securities and Investments Commission, “Managed Investment Schemes”, last updated 8 September 2021.

³⁴ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601FA.

If less than half of the responsible entity's directors are external directors,³⁵ the responsible entity must establish a compliance committee³⁶ to, among other things, monitor to what extent the responsible entity complies with the compliance plan for the scheme and report on its findings to the responsible entity.³⁷

Australian law prohibits³⁸ (subject to some limited exceptions³⁹) the responsible entity (or a related body corporate of the responsible entity) from indemnifying a person who is, or has been, a member of the scheme's compliance committee against a liability incurred by the person as a member of the compliance committee.

Unfair contract terms

Under Australian law,⁴⁰ consumers⁴¹ and small businesses⁴² are protected from unfair contract terms in standard-form contracts.

For example, an indemnity can be at risk of being declared an unfair contract term under the ACL if it has one or more of the following features:⁴³

- the indemnity requires a consumer or small business to indemnify a counterparty for losses that are not within the reasonable control of the consumer or small business or may have been caused by the counterparty;
- the consumer or small business does not have the benefit of a similar indemnity; and
- there are very limited exceptions to the indemnity (such as gross negligence or wilful misconduct by the indemnified party).

³⁵ See the definition of an "external director" in Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601JA(2).

³⁶ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601JA(1)

³⁷ See Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601JC.

³⁸ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601JF(1)(a).

³⁹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 601JF(3) and (4).

⁴⁰ Australian Securities and Investments Commission Act 2001 (Act No 51 of 2001) (Cth) [🔗 : ✖], Part 2, Division 2, Subdivision BA; and Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 ("Australian Consumer Law"), Chapter 2 ("General Protections"), Part 2-3 ("Unfair Contract Terms").

⁴¹ See the definition of "consumer contract" in Australian Securities and Investments Commission Act 2001 (Act No 51 of 2001) (Cth) [🔗 : ✖], Part 2, Division 2, Subdivision BA, section 12BF(3); and Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 ("Australian Consumer Law"), Chapter 2, Part 2-3, section 23(3).

⁴² See the definition of "small business contract" in Australian Securities and Investments Commission Act 2001 (Act No 51 of 2001) (Cth) [🔗 : ✖], Part 2, Division 2, Subdivision BA, section 12BF(4); and Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 ("Australian Consumer Law"), Chapter 2, Part 2-3, section 23(4).

⁴³ *ACCC v Servcorp Limited* [2018] FCA 1044 (13 July 2018) (Federal Court of Australia) [✖]; *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 (13 October 2017) (Federal Court of Australia) [✖]; *ASIC v Bendigo and Adelaide Bank Limited* [2020] FCA 716 (28 May 2020) (Federal Court of Australia) [✖].

Limitation period

Under Australian law, causes of action founded on a contract must be brought before the expiration of a certain period of time, known as a “limitation period”. The limitation periods for causes of action under Australian law are specified by statutes passed by the legislatures of Australia’s federal, state and territory governments.

For example, in the state of New South Wales, a cause of action founded on a contract must be brought within six years from the date on which the cause of action first accrued to the plaintiff.⁴⁴ A cause of action “accrues” to the plaintiff once all the elements required to establish the cause of action materialise. A cause of action for breach of contract accrues from the date of the breach by the other party.

Generally, a cause of action under an indemnity clause will accrue when the beneficiary first suffers loss or damage.⁴⁵ Thus, how the contract defines “loss” for the purposes of an indemnity clause will affect the “start date” of the limitation period. Further, the event which causes the beneficiary’s loss (e.g., negligence or wrongdoing by the indemnifier) may not coincide with the loss that flows from the event.

If there is an indemnity under which the party who breaches the contract is obliged to indemnify the other party for losses incurred as a result of the breach, the rights of that other party under the indemnity will continue for as long as the indemnity remains in force. If the party in breach refuses to honour its obligations under the indemnity, there will be a cause of action for breach of the obligation to indemnify. The limitation period will begin to run from the time when the cause of action accrues (i.e., the time when loss is first suffered) and expire six years from that date.

Proportionate liability

Australian law imposes a proportionate liability regime which requires liability under certain claims to be apportioned between all the concurrent wrongdoers according to their respective responsibility for the loss. The proportionate liability regime aims to prevent the plaintiff from selecting the defendant(s) (with the deepest pockets) to recover from, and thus eliminates the burden on the chosen defendant(s) from chasing the other wrongdoers for contribution.

The proportionate liability regime legislation differs across each jurisdiction in Australia but generally only applies to claims which are apportionable (e.g., claims for economic loss arising from a failure to take reasonable care; or arising from a breach of a duty of care; or arising from misleading or deceptive conduct).⁴⁶ There are a number of categories of claims which are excluded from the proportionate liability regime, which include intentional or fraudulent conduct claims, personal injury claims, as well as claims for exemplary or punitive damages.

⁴⁴ Limitation Act 1969 (Act No 31 of 1969) (NSW) [✖] section 14(1)(a).

⁴⁵ *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; [1992] HCA 55 (28 October 1992) (High Court of Australia) [🔍 : 🔍 : ✖].

⁴⁶ See for example Civil Liability Act 2002 (NSW) [✖] section 34(1) and (3); Civil Law (Wrongs) Act 2002 (ACT) [✖] section 107B(2) and (3); Proportionate Liability Act 2005 (NT) [✖] section 4(2) and (3); Civil Liability Act 2002 (TAS) [✖] section 43A(1); Civil Liability Act 2002 (WA) [✖] section 5A1(a) and (b); Wrongs Act 1958 (Vic) [✖] section 24AF(1); Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) [✖] section 3(2); and Civil Liability Act 2003 (QLD) [✖] section 28(1)(a).

Under the *Corporations Act 2001* (Cth), the proportionate liability regime is limited to claims based upon misleading or deceptive conduct in relation to a financial product or service.⁴⁷ Under the *Competition and Consumer Act 2010* (Cth), an apportionable claim is only a claim for damages by conduct in contravention of section 18 of the ACL (i.e., misleading or deceptive conduct).⁴⁸

Due to the proportionate liability regime, contractual indemnities may not be effective to the extent that they require a concurrent wrongdoer to bear more than the liability apportioned to it by a court. However, certain jurisdictions have different approaches to contracting out of the scheme. These differing approaches are set out in the table below:

Jurisdiction	Prohibition against contributing to/indemnifying a concurrent wrongdoer?⁴⁹	Express right to contract out of proportionate liability regime?
New South Wales	Yes	Yes ⁵⁰
Victoria	Yes	No
Queensland	Yes	No — express prohibition against contracting out ⁵¹
Western Australia	Yes (with an express carve out for contractual indemnities) ⁵²	Yes ⁵³
South Australia	No	No
Tasmania	Yes (with an express carve out for contractual indemnities) ⁵⁴	Yes ⁵⁵

⁴⁷ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 1041H; and *Selig v Wealthsure* [2015] HCA 18 (13 May 2015) (High Court of Australia) [🔗 : 🇺🇸 : ✖].

⁴⁸ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 87CB.

⁴⁹ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 1041P; Civil Liability Act 2002 (NSW) [✖] section 36; Civil Liability Act 2003 (QLD) [✖] section 32A; Civil Law (Wrongs) Act 2002 (ACT) [✖] section 107H; Civil Liability Act 2002 (WA) [✖] section 5AL; Civil Liability Act 2002 (TAS) [✖] section 43C; Wrongs Act 1958 (Vic) [✖] section 24AJ; Proportionate Liability Act 2005 (NT) [✖] section 15; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) [✖] section 9; and Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 87CF.

⁵⁰ Civil Liability Act 2002 (NSW) [✖] section 3A(2).

⁵¹ Civil Liability Act 2003 (QLD) [✖] section 7(3).

⁵² Civil Liability Act 2002 (WA) [✖] section 5AL(2).

⁵³ Civil Liability Act 2002 (WA) [✖] section 4A.

⁵⁴ Civil Liability Act 2002 (TAS) [✖] section 43(C).

⁵⁵ Civil Liability Act 2002 (TAS) [✖] section 3A(3).

Jurisdiction	Prohibition against contributing to/indemnifying a concurrent wrongdoer?⁵⁶	Express right to contract out of proportionate liability regime?
Northern Territory	Yes (with an express carve out for contractual indemnities) ⁵⁷	No
Australian Capital Territory	Yes	No
Corporations Act 2001 (Cth)	Yes	No
Competition and Consumer Act 2010 (Cth)	Yes	No

In New South Wales, for example, an appropriately drafted contractual indemnity may avoid being ineffective under the proportionate liability regime — as New South Wales is, in addition to Western Australia and Tasmania, a jurisdiction in which contracting out of the proportionate liability regime is permitted.

Indemnification of suppliers by manufacturers

Where a supplier of consumer goods and services is liable to a consumer for a breach of any consumer guarantee under the ACL, the supplier has a right of indemnity against the manufacturer to recover its losses from liability arising from the breach.⁵⁸

A supplier has three years within which to make an indemnity claim against the manufacturer under the ACL. The three-year period commences on the earlier of either the day the supplier made payment with respect to the liability to the consumer, or the day on which a proceeding was commenced against the supplier for that liability.⁵⁹

Limitations on liability

In a “reverse” indemnity (also called a “reflexive” indemnity), the indemnity may function as a limit or exclusion of the liability of the beneficiary. For example, where the indemnifier indemnifies the beneficiary against losses incurred as a result of the beneficiary’s own acts and/or negligence. Such clauses are subject to the principles of Australian law concerning a contract party’s ability to exclude or limit its liability.

⁵⁶ Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 1041P; Civil Liability Act 2002 (NSW) [✖] section 36; Civil Liability Act 2003 (QLD) [✖] section 32A; Civil Law (Wrongs) Act 2002 (ACT) [✖] section 107H; Civil Liability Act 2002 (WA) [✖] section 5AL; Civil Liability Act 2002 (TAS) [✖] section 43C; Wrongs Act 1958 (Vic) [✖] section 24AJ; Proportionate Liability Act 2005 (NT) [✖] section 15; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) [✖] section 9; and Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 87CF.

⁵⁷ Proportionate Liability Act 2005 (NT) [✖] section 15(2).

⁵⁸ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), section 274.

⁵⁹ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🔗 : ✖], Schedule 2 (“Australian Consumer Law”), section 274(4).

For example, a reverse indemnity that attempts to shift the beneficiary's liability for breach of the "consumer guarantees" (implied into contracts governed by Australian law) to the indemnifier is unenforceable.⁶⁰

Rule against penalties

The parties may specify in the indemnity clause that the indemnifier is to pay the beneficiary a specified sum (i.e., a "liquidated" amount) upon the occurrence of a certain trigger event. In such cases, the specified sum should be a genuine estimate of the loss that would be suffered on the occurrence of the certain trigger event so that it does not contravene the rule against penalties.

The rule against penalties makes the payment unenforceable if the sum to be paid is "out of all proportion" to either the beneficiary's interests or the possible loss that could have been suffered by the beneficiary.

If the clause is rendered unenforceable, the beneficiary may still be able to claim against the indemnifier for breach of the relevant obligation if it can prove the quantum of the loss suffered.

Indemnity for breach of contract

An indemnity clause that requires the indemnifier to indemnify the beneficiary for breach of contract by the indemnifier will not offend the rule against penalties provided the indemnity is proportionate to the beneficiary's interests in performance of the contract. For example, if the indemnity only requires that the indemnifier pay what the law would otherwise award as damages for breach of contract, the indemnity will not offend the rule against penalties. However, if the indemnity is "out of all proportion" to the beneficiary's interests, the indemnity will be unenforceable. In such a case, the indemnifier will still be liable to pay damages (unless the parties have excluded liability for damages).

Indemnities vs guarantees

Guarantees and indemnities are very similar in nature and are often regarded as one and the same. In both cases, the person providing the guarantee or indemnity will become liable for the debt if the borrower does not satisfy it.

Guarantees usually guarantee all the obligations of the principal to the guaranteed party in relation to a specific transaction only. The crucial element of the guarantee, which distinguishes it from the indemnity, is the promise to answer for the debt or default of another.

An indemnity is a primary obligation. It is an express obligation to compensate someone for loss or damage and is independent of the obligations of the party whose covenants are being reinforced by the provision of the indemnity.

A guarantee is a secondary obligation. A guarantor will only be liable on a guarantee if the party whose obligations have been guaranteed has failed to perform its primary obligations.

An indemnity has advantages over a guarantee because of the primary nature of the obligation. If the primary liability is extinguished or satisfied, the guarantee will no longer be required. A guarantor's liability can also be extinguished by any transaction between the beneficiary and the primary obligor which has the effect of expanding the guarantor's liability (this includes any transaction between the beneficiary and the primary obligor which was not approved by the guarantor).

Some key differences between guarantees and indemnities are set out in the table below.

⁶⁰ Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [🌐:✳️], Schedule 2 ("Australian Consumer Law"), section 150.

	Guarantee	Indemnity
Form	In most Australian jurisdictions, guarantees must be evidenced in writing.	Generally, there is no requirement that indemnities must be evidenced in writing, that is, an indemnity may be verbal. Also, an indemnity may be implied.
Does a primary obligation need to exist?	Primary obligation needs to exist for the guarantee to be enforceable.	Primary obligation does not need to exist for the indemnity to be enforceable. Indemnity is enforceable as long as loss has occurred.
Scope of liability	Liability is limited by the extent of the principal obligor's liability.	Liability is determined by terms of the indemnity.
Rights of subrogation and contribution	A guarantee carries the right of subrogation and contribution.	An indemnity does not carry the right of subrogation and contribution.
Defects or variations of primary obligation	Defects or variations in the primary obligation may (absent special protections) void a guarantee.	Defects or variations in the primary obligation are unlikely to void an indemnity.

Indemnities vs claims for breach of contract

The benefits of indemnities are primarily the benefits of relying on indemnities over reliance on a claim for breach of contract.

Indemnities are often drafted to cover third parties and circumstances beyond the ordinary breach circumstances actionable under the common law. Sometimes indemnity clauses also seek to apply even when there is no breach of contract by the party. A common instance of this is a guarantee where one party indemnifies another party for the act, default or breach of a third party. These types of indemnities can create onerous obligations which, but for the contract, the common law would not impose.

The differences between a claim under an indemnity and a claim for damages for breach of contract are as follows:

Indemnity payment for loss

Damages for breach

Amount

Liability under an indemnity may extend to cover loss or damage that is not ordinarily recoverable for breach of contract due to the damages being too remote. Loss or damage which does not usually flow from a breach of contract, or which was not contemplated by the parties at the time the contract was entered into, may also be recoverable under an indemnity. This will depend on the wording of the indemnity.

Damages for breach of contract are subject to certain limitations. Damages may not be recoverable from a party in respect of a breach of contract if they are too remote. A party's liability may also be reduced to the extent that a concurrent wrongdoer is also liable for the loss or damage and the proportionate liability legislation applies. A party who suffers a loss may also need to take steps to mitigate their loss. If they do not, their rights of recovery may be impacted. Additionally, the statutory limitation period for damages from breach of contract is six years from the date that loss is first incurred.

Mitigation

It is generally considered that a beneficiary (unless the indemnity expressly requires them to mitigate losses) has no obligation to mitigate. This is because the obligation to mitigate arises in respect of damages following a breach of contract. In the case of an indemnity, the relevant breach of contract will be the refusal to indemnify, rather than the event giving rise to the right to claim under the indemnity in the first place. In this context, a party with a claim for breach of an indemnity cannot be expected to mitigate its loss, where that loss represents the very amount for which it should be indemnified.

A plaintiff cannot recover damages for loss that they should have taken reasonable steps to avoid. These steps would either be set out in the contract or determined by the court. Where there is a duty to mitigate, the court will consider any failure by the plaintiff to discharge that duty and may reduce the award of damages if the plaintiff has failed to mitigate.

Indemnity payment for loss

Damages for breach

Proof

Courts usually apply a strict interpretation to indemnity clauses so that they extend to protect against only those liabilities that are reasonably incurred. Accordingly, the wording used in indemnity clauses should be as clear as possible to avoid any disputes as to the interpretation and construction of the clauses. Similarly, any terms referred to in an indemnity clause, such as loss or claim, should be clearly defined.

To claim damages for breach of contract, the plaintiff must establish breach of contract. In addition, in order to recover damages, the plaintiff must also prove that the loss incurred was a result of the breach of contract.

Limitation period

Generally, a cause of action under an indemnity clause will accrue when the beneficiary first suffers loss or damage. How the contract defines “loss” for the purposes of an indemnity clause will affect the “start date” of the limitation period. Further, the event which causes the beneficiary’s loss (e.g., negligence or wrongdoing by the indemnifier) may not coincide with the loss that flows from the event.

The limitation period will begin to run from the time of the refusal to indemnify and expire six years from that date. That start date may occur long after the original breach of contract.

A cause of action founded on a contract must be brought within six years from the date on which the cause of action first accrued to the plaintiff. A cause of action for breach of contract accrues from the date of the breach by the other party.

Indemnity payment for loss

Legal proceedings

Certain indemnities may be interpreted as giving rise to an obligation on the indemnifier to compensate the indemnified party (i.e., a “make good” indemnity), in which case the indemnified party may have a claim under the contract for the sum payable (i.e., an action for the recovery of a debt as opposed to a claim for damages for breach of contract). However, there are no material differences in the enforcement of an indemnity of this type.

The indemnified party will still be required to establish that the event triggering the obligation to pay the sum sought has occurred and to establish the sum owed. These proceedings would be substantially the same as those described in the column to the right.

Costs

Based on the precise wording and nature of the indemnity, Australian courts may find that a contractual indemnity entitles a party to also indemnify a party for all costs associated with enforcing the indemnity, which may include legal costs incurred prior to the commencement of proceedings (which may not be recoverable under a costs order made in proceedings). This would be a claim under the indemnity itself, rather than a claim under a costs order in the proceedings.

Ultimately, the court will need to consider the precise wording and nature of the indemnity to determine whether a plain and unambiguous agreement on the costs of enforcement exists between the parties.

Damages for breach

A breach by one party of an obligation under a contract may entitle the other party to compensation by way of an award of damages.

Unless the person in breach of the contract agrees to pay damages, the recovery of damages will generally require the innocent party to commence proceedings in a specific court or jurisdiction, or through an identified alternative dispute resolution mechanism such as arbitration or mediation.

In a claim for breach of contract, if proceedings are commenced, and the plaintiff is successful, the plaintiff is likely to also obtain a costs order in its favour whereby the defendant will be ordered to pay the plaintiff's costs of the proceeding.

The court has discretion whether to order costs. Costs are generally awarded on an “ordinary basis” and not an “indemnity basis”. When awarded on an ordinary basis, a party is entitled to recover a fair and reasonable amount of the legal costs and disbursements that were reasonably incurred in the conduct of the proceedings, but will not be reimbursed entirely for all legal costs incurred in the proceeding.

Indemnity payment for loss

If proceedings are commenced, and a costs order is made, the court's approach to awarding costs will be the same for an indemnity claim (e.g., for the recovery of a debt) or under a breach of contract claim.

Damages for breach

Costs will more rarely be awarded on an "indemnity basis", often where a party is guilty of some "relevant delinquency".⁶¹ Where costs are awarded on an "indemnity basis", that will include all costs other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount.

The costs order in a proceeding would not entitle a plaintiff to recovery of any legal costs incurred well before the proceeding (unless there is some connection to the proceeding).

⁶¹ *Oshlack v Richmond River Council* (1998) 193 CLR 72 (25 February 1998) (High Court of Australia) [18 : 20 : 21] at [44].

Indemnities for contractual breach

Generally, losses recoverable under a contract are losses that are measurable following a breach of contract by a party to the contract, and the parties are aware of the possibility of a breach at the time the contract was entered into. This position may be altered by indemnity provisions. This is because, generally, having indemnity provisions removes the need to show causation as a prerequisite to make a claim. Further, the need to mitigate loss can also be avoided under an indemnity. Also, as explained above, an indemnity can be drafted to remove the requirement that recoverable losses must be foreseeable and not too remote.

Regulatory approvals

There are no requirements under Australian law for a regulator or authority to approve an indemnity provided by an Australian company or person in favour of a foreign entity.

Power to give an indemnity

Capacity to meet the indemnity

It is important to consider the capacity of the party giving the indemnity to meet the indemnity. A broadly worded indemnity clause will be worthless to an indemnified party if the party giving the indemnity does not have the financial resources to make good on its promise. Similarly, the party giving the indemnity would be well advised to consider how it will fund its promise. If it may not be capable of doing so itself, it may need protection through insurance or some other arrangement.

Capacity to give the indemnity

It is also important to consider whether the party giving the indemnity has the power to grant the indemnity.

Corporations

In the case of a corporation (both Australian and foreign registered companies), the indemnity should be executed pursuant to the requirements of Australian law, namely by either two directors or one director and the company secretary of the company.⁶² A duly executed indemnity will avoid arguments as to validity or whether those individuals had capacity or authority to provide the indemnity.

Individuals

Individuals are generally considered to have capacity to provide an indemnity. However, a beneficiary ought to take steps to ensure that the indemnifier has the financial resources to make good on its promise. Similarly, the indemnifier should be advised to consider how it will fund its promise. If it is incapable of doing so itself, it may need protection through insurance or some other arrangement.

Government entities

Australian law regulates the financial and corporate governance arrangements of federal government (the federal government is called the “Commonwealth”) entities, comprising corporate and non-corporate Commonwealth entities.

⁶² Corporations Act 2001 (Act No 51 of 1974) (Cth) [🔗 : ✖] section 127.

Corporate Commonwealth entities

A corporate Commonwealth entity (**CCE**) is an entity that is a body corporate. CCEs are established by legislation or legislative instrument.⁶³ A list of CCEs is available from Australia's Department of Finance.⁶⁴ Australian law⁶⁵ prohibits CCEs from indemnifying persons for certain types of liability. So, the beneficiary of an indemnity provided by a CCE should ensure that the CCE has the power to grant the indemnity.

Non-corporate Commonwealth entities

A non-corporate Commonwealth entity (**NCE**) is an entity that is not a body corporate.⁶⁶ NCEs are established under a power derived from the Australian Constitution,⁶⁷ usually through legislation (passed by the legislative branch of the Australian government) and the exercise of power (by the executive branch of the Australian government). NCEs are legally and financially part of the executive branch of the Australian government and are accountable to the Australian Parliament. A list of NCEs is available from Australia's Department of Finance.⁶⁸ Australian law⁶⁹ empowers Australia's Finance Minister to grant an indemnity on behalf of the Australian government. So, the beneficiary of an indemnity provided by a NCE should ensure that the Australian Finance Minister approved the grant of the indemnity by the NCE.

⁶³ Australian Government, "Corporate Commonwealth entity (CCE)", *Department of Finance*, 21 January 2020.

⁶⁴ Australian Government, "List of Commonwealth entities and companies under the Public Governance, Performance and Accountability Act 2013 (PGPA Act)", *Department of Finance*, 16 July 2021.

⁶⁵ Public Governance, Performance and Accountability Rule 2014 (Compilation No. 41) (Cth) [🔗 : ✖] rule 22B. The Public Governance, Performance and Accountability Rule 2014 is made under the Public Governance, Performance and Accountability Act 2013 (Act No 123 of 2013) (Cth) [🔗 : ✖].

⁶⁶ Public Governance, Performance and Accountability Act 2013 (Act No 123 of 2013) (Cth) [🔗 : ✖] section 11(b).

⁶⁷ Parliament of Australia, "The Australian Constitution" *Parliament of Australia*, undated.

⁶⁸ Australian Government, "List of Commonwealth entities and companies under the Public Governance, Performance and Accountability Act 2013 (PGPA Act)", *Department of Finance*, 16 July 2021.

⁶⁹ Public Governance, Performance and Accountability Act 2013 (Act No 123 of 2013) (Cth) [🔗 : ✖] section 60.

Waiver

Waiver is an imprecise and currently unsettled concept in Australian law.⁷⁰ From current authority, a beneficiary can waive their right to an indemnity by:

- agreement supported by consideration, such as a term of a contract which expressly restricts a beneficiary's ability to rely on the indemnity;⁷¹
- estoppel, where a beneficiary has made a representation to an indemnifier and the indemnifier has relied on that representation to their detriment; and⁷²
- election, where a beneficiary is required to choose between two mutually exclusive courses of action and upon making their choice has waived their right to invoke the other.⁷³

It is common for parties to negotiate a "no waiver" clause into an agreement creating an indemnity. These clauses usually make clear that any failure or delay in exercising a right under the agreement does not prevent the beneficiary from exercising that right, such as an indemnity, under the agreement. Whilst these clauses are common, there is no guarantee that they may be effective. As such, if a breach of the indemnity has occurred, it is prudent for a beneficiary to send a "reservation of rights" letter to the indemnifier.

Effect of termination of the contract

Survival

It is usual practice to expressly provide that an indemnity will survive termination of the contract. If the indemnification language covers only breaches of the contract, a party may not require an indemnity to survive termination of the contract, since the other party would still be able to file a claim for breach of the terminated contract.

However, since a party might not become aware of third-party claims until after termination of the contract, those types of indemnification provisions should survive termination. Without a survival clause in the contract, the survival of any indemnities will be subject to an interpretation of the contract and the parties' intentions.

Generally, if an indemnity clause is not expressly limited in time, it theoretically can bind the indemnifier indefinitely. Each claim under the indemnity will be subject to the usual limitation period under Australian law.

Whether an indemnity survives termination of the contract is subject to the interpretation of the contract and whether the parties (objectively) intended for the indemnity to survive termination of the contract.

⁷⁰ Whether a doctrine of waiver in Australian law exists separately from common law election and estoppel is a question of law that is currently being considered by the High Court of Australia in *Allianz Australia Insurance Limited v Delor Vue Apartments* S42/2022.

⁷¹ CCH '8-610 Scope of doctrine of waiver'.

⁷² *Commonwealth v Verwayen* (1990) 170 CLR 394 (5 September 1990) (High Court of Australia) [¶ : ¶ : ✖] at p 406.

⁷³ *Allianz Australia Insurance Ltd v Delor Vue Apartments* [2021] FCAFC 121 (9 July 2021) (Federal Court of Australia) [✖] at [85] – [92] citing *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 (12 May 1993) (High Court of Australia) [¶ : ¶ : ✖] at p 42 and *Victoria v Sutton* (1998) 195 CLR 291 (2 September 1998) (High Court of Australia) [¶ : ¶ : ✖] at [40].

For example, where the indemnifier indemnifies the beneficiary for claims brought against the beneficiary by third parties to the contract, such an indemnification clause should survive termination since the beneficiary may not become aware of third-party claims until after termination of the contract.

It is best practice to set out in the contract which clauses the parties intend to survive termination. The parties may also specify a “long stop” date after which no new claims can be brought under the indemnity.

Indemnity for breach of contract

If the indemnity clause covers only breaches of the contract, it will survive termination of the contract, since the other party would still be able to file a claim for breach of the terminated contract.

Effect of insolvency of the indemnifier

An indemnifier owes a primary obligation to the beneficiary to pay a debt if a certain event occurs. This obligation can be characterised as a contingent debt as it is an existing obligation to pay a sum of money on the occurrence of a future event which may happen.⁷⁴

If an indemnifier becomes insolvent after granting the indemnity and is being wound up, the beneficiary, as the holder of a contingent debt, would generally be entitled to lodge a proof of their indemnity and be treated as a contingent creditor of the indemnifier.⁷⁵

Effect of transfer of the contract

Where contracts are transferred, the “benefit” and the “burden” of indemnities are treated differently. Transferring the “benefit” can be achieved by assignment whereas transferring the “burden” typically occurs by novation of the contract.

An indemnity is a primary obligation (as compared to a secondary obligation in the case of guarantees), and as such the benefit of that indemnity can extend to subsequent beneficiaries, or assignees, if specifically assigned. As for the burden of an indemnity, where assignment occurs, the assignor does not relinquish their obligation to indemnify and must then indemnify the assignee.

Should the parties wish for the burden of the contract to be transferred, this generally must occur via novation, being the replacement of the existing contract with a new one. As a result, the indemnifying party is replaced.

Transfer of contractual obligations

If a contract contains a clause which allows a party to outsource, subcontract or transfer its obligations and rights under the contract to another party, to ensure any indemnity clause in the contract is not extinguished, the scope of this indemnity clause should expressly articulate any third parties’ liability under the indemnity.





⁷⁴ *Community Development Pty Ltd v Engwirda Construction Company* (1969) 120 CLR 455 (10 October 1969) (High Court of Australia) [10 : 10 : 10].

⁷⁵ Corporations Act 2001 (Act No 51 of 1974) (Cth) [10 : 10] section 553(1).

References

Statutes


Commonwealth

- Australian Securities and Investments Commission Act 2001 (Act No 51 of 2001) (Cth) [ : ✖].
- Competition and Consumer Act 2010 (Act No 51 of 1974) (Cth) [ : ✖].
- Corporations Act 2001 (Act No 50 of 2001) (Cth) [ : ✖].
- Public Governance, Performance and Accountability Act 2013 (Act No 123 of 2013) (Cth) [ : ✖].

States and territories



















- Civil Law (Wrongs) Act 2002 (ACT) [✖].
- Civil Liability Act 2002 (NSW) [✖].
- Civil Liability Act 2003 (QLD) [✖].
- Civil Liability Act 2002 (TAS) [✖].
- Civil Liability Act 2002 (WA) [✖].
- Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) [✖].
- Limitation Act 1969 (Act No 31 of 1969) (NSW) [✖].
- Proportionate Liability Act 2005 (NT) [✖].
- Wrongs Act 1958 (Vic) [✖].

Subsidiary legislation

- Public Governance, Performance and Accountability Rule 2014 (Compilation No. 41) (Cth) [ : ✖].

Cases

- *ACCC v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 (13 October 2017) (Federal Court of Australia) [✖].
- *ACCC v Servcorp Limited* [2018] FCA 1044 (13 July 2018) (Federal Court of Australia) [✖].
- *Allianz Australia Insurance Limited v Delor Vue Apartments S42/2022* (High Court of Australia) [].
- *Allianz Australia Insurance Ltd v Delor Vue Apartments* [2021] FCAFC 121 (9 July 2021) (Federal Court of Australia) [✖].
- *Andar Transport Pty Ltd v Brambles* (2004) 217 CLR 424; [2004] HCA 28 (15 June 2004) (High Court of Australia) [ :  : ✖].
- *ASIC v Bendigo and Adelaide Bank Limited* [2020] FCA 716 (28 May 2020) (Federal Court of Australia) [✖].
- *Bofinger v Kingsway Group Limited* (2009) 239 CLR 269; [2009] HCA 44 (13 October 2009) (High Court of Australia) [ :  : ✖].
- *Commonwealth v Verwayen* (1990) 170 CLR 394 (5 September 1990) (High Court of Australia) [ :  : ✖].





- *Community Development Pty Ltd v Engwirda Construction Company* (1969) 120 CLR 455 (10 October 1969) (High Court of Australia) [ :  : .
- *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 (12 May 1993) (High Court of Australia) [ :  : .
- *Oshlack v Richmond River Council* (1998) 193 CLR 72 (25 February 1998) (High Court of Australia) [ :  : .
- *Selig v Wealthsure* [2015] HCA 18 (13 May 2015) (High Court of Australia) [ :  : .
- *Victoria v Sutton* (1998) 195 CLR 291 (2 September 1998) (High Court of Australia) [ :  : .
- *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; [1992] HCA 55 (28 October 1992) (High Court of Australia) [ :  : .

Key

The statutes, subsidiary legislation and cases referred to above are freely available from several websites. Each website has its own unique features, and its own pros and cons. Users may prefer one website over another.

In the footnotes we have indicated the website(s) where a document can be accessed by including an icon for that website (each icon being a “favicon” for the relevant website) between two square brackets (“[]”) where each icon is delaminated by a colon (“:”). The icons are hyperlinked to the relevant website. If the website facilitates links to a specific part of a document (e.g., a specific section of a statute), we have hyperlinked to that specific part.

The icons are as follows:

Icon	Website	Owner
	Australasian Legal Information Institute (AustLII)	Faculties of Law of the University of Technology Sydney and the University of New South Wales
	Federal Register of Legislation	Commonwealth Office of Parliamentary Counsel
	High Court of Australia	High Court of Australia
	Judgment and Decisions Enhanced (Jade)	BarNet Networks Pty Ltd

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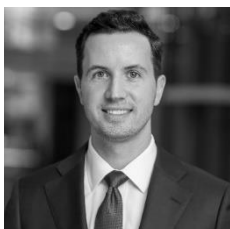
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China

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The concept of an indemnity as understood by the common law does not exist under Chinese law.

Chinese law recognises the concept of freedom of contract. But as the concept of an indemnity does not exist under Chinese law, it is not uncommon for Chinese courts to interpret an indemnity clause as being analogous to remedies that exist under Chinese law, even though there are differences between those remedies and the concept of an indemnity.

The two analogues available under Chinese law are:

- compensation for damages; and
- payment of penalty for breach.

A table comparing these two remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist under Chinese law, because Chinese law recognises the concept of freedom of contract, contractual parties can agree that liability of one party to another is triggered on the occurrence of a “trigger event”. Such “trigger events” are examined [below](#).

Freedom of contract

Under Chinese law, a person, when conducting a civil activity, may, in compliance with the principle of voluntariness, create, alter or terminate a civil juristic relationship according to that person's own will.⁷⁶

But, in conducting a civil activity, no person can violate the law or offend public order or good morals.⁷⁷

⁷⁶ Civil Code of the People's Republic of China (effective 1 January 2021) Article 5.

⁷⁷ Civil Code of the People's Republic of China (effective 1 January 2021) Article 8.

Comparison of Chinese law remedies with common law indemnities

A table comparing common law indemnities against the following Chinese law remedies is set out below:

- compensation for damages; and
- penalty for breach.

	Compensation for damages	Penalty for breach	Common law indemnity
Amount	The amount of damages is equivalent to the loss suffered by the aggrieved party due to breach by the other party, which includes the profit which the aggrieved party would have earned had the contract been properly performed, provided that the amount cannot exceed the loss that was or should have been foreseen by the party in breach from the same breach when the contract was entered into. ⁷⁸	The penalty sum for breach of a contractual obligation is subject to the agreement between the parties. However, a people's court may, upon request by a party concerned, increase the penalty sum if the agreed amount is unable to cover the loss incurred, or appropriately reduce the penalty sum if the agreed amount exceeds the loss incurred by a large margin. ⁷⁹	The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides “dollar-for-dollar” (or, in the English context, “pound-for-pound”) recovery of loss suffered by the indemnified party.

⁷⁸ Civil Code of the People's Republic of China (effective 1 January 2021) Article 584.

⁷⁹ Civil Code of the People's Republic of China (effective 1 January 2021) Article 585.

	Compensation for damages	Penalty for breach	Common law indemnity
Mitigation	The party claiming damages must take appropriate measures to mitigate the loss caused by a contractual breach by the other party; otherwise, the party claiming damages cannot demand compensation for the aggravated portion of the loss that is incurred as a result of the failure to take appropriate measures of mitigation. ⁸⁰	<p>The party claiming breach does not have to mitigate its losses.</p> <p>In practice, however, if the innocent party who has suffered losses fails to mitigate its losses, and the party in breach claims that the penalty sum is excessively large, the people's court may be of the view that the aggravated portion of the losses does not belong to the loss prescribed by law and thus determine that the agreed penalty sum is too high.</p>	The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.

⁸⁰ Civil Code of the People's Republic of China (effective 1 January 2021) Article 591.

	Compensation for damages	Penalty for breach	Common law indemnity
Proof	<p>The party claiming breach bears the burden of proving:</p> <ul style="list-style-type: none"> • the breach of contract; • the loss; • the breach of contract as the cause of the loss; • the extent of the loss; and • the amount of profits it would have earned had the contract been properly performed. 	<p>The party claiming breach bears the burden of proving:</p> <ul style="list-style-type: none"> • occurrence of the breach; and • existence of a penalty agreement in the contract for such breach. <p>The party in breach bears the burden to prove its argument that the penalty sum agreed is excessively high compared to the loss incurred, if it requests a people's court to appropriately reduce the penalty sum. In this case, the counterparty shall also furnish corresponding evidence if it claims that the agreed penalty sum is reasonable.</p>	<p>The indemnified party must prove the “trigger event” (and whatever else the contract requires to establish the claim under the indemnity).</p>

	Compensation for damages	Penalty for breach	Common law indemnity
Limitation period	<p>The limitation period for initiating a legal action for a breach of contract claim is three years commencing from the date when the innocent party knew or should have known of the infringement on its right.⁸¹</p> <p>The limitation period for initiating a legal action for disputes over a contract on international purchase and sale of goods or a technology import and export contract is four years.⁸²</p>	<p>The limitation period for initiating a legal action for a breach of contract claim is three years commencing from the date when the innocent party knew or should have known of the infringement on its right.</p> <p>The limitation period for initiating a legal action for disputes over a contract on international purchase and sale of goods or a technology import and export contract is four years.</p>	<p>The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the “trigger event”). The parties can agree that the payment becomes due on a date other than the date of the “trigger event”.</p>
Costs	<p>The plaintiff may claim from the defendant fees for realising its claims.⁸³ Details of such fees are not prescribed by the Civil Code, but they general include, in practice, fees for courier services, lawyers’ fees, fees for property preservation, fees for insurance for property preservation, fees for travelling, and fees for notarization, certification, valuation, appraisal, audit, etc. Whether the court will uphold a claim for lawyers’ fees depends on the circumstances of the case.</p>	<p>If the sum of penalty for breach agreed upon by the parties covers the fees for realising the claim, such fees are recoverable.</p> <p>If such fees are not covered by the sum of penalty for breach agreed, the plaintiff may separately claim fees for realising its claim apart from the penalty sum, in which case similar rules applicable to a claim for compensation for damages will apply.</p>	<p>The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.</p>

⁸¹ Civil Code of the People's Republic of China (effective 1 January 2021) Article 188.

⁸² Civil Code of the People's Republic of China (effective 1 January 2021) Article 594.

⁸³ Civil Code of the People's Republic of China (effective 1 January 2021) Article 561.

	Compensation for damages	Penalty for breach	Common law indemnity
Legal proceedings	A claim for compensation for damages requires the commencement of legal proceedings before Chinese courts.	A claim for penalty for breach requires the commencement of legal proceedings before Chinese courts.	Depending on the wording of the indemnity, a claim under it may be able to be brought as a claim for a debt (e.g., if the loss can be easily calculated or if the liability is for a specific type of loss). Such claims are more difficult to resist and procedurally more straightforward to commence.

Trigger events

Under the common law, indemnity clauses generally fall into two categories:

- **third-party indemnity.** Indemnities that protect the indemnified party from loss or damage resulting from a claim by a third party (i.e., someone who is not a party to the contract between the indemnified and the indemnifier); and
- **inter-party indemnity.** Indemnities that protect the indemnified party from loss or damage resulting from the indemnifying party's breach of contract or loss or damage resulting from a statement of fact made by the indemnifying party being false.

The obligation to indemnify under the common law arises upon the occurrence of a "trigger event". Common trigger events include loss or damage suffered because of:

- a breach of contract by the indemnifier;
- a misrepresentation by the indemnifier;
- fault or negligence by the indemnifier; and
- a claim by a third party against the indemnified.

Breach of contract

The "trigger event" for a remedy of compensation for damages or penalty for breach under Chinese law is a breach of contract. Therefore, a breach of contract can be a "trigger event" for those two remedies.

Misrepresentation

If one party enters into a contract as a result of "fraud" on the part of the other party, the party defrauded is entitled to request the contract be rescinded within the prescribed time period,⁸⁴ and the contract, once rescinded, shall be invalid *ab initio*.⁸⁵ If a contract is declared invalid, the party that is at fault must compensate the other party for the loss suffered as a result.⁸⁶

So, if a party (the representee) wants a right to a remedy in the event that the other party (the representor) makes a false statement of fact in the contract that is not fraudulent, the party should specify in the contract the remedy available to it in such a case.

Non-contractual wrongs

A clause such as the following in a contract is enforceable under Chinese law:

The Vendor must compensate the Buyer for all costs, damages and interests resulting from the Vendor's gross negligence or wilful acts.

This is because the obligation to not commit gross negligence or wilful conduct is a statutory obligation. Therefore, the clause above functions to convert a statutory obligation to a contractual obligation, or may be considered as affirmation of a statutory obligation.

⁸⁴ Civil Code of the People's Republic of China (effective 1 January 2021) Article 148 read together with Article 152.

⁸⁵ Civil Code of the People's Republic of China (effective 1 January 2021) Article 146 read together with Article 155.

⁸⁶ Civil Code of the People's Republic of China (effective 1 January 2021) Article 157.

Third-party claims

The treatment of a clause such as the following in a contract under Chinese law depends on the actual circumstances of the case.

If any legal proceeding is brought by a non-party to the agreement against the Buyer in relation to the Buyer's purchase or use of Units, the Vendor shall compensate the Buyer for all costs, damages and interests arising out of that legal proceeding.

Broadly speaking, the judge may treat the clause as stipulating primary payment obligations under the contract or as stipulating certain statutory obligations if such obligations can be found in the relevant legislation. For example, under Chinese law, the seller to a purchase and sale contract is under an obligation to warrant that the subject matter to be delivered is not subject to any encumbrance by a third party, unless otherwise prescribed by law.⁸⁷

References

- Civil Code of the People's Republic of China (effective 1 January 2021)
- Civil Procedure Law of the People's Republic of China (last revised 24 December 2021)
- Enterprise Bankruptcy Law of the People's Republic of China (effective 1 June 2007)

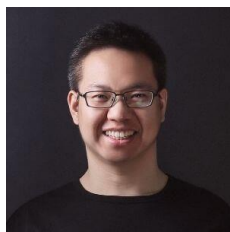
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⁸⁷ Civil Code of the People's Republic of China (effective 1 January 2021) Article 612.

England and Wales

By Rhys Thomas, David Harding and Stanzi Rosenthal*

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* This report focusses on contractual indemnities in business-to-business contracts under the laws of England and Wales. It does not deal with business-to-consumer contracts, insurance contract law or indemnity costs in litigation. The content and views of the authors set forth herein do not necessarily reflect those of Jones Day and should not be construed as legal advice but for general information purposes.

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Definition

An indemnity is a promise (usually in a contract) to protect the benefitting party against loss by paying money on the occurrence of a specified trigger event.

Purpose

There is no general rule on when to seek a contractual indemnity and contractual indemnities are used in all manner of circumstances. They tend to be appropriate for matters which are specific and known and which are clearly not the responsibility of the benefitting party.

A party may seek an indemnity for the following reasons if it fears a loss:

- to make the indemnifier liable for that loss; and
- (if the indemnifier is already liable to the benefitting party) to gain some or all of the perceived advantages of an indemnity, which are set out in the second column of the table below under the heading "Indemnities vs damages claims for breach of contract".

Common examples

Some examples of where indemnities may be used are:

- **Breach of contract:** A party may seek an indemnity against breaches of a contract (both generally and for specific breaches).
- **Share sales:** A buyer tends to request a covenant and indemnity against tax liabilities of the target company or in respect of the target company's environmental matters, litigation, product liability matters and pension scheme shortfalls. In share purchase agreements, indemnities are usually set up to recover against a breach of warranty.
- **Asset sales:** Indemnity covenants can be required in property transactions and in respect of defects in other asset sales.
- **Employee transfers:** Where a transaction involves the transfer of employees, the party who "inherits" the employees typically seeks an indemnity from the previous employer to mitigate against any employment-related liabilities caused by the transfer.
- **Assignments:** Where a contract is assigned, the assignee will usually agree to assume the performance of an ongoing contract after assignment and indemnify the assignor against any breach or failure to perform the terms of the contract by the assignee.
- **Confidentiality:** Before disclosing valuable or sensitive information, the disclosing party may ask for an indemnity against losses caused by the misuse of that information by the discloser.
- **Intellectual property:** The owner of intellectual property rights often gives other users an indemnity against loss they may suffer from defects in those rights.
- **Data protection:** A party with data protection duties often gives an indemnity against losses the other party may sustain as a result of a breach of those duties.
- **Agents:** An agent may demand an express contractual right to be indemnified by its principal for expenses and liabilities incurred by the agent during the execution of its role.
- **Pensions and trusts:** A trustee may demand an indemnity from the pension or other trust fund against some or all of the liabilities involved in taking on its responsibility as a trustee.

- **Legal costs:** Indemnities are often given against legal costs. The stronger (benefitting) party in a dispute can take an indemnity against the costs of enforcing the contract. The benefitting party can also take an indemnity against legal costs incurred by the benefitting party in a dispute with a third party.

Requirements

Clear drafting

Where an indemnity is created expressly by contract (and it does not arise pursuant to a statute or by operation of law), its nature, effect and enforceability depend on the specific drafting of the indemnity clause and on contractual interpretation. Contractual indemnities are therefore highly flexible and subject to few prescribed rules, but their drafting must be clear. For example, there must be a clearly defined trigger for liability and a payment obligation for a quantifiable loss.

Writing not required

Contractual indemnities do not need to be in writing and signed by the indemnifier or its agent in order to be enforceable. An indemnity could be given verbally at the time the contract was made provided that the other features of a legally binding contract are present (for example, consideration and intention to create a legally binding contract). However, an indemnity which is not in writing or evidenced in writing will be more difficult to rely upon and enforce on an evidential basis.

Implied indemnities

In addition to being included expressly in contracts, a duty to indemnify may also arise:

- in a statute, and the remedy sought for breach of a statutory duty; or
- by operation of law, such as:
 - as a remedy, or as part of the remedy of rescission;
 - as part of an employer's vicarious liability resulting from an employee's negligence;⁸⁸ or
 - an agent's right to be indemnified by its principal for expenses and liabilities incurred by the agent during the execution of its role.⁸⁹

Terminology

Whilst the words "indemnity" or "indemnify" indicate a duty to indemnify, use of these words is not critical or conclusive. A payment obligation in a contract can be an indemnity in substance even without these words. The effect of any contractual indemnity depends much more on its drafting and interpretation than on how it is classified.⁹⁰

⁸⁸ Civil Liability (Contribution) Act 1978, section 2(1).

⁸⁹ *Anglo-Overseas Transport Co Ltd v Titan Industrial Corp (United Kingdom)* [1959] 2 Lloyd's Rep 152; *Re Famatina Development Corp Ltd* [1914] 2 Ch 271.

⁹⁰ *Total Transport Corp v Arcadia Petroleum Ltd (The Eurys)* [1998] 1 Lloyd's Rep 351; *AXA SA v Genworth Financial International Holdings Inc* [2019] EWHC 3376 (Comm), at [64]–[69], and [118]–[122].

Restrictions

Un-indemnifiable losses

The freedom to define the terms of an indemnity is limited by statute and case law and some losses cannot be indemnified.

Deliberate acts

English law will probably not enforce an indemnity against losses caused by the benefitting party's deliberate acts.

Illegal acts

It would also be against public policy to allow a party to be indemnified against the consequences of its own fraud or deliberate crime and a clause purporting to do so would be ineffective.

Unfair indemnities

There is no general rule preventing enforcement of an onerous or unfair indemnity in business-to-business contracts. However, where an indemnity clause has the effect of limiting liability, the indemnity may be decreased (potentially entirely) by the law on limiting liability and normal principles of contract interpretation, as explained in more detail below.

Interpretation

Contractual indemnities in business-to-business contracts are not subject to specific rules of interpretation under English law. For example, there is no special rule of interpretation calling for strict interpretation of an indemnity against one party.

English law's general rules on contract interpretation apply to contractual indemnities as they do to other contract terms, although a non-negotiated indemnity (especially in a standard-form contract imposed by one party) might be interpreted strictly (*contra proferentem*) against the benefitting party who imposed it on the indemnifying party, although this is unlikely unless supported by stronger interpretative arguments (for example, where a more literal interpretation of the indemnity clause could not represent what the parties must have intended).

Trigger events

An obligation on one party to indemnify the other must be triggered on a specified action or event. Some common "trigger events" include:

- **Claims by third parties**, being claims brought by non-parties to the contract against the benefitting party.
- **Breach of contract**, either generally or in respect of breaches of specific clauses, such as warranties.
- **Non-contractual wrongs**, such as breach of duty, misrepresentation, negligence (although for an indemnity to be triggered by a party's negligence, it must specifically mention negligence), fraud or other intentional conduct.
- **Fines or penalties** incurred by the benefitting party, for example, as a result of actions taken by the indemnifier.
- **Costs and expenses** incurred by the benefitting party which the indemnifier agrees to reimburse pursuant to the indemnity.

- **Damage** (loss, harm, deterioration or defects), although the term "damage" has been interpreted in a variety of ways.⁹¹
- **Liabilities** that become due and/or payable, for example tax liabilities.

Common carve-outs

Deliberate acts

English law will generally not enforce an indemnity against losses caused by the benefitting party's deliberate acts. However, for the avoidance of doubt, losses caused by the benefitting party's deliberate acts or misconduct can be excluded from indemnity clauses.

Illegal acts

English law will also not enforce an indemnity against losses caused by the benefitting party's own crimes or fraud for public policy reasons. "Fraud" in the context of public policy and contract interpretation often extends beyond the crime of fraud to dishonesty in general. That said, losses arising from the benefitting party's fraud, bad faith and/or dishonesty can be carved out to remove any doubt.

Negligence or gross negligence

"Clear words" are required to exclude losses caused by the benefitting party's negligence.⁹² Accordingly, losses which result from the benefitting party's negligence are commonly carved out (or simply not referred to).

Causation

An indemnifier may wish to exclude trigger events which are out of its control or for which it is not to blame.

Remoteness

The parties can expressly agree that unforeseeable losses at the time the contract is entered into are carved out of any payment under the indemnity. This is often the case where the parties are of equal bargaining power.

Mitigation

The indemnifying party might only agree to pay losses that cannot be avoided by the benefitting party's reasonable efforts. Accordingly, any losses that can be avoided by the benefitting party's reasonable efforts can be carved out of the indemnity. This is often the case where the parties are of equal bargaining power.

Limitation period

The limitation period for a claim under a contractual indemnity is six years if it is entered into as a contract⁹³ or 12 years if it is entered into as a deed.⁹⁴ The limitation period commences from the date the indemnity payment was due, i.e., from the date of loss and/or demand for payment (depending on how the indemnity is drafted), rather than the date of the contract.

⁹¹ *Gwynt y Mor OFTO v Gwynt y Mor Offshore* [2020] EWHC 850 (Comm), at [45]–[59].

⁹² *Smith v UMB Chrysler Ltd* [1977] UKHL 7.

⁹³ Limitation Act 1980, section 5.

⁹⁴ Limitation Act 1980, section 8.

Indemnities vs damages claims for breach of contract

The main differences which are possible between a claim under an indemnity for recovery of loss and a damages claim for breach of contract are as follows, although whether there is any actual difference in practice depends on the drafting and interpretation of the indemnity clause:

	Indemnity payment for loss	Damages for breach
Amount / Remoteness	<p>The payment sum is dependent on the wording and interpretation of the payment obligation in the indemnity clause.⁹⁵ Express wording could modify the amount recoverable versus what would be recoverable as damages.⁹⁶ For example, unlike damages for breach, the payment sum is not necessarily limited to reasonably foreseeable losses. A payment obligation in an indemnity could also replace the usual measure of damages with an agreed payment sum.</p> <p>However, it should be noted that unless the express drafting of the clause indicates otherwise (for example, it expressly excludes some or all of the rules on mitigation, remoteness and causation), an indemnity payable for losses caused by a breach of contract might be interpreted by the Courts as intended to pay the benefitting party's losses on the same basis as damages for breach of contract.⁹⁷</p>	<p>Damages are limited to losses caused by the breach which were foreseeable when the contract was executed.</p>

⁹⁵ *Maurice v Goldsbrough* [1939] AC 452 (HL).

⁹⁶ *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, p 1448, obiter; *Total Transport Corp v Arcadia Petroleum Ltd (The Eurys)* [1998] 1 Lloyd's Rep 351, obiter.

⁹⁷ *Total Transport Corp v Arcadia Petroleum Ltd (The Eurys)* [1996] 2 Lloyd's Rep 408.

	Indemnity payment for loss	Damages for breach
Causation	It is possible to draft an indemnity against losses not only caused by the trigger event but also more widely, such as "in connection with" it. ⁹⁸ Even if the trigger event is not a breach of contract, the benefitting party under the indemnity must still prove causation (and the amount of its loss) not because of the law on assessing damages for breach of contract but because those are the facts necessary to prove what is due under the express wording of the indemnity clause.	A claimant must prove on the balance of probabilities that the breach caused the loss, i.e., that the loss would not have occurred "but for" the defendant's breach. ⁹⁹
Mitigation	The wording and interpretation of the contract determines whether the benefitting party can claim for losses it could have reasonably avoided and/or its costs of attempting to mitigate its loss. Accordingly, express wording could increase the amount recoverable.	The benefitting party is obliged to act reasonably to reduce its losses, and those losses which could have been reasonably avoided cannot be recovered. However, the cost of any reasonable steps to mitigate losses are recoverable (irrespective of whether they are effective).
Proof	The benefitting party needs only to prove the trigger event (the breach of contract) and whatever else the contract requires to establish an indemnity claim (which would usually include evidence of its loss).	The benefitting party needs to prove the breach of contract and the fact and the amount of the losses caused by the breach.

⁹⁸ *Campbell v Conoco UK Ltd* [2002] EWCA Civ 704 at [19]; *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm).

⁹⁹ *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402.

	Indemnity payment for loss	Damages for breach
Limitation period	<p>The limitation period starts from the date the indemnity payment was due. Depending on the wording and interpretation of the indemnity clause, payment may be due on demand or on a date later than the trigger event.</p> <p>Accordingly, new losses can trigger a new claim under the indemnity.</p>	<p>The limitation period starts from the date of the breach. New losses do not start the limitation period again unless there is a new or continuing breach.</p>
Costs	<p>The indemnifying party is obliged to pay the enforcement costs specified in the contract. Depending on the wording and interpretation of the contract, this may increase recovery of legal and other related costs.</p>	<p>The paying party must usually pay the benefitting party part (but not all) of its legal costs in English litigation or arbitration if the court rules in favour of the benefitting party.</p>
Legal proceedings	<p>It may be possible for an indemnity payment obligation to be pursued as a debt claim which can make recovery more straightforward. However, this argument should be approached with caution as there are conflicting Court of Appeal decisions on whether an indemnity creates a claim for debt (in which case the normal rules on causation, remoteness, mitigation and proof of loss in relation to damages would not apply) or a claim for damages (in which case such rules would apply).¹⁰⁰ In any event, indemnity claims tend to be seen as more difficult to resist and payments are more likely to be made without the need for legal proceedings.</p>	<p>A breach of contract claim requires legal proceedings to be initiated. Payment of damages requires the court to rule in favour of the benefitting party and assess its damages.</p>

¹⁰⁰

Royscot Commercial Leasing Ltd v Ismail [1993] 4 WLUK 233; *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

Indemnities vs guarantees

An indemnity is a contractual mechanism for allocating risks, in a similar way to a guarantee. However, there are differences between guarantees and indemnities. Those differences are, briefly, as follows:

	Indemnity	Guarantee
Formal requirements	There are no formal execution requirements for a valid indemnity. For example, an indemnity could be given verbally provided that the other features of an enforceable contract are present (as described above).	A guarantee must be in writing or evidenced in writing and be signed by the guarantor or a person authorised by it. ¹⁰¹
Nature of liability	An indemnity is a primary obligation from the indemnifying party to the benefitting party. If the underlying primary obligation is set aside (for example, because it is illegal) or the primary obligor is discharged from liability, the indemnity will remain valid.	A guarantee is a secondary obligation and depends on the primary obligation. If the underlying transaction is set aside or the primary obligor is discharged from liability, the guarantor's obligations under the guarantee will also be unenforceable or discharged.
Extent of liability	The indemnifying party is liable to the benefitting party independently of the primary obligor, and its liability may exceed that of the primary obligor.	The guarantor is only liable to the beneficiary to the same extent as the primary obligor is liable to the beneficiary.
Variation	Variation of the primary underlying contract will not typically discharge the indemnity. ¹⁰²	Variation of guaranteed obligations may discharge the guarantee. Any amendments of the primary underlying contract, after the giving of the guarantee, will discharge the guarantor's liability under the guarantee unless: (i) the guarantor consents to the variation or (ii) the variation is patently insubstantial or incapable of adversely affecting the guarantor. ¹⁰³

¹⁰¹ Statute of Frauds (1677), section 4.

¹⁰² *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).

¹⁰³ *Holme v Brunskill* [1877] 3 QBD 495.

	Indemnity	Guarantee
Default	The benefitting party can claim against the indemnifying party irrespective of a default by the principal obligor.	The beneficiary can claim against the guarantor only after the principal obligor defaults on its obligations.

Regulatory approvals

English law does not require that indemnities be approved or registered with any regulatory authority. It does not matter whether the indemnity is granted in favour of a foreign entity.

Power to give an indemnity

It is possible that an English company may not have the power to give an indemnity to a contract party and that the company's constitutional documents place limitations on the directors' powers. The directors should be careful to act within the limits set by the company's constitutional documents, and if they do not provide wide enough powers for the company to enter into an indemnity (or guarantee), the constitutional documents will need to be amended by shareholders' special resolution.

The constitutional documents of a company should ideally provide an express power to enter into indemnities (and indeed guarantees). However, depending on the constitutional documents, the giving of an indemnity (or guarantee) is likely to be ancillary to the object of most trading companies. If the directors exercise an ancillary power of the company, they must show that they are acting to further the objects of the company and that there is no abuse of power caused by the directors acting with improper purpose. The directors should be able to demonstrate that they are promoting the success of the company¹⁰⁴ as a result of entering into the indemnity. Generally, it will be sufficient for the relevant board minutes to state that the directors have taken these factors into account in their decision to grant an indemnity. If there is any doubt about the benefit to the company of granting an indemnity or the capacity of the directors, a shareholders' resolution should be sought.

Waiver

A contractual right to be indemnified can, in principle, be waived (i) by contract or deed, or (ii) by estoppel, in the same way as any other contractual right. It is unlikely that a right to be indemnified could be waived by election (pursuant to an option that can be exercised once) but this will depend on the drafting of the indemnity. If waiver by election could apply to the drafting of the indemnity, such a waiver would be subject to the general principles of waiver by election of contractual rights.

Waiver by contract or deed

Whether there has been a waiver of a right to be indemnified by contract or deed is a matter of construction. Such a contract or deed will need to comply with the requirements of a binding contract or deed (consideration, intention to create a legally binding agreement and other applicable formalities).

¹⁰⁴ Companies Act 2006, section 172(1).

Waiver by estoppel

A waiver by estoppel can arise if the benefitting party under the indemnity makes an unequivocal statement or conducts itself in a way which objectively indicates an intention to give up or promise not to enforce its right to be indemnified. It is not necessary for the benefitting party to actually know that it has a right to waive or intend to waive its right, provided that it would objectively appear to a reasonable person that the benefitting party knew it had a right to waive and intended to waive that right.¹⁰⁵

An estoppel, which would prevent the benefitting party from relying on the waived right to be indemnified, only arises:

- once the right or obligation being waived has arisen, for example, when the payment under the indemnity becomes due. However, the unequivocal statement or conduct which leads to the waiver can occur either before, at, or after the time for performance; and
- if the indemnifying party relied on the waiver (for example, by not doing something that it should ("but for" the waiver) have done or by undertaking obligations that did not need ("but for" the waiver) to be undertaken), therefore making it inequitable for the benefitting party to retract its waiver.

Estoppel is an equitable remedy and therefore any waiver by estoppel only has a suspensory effect. It arises only where and for the period in which it would be unfair to allow the benefitting party to rely on the right to be indemnified, having represented that it would not do so.

Effect of termination of the contract

In principle, if an indemnity is not expressly limited in time, it can continue to bind the indemnifying party indefinitely. Each claim will be time-barred after the expiry of the usual limitation period. However, depending on how the indemnity clause defines the trigger event and the payment due date, new claims under the same indemnity may continue to arise after a contract ends.

Termination of the contract will not necessarily end the obligation to indemnify. Whether it does is subject to the indemnity clause's drafting and interpretation and whether the parties intended the indemnity to survive the expiry or termination of the contract. As a result, certain contracts will expressly add a long stop date after which no new claims can arise when specifying the payment trigger event.

Effect of insolvency of the indemnifier

If a corporate indemnifier enters an English insolvency procedure, the indemnities it has entered into are not extinguished. The insolvency office holder appointed to the insolvent indemnifier's estate will need to estimate the value of any of the company's debts which do not have a certain value by virtue of it being subject to a contingency¹⁰⁶ (which would include any liability under an indemnity which may or may not be called upon). This estimate may be revised if there is a change in circumstances or a change in the information available to the office holder (for example, if the indemnity is called upon or payment under the indemnity becomes due). The amount provable as a debt claim against the insolvent indemnifier will be the amount of the estimate or revised estimate.

¹⁰⁵ *HIH Casualty and General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253; *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108 at [57]–[58].

¹⁰⁶ The Insolvency (England and Wales) Rules 2016, rule 14.14.

Effect of transfer of the contract

A clause allowing a party to "outsource, delegate or transfer" its obligations and rights is likely to envisage an "assignment" or "novation" of the contract under English law. Neither an assignment nor a novation will extinguish the indemnifying party's liability under an indemnity. An indemnity can be assigned and novated in the same way as any other contractual provision.

Assignment

The benefit of a contract (which can include the benefit of an indemnity) is a personal right in property and, in principle, can be freely assigned by the benefiting party. The effect of an assignment is that the assignee is entitled to the benefit of the contract (including any right of payment under an indemnity) subject to any limitations, defences and set-offs that the original contracting party would have been able to raise against the assignor. As the burden of a contract cannot be "assigned" (it can only be "novated"), the assignor would remain liable post-assignment to perform any part of the contract yet to be fulfilled (and if the assignor is the indemnifying party, this would include any payment under an indemnity). In practice, the assignee will usually agree to assume the performance of an ongoing contract after assignment and indemnify the assignor against any breach or failure to perform the terms of the contract by the assignee. The assignor will typically remain liable for obligations and liabilities incurred before the assignment.

Novation

The burden of a contract (including any obligation to pay under an indemnity) cannot be assigned. Instead, it must be "novated" by the outgoing, incoming and continuing parties. Novation replaces the old contract between the outgoing party and the continuing party with an identical new one between the incoming party and the continuing party. If a contract is novated by all the parties involved, the outgoing party surrenders its rights and is released from its obligations in the process.

References

Legislation

- Civil Liability (Contribution) Act 1978.
- Limitation Act 1980.
- Statute of Frauds 1677.
- Companies Act 2006.
- The Insolvency (England and Wales) Rules 2016.

Cases

- *Anglo-Overseas Transport Co Ltd v Titan Industrial Corp (United Kingdom)* [1959] 2 Lloyd's Rep 152.
- *AXA SA v Genworth Financial International Holdings Inc* [2019] EWHC 3376 (Comm).
- *Campbell v Conoco UK Ltd* [2002] EWCA Civ 704.
- *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67.
- *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402.
- *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).
- *Gwynt y Mor OFTO v Gwynt y Mor Offshore* [2020] EWHC 850 (Comm).
- *HIH Casualty and General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253.

- *Holme v Brunskill* [1877] 3 QBD 495.
- *Maurice v Goldsbrough* [1939] AC 452 (HL).
- *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA Civ 1108.
- *Re Famatina Development Corp Ltd* [1914] 2 Ch 271.
- *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428.
- *Royscot Commercial Leasing Ltd v Ismail* [1993] 4 WLUK 233.
- *Scipion Active Trading Fund v Vallis Group Ltd* [2020] EWHC 1451 (Comm).
- *Smith v UMB Chrysler Ltd* [1977] UKHL 7.
- *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.
- *Total Transport Corp v Arcadia Petroleum Ltd (The Eurys)* [1998] 1 Lloyd's Rep 351.

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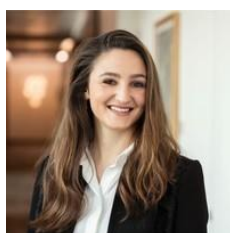
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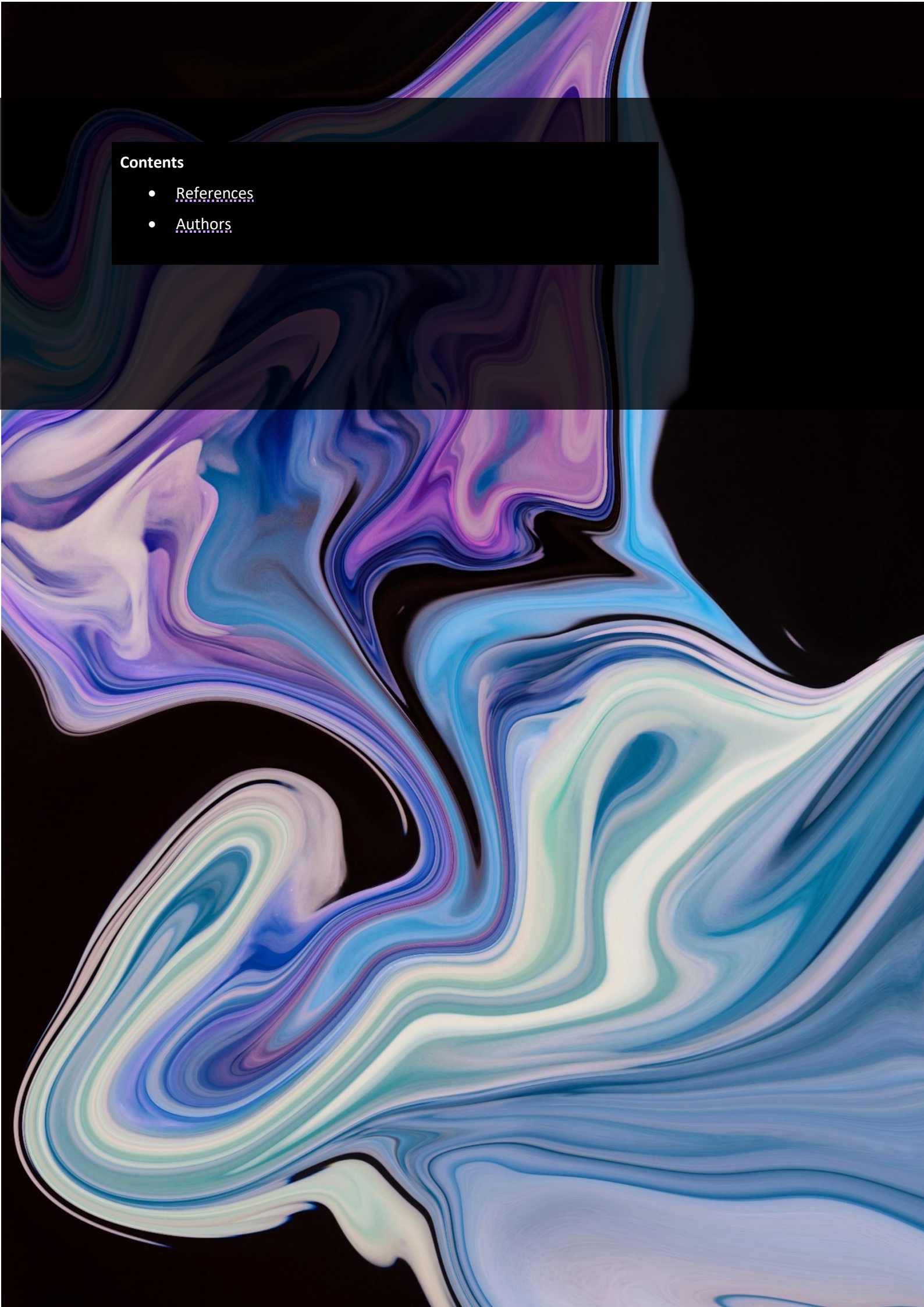
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India

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Definition

Under Indian law, a “contract of indemnity” is “a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person”.¹⁰⁷

Indian law gives the following illustration of a “contract of indemnity”:

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Purpose of contracts of indemnity

Common situations where an indemnity may be sought include:

- Contracts of indemnity are included in commercial contracts to manage the risk of losses arising out of the contract (for example, acquisition and investment deals typically have highly negotiated indemnity provisions, which protect the buyer or investor from any unforeseen losses, including in relation to the business of the company).
- Public and government institutions, corporate officers, and board members of companies often require a contract of indemnity in their contracts prior to engaging in any sort of work.
- Partners of firms indemnify the partnership firm for any loss that may be caused to it by their fraud, in the conduct of the business of the firm.
- Contracts of indemnity are common in contractual arrangements involving intellectual properties. For instance, it is used in licenses in which the licensor does not want to be liable for misdeeds of the licensee. Usually, a licensee (with the appropriate indemnification provision) protects the licensor against product liability and patent infringement.
- Numerous day-to-day insurance transactions such as marine insurance, fire insurance and motor insurance operate on the principle of indemnity and are considered as contracts of indemnity.
- Contracts of indemnity are also seen in confidentiality or non-disclosure agreements to compensate for any loss caused on account of disclosure.

Requirements

The requirements of an enforceable contract of indemnity under Indian law are:

- **A contract.** The contract containing the contract of indemnity must have been entered into by parties of sound mind who give free consent, for legitimate purposes and without any misrepresentation, fraud or coercion on part of the parties to the contract.
- **Promise to indemnify.** There must be a promise by one party (the indemnifier) to save the other party (indemnity holder) from loss caused to the indemnity holder by the conduct of the indemnifier or the conduct of another person.

¹⁰⁷

Indian Contract Act, 1872, section 124.

- **Loss.** A loss must have occurred. The Indian courts have ruled¹⁰⁸ that a loss is considered to have occurred if:
 - the liability of the indemnity holder has become absolute (that is, there is in existence of a clear enforceable claim, even with no actual loss); and
 - the loss sought to be indemnified must be specifically defined to ensure that the indemnity holder has a precise remedy to the loss caused to them subsequently. The loss must be caused to the promisor or any other person as per the terms of the agreement.

Writing

Indian law does not require that a contract of indemnity be recorded in writing.

Implied contracts of indemnity

The Indian courts have ruled that a contract of indemnity need not be expressly defined but can be implied from the circumstances of the case.¹⁰⁹

Terminology

There is no requirement under Indian law to use the word “indemnity” or “indemnify” for a contractual clause to be considered as an indemnity contract. Indian law looks to the objective intention of the parties to determine a contract of indemnity.¹¹⁰

Advantages of contracts of indemnity

Advantages of indemnity include:

- The Indian courts have ruled that in the case of damages, the party suffering the loss can only claim damages once the loss has occurred.¹¹¹ On the other hand, the Indian courts have ruled¹¹² that in the case of indemnity, the indemnity holder can claim from the indemnifier even when the loss has not occurred, but when there is accrual of liability and such liability has become absolute. For instance, if the indemnifier promises to save the indemnified from losses caused to the indemnified by legal proceedings brought by a third party against the indemnified, the indemnified does not have to wait until the judgment in those proceedings is rendered against the indemnified. Provided that the indemnified has accrued a liability and that liability is absolute, the indemnified is entitled to call upon the contract of indemnity to save it from that liability and pay it off. Hence, in the above example, the indemnified could require the indemnifier to pay off the claim or pay into court sufficient money which would constitute a fund for paying off the claim whenever it was made.¹¹³
- Damages can only be claimed against the party who has made the contract. Indemnity contracts, however, allow the indemnity holder to hold the indemnifier liable for losses caused not just due to the actions of the indemnifier but any other third party as well.

¹⁰⁸ *Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* (AIR 1942 Bom 302); *Jet Airways (India) Limited v Sahara Airlines Limited & Ors* at [40]–[41] (2011 SCC Online Bom 576); *Khetarpal v Madhukar Pictures* (AIR 1956 Bom 106).

¹⁰⁹ *Lala Shanti Swarup v Munshi Singh* (AIR 1967 SC 1315).

¹¹⁰ *Lala Shanti Swarup v Munshi Singh* (AIR 1967 SC 1315).

¹¹¹ *Maharashtra State Electricity Board v Sterlite Industries (India) Ltd.* (2000 SCC Online Bom 80).

¹¹² *Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* (AIR 1942 Bom 302).

¹¹³ *Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* (AIR 1942 Bom 302).

- Providing for an indemnity clause to be invoked in the case of a breach of contract simplifies the resolution of any dispute between the parties since the party relying on the indemnity does not have to establish the elements of its claim to the extent which would otherwise be required for claiming damages for breach. It assists in avoiding a stricter and more onerous dispute resolution. For instance, in a claim for damages, a party may only seek compensation for any loss “*which the parties knew, when they made the contract, to be likely to result from the breach of it*” at the time of entering into the contract. Further, the damages claimed must be reasonable. Such restrictions do not apply to an indemnity claim as indemnified parties do not need to establish reasonable foreseeability of such losses and can also claim remote, consequential, indirect, and third-party losses, unless specifically excluded in the indemnity clause.
- Under a claim for damages, the claimant must prove that (a) it took reasonable steps to reduce/contain the loss; and (b) it did not act unreasonably so as to increase the loss. Unless specifically provided in the indemnity clause itself, such obligations may not arise in an indemnity claim.

Disadvantages of contracts of indemnity

Disadvantages of a contract of indemnity include:

- Since an indemnity clause intends to return the aggrieved party to the spot he was before the misfortune happened, the aggrieved party will only be reimbursed to his original position and actual losses, i.e., similar monetary situation or less (depending on the terms of the indemnity clause), and he will not be able to gain any benefit out of it. On the other hand, in certain circumstances, while awarding monetary damages, Indian courts may also take into account loss of opportunity and future profits and accordingly award damages in addition to actual loss.¹¹⁴
- The indemnifier may be subject to unlimited liability. So, indemnifiers will ordinarily seek to carve out certain types of losses (or losses caused by certain types of events) from a contract of indemnity.

Limitations of contracts of indemnity

Conduct by natural or juristic persons

One of the limitations of the law of indemnity in India is that it restricts the loss caused to the indemnified by the “conduct” of the indemnifier or another person.¹¹⁵ That is, the loss caused by a natural or juristic person. This restricts the existence of indemnity contracts that arise out of natural events that are often seen in insurance indemnities.

¹¹⁴ *MSK Projects (I) (JV) Ltd. vs State of Rajasthan (2011)* 10 SCC 573 at [39]; *A.T. Brij Paul Singh vs State of Gujarat (1984)* 4 SCC 59 at [8]–[10]. While in principle it may be possible to include an indemnity clause ensuring that lost profits are recoverable, it is very rare to come across such indemnity clauses in commercial contracts. In practice, parties exclude the insured’s losses arising out of loss of profit, or loss of opportunity (see for instance, point 5 under “Special Exclusions Applicable to Cover 3(a)”).

¹¹⁵ Indian Contract Act, 1872, section 124.

For example, a life insurance policy would not be covered under the law of indemnity in India. This is because even though the general principles remain the same (that is, one party promises to compensate the other), the stipulated amount is guaranteed upon death or maturity of the life insurance contract, and there is no need to identify a loss upon death or maturity caused by another person.

Transfer of equity instruments with non-residents

The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 provide¹¹⁶ that in case of a transfer of an equity instrument¹¹⁷ of an Indian company between an Indian resident and a non-resident, the seller may furnish an indemnity for an amount which cannot be more than 25% of the total consideration (paid in full) and such indemnity obligation cannot be extended beyond a period of 18 months from the date of payment of the full consideration.

For other transactions, contractually agreed indemnification provisions between parties are often included in commercial arrangements without any caps or limitations and does not require *prior* approval from the Reserve Bank of India (**RBI**). That is, RBI approval does not need to be sought and obtained prior to entering into the contract of indemnity. However, any payment under the indemnity to a non-resident under the contract of indemnity would require approval from the RBI.

Losses that cannot be indemnified

Under Indian law, an indemnity contract can only be entered into for a lawful object and a lawful consideration.¹¹⁸ A contract to indemnify losses caused by illegal acts is contrary to the public policy of India and may not be enforceable before the Indian courts. Similarly, enforcement of an indemnity contract for losses arising out of the wilful misconduct (or wilful default or deliberate default), gross negligence, etc. of the indemnified person may not be enforceable.¹¹⁹

Further, a contract to indemnify is an independent contract in itself. Therefore, a breach in the case of an indemnity contract is the refusal to indemnify itself rather than the specific trigger event which led the indemnified party to seek the indemnity. In such situations, if the parties have specified a capped indemnity clause, it will operate on a different footing as the concept of reasonability, foreseeability and remoteness which are generally applicable to a claim for damages may not be applicable to the adjudication of an indemnity claim. Hence, the parties may be able to enforce the indemnity contract even where it is penal in nature.

Indian courts predominantly refuse to enforce contracts of indemnity when:

- the clause is ambiguous or unclear in expressing the intention of one party to another;
- the clause is unfair, unreasonable and unconscionable; or
- the clause is against Indian public policy or a statute.

¹¹⁶ Foreign Exchange Management (Non-debt Instruments) Rules, 2019, rule 9(6).

¹¹⁷ Rule 2(k) of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 defines “equity instruments” to mean equity shares, convertible debentures, preference shares and share warrants issued by an Indian company.

¹¹⁸ Indian Contract Act, 1872, section 23.

¹¹⁹ *Simplex Concrete Piles (India) Limited v. Union of India*, ILR (2010) II Delhi 699.

Interpretation

Among others, usage of the following phrases in a contract of indemnity may attract special rules of interpretation by the Indian courts:

- Usage of phrases such as “make good” or “compensate” may be interpreted to only include claims arising out of actual loss suffered by the indemnified party and not situations where the liability has accrued but no payment has been made. On the contrary, usage of the phrase “hold harmless” may be interpreted by Indian courts to cover both the aforesaid situations. Similarly, usage of the phrase “protect from liability” ensures that the indemnifying party has an additional obligation to defend the indemnified against covered third-party claims as well as potentially first-party claims (depending on the language of the indemnity clause).
- Usage of the phrase “Losses include” as against “Losses mean” ensures that consequential, indirect and remote losses are covered under the indemnity clause.
- Usage of the phrase “arising out of” as against “result of” / “in connection of” may be interpreted broadly by the courts and mere occurrence of the event would suffice invocation of the indemnity clause.

Trigger events

Under Indian law, contracts of indemnity fall into two categories:

- **third-party indemnities.** Indemnities that protect the indemnified party from loss or damage caused by the conduct of a third party (i.e., someone who is not a party to the contract between the indemnified and the indemnifier); and
- **inter-party indemnities.** Indemnities that protect the indemnified party from loss or damage caused by the indemnifying party’s breach of contract or loss or damage caused by a statement of fact made by the indemnifying party being false.

The obligation to indemnify arises upon the occurrence of a “trigger event”. Common trigger events include loss or damage suffered because of:

- a breach of contract by the indemnifier;
- fault or negligence by the indemnifier;
- a misrepresentation by the indemnifier; and
- a claim by a third party against the indemnified.

Breach of contract as trigger event

Under Indian law, the concepts of foreseeability, reasonability, remoteness, and the duty to mitigate loss may not apply to indemnity contracts.¹²⁰ A contract of indemnity is an independent contract in itself. Therefore, the breach in the case of indemnity contracts is the refusal to indemnify itself rather than the specific trigger event (including breach of contract) which led the indemnified party to seek the indemnity. Accordingly, the indemnity clause that is triggered on a breach of contract may be treated as a claim for debt and not as a claim for damages.

¹²⁰

Osman Jamal and Sons Limited v. Gopal Purshattam, (1928) ILR Cal 262.

In any event, it is worth noting that there remains no inherent indication as to what is covered by an indemnity clause, as the same is dependent on the wording used in the specific contract. Therefore, it is advisable to include an “express exclusion” clause in the indemnity contract to persuade the Indian courts that the contractual indemnity in question was not intended to cover remote, consequential, indirect, and third-party losses.

Common carve-outs

Parties may contractually agree to certain carve-outs or limitations to indemnity. These typically include failure to avoid or mitigate loss, and indirect or consequential losses (including loss of profits, loss of goodwill or business, special or punitive losses and claims covered by insurance). Indemnity contracts are generally entered into to cover specific identified risks. If the liability of the indemnifier under the indemnity clause is uncapped and unlimited, the potential losses that may be arising out of the indemnified person’s failure to avoid or mitigate loss, and indirect or consequential losses, may be significant and the indemnifier may have to support any losses from its cash reserves or, if insufficient, its assets.

As mentioned earlier, Indian courts may not enforce an indemnity clause which indemnifies a person against losses arising out of the wilful misconduct (or wilful default or deliberate default), gross negligence. etc. of such indemnified person, unless it is clearly expressed to have such an effect.

Limitation period

Under Indian law, since the contract of indemnity is treated as an independent and separate contract from the main contract, irrespective of the nature of the conduct which triggers the breach of the contract of indemnity, the right to sue on a contract of indemnity arises when the indemnifier fails to pay or refuses to honour the indemnity and when the contract of indemnity is broken.¹²¹

The indemnified party would then have a further three years from that date within which to bring legal proceedings to enforce the indemnity contract.¹²²

¹²¹ *Deepak Bhandari Vs. Himachal Pradesh State Industrial Development Corporation Limited*, AIR 2014 SC 961.

¹²² Limitation Act, 1963, Article 55.

Claims under contracts of indemnity vs claims for breach of contract

The differences between a claim under a contract of indemnity and a claim for breach of contract are as follows:

	Claim under contract of indemnity	Damages for breach of contract
Amount	<p>The quantum of compensation recoverable under a contract of indemnity depends on the wording of the contract of indemnity.</p> <p>Indian law states that the indemnified can recover all damages which it may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.¹²³</p>	<p>The party claiming breach is entitled to recover from the breaching party compensation for any loss or damage caused to it, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.¹²⁴</p> <p>The party claiming breach is not entitled to recover from the breaching party any remote and indirect losses or damage sustained by reason of the breach.¹²⁵</p>
Mitigation	<p>The indemnified party has no duty to mitigate its losses (unless otherwise specified in the contract).</p>	<p>Reasonable steps to mitigate the loss should be taken by claimant, otherwise he cannot claim any part of the damage which is due to his neglect to take such steps.¹²⁶</p> <p>Under the law, the obligation to mitigate is not stated strictly as a “duty” but rather as a restriction on recoverable damages that <i>debars him from claiming any part of the damage which is due to his neglect to take such steps.</i></p>

¹²³ Indian Contract Act, 1872, section 125(1)

¹²⁴ Indian Contract Act, 1872, section 73.

¹²⁵ Indian Contract Act, 1872, section 73.

¹²⁶ Indian Contract Act, 1872 Explanation appended to section 73. See also *A.S. Sharma v. Union of India*, 1995 ACJ 493 at 498(Guj.); *M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr* AIR 1962 SC 366.

	Claim under contract of indemnity	Damages for breach of contract
Proof	The indemnifier can be compelled to compensate the indemnified even before the indemnified has discharged his liability, provided the indemnifier's liability has become absolute. ¹²⁷	The party claiming breach must prove the breach of contract and the fact and the amount of losses sustained by the breach. ¹²⁸
Limitation period	<p>Since the contract of indemnity is treated as an independent and separate contract from the main contract, irrespective of the nature of the conduct which triggers the breach of the contract of indemnity, the right to sue on a contract of indemnity arises when the indemnifier fails to pay or refuses to honour the indemnity and when the contract of indemnity is broken.¹²⁹</p> <p>The indemnified party would then have a further three years from that date within which to bring legal proceedings to enforce the indemnity contract.¹³⁰</p>	<p>The limitation period for a breach of contract claims is three years.</p> <p>The commencement of such limitation period depends on factors such as the nature of the contract and the number of breaches. Accordingly, the limitation period for a breach of contract claim will start from the time of occurrence of a single breach. In the case of successive breaches, the limitation period will start from the time of occurrence of the relevant breach and where the breach is continuing, the limitation period will start from the time of cessation of such breach.</p>

¹²⁷ *Khetarpal v Madhukar Pictures* AIR 1956 Bom 106.

¹²⁸ Indian Contract Act, 1872, section 73.

¹²⁹ *Deepak Bhandari Vs. Himachal Pradesh State Industrial Development Corporation Limited*, AIR 2014 SC 961.

¹³⁰ Limitation Act, 1963, Article 55.

	Claim under contract of indemnity	Damages for breach of contract
Costs	<p>The indemnified can recover:</p> <ul style="list-style-type: none"> all costs which it may be compelled to pay in any suit if (in bringing or defending it) it did not contravene the orders of the indemnifier, and acted as it would have been prudent for it to act in the absence of any contract of indemnity, or if the indemnifier authorised him to bring or defend the suit;¹³¹ any sums which it may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the indemnifier, and was one which it would have been prudent for the indemnified to make in the absence of any contract of indemnity, or if the indemnifier authorised him to compromise the suit.¹³² 	<p>Under the Indian legal framework, costs are awarded to the successful party in a claim for breach of contract in accordance with Section 35 of the Code of Civil Procedure, 1908. The successful party may or may not recover its legal fees and expenses from the unsuccessful party for a claim of breach of contract. Indian courts and consumer forums may grant costs at their own discretion.</p>
Legal proceedings	<p>A claim under a contract of indemnity may be brought as a claim for a “debt” as opposed to a traditional claim in damages.</p> <p>In an action for the recovery of a debt, the indemnified party only needs to establish that the trigger event has occurred. Such debt proceedings are more straightforward than an action for damages for breach of contract, as the indemnified person does not have to establish that both a breach of contract has occurred and that the damages being claimed have, in fact, been suffered (which may have an additional obligation of adducing expert evidence).</p>	<p>The party claiming breach must bring legal proceedings to recover damages for breach of contract from the other party.</p>

¹³¹ Indian Contract Act, 1872, section 125(2).

¹³² Indian Contract Act, 1872, section 125(3).

Contract of indemnity vs contract of guarantee

Under Indian law,¹³³ a contract of guarantee is a “contract to perform the promise, or discharge the liability, of a third person in case of his default”. The person who agrees to perform the promise or discharge the liability is called the “surety”.¹³⁴ The “third person”, in respect of whose obligations or liabilities are to be discharged by the “surety”, is called the “principal debtor”.¹³⁵ The person who is given the guarantee by the surety is called the “creditor”.

Two parties vs three

The primary difference between a contract of guarantee and a contract of indemnity is the number of contracting parties. A contract of indemnity is between two parties. That is, the indemnifier and the indemnity holder (the indemnified). Under a contract of indemnity, the indemnifier indemnifies the indemnity holder of any loss caused by the indemnifier itself or any other third party.

A contract of guarantee, on the other hand, is a tripartite agreement between a surety, principal debtor and creditor, where the surety guarantees the performance or the discharge of the liabilities of the principal debtor if the principal debtor defaults in its obligations or liability to the creditor. Therefore, while a contract of indemnity is derived from a single agreement, there are often multiple agreements in place in the case of a guarantee (one between the creditor and the principal debtor, another between the surety and the creditor and a final expressed or implied agreement between the principal debtor and the surety).

Primary vs secondary obligations

A contract of indemnity creates a primary obligation on the indemnifier to compensate the indemnity holder for losses incurred. A contract of guarantee, however, creates a secondary obligation on the surety, which kicks in only when the principal debtor fails to fulfil its primary obligation or liability to the creditor.

In a contract of indemnity, the indemnifier cannot sue another party for claims once it fulfils the payment to the indemnity holder. A surety, however, once it discharges its obligation towards the creditor, steps into the shoes of the creditor and can later sue the principal debtor for compensation of the payment thus made.

Power to provide a contract of indemnity

It is possible that the constitution of an Indian company may restrict its ability to extend a contract of indemnity to another person.

If a clause in the constitutional document prevents the company from extending contracts of indemnity, the directors have no authority to extend such indemnity. The company may take legal action against the director for acting against the interest of the company and in violation of its fiduciary duty towards the company and its shareholders.

Hence, in day-to-day commercial arrangements (specifically financial transactions), prior to entering into any contract, the indemnified person should seek to review the constitutional documents (including memorandum of association and articles of association) of the indemnifier company along with requisite board resolutions giving the company the authority to execute an indemnity contract in favour of the indemnified person.

¹³³ Indian Contract Act, 1872, section 126.

¹³⁴ Indian Contract Act, 1872, section 126.

¹³⁵ Indian Contract Act, 1872, section 126.

Regulatory approvals

Apart from contracts of indemnity entered into between an Indian resident and a non-resident in relation to the transfer of equity instruments, Indian law does not require that a contract of indemnity be approved or registered with any government agency, even if the indemnified is a foreign entity.

Transfer of equity instruments to non-residents

Indian residents, including Indian companies, are prohibited from entering into contracts of indemnity in relation to the transfer of equity instruments of an Indian company between them and persons resident outside India or non-residents under which:

- the liability of the seller of equity instruments exceeds 25% of the total consideration for the equity instruments; or
- the period of the contract of indemnity exceeds 18 months from the date on which the seller of the equity instruments receives payment of full consideration for the equity instruments; or
- both.

So, in the case of the transfer of equity instruments of an Indian company, the parties would have to agree that the seller/indemnifier's liability under the contract of indemnity:

- is limited to 25% of the total consideration to be paid by the buyer/indemnified for the transfer of the equity instruments; and
- will be terminated after the expiration of 18 months from the day on which the seller/indemnifier received full payment of the total consideration for the equity instruments.

For other transactions, approval from the RBI does not have to be sought and obtained prior to entering into a contract of indemnity. But it must be sought and obtained before the Indian resident makes any payment under the contract of indemnity.

If any person contravenes the restrictions described above, the maximum penalty that may be imposed would be an amount up to thrice the sum involved in such contravention (where it is quantifiable) or up to Indian Rupees Two Lakh (where it is not quantifiable). In case of continuing contravention, a further penalty may be extended to Indian Rupees Five Thousand for every day after the first day during which the contravention continues.¹³⁶

Waiver of contracts of indemnity

The principle of waiver is recognised under Indian law,¹³⁷ and provides for relinquishment of rights between the parties. Rights that may be relinquished include obligations as well as claims that had been consented to be performed and exercised by the parties. Since a contract of indemnity is treated¹³⁸ as an obligation of the indemnifier to save the indemnified from loss caused to him by the conduct of the indemnifier, or by the conduct of any other person, such obligations of the indemnifier may be waived by the parties to the contract of indemnity. The person indemnified may waive the benefits of indemnification and such waiver of right does not require any consideration or an agreement.

¹³⁶ Foreign Exchange Management Act, 1999, section 13.

¹³⁷ Indian Contract Act, 1872, section 63.

¹³⁸ Indian Contract Act, 1872, section 124.

Survival of obligation to indemnify after termination of the contract

It is possible to allow an indemnity clause and its attached obligations to survive even once the contract is terminated. If the indemnity clause in a contract states that the indemnity will survive till a particular period after the termination of the contract, then the indemnity is considered valid even after the contract comes to an end.

There exists no clear Indian jurisprudence on the point of survival of indemnity where the underlying contract is silent and where the trigger events for invocation of indemnity are non-contractual breaches like negligence or third-party claims. Hence, it is advisable for parties to include an express clause indicating that the indemnity would survive till a particular period after the expiry of the contract, including in cases where the trigger events for invocation of such indemnity are non-contractual breaches such as negligence.

Effect of insolvency of the indemnifier

An indemnity qualifies as a financial debt under the Insolvency and Bankruptcy Code, 2016. The indemnity holder can file a claim as a financial creditor and participate in the insolvency process.

Transfer

Under Indian law, the concept of “assignment” refers to the transfer of contractual rights or liabilities by a party to the contract to some other person who is not a party to that contract. As a matter of established principle, benefit of a contract may be assigned to a third party without the consent of the other contracting party. On the other hand, obligations are not assignable under a contract (unless with the consent of the counterparty to the contract)¹³⁹ and where such obligations are assigned, it amounts to novation of the contract.

In the case of novation, with the consent of the promisee, the promisor drops out and some other person takes over his obligation. Hence, novation is effectuated through change of parties with mutual assent, and where such consent is obtained from the promisee, it will be considered as a deemed novation, resulting in the substitution of liabilities and obligations to the assignee. Parties are allowed to dispense with performance and/or obligations under a contract by way of assignment.¹⁴⁰

References

Statutes

- Foreign Exchange Management Act, 1999.
- Indian Contract Act, 1872.
- Limitation Act, 1963.

Rules

- Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

Cases

- *A.S. Sharma v. Union of India* (1995 ACJ 493 at 498 (Guj.).
- *A.T. Brij Paul Singh vs State of Gujarat* (1984) 4 SCC 59.

¹³⁹ *Khared and Co. Ltd. v. Ramon and Co. Pvt. Ltd.* AIR 1962 SC 1810.

¹⁴⁰ Indian Contract Act, 1872 section 37.

- *Deepak Bhandari Vs. Himachal Pradesh State Industrial Development Corporation Limited* (AIR 2014 SC 961).
- *Gajanan Moreshwar Parelkar v Moreshwar Madan Mantri* (AIR 1942 Bom 302).
- *Khared and Co. Ltd. v. Ramon and Co. Pvt. Ltd.* (AIR 1962 SC 1810).
- *Khetarpal v Madhukar Pictures* AIR 1956 Bom 106.
- *Jet Airways (India) Limited v Sahara Airlines Limited & Ors* (2011 SCC Online Bom 576).
- *Lala Shanti Swarup v Munshi Singh* (AIR 1967 SC 1315).
- *Maharashtra State Electricity Board v Sterlite Industries (India) Ltd* (2000 SCC Online Bom 80).
- *M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr* (AIR 1962 SC 366).
- *MSK Projects (I) (JV) Ltd. vs State of Rajasthan* (2011) 10 SCC 573.
- *Osman Jamal and Sons Limited v. Gopal Purshattam* (1928) ILR Cal 262.
- *Simplex Concrete Piles (India) Limited v. Union of India* (ILR (2010) II Delhi 699).

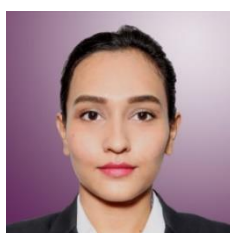
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Indonesia

By Fransiscus Rodyanto and Fadhira Mediana

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Indonesian law recognises the concept of freedom of contract. But the concept of an indemnity as understood by the common law does not exist under Indonesian law.

The most analogous remedies under Indonesian law are:

- compensation for costs, damages and interests for breach of obligations (in Indonesian: *Penggantian Biaya, Kerugian dan Bunga Karena Tidak Dipenuhinya Suatu Perikatan*); and
- liquidated compensation for costs, damages and interests for breach of obligations

A table comparing these remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist under Indonesian law, because Indonesian law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of a “trigger event”. Such “trigger events” are examined [below](#).

Freedom of contract

Under Indonesian law, all valid agreements apply to the individuals who have concluded them at law.¹⁴¹

Such agreements are irrevocable other than by mutual consent or pursuant to reasons stipulated by law.¹⁴²

But the cause of the contract must not be prohibited by Indonesian law or violate morality or public order.¹⁴³

¹⁴¹ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1338

¹⁴² Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1338

¹⁴³ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1337.

Comparison of Indonesian law remedies with common law indemnities

A table comparing common law indemnities against the following Indonesian law remedies is set out below:

- compensation for costs, damages and interests for breach of obligations; and
- liquidated compensation for costs, damages and interests for breach of obligations.

	Compensation for costs, damages and interests for breach of obligations	Liquidated compensation for costs, damages and interests for breach of obligations	Common law indemnity
Amount	<p>The creditor is entitled to recover losses suffered, and the profits it would have enjoyed, that:</p> <ul style="list-style-type: none"> • have materialised; or • were reasonably foreseeable at the time the contract was entered into. <p>The losses suffered and the profits that would have been enjoyed are only recoverable if they are the direct consequence of the debtor's breach of the obligation.</p>	<p>If the parties agree that a liquidated sum is to be paid as compensation on breach of an obligation, the party claiming breach is entitled to recover that sum, and the debtor should not be liable to pay the creditor and any other parties any amount that is more or less than the specified amount.</p>	<p>The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides "dollar-for-dollar" (or, in the English context, "pound-for-pound") recovery of loss suffered by the indemnified party.</p>
Mitigation	<p>There is no obligation of mitigation under the law, although the parties to a contract may include a clause specifying the duty to mitigate pursuant to the principle of freedom of contract.</p>	<p>There is no obligation of mitigation under the law, although the parties to a contract may include a clause specifying the duty to mitigate pursuant to the principle of freedom of contract.</p>	<p>The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.</p>

	Compensation for costs, damages and interests for breach of obligations	Liquidated compensation for costs, damages and interests for breach of obligations	Common law indemnity
Proof	<p>The creditor must prove:</p> <ul style="list-style-type: none"> • that it was owed an obligation by the debtor that the debtor did not perform; • the fact that it has suffered loss and/or that it would have enjoyed profits; • the amount of losses it suffered and/or the amount of profits it would have enjoyed as a result of the debtor's breach; • the losses suffered or the profits it would have enjoyed: <ul style="list-style-type: none"> ○ have materialised; or ○ were reasonably foreseeable at the time that the contract was made; and • the losses suffered or the profits it would have enjoyed are a direct consequence of the debtor's breach of obligation. 	<p>If a contract can only be performed by way of making payment, and payment is not made or is made late, it is not necessary for the creditor to prove any loss before it may claim compensation for costs, damages and interests in a liquidated sum. In this case, the creditor only needs to prove that the debtor has breached the obligation of payment.</p>	<p>The indemnified party must prove the "trigger event" (and whatever else the contract requires to establish the claim under the indemnity).</p>

	Compensation for costs, damages and interests for breach of obligations	Liquidated compensation for costs, damages and interests for breach of obligations	Common law indemnity
Limitation period	<p>The limitation (or “prescription”) period for claims of compensation for costs, damages and interests for breach of obligations is 30 years. The Indonesian Civil Code (ICC) does not clearly stipulate when the limitation period commences. In practice, this thirty-year period starts when a breach has caused damage or when a breach has occurred. Ultimately, it will depend on the argument put forward before the judge or the decision by the judge.</p> <p>Shorter limitation periods are sometimes imposed on different types of claims.</p>	<p>The limitation (or “prescription”) period for claims of liquidated compensation for costs, damages and interests for breach of obligations is 30 years. The ICC does not clearly stipulate when the limitation period commences. In practice, this thirty-year period starts when a breach has caused damage or when a breach has occurred. Ultimately, it will depend on the argument put forward before the judge or the decision by the judge.</p> <p>Shorter limitation periods are sometimes imposed on different types of claims.</p>	<p>The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the “trigger event”). The parties can agree that the payment becomes due on a date other than the “trigger event”.</p>

	Compensation for costs, damages and interests for breach of obligations	Liquidated compensation for costs, damages and interests for breach of obligations	Common law indemnity
Costs	<p>Under Indonesian law, legal costs are generally not awarded to a successful plaintiff because</p> <ul style="list-style-type: none"> • they are not included in the scope of costs, damages and interests regulated under the ICC; and • they are excluded from the possible demands of compensation by the creditor.¹⁴⁴ <p>In specific cases in practice, the creditor might put an additional clause in the petition of the lawsuit, asking the Court to rule that the debtor should bear the cost of court proceedings. However, such a clause is not commonly granted by the Court, as legal costs are often much lower in proportion compared to other costs involved in the proceedings.</p>	<p>Legal costs are not awarded to a successful plaintiff because the parties have already agreed on a liquidated sum to be paid as compensation.</p>	<p>The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.</p>

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Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1243 and its commentaries.

Trigger events under Indonesian law

Under the common law, indemnity clauses generally fall into two categories:

- **third-party indemnities.** Indemnities that protect the indemnified party from loss or damage resulting from a claim by a third party (i.e., someone who is not a party to the contract between the indemnified and the indemnifier);
- **inter-party indemnities.** Indemnities that protect the indemnified party from loss or damage resulting from the indemnifying party's breach of contract or loss or damage resulting from a statement of fact made by the indemnifying party being false.

The obligation to indemnify under the common law arises upon the occurrence of a "trigger event".

Common trigger events include loss or damage suffered because of:

- a breach of contract by the indemnifier;
- a misrepresentation by the indemnifier;
- fault or negligence by the indemnifier; and
- a claim by a third party against the indemnified.

Breach of contract

The "trigger event" for a claim for compensation for costs, damages and interests for breach of obligations is when the debtor is in default of an obligation.¹⁴⁶ So, a breach of contract can be a "trigger event" for that remedy.

Similarly, if the parties stipulate that a defaulting debtor must, as compensation, pay a certain sum of money to the creditor,¹⁴⁷ the "trigger event" is the default of the debtor.

Misrepresentation

Indonesian law requires the presence of four elements before a contract can be valid:¹⁴⁸

- **consent of the parties to be bound by the contract:** consent must be voluntarily given, and must be free from any mistake, duress or fraud;
- **parties having the capacity to be bound:** the parties to the contract must have the capacity to enter into the contract;
- **subject matter** of the contract being certain; and
- **lawful cause:** the cause for the contract is not prohibited by law, false, illegal, or contrary to decency or public policy in Indonesia.

As an agreement is of no value if it is entered into by error, duress or fraud,¹⁴⁹ it is possible for a party to nullify an agreement if the party can sufficiently prove that the agreement is made due to fraudulent claims by the other party. However, relying on fraud to annul a contract in Indonesia would typically require a decision from a criminal court as evidence.¹⁵⁰

¹⁴⁶ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1243.

¹⁴⁷ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1249.

¹⁴⁸ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1320.

¹⁴⁹ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1321.

¹⁵⁰ Palembang District Court Decision No. 117/Pdt.G/2014/PN.Plg.

While the ICC does not expressly provide for compensation due to false statements or misrepresentations, it is common for parties to include clauses of representations and warranties and indemnification in contracts to protect themselves.

Non-contractual wrongs

Indonesian law recognises the concept of negligence since “every illegal act causing damage to another party shall oblige the party who caused the damage to pay compensation”,¹⁵¹ and “everyone shall be responsible not only for damage caused by his action, but also for losses by his negligence or lack of care”.¹⁵²

Therefore, the following type of clause is enforceable under Indonesian law. In fact, it is common for parties to include such clauses in their contracts.

The Vendor must compensate the Buyer for all costs, damages and interests resulting from the Vendor’s negligence or wilful acts.

Third-party claims

The following type of clause will be enforceable under Indonesian law.

If any legal proceeding is brought by a non-party to the agreement against the Buyer in relation to the Buyer’s purchase or use of Units, the Vendor shall compensate the Buyer for all costs, damages and interests arising out of that legal proceeding.

Under Indonesian law, indemnity, including indemnity against any third-party claim, may be sought in a variety of contexts. The ICC does not contain any specific rule on when to seek or provide an indemnity. Depending on the circumstances of contracts and the bargaining powers of the parties, it is common for the parties to include a clause to the effect that each shall indemnify and hold harmless the other from any claims and liabilities (including those arising from third parties) as a result of a material breach of the agreement.

References

Legislation

- Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23)
- Supreme Court Regulation No. 1 of 2016 regarding Mediation

Cases

- Palembang District Court Decision No. 117/Pdt.G/2014/PN.Plg

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¹⁵¹ Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1365.

¹⁵² Indonesia Civil Code (Promulgated by publication of April 39 1847 S.NO.23) Article 1366.



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Japan

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Japanese law recognises the concept of freedom of contract. But the concept of an indemnity as understood by the common law does not exist traditionally under Japanese law.

The two most analogous remedies under Japanese law are:

- compensation for loss or damage due to non-performance; and
- liquidated damages.

A table comparing these remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist traditionally under Japanese law, because Japanese law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of a “trigger event”. Such “trigger events” are examined [below](#).

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Freedom of contract

Under Japanese law, a person may freely decide whether or not to conclude a contract unless otherwise provided for under Japanese laws and regulations.¹⁵³

The parties to a contract may freely decide the terms of the contract, subject to the restrictions prescribed by Japan's laws and regulations.¹⁵⁴

Indemnities under Japanese law

The absence of the concept of "indemnity" in the Japanese Civil Code and the lack of judicial precedents on the issue do not preclude parties to a contract governed by Japanese law from agreeing that one party is to indemnify the other on the occurrence of certain trigger events. Indemnities are widely used in practice in Japan.

In transaction, indemnity is broadly used in Japanese law to be contracts for securing damages caused by breaches of representations and warranties of a contract. This kind of indemnification contract does not require that the indemnifier breach an obligation owed to the indemnified, and are separate liabilities from the liability of default or tort. An additional type of widely adopted indemnity used in practice is the indemnity for breach of covenant, which is understood to be a modification of the requirements and effects of default liability under the Japanese Civil Code as the liability depends on the details of the covenant obligation.

Within the Japanese legal landscape, an indemnity may be sought in circumstances where the indemnifier is in a suitable position to control the risk. Examples of this are exhibited in instances such as in cases where a supplier is providing goods or services to a buyer that may be subject to intellectual property claims by a third party, or cases concerning share purchase agreements in merger and acquisition transactions. A cause of indemnity may also occur through a breach of representations and warranties by the seller, which usually cannot be ascertained in advance by the buyer and thereby enables ex-post price adjustments to the subject matter of the contract. In addition, a breach of covenant by the seller may also be used as a cause of indemnity, hence deterring the seller from breaching its obligations.

Parties in practice often implement an agreed validity period for claims under an indemnity governed by Japanese law. For example, a period of one year from the date of execution of a transaction can be stated to be the claimable period under an indemnity.

Indemnification is now widely used in Japan. However, the accumulation of judicial precedents is still limited, leaving room for modification by judges. It is therefore advisable that parties stipulate as clearly as possible the requirements and effects of matters subject to indemnification, even under exceptional circumstances.

¹⁵³ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 521(1).

¹⁵⁴ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 521(2).

Comparison of Japanese law remedies with common law indemnities

A table comparing common law indemnities against the following Japanese law remedies is set out below:

- compensation for loss or damage due to non-performance; and
- liquidated damages.

	Compensation for loss or damage due to non-performance	Liquidated damages	Common law indemnity
Amount	<p>Compensation is limited to:</p> <ul style="list-style-type: none"> • loss or damage that ordinarily arises from the non-performance;¹⁵⁵ and • damage which has arisen from any special circumstances if the obligor did foresee, or should have foreseen, the circumstance¹⁵⁶ at the time when the failure to perform an obligation occurs. 	<p>The amount of damages recoverable is that agreed by the parties.¹⁵⁷</p> <p>However, the courts may invalidate a liquidation of "excessive" damages on the ground that such liquidation violates general principles such as public order and morality.</p>	<p>The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides "dollar-for-dollar" (or, in the English context, "pound-for-pound") recovery of loss suffered by the indemnified party.</p>

¹⁵⁵ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 416(1).

¹⁵⁶ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 416(2).

¹⁵⁷ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 420(1).

	Compensation for loss or damage due to non-performance	Liquidated damages	Common law indemnity
	<p>Lost profits are also recoverable. However, as lost profits are categorised differently from loss or damage which would ordinarily arise from the failure or loss or damage which has arisen from special circumstances, the recovery of lost profits depends on the type of contract and the intention of the parties.</p>		
Mitigation	<p>The obligation to mitigate is not explicitly recognised although it may be derived from the rule of good faith.</p> <p>If the obligee is negligent in its failure to perform the obligation or is negligent in contributing to the occurrence or aggravation of damage caused thereby, the court shall take the obligee's negligence into consideration when determining the liability for compensation for loss or damage and the amount of such loss or damage.¹⁵⁸</p>	<p>The obligation to mitigate is not explicitly recognised although it may be derived from the rule of good faith.</p> <p>If the obligee is negligent in contributing to the occurrence or aggravation of damage caused thereby, the court shall take the obligee's negligence into consideration when determining the liability for compensation for loss or damage and the amount of such loss or damage.¹⁵⁹</p>	<p>The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.</p>

¹⁵⁸ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 418.

¹⁵⁹ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 418.

	Compensation for loss or damage due to non-performance	Liquidated damages	Common law indemnity
Proof	<p>The obligee must prove:</p> <ul style="list-style-type: none"> • an obligation owed by the obligor to the obligee; • breach of the obligation by the obligor; • loss or damage suffered by the obligee; • causation between breach of the obligation and the loss or damage; and • in respect of damage arising from special circumstances, that the obligor foresaw, or should have foreseen, the special circumstances at the time of default. 	<p>The obligee must prove:</p> <ul style="list-style-type: none"> • an obligation owed by the obligor to the obligee; • breach of an obligation by the obligor; and • an agreement to pay liquidated damages. <p>The obligee does not need to prove that it has suffered loss or damage due to the breach, and only needs to prove that the breach has occurred.</p>	<p>The indemnified party must prove the “trigger event” (and whatever else the contract requires to establish the claim under the indemnity).</p>

	Compensation for loss or damage due to non-performance	Liquidated damages	Common law indemnity
Limitation period	<p>The limitation period (called “prescription of claims”) is:</p> <ul style="list-style-type: none"> • five years from the time when the obligee came to know that its right to compensation was exercisable;¹⁶⁰ or • ten years from the time when the right to compensation was exercisable.¹⁶¹ <p>The right to claim compensation for loss or damage due to non-performance becomes exercisable, in general, when the obligee can claim performance of the original obligation.</p>	<p>The limitation period (called “prescription of claims”) is:</p> <ul style="list-style-type: none"> • five years from the time when the obligee came to know that its right to compensation was exercisable;¹⁶² or • ten years from the time when the right to compensation was exercisable.¹⁶³ <p>The right to claim liquidated damages becomes exercisable, in general, when the obligee can claim performance of the original obligation.</p>	<p>The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the “trigger event”). The parties can agree that the payment becomes due on a date other than the “trigger event”.</p>

¹⁶⁰ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 166(1)(i).

¹⁶¹ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 166(1)(ii).

¹⁶² Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 166(1)(i).

¹⁶³ Civil Code (In Japanese: 民法) (Act No. 89 of April 27, 1896) Article 166(1)(ii).

	Compensation for loss or damage due to non-performance	Liquidated damages	Common law indemnity
Costs	Court fees are usually borne by the losing party, but attorney's fees depend on the nature of the obligation.	Court fees are usually borne by the losing party, but attorney's fees depend on the nature of the obligation.	The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.
Legal proceedings	A claim for compensation for loss or damage due to non-performance requires the commencement of legal proceedings.	A claim for compensation for liquidated damages requires the commencement of legal proceedings.	Depending on the wording of the indemnity, a claim under it may be able to be brought as a claim for a debt (e.g., if the loss can be easily calculated or if the liability is for a specific type of loss). Such claims are more difficult to resist and procedurally more straightforward to commence.

Trigger events

Under the common law, indemnity clauses generally fall into two categories:

- **third-party indemnity.** Indemnities that protect the indemnified party from loss or damage resulting from a claim by a third party (i.e., someone who is not a party to the contract between the indemnified and the indemnifier); and
- **inter-party indemnity.** Indemnities that protect the indemnified party from loss or damage resulting from the indemnifying party's breach of contract or loss or damage resulting from a statement of fact made by the indemnifying party being false.

The obligation to indemnify under the common law arises upon the occurrence of a "trigger event". Common trigger events include loss or damage suffered because of:

- a breach of contract by the indemnifier;
- fault or negligence by the indemnifier;
- a misrepresentation by the indemnifier; and
- a claim by a third party against the indemnified.

Breach of contract

The "trigger event" for a remedy of compensation for loss or damage due to non-performance is the failure to perform an obligation. Similarly, liquidated damages are payable in respect of a failure to perform an obligation. So, the trigger event for a remedy of compensation for loss or damage or liquidated damages due to non-performance can be a breach of contract.

Incorrect statements of fact

If one party to a contract makes a statement of fact to the other party and that statement subsequently turns out to be false and the other party suffers loss or damage as a result, the party that suffers loss or damage may, among others, claim compensation for damages or rescission based on several legal reasonings.

A contract is subject to be rescinded when the consumer is told a statement regarding an important matter, thereby he or she is in the mistaken belief that the statement is true and enters into the contract. For another reasoning, if the notified fact is the basis for the conclusion of the contract and the other party is aware of this, the contract may be rescinded as a mistake. In addition, if a party intentionally tells a matter that is different from the fact, the court would more likely recognise a breach of the obligation to provide proper explanations.

Third-party claims

A clause such as the example below is sometimes used in contracts governed by Japanese law. However, its enforceability under Japanese law is uncertain.

If any legal proceeding is brought by a non-party to the agreement against a party in relation to a matter for which indemnification may be claimed against the other party, the party shall not admit or settle the claim of the third party without prior written consent of the other party.

Non-contractual wrongs

A clause for claiming damages for breach of non-contractual obligations, such as tort, is valid under Japanese law. However, in the case of clauses limiting liability, their application is denied to liability based on intent or gross negligence.

References

- Civil Code (Act No. 89 of April 27, 1896).

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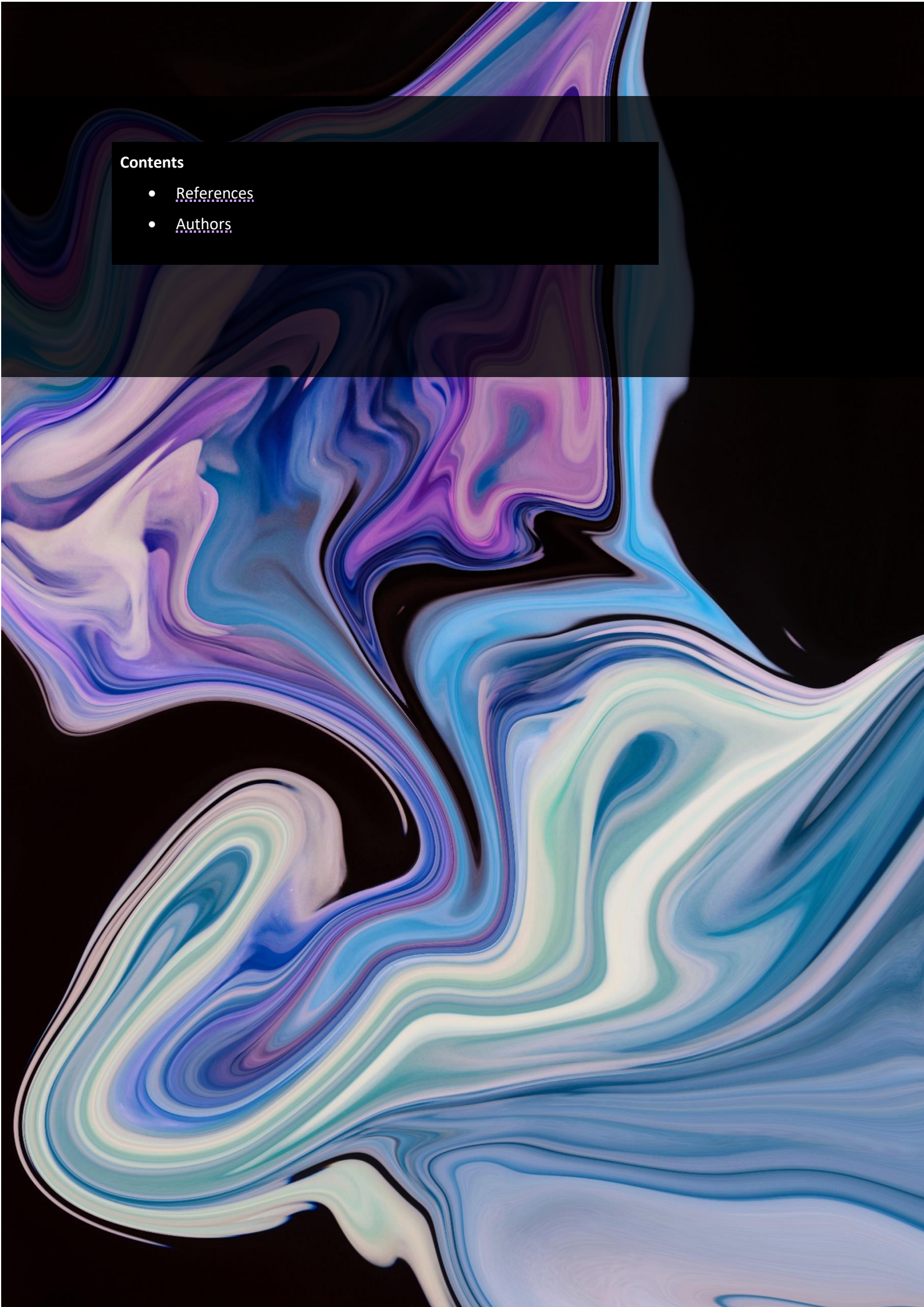
Malaysia

By Lee Lily @ Lee Eng Cher and Lim Yim Siew*

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* This article was prepared with the assistance of Sangghamitra Panadam Verapandian, Sara Jane Jayamana and Muhamad Rauf bin Mashod of Zaid Ibrahim & Co.



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Definition

Under Malaysian law, a “contract of indemnity” is “a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person”.¹⁶⁴

Malaysian law gives the following illustration of a “contract of indemnity”:

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of RM200. This is a contract of indemnity.

Purpose of a contract of indemnity

It is common for a contract of indemnity to be sought in the following circumstances:

- Where a party (the indemnifier) is better placed to control the risk which the other party (the indemnified) would otherwise have to bear. For instance, it is often that a buyer will seek for an indemnity from the seller of goods over the goods sold, mostly in relation to the conditions of the goods or any warranties given by the seller over the goods or where the goods are subjected to any intellectual property claims by a third party. By having an indemnity clause, the buyer can be compensated by the seller where these aspects are breached.
- Where the contract involves transactions such as share or business sale, it is common that an indemnity would be sought by the purchaser to protect itself against any specific identified areas of risks, such as tax liabilities or ongoing or anticipated litigation in relation to the target company.

Requirements of a contract of indemnity

The requirements of an enforceable contract of indemnity under Malaysian law are:

- a contract. The contract itself which contains the indemnity clause must satisfy the fundamental requirements of a contract under Malaysian law (including the existence of lawful consideration¹⁶⁵), failing which the contract (with the indemnity clause) would be void under Malaysian law.¹⁶⁶
- a promise by one party (the indemnifier) to the other (the indemnified) to save the indemnified from loss caused to the indemnified by:
 - the indemnifier; or
 - the conduct of another person.

Writing not required

Malaysian law does not require that an indemnity to be recorded in writing.

¹⁶⁴ Contracts Act 1950, section 77.

¹⁶⁵ Contracts Act 1950, section 24.

¹⁶⁶ If the consideration or object of the contract is unlawful, Malaysian law renders the contract void (see Contracts Act 1950, section 25). If an agreement does not have consideration, subject to certain exceptions, it will also be void under Malaysian law (see Contracts Act 1950, section 26).

Implied contracts of indemnity

A contract of indemnity could be implied. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongfully.¹⁶⁷

Terminology

In interpreting an indemnity, the Malaysian courts¹⁶⁸ have taken an objective approach whereby the courts are not bound by the label affixed onto that particular document nor be concerned with the subjective intention of the parties but their imputed objective¹⁶⁹ intention that is relevant. The duty of the courts is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.¹⁷⁰

Advantages of contracts of indemnity

Briefly, the advantages of a contract of indemnity (mostly to the benefit of the indemnified) are as follows:

- There is no legal requirement that a contract of indemnity be recorded in writing.
- A contract of indemnity provides a wider scope of claim for the indemnified party, such as loss caused by a third party, including any indirect or consequential losses (unless otherwise expressly excluded from the indemnity clause). In comparison with a party claiming for damages under a breach of contract, Malaysian law clearly states that compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.¹⁷¹
- The proof of damages (which falls on the party claiming for damages under a breach of contract) is removed whereby the indemnifier can be compelled to pay even before the indemnified party has discharged his liability, provided the liability of the indemnified party has become absolute. The indemnified party may enforce his right as soon as his liability to the third party has arisen, and, therefore, he may obtain relief before he had actually suffered loss.¹⁷²

¹⁶⁷ Contracts Act 1960, section 98.

¹⁶⁸ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15; *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] 6 CLJ 406.

¹⁶⁹ *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd.* [1994] 2 MLJ 754; *Hong Realty (Pte) Ltd v Chua Keng Mong* [1994] 3 SLR 819 82.

¹⁷⁰ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15; *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] 6 CLJ 406.

¹⁷¹ Contracts Act 1950, section 74(2).

¹⁷² *Wong Ai Sung v Orix Credit Malaysia Sdn. Bhd.* [2007] 4 CLJ 52, with reference to *Khetarpal v Madhukar Pictures* 65 IA 286, the Indian Court.

- The indemnified party is under no duty to mitigate its losses (unless otherwise specified in the contract). The Malaysian courts have ruled that in relation to a contract of indemnity the duty of taking steps to mitigate the losses is irrelevant as the parties are bound by the express terms and conditions of the contract.¹⁷³ In comparison with a party claiming for damages under a breach of contract, the Malaysian courts¹⁷⁴ have ruled that there is a duty on the said party to mitigate or minimise the damages.

Disadvantages of contracts of indemnity

Briefly, the disadvantages of a contract of indemnity (mostly on the indemnifier) are as follows:

- the indemnifier may be subjected to unknown and unlimited¹⁷⁵ liability. If the indemnity clause is widely drafted without limitation, the indemnifier may unnecessarily be subjected to unknown, unquantifiable and unlimited liability; and
- there is an assumption of full liability on the indemnifier even though there is no full liability or fault.¹⁷⁶ So, from the indemnifier's perspective, it is important that proper carve-outs are negotiated to reduce the indemnifier's risks.

Limitations of contracts of indemnity

A contract of indemnity will be unenforceable if:¹⁷⁷

- it is illegal/forbidden by a law;
- it is of such a nature that, if permitted, it would defeat any law;
- it is fraudulent;
- it involves or implies injury to the person or property of another, or the court regards it as immoral, or opposed to public policy.

There are restrictions on indemnities against losses caused by the indemnified's deliberate acts. An indemnity will be invalid if it was made by means of misrepresentation by the indemnified or with his knowledge and assent, or made by the indemnified knowingly keeping silent on material information.¹⁷⁸

¹⁷³ *AmBank (M) Bhd v Rev Engineering Worldwide (M) Sdn. Bhd. & Ors* [2021] 1 LNS 2035. Having said this, it is important to note that the Malaysian courts would consider each claim on a case-by-case basis based on the terms and circumstances surrounding the contract.

¹⁷⁴ *Pan Malaysian Pools Sdn. Bhd. v Kwan Tat Thai & Anor and other appeals* [2018] 4 CLJ 323.

¹⁷⁵ *Ooi Boon Leong v Citibank N.A.* [1984] 1 MLJ 222. It is important to note that in present time there is no statutory limitation in Malaysia on contractual provision to restrict or exclude the liability of one or both of the parties concerning indemnity and liability.

¹⁷⁶ *Sabah Shell Petroleum Co. Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel of the 'Borcos Takdir'* [2012] 1 LNS 1116.

¹⁷⁷ Contracts Act 1950, section 24.

¹⁷⁸ Contracts Act 1950, sections 95 and 96.

In matters in relation to the penalties in the contract, if a sum is named in a contract as the amount to be paid in such breach or if there is any other stipulation by way of penalty in the contract, the indemnified is entitled to receive from the indemnifier reasonable compensation not exceeding the amount of penalty stipulated.¹⁷⁹

Interpretation of contracts of indemnity

Contracts of indemnity are not subject to specific rules of interpretation under Malaysian law. For example, Malaysian law does not have a rule that where there is doubt as to the interpretation of a contract of indemnity, that ambiguity is to be resolved in favour of the indemnified.

Malaysian law's general rules for the interpretation of contracts apply equally to contracts of indemnity.

Trigger events in contracts of indemnity

Under Malaysian law, contracts for indemnity fall into two categories:

- **third-party indemnities.** Indemnities that protect the indemnified party from loss or damage resulting from a claim by a third party (i.e., someone who is not a party to the contract between the indemnified and the indemnifier); and
- **inter-party indemnities.** Indemnities that protect the indemnified party from loss or damage resulting from the indemnifying party's breach of contract or loss or damage resulting from a statement of fact made by the indemnifying party being false.

The obligation to indemnify arises upon the occurrence of a "trigger event". Common trigger events include loss or damage suffered because of:

- a breach of contract by the indemnifier;
- fault or negligence by the indemnifier;
- a misrepresentation by the indemnifier;
- a claim by a third-party against the indemnified; and
- a concealment by the indemnifier.¹⁸⁰

Breach of contract as trigger event

A contract of indemnity that is triggered on a breach of contract can become a claim for a debt (as opposed to a claim for damages). This is evident from a number of authorities which supported such argument or contention. In *Royscot Commercial Leasing Ltd v Ismail*,¹⁸¹ the claimant had argued that:¹⁸²

a claim under a contract of indemnity, such as this, is not a claim in damages at all, but is a claim in debt.... Accordingly, it should not be open to a person providing an indemnity to challenge his obligation to pay under the contract of indemnity by reference to principles relating to the assessment of damages for breach of contract which have no application to debts.

¹⁷⁹ Contracts Act 1950, section 75.

¹⁸⁰ Contracts Act 1950, section 96.

¹⁸¹ [1997] LC 70. See also F. Chukwu, 'The breach of contractual indemnities under English law – a debt claim or a damages claim?' (2020) 7(1) IALS Student Law Review 3-14.

¹⁸² F. Chukwu, 'The breach of contractual indemnities under English law – a debt claim or a damages claim?' (2020) 7(1) IALS Student Law Review 3-14, 7.

Common carve-outs from contracts of indemnity

Common “carve-outs” from contracts of indemnity are where the losses caused to the indemnified by the indemnifier are as a result of the indemnified party’s negligence, omission, default, fraud, wilful misconduct and breach of contract.

The common “carve-outs” listed have the following common characteristics:

- not within the indemnifier or indemnifying party’s control; and
- the indemnifier or indemnifying party would not want to incur more money and consequently limit the extent of its liability.

It would be reasonably unfair to hold the indemnifier or indemnifying party accountable for the indemnitee or indemnified party’s own action or omission, to which the indemnifier or indemnifying party has no power to prevent it from happening and consequently causing losses to the indemnitee or indemnified party. If they are not made as “carve-outs”, it would defeat the very purpose of upholding justice.

The indemnifier would usually exclude any indirect or consequential losses from the indemnity clause. This is because the indemnifier or indemnifying party would not want to incur more cost by trying to limit its liability as much as possible.

Limitation period for claims under contracts of indemnity

The limitation period for a claim under a contract of indemnity depends on what “trigger event” activates the obligation to indemnify.

Parties can modify these limitation periods by agreement by either shortening or extending the period. As per the case of *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar*,¹⁸³ the judge had to determine the nature of the claim before being able to determine at what point of time does time begins to run for the purpose of limitation.

Breach of contract as trigger event

Under Malaysian law, the limitation period for breach of contract claims is six years from the date on which the cause of action accrued.¹⁸⁴ So, a claim under a contract for indemnity that is triggered on a breach of the contract by the indemnifier expires six years from the date of breach.

Breach of tortious duty as trigger event

Under Malaysian law, the limitation period for tort-related claims is six years from the date on which the cause of action accrued.¹⁸⁵

A claim under a contract of indemnity that is triggered by the negligence of the indemnifier expires six years from the date of the suffering of loss.¹⁸⁶ As for personal injury or death, no known difference is found anywhere in the legal provisions.

¹⁸³ [2009] 4 MLJ 821.

¹⁸⁴ Limitation Act 1953 section 6(a).

¹⁸⁵ Limitation Act 1953 section 6(a).

¹⁸⁶ *AmBank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784.

In order to ascertain when the limitation period for indemnity begins to run, regard has to be given to the true nature of the promise made by one party to the other.¹⁸⁷

Breach of representation or warranty as trigger event

A breach of representation or warranty as trigger event would depend on the nature of the breach, i.e., whether the breach is contractual in nature or tortious in nature. Accordingly, the limitation period would follow the limitation period of the relevant type of breach.

Third-party claim as trigger event

There are currently no cases reported on the limitation period for a third-party claim as a trigger event for indemnity in Malaysia.

¹⁸⁷ Suhara Sidek, 'Malaysia - Indemnity Clauses In Share Sale Transactions' (*Convectus Law*, 29 November 2019 <<https://conventuslaw.com/report/malaysia-indemnity-clauses-in-share-sale/>>).

Claims under contracts of indemnity vs claims for breach of contract

The differences between a claim under a contract of indemnity and a claim for breach of contract are as follows:

	Claim under contract of indemnity	Damages for breach of contract
Amount	<p>The quantum of compensation recoverable under a contract of indemnity depends on the wording of the contract of indemnity.</p> <p>Malaysian law states that the indemnified can recover all damages which it may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.¹⁸⁸</p> <p>It is common for a contract of indemnity to cover indirect or consequential losses or damage (unless otherwise expressly excluded from the contract of indemnity).¹⁸⁹</p>	<p>The party claiming breach is entitled to recover from the breaching party compensation for any loss or damage caused to it, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.¹⁹⁰</p> <p>The party claiming breach is not entitled to recover from the breaching party any remote and indirect losses or damage sustained by reason of the breach.¹⁹¹</p>

¹⁸⁸ Contracts Act 1950 section 78(a).

¹⁸⁹ *Wong Ai Sung v Orix Credit Malaysia Sdn. Bhd.* [2007] 4 CLJ 52, with reference to *Khetarpal v Madhukar Pictures* 65 IA, the Indian Court.

¹⁹⁰ Contracts Act 1950 section 74(1).

¹⁹¹ Contracts Act 1950 section 74(2).

	Claim under contract of indemnity	Damages for breach of contract
Mitigation	The indemnified party has no duty to mitigate its losses (unless otherwise specified in the contract). The Malaysian courts have ruled that in relation to a contract of indemnity that the duty of taking steps to mitigate the losses is irrelevant as the parties are bound by the express terms and conditions of the contract. ¹⁹²	The party claiming breach has a duty to take all reasonable precautions to reduce the amount of loss or damage arising from the other party's breach of contract. Any loss or damage, which with the exercise of reasonable care, the party claiming breach could have avoided, is deemed by Malaysian law to be too remote to be recoverable. ¹⁹³
Proof	The indemnifier can be compelled to compensate the indemnified even before the indemnified has discharged his liability, provided the indemnifier's liability has become absolute. ¹⁹⁴ The indemnified can sue for specific performance of the contract of indemnity even before he incurs damage, provided that the indemnified shows that it has incurred an absolute liability and the contract of indemnity covers that liability. ¹⁹⁵	The party claiming breach must prove the breach of contract and the fact and the amount of losses sustained by the breach. ¹⁹⁶

¹⁹² *AmBank (M) Bhd v Rev Engineering Worldwide (M) Sdn. Bhd. & Ors* [2021] 1 LNS 2035. Having said this, it is important to note that the Malaysian courts would consider each claim on a case-by-case basis based on the terms and circumstances surrounding the contract.

¹⁹³ *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 CLJ 323.

¹⁹⁴ *Wong Ai Sung v Orix Credit Malaysia Sdn Bhd* [2007] 4 CLJ 52, with reference to *Khetarpal v Madhukar Pictures* 65 IA 286, the Indian Court.

¹⁹⁵ *Wong Ai Sung v Orix Credit Malaysia Sdn Bhd* [2007] 4 CLJ 52, with reference to *Khetarpal v Madhukar Pictures* 65 IA 286, the Indian Court.

¹⁹⁶ *Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd* [2021] 10 CLJ 31; *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2003] 4 CLJ 785.

Claim under contract of indemnity

Damages for breach of contract

Under a third-party indemnity, the indemnified can enforce its right as soon as its liability to the third party has arisen. That is, the indemnified can obtain relief before it has actually suffered loss. So, the indemnified may, in an appropriate case, obtain an order compelling the indemnifier to set aside a fund out of which the liability may be met or to pay the amount due directly to the third party, or even when the indemnified is under no liability to the third party, as is the case in contracts of mere indemnity, to the indemnified party. Nor is the indemnified precluded from obtaining relief by the fact that its liability to the third party cannot be effectively enforced against it (the indemnified).¹⁹⁷

Limitation period

It would depend on what “trigger event” takes place to activate the obligation to indemnify.

As mentioned earlier, the parties can modify these limitation periods by agreement by either shortening or extending the periods.

An action founded on contract shall not be brought after the expiration of six years from the date of breach.¹⁹⁸

¹⁹⁷ *Wong Ai Sung v Orix Credit Malaysia Sdn Bhd* [2007] 4 CLJ 52, with reference to *Khetarpal v Madhukar Pictures* 65 IA 286, the Indian Court.

¹⁹⁸ Limitation Act 1953, section 6(1).

	Claim under contract of indemnity	Damages for breach of contract
Costs	<p>The indemnified can recover:</p> <ul style="list-style-type: none"> all costs which it may be compelled in any suit if (in bringing or defending it) it did not contravene the orders of the indemnifier, and acted as it would have been prudent for it to act in the absence of any contract of indemnity, or if the indemnifier authorised him to bring or defend the suit;¹⁹⁹ any sums which it may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the indemnifier, and was one which it would have been prudent for the indemnified to make in the absence of any contract of indemnity, or if the indemnifier authorised him to compromise the suit.²⁰⁰ <p>The indemnifier must usually pay part of the indemnified's legal costs in Malaysian litigation or arbitral proceedings.²⁰¹</p>	<p>The party found to be liable for the breach of contract would have to bear the costs of legal proceedings in addition to any damages for breach of contract.</p> <p>In Malaysia, the general rule is that the losing party in a suit will bear the costs for legal proceedings.²⁰²</p>

¹⁹⁹ Contracts Act 1950, section 78(b).

²⁰⁰ Contracts Act 1950, section 78(c).

²⁰¹ Contracts Act 1950, section 78 and *Bond M & E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd, third party)* [2017] 7 MLJ 732.

²⁰² Order 59 Rule 3(2) of the Rules of Court 2012.

Claim under contract of indemnity

Damages for breach of contract

Legal proceedings

For this, there is no current case law or statute provided in Malaysia that seems to suggest specifically either one or the other. However, looking at the English position, there are two conflicting judgments in 2014 from the High Court of England and Wales. The decision in the case of *ABM Amro Commercial Finance plc v Ambrose McGinn*²⁰³ took the stand that a breach of an indemnity gave rise to debt claims whereas in *Durley House Limited v Firmdale Hotels plc*,²⁰⁴ it was held that breaches of indemnities gave the indemnitee a right to claim for damages. (As of now, there has been no reference of these two cases in Malaysian case law).

The party claiming breach must bring legal proceedings to recover damages for breach of contract from the other party.

²⁰³ [2014] EWHC 1674 (Comm).

²⁰⁴ [2014] EWHC 2608 (Ch).

Contracts of indemnity vs contracts of guarantee

Malaysian law defines a “contract of guarantee” as a contract to perform the promise, or discharge the liability, of a third person in case of his default.²⁰⁵ The person who gives the guarantee is called the “surety”; the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.²⁰⁶

The main differences between a contract of indemnity and a “guarantee” have been further explained by the Malaysian courts as follows:

- In a contract of indemnity, the promisor undertakes an original and independent obligation to indemnify the other party against any loss.²⁰⁷ It is nothing more than a contract by one party to keep the other harmless against loss.²⁰⁸ The obligation has no reference in law to the debt of another. In the case of an indemnity, two parties may be sufficient.²⁰⁹
- In a contract of guarantee, it is a collateral contract by which a guarantor/surety undertakes to answer for the default of the principal debtor/borrower who is primarily liable to the creditor. The guarantor only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. In the case of a guarantee, there must be three parties involved; the surety, the principal debtor/borrower and the creditor.²¹⁰

Power to provide a contract of indemnity

It is unlikely that a body corporate indemnifier may not have the power to give an indemnity to a contract party based on the following:

- Malaysian law²¹¹ provides that any provision, whether contained in the constitution or in any contract with a company or otherwise, for exempting any officer (which includes director) or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void; and
- under Malaysian law,²¹² a company has the full capacity to carry on or undertake any business or activity including, to sue and be sued and to do any act which it may do or to

²⁰⁵ Contracts Act 1950, section 79.

²⁰⁶ Contracts Act 1950, section 79.

²⁰⁷ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15.

²⁰⁸ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15.

²⁰⁹ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15, *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] 6 CLJ 406.

²¹⁰ *GJ Consultancy Sdn. Bhd. v Gan Teck Lim* [2021] 7 CLJ 738; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15; *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15, *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] 6 CLJ 406.

²¹¹ Companies Act 2016, section 288.

²¹² Companies Act 2016, section 21.

enter into transactions. This would include providing an indemnity to a contract party. Where a company provides an indemnity, the director's risk would be diminished if the director is able to meet the requirements under section 289 of the Companies Act 2016 which provides the circumstances where a director can be indemnified by the company, namely:

- for any costs incurred by him or the company in respect of any proceedings:
 - that relate to the liability for any act or omission in his capacity as the director; and
 - in which judgment is given in favour of the director or in which the director is acquitted or in which the director is granted relief under the Companies Act 2016, or where proceedings are discontinued or not pursued.
- for any liability to any person, other than the company, for any act or omission in his capacity as the director;
- for any costs incurred by that director in defending or settling any claim or proceedings relating to any such liability except:
 - any liability of the director to pay a fine imposed in criminal proceedings; or a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature, however arising; or
 - any liability incurred by the director in defending criminal proceedings in which he is convicted; or in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him; or
 - in connection with an application for relief under the Companies Act 2016.

Regulatory approvals of contracts of indemnity

Malaysian law does not require that contracts of indemnity be approved or registered with any regulatory authority. It does not matter whether the contract of indemnity is granted in favour of a foreign entity.

Waiver of contracts of indemnity

Currently, neither case law nor statutes in Malaysia have stated whether indemnity may be waived expressly or impliedly. This is also uncharted waters in other jurisdictions too.

Survival of obligation to indemnify on termination of the contract

Whether an obligation to indemnify survives termination of the contract in which it is contained generally depends on the terms of that contract. That is, whether the contract states that the obligation to indemnify will survive the expiry or termination of the contract.

In some instances, the indemnified party may negotiate for the indemnity clause to be valid for a certain period of years after the expiry or termination of the contract.

Where the contract is silent on the survival of the obligation to indemnify and the indemnity covers claims arising from *breach of contract or tort-related claims*, the indemnifier may still bring actions under the indemnity clause post expiry or termination of the contract, provided the claim is brought

before the expiration of the relevant limitation period under Malaysian law. Under Malaysian law,²¹³ actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued, i.e., the date of breach (this would mean that the limitation period would start from the date of breach of contract, and in cases of tort-related claims, when the tort took place).

If there are no clauses stipulated in the contract, the likely dispute would be settled through a legal process such as mediation or arbitration or through the Malaysian courts depending on the jurisdiction clause of the contract.

Effect of insolvency of the indemnifier

Where an indemnifier enters insolvency, all of his property²¹⁴ is vested under:

- the Director General of Insolvency, if the indemnifier is an individual;²¹⁵ or
- the liquidator, if the indemnifier is a company.²¹⁶

Under Malaysian law, a person's "property" includes "obligations" (whether present or future, vested or contingent).

Any claims by the indemnified party over the indemnity given by the insolvent indemnifier would then be subjected to Malaysian insolvency rules and laws.

Transfer

The indemnified (as assignor) may assign the benefit of a contract of indemnity (the legal chose in action) to a third party (the assignee). To do so, the assignment must satisfy the requirements of an "absolute assignment" under Malaysian law.²¹⁷

In establishing an absolute assignment,²¹⁸ the following requirements must be met:

- there must be assignment in writing under the hand of the assignor which assigned to the assignee any debt or other legal chose in action;
- the assignment is absolute and not by way of charge only; and
- express notice in writing of such assignment was given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action.

²¹³ Limitation Act 1953, section 6(a).

²¹⁴ Section 2 of the Insolvency Act 1967 defines "property" to include money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

²¹⁵ Insolvency Act 1967, section 8.

²¹⁶ Companies Act 2016, section 483.

²¹⁷ Civil Law Act 1956, section 4(3).

²¹⁸ As summarised in *Progressive Insurance Bhd v Ministry of Defence Malaysia* [2021] 1 LNS 2072.

Where there is an absolute assignment, the indemnity would be deemed to have been effectual in law to pass and transfer the benefits to the assignee. On the other hand, where there is no absolute assignment, such liability under the indemnity would continue to be borne by the original indemnifier.

Under Malaysian law,²¹⁹ when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. So, if the (original) indemnifier assigns its obligation under the indemnity to a third-party assignee, the indemnified cannot afterwards enforce the contract of indemnity against the original indemnifier.

However, the Malaysian courts would look at the terms of the contract between the assignor and the assignee. In addition, there must be performance in whole (and not in part) by the third party before the original indemnifier can refuse performance under the contract of indemnity, failing which the indemnified party is not estopped from bringing an action against the original indemnifier.²²⁰

For novation, in the case of *Puncak Alam Housing Sdn. Bhd. (formerly known as Bukit Cerakah Development Sdn. Bhd.) v Menta Construction Sdn. Bhd. & Anor*,²²¹ the Court of Appeal referred to a few cases on novation:

Salleh Abas LP in *Lyl Hooker Sdn. Bhd. v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52, at p 53 aptly described 'novation' in these erudite terms:

Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished (see Chitty on Contract, Vol 1, (1983 Ed), at paras 1315–1316).

Another case that was referred to is *Malaysian International Merchant Bankers Bhd v Datuk Mohd Salleh & Anor*²²² where Gunn Chit Tuan J (as he then was) explained the meaning of “novation” in this way:

Novation, no doubt, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter is discharged. Usually, but not necessarily, a novation takes the form of the introduction of a new party to the new contract and the discharge of a person who was party to the old contract.

²¹⁹ Civil Law Act 1956, section 42.

²²⁰ *Seagate Global Trading Sdn. Bhd. v Pelita Maintenance Resources Sdn. Bhd. & Ors* [2019] 1 LNS 1338.

²²¹ *Puncak Alam Housing Sdn. Bhd. (formerly known as Bukit Cerakah Development Sdn. Bhd.) v Menta Construction Sdn. Bhd. & Anor* [2014] 1 MLJ 287.

²²² *Malaysian International Merchant Bankers Bhd v Datuk Mohd Salleh & Anor* [1988] 1 CLJ (Rep) 786 at p 792.

Also, the Court of Appeal referred to what Low Hop Bing J (later JCA) in *Kah Seng Construction Sdn. Bhd. v Selsin Development Sdn. Bhd.*²²³ had to say about “novation” at p 454:

Pollock & Mulla in *Indian Contract and Specific Relief Acts* (10th Ed), p 501 sets out the requirements that must be satisfied before a party can successfully show that a contract has been varied pursuant to s 63, viz:

- (a) firstly, the variation of the contract may be shown by express agreement; and
- (b) secondly, if variation is to come about by a course of conduct, the variation was intended and understood by both parties.

The burden is on the plaintiff to establish that the above requirements are fulfilled in order to bring about the operation of the principles of novation.

The Court of Appeal looked into the case of *Mawar Awal (M) Sdn. Bhd. v Kepong Management Sdn. Bhd.*²²⁴ at p 150, and made reference to “novation” in this way:

(38) It is ideal to mention that s 63 of the Contracts Act 1950 on novation is of wider import. Indeed this was the view held by Visu Sinnadurai J in *Polygram Records Sdn. Bhd. v The Search* [1994] 3 MLJ 127; [1994] 3 CLJ 806; [1994] 3 AMR 2060 and I certainly share his view. His Lordship Visu Sinnadurai J in that case aptly said:

Section 63 is not limited in its scope to novation as it is understood under English Law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force.

The Court of Appeal also made reference to Halsbury's Laws of England, Vol 8, (3rd Ed) and defined “novation” in this way:

Novation is, in effect, a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily, a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction, and thus affords a defence to any action upon the old contract.

For novation to ensue there must be not only the substitution of some other obligation for the original one, but also the intention or animus novandi.

Thus, based on the above, it can be deduced that with regard to novation, the requirements would be that:

- (a) there must be a new contract where the parties have rescinded the previous one; and
- (b) there must be intention of the parties to do so.

Under Malaysian law, it provides that if the parties to a contract agree to substitute a new contract for it, the original contract need not be performed. There is no definition or requirements provided in the Contracts Act 1950.

²²³ *Kah Seng Construction Sdn. Bhd. v Selsin Development Sdn. Bhd.* [1996] MLJU 359; [1997] 1 CLJ Supp 448.

²²⁴ *Mawar Awal (M) Sdn. Bhd. v Kepong Management Sdn. Bhd. & Anor* [2005] 6 MLJ 132.

References

Statutes

- Civil Law Act 1956.
- Companies Act 2016.
- Contracts Act 1950.
- Insolvency Act 1967.
- Limitation Act 1953.

Cases

Malaysia

- *AmBank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784.
- *AmBank (M) Bhd v Rev Engineering Worldwide (M) Sdn Bhd & Ors* [2021] 1 LNS 2035.
- *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2003] 4 CLJ 785.
- *Bank Pembangunan Malaysia Bhd v Spring Hill Bioventures Sdn. Bhd.* [2020] 4 CLJ 15.
- *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 821.
- *GJ Consultancy Sdn Bhd v Gan Teck Lim* [2021] 7 CLJ 738.
- *Kah Seng Construction Sdn. Bhd. v Selsin Development Sdn. Bhd.* [1996] MLJU 359; [1997] 1 CLJ Supp 448.
- *Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd* [2021] 10 CLJ 31.
- *Malaysian International Merchant Bankers Bhd v Datuk Mohd Salleh & Anor* [1988] 1 CLJ (Rep) 786.
- *Mawar Awal (M) Sdn. Bhd. v Kepong Management Sdn. Bhd. & Anor* [2005] 6 MLJ 132.
- *Ooi Boon Leong v Citibank N.A.* [1984] 1 MLJ 222.
- *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 CLJ 323.
- *Progressive Insurance Bhd v Ministry of Defence Malaysia* [2021] 1 LNS 2072
- *Puncak Alam Housing Sdn. Bhd. (formerly known as Bukit Cerakah Development Sdn. Bhd.) v Menta Construction Sdn. Bhd. & Anor* [2014] 1 MLJ 287.
- *Royscot Commercial Leasing Ltd v Ismail* [1997] LC 70.
- *Sabah Shell Petroleum Co. Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel of the 'Borcos Takdir'* [2012] 1 LNS 1116.
- *Seagate Global Trading Sdn. Bhd. v Pelita Maintenance Resources Sdn. Bhd. & Ors* [2019] 1 LNS 1338.
- *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1996] 3 CLJ 26.
- *The Pacific Bank Bhd v Vimla Textiles & Ors* [2004] 6 CLJ 406.
- *Wong Ai Sung v Orix Credit Malaysia Sdn. Bhd.* [2007] 4 CLJ 52.

England and Wales

- *ABM Amro Commercial Finance plc v Ambrose McGinn* [2014] EWHC 1674 (Comm).
- *Durley House Limited v Firmdale Hotels plc* [2014] EWHC 2608 (Ch).

India

- *Khetarpal v Madhukar Pictures* 65 IA 286.

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The content and views of the authors set forth herein do not necessarily reflect those of Jones Day and should not be construed as legal advice but for general information purposes.

Definition

New York law recognises an indemnity as the right of one party to shift loss to another.²²⁵ Indemnification may be found expressly or impliedly in a contract.²²⁶

Express indemnification

Express indemnification is typically the result of “an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party”,²²⁷ for losses due to the other party’s contractual breaches, or for other specified losses.²²⁸

Implied indemnification

Implied indemnification is limited to instances where an indemnitee owes a duty—independent of the contract—to the indemnitor.²²⁹ Implied indemnification allows a party that discharged a duty to recover from another party that either actually or should have discharged the duty.²³⁰ As an example, implied indemnification may allow a general contractor or builder to “shift all liability to a subcontractor who ... actually caused the loss.”²³¹

Purpose

An indemnity allows parties to allocate risks. An indemnification provision is typically sought where the indemnifier is in a better position to control particular risks.²³²

The principal advantage of an indemnity is the ability to shift liability to another party.²³³ The principal disadvantage of an indemnity is that enforcement of an indemnification right (if contested) requires court involvement, and that process can be costly.²³⁴

²²⁵ *Bellevue S. Assocs. v. HRH Constr. Corp.*, 579 N.E.2d 195, 200 (N.Y. 1991).

²²⁶ *Bellevue S. Assocs. v. HRH Constr. Corp.*, 579 N.E.2d 195, 200 (N.Y. 1991).

²²⁷ *Genger ex rel. AG Props. Co. v. Sharon*, 910 F. Supp. 2d 581, 587 (S.D.N.Y. 2012) (interpreting New York law).

²²⁸ *Wilmington Tr. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 58 N.Y.S.3d 358, 359 (N.Y. App. Div. 1st Dept. 2017); *Wind Point Partners VII-A, L.P. v. Hoya Corp.*, 128 N.Y.S.3d 186, 188 (N.Y. App. Div. 1st Dept. 2020).

²²⁹ *See Raquet v. Braun*, 681 N.E.2d 404 (N.Y. 1997).

²³⁰ *D’Ambrosio v. City of New York*, 435 N.E.2d 366 (N.Y. 1982).

²³¹ *Vista Fee Assocs. v. Teachers Ins. & Annuity Ass’n of Am.*, 693 N.Y.S.2d 554, 557–58 (N.Y. App. Div. 1st Dept. 1999).

²³² *See, e.g., Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 900 N.Y.S.2d 246 (N.Y. App. Div. 1st Dept. 2010) (concerning a lending group indemnifying a loan agent).

²³³ 28A N.Y. Prac., Contract Law § 26:16.

²³⁴ 28A N.Y. Prac., Contract Law § 26:16.

Indemnities can have other benefits, depending on the negotiated terms of the indemnity.²³⁵ For example, parties may contract to recover losses that are not direct, whereas absent an indemnity, damages may be limited to direct losses.²³⁶ Although indemnity holders must generally reasonably mitigate losses, parties may agree to limit the scope of what represents reasonable mitigation.²³⁷

Requirements

Clear and unambiguous intention

New York law generally provides full meaning and effect to all material provisions in contracts, including indemnification clauses.²³⁸ As with all contracts, for an indemnity agreement or contractual provision to be valid and enforceable, the intent of the parties must be clear and unambiguous.²³⁹ Certain actions may not be indemnified under New York law as a public policy matter.

Writing not required

Subject to the statute of frauds, indemnities may be agreed to orally and need not be in writing, though putting an indemnity in writing is typically the more prudent course of action.²⁴⁰

Implied indemnification

Implied indemnification turns on whether the indemnitor possessed responsibility for the wrong and whether the indemnitee participated in the wrong.²⁴¹ Parties that participated in the wrongdoing will not receive the benefit of implied indemnification.²⁴² Parties participating in the wrongdoing may instead seek contribution, which allocates liability according to the share of responsibility of the wrong.²⁴³

Terminology

Indemnity clauses need not be expressed in specific words.²⁴⁴ Rather, indemnities need only be “clearly implied from the language and purpose of the entire agreement and surrounding facts and circumstances.”²⁴⁵

²³⁵ *Gillmore v. Duke/Fluor Daniel*, 634 N.Y.S.2d 588, 590 (N.Y. App. Div. 4th Dept. 1995).

²³⁶ *Hooters of Manhattan, Ltd. v. 211 W. 56 Assocs.*, 857 N.Y.S.2d 112, 113 (N.Y. App. Div. 1st Dept. 2008).

²³⁷ *Town of Poland v. Transamerica Ins. Co.*, 385 N.Y.S.2d 987, 990 (N.Y. App. Div. 4th Dept. 1976); see *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V.*, 920 N.Y.S.2d 241 (N.Y. Sup. Ct. 2010).

²³⁸ *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 323 (N.Y. 2007).

²³⁹ *Bradley v. Earl B. Feiden, Inc.*, 864 N.E.2d 600, 605 (N.Y. 2007).

²⁴⁰ *See Tucci v. Talon Seafood S., Inc.*, 812 N.Y.S.2d 607, 608 (N.Y. App. Div. 2d Dept. 2006).

²⁴¹ *See Rosado v. Proctor & Schwartz, Inc.*, 483 N.Y.S.2d 271, 275 (N.Y. App. Div. 1st Dept. 1984).

²⁴² *Trs. of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 492 N.Y.S.2d 371, 375 (N.Y. App. Div. 1st Dept. 1985).

²⁴³ *Trs. of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 492 N.Y.S.2d 371, 375 (N.Y. App. Div. 1st Dept. 1985).

²⁴⁴ *Hogeland v. Sibley, Lindsay & Curr Co.*, 366 N.E.2d 263 (N.Y. 1977).

²⁴⁵ *Hooper Assocs. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491–92 (N.Y. 1989).

Interpretation

New York courts strictly construe indemnity clauses “to avoid reading in ... dut[ies] which the parties did not intend to be assumed.”²⁴⁶ Courts thus limit the scope of indemnity clauses to that which is clear from the contractual language.²⁴⁷ Ambiguities are construed against the drafter of the indemnity clause.

Restrictions

Negligence

Generally, parties may agree to indemnify another party for its own negligence.²⁴⁸ However, a party may not shield itself from gross negligence.²⁴⁹ Additionally, statutory law voids agreements purporting to indemnify building contractors against their own negligence.²⁵⁰

Negligence and gross negligence differ in degree and kind.²⁵¹ Negligence usually occurs when a person acts carelessly, and either directly or indirectly causes some type of injury or harm to another person.²⁵² Gross negligence is conduct that either is intentional or “evinces a reckless indifference to the rights of others.”²⁵³

Public policy

Public policy and statutory law void certain indemnity agreements.

Punitive damages

Agreements purporting to indemnify the indemnitee for punitive damages directed at its conduct are generally void under New York law.²⁵⁴

Intentional wrongdoing

Agreements purporting to indemnify the indemnitee for damages related to its intentional wrongdoings are generally void under New York law.²⁵⁵

Criminal or illegal conduct

Additionally, parties may not agree to indemnify criminal or illegal conduct.²⁵⁶

²⁴⁶ *Hooper Assocs. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (N.Y. 1989); see *Mejia v. Trs. of Net Realty Holding Tr.*, 759 N.Y.S.2d 91, 93 (N.Y. App. Div. 2d Dept. 2003).

²⁴⁷ *Hooper Assocs. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (N.Y. 1989).

²⁴⁸ See *Sherry v. Wal-Mart Stores E., L.P.*, 889 N.Y.S.2d 251 (N.Y. App. Div. 2d Dept. 2009).

²⁴⁹ See *Adler v. Columbia Sav. & Loan Ass’n*, 811 N.Y.S.2d 737, 738 (N.Y. App. Div. 2d Dept. 2006) (citing *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365 (N.Y. 1992)).

²⁵⁰ N.Y. GEN. OBLIG. § 5-322.1.

²⁵¹ *Colnaghi, U.S.A., Ltd. v. Jewelers Protec. Services, Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993).

²⁵² *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1369 (N.Y. 1992).

²⁵³ *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1371 (N.Y. 1992); Restatement (Second) of Contracts § 195 (1981).

²⁵⁴ *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 813–14 (N.Y. 1981).

²⁵⁵ *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 813–14 (N.Y. 1981).

²⁵⁶ *Feuer v. Menkes Feuer, Inc.*, 187 N.Y.S.2d 116 (N.Y. App. Div. 1st Dept. 1959).

Trigger events

An indemnification may be contingent upon a specified event, including breach of contract or claims filed by third parties.²⁵⁷ Parties may contract for multiple actions to be trigger events and, subject to the limitations discussed elsewhere herein, New York courts will generally defer to the parties' agreement.²⁵⁸

Ordinarily, a contractual indemnification claim "only accrues once the indemnitee has suffered a loss, i.e., made a payment."²⁵⁹ However, because contractual indemnification arises from contract, the parties are free within the limits of public policy to agree that the indemnitee need not make payment before seeking indemnification.

Common carve-outs

Given the restrictions imposed on indemnities under New York law, it is common for the parties to exclude from the indemnity liability for:²⁶⁰

- gross negligence;
- punitive damages;
- damages related to intentional wrongdoings or fraud; and
- criminal or illegal conduct.

Limitation period

Under New York law, indemnification claims generally accrue when "the party seeking indemnification has made payment to the injured person" or otherwise suffered an indemnifiable loss, and indemnification claims are governed by the same six-year statute of limitations as other causes of action based on contract.²⁶¹ The parties to a contract may alter this time period by agreement, and it is not uncommon to shorten the time period to pursue a claim for indemnification under a contract.²⁶²

Indemnities vs claims for breach of contract

Contractual indemnities, unlike damages, are "not dependent upon the legislative will."²⁶³ Unlike the remedies available for breach of contract as a matter of law, parties are free to bargain for their desired terms and scope of liability.²⁶⁴ In addition, unlike implied indemnification, parties may agree to express indemnification even for events they partly cause.²⁶⁵

²⁵⁷ *Erickson Air-Crane Inc. v. EAC Holdings, L.L.C.*, 927 N.Y.S.2d 320, 320 (N.Y. App. Div. 1st Dept. 2011).

²⁵⁸ See, e.g., *Gell-Tejada v. Macy's Retail Holding, Inc.*, 984 N.Y.S.2d 345, 346 (N.Y. App. Div. 1st Dept. 2014).

²⁵⁹ *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 188 (2d Cir. 2014).

²⁶⁰ See *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 509 (N.Y. 1994); *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131, 145 (S.D.N.Y. 2004).

²⁶¹ *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, 125 (S.D.N.Y. 2016).

²⁶² *Newmont Mining Corp. v. AngloGold Ashanti Ltd.*, 344 F. Supp. 3d 724, 748 (S.D.N.Y. 2018).

²⁶³ *McDermott v. City of New York*, 406 N.E.2d 460, 462 (N.Y. 1980).

²⁶⁴ *McDermott v. City of New York*, 406 N.E.2d 460, 462 (N.Y. 1980).

²⁶⁵ See *Szalkowski v. Asbestospray Corp.*, 686 N.Y.S.2d 243, 246 (N.Y. App. Div. 3d Dept. 1999).

The differences between an indemnity and a claim for breach of contract are as follows:

	Indemnity payment for loss	Damages for breach
Amount	If the contractual language is “unmistakably clear”, then the parties should be held to the language of their promise to indemnify, which includes the allocation and amount of damages. ²⁶⁶	Damages are limited to losses caused by the breach which were “foreseeable and probable”. ²⁶⁷
Mitigation	Duty to reasonably mitigate damages exists, barring an agreement that limits the scope of reasonable mitigation. ²⁶⁸	Duty to reasonably mitigate damages exists. ²⁶⁹
Proof	The party needs to prove that the trigger event has occurred and whatever else the contract requires to establish an indemnity claim. ²⁷⁰	The party needs to prove the breach of contract as well as the fact and the amount of the losses caused by the breach. ²⁷¹
Limitation period	Six years ²⁷²	Six years ²⁷³
Costs	The court will uphold a promise from one party to indemnify the other’s legal fees only if the “intention to do so is unmistakably clear from the language of the promise”. ²⁷⁴	There is generally no right to attorney fees. ²⁷⁵
Legal proceedings	An indemnity claim requires legal proceedings to be initiated. ²⁷⁶	A breach of contract claim requires legal proceedings to be initiated.

Indemnities vs guarantees

An indemnity differs from a guarantee in that an indemnity is a contractual promise of primary liability.²⁷⁷ Conversely, a guarantee is generally a contractual promise of secondary liability.²⁷⁸ The obligation of the guarantor generally arises only after the party primarily liable defaults.²⁷⁹

²⁶⁶ *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989).

²⁶⁷ *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 130 (N.Y. 2008).

²⁶⁸ *Town of Poland v. Transamerica Ins. Co.*, 385 N.Y.S.2d 987, 990 (N.Y. App. Div. 4th Dept. 1976); see *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V.*, 920 N.Y.S.2d 241 (N.Y. Sup. Ct. 2010).

²⁶⁹ *Mohegan Lake Motors, Inc. v. Maoli*, 559 F. Supp. 3d 323, 346 (S.D.N.Y. 2021).

²⁷⁰ *Erickson Air-Crane Inc. v. EAC Holdings, L.L.C.*, 927 N.Y.S.2d 320, 320 (N.Y. App. Div. 1st Dept. 2011).

²⁷¹ *Gertler v. Davidoff Hutcher & Citron LLP*, 186 A.D.3d 801, 805 (N.Y. App. Div. 2d Dept. 2020).

Both indemnities and guarantees, however, are based on the contractual terms the parties agree to and will generally be enforced whether called an indemnity or a guarantee.

	Indemnity	Guarantee
Formal requirements	Subject to the statute of frauds, indemnities may be agreed to orally and need not be in writing. ²⁸⁰	Guarantees must be in writing. ²⁸¹
Nature of liability	An indemnity is a primary obligation. Indemnitors are primarily liable for losses and events in scope of the indemnity. ²⁸²	A guarantee is generally a secondary obligation (if not otherwise specified in the guarantee contract); guarantors are secondarily liable after the primary obligor has defaulted. ²⁸³
Extent of liability	Liability for indemnitors extends only to obligations that the indemnitee was obliged to pay. ²⁸⁴	Liability for guarantors extends only to the obligations of the primary obligor. ²⁸⁵
Variation	Variation of the primary underlying contract will not discharge the indemnity, if consistent with the intentions of the parties. ²⁸⁶	Variation of the obligation guaranteed generally releases the guarantor from the modified liability (if not otherwise specified in the guarantee contract). ²⁸⁷

²⁷² *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, 125 (S.D.N.Y. 2016).

²⁷³ *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, 125 (S.D.N.Y. 2016).

²⁷⁴ *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (N.Y. 1989).

²⁷⁵ *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 519, 344 N.E.2d 391, 394 (N.Y. 1976).

²⁷⁶ 28A N.Y. Prac., Contract Law § 26:16.

²⁷⁷ *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁷⁸ *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁷⁹ *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁸⁰ *Tucci v. Talon Seafood S., Inc.*, 812 N.Y.S.2d 607, 608 (N.Y. App. Div. 2d Dept. 2006).

²⁸¹ N.Y. GEN. OBLIG. § 5-701.

²⁸² *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁸³ *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁸⁴ 23 N.Y. Jur. 2d Contribution, Etc. § 133.

²⁸⁵ *Arlona Ltd. Partn. v. 8th of January Corp.*, 857 N.Y.S.2d 208, 209 (N.Y. App. Div. 2d Dept. 2008).

²⁸⁶ *Rovnak v. Union Carbide Corp., Linde Div.*, 407 N.Y.S.2d 323, 325 (N.Y. App. Div. 4th Dept. 1978).

²⁸⁷ *Coburn Corp. of Am. v. Orr*, 304 N.Y.S.2d 345, 349 (N.Y. Civ. Ct. 1969).

Default

Indemnities require indemnitors to assume liability regardless of the indemnitee's liability.²⁸⁸

Guarantees are a promise to assume liability after the default of the primary obligor.²⁸⁹

Regulatory approvals

New York law does not mandate regulatory approval for indemnities given to foreign entities.²⁹⁰ Nor does New York law require that indemnities be registered.

Power to provide an indemnity

Whether a corporate officer or another representative may contract for an indemnity depends on their scope of authority.²⁹¹ If an officer or representative holds a position that would ordinarily possess the ability to contract for an indemnity or the contracting is consistent with the general scope of authority of the officer or representative, a counterparty may reasonably rely on the authority of the officer or representative to enter into indemnity contracts.²⁹²

New York law does not impose a duty on contracting parties to inquire into an indemnifier's actual authority.²⁹³ However, to protect against the risk of an indemnifier lacking requisite contracting authority, parties may verify the authority through corporate governing documents.²⁹⁴ Parties may also seek approval from more senior officers or a board of directors.

If an officer or representative in fact lacks authority to contract for an indemnity, the risk of loss is assigned to the indemnifier's corporation.²⁹⁵ Though the officers and representatives are generally imbued with the authority to contract, individuals should be careful to act within their authority.²⁹⁶

Waiver of an indemnity

Waivers of express and implied indemnifications are generally valid.²⁹⁷ Waivers must represent "an intentional relinquishment of a known right and should not be lightly presumed" and must be based upon the "full knowledge of the facts upon which the right depends".²⁹⁸ Waivers must be demonstrated by conduct or actions that prove intentional relinquishment of the indemnity with full

²⁸⁸ See *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242, 246 (N.Y. 1996).

²⁸⁹ *Sweeters v. Hodges*, 683 N.Y.S.2d 9, 9 (N.Y. App. Div. 1st Dept. 1998).

²⁹⁰ See, e.g., *Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 350 (2d Cir. 1986).

²⁹¹ See *Odell v. 704 Broadway Condo.*, 728 N.Y.S.2d 464, 469 (N.Y. App. Div. 1st Dept. 2001).

²⁹² See *Odell v. 704 Broadway Condo.*, 728 N.Y.S.2d 464, 469 (N.Y. App. Div. 1st Dept. 2001).

²⁹³ *Goldston v. Bandwidth Tech. Corp.*, 859 N.Y.S.2d 651, 655 (N.Y. App. Div. 1st Dept. 2008).

²⁹⁴ See *Odell*, 728 N.Y.S.2d at 469.

²⁹⁵ *Geotel, Inc. v. Wallace*, 556 N.Y.S.2d 577 (N.Y. 1990).

²⁹⁶ See *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 951 (N.Y. 2010).

²⁹⁷ See *Robinson v. Holiday Showcase Rests., Inc.*, 848 N.Y.S.2d 728, 729 (N.Y. App. Div. 3d Dept. 2007); *Travelers Indem. Co. v. LLJV Dev. Corp.*, 643 N.Y.S.2d 520, 525 (N.Y. App. Div. 1st Dept. 1996).

²⁹⁸ *Santamaria v. 1125 Park Ave. Corp.*, 657 N.Y.S.2d 20, 22 (N.Y. App. Div. 1st Dept. 1997); *S. & E. Motor Hire Corp. v. New York Indem. Co.*, 174 N.E. 65, 66 (N.Y. 1930).

knowledge of the waiver.²⁹⁹ Valid waivers are generally not disregarded on public policy grounds.³⁰⁰

Effect of termination of the contract

Parties define the scope of the indemnification in the contract.³⁰¹ If parties agree to limit the scope of the indemnification and the intent to do so is clear, a claim seeking to later expand the scope will be denied.³⁰² Parties may expressly contract for indemnification to survive the termination of the contract.³⁰³ For example, a supplier may agree to indemnify a manufacturer after the conclusion of the contract and throughout resulting lawsuits.³⁰⁴

If parties do not expressly state that an indemnity survives termination, whether the indemnity survives depends on the circumstances surrounding the contract. For example, if a contract indemnifies a party against a loss contemplated but not realized before termination, the indemnity will generally survive subject to the six-year limitation period for losses.³⁰⁵ However, if a contract specifies that certain other specific obligations survive termination, but the indemnity is not specified as surviving termination, the indemnity in such a contract will generally not survive.³⁰⁶

Effect of insolvency of the indemnifier

Parties seeking to enforce indemnity agreements with an insolvent party must assert indemnity claims before the resolution of the insolvent party's estate.³⁰⁷

The U.S. Bankruptcy Code may be implicated if the indemnitor files under Chapter 11. In such an instance, a party seeking to enforce an indemnification may not be able to do so outside of the bankruptcy proceeding because of, among other things, the imposition of the "automatic stay" upon commencement of the bankruptcy proceedings.³⁰⁸

Effect of transfer of the contract

Parties generally may delegate or assign obligations and rights arising out of an indemnity, unless barred by the parties' agreement.³⁰⁹ Because the assignee simply replaces the assignor, assignments do not change the nature of the assigned rights, and assignment restrictions are determined by the parties.³¹⁰

²⁹⁹ *Santamaria v. 1125 Park Ave. Corp.*, 657 N.Y.S.2d 20, 22 (N.Y. App. Div. 1st Dept. 1997); *Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512, 514 (N.Y. 1988).

³⁰⁰ See *Alger v. Abele Tractor & Equip. Co., Inc.*, 460 N.Y.S.2d 202, 203 (N.Y. App. Div. 3d Dept. 1983).

³⁰¹ *Levine v. Shell Oil Co.*, 269 N.E.2d 799, 803 (N.Y. 1971).

³⁰² *Levine v. Shell Oil Co.*, 269 N.E.2d 799, 803 (N.Y. 1971).

³⁰³ See, e.g., *O'Donnell v. A.R. Fuels, Inc.*, 7 N.Y.S.3d 243 (N.Y. Sup. Ct. 2014).

³⁰⁴ See, e.g., *Bradley*, 864 N.E.2d at 606.

³⁰⁵ N.Y. C.P.L.R. 213; *Chicago Title Ins. Co. v. Brookwood Title Agency, LLC*, 114 N.Y.S.3d 703, 704 (N.Y. App. Div. 2d Dept. 2020); see generally 23 N.Y. Jur. 2d Contribution, Etc. § 143.

³⁰⁶ *Pierson v. Empire State Land Assocs., LLC*, 886 N.Y.S.2d 411, 412 (N.Y. App. Div. 2d Dept. 2009).

³⁰⁷ *Watson v. Newell Indus., Inc.*, 888 N.Y.S.2d 175, 176 (N.Y. App. Div. 2d Dept. 2009).

³⁰⁸ See 11 U.S.C. § 362.

³⁰⁹ *In re Stralem*, 758 N.Y.S.2d 345, 347 (N.Y. App. Div. 2d Dept. 2003).

³¹⁰ See *Badiak v. White Plain Kensington, LLC*, 918 N.Y.S.2d 329, 331 (N.Y. Sup. Ct. 2011).

Implied indemnification

Under implied indemnification, if a party delegates its obligations under the contract to another, liability under the indemnity is generally not extinguished altogether.³¹¹ The delegating party may seek indemnification from the party that performed the obligation if the delegation occurred prior to the loss.³¹²

References

Statutes

- Consolidated Laws of New York, Ch 24-A General Obligations.
- Consolidated Laws of New York, Ch 8 Civil Practice Law and Rules.
- Code of Laws of the United States of America.

Cases

- *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554 (N.Y. App. Div. 1st Dept. 1999).
- *Alger v. Abele Tractor & Equip. Co., Inc.*, 460 N.Y.S.2d 202 (N.Y. App. Div. 3d Dept. 1983).
- *Adler v. Columbia Sav. & Loan Ass'n*, 811 N.Y.S.2d 737 (N.Y. App. Div. 2d Dept. 2006).
- *Arlona Ltd. Partn. v. 8th of January Corp.*, 857 N.Y.S.2d 208 (N.Y. App. Div. 2d Dept. 2008).
- *Badiak v. White Plain Kensington, LLC*, 918 N.Y.S.2d 329 (N.Y. Sup. Ct. 2011).
- *Austro v. Niagara Mohawk Power Corp.*, 487 N.E.2d 267 (N.Y. 1985).
- *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (N.Y. 2007).
- *Bellevue S. Assocs. v. HRH Constr. Corp.*, 579 N.E.2d 195 (N.Y. 1991).
- *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127 (N.Y. 2008).
- *Bradley v. Earl B. Feiden, Inc.*, 864 N.E.2d 600 (N.Y. 2007).
- *Chicago Title Ins. Co. v. Brookwood Title Agency, LLC*, 114 N.Y.S.3d 703 (N.Y. App. Div. 2d Dept. 2020)
- *Coburn Corp. of Am. v. Orr*, 304 N.Y.S.2d 345 (N.Y. Civ. Ct. 1969).
- *Colnaghi, U.S.A., Ltd. v. Jewelers Protec. Services, Ltd.*, 611 N.E.2d 282 (N.Y. 1993).
- *D'Ambrosio v. City of New York*, 435 N.E.2d 366 (N.Y. 1982).
- *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 900 N.Y.S.2d 246 (N.Y. App. Div. 1st Dept. 2010).
- *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516 (N.Y. 1976).
- *Erickson Air-Crane Inc. v. EAC Holdings, L.L.C.*, 927 N.Y.S.2d 320 (N.Y. App. Div. 1st Dept.

³¹¹ See *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554, 558 (N.Y. App. Div. 1st Dept. 1999).

³¹² See *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554, 558 (N.Y. App. Div. 1st Dept. 1999).

2011).

- *Exxon Mobil Corp. v. Tredegar Corp.*, 891 F. Supp. 2d 559 (S.D.N.Y. 2012).
- *Feuer v. Menkes Feuer, Inc.*, 187 N.Y.S.2d 116 (N.Y. App. Div. 1st Dept. 1959).
- *Gell-Tejada v. Macy's Retail Holding, Inc.*, 984 N.Y.S.2d 345 (N.Y. App. Div. 1st Dept. 2014).
- *Genger ex rel. AG Props. Co. v. Sharon*, 910 F. Supp. 2d 581 (S.D.N.Y. 2012).
- *Geotel, Inc. v. Wallace*, 556 N.Y.S.2d 577 (N.Y. 1990).
- *Gertler v. Davidoff Hutcher & Citron LLP*, 186 A.D.3d 801 (N.Y. App. Div. 2d Dept. 2020).
- *Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512 (N.Y. 1988).
- *Gillmore v. Duke/Fluor Daniel*, 634 N.Y.S.2d 588 (N.Y. App. Div. 4th Dept. 1995).
- *Goldston v. Bandwidth Tech. Corp.*, 859 N.Y.S.2d 651 (N.Y. App. Div. 1st Dept. 2008).
- *Hogeland v. Sibley, Lindsay & Curr Co.*, 366 N.E.2d 263 (N.Y. 1977).
- *Hooper Assocs. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (N.Y. 1989).
- *Hooters of Manhattan, Ltd. v. 211 W. 56 Assocs.*, 857 N.Y.S.2d 112 (N.Y. App. Div. 1st Dept. 2008).
- *In re Stralem*, 758 N.Y.S.2d 345 (N.Y. App. Div. 2d Dept. 2003).
- *JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V.*, 920 N.Y.S.2d 241 (N.Y. Sup. Ct. 2010).
- *Kirschner v. KPMG LLP*, 938 N.E.2d 941 (N.Y. 2010).
- *Levine v. Shell Oil Co.*, 269 N.E.2d 799 (N.Y. 1971).
- *Margolin v. New York Life Ins. Co.*, 297 N.E.2d 80 (N.Y. 1973).
- *McDermott v. City of New York*, 406 N.E.2d 460 (N.Y. 1980).
- *Mejia v. Trs. of Net Realty Holding Tr.*, 759 N.Y.S.2d 91 (N.Y. App. Div. 2d Dept. 2003).
- *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430 (N.Y. 1994).
- *Mohegan Lake Motors, Inc. v. Maoli*, 559 F. Supp. 3d 323 (S.D.N.Y. 2021).
- *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107 (S.D.N.Y. 2016).
- *Odell v. 704 Broadway Condo.*, 728 N.Y.S.2d 464 (N.Y. App. Div. 1st Dept. 2001).
- *O'Donnell v. A.R. Fuels, Inc.*, 7 N.Y.S.3d 243 (N.Y. Sup. Ct. 2014).
- *Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346 (2d Cir. 1986).
- *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131 (S.D.N.Y. 2004).
- *Pierson v. Empire State Land Assocs., LLC*, 886 N.Y.S.2d 411 (N.Y. App. Div. 2d Dept. 2009).
- *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981).
- *Raquet v. Braun*, 681 N.E.2d 404 (N.Y. 1997).
- *Robinson v. Holiday Showcase Rests., Inc.*, 848 N.Y.S.2d 728 (N.Y. App. Div. 3d Dept. 2007).
- *Rosado v. Proctor & Schwartz, Inc.*, 483 N.Y.S.2d 271 (N.Y. App. Div. 1st Dept. 1984).

- *Rovnak v. Union Carbide Corp., Linde Div.*, 407 N.Y.S.2d 323 (N.Y. App. Div. 4th Dept. 1978).
- *S. & E. Motor Hire Corp. v. New York Indem. Co.*, 174 N.E. 65 (N.Y. 1930).
- *Santamaria v. 1125 Park Ave. Corp.*, 657 N.Y.S.2d 20 (N.Y. App. Div. 1st Dept. 1997).
- *Sherry v. Wal-Mart Stores E., L.P.*, 889 N.Y.S.2d 251 (N.Y. App. Div. 2d Dept. 2009).
- *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365 (N.Y. 1992).
- *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165 (2d Cir. 2014).
- *Sweeters v. Hodges*, 683 N.Y.S.2d 9 (N.Y. App. Div. 1st Dept. 1998).
- *Szalkowski v. Asbestospray Corp.*, 686 N.Y.S.2d 243 (N.Y. App. Div. 3d Dept. 1999).
- *Town of Poland v. Transamerica Ins. Co.*, 385 N.Y.S.2d 987 (N.Y. App. Div. 4th Dept. 1976).
- *Travelers Indem. Co. v. LLJV Dev. Corp.*, 643 N.Y.S.2d 520 (N.Y. App. Div. 1st Dept. 1996).
- *Trs. of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 492 N.Y.S.2d 371 (N.Y. App. Div. 1st Dept. 1985).
- *Tucci v. Talon Seafood S., Inc.*, 812 N.Y.S.2d 607 (N.Y. App. Div. 2d Dept. 2006).
- *Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554 (N.Y. App. Div. 1st Dept. 1999).
- *Watson v. Newell Indus., Inc.*, 888 N.Y.S.2d 175 (N.Y. App. Div. 2d Dept. 2009).
- *Weissman v. Sinorm Deli, Inc.*, 669 N.E.2d 242 (N.Y. 1996).
- *Wilmington Tr. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 58 N.Y.S.3d 358 (N.Y. App. Div. 1st Dept. 2017).
- *Wind Point Partners VII-A, L.P. v. Hoya Corp.*, 128 N.Y.S.3d 186 (N.Y. App. Div. 1st Dept. 2020).

Secondary materials

- Glen Banks, *New York Contract Law* (2nd ed, Thomson West, 2021).
- Glenn A. Guarino, Rachel M. Kane, Lucas Martin, Caralyn M. Ross, and Stephanie Zeller, *Contribution, Indemnity, and Subrogation* (2nd ed, Thomson West, 2022).
- Restatement (Second) of Contracts (1981).

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Philippine law recognises the concept of freedom of contract. But the concept of an indemnity as understood by the common law does not exist under Philippine law.

The three most analogous remedies³¹³ under Philippine law are:

- actual or compensatory damages;
- liquidated damages; and
- penal clauses.

A table comparing these three remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist under Philippine law, because Philippine law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of a “trigger event”. Such “trigger events” are examined [below](#).

³¹³

There are other forms of damages that may be awarded depending on circumstances, although discussions of those damages are beyond this article.

Freedom of contract

Under Philippine law, contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy of the Philippines.³¹⁴

Philippines law states that all services may be the *object* of a contract provided that the service is not contrary to law, morals, good customs, public order or public policy of the Philippines.³¹⁵ Similarly, the *cause* of a contract is unlawful if it is contrary to law, morals, good customs, public order or public policy.³¹⁶

A contract that has a cause, object or purpose that is contrary to law, morals, good customs, public order or public policy of the Philippines are “inexistent” and void from the beginning (i.e., *void ab initio*).³¹⁷

Philippine law also deems that certain stipulations in contracts with common carriers are against public policy.³¹⁸

³¹⁴ Republic Act No 386, Civil Code, Article 1306.

³¹⁵ Republic Act No 386, Civil Code, Article 1347.

³¹⁶ Republic Act No 386, Civil Code, Article 1352.

³¹⁷ Republic Act No 386, Civil Code, Article 1409(1).

³¹⁸ Republic Act No 386, Civil Code, Article 1745.

Comparison of Philippine law remedies with common law indemnities

A table comparing common law indemnities against the following Philippine law remedies is set out below:

- actual or compensatory damages;
- liquidated damages; and
- penal clauses.

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
Amount recoverable	<p>The amount of the damages recoverable depends on the nature of the breach.</p> <p><i>Breach in good faith</i></p> <p>The damages recoverable are those that are the “natural and probable consequences of the breach” and “which the parties have foreseen or could have reasonably foreseen” at the time the contract was constituted.³²⁵</p> <p>The damages include not only the loss suffered, but also the profits that the obligee (i.e.,</p>	<p>The amount of the damages recoverable is that agreed upon by the parties.</p> <p>But the damages will be “equitably” reduced if the damages are “iniquitous or unconscionable”.³²⁸</p>	<p>The amount of the penalty recoverable is that agreed by the parties.</p> <p>But the penalty will be reduced if the penalty is “iniquitous or unconscionable”.³²⁹</p>	<p>The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides “dollar-for-dollar” (or, in the English context, “pound-for-pound”) recovery of loss suffered by the indemnified party.</p>

³²⁵ Republic Act No 386, Civil Code, Article 2201.

³²⁸ Republic Act No 386, Civil Code, Article 2227.

³²⁹ Republic Act No 386, Civil Code, Article 1229.

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
	<p>the party claiming breach) failed to obtain as a result of the breach.³²⁶</p> <p><i>Breach in bad faith or with fraud, malice or wanton attitude</i></p> <p>The damages include all damages which may be reasonably attributed to the non-performance of the obligation.³²⁷</p>			
Mitigation	<p>The party claiming breach must minimise the damages resulting from the breach by the breaching party.³³⁰</p>	<p>The party claiming breach does not have to minimise the damages resulting from the breach by the breaching party.</p>	<p>The party claiming breach does not have to minimise the damages resulting from the breach by the breaching party.</p>	<p>The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.</p>

³²⁶ Republic Act No 386, Civil Code, Article 2200.

³²⁷ Republic Act No 386, Civil Code, Article 2201.

³³⁰ Republic Act No 386, Civil Code, Article 2203.

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
Proof	<p>What the party claiming breach must prove depends on whether the breach was:</p> <ul style="list-style-type: none"> • in good faith; or • in bad faith or with fraud, malice or wanton attitude. <p><i>Breach in good faith</i></p> <p>The party claiming breach must prove:</p> <ul style="list-style-type: none"> • breach of contract; • loss suffered by the party claiming breach; • the loss suffered is a result of the "natural and probable consequences" of the breach of contract; and • the loss was foreseen or could have reasonably been foreseen when the contract was concluded. 	<p>The party claiming breach must prove:</p> <ul style="list-style-type: none"> • the parties agreed on liquidated damages to be paid on breach of the contract; • there was a breach of the contract; and • the breach of contract was one that the parties contemplated in agreeing upon the liquidated damages. <p>The party claiming breach does not have to prove loss was suffered.</p>	<p>The party claiming breach must prove:</p> <ul style="list-style-type: none"> • the parties agreed that a penalty was payable on breach of the contract; • there was a breach of contract; and • the creditor to the penalty clause demanded payment of the penalty in lieu of performance of the contract. <p>The party claiming breach does not have to prove loss was suffered.</p>	<p>The indemnified party must prove the "trigger event" (and whatever else the contract requires to establish the claim under the indemnity).</p>

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
	<p><i>Breach in bad faith or with fraud, malice or wanton attitude</i></p> <p>The party claiming breach must prove:</p> <ul style="list-style-type: none"> • breach of contract; • loss suffered by the party claiming breach; and • the loss suffered can be reasonably attributed to the breach. 			
Limitation period	<p>The limitation period depends on whether the contract is written or oral.</p> <ul style="list-style-type: none"> • Written contracts: ten years from the date of breach. • Oral contracts: six years from the date of breach. 	<p>The limitation period depends on whether the contract is written or oral.</p> <ul style="list-style-type: none"> • Written contracts: ten years from the date of breach. • Oral contracts: six years from the date of breach. 	<p>The limitation period depends on whether the contract is written or oral.</p> <ul style="list-style-type: none"> • Written contracts: ten years from the date of breach. • Oral contracts: six years from the date of breach. 	<p>The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the “trigger event”). The parties can agree that the payment becomes due on a date other than the “trigger event”.</p>

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
Costs	<p>Attorney fees and expenses of litigation, other than judicial costs, cannot be recovered (unless otherwise agreed between the parties).³³¹</p> <p><i>Judicial costs</i></p> <p>Court filing fees, hearing fees, etc. are examples of judicial costs.</p> <p>Under the Philippine Rules of Court,³³² judicial costs are allowed to the prevailing party, but the court shall have the power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable.</p> <p>If otherwise agreed, attorney fees and litigation fees and expenses must be reasonable.³³³</p>	<p>Attorney fees and expenses of litigation, other than judicial costs, cannot be recovered (unless otherwise agreed between the parties).</p> <p><i>Judicial costs</i></p> <p>Court filing fees, hearing fees, etc. are examples of judicial costs.</p> <p>Under the Philippine Rules of Court, judicial costs are allowed to the prevailing party, but the court shall have the power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable.</p> <p>If otherwise agreed, the attorney fees and litigation fees and expenses must be reasonable.</p>	<p>Attorney fees and expenses of litigation, other than judicial costs, cannot be recovered (unless otherwise agreed between the parties).</p> <p><i>Judicial costs</i></p> <p>Court filing fees, hearing fees, etc. are examples of judicial costs.</p> <p>Under the Philippine Rules of Court, judicial costs are allowed to the prevailing party, but the court shall have the power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided, as may be equitable.</p> <p>If otherwise agreed, the attorney fees and litigation fees and expenses must be reasonable.</p>	<p>The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.</p>

³³¹ Republic Act No 386, Civil Code Article 2208. See also Rules of Court in the Philippines, Rule 142, section 6.

³³² Rules of Court in the Philippines, Rule 142, section 1.

³³³ Republic Act No 386, Civil Code Article 2208.

Feature	Actual or compensatory damages	Liquidated damages	Penal clauses	Common law indemnity
Legal proceedings	A claim for compensation for actual or compensatory damages requires the commencement of legal proceedings.	If a breach that will give rise to the enforcement of the liquidated damages clause occurs, the injured party may demand, judicially or extrajudicially, for the payment of the liquidated damages.	If a breach that will give rise to the enforcement of the penal clause occurs, the injured party may demand, judicially or extrajudicially, for the payment of the penalty.	Depending on the wording of the indemnity, a claim under it may be able to be brought as a claim for a debt (e.g., if the loss can be easily calculated or if the liability is for a specific type of loss). Such claims are more difficult to resist and procedurally more straightforward to commence.

Trigger events for liability under Philippine law

Under a common law indemnity, the obligation to indemnify is activated on the occurrence of a specific event (called a "trigger event"). Common trigger events are: breach of contract, negligence (or other wrongful conduct), misrepresentation or claims brought by a third party (that is, a non-party) to the contract against a party to the contract (called a "third-party indemnity").

While the concept of an indemnity does not exist under Philippine law, because Philippine law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of the following events:

- breach of contract;
- negligent performance;
- quasi-delict;
- misrepresentation; and
- third-party claims.

But because Philippine law does not recognise the concept of an indemnity, the "beneficiary" of the agreement will not receive peso-for-peso (or "blank cheque") recovery for the loss it suffers from the event.

Breach of contract

Actual or compensatory damages

Under Philippine law, an obligor is liable to pay actual or compensatory damages that are the natural and probable consequences of the breach of contract. So, the trigger event for an obligation to pay actual or compensatory damages is a breach of contract.

Liquidated damages

Under Philippine law, liquidated damages are agreed damages to be paid on breach of contract. So, the trigger event for an obligation to pay liquidated damages is a breach of contract.

Penal clauses

Under Philippine law, a penal clause substitutes the obligation to pay actual or compensatory damages with an obligation to pay a penalty. So, the trigger event for an obligation to pay a penalty is a breach of contract.

Negligent performance

Those who in the performance of their obligations are guilty of negligence are liable for damages under Philippine law.³²⁸

Negligence means the "omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place".³²⁹

The obligor who is guilty of negligence is liable to pay actual or compensatory damages to the obligee, but the obligor's liability "may be regulated by the courts, according to the circumstances".³³⁰

³²⁸ Republic Act No 386, Civil Code, Articles 1170 and 1172

³²⁹ Republic Act No 386, Civil Code, Article 1173.

³³⁰ Republic Act No 386, Civil Code, Article 1172.

If the obligor's negligence shows bad faith, the obligor is "responsible for all damages which may be reasonably attributed to the non-performance of the obligation".³³¹

In the case of negligence in the performance of a contractual obligation, an action for breach of contract must be brought within ten years for a written contract, or six years for an oral contract, from the time the right of action accrues.³³²

Quasi-delict

Under Philippine law, obligations can arise from "quasi-delicts".³³³ Quasi-delicts are analogous, but not identical, to common law torts.³³⁴

A quasi-delict is an act or omission by one person, committed through that person's fault or negligence, that causes damage to another *where there is no contractual relationship between the parties*.³³⁵ Quasi-delicts give rise to liability to pay actual or compensatory damages.

The Supreme Court of the Philippines has ruled that the existence of a contract between the parties does not bar the commission of a quasi-delict by one party against the other and the subsequent recovery of damages.³³⁶ That is because the acts or omissions that breach the contract may also be a quasi-delict.³³⁷

A quasi-delict action must be commenced within six years from the time the right of action accrues.³³⁸

Misrepresentation

Misrepresentation under Philippine law

A misrepresentation made by one party (the representor) to the other (the representee) is actionable under Philippine law if the misrepresentation is fraudulent.³³⁹

The remedy available to the representee depends on the type of fraud involved. If the fraud is "causal", the contract is voidable and the representee is entitled to actual or compensatory damages. If the fraud is "incidental", the contract is not voidable but the representee is entitled to actual or compensatory damages.

If the misrepresentation is not fraudulent, the representee has no remedies under Philippine law (unless the non-fraudulent misrepresentation amounts to an actionable "mistake").

If a contract is voidable due to misrepresentation, the action for annulment of the contract shall be brought within four years from the discovery of the fraud or mistake.³⁴⁰

³³¹ Republic Act No 386, Civil Code, Article 1173 read with Article 2201 paragraph 2.

³³² Republic Act No 386, Civil Code, Article 1144.

³³³ Republic Act No 386, Civil Code, Article 1157(5).

³³⁴ *Coca-Cola Bottlers Philippines Inc v Court of Appeals*, GR No 110295, 18 October 1993.

³³⁵ Republic Act No 386, Civil Code, Article 2176.

³³⁶ *Singson vs. Bank of the Philippine Islands* 23 SCRA 1117 [1968].

³³⁷ *Coca-Cola Bottlers Philippines Inc v Court of Appeals*, GR No 110295, 18 October 1993.

³³⁸ Republic Act No 386, Civil Code, Article 1145.

³³⁹ Philippine law also deems certain types of misrepresentations to be fraudulent: see Republic Act No 386, Civil Code, Articles 1338, 1340 and 1341.

³⁴⁰ Republic Act No 386, Civil Code, Article 1391.

Modifying the effect of Philippine law

As Philippine law recognises the concept of freedom of contract, the parties can agree to modify the effect of misrepresentations under Philippine law.

For example, a representee has no remedies under Philippine law against a representor that makes a non-fraudulent misrepresentation.

But the parties could agree that the representor is liable to compensate the representee for any pecuniary loss suffered by the representee resulting from a non-fraudulent misrepresentation.

Such a provision would give rise to an action for actual or compensatory damages under Philippine law. The extent of recovery depends on whether the representor acted with good faith or not.

If the representor acted with fraud, bad faith, malice or wanton attitude, the representee may receive *close to* full recovery (i.e., close to peso-for-peso or "blank cheque" recovery) of the loss it suffers. That is because the representee is entitled to recover all damages that are "reasonably" attributed to the breach. That is, not all damages that are "attributed" to the breach can be recovered, only those that are "reasonably" attributed to the breach.

If the representor acted with good faith, the representee may not receive full, or close to, full recovery. That is because the damages to which the representee is entitled are limited to those damages that are the "natural and probable consequences of the breach" and that "which the parties have foreseen or could have reasonably foreseen" at the time the obligation was constituted.

Alternatively, the parties could agree that the representor is liable to pay the representee an agreed upon sum of money resulting from a (non-fraudulent) misrepresentation, giving rise to a right of action (depending on its nature) for liquidated damages or a penalty.

Third-party claims

As Philippine law recognises the concept of freedom of contract, the parties can agree that one party (the obligor) is liable to compensate the other (the obligee) for any pecuniary loss suffered by the obligee resulting from a third-party claim.

Such an obligation would be a conditional obligation that arises on the happening of the event which constitutes the condition.³⁴¹

Breach of the conditional obligation would give rise to an action for actual or compensatory damages under Philippine law. That is, if the obligor failed to compensate the obligee for the loss it suffers as a result of the third-party claim as agreed, the obligor would be in breach of contract. That breach would entitle the obligee to actual or compensatory damages under Philippine law.

The extent of recovery depends on whether the obligor acted with good faith or not in failing to compensate the obligee as agreed.

If the obligor acted with fraud, bad faith, malice or wanton attitude, the obligee may receive *close to* full recovery (i.e., close to peso-for-peso or "blank cheque" recovery) of the loss it suffers. That is because the obligee is entitled to recover all damages that are "reasonably" attributed to the breach. That is, not all damages that are "attributed" to the breach can be recovered, only those that are "reasonably" attributed to the breach.

If the obligor acted with good faith, the obligee may not receive full, or close to, full recovery. That is because the damages to which the obligee is entitled are limited to those damages that are the "natural and probable consequences of the breach" and that "which the parties have foreseen or could have reasonably foreseen" at the time the obligation was constituted.

³⁴¹ Republic Act No 386, Civil Code, Article 1181.

Alternatively, the parties could agree that the obligor is liable to pay the obligee an agreed upon sum of money if a claim is brought by a third party against the obligee, giving rise to a right of action (depending on its nature) for liquidated damages or a penalty.

References

Codes

- Republic Act No 386, Civil Code.

Rules

- Rules of Court in the Philippines.

Cases

- *Coca-Cola Bottlers Philippines Inc v Court of Appeals* GR No 110295, 18 October 1993.
- *Singson vs. Bank of the Philippine Islands* 23 SCRA 1117 [1968].

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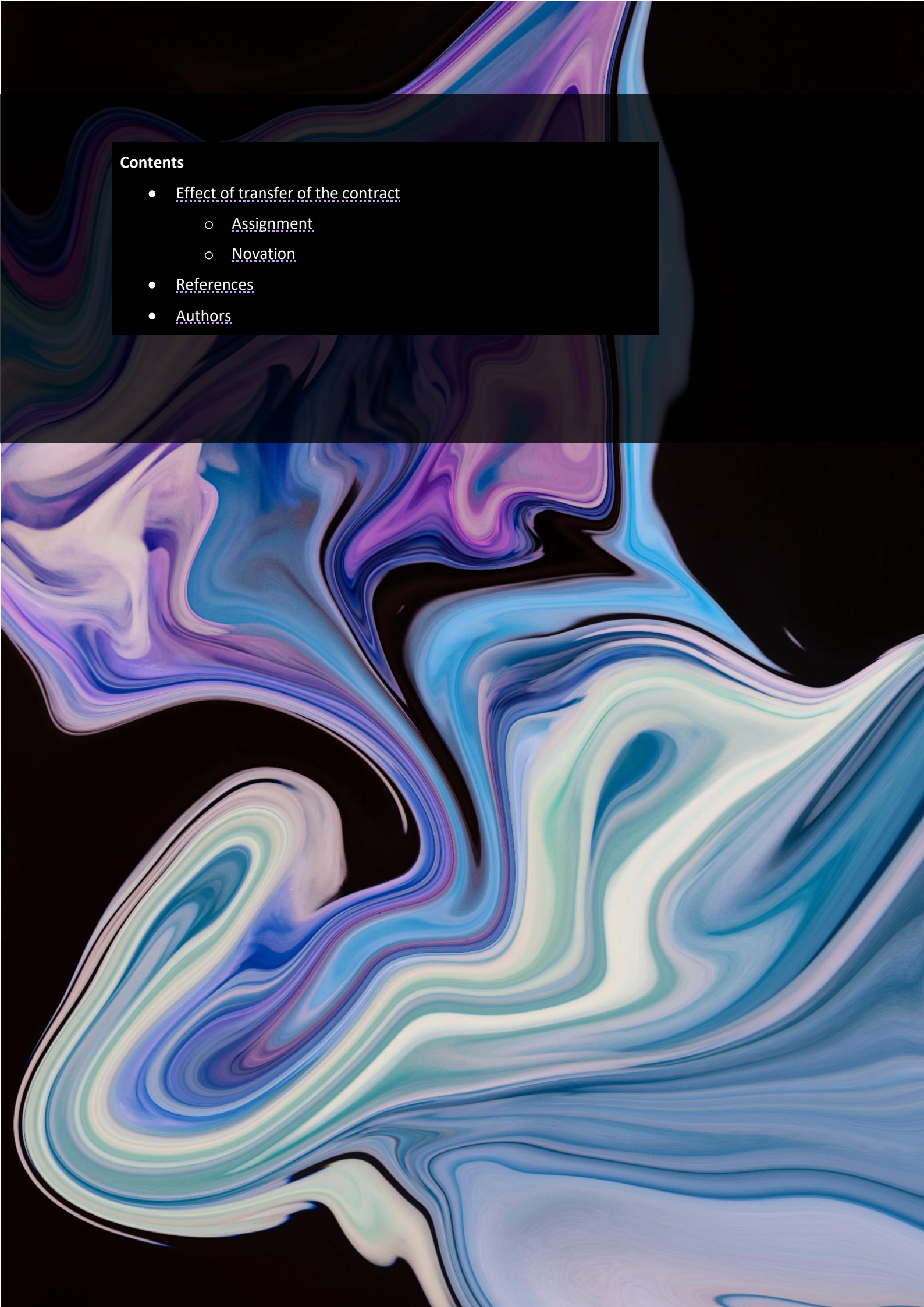
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Definition

Under Singapore law, an indemnity is a promise (usually in a contract) to protect the benefitting party against loss by paying money on the occurrence of a specified trigger event.

Purpose

There is no general rule on when to seek an indemnity and they are used in all manner of circumstances. Indemnities tend to be appropriate for matters which are specific and known and which are clearly not the responsibility of the benefitting party.

The main reasons for seeking an indemnity are where the benefitting party fears a loss:

- to make the indemnifier liable for that loss;
- (if the indemnifier is already liable to the benefitting party) to gain some or all of the advantages of an indemnity; or
- both.

Common examples

Some examples of where indemnities may be used are:

- **Share sales:** A buyer often takes a covenant and indemnity against tax liabilities of the target group or in respect of liabilities arising from due diligence of the target group, including the target group's environmental matters, litigation, and product liability matters.
- **Employee transfers:** Where a transaction involves the transfer of employees, the party who "inherits" the employees typically seeks an indemnity from the previous employer to mitigate against any employment-related liabilities or claims arising from the transfer.
- **Data protection:** A party with data protection duties often gives an indemnity against losses the other party may sustain as a result of breach of those duties.
- **Bribery:** If a local representative commits acts of bribery, its principal may incur penalties. As well as prohibiting these acts, the principal may seek an indemnity against any losses the local representative may cause.
- **Intellectual property rights:** The owner of intellectual property rights often gives other users an indemnity against loss they may suffer from defects in those rights.
- **Confidentiality:** Before disclosing valuable or sensitive information, the disclosing party may ask for an indemnity against losses caused by the misuse of that information.
- **Trusts:** A trustee may demand an indemnity from the fund against some of the liabilities involved in taking on this responsibility.
- **Breach of contract:** An indemnity against breaches of a contract (both generally and for specific breaches).
- **Legal costs:** Indemnities are often given against legal costs. The stronger (benefitting) party in a dispute can take an indemnity against the costs of enforcing the contract. The benefitting party can also take an indemnity against legal costs incurred by it in a dispute with a third party.

Requirements

Clear drafting

Given that an indemnity is created expressly by contract, not by law, its nature, effect and enforceability depend on the specific drafting of the clause and on contractual interpretation. Indemnities are therefore highly flexible and subject to few prescribed rules, but their drafting must be clear.

Writing not required

There is generally no strict requirement under Singapore law for an indemnity to be in writing as it does not fall within the ambits of contracts which must be evidenced in writing.³⁴²

Implied indemnities

Generally, indemnities will only be implied if it is so necessary that all the contracting parties must have intended its inclusion in the contract, as the Singapore Court of Appeal observed:³⁴³

an obligation to indemnify is an onerous one, and the courts will be slow to imply such an obligation into a contract as it goes against commercial logic to have an implied term on indemnity without laying down properly defined parameters for the purported indemnity.

Terminology

While plain and unambiguous language of “indemnity” or “indemnify” is desirable, the approach taken to construction indicates that the interpretation of an indemnity depends on the meaning which the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time the indemnity was agreed.³⁴⁴

Restrictions

Un-indemnifiable losses

The freedom to define the terms of an indemnity is limited by statute and case law and some losses cannot be indemnified.

Deliberate acts

Singapore law is unlikely to enforce an indemnity against losses caused by the benefitting party's deliberate acts.

Illegal acts

It would also be against public policy to offer a party an indemnity against the consequences of its own fraud or deliberate crime and a clause purporting to do so would be ineffective.

³⁴² Civil Law Act 1909, section 6.

³⁴³ *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549.

³⁴⁴ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.

Unfair indemnities

Section 4 of the Unfair Contract Terms Act 1977 of Singapore states that a person dealing as a consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness. This section applies whether the liability in question (a) is directly that of the person to be indemnified or is incurred by him vicariously; or (b) is to the person dealing as consumer or to someone else.

Even if the law on limiting liability does not apply, an unfair indemnity may be reduced or extinguished under the normal principles of contract interpretation. For example, a non-negotiated indemnity might be interpreted strictly (*contra proferentem*) against the benefitting party who imposed it on the paying party.

Rule against penalties

The rule against penalties applies to a contractual payment triggered by a breach of contract (an indemnity triggered by an event other than a breach of contract is not affected by this rule). The Singapore Court of Appeal has affirmed³⁴⁵ that the rule against penalties in Singapore remained as that set out by Lord Dunedin in *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd*³⁴⁶ [1915] AC 79 (i.e., whether or not the contractual provision concerned provided a genuine pre-estimate of the likely loss as assessed at the time of contracting). The Singapore Court of Appeal has declined³⁴⁷ to follow the legitimate interest test developed by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi*.³⁴⁸

An indemnity against breach of contract is not affected by the rule against penalties if it requires the paying party to pay only what the law would allow as damages for breach of contract. If it is determined that the indemnity is drafted so widely that it amounts to a penalty (and is therefore unenforceable), damages will still be payable on the same basis as if it had not been drafted so widely (unless damages are otherwise excluded under the contract).

Interpretation

Indemnities are to be interpreted strictly under Singapore law.³⁴⁹

Singapore courts cannot, however, reject an indemnity if the words are clear and unambiguous and susceptible of one meaning only. The related *contra proferentum* rule that “contractual provisions should prima facie be construed against the party who was responsible for the preparation of the contract and/or who is to benefit from the provision” would also apply to the interpretation of indemnities.

³⁴⁵ *Denka Advantech Private Limited & another v Seraya Energy Pte Ltd & another* [2020] SGCA 119.

³⁴⁶ *Dunlop Pneumatic Tyre Co, Ltd v New Garage and Motor Co, Ltd* [1915] AC 79.

³⁴⁷ *Denka Advantech Private Limited & another v Seraya Energy Pte Ltd & another* [2020] SGCA 119.

³⁴⁸ *Cavendish Square Holding BV v Makdessi* [2016] AC 1172.

³⁴⁹ See *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1.

The Singapore Court of Appeal³⁵⁰ has also held that the introduction of a boilerplate indemnity that had not been specifically negotiated by the parties cannot have the effect of overriding the negotiated commercial structure of the deal and the calibrated allocation of risks that is reflected elsewhere in the contractual documents that were entered into by the parties.

Trigger events

An obligation on one party to indemnify the other may be triggered on a specified action or event. Under Singapore law, the extent of an indemnity would be a matter of commercial negotiation and agreement between the parties and could be limited to specific categories of loss or cover all contractual breaches if the parties agree to this. Common “trigger events” include:

- claims by third parties (i.e., claims brought by non-parties to the contract against the benefitting party);
- penalties arising from non-compliance with any law, rule or regulation;
- breach of contract;
- non-contractual wrongs, such as misrepresentation, negligence, fraud or other intentional conduct; and
- occurrence of a specific agreed event.

Common carve-outs

Deliberate acts

Singapore law will generally not enforce an indemnity against losses caused by the benefitting party's deliberate acts. However, for the avoidance of doubt, losses caused by the benefitting party's deliberate acts or misconduct can be excluded from indemnity clauses.

Illegal acts

Singapore law will also generally not enforce an indemnity against losses caused by the benefitting party's own crimes or fraud for public policy reasons. “Fraud” in the context of public policy and contract interpretation often extends beyond the crime of fraud to dishonesty in general. That said, losses arising from the benefitting party's fraud, bad faith and/or dishonesty can be carved out to remove any doubt.

Negligence

“Clear words” are required to exclude a party's liability for negligence.³⁵¹ Accordingly, losses which result from the benefitting party's negligence are commonly carved out.

Limitation period

The limitation period for a claim under an indemnity under Singapore law is generally six years.³⁵² The limitation period commences from the date the indemnity payment was due.

³⁵⁰ *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2017] SGCA 70.

³⁵¹ See *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1.

³⁵² Limitation Act 1959, section 6.

Indemnities vs claims of damages for breach of contract

The differences between an indemnity and a claim of damages for breach of contract are as follows:

	Indemnity payment for loss	Damages for breach
Amount	The payment sum is dependent on the wording and interpretation of the indemnity clause. Express wording could increase the amount recoverable. Unlike damages for breach, the payment sum is not necessarily limited to reasonably foreseeable losses.	Damages are limited to losses caused by the breach which were foreseeable when the contract was executed.
Mitigation	The scope of liability under an indemnity clause would depend on its wording and interpretation, taking into account the factual matrix in which the contract was entered into. ³⁵³ Accordingly, contracting parties can create an indemnity clause that expressly applies or excludes the rules on mitigation, remoteness, and causation.	The benefitting party is obliged under Singapore law to act reasonably to reduce its losses and those which could have been reasonably avoided cannot be recovered. However, the cost of any reasonable steps to mitigate losses are recoverable (irrespective of whether they are effective).
Proof	The benefitting party needs only to prove the trigger event (the breach of contract) and whatever else the contract requires to establish an indemnity claim. There is no obligation on the part of the benefitting party to prove the causal link between its losses (if any) and the payment sum claimed as well as to prove whether the payment sum claimed is too remote from its losses.	The benefitting party needs to prove the breach of contract and the fact and the amount of the losses caused by the breach.

³⁵³

See *Sunny Metal & Engineering v Ng Khim Ming* [2007] 3 SLR(R) 782.

	Indemnity payment for loss	Damages for breach
Limitation period	The limitation period starts from the date the indemnity payment was due. Depending on the wording and interpretation of the indemnity, payment may be due on demand or on a date later than the trigger event. Accordingly, new losses can trigger a new claim.	The limitation period starts from the date of the breach. New losses do not start the limitation period again unless there is a new breach.
Costs	The paying party is obliged to pay the enforcement costs specified in the contract. Depending on the wording and interpretation of the contract, this may increase recovery of legal and other related costs.	The paying party must usually pay the benefitting party part (but not all) of its legal costs in litigation or arbitration.
Legal proceedings	It may be possible for an indemnity payment obligation to be pursued as a debt claim which can make recovery more straightforward. However, this should be approached with caution as there are conflicting UK Court of Appeal decisions on whether an indemnity creates a claim for debt or a claim for damages. ³⁵⁴ In any event, indemnity claims tend to be seen as more difficult to resist and payments are more likely to be made without the need for legal proceedings.	A breach of contract claim requires legal proceedings to be initiated.

Indemnity for breach of contract

An indemnity against losses caused by a breach of contract can modify the normal measure of damages for breach of contract or replace it with an agreed payment obligation (although the benefitting party will want to ensure that the indemnity does not offend the rule against penalties). It has been argued that this agreed contractual claim is a debt and therefore the rules on causation, remoteness, mitigation and proof of loss do not apply. However, this argument may not be correct as it is the subject of conflicting UK Court of Appeal decisions and not dealt with by the Singapore Courts.³⁵⁵

³⁵⁴ *Royscot Commercial Leasing Ltd v Ismail, The Independent*, 17 May 1993) and *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

³⁵⁵ *Royscot Commercial Leasing Ltd v Ismail, The Independent*, 17 May 1993) and *Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

It is well established, however, that the sum payable under an indemnity depends on the payment obligation in the contract. Even if a claim under an indemnity is, technically, a claim for damages, the contract can define the amount due. In the absence of any express provision, an indemnity against breach of contract might be interpreted as intended to pay the benefitting party's losses on the same basis as damages for breach of contract.

Specific wording can create an indemnity that expressly applies or excludes some or all of the rules on mitigation, remoteness and causation. Whether it does so is a question of interpretation:

- **Causation:** It is possible to draft an indemnity against losses not caused by the trigger event but only connected with it.³⁵⁶ However, most indemnities require payment of loss caused by a specific trigger event. Even if the trigger event is not a breach of contract, the benefitting party under the indemnity must prove causation and the amount of its loss, not because of the law on assessing damages for breach of contract but because those are the facts necessary to prove what is due under the express wording of the clause.
- **Remoteness:** Express words could require payment of losses that would be too remote to recover as damages for breach of contract.³⁵⁷

Indemnities vs guarantees

An indemnity is a contractual mechanism for allocating risks, in a similar way to a guarantee. However, there are differences between guarantees and indemnities. Those differences are as follows:

	Indemnity	Guarantee
Formal requirements	There are no formal requirements for a valid indemnity.	A guarantee must be in writing or evidenced in writing and be signed by the guarantor or its agent. ³⁵⁸
Nature of liability	An indemnity is a primary obligation. If the underlying transaction is set aside or the primary obligor is discharged from liability, the indemnity will remain valid.	A guarantee is a secondary obligation. If the underlying transaction is set aside or the primary obligor is discharged from liability, the guarantor's obligations under the guarantee will also be unenforceable or discharged.
Extent of liability	The indemnifying party is liable to the benefitting party independently of the primary obligor and its liability may exceed that of the primary obligor.	The guarantor is only liable to the beneficiary to the same extent as the primary obligor is liable to the beneficiary.

³⁵⁶ *Campbell v Conoco UK Ltd* [2002] EWCA Civ 704.

³⁵⁷ *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, page 1448, obiter.

³⁵⁸ Civil Law Act 1909, section 6.

	Indemnity	Guarantee
Variation	Variation of the primary underlying contract will not typically discharge the indemnity. ³⁵⁹	Variation of guaranteed obligations may discharge the guarantee. Any amendments of the primary underlying contract, after the giving of the guarantee, will discharge the guarantor's liability under the guarantee unless: (i) the guarantor consents to the variation or (ii) the variation is patently insubstantial or incapable of adversely affecting the guarantor. ³⁶⁰
Default	The benefitting party can claim against the indemnifying party irrespective of a default by the principal obligor.	The beneficiary can claim against the guarantor only after the principal obligor defaults on its obligations.

Regulatory approvals

Singapore law does not require that indemnities be approved or registered with any regulatory authority. It does not matter whether the indemnity is granted in favour of a foreign entity.

Power to give an indemnity

It is possible that a Singapore-incorporated company may not have the requisite capacity or power to give an indemnity to a contract party and that the company's constitutional documents place limitations on the directors' exercise of their powers. In this case, the directors need to ensure that they are acting within the limits circumscribed by the constitutional documents and if they do not provide wide enough powers for the company to enter into an indemnity, the constitutional documents will need to be amended by shareholders' special resolution.

Waiver

An obligation to indemnify, or a claim thereunder, can be waived expressly or impliedly subject to Singapore law's general principles on waivers of contractual obligations. This is done through a waiver, a legally binding provision where either party in a contract agrees to voluntarily forfeit a claim without the other party being liable, and can be either in written form or some form of action.

³⁵⁹ *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).

³⁶⁰ *Holme v Brunskill* [1877] 3 QBD 495.

Effect of termination of the contract

In principle, if an indemnity is not expressly limited in time, it can continue to bind the indemnifying party indefinitely. Each claim will be time-barred after the usual [limitation period](#). However, depending on how the indemnity clause defines the trigger event and the payment date, new claims under the same indemnity may continue to arise after a contract was made and its primary duties performed.

Termination of the contract will not necessarily end the obligation to indemnify. Whether it does is subject to the clause's interpretation and whether the parties intended the indemnity to survive expiry or termination of the contract. As a result, contracts may add a long stop date after which no new claims can arise when specifying the payment trigger event.

Effect of insolvency of the indemnifier

If a corporate indemnifier enters a Singaporean insolvency procedure, the indemnities it has entered into are not automatically extinguished.

Effect of transfer of the contract

A clause allowing a party to "outsource, delegate or transfer" its obligations and rights is likely to envisage an "assignment" or "novation" of the contract under Singapore law. Neither an assignment nor a novation will extinguish a liability under an indemnity. An indemnity can be assigned and novated in the same way as any other contractual provision.

Assignment

The benefit of a contract (which can include the benefit of an indemnity) is a personal right in property and, in principle, can be freely assigned by the benefiting party. The effect of an assignment is that the assignee is entitled to claim and enjoy the benefit of the contract (including any right of payment under an indemnity) subject to any limitations, defences and set-offs that the original contracting party would have been able to raise against the assignor. As the burden of a contract cannot be "assigned" (it can only be "novated"), the assignor would remain liable post-assignment to perform any part of the contract yet to be fulfilled (including any payment under an indemnity). In practice, the assignee will usually agree to assume the performance of an ongoing contract after assignment and indemnify the assignor against any breach or failure to perform by the assignee. The assignor will typically remain liable for obligations and liabilities incurred before the assignment.

Novation

The burden of a contract (including any obligation to pay under an indemnity) cannot be assigned. Instead, it must be "novated" by the outgoing, incoming and continuing parties. Novation replaces the old contract between the outgoing party and the continuing party with an identical new one between the incoming party and the continuing party. If a contract is novated by all the parties involved, the outgoing party surrenders its rights and is released from its obligations in the process.

References

Legislation

- Civil Law Act 1909.
- Limitation Act 1959.

Cases

Singapore

- *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2017] 1 SLR 70.
- *Denka Advantech Private Limited & another v Seraya Energy Pte Ltd & another* [2020] SGCA 119.
- *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1.
- *Sunny Metal & Engineering v Ng Khim Ming* [2007] 3 SLR(R) 782.
- *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549.

England and Wales

- *Campbell v Conoco UK Ltd* [2002] EWCA Civ 704.
- *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).
- *Holme v Brunskill* [1877] 3 QBD 495.
- *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.
- *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428.
- *Royscot Commercial Leasing Ltd v Ismail, The Independent, 17 May 1993) and Sprung v Royal Insurance (UK) Ltd* [1997] CLC 70.

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Thailand

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Thai law recognises the concept of freedom of contract. But the concept of an indemnity as understood by the common law does not exist under Thai law.

There are two analogous remedies available under Thai law. Those remedies are:

- compensation for damages; and
- stipulated penalties.

A table comparing these two remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist under Thai law, because Thai law recognises the concept of freedom of contract, contract parties *prima facie* can agree that liability of one party to another is triggered on the occurrence of a “trigger event”. Such “trigger events” are examined [below](#).

Freedom of contract

Thai law recognises the concept of freedom of contract. Under Thai law, “juristic acts” are void if the object of the act is:³⁶¹

- expressly prohibited by Thai law; or
- impossible; or
- contrary to public order or good morals.

Further, a juristic act is not void because it differs from a provision of any law if such a law does not relate to public order or good morals.³⁶²

Thai law defines “juristic acts” as “voluntary lawful acts, the immediate purpose of which is to establish between persons relations to create, modify, transfer, preserve or extinguish rights”.³⁶³

So, under Thai law, a voluntary agreement to create rights to compensation in favour of one party is valid and enforceable provided it is not expressly prohibited by Thai law, is not impossible or is not contrary to public order or good morals.

³⁶¹ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 150.

³⁶² Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 151.

³⁶³ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 149.

Comparison of Thai law remedies with common law indemnities

A table comparing common law indemnities against the following Thai law remedies is set out below:

- compensation for damages; and
- stipulated penalties.

	Compensation for damages	Stipulated penalty	Common law indemnity
Amount	<p>The creditor is entitled to receive from the debtor compensation for:</p> <ul style="list-style-type: none"> • all damages as usually arise from the non-performance;³⁶⁴ and • damages that have arisen from “special circumstances”, if the debtor foresaw or ought to have foreseen those special circumstances³⁶⁵ at the time the contract was entered into. 	<p>The creditor is entitled to receive from the debtor the sum of money agreed between the parties.³⁶⁶</p> <p>But if the penalty is “disproportionately high”, it may be reduced to a “reasonable amount” by a Thai court. In determining what a “reasonable amount” is, the Thai court considers every legitimate interest of the creditor.³⁶⁷</p>	<p>The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides “dollar-for-dollar” (or, in the English context, “pound-for-pound”) recovery of loss suffered by the indemnified party.</p>

³⁶⁴ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 222.

³⁶⁵ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 222.

³⁶⁶ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 380.

³⁶⁷ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 383.

	Compensation for damages	Stipulated penalty	Common law indemnity
Mitigation	A Thai court may reduce the compensation that the debtor must pay to the creditor if the creditor has omitted to avert or mitigate the damage it suffers. ³⁶⁸	The creditor does not have to mitigate its losses.	The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.
Proof	<p>The creditor must prove:</p> <ul style="list-style-type: none"> • there was an obligation owed by the debtor to the creditor; • the debtor did not perform the obligation in accordance with the true intent and purpose of the obligation; • the creditor suffered damage; and • the damage suffered: (a) is of a type that usually arises from the debtor's non-performance; or (b) arose from special circumstances that the debtor foresaw, or should have foreseen, at the time the contract was entered into. 	<p>The creditor must prove:</p> <ul style="list-style-type: none"> • that the debtor promised to pay the creditor a sum of money as a penalty for non-performance of an obligation;³⁶⁹ and • that the debtor did not perform (that is, did not perform in the proper manner) the obligation.³⁷⁰ <p>The debtor does not need to prove that it suffered loss to be entitled to the penalty.</p>	The indemnified party must prove the "trigger event" (and whatever else the contract requires to establish the claim under the indemnity).

³⁶⁸ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 223.

³⁶⁹ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 379.

³⁷⁰ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 379.

	Compensation for damages	Stipulated penalty	Common law indemnity
Limitation period	The default limitation period is ten years, ³⁷¹ commencing from the date on which the right of claim arises, e.g., the date of default or non-performance. Shorter limitation periods are imposed for claims by certain types of parties. ³⁷²	The default limitation period is ten years, ³⁷³ commencing from the date on which the right of claim arises, e.g., the date of default or non-performance. Shorter limitation periods are imposed for claims by certain types of parties. ³⁷⁴	The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the “trigger event”). The parties can agree that the payment becomes due on a date other than the “trigger event”.
Costs	Thai courts have a discretion to order that the unsuccessful party to litigation pay the successful party’s attorney fees. ³⁷⁵ In practice, Thai courts will only order that the unsuccessful party pay a fraction of the successful party’s attorney fees.	Thai courts have a discretion to order that the unsuccessful party to litigation pay the successful party’s attorney fees. In practice, Thai courts will only order that the unsuccessful party pay a fraction of the successful party’s attorney fees.	The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.
Legal proceedings	If the claim cannot be settled out-of-court, a claim for compensation for damages requires the commencement of legal proceedings by the creditor before the Thai courts.	If the claim cannot be settled out-of-court, a claim for a stipulated penalty requires the commencement of legal proceedings by the creditor before the Thai courts.	Depending on the wording of the indemnity, a claim under it may be able to be brought as a claim for a debt (e.g., if the loss can be easily calculated or if the liability is for a specific type of loss). Such claims are more difficult to resist and procedurally more straightforward

³⁷¹ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 193/30.

³⁷² Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 193/34.

³⁷³ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 193/30.

³⁷⁴ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 193/34.

³⁷⁵ Schedule I, Court’s fees (Fees of Appearing in Court) as annex of the Civil Procedure Code (ประมวลกฎหมายแพ่งและพาณิชย์).

Compensation for damages	Stipulated penalty	Common law indemnity
<p><i>Monetary claims less than THB 50 million (approx. USD 1.5 million)</i></p> <p>The creditor must deposit a court filing fee equal to 2% of the anticipated claim value, up to a maximum of THB 200,000 (approx. USD 6,000).³⁷⁶</p> <p><i>Monetary claims greater than THB 50 million (approx. USD 1.5 million)</i></p> <p>The creditor must deposit a court filing fee of THB 200,000 (approx. USD 6,000) plus 0.1% of the amount of the claim that exceeds THB 50 million (approx. USD 1.5 million).³⁷⁷</p> <p><i>Outcome of proceedings</i></p> <p>If the creditor is successful, the court will instruct the deposit to be returned to the creditor. If the creditor is unsuccessful, the deposit will be forfeited to the court.</p>	<p><i>Monetary claims less than THB 50 million (approx. USD 1.5 million)</i></p> <p>The creditor must deposit a court filing fee equal to 2% of the anticipated claim value, up to a maximum of THB 200,000 (approx. USD 6,000).</p> <p><i>Monetary claims greater than THB 50 million (approx. USD 1.5 million)</i></p> <p>The creditor must deposit a court filing fee of THB 200,000 (approx. USD 6,000) plus 0.1% of the amount of the claim that exceeds THB 50 million (approx. USD 1.5 million).</p> <p><i>Outcome of proceedings</i></p> <p>If the creditor is successful, the court will instruct the deposit to be returned to the creditor. If the creditor is unsuccessful, the deposit will be forfeited to the court.</p>	<p>to commence.</p>

³⁷⁶ See International Affairs Division of the Office of the Judiciary, *Civil Procedure*, undated.

³⁷⁷ See International Affairs Division of the Office of the Judiciary, *Civil Procedure*, undated.

Trigger events for liability under Thai law

Under a common law indemnity, the obligation to indemnify is activated on the occurrence of a specific event (called a "trigger event"). Common trigger events are: breach of contract, negligence (or other wrongful conduct), misrepresentation or claims brought by a third party (that is, a non-party) to the contract against a party to the contract (called a "third-party indemnity").

While the concept of an indemnity does not exist under Thai law, because Thai law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of the following events:

- breach of contract;
- wrongful acts;
- misrepresentation; and
- third-party claims.

But because Thai law does not recognise the concept of an indemnity, the "beneficiary" of the agreement will not receive bhat-for-bhat (or "blank cheque") recovery for the loss it suffers from the event.

Breach of contract

Compensation for damages

Under Thai law, an obligor who fails to perform an obligation in accordance with the obligation's true intent and purpose is liable to pay compensation to the obligee for any damage caused by the obligor's non-performance.³⁷⁸

So, the trigger event for compensation for damages is a breach of contract.

Stipulated penalty

Under Thai law, if an obligor promises to pay a sum of money to the obligee as a penalty in case the obligor does not perform an obligation in a proper manner (that is, a "stipulated penalty"), the obligor forfeits that sum of money if it fails to perform the obligation in the proper manner.

So, the trigger event for a stipulated penalty is a breach of contract.

Wrongful acts

A person who wilfully or negligently, or unlawfully injures the life, body, health, liberty, property or any right of another person commits a wrongful act under Thai law, and is liable to compensate the injured party.³⁷⁹ This is analogous to the concept of "tort" in common law systems or "delict" in civil law systems.

In such circumstances, the court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.³⁸⁰ Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages for any injury caused.³⁸¹

³⁷⁸ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 215.

³⁷⁹ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 420.

³⁸⁰ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 438, paragraph 1.

³⁸¹ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 438, paragraph 2.

The limitation period (called the period of “prescription”) for claims for damages arising from wrongful acts is:³⁸²

- one year from the day when the wrongful act and the person bound to make compensation became known to the injured person; or
- ten years from the day when the wrongful act was committed.

Thai law does not state whether the existence of a contract between the injured party and the wrongdoer bars the commission of a wrongful act by one party against the other and the subsequent recovery of damages.

So, *prima facie*, it may be possible that the parties can reach an agreement on the liability of one party to another on the occurrence of a wrongful act by one party that causes damages to another (including modifying the limitation period).

Misrepresentation

Misrepresentation under Thai law

Thai law does not have a concept of “misrepresentation”. However, Thai law does allow a representee to “avoid”³⁸³ (that is, annul) a contract if:

- the representor engages in fraud and the representee would not have entered into the contract in the absence of that fraud;³⁸⁴ or
- the representor intentionally remains silent about a fact or quality of the contract (of which the representee is ignorant) and the representee would not have entered into the contract had the representor not been silent about that fact or quality.³⁸⁵

In the latter case, Thai law deems the conduct of the representor to be fraudulent.³⁸⁶

Modifying the effect of Thai law

Thai law recognises the concept of freedom of contract.³⁸⁷ So, *prima facie*, the parties can agree that the representor must compensate the representee for any damages suffered by the representee resulting from a non-fraudulent misrepresentation or pay a stipulated penalty if it makes a non-fraudulent misrepresentation.

Third-party claims

As Thai law recognises the concept of freedom of contract, the parties may be able to agree that one party (the obligor) is liable to pay compensation for damages or a stipulated penalty to the other (the obligee) resulting from a third-party claim. The benefit of agreeing to a stipulated penalty, rather than a right to compensation for damages, is that the obligee would not have to prove any loss suffered before claiming the penalty.

³⁸² Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 448.

³⁸³ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์) Chapter III.

³⁸⁴ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 159.

³⁸⁵ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 162.

³⁸⁶ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), section 162.

³⁸⁷ Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์), sections 150 and 151.

References

- Civil and Commercial Code (ประมวลกฎหมายแพ่งและพาณิชย์).
- Civil Procedure Code (ประมวลกฎหมายแพ่งและพาณิชย์).

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The concept of an indemnity as understood by the common law does not exist under Vietnamese law.

Vietnamese law recognises the concept of freedom of contract. And it also recognises that parties may agree to other remedies not stipulated under Vietnamese law (known as “[party-agreed remedies](#)”).

However, party-agreed remedies have not been widely tested before the Vietnamese courts and it is not uncommon for Vietnamese courts to interpret an indemnity provision as being analogous to remedies stipulated under Vietnamese law, even though there are differences between those remedies and the concept of an indemnity.

The two most analogous remedies under Vietnamese law are:

- compensation for damages; and
- penalties for breach.

A table comparing these two remedies against the common law concept of an indemnity is set out [below](#).

Liability under a common law indemnity is generally triggered on the occurrence of a “trigger event” such as breach of contract or a third-party claim. While the concept of an indemnity does not exist under Vietnamese law, because Vietnamese law recognises the concept of freedom of contract,

contract parties can agree that liability of one party to another is triggered on the occurrence of a "trigger event". Such "trigger events" are examined below.

Freedom of contract

Under Vietnamese law, individuals and legal entities are permitted to establish, perform and terminate their civil rights and obligations on the basis of free and voluntary commitments and agreements.³⁸⁸ Further, any commitment or agreement that does not violate a prohibition under Vietnamese law or is not contrary to Vietnamese “social morals” is valid for performance by the parties and must be respected by others.³⁸⁹

Vietnamese law stipulates several remedies for breach of contract. But Vietnamese law permits parties to agree to other types of remedies provided that such remedies are not contrary to:³⁹⁰

- the fundamental principles of Vietnamese law;
- any international treaty to which Vietnam is party; or
- international commercial practice.

Party-agreed remedies

As mentioned above, Vietnamese law permits parties to agree to other types of “commercial” remedies, subject to certain conditions.

Such a remedy agreed between the parties is called a “party-agreed remedy” (in Vietnamese “biện pháp khắc phục do các bên thỏa thuận”).

So, the concept of an “indemnity” as an agreed remedy that provides for full or dollar-for-dollar (or, in the Vietnamese context đồng-for-đồng, i.e., “blank cheque”) recovery for loss suffered as the result of a “trigger event” is *prima facie* possible under Vietnamese law.

However, the enforceability of “party-agreed remedies” has not been widely tested before the Vietnamese courts. It is also not uncommon for Vietnamese courts to interpret an indemnity provision as being analogous to the remedies stipulated under Vietnamese law for breach of contract, even though there are differences between those remedies and the concept of an indemnity.

So, “party-agreed remedies” should be approached with caution.

Insurance

Certain characteristics of the concept of an indemnity can be found in some regulations under Vietnamese law, especially the regulations on insurance. Under Vietnamese insurance laws, in an insurance contract, an insurance institution may undertake to compensate an insured party for a certain amount of the insured money upon the occurrence of an “insured event” as agreed by the parties or as stipulated by law.³⁹¹ However, it is noted that such regulations only apply to insurance contracts where one side is an insurance institution and shall not be utilised to interpret an indemnity clause in civil or common commercial contracts.

³⁸⁸ Civil Code 2015 (No. 91/2015/QH13) Article 3.2.

³⁸⁹ Civil Code 2015 (No. 91/2015/QH13) Article 3.2.

³⁹⁰ Commercial Law (No. 36/2005/QH11) Art 292.7.

³⁹¹ Law on Insurance (No. 24/2000/QH10) Article 12.1.

Comparison of Vietnamese law remedies with common law indemnities

A table comparing common law indemnities against the following Vietnamese law remedies is set out below:

- compensatory for damages; and
- penalty for breach.

	Compensation for damages	Penalty for breach	Common law indemnity
Amount	<p>Damages are limited to:</p> <ul style="list-style-type: none"> • losses caused by the breaching party's breach that are actual and direct; and • direct profits that would have been earned had the breach by the breaching party not occurred. 	<p><i>Commercial contracts</i></p> <p>A penalty for breach of commercial contracts (either individually or in the aggregate) cannot exceed 8% of the value of the contractual obligation which is the subject of the breach.</p> <p><i>Civil contracts</i></p> <p>A penalty for breach of other civil contracts is not limited.</p>	<p>The purpose of an indemnity is to ensure that the indemnified party recovers 100% of its loss. That is, the indemnity provides "dollar-for-dollar" (or, in the English context, "pound-for-pound") recovery of loss suffered by the indemnified party.</p>
Mitigation	<p>The party claiming breach is required to mitigate its loss (including the loss of direct profits) caused by the breaching party's breach. The breaching party is entitled to request a rebate of the value of damages to the extent the loss claimed could have been mitigated.³⁹²</p>	<p>The party claiming breach does not have to mitigate its losses.</p>	<p>The indemnified does not have to mitigate its losses, especially if the claim under an indemnity is a debt claim.</p>

³⁹² Commercial Law (No. 36/2005/QH11) Article 305.

	Compensation for damages	Penalty for breach	Common law indemnity
Proof	<p>The party claiming breach bears the burden of proving:³⁹³</p> <ul style="list-style-type: none"> • occurrence of the breach; • occurrence of the actual loss (i.e., the extent of the loss caused by the breaching party's breach and the amount of direct profits that it would have earned if the breach by the breaching party had not been committed); and • the breach is the direct cause of the loss. 	<p>The party claiming breach bears the burden of proving:</p> <ul style="list-style-type: none"> • occurrence of the breach; and • existence of a penalty agreement in the contract for such breach. <p>The party claiming breach is not required to prove loss.</p>	<p>The indemnified party must prove the "trigger event" (and whatever else the contract requires to establish the claim under the indemnity).</p>
Limitation period	<p><i>Commercial contracts</i></p> <p>The limitation period is two years for commercial disputes, commencing from the time of infringement of lawful rights and interests. It is unclear whether this period starts from the date of breach, the date of occurrence of loss or the date of demand for payment.</p>	<p><i>Commercial contracts</i></p> <p>The limitation period is two years for commercial disputes, commencing from the time of infringement of lawful rights and interests. It is unclear whether this period starts from the date of breach, the date of occurrence of loss or the date of demand for payment.</p>	<p>The limitation period starts from the date that the payment under the indemnity is due (normally on the occurrence of the "trigger event"). The parties can agree that the payment becomes due on a date other than the "trigger event".</p>

³⁹³ Commercial Law (No. 36/2005/QH11) Articles 303 and 304.

	Compensation for damages	Penalty for breach	Common law indemnity
	<p><i>Civil contracts</i></p> <p>The limitation period is three years for other disputes arising from civil contracts, commencing from the date on which the claimant knew or should have known that his/her lawful rights and interests were infringed upon.</p>	<p><i>Civil contracts</i></p> <p>The limitation period is three years for other disputes arising from civil contracts, commencing from the date on which the claimant knew or should have known that his/her lawful rights and interests were infringed upon.</p>	
Costs	<p>Under Vietnamese law, the claimant can recover their court fees if their claim is upheld by the court.³⁹⁴</p> <p>Generally speaking, whether the claimant can recover attorney fees is not regulated under Vietnamese laws. There is only one regulation under the Law on Intellectual Properties that in addition to claiming compensation for damages, the aggrieved party can request the court to force a defaulting party to compensate reasonable attorney fees.³⁹⁵</p>	<p>Under Vietnamese law, the claimant can recover their court fees if their claim is upheld by the court.</p> <p>Generally speaking, whether the claimant can recover attorney fees is not regulated under Vietnamese laws. There is only one regulation under the Law on Intellectual Properties that in addition to claiming compensation for damages, the aggrieved party can request the court to force a defaulting party to compensate reasonable attorney fees.</p>	<p>The indemnifier must pay the enforcement costs specified in the contract. This may, depending on the wording of the contract, increase the recovery of legal and other related costs.</p>
Legal proceedings	<p>A claim for compensation for damages requires the commencement of legal proceedings before Vietnamese courts.</p>	<p>A claim for penalty for breach requires the commencement of legal proceedings before Vietnamese courts.</p>	<p>Depending on the wording of the indemnity, a claim under it may be able to be brought as a claim for a debt (e.g., if the loss can be easily calculated or if the liability is for a specific type of loss).</p>

³⁹⁴ Resolution No. 326/2016/UBTVQH14 dated 30 December 2016 Articles 26 and 29.

³⁹⁵ Law on Intellectual Properties (No. 50/2005/QH11 dated 29 November 2015) Article 205.3.

Such claims are more difficult to resist and procedurally more straightforward to commence.

Trigger events for liability under Vietnamese law

Under a common law indemnity, the obligation to indemnify is activated on the occurrence of a specific event (called a "trigger event"). Common trigger events are: breach of contract, negligence (or other wrongful conduct), misrepresentation or claims brought by a third party (that is, a non-party) to the contract against a party to the contract (called a "third-party indemnity").

While the concept of an indemnity does not exist under Vietnamese law, because Vietnamese law recognises the concept of freedom of contract, contract parties can agree that liability of one party to another is triggered on the occurrence of the following events:

- breach of contract;
- Non-contractual wrongs;
- misrepresentation; and
- third-party claims.

Breach of contract

Compensation for damages

Under Vietnamese law, an obligor is liable to pay compensation for damages that cover the actual and direct loss suffered by the obligee and the direct profit which the obligee would have earned if the breach had not been committed.³⁹⁶

So, the trigger event for an obligation to pay compensation for damages is a breach of contract.

Penalty for breach

Under Vietnamese law, a penalty for breach is a remedy where the parties agree that the obligee can request that the obligor pay the obligee a penalty for the obligor's breach of contract.³⁹⁷

So, the trigger event for an obligation to pay a penalty for breach is a breach of contract.

Non-contractual wrongs

Vietnamese law provides liability for compensation for non-contractual wrongs (in Vietnamese "*Trách nhiệm bồi thường thiệt hại ngoài hợp đồng*").³⁹⁸ This is like the concept of a "tort" in common law systems or "delicts" in civil law systems.

Vietnamese law provides that a person who harms the "life, health, honour, dignity, reputation, property, or other legal rights or interests" of another person, thereby causing loss and damage, must compensate for such loss and damage.³⁹⁹

So, the trigger event to pay compensation can be a non-contractual wrong that harms another person.

³⁹⁶ Commercial Law (No. 36/2005/QH11) Article 302.2

³⁹⁷ Commercial Law (No. 36/2005/QH11) Article 300.

³⁹⁸ Civil Code 2015 (No. 91/2015/QH13) Chapter 20.

³⁹⁹ Civil Code 2015 (No. 91/2015/QH13) Article 584.1

Misrepresentation

Misrepresentation under Vietnamese law

Under Vietnamese law, a party that participates in a civil transaction as a result of deception, threat or coercion has a right to request that a court declare the transaction invalid.⁴⁰⁰

If a contract is declared invalid, the parties must be restored to their original state prior to the entry into the transaction and return to each other what they have received.⁴⁰¹ The party that engaged in the deception must compensate the other party for loss or damage suffered.⁴⁰²

“Deception” in a civil transaction means an intentional act of a party (or a third person) (the representor) for the purpose of misleading another party (the representee) as to the subject matter, nature or contents of the transaction which has caused the representee to enter into the transaction.⁴⁰³

So, the requirements for an actionable misrepresentation under Vietnamese law are:

- an act by the representor that is deceptive, threatening or coercive;
- the representor intended by its act to mislead the representee as to the subject matter, nature or contents of the transaction; and
- reliance by the representee on the representor’s intentional act in entering into the transaction.

If any of the above elements is absent, the representee will not have a remedy under Vietnamese law (unless the civil transaction involves a “misunderstanding”⁴⁰⁴).

The limitation period to seek a court declaration that a civil transaction is invalid as a result of deception is two years from the date the deceived person knew, or should have known, that the civil transaction was established due to the deception.⁴⁰⁵

Modifying the effect of Vietnamese law

As Vietnamese law recognises the concept of freedom of contract,⁴⁰⁶ the parties can agree to modify the effect of misrepresentations under Vietnamese law by using a “party-agreed remedy”.

For example, a representee has no remedies under Vietnamese law against a representor that makes a non-intentional misrepresentation. But the parties could agree to a “party-agreed remedy” whereby the representor is liable to pay compensation for damages, liquidated damages or a penalty for breach if it makes a false misrepresentation (whether made intentionally or not).

⁴⁰⁰ Civil Code 2015 (No. 91/2015/QH13) Article 127.

⁴⁰¹ Civil Code 2015 (No. 91/2015/QH13) Article 131.2

⁴⁰² Civil Code 2015 (No. 91/2015/QH13) Article 131.4.

⁴⁰³ Civil Code 2015 (No. 91/2015/QH13) Article 127, paragraph 2.

⁴⁰⁴ Civil Code 2015 (No. 91/2015/QH13) Article 126.

⁴⁰⁵ Civil Code 2015 (No. 91/2015/QH13) Article 132.1(b).

⁴⁰⁶ Civil Code 2015 (No. 91/2015/QH13) Article 3.2

Third-party claims

As Vietnamese law recognises the concept of freedom of contract,⁴⁰⁷ the parties can agree to a “party-agreed remedy” to compensate the obligee in the event that a third party makes a claim of, or brings legal proceedings, against the obligee.

For example, the parties could agree that the obligor is liable to pay compensation for damages, liquidated damages or a penalty for breach if a third party makes a claim of, or brings legal proceedings, against the obligee.

References

- Civil Code (No. 91/2015/QH13).
- Commercial Law (No. 36/2005/QH11).
- Law on Insurance (No. 24/2000/QH10).
- Law on Intellectual Properties (No. 50/2005/QH11 dated 29 November 2015); and
- Resolution No. 326/2016/UBTVQH14 dated 30 December 2016

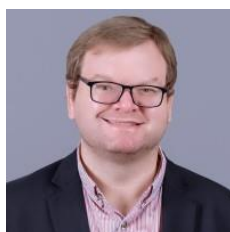
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⁴⁰⁷ Civil Code 2015 (No. 91/2015/QH13) Article 3.2.

