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# Indemnity Clause Checklist

GLS Checklists – Knowledge Leverage Tools



## 1. INTRODUCTION

An indemnity enables its beneficiary to claim on a dollar-for-dollar basis if the indemnified matter arises, rather than bringing a claim for damages with the consequent need to evidence contract breach and loss.

An indemnity is a powerful way of allocating identified contract-related risks between the Parties. It may reinforce, re-direct, transfer of even reverse the risk – depending on how the indemnity is used.

The indemnity requires a commitment from one party to pay for the financial loss incurred by the other party when a pre-agreed event or series of events occurs (or not). Indemnities are not given, and should not, be given lightly.

Indemnities offer enhanced protection to the indemnified party as they may not have to demonstrate the link between fault, cause and/or loss. It could be that if the event happens then the indemnifier must pay.

Additionally, the obligation to pay under an indemnity can also be treated as a “debt”. Assuming no contract provision excludes it, monies owed to you under an indemnity can be “set it off” against any monies you owe.

Most organisations are subject to very specific restrictions as to what indemnities they require or can or cannot give. As such, this checklist is extensively detailed to aid proper consideration of the indemnity provision.

## 2. RELATED ASSUMPTIONS

In preparing this checklist, we have made the following assumptions:

- Our checklist is based on English law principles
- Contracting Parties are assumed to be corporations
- Provisions are considered as though arising in a “Supply Contract” scenario, and the principles they invoke will be applicable to most commercial transactions
- Generally, we are reviewing the indemnity from the customer’s perspective

Please remember that this checklist does NOT replace the need for independent legal advice.

## 3. INDEMNITY CLAUSE

### 3.1 Issues dashboard

#### You should look at:

Indemnifying Party’s Status	Indemnity Trigger Events
Indemnity Scope Adequacy	Indemnity Beneficiaries
Event & Consequence Nexus	Impact of Liability Limitation/Exclusion
Indemnity Procedurals Qualification	Other Indemnity Qualifications
Indemnity Like Provisions	Indemnity Invoicing

### 3.2 Indemnifying Party’s Status

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.2.1 Is it clear who the indemnifier is (i.e., party to contract)?	N	(a) Clarify if not. Ensure it is a party to the contract otherwise it may not be enforceable
	Y	(b) Confirm they are Party to the contract otherwise it may not be enforceable
3.2.2 Does indemnifier have financial means to give indemnities?	Y	(a) Consider requesting proof of ability to pay e.g., insurance coverage for indemnities granted.



- N
- (b) Consider imposing requirement that they insure their contract risk and provide proof of the same
- (c) If they do not have means to give indemnity, reconsider their suitability to contract with

**3.3 Indemnity Trigger Events**

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.3.1 Is the trigger event for each indemnity precisely stated?	N	(a) <u>Indemnifier</u> : tighten up language if it is not clear (b) <u>Beneficiary</u> : ambiguity in language may advantageously broaden applicability of indemnity
3.3.2 Is the time during which the trigger event must occur clear?	N	(a) <u>Indemnifier</u> : always be clear on when availability of indemnity is intended to be given (b) No time limit could create open ended / perpetual indemnification / liability scenario
3.3.3 Do any of the indemnities survive contract termination?	C	(a) Consider if indemnities should / should not survive termination (b) <u>Beneficiary</u> : Should they? Indemnities re IPR, fraud etc should go beyond termination (c) <u>Indemnifier</u> : Avoid indemnities that run post contract term – may create perpetual liability

**3.4 Indemnity Scope Adequacy**

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.4.1 Has the scope of the indemnity claim been set out?	C	(a) Check the scope of the claim in every instance (b) Does it include claims, demands, costs or judgments etc? Should it? (c) <u>Beneficiary</u> : ensure permissible scope of claims is as broad as possible
3.4.2 Is the type of loss covered by the indemnity clear?	Y	(a) Is it adequate for your needs? (b) Consider indemnity's purpose: reinforce, reverse, re-direct risk appropriately (c) Check whether indemnity does/should cover both direct and indirect loss scenarios (d) Spell out specific loss scenarios you want to see covered (e.g., cost of repairing XYZ)
	N	(e) <u>Indemnifier</u> : need to be clear about what you have to cover and any exceptions to cover (f) <u>Beneficiary</u> : balance benefit of precisely defined loss scenarios with general language descriptors
3.4.3 Is the scope of indemnity adequate?	C	(a) <u>Indemnifier</u> : consider limiting indemnified areas of loss to that for which you have insurance



		(b) <b>Beneficiary:</b> does it cover all areas of risk that indemnifier should cover as they control risks?
		(c) <b>Indemnifier:</b> reject indemnification of things you are not in sole and direct control of
3.4.4 Does the indemnity cover third party "claims"?	N	(a) <b>Beneficiary:</b> make sure you can cover "claims" – as opposed to proven damages/final claims
	Y	(b) <b>Indemnifier:</b> consider limiting to proven claims – substantially reduces scope of the indemnity
3.4.5 Does the indemnity cover indirect losses?	Y	(a) Consider whether it should and request changes if need be
		(b) Always check impact of exclusion/limitation of liability provisions on indemnities you receive
		(c) Rules regarding application of limitation of liability language vs indemnity drafting apply
3.4.6 Is broad/vague language used to describe each indemnity?	N	(a) <b>Beneficiary:</b> carefully consider all risk scenarios you want covered are in fact covered
	Y	(b) <b>Indemnifier:</b> carefully consider making language more specific to reduce indemnity exposure

**3.5 Indemnity Beneficiaries**

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.5.1 Are the beneficiaries of the indemnity clearly stated?	N	(a) Consider clarifying if not clear enough (b) Limit if you are the Indemnifier / expand if you are Beneficiary
3.5.2 Does any third party benefit from the indemnity?		(a) Should they? (b) In each case – carefully consider impact of rights of third parties' legislation (c) <b>Indemnifier:</b> third parties to the agreement should not benefit from your indemnities
3.5.3 Are categories of third party beneficiaries clear, if any?	N	(a) Ensure categories accurately defined (b) Consider who should benefit – ensure language captures them (c) Consider if Affiliates, Directors, Shareholders, Employees, Contractors, Agents, etc should be included
3.5.4 Does the indemnity benefit your Affiliates?	N	(a) Should it? Especially if this is an MSA/Group based procurement contract
	Y	(b) <b>Indemnifier:</b> consider whether indemnity should be restricted to avoid covering Affiliates



### 3.6 Event & Consequence Nexus

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.6.1 Is the causal link between trigger event & indemnity adequate?	N	(a) <u>Indemnifier</u> : ensure a concise causal link is established and one that can be evidenced  (b) <u>Indemnifier</u> : focus on ensuring sensible causal link to the performance of the contract
3.6.2 Is an expansive causal link used between the trigger event & indemnity coverage?	Y	(a) <u>Indemnifier</u> : avoid expansive causal links such as “ <i>arising out of or in connection with</i> ” or “ <i>directly or indirectly related to</i> ”  (b) <u>Indemnifier</u> : The above language may result in the indemnity capturing indirect, special and consequential loss  (c) <u>Beneficiary</u> : obviously this expansive language could be beneficial
3.6.3 Does Beneficiary have to prove causal link?	Y	(a) Consider how easily this can be done  (b) Ensure “evidential” requirement does not effectively undermine ability to claim indemnity

### 3.7 Indemnified Loss Scope

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.7.1 Is scope of indemnified loss clear?	Y	(a) Is it adequate for your needs?  (b) Consider indemnity’s purpose: reinforce, reverse, re-direct risk appropriately
	N	(c) <u>Indemnifier</u> : need to be clear about what you have to cover  (d) <u>Beneficiary</u> : balance benefit of precisely defined loss scenarios with general language descriptors
3.7.2 Does indemnity clearly capture direct/indirect losses?	C	(a) Rules regarding application of limitation of liability language vs indemnity drafting

### 3.8 Impact of Liability Exclusion/Limitation

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.8.1 Have you assessed impact of limitation/exclusion provisions?	Y	(a) <u>Beneficiary</u> : Ensure indemnity remains intact once liability provisions are applied  (b) <u>Indemnifier</u> : ensure liability and indemnity provisions dovetail together as intended
3.8.2 Are there any limits on the following indemnities?  Should there be?		(a) Breach of third Party IPR – there should not be caps/exclusions  (b) Data Protection breaches – almost certainly there should be a cap  (c) Workplace Matters (i.e. claims from counterparty’s employees) – should be no caps/exclusions



3.9 Conduct Of Proceeding

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.9.1 Has a conduct of proceedings provision been included?	Y	(a) Consider if provision is reasonable? (b) <u>Beneficiary</u> : Ensure it doesn't dilute value of the indemnity you receive
	N	(c) <u>Indemnifier</u> : it is vital to include a conduct of proceeding clause (d) <u>Indemnifier</u> : need to ensure Beneficiary isn't just running up expenses unreasonably
3.9.2 Does the conduct of proceedings clause deal with:	C	(a) Notice of written claims (b) No admissions of liability (c) Ability to conduct proceedings (d) Ability to settle proceedings / approvals (e) Obligation not to compromise negotiations (f) [Consider other criteria ...]

3.10 Other Indemnity Qualification

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.10.1 Are there qualifications on the exercise of your indemnity?	Y	(a) <u>Beneficiary</u> : Are they reasonable / practical? (b) <u>Beneficiary</u> : Do they diminish value of your indemnity protection?
3.10.2 Are any of the following eligibility qualifications put in place? Are they reasonable?		(a) Time to bring claim? (b) Timing and form of notices of claims? (c) Requirement to evidence loss? (d) Form in which the claim may be brought? (e) Limited to damages awarded by court / of final appeal?
3.10.3 Are there any unreasonable obstacles to claim indemnity?	Y	(a) <u>Beneficiary</u> : amend/negotiate to remove these obstacles
3.10.4 Is there a "no fault, no liability" indemnity carve out?	N	(a) <u>Indemnifier</u> : consider including as means of mitigating exposure
	Y	(b) <u>Beneficiary</u> : ensure that scope of language doesn't invalidate value of indemnity (c) Ensure indemnity cover reduced only to the extent of proven fault/contribution (d) <u>Beneficiary</u> : ensure it doesn't invalidate the entire indemnity
3.10.5 Is there a duty to mitigate indemnified loss?	N	(a) <u>Indemnifier</u> : always include a duty on the Beneficiary to mitigate losses reasonably



3.10.6 Is the indemnity stated as an exclusive remedy?	Y	(a) Consider if this appropriate?
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### 3.11 Indemnity like provisions

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.11.1 Is there “indemnity like” language used in the agreement?	Y	(a) Does it amount to an indemnity? (b) Should it be clarified as an indemnity? (c) Clarify where it is not intended as an indemnity
3.11.2 Consider appropriateness of the following types of language, if included	C	(a) Will reimburse ... (b) For your account ... (c) At your expense ... (d) You will pay for ... (e) Can deduct from money we owe you ...
3.11.3 Have you had a lawyer review “indemnity like” language?	N	(a) Get your lawyer to review and advise on legal/financial implications

### 3.12 Indemnity Invoicing

Primary Query	Y/N/C	Secondary Query / Comment / Action
3.12.1 Is it clear how you may invoice for an indemnity you are claiming?	N	(a) <u>Beneficiary</u> : customers do not usually raise invoices – you may need to include terms to invoice for indemnity (b) Invoice terms of an indemnity do not need to mirror supplier invoice terms
3.12.2 Do you have a “set-off right” to claim indemnity sums against money you owe?	C	(a) <u>Beneficiary</u> : it is more advantageous to have a set-off right (especially when a customer) (b) <u>Indemnifier</u> : granting a set-off right makes it too easy for the Beneficiary to claim – push back

#### PRACTICAL TIPS

- Use indemnities when you want to reinforce, limit, transfer or reverse liability scenarios
- Always consider how the indemnities interact with overall caps/exclusions of liability
- Be careful of language which acts like an indemnity without using the word “indemnity”
- When articulating loss types that are recoverable – use same precision of language that you would when drafting an exclusion/limitation of liability call
- If you are a non-lawyer – always check indemnity language with your lawyer – do not assume you understand the legal import of indemnity related language
- Never give an indemnity lightly or broadly – they can create extensive financial exposure
- Check to ensure your insurance covers any indemnities that you might end up giving