



Global Legal Solutions®

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 or 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.



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) Beneficiary: 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) Beneficiary: it is more advantageous to have a set-off right (especially when a customer) (b) Indemnifier: 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