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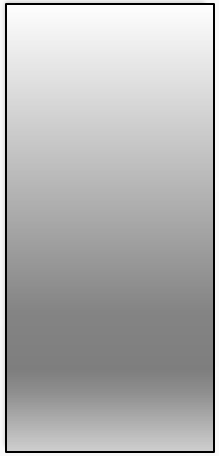
NOTE ON INDEMNIFICATION



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NOTE ON INDEMNIFICATION

A) Definition

1) Indemnity is a legal concept, entered in the form of a contract, or mentioned as a clause in commercial contracts. The term 'Indemnity' is derived from a Latin word '*indemnis*' which stands for 'unhurt' or 'free from loss'. In the broadest sense, indemnity is an undertaking and absolute promise made willingly by one party called the "**Indemnifying Party"** or **"Indemnifier**", as security to protect and/or compensate the other party called the "**Indemnified Party"** or **"Indemnity Holder**" from any loss, expense, cost, damage or any other consequences caused due to an act or omission by the conduct of the Indemnifier or any third party or an event.

2) Section 124 of the Indian Contract Act, 1872 ("**Contract Act**") defines the contract of indemnity as:

"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".

- A perusal of section 124 of the Contract Act reflects that –

  - a prior promise should be made to protect the Indemnity Holder; and
  - the question of indemnification arises only when the loss or damage which has occurred is with regard to the prior promise which was made by the Indemnifier to the Indemnity Holder to protect from such loss or damage.

- The definition and concept of indemnity under the Contract Act is however narrower since it only deals with one particular kind of indemnity which arises from a promise made by the Indemnifier to save the Indemnity Holder from the loss caused to him either by the conduct of Indemnifier himself or any other third person. It is not exhaustive enough to cover those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the Indemnifier or any third person, or by reason of liability incurred by something done by the Indemnity Holder at the request of the Indemnifier. In the matter of ***Gajanan Moreshwar Parelkar vs. Moreshwar Madan Mantri on 1 April, 1942,*** the Hon'ble Bombay High Court has also upheld that indemnity provisions in the Contract Act are not self-sufficient and common law principles are to be relied upon.

3) Essentially, the underlying principle of an indemnity is to shift the liability / potential costs, in whole or part, from one party to another – to protect the Indemnity Holder against a financial burden. However, it is pertinent to note that the purpose of indemnity is not to merely reimburse the Indemnity Holder in terms of any amount paid, but is basically the liability of the Indemnifier to save the Indemnity Holder from a claim made by a third party. The clauses on Indemnity are deeply focused upon, during negotiation of commercial contracts. Serious consequences can arise due to a poorly negotiated indemnity clause.

4) Broadly indemnity includes all contracts of protection, security, guarantee, etc. However, it is to be noted that although similar, there is a difference between indemnity and guarantee and the difference lies in the 'obligation'. Indemnity creates a primary obligation, whereas guarantees create a secondary obligation. In practice, this means a guarantee offers you either compensation or fulfilment of a contract as a guarantor

will take on responsibility if the other party is unable to perform whereas an indemnity can only offer compensation to you if you suffer a loss or future loss. Although, the guarantee can be invoked by the creditor without invoking the obligation of the principal debtor, more often than not, the guarantee will either be co-existing or secondary in nature as the creditor will try to exhaust the security provided by the principal debtor, unlike in cases of indemnity.

B) Type of Indemnity

1) The literal interpretation of the section 124 of the Contract Act although points towards the need for contracts of indemnity to be in written/express form, however flowing from general principles governing contract law, a contract for indemnity can be either:

A. **Express** – a promise where there is an express agreement of indemnification; or
B. **Implied** – a promise by operation of law. The principles of implied indemnity are dealt with under the following provisions of law:

a) **Contract Act.**

- **Section 69** – which provides that if a party who is interested in payment of money which another is destined by law to pay and therefore himself pays it, he is designated to be indemnified.
- **Section 145** – which provides that a party has a right of the surety to claim indemnity from the principal defaulter for all sums which he has lawfully paid towards the guarantee.
- **Section 222** – which provides for liability of the principal to indemnify the agent in respect of all amounts paid by him during the legitimate exercise of his power.

b) **Indian Partnership Act, 1932**

- **Section 10** - Duty to indemnify for loss caused by fraud —Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.
- **Section 13** - Mutual rights and liabilities — Subject to contract between the partners —
(e) the firm shall indemnify a partner in respect of payments made and liabilities incurred by it:
- in the ordinary and proper conduct of the business, and
- in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and
(f) a partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

c) **Negotiable Instruments Act, 1881**

i) **Section 45A and 81** – Drawer of the instrument (promissory note/bill of exchange/cheque) to provide indemnity to the holder of the instrument, in case the instrument is lost before it is overdue for payment.

Implied Indemnity was further identified / recognized by the Privy Council in the matter of ***The Secretary of State vs. The Bank of India Limited. on 2 March, 1938***, where it was held that there was an implied promise between the state and the bank which made it possible for the state to recover money from the bank when it was discovered that the endorsement sent by the bank in good faith to the Public Debt Office was actually forged. It was further held that the express indemnity clause is not necessary in face of implied right to indemnity already existing under the Indian Laws.

2. Indemnity can be:

a) **One-way** – where only one party indemnifies the other party; or
b) **Mutual** – where both the parties indemnify each other.

C) Rights and remedies of the Indemnity Holder and Obligations of the Indemnifier

1) It is pertinent to note that the rights of the Indemnity Holder are the obligations of the Indemnifier. Section 125 of the Contract Act provides for remedies available to the Indemnity Holder and accordingly also lists down the obligations of the Indemnifier; whereby the Indemnity Holder is entitled to recover from the Indemnifier and the Indemnifier is obligated to pay the Indemnity Holder for the following:

a) **All damages** – which the Indemnifier has promised to indemnify and which the Indemnity Holder is compelled to pay in any suit in respect of any of the matter to which the promise to indemnify applies. The logical principle is that when a third party lays down a claim against the Indemnity Holder, who had acted on the faith of Indemnifier, must be indemnified by the Indemnifier.

- This requires the Indemnifier to: i) reimburse the Indemnity Holder for its paid costs and expenses, referred to as losses; and ii) advance payments to the Indemnity Holder for its unpaid costs and expenses, such as liabilities, claims and/or causes of action.
- In order to recover damages, it is necessary to prove that the Indemnity Holder was compelled by law to pay such damages however there is no need to prove that the loss incurred is direct or indirect in nature.

b) **All defense costs and expenses -** which the Indemnity Holder may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit.

- When pursuing a suit, in which the purpose or the action of the indemnity is being involved, the Indemnity Holder is being provided with the statutory right to claim costs as well with the damages from the Indemnifier. This was further confirmed by the Hon'ble Calcutta High Court in the matter of ***Pepin vs Chunder Seekur Mookerjee and Anr. on 1 April, 1880***.
- This also provides right to the Indemnifier to control the defense of the third-party suit.
- The obligation to defend is broader than the obligation to indemnify because it applies regardless of the merits of the third-party suit. The allegations of the lawsuit trigger the obligation to defend, not the ultimate disposition of the case.

c) **All Sums** - which the Indemnity Holder may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

- This provision deals with sums paid in lieu of a compromise. A strict interpretation of this provision would enable the Indemnity Holder to recover only those sums brought after the initiation of a suit thereby excluding sums paid in a compromise entered into prior to the initiation of the suit. However, the Hon'ble Allahabad High Court in the matter of ***Kali Charan vs Durga Kunwar and Ors. on 23 January, 1913,*** did not view the provision in a strict and literal manner and broadened the extent of sums recoverable to include

a prior compromise as well, as long as it had been made prudently or after receiving due authorization from the Indemnifier.

- It is important to note that if and when the Indemnity Holder pays a certain sum of money to compromise and end the litigation, such a sum can be recovered from the Indemnifier; only if he has acted prudently as under:
  - He has acted in good faith.
  - He has not deceived the Indemnifier.
  - He has not recovered or attempted to recover sums fraudulently.
  - He has followed all instructions and directions, if any, as given by the Indemnifier.
  - His claim under-recovery is fair and reasonable.

2) In the light of the above statutory rights provided under section 125 of the Contract Act, it is pertinent to note the following judicial precedents –

a) The rights of Indemnity Holder were given validation in the matter of ***Nallappa Reddi vs. Vridhachala Reddi and Anr. on 6 October, 1911,*** whereby the Hon'ble Madras High Court held that "*where there is a contract to indemnify, if a decree has been passed against the person entitled to indemnity, the correctness of that decree cannot be impeached by the person bound to indemnify. The contract of indemnity might no doubt strictly be said to require that it should be proved that the indemnifier acted in violation of his duty, as well as that his act caused loss to the party entitled to indemnity. But the courts have held, and we think rightly, if we may say so, that the contract is substantially broken when the court has found in a suit honestly defended by the party entitled to indemnity that there has been a violation of duty by the indemnifier which has entitled a third party to the damages for which the indemnity has been given. It has further been held that, if both the indemnifier and the party entitled to indemnity were parties to the action by the third party, as in this case, or if the indemnifier had notice given to him of the suit against the party entitled to the indemnity, the judgment would be conclusive against the indemnifier even as an adjudication by court".*

b) Further, in the matter of ***Anwar Khan v. Gulam Kasam, AIR 1919 Nag 126***, the Hon'ble Nagpur Court has held that the sum of money demanded under damages to recover sums under the compromise, by the Indemnity Holder, must be fair and proportionate. The Indemnifier is liable to indemnify only to the extent he has promised to indemnify and no further. If the amount asked for recovery is beyond what has been promised, the Indemnifier can refuse to pay, as it lead to the Indemnity Holder benefiting from undue gain.

c) In the matter of ***Alla Venkataramanna vs Palacherla Manqamma and Ors. dated 5 November, 1943,*** the Hon'ble Madras High Court has *inter alia* laid down the conditions for the claim by the promisee, to be valid. If the Indemnity Holder genuinely wants the amount to be recovered, certain conditions with respect to the compromise so effected would have to fulfill:

- The compromise should have been put to effect in a bona fide manner.
- It has been resolved without any sort of collusion
- It has not been impeached as an imprudent bargain

d) In the same matter, the court had also upheld that "*It is a settled law that a judgment obtained after bona fide contest against the party indemnified in respect of the matter to which a contract of indemnity applies is conclusive against the indemnifier although the latter was no party to it, not because such judgment binds him as res judicata, but because the claim against which indemnification has been promised has been conclusively established against the party indemnified";* which makes it absolutely conclusive that the Indemnifier cannot excuse his liability to indemnify the Indemnity Holder under the pretext that he was not a party to the suit/dispute.

In the matter of ***Khetarpal Amarnath vs Madhukar Pictures on 18 August, 1955,*** the Hon'ble Bombay High Court held that the right of the Indemnity Holder need not be confined to the contents of section 125 of the Contract Act. The Indemnity Holder is open to use for the specific performance of the contract of indemnity if an absolute liability is incurred by him. Therefore, there is no particular straitjacket approach for the determination of the extent of liability as it depends on the nature and terms of the contract which is subjective to each case.

D) Rights of the Indemnifier

1) The Contract Act is silent about the rights of Indemnifier.

2) However, in the matter of ***Jaswant Singh vs The State on 15 July 1965***, it was held that the rights of Indemnifier are the same as the rights of surety. The rights of the Indemnifier therefore include –

   a) **Right to sue the third party** - As soon as the Indemnifier has indemnified the Indemnity Holder against the damages and amount of the property, he is entitled to have full rights over the property and has the right to sue the third party for that property too. Before paying damages to the Indemnity Holder, Indemnifier cannot sue the third party.
   b) **Compensate losses which are covered in the deed** - The Indemnifier has a right to pay for only those losses which are covered in the contract of indemnity.
   c) **Right under doctrine of subrogation** - According to surety's subrogation rights, after settling the claims of the former creditor, the surety steps into the shoes of the creditor and in certain cases is entitled to receive the whole amount from the debtor. Similarly, Indemnifier also has rights in some cases to recover the money or possession.

E) Commencement of Liability

1. When the liability exactly commences has not been clearly defined or explained anywhere by the statutory law but instead, the answer has been developed through judicial precedents.

2. At the very outset, it is necessary to point out that the law established in this regard is different in Indian law as opposed to the original concept developed under English law. According to the original rule, the Indemnity Holder would only be able to recover money after actual loss had been suffered. Actual loss here refers to payment made by the Indemnity Holder in lieu of claims arising. But the Indian law deviated from this position.

3. In the matter of ***Osman Jamal and Sons Ltd. vs Gopal Purshottam on 19 July, 1928***, the Hon'ble Calcutta High Court held that "*Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay*. Later, in the landmark judgement of ***Gajanan Moreshwar Parelkar vs Moreshwar Madan Mantri on 1 April, 1942*** the Hon'ble Bombay Court also changed the emphasis from when the occurrence of actual loss takes place to instead, the moment when the liability becomes absolute. The court further explained that 'an intolerable burden' is placed on the Indemnity Holder if they are required to wait till a judgement has been pronounced, suffer actual loss by paying off the liabilities and only thereafter can they ask the Indemnifier to reimburse them. This would lead to an inequitable result where the Indemnity Holder does not have the ability to repay his dues and cannot enforce the promise of indemnity till he does. The court therefore held that the Indemnifier

is required to pay as soon as the liability becomes absolute. Absolute here means that it has become certain and clear that loss will occur.

4. This interpretation moves away from the concept of actual loss thereby absolving the Indemnity Holder to pay at the first instance. If loss becomes absolute in nature, then the Indemnifier can either pay off the liabilities or create a fund by depositing money with the court from which the claims can be paid off in the future.

5. The liability of the Indemnifier therefore starts the moment the loss or damages in the form of liability to the Indemnity Holder becomes absolute and without limit.

F) Recoverable damages

1. Recoverable damages are specific types of damages listed in the indemnification clause. These can vary and are negotiated by the parties to the indemnity.

2. There is no burden to show breach or actual losses or damages been suffered by the Indemnity Holder to recover damages under indemnity.

3. It is pertinent to note that the indemnity and damages provided under section 73 of the Contract Act are two closely related words when it comes to contracts and agreements, yet bears completely different principle and usage. Major differences are -

- An indemnity claim may be brought before breach of contract, whereas damages claim can only be brought after the breach of a contract.
- Section 73 of the Act puts a duty on the claimants to mitigate their losses and states that they may not claim losses which arose due to their failure of mitigation, whereas section 124 of the Contract Act puts no such obligation on the Indemnity Holder.
- Indemnity can be claimed for loss arising out of the action of a third party to a contract, whereas damages can only be claimed for loss arising out of the actions of the parties upon breach of contract.
- Under an indemnity, relief may be claimed for loss caused by the action of a third party which may not necessarily result from the breach of contract, whereas damages can only be claimed when there is a breach of contract by either party to a contract.
- The main principle behind indemnity is to put a person back into the place he was before the loss occurred. Hence when a person is indemnified he will never make a profit or a loss out of it, he will be restored to his original position, whereas in case of monetary damages, award may be awarded more than the actual loss occurred or less than the actual loss occurred.
- Under the claim for damages in pursuant to section 73 of the Contract Act, only 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 can be claimed. However, no such restriction applies for an indemnity clause.

4. It is therefore pertinent to note that under indemnity, any and all consequential, remote, indirect, or third party losses can be claimed by the Indemnity Holder; unless specifically excluded.

G) Exceptions to Indemnifications

1. There are a number of common exceptions to indemnification where the Indemnity Holder will not be able to recover damages.

2. These exceptions generally relate to circumstances where the Indemnity Holder's own actions either cause or contribute to the harm that triggers indemnification. For example, an indemnification provision may exclude indemnification for claims or losses that result from the Indemnity Holder's:

- Negligence or gross negligence;
- Improper use of the products/service;
- Bad faith or failure to comply with obligations in the agreement.

H) Limitation of Liability

1. The parties to a contract can, and usually do, exclude the liability for certain types of losses, which may be suffered by each or either party, or limit the amount of their liability pursuant to such loss by incorporating a limitation of liability clause in the contract. The limitation of liability clause confines the economic liability of a party or both parties to a defined monetary limit and/or to limited losses.

2. The liability can be limited by including a liability cap in the limitation of liability clause such as:

   "ABC shall not be liable for an amount exceeding INR [-] under the contract"

3. In the matter of ***Bharathi Knitting Company vs DHL Worldwide Express Courier dated 9th May, 1996***., the Supreme Court while dealing with a clause, which limited the liability of a courier company in case of any loss or damage to a shipment, in the terms and conditions printed on a consignment note for shipment of a package, upheld the decision of the National Consumer Disputes Redressal Commission, which limited the amount awarded to the consignor for deficiency of service, to the amount specified in the limitation of liability clause. The court held that parties who sign documents containing contractual terms are usually bound by such contract and rejected the contention that there was no consensus ad idem between the parties on limitation of liability, in view of the National Commission's finding of fact that the consignor had signed the consignment note.

4. The scope of limitation of liability can be limited / excluded by adding exceptions such as:

   "This limitation on ABC's liability shall not be applicable in case of breach of confidentiality or intellectual property obligations, death, bodily injury, violation of applicable law, fraud, gross negligence or willful misconduct"

5. In the matter of ***Simplex Infrastructures Limited vs Siemens Limited and Anr on 5 January, 2015***, the Hon'ble Bombay High Court had occasion to consider a limitation of liability clause in a works contract. The petitioner therein sought certain interim reliefs, including restraint against encashment of a bank guarantee, pending conclusion of arbitral proceedings on various grounds, including the fact that the contract limited the petitioner's liability to a certain amount. The limitation of liability clause excluded the petitioner's liability for specific losses, including loss of production, loss of use, loss of profit, loss of information and/or data and any indirect or consequential damage, and capped the petitioner's liability for all losses, claims or damages arising out of the contract. However, the clause also provided that it would not apply to any damage or loss or claims caused or arising intentionally or by willful misconduct. The court prima facie found that the respondent therein invoked the bank guarantee inter alia to recover additional expenses that it had to incur on account of numerous defaults by the petitioner, and that such recoveries would not be covered by the limitation of liability clause, which was limited in scope. The court also found that the petitioner's conduct would fall within the willful misconduct exception, and therefore the petitioner's contention that its liability was capped under the contract was rejected.

6. However, it is pertinent to note that although clauses limiting liability are by and large enforced, this may be subject to considerations such as bargaining power of the parties and public policy. The Madras High Court refused to enforce a clause limiting the liability of a dry cleaner, which was printed on the reverse of the bill handed over to the customer, to 50% of the market price or value of the articles in case of loss. The court found such a term to be opposed to public policy, public interest and the fundamental principles of the law of contract and held that imposition of such a condition is in flagrant infringement of the law relating to negligence.

7. Further, in the case of contracts where parties are found to have unequal bargaining power, it is important to be wary of the possibility that courts may refuse to enforce clauses excluding or limiting liability, which are found to be unconscionable.

I) Negotiating Indemnification

1. A simple indemnification provision can never be an answer to liability issues. The law leans disfavor ably towards for those who try to prevent liability or look for dispensation from liability for their actions. The fundamental reason is that a careless party should not be able to completely shift all claim and damages made against him to another, non-negligent party

2. Indemnification provisions are therefore generally heavily negotiated (and often heavily litigated). It is regarded to be crucial as it not only determines the risk on the part of the Indemnifier but also the rights of the Indemnity Holder. Hence, consequences may be faced by both the parties in case of ambiguities being present in the indemnification provision. Both the parties whether the party is an Indemnifier or the Indemnity Holder, need to have a well drafted indemnification provision which provides full-proof protection and balances the interests of the parties to the contract; as explained below:

A. ***Key Considerations from the perspective of an Indemnity Holder:***

a) ***Parties –*** Indemnity will only extend to the persons listed as a beneficiary (including any person mentioned in the third-party rights clause). It is therefore pertinent to identify and include all persons as beneficiary to whom the Indemnity Holder wishes to extend the indemnity.

b) ***Define "Losses"*:** Since all indirect, consequential and remote losses can be claimed under indemnity clause, it is vital to be cautious in defining losses or liability. The definition must not be exhaustive, rather should use terms like *Losses '**includes'*** instead of *Losses '**means'***. The term *Losses* should be defined depending upon the type and nature of the breach which a party expects and whether such breach would have any immediately quantifiable loss or not.

c) ***Proper use of phrases***: It is advisable to avert usage of terms "make good" or "compensate" as the courts can depict it as covering claims only due to actual loss or damages suffered by the Indemnity Holder and not cover situations where the liability was accrued, but no payment has been made. Therefore, it is advisable to use the term "**Hold Harmless**" which will cover both the cases. Also, use of term "**protect from liability**" guarantees that the Indemnifier has and added the responsibility of duty to defend cast upon him which needs the Indemnifier to protect the Indemnity Holder against covered first party and third-party claims.

d) **Nexus phrases:** The phrases "caused by" and "resulting from" are referred to as nexus phrases. Nexus phrases link the recoverable damages to the covered events. These phrases are typically negotiated by the parties because they either broaden or limit the obligation to indemnify. It is therefore advisable that the Indemnity Holder uses a broad nexus phrase, such as "**related to**" or "**arising out of**" because it expands the scope of the indemnity and a widespread perception is given by the courts.

e) ***Obligation to defend against third party claims***: Indemnity clause is an equitable remedy and therefore may provide that the obligation to defend the Indemnity Holder by the Indemnifier will kick in the moment any claim is made by any third party (whether the liability has accrued or not accrued).

f) ***Claim Notice***: It is imperative to draft an indemnity clause in a manner that the indemnity payment claim gets automatically triggered on issue of a claim notice. The clause should clearly state that upon the Indemnity Holder giving a notice to the Indemnifier of any claim that may arise out of an indemnity clause, the obligation of the Indemnifier to make the payment shall become due and payable upon receipt of the notice or within a period of stipulated days of receipt of such notice. Further, it should also be stated that any delay in making any claims or giving a notice does not let free the Indemnity Holder of such responsibility.

g) ***Tax Implications/ Gross-up*****:** A payment for indemnity is usually made due to breach of representations and warranties or breach of covenants in a contract. It is therefore advisable to capture in the indemnity clause that Indemnifier absorbs the tax consequences of any indemnifiable loss. Indemnity payments are assumed as other income and are subjected to applicable tax. Therefore, the indemnity payments are to be made in such a manner that the actual payment is equal to the payment due under the indemnity claim plus the amount of taxes payable with respect to its receipt.

h) ***Exceptions to limitation of liability:*** Indemnity Holder can exclude the limitation of liability, if any, claimed by the Indemnifier for such matters / breaches which it believes could cause irreparable damage/loss and/or limiting the monetary liability for which won't be adequate / sufficient.

i) ***Survival:*** Indemnity Holder should ensure that there is a survival clause for indemnity to allow the indemnity obligation to survive the termination of the contract.

B. ***Key Considerations from the perspective of the Indemnifier***

a) ***Duty to Mitigate***: Unless expressly provided in the indemnity clause**,** there may not be any specific obligation cast upon the Indemnity Holder to mitigate losses. Hence, the Indemnifier must negotiate and specifically provide for duty to mitigate in the indemnity clause. The Indemnifier should prefer narrower nexus phrases, such as 'caused by' or 'resulting from' because they narrow the scope of the indemnity.

b) ***Limitation of Liability***: As mentioned earlier, contracts have limitation of liability clauses which simply limit the liability of the Indemnifier but does not rule out other contractual remedies to be pursued against the Indemnifier. However, an Indemnifier must always go for a 'limitation of remedy' clause which takes into its ambit both the limitation of liability and exclusive remedy clause and leaves no room for any ambiguity in interpretation.

c) ***Survival of Indemnity clause***: While, parties may state that the indemnity clause will survive the termination of the contract. However, from an Indemnifier's perspective, it is important that the survival

clause is tailor made. For instance, it may be stated that any indemnity claim arising out of breach of representations may be valid for a limited period for instance say 2 (two) years post the termination of the contract.

d) **Continuity Obligation**: As the indemnity is a continuity obligation, it should be clearly mentioned that the Indemnity Holder is not designated to recover more than once in respect of the same matter or the same event which has promoted the loss. It should also be stated that the Indemnifier will not be liable in respect of any claim to the extent such losses or damages are covered by a policy of insurance or can be recoverable from a third person.

e) ***Treatment of Third Party Claims***: Spell out clearly the process of settlement of third party claims and statutory claims. It would be advisable to have two separate provisions with respect of indemnity arising out of breach (of a party) and separately for third party claims. Questions of what are the rights of the Indemnity Holder in the defense of a third party claim could be clearly carved out. As an Indemnifier seek protection against permission to settle or defend cases at the whim of the Indemnity Holder.

J) Conclusion

1. To sum up, the contract of indemnity is indispensable, because a party may not be able to command all visible features of the performance of a promise. The party can be sued for the actions of another where the circumstances of performance were out of his authority and control.

2. Indemnity also allows a contracting party to:

- Customize the amount of risk it is willing to undertake;
- Protect itself from damages and lawsuits that are more efficiently borne by the counterparty; and
- Claim damages for loss.