Page 2108 - 2114 **DOI:** *https://doij.org/10.10000/IJLMH.111563*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

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Contract of Indemnity: Relevance in the Covid-19 Pandemic

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ABSTRACT

The COVID-19 pandemic has shrouded silences of the conditions prevalent before its onset. First wave exposed the pandemic's short glance, but the second wave has devastated many lives, abandoned many children, snatch people's livelihood from them. The situation could be controlled as truly reflected in stances of intellectuals and pioneered by scientific evidence by massive vaccination. The central government of India adopted revolutionized methods to pace up the vaccine program and claimed to get every Indian adult vaccinated by 2021 end. But, does this seem possible considering the Indian vaccine manufacturers already producing on their maximum capacity. At this juncture, the possible solution is import of vaccines. But, when foreign vaccine manufacturers put forward the condition of including 'indemnity clause', is the government capable of compensating its citizens if these vaccines have any side-effects.

In order to understand the issue at hand, a brief discussion about Indemnity in a contract is needed to be acquainted with. The article aptly deals with explaining indemnity along with case laws. The article addresses the contemporary issue of indemnity clause in contracts between the government and foreign vaccine manufacturers such as Pfizer and Moderna.

Keywords: *Indemnity, Indian Contract Act, Vaccine manufacturers, Covid-19.*

I. INTRODUCTION

In common parlance, the term 'Indemnity' refers to protection provided against any loss or damage. When it comes to the field of law, 'indemnity' can be defined as a contract between two parties in which one party agrees to save the other party from any loss arising out of the actions of the party who is making the promise or the actions of a third party. The party making the promise is called the 'indemnifier' and the party to which the promise has been made is termed as the 'indemnified' or 'indemnity - holder'.

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The principle of Indemnity has been widely accepted in the Indian legal system by virtue of the Indian Contract Act, 1872 which has certain express provisions dealing with indemnity. The principle has been further developed by way of precedents and case laws which have been discussed in this article.

II. RELEVANT PROVISIONS UNDER INDIAN LAW

Although Sections 124 and 125 of the Indian Contract Act specifically deal with Indemnity, they are not exhaustive of the law of indemnity and the courts apply the same equitable principles that the Courts in England do.[3]

(A) Definition of Indemnity

Section 124 of the Indian Contract Act defines 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."* The concept can be understood by a simple example: X enters into a contract of indemnity with Y to protect him against any legal proceedings which Z may institute against Y in respect of a certain amount. Here, X is the indemnifier and Y is the indemnity-holder or indemnified.

The essential elements of the definition are:

- There must be some financial loss or any other damage suffered by the indemnity-holder.
- The loss must be resultant of the conduct of the promisor or any other person.
- The indemnifier has the liability to reimburse the loss or discharge the liability of the indemnity-holder.

(B) Rights of the Indemnity Holder

Section 125 of the act lays down the rights of indemnity-holder on being sued. According to the section, " the indemnity holder is entitled to recover from the indemnifier:

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he 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

[3] Ganjan Moreshwar v. Moreshwar Madan, (1942) BomLR 704.

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bring or defend the suit;

(3) all sums which he 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."

While enjoying the above rights, there are certain conditions that the indemnity-holder must keep in mind. He should act with normal intelligence and should perform his actions with due care and caution. Therefore, the rights provided under the section are not absolute and the indemnity-holder must act reasonably, as if there is no contract of indemnity. He can claim such benefits only if all these conditions have been fulfilled.

(C) Difference between Section 124 and Section 126

Indemnity is often confused with the concept of Guarantee which is provided in Section 126 of the act. However, on a close scrutiny, it can be construed that the terms are completely different in their context. The contract of guarantee imposes an obligation on the promisor (known as 'surety) to discharge the liability of a third person (known as 'principal debtor') in case of his default. Therefore, the liability of the surety arises only when the principal debtor has defaulted in performing his promise. On the other hand, the contract of indemnity is independent of default by the indemnity-holder. The moment the indemnifier enters into the contract, he agrees to discharge the liabilities of the indemnity-holder.

The court has time and again emphasized the difference between the two terms. As per its observations in *Birkmyr v. Darnell*,[4] the term 'guarantee' is basically saying, "Let him have the goods; if he does not pay you, I will." On the other hand, 'indemnity' is like stating, "Let him have the goods, I will be your paymaster."

III. JUDICIAL PRECEDENTS

The principle of Indemnity is not a new one. The concept has evolved over time with significant judicial pronouncements dating back to as early as the 18th century. The first Indian Judgment identifying the rights of the indemnity-holder was *Osman Jamal And Sons Ltd. v. Gopal Purshottam.*[5] Further, the 1872 judgment of *Adamson v. Jarvis*[6] is known for its contribution to the development of the principle. In this case, 'implied indemnity' was recognized for the first time. The court emphasized the underlying assumption of immunity in a case where the

[4] Birkmyr v. Darnell, (1704) 1 Salk 27.
[5] Osman Jamal v. Gopal Purshottam, AIR 1929 Cal 208.
[6] Adamson v. Jarvis, (1827) 4 Bing 66.

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plaintiff acted on the directions of the defendant. Following the directions of the defendant, the plaintiff sold certain cattle. Eventually, it was discovered that the actual owner of the cattle was not the defendant, but someone else. When the actual owner sued the plaintiff for conversion, the plaintiff in turn sued the defendant for the loss suffered by him. The court reasoned that the plaintiff while acting on the request of the defendant, had the assumption that he would be indemnified if things went wrong. Therefore, the court ordered the defendant to indemnify the plaintiff against the losses accrued to him. The judgment broadened the scope of indemnity and included any loss, irrespective of its cause under the purview of indemnity.

Thereafter, this view has been upheld by in a catena of cases including the privy council case of *Musammat Izzat-un-Nisa Begum v. Kunwar Pertab Singh*[7] wherein it was observed that the contract of immunity may be express or implied.

The primary question with regard to indemnity of the indemnifier is "*When does the commencement of liability arise?"* The court in *Ganjan Moreshwar v. Moreshwar Madan*,[8] attempted to answer the question. It was noted that if the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off. The court decided that the indemnified can constrain the indemnifier to place him in a position to meet liability that may be built upon him without waiting until the indemnified has cleared the same. The same view was upheld in the judgments of *Nobo Kumar v. K. Bhattacharjee*[9] and *Shiam Lal v. Abdul Salam.*[10]

The case of *Mohit Kumar Saha v. New India Assurance*[11] relates to the quantum of damages to be paid by the indemnifier. It was held that in case of theft of a vehicle, the full value of the vehicle as ascertained by the surveyor must be paid to the indemnity-holder.

IV. INDEMNITY FOR COVID-19 VACCINE MANUFACTURERS

The COVID-19 pandemic struck humankind in 2020 while the first case was reported in 2019. Since then, the potential countries have been looking forward for manufacturing vaccines. When the second wave hit India badly and the Central Government received brickbats for its vaccination policy because of shortage of sufficient doses, it has now initiated one of the biggest vaccinations drives in the second most populated nation. With halting exports of COVID-19 vaccine doses and introducing 'Vaccine Maitri' program to inoculate people, the

[7] Musammat Izzat-un-Nisa Begum v. Kunwar Pertab Singh, (1909) ILR 31 All 583.
[8] Ganjan Moreshwar v. Moreshwar Madan, (1942) BomLR 704.
[9] Nobo Kumar v. K. Bhattacharjee, (1899) ILR 26 Cal 241.
[10] Shiam Lal v. Abdul Salam, AIR 1931 All 754.
[11] Mohit Kumar Saha v. New India Assurance, 1997 ACJ 1170.

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government is trying hard to procure doses from foreign manufacturers. Adar Poonawalla, CEO of the Serum Institute of India uttered to produce Covishield at greater pace so as to meet the requirements of the nation. Covishield had been accepted as Emergency Use Authorization by World Health Organization. Until lately before production of Covaxin by Bharat Biotech ltd., India had been solely relying on Covishield for vaccinating frontline workers.

For vaccinating every adult by the end of the year, the government is working finger to the bone in order to procure doses of vaccines from other countries. Government's approach to vaccine manufacturers such as Moderna, Pfizer and their demand of invoking indemnity clause in the contract has posed a dilemma for the government. As Moderna won't be able to deliver vaccine's doses by year end due to lack of surplus stock, the issue of Pfizer which supplies the Pfizer-BioNTech mRNA Vaccine remains in sight.

These vaccine manufactures demand for indemnity clause in the contract to be signed between them and the Union Government or supernational organization. The clause will protect producers from legal actions in future if vaccine administration result in adverse effects. Indian laws on drugs don't approve for indemnity, however taking cognizance of second wave and its disastrous impact inoculation is mandatory as soon as possible. The indemnity bond in such case can only be executed by the Union government. Invoking indemnity clause implies that if any loss be it death or any other loss would be met by the government but not the company.

Pfizer, the US based pharma has incorporated the clause in all the contracts signed with other countries comprising the United States and the United Kingdom. With the supplier's demand of negotiating only with the Central government, the only way forward for procuring vaccine doses is through indemnity clause. Consequently, Serum Institute of India, domestic manufacturer has also raised demand for incorporating the clause in its deals. Since there's no probable solution in sight, the question to be pondered upon is how will it affect pricing and availability of doses in India.

Although Pfizer has made it absolutely transparent that it won't enter into deal unless indemnity clause comes into foresight, even if now it agrees for contract in absence of indemnity clause, the pricing of each dose might raise. Also, inserting the clause can increase probabilities of negotiations and reduction in each dose's price which is the ultimate need of the hour. However, if some unfortunate and undesirable situation occurs, the government is not financially capable of meeting the compensation requirements. Due to ongoing demand for indemnity clause, Serum Institute of India urges to replace liability clause with indemnity clause. Liability clause holds manufacturer liable for any severe side effect of vaccine on

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individual.

Recognizing the instantaneous need of massive vaccination, the Drugs Controller-General of India has taken a big step towards fast-tracking the import of vaccines by dispensing with the local trials.[12] Earlier, bridging trials of foreign-produced vaccines that had been approved for WHO's Emergency Use Authorization was necessary, but it had been waived due to time-taking process of such trials and to avoid risk of adverse events to participants. Also, the board has reduced risk to overseas manufacturers from stringent rules set under the New Drugs and Clinical Trial Rules, 2019. According to the rules, the sponsor of trial or its representative had to compensate the participant if any adverse event occurs. However, the future claim of adverse effects and liability under law of torts increase probable fear in the companies.

However, there are certain problems with government's attitude for not including indemnity clause at all. It would discourage vaccine manufacturers from producing because they would be held liable for unavoidable safety risks. For doctrines related to pharmaceutical products, products liability section of the Second Restatement of Torts is important which states that vaccine producers shall not hold accountable and thus, liable for unprecedented safety risks when there wasn't sufficient time to guarantee the safety until vaccine is properly prepared and accompanied by adequate warnings. Demand for including indemnity clause isn't happening for the very first time, it has happened in history as well. During the manufacturing of vaccine for Zika Virus, the company's apprehensions about liability caused delay in distribution of vaccine, thus, discouraging the manufacturer.

V. CONCLUSION

We have seen how the concept of Indemnity developed as a full-fledged principle of Contract law. Indemnity has become an important tool to protect any person, including companies, from any damage that might be caused to them as a result of the actions of a third party. Recently, the contract of indemnity has become the talk of the town with the vociferous demand for indemnity by private manufacturers of the COVID-19 vaccine. The COVID-19 vaccine, along with other COVID norms of proper masking and social distancing, has the potential to protect Indian citizens from another deadly wave of the virus. The conduct of Pfizer and Moderna might be justifiable at their ends because they are in constant fear of any legal consequences in case their vaccines leave any side-effects and them being financially incapable of producing

[12] K. Venkataramanan, Explained | What is indemnity, and how will it affect COVID-19 vaccine pricing and availability in India?, The Hindu (June 06, 2021, 18:50), https://www.thehindu.com/sci-tech/health/explained-what-is-indemnity-and-how-will-it-affect-covid-19-vaccine-pricing-and-availability-in-india/article34740900.ece.

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vaccine when the world was in dire need and now also compensate people. However, it is difficult for Indian government to compensate people due to economic conditions and inadequate infrastructure unlike countries such as the US, UK and supranational organizations such as European Union. Even if these manufacturers succeed in inserting indemnity clause in the contract the fear of future consequences of being held liable in tort law remains consistent and this hasn't been the first-time demand of indemnity clause is put up. If government subscribes to the demands of foreign vaccine manufacturers, the issue that would arise then is Indian domestic manufacturers asking for indemnity clause.

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