International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

Contracts of Insurance: A Critical Analysis of their Exclusion from the Indian Contract Act, 1872

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Abstract

A contract of insurance represents a specialized form of contractual relationship that is primarily based on the principle of indemnity. Section 124 of the Indian Contract Act, 1872 defines a contract of indemnity as a contract whereby one party promises to save the other from loss caused by the conduct of the promisor himself or any other person. However, the scope of this statutory definition is limited and does not include contracts of insurance, despite the fact that several classes of insurance, particularly contracts of general insurance, operate on the fundamental principle of indemnity.

This research critically examines the relationship between contracts of insurance and Section 124 of the Indian Contract Act, 1872, with particular emphasis on whether insurance contracts should be recognized within the statutory framework of indemnity. The study analyzes the conceptual similarities and differences between a statutory contract of indemnity and an insurance contract, including the elements of risk transfer, compensation for loss, and the obligations of the parties.

The research further explores the legal nature of insurance contracts and their applicability under the general principles of contract law, particularly the essential requirements of a valid contract under Section 10 of the Indian Contract Act, 1872. It examines the role of offer, acceptance, consideration, free consent, competency of parties, and lawful object in the formation and enforceability of insurance agreements.

The study also investigates the rationale behind the exclusion of insurance contracts from the definition of indemnity under Section 124 and examines the legislative intent behind maintaining a distinction between ordinary contracts of indemnity and contracts of insurance. While both forms of contracts aim to provide protection against financial loss, insurance contracts involve additional principles such as utmost good faith (*uberrimae fidei*), insurable interest, subrogation, contribution, and risk assessment, which require a specialized legal framework.

Through doctrinal analysis of statutory provisions, judicial interpretations, and legal literature, this research seeks to determine whether the existing legal position adequately addresses the relationship between indemnity and insurance or whether a broader interpretation of indemnity principles is required.

Keywords: Contract of Indemnity, Insurance Contracts, Protection.

1. Introduction

A contract of insurance is an agreement whereby one party, known as the insurer, undertakes to compensate another party, known as the insured, against specified risks or losses in exchange for the payment of a sum

of money, known as premium. It is a legally enforceable agreement. Like other contracts, insurance agreements require the fulfilment of essential elements such as offer, acceptance, consideration, competency of parties, free consent, and lawful object as provided under the Indian Contract Act, 1872.
However, insurance contracts possess distinctive characteristics that differentiate them from ordinary commercial contracts. The primary purpose of insurance is not to create an immediate exchange of goods or services but to provide financial protection against uncertain future events. The insurer assumes a particular risk in return for a premium paid by the insured, thereby transferring the burden of potential loss from the insured to the insurer.
One of the fundamental principles governing insurance contracts is the principle of indemnity, according to which the insured is compensated only to the extent of the actual loss suffered and is not permitted to make a profit from the occurrence of an insured event. This principle is applicable mainly to contracts of general insurance, such as fire insurance, marine insurance, and property insurance. However, life insurance contracts differ because the value of human life cannot be measured precisely in monetary terms; therefore, the principle of indemnity is absent in life insurance contracts.
Section 124 of the Indian Contract Act, 1872 defines a 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". Although this provision establishes the statutory foundation of indemnity, it does not expressly mention insurance contracts. This omission has raised significant legal questions regarding whether contracts of insurance, particularly those based on indemnity, fall within the scope of Section 124.
The distinction between statutory indemnity under section 124 of the Indian Contract Act, 1872 and the principle of indemnity present in insurance contracts is based on the specialized nature of insurance contracts. Insurance contracts involve additional obligations and principles, including the duty of utmost good faith, disclosure of material facts, existence of insurable interest, subrogation rights of insurers, and contribution between multiple insurers. These principles have evolved through judicial decisions and specific insurance legislation rather than through the limited statutory definition provided under Section 124.

2. Research Objectives

- To examine the legal nature and essential characteristics of contracts of insurance under Indian law.
- To analyze the rationale behind the exclusion of insurance contracts from the Indian Contract Act, 1872, and the legislative intent behind such exclusion.
- To analyze the applicability of essential elements of a valid contract, such as offer, acceptance, consideration, free consent, competency of parties, and lawful object, to contracts of insurance.

3. Research methodology

The present study follows a doctrinal research methodology. Doctrinal research involves the systematic study and analysis of legal principles, statutes, and case laws. It focuses on understanding the existing legal framework and interpreting legal provisions.

4. Essential Characteristics of Contracts of Insurance

Contractual Agreement

An insurance contract arises from an agreement between two parties—the insurer and the insured. The

insured proposes to obtain coverage by submitting a proposal form, and acceptance by the insurer creates a contractual relationship. The terms and conditions of the policy determine the rights and obligations of both parties.

Contract of Utmost Good Faith (*Uberrimae Fidei*)

Insurance contracts are based on the principle of utmost good faith. Both parties are required to disclose all material facts that may influence the decision of the other party. The insured must disclose relevant information regarding the subject matter of insurance, while the insurer must provide clear information about policy terms, exclusions, and conditions.

Non-disclosure or misrepresentation of material facts may affect the validity of the insurance contract.

Contract of Indemnity

Most insurance contracts, such as property insurance, health insurance, fire insurance, and mediclaim policies, except life insurance, operate on the principle of indemnity. The primary objective of this principle is to restore the insured to the same financial position that existed before the occurrence of the insured event. The insurer undertakes to compensate the insured only for the actual loss suffered and not to provide any profit or financial advantage arising from the loss. Thus, the insured cannot claim an amount greater than the value of the loss, as insurance is intended to provide protection against loss and not to become a source of gain.

The principle of indemnity is based on the idea that an insurance contract is a contract of compensation rather than a contract for enrichment. For example, if a person's property worth ₹10 lakh is damaged due to fire, the insurer's liability will generally be limited to the actual amount of loss suffered, subject to the terms and conditions of the policy. The insured cannot recover more than the value of the damaged property, as doing so would defeat the very purpose of indemnity.

This principle forms the basis of the relationship between insurance contracts and Section 124 of the Indian Contract Act, 1872, which defines a contract of indemnity. Under Section 124, one party promises to save the other from loss caused by the conduct of the promisor himself or by the conduct of another person. Similarly, in insurance contracts based on indemnity, the insurer promises to protect the insured against financial loss arising from specified risks covered under the policy.

Although insurance contracts and statutory contracts of indemnity under Section 124 are not identical in every respect, they share a common objective: providing protection against financial loss. Both seek to shift the burden of loss from the affected party to another party who has undertaken the responsibility to compensate for that loss. The principle of indemnity therefore acts as a connecting link between the general law of contracts and the law of insurance.

However, the principle of indemnity does not apply to all types of insurance. Life insurance contracts are considered contracts of assurance rather than contracts of indemnity because the loss arising from the death of a person cannot be measured precisely in monetary terms. Therefore, the insurer pays the agreed sum assured upon the occurrence of the insured event, regardless of the actual financial loss suffered by the beneficiaries.

Contingent Contract

Contingent contracts are defined under Section 31 of the Indian Contract Act, 1872. According to this provision, "A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen." The essential feature of a contingent contract is that the performance of the contract depends upon the happening or non-happening of a future uncertain event.

Insurance contracts are contingent in nature because the liability of the insurer arises only upon the occurrence of an uncertain event against which the insurance policy has been taken. The insurer does not become liable immediately after entering into the contract; rather, the obligation to compensate arises only when the insured risk occurs during the period of insurance coverage. Until such event takes place, the insurer has no liability to make payment under the policy. For example, a fire insurance policy becomes enforceable only when the insured property suffers damage or loss due to fire. If no fire occurs during the policy period, the insurer is not required to pay any compensation. Similarly, in a health insurance contract, the insurer's liability arises only when the insured suffers illness, undergoes medical treatment, or incurs expenses covered under the terms of the policy.

The uncertain event in an insurance contract is generally independent of the control of both the insurer and the insured. This element of uncertainty distinguishes insurance contracts from ordinary contracts. The insured pays a premium in consideration of the insurer's promise to provide financial protection against specified risks, but the actual performance of the insurer's promise depends upon the occurrence of the insured event.

The relationship between contingent contracts and insurance contracts is therefore based on the dependence of contractual obligations upon uncertain future events. Insurance contracts satisfy the requirements of contingent contracts because there is a valid agreement between the parties, the event is uncertain, and the liability of one party arises only when that event occurs.

Contract Based on Consideration

The payment of premium by the insured constitutes consideration for the promise made by the insurer. Without consideration, an insurance agreement cannot become a valid contractual obligation.

Risk Transfer Mechanism

The fundamental purpose of insurance is the transfer of risk from the insured to the insurer. By paying a premium, the insured transfers the financial consequences of uncertain events to the insurer, who assumes responsibility for compensation according to the policy terms.

Requirement of Insurable Interest

A valid insurance contract requires the insured to have an insurable interest in the subject matter of insurance. The insured must have a legally recognized interest such that the occurrence of the insured event would cause financial loss, damage, or prejudice to the insured. Insurable interest is considered an essential element of a valid insurance contract because it prevents insurance from being used as a means of speculation or gambling.

The existence of insurable interest creates a legitimate relationship between the insured and the subject matter of insurance. The insured must stand to suffer a monetary loss if the insured property is damaged, destroyed, or if the insured event occurs. For example, a person who owns a house has an insurable interest in that property because any damage caused by fire or other insured risks would result in financial loss to the owner. Similarly, a creditor may have an insurable interest in the property of a debtor to the extent of the amount owed. In life insurance, insurable interest must exist at the time the policy is taken. A person may insure their own life because they have an interest in their continued existence. Similarly, a spouse may have an insurable interest in the life of their partner due to the financial and legal relationship between them. On the other hand, a person cannot ordinarily insure the life or property of a stranger because they do not have any legally recognized interest in that subject matter.

The principle of insurable interest ensures that insurance contracts are contracts of protection and not instruments for making profit from uncertain events. Without insurable interest, a person could obtain

insurance on property or life in which they have no connection and gain financially from its loss, which would defeat the purpose of insurance.

Contract of Adhesion

Insurance contracts are generally drafted by insurers in standard form, and the insured usually accepts the terms without negotiation. Due to this unequal bargaining position, courts and regulatory authorities emphasize fair interpretation of insurance policies.

Personal Nature of Contract

Insurance contracts are generally personal agreements between the insurer and the insured. The insurer evaluates the risk based on the identity, circumstances, and representations of the insured. Therefore, assignment or transfer of insurance rights is usually subject to policy conditions and legal requirements.

Principle of Subrogation

After compensating the insured for a loss, the insurer obtains the right to recover damages from the third party responsible for the loss. For Example: If an insurer pays for damage caused by a negligent third party, the insurer may pursue recovery from that third party.

Principle of Contribution

Where the same risk is insured with multiple insurers, each insurer contributes proportionately towards the loss. The insured cannot recover more than the actual loss suffered, as the purpose of insurance is to provide compensation and not to allow the insured to make a profit from the occurrence of an insured event. This principle is known as the principle of contribution and it is an extension of the principle of indemnity.

The principle of contribution applies when two or more insurance policies cover the same subject matter, the same risk, and the same interest of the insured. In such cases, if a loss occurs, the insured may claim compensation from any one of the insurers; however, the insurer who pays the claim is entitled to seek contribution from the other insurers who are also liable for the same risk. The liability of each insurer is determined according to the proportion of the total insurance coverage provided by them.

The principle of contribution prevents the insured from receiving double compensation for the same loss and maintains fairness among insurers. It ensures that the burden of payment is distributed among all insurers who have undertaken the same risk. This principle is based on the idea that all insurers should share responsibility proportionately rather than one insurer bearing the entire liability.

5. Exclusion of Insurance Contracts from the ambit of Indian Contract Act, 1872

Section 124 of the Indian Contract Act, 1872 covers only those losses which are caused by the conduct of the promisor or by the conduct of any other person. However, insurance contracts are not included within this definition because the provision was intended to cover ordinary indemnity agreements between private parties only, and not the field of insurance.

Insurance contracts involve several unique principles, such as insurable interest, utmost good faith, premium payment, risk assessment, subrogation, and contribution, which are not addressed by section 124. Moreover, insurance does not always operate as a simple promise to compensate for loss. For example, life insurance provides payment of an agreed sum on the occurrence of death and is not based on the actual monetary loss suffered; therefore, it is not a contract of indemnity.

The omission of insurance contracts from section 124 reflects the legislative intention to treat insurance as a separate and specialized branch of law requiring specific regulation. Insurance contracts are governed

by insurance statutes and principles developed through judicial decisions rather than being confined to the limited definition of indemnity under the Indian Contract Act, 1872.

6. Applicability of Essential Elements of a Valid Contract to Contracts of Insurance

A contract of insurance is a special type of contract, but it must satisfy the fundamental requirements of a valid contract under the Indian Contract Act, 1872. Although insurance contracts are regulated by specific insurance laws, the basic principles of contract formation continue to apply. Section 10 provides "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void". The essential elements such as offer, acceptance, consideration, free consent, competency of parties, and lawful object determine the validity and enforceability of an insurance contract.

Offer and Acceptance

The essential of offer and acceptance applies to insurance contracts in the same manner as ordinary contracts. A valid insurance agreement arises only when one party makes an offer and the other party accepts it. The two parties are called the "insurer" and the "insured".

Consideration

Consideration is an essential element defined under Section 2(d) of the Indian Contract Act, 1872. It provides "when, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise". In insurance contracts, the premium paid by the insured is the consideration for the insurer's promise to provide protection against specified risks. The insurer's consideration is the promise to compensate or provide benefits upon the occurrence of the insured event. Without payment of premium or a legally recognized obligation to pay it, the insurance contract cannot normally operate. For example, in a health insurance contract, the insured pays a premium, and in return, the insurer promises to cover medical expenses according to the policy terms.

Free Consent

Consent is defined under section 13 of the Indian Contract Act, 1872, "two persons are said to consent when they agree upon the same thing in the same sense". Free consent is defined under section14. "Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation, or mistake."

The principle of free consent has special importance in insurance because these contracts are based on utmost good faith (uberrimae fidei). Both the parties must honestly disclose all material facts affecting the risk. For example, if a person conceals a serious medical condition while obtaining health insurance, the insurer may challenge the validity of the contract because consent was obtained based on incomplete information.

Competency of Parties

Section 11 of the Indian Contract Act, 1872 requires parties to a contract to be competent. This requirement applies to insurance contracts as well. "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject".

Lawful Object

Under Section 23 of the Indian Contract Act, 1872, the object of a contract must be lawful. Insurance contracts must have a legitimate purpose and cannot be created to support illegal activities or unlawful

interests. The object of insurance is the lawful transfer of risk and protection against financial loss. However, a contract based on illegal activities, such as insuring an unlawful interest, would not be enforceable. For example, a person cannot obtain insurance for property used exclusively for illegal purposes.

Not Expressly Declared to be Void

One of these essential conditions is that the agreement must not be expressly declared to be void by the Act. This means that an insurance contract will be valid and enforceable only if it does not fall within any category of agreements that the law specifically declares to be void.

7. Conclusion

The relationship between contracts of insurance and Section 124 of the Indian Contract Act, 1872 highlights an important limitation in the existing law of indemnity. Although insurance contracts, particularly contracts of general insurance, are founded upon the principle of indemnity, they do not fall within the literal scope of the definition provided under Section 124. The statutory definition primarily contemplates a promise to save a person from loss caused by the conduct of the promisor or another person, whereas insurance contracts extend beyond such situations by providing protection against uncertain risks and future contingencies. The narrow language of Section 124 reflects the historical context in which the Indian Contract Act was enacted and does not fully accommodate the complexities of modern commercial transactions. As insurance has evolved into an essential mechanism for risk management, the law of indemnity requires reconsideration to ensure that it reflects contemporary contractual realities.

Therefore, while maintaining the separate regulatory framework for insurance, there is a need to harmonize insurance principles with the general law of contracts. Expanding the scope of Section 124 or providing statutory recognition of insurance as a specialized form of indemnity would promote greater clarity, consistency, and legal certainty. Such reform would bridge the gap between traditional contract principles and modern insurance practices, thereby strengthening the overall framework of Indian contract law.

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