



Reviewing contracts for their insurance implications

DELIVERED BY DIANE JENKINS ACII, CHARTERED
INSURANCE BROKER

OCTOBER 2022



Introduction / housekeeping

Welcome and thank you!

60 minutes webinar format – muted and video off. Polls, Chat, Q&A

Diane Jenkins

- Background in Insurance Broking Sector – technical programme design, M&A due diligence, BI reviews
- Former chair and education secretary of London Business Interruption Association



Nick Thomas & Associates

- Up to the minute training solutions addressing the challenges of the modern insurance professional
- Technical insurance; sales, communication and soft skills; customer service; management and leadership; performance, resilience and wellbeing training

Objectives

By the end of this session delegates will:

- have an improved understanding of the clients' liabilities associated with key contracts
- be able to identify key areas of risk in commercial contracts
- know how to improve advice given to clients about contract risk

At the start

E&O position – no legal advice only
insurance advice

Ask client to send the entire contract -
reviewing extracts could be misleading

All contracts may have insurance
implications



Client position

“I’m insured - why should I worry about my responsibilities under the contract?”

“ I have signed this contract – could you just let insurers know”

“ This won’t be a problem, will it?”



Types of contract

Contracts of purchase/sale of business

Terms of trading

Standard conditions imposed by certain bodies
e.g. JCT, CPA.

Outsourcing/ maintenance agreements

Loans/mortgagees/security

Leases



Classes of insurance commonly affected

Public & products liability

Professional indemnity

Cyber

Employers' liability

Motor

Contractors all risks

Property



Key parts of the contract

Responsibilities

Indemnities

- NB client may not usually provide indemnities...
- BUT may be relying on indemnities provided to manage risk

Obligations/duties

Insurance

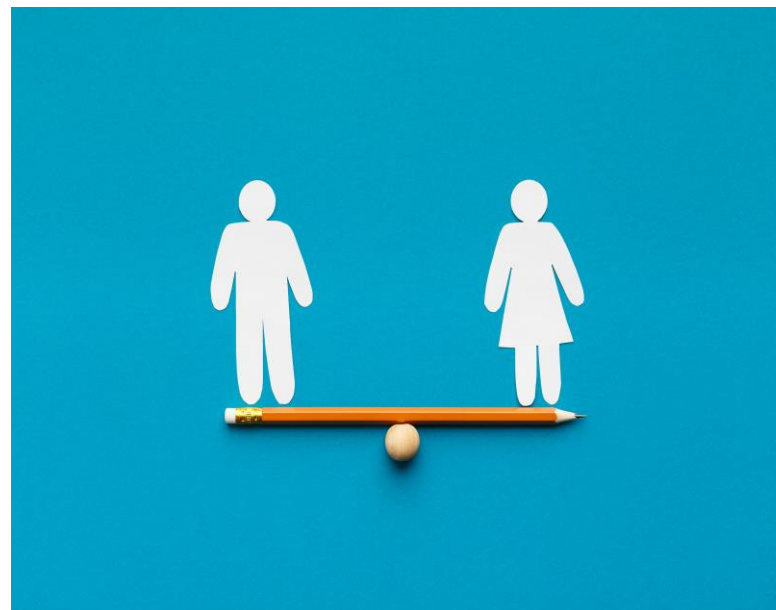


Responsibilities

Part of contract that sets out who is responsible for what

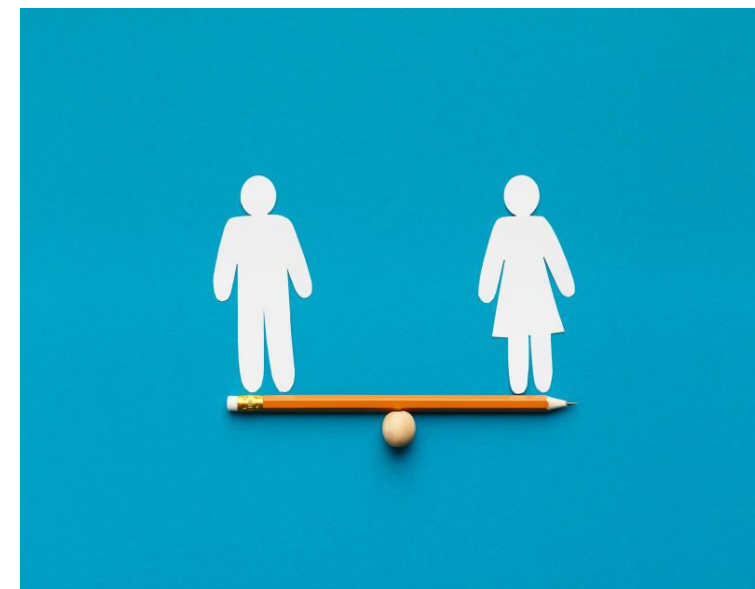
Consider various contract options:

1. A company is made responsible for **all** bodily injury and property damage **irrespective** of negligence on their part
- BUT most relevant insurance policies only provide cover for insured's negligence
 - BUT all insurance policies have exclusions



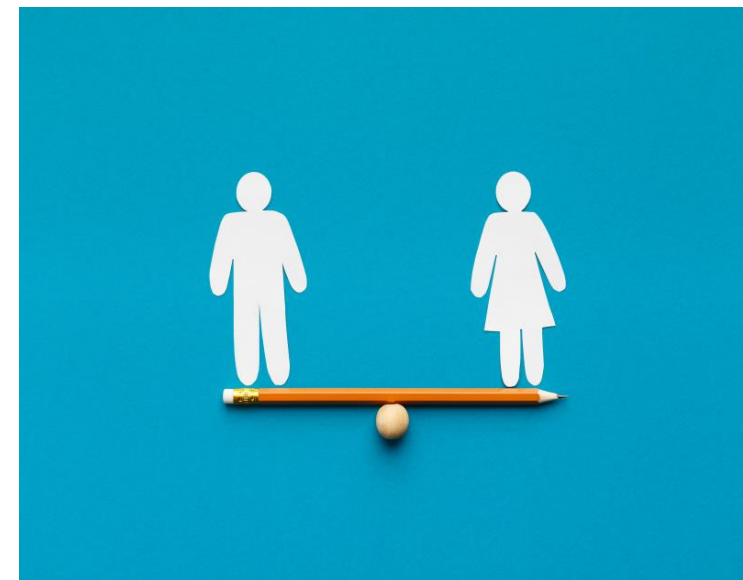
Responsibilities

2. Each party is responsible for **all bodily injury and property damage** where they are negligent
 - Seems OK, BUT
 - All insurance policies define bodily injury – do definitions match
 - Only tangible physical property covered by property insurance – do they have a cyber policy?
 - All policies have exclusions – are any relevant?



Responsibilities

3. There is a hold harmless agreement between the company and their principal
- BUT insurers expect to be able to recover from the negligent party...
 - Existence of subrogation waiver/hold harmless must be notified to insurers as material fact



Consequential loss

A contract requires a service provider to accept responsibility for consequential loss of any kind

Consider if client can:

- Amend the contract to exclude such losses (lawyer's role)
- Restrict liability to consequential losses arising from injury or damage brought about by their own negligence (lawyer's role)
- Transfer as much of the risk as possible through insurance BUT...



Consequential loss

Extent of insurance for consequential loss in a liability policy will depend on wording

“in respect of” or “arising from”

Rexodan International Ltd. -v- Commercial Union Assurance Co. PLC 1997

Exclusions

- Contractual liability



Indemnities

Indemnity = promise to pay

Fall into 2 areas:

1. Indemnities to the other parties to the contract
2. Indemnities to other parties not privy to the contract (collateral warranties)



Indemnities

Who pays who in the event of

- i. Third party injury/damage
- ii. Financial/consequential loss
- iii. Other pre-defined contingencies (e.g. cyber attack)

Check - does indemnity clause

- i. extend common law position?
- ii. restrict liability?
- iii. re-state common law position?



Indemnities

Example A - Specified indemnities

ABC Plc must indemnify XYZ from any claim arising out of bodily injury sustained by third parties arising out of ABC's negligence

Insurance issues

- Any claim – what about exclusions/conditions in policy?
- Definition of bodily injury in policy
- What does 'sustained mean – most third-party liability policies triggered by occurrence
- Meaning of 'arising' in insurance policy



Indemnities

Example B - Unspecified indemnities

ABC plc will indemnify XYZ against all costs, claims, demands and liabilities

Insurance issues

- ‘All costs, claims’ – what about policy exclusions (e.g., fines, cyber)
- Contractual liability v tort
- Insurance policies all have a limit
- Some policies on ‘claims made’ basis
- No policy will match indemnity



Indemnities

Example C - Hold harmless agreements

ABC Plc must hold XYZ harmless from any and all claims, injuries or losses arising out of the contract

Insurance issues

- Hold harmless /subrogation waiver – means no rights of recovery from party that caused injury or damage - disliked by insurers
- Some policies do not permit subrogation waivers/hold harmless agreements (e.g., cyber) – means any indemnity provided uninsured
- Existence of subrogation waiver/hold harmless should be notified to insurers as material fact



Indemnities

Indemnity may be subject to limit of liability/quantum

- Is limit specified or unlimited?
- NB limit in insurance clause is not limit of liability
- Does the counterparty have funds if insurance fails?

Unfair Contract Terms Act 1977

- Contracting party cannot contract out of liability for injury / fraud
- Can add limit – suggest no higher than insurance limit
- Watch for any one claim v aggregate limits
- Liability must be ‘reasonable’



Injury to employees

Who is responsible?

- Contractual liability
- Subrogation waiver

Principal named joint insured on the contractor's employers' liability policy

TUPE

- Is there insurance cover for transferred employees (NB some employees transferred with no EL cover)
- Retrospective EL almost impossible to buy



Contractors and sub-contractors

Evidence of cover

- Is there sufficient information provided
- Ask specific questions (premium paid, conditions, exclusions)

Options for a client using sub-contractors

1. Reliance on sub-contractors' cover – Indemnity to Principals clause, BUT...
2. Contingency cover
3. Cover arranged by client for client and sub-contractor



Insurance aspects - material damage

Responsibility for insuring physical assets against loss or damage by physical causes

May be specified or unspecified

Insurance issues

- Definitions of property
- If specified are all perils covered (terrorism?)
- Events excluded
- Types of property excluded
- Sums insured declared to insurers



Obligations / duties

Claims

Information

Use of money/reinstatement

Obtain a subrogation waiver in policy

Arrange insurance



Insurance clause

Obligation to insure

- What classes of insurance needed?

Minimum insurance requirements

- Requests for 'unnecessary' insurance

Policy terms/conditions

- May need to specify conditions or clauses want/don't want
- Joint names v composite insureds
- Non-vitiation
- UK policies v contracts subject to overseas jurisdiction

Evidence that cover is 'satisfactory'



Policy triggers and contract periods

Different policies have different policy triggers

Triggers include

- Causation e.g., employers' liability
- Occurrence e.g., public liability, products liability
- Claims made e.g., directors' and officers' liability, professional indemnity, cyber liability
- Discovery e.g., cyber first party, crime

Insurance clauses in contracts should consider need for run off cover



Client position

“I’m insured - why should I worry about my responsibilities under the contract?”

Cover is limited

Exclusions

Material facts

Cover is annual

Claims reflected in future premiums



Key issues

Hard market – manage client expectations

Remember ‘noted’ does not mean ‘covered’

Usually, OK

- Indemnity to Principals, waiver of subrogation

Maybe, but at additional cost (and with excellent presentation before contract signed)

- Some contractual liability, hold harmless, financial loss

Expect a ‘No’

- Subrogation waiver for products exported to the US, punitive damages, liquidated damages



Review Objectives

By the end of this session delegates now:

- have an improved understanding of the clients' liabilities associated with key contracts
- can identify key areas of risk in commercial contracts
- know how to improve advice given to clients about contract risk

Thank you! Questions?

Contact:

Email: nick@nickthomasassociates.co.uk

Telephone: 07767 647812

LinkedIn: <https://www.linkedin.com/in/nick-thomas-64046113/>

LinkedIn Company:
<https://www.linkedin.com/company/nick-thomas-associates/>

'Up to the minute training solutions addressing the challenges of the modern insurance professional'

