

COLLATERAL WARRANTIES

One of the questions frequently asked is 'does my policy cover me for my work under this contract?'

Most policies provide cover for disputes, which are litigated in the UK Courts, but not necessarily in other jurisdictions. The first point to check is that the contract is governed by UK law, if not then can UK jurisdiction be negotiated?

The following is not to be relied upon as legal advice and the Insured should **always** obtain professional legal advice from an appropriate firm of solicitors before entering into any contract. We would strongly recommend that a copy of the policy wording and schedule, with all relevant endorsements are submitted to the insured's solicitor at the same time so that consideration may be given to the insured's position under the policy.

Make sure that all contracts and pre-contract correspondence in connection with the project are read in conjunction as together these will define the liabilities and obligations of the insured. Are the parties to the agreement those that would be expected?

Ensure that the contract is not agreed until all the provisions, terms and conditions have been set out in full.

Bear in mind that the insurance cover may vary across the insurance market according to industry views and experience from year to year and as such because the liability under a collateral warranty often lasts for 12 years from the practical date of completion or the issuance of the certificate of completion, cover under future policies of insurance may not necessarily cover matters that are currently covered.

No insurance policy will cover every eventuality arising under a contract and as such there will always be areas of exposure for which the insured is not covered under their professional indemnity insurance but equally it is not necessarily possible to guess what claim might be made and hence what gaps might therefore exist.

The purpose of a collateral warranty is generally to impose a higher duty of care / contractual liability than would otherwise apply and to extend the period for which you may be liable.

The duty of care required under the contract may well be higher than that normally imposed by law. The collateral warranty often creates a contractual liability where there would otherwise be none or with a party to whom the insured would otherwise owe no duty of care.

It is essential to establish the specifics of the contract and a draft contract that does not set out the specific level of professional indemnity required, or set out the extent of liabilities and does not set out the specific duties and responsibilities of the insured is impossible to risk assess as it is not possible to establish the actual liability of the insured. Where these issues are set out make sure that they are clearly laid down and there are no ambiguities. If the client's requirements appear too onerous the insured should get his solicitor to re-negotiate the contract or consider whether the risk is such that the contract should be declined altogether. Obviously a claim or series of claims that are not covered by insurance or exceed the level of cover provided by the insurance could result in financial ruin for the insured.

Look to see if the contract seeks to impose a higher duty of care than would otherwise apply, i.e. going beyond the reasonable skill, care and diligence usually expected of such a professional, does the contract seek to land the insured with responsibilities of others?

Where sub-contractors are employed endeavour to ensure that they are directly employed by the client and are bound by equally onerous contract terms. If the insured employs sub-contractors they may be accepting liability for their mistakes and reliance that the claim may eventually be reimbursed by the sub-contractors' own professional indemnity cover may not occur if the sub-contractor has subsequently cancelled their cover, or the claim is declined due to the actions of the sub-contractor or their limit of indemnity is inadequate, to give but a few possibilities.

Deleterious Materials Clauses should be approached with caution, for example materials may change in status during a project and the insured should be very careful as to what liabilities they are accepting.

Problems arising from computers and computer viruses are generally excluded from most policies of insurance.

COLLATERAL WARRANTIES

Generally the contract will grant a licence for the beneficiary to use the copyright and other intellectual property / documentation royalty free and the extent and nature of such licences needs careful examination as does the assignment provisions relating to such licenses.

The insured may be required to provide an indemnity to parties that their work does not breach the intellectual property rights of third parties, but the liability under the policies is generally restricted to the insured's own liability to third parties. In any event the nature of intellectual property disputes is such that the offended party may seek to bring an action outside the geographical areas covered by the professional indemnity insurance.

It is important to review the insured's duties to maintain professional indemnity insurance, i.e. on what terms and at what level and for how long. Obviously no one can predict the availability or not of professional indemnity insurance in the future.

The liability period needs to be considered carefully particularly as many contracts refer to the period being 12 years from the date of the insurance of the written statement of Practical completion. This is generally undesirable as the certificate may be delayed or indeed never be issued and it is preferable to negotiate the period as running from the completion of the insured's responsibilities or the practical completion of the project.

Endeavour to limit the number of warranties, for example to the first purchaser, tenant or funder. Make sure that the collateral warranty does not create a greater liability than that to the original client under the appointment.

The provisions of the Contracts (rights of third parties) act 1999 should specifically be excluded in effect from all contracts. Check that the responsibilities of another party under the CDM regulations are not being palmed off onto the insured.

In respect of adjudication it may well be worth seeking to ensure that rights of appeal are retained against the decision of the adjudicator even if neither party seeks such referral to another forum within a certain period of time.

The insured should look specifically at the policy exclusions and some of the most obvious ones common to most if not all professional indemnity insurance products in the market are as follows (note this is not intended to be an exhaustive list):

- War and Terrorism.
- Nuclear Risks.
- Supply of Products – need Product Liability Insurance for the physical aspects.
- Employers Liability Risks.
- Insured developing their own property or claims against, involving associated companies.

In conclusion every insurance policy has limitations and with the complex and varied nature of collateral warranties and the supporting contracts. It is always likely that the insured's liabilities may exceed their policy coverage which is why the insured should seek independent legal advice and seek to negotiate as favourable agreements as can commercially be achieved or walk away from the project if appropriate.

Please note that if the underlying contract is under the terms of PPC 2000 then insurers will specifically need to see that contract and the terms of instruction for the insured in order to review insurer's position.

An additional premium will be payable for each PPC 2000 contract entered into.

All material facts must be disclosed to insurers as failure to do so may entitle insurers to avoid the contract of insurance or at their discretion decline any claim(s) arising from the circumstances in question.

As will be appreciated from the above policy terms and conditions apply at all times and nothing in the above shall alter that position. When underwriters 'note' a collateral warranty or other contract on their file that does not mean that any claim arising from that contract against or involving the insured will be covered as coverage is governed strictly by the policy.