Contract Insurances

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This is a summary of a talk given to the London Branch by Mr. Coad on 15th April 1977.

In the time available it was only possible to give a brief sketch of a subject which has become more complicated as the technical and contractual aspects of Building and Engineering contracts have developed. Stress was laid on the need for constant vigilance in regard to insurance requirements, the extent and duration of the cover arranged, and the need for expert advice and guidance. It was necessary to limit the talk to the types of insurance in which problems frequently arise, and to leave aside various standard forms of cover such as Employers Liability, Personal Accident and Sickness, Motor, Fidelity and Bonds.

Types of Cover

The two main types referred to were:—

(a) Material Damage, i.e., the protection, by insurance, against loss of, or damage to, the work to be done, and the plant, equipment, temporary buildings and materials which are used.

(b) Liabilities, whether under Contract or Common Law, which devolve upon the Contractor, and upon the Principal or Employer, whether for injury to persons or for loss of or damage to property. (The distinctive professional liabilities of Consulting Engineers, Architects and Quantity Surveyors, and the insurance appropriate thereto, form a separate subject.)

In both the above areas it is of the utmost importance that the insurance cover is in accordance with the requirements of the Contract, insofar as such cover is available in the insurance market. In the case of the standard forms of Contract, Insurers are, of course, familiar with the insurance requirements, and are normally willing to provide cover in respect of the contingencies and liabilities set out in them. In some standard forms there may, however, be alternative clauses, e.g. in the RIBA conditions relating to the insurance of the works against fire, etc., and it is vital that these are correctly used, and their application clearly understood, before the commencement of any costing, preparations, or actual work. Otherwise, the cover that the Insurers are asked to provide may be inappropriate to the contractual position.

For the purposes of this talk, reference was made to the following forms of Contract – the Standard Form of Building Contract issued by the Joint Contracts Tribunal (referred to as the RIBA conditions), the ICE Conditions of Contract, and the General Conditions of Government Contracts for Building and Civil Engineering Works. These standard forms have a varied history so far as the insurance requirements are concerned, and the relevant clauses have undergone considerable revision in the course of time, partly as a result of increasing consultation with insurers and insurance brokers. The speaker recalled the days before the introduction of Clause 19(2)(a) in the RIBA conditions, when it was not unusual to find a requirement that the Contractor should "insure any adjacent property against subsidence, settlement or collapse". The confusion arising from such imprecise language, and the well-known case of Gold v. Patman and Fotheringham, had considerable repercussions, and eventually, after various revisions, the present Clause 19(2)(a) was evolved.

It is now general practice for the insurance market to be consulted when standard forms of contract are being revised, with beneficial results. It is, however, when the standard wordings are altered, or a special wording substituted, that the need for correlation between the relevant clauses in the contract, and the insurance arrangements, is especially great.

The Insurance Policy and its Limitations

An Insurance Policy is a legal agreement in its own right, quite separate from the Building or Engineering Contract, and is subject to its own terms, conditions and exclusions. These may be capable of amendment to meet the requirements of a particular contract, or may be adapted to apply to all contracts carried out on the same specified conditions, provided the Insurers are given satisfactory information on various matters. For example, in the case of the RIBA conditions, some insurers will agree to amend the normal liability cover to comply with the requirements under Clause 19(2)(a), but there will still be exclusions to the cover, and stipulations regarding information to be supplied to and approved by the insurers. These will need careful study if misunderstandings are to be avoided.

There will, however, always be certain differences between the liabilities and responsibilities of the Contractor and Employer on the one hand, and the extent to which protection can be provided by an insurance policy, on the other. It is a fallacy to assume that all losses and liabilities will be covered without qualification, whatever their nature and extent. It is strange how the insurance clauses in some contracts, even today, seem to be drawn up on the assumption that "everything can be insured!" (or "you can cover anything at Lloyd's!") Not only is insurance cover limited in the ways set out in the wording of the policy, but it is subject to various underlying principles, such as the principle of the Utmost Good Faith, Insurable Interest, Indemnity and Subrogation. The significance and application of these basic legal principles may well require consultation with insurers or brokers, if they are to be rightly understood.

Insurance policies may be taken out to apply to individual contracts, or it may be possible to effect "blanket" cover on an annual basis. If the latter method is adopted, it is still of the greatest importance to study the extent of the cover provided and any stipulations regarding information to be submitted to the insurers in particular cases before cover applies.

The Arranging of Insurance

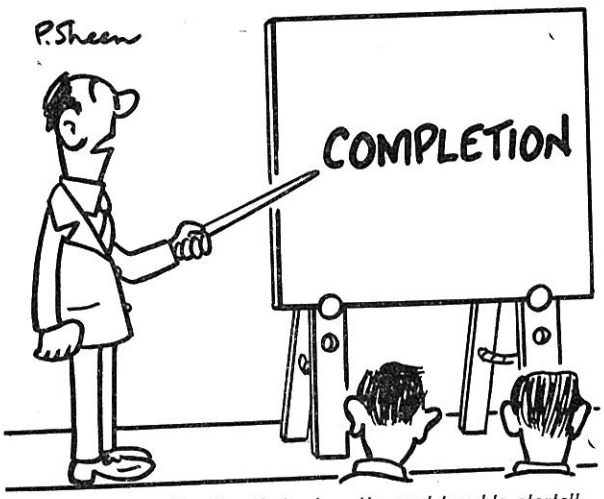
Consultation with a qualified and experienced broker is recommended, if the best possible terms for insurance are to be obtained. But apart from guidance from "outside" experts, responsibilities in insurance matters should be clearly defined. In the case of large and complicated Contracts, involving a number of Contractors and Sub-Contractors, certain questions should be asked and answered at an early stage, if misunderstandings and confusion are to be avoided. Here are some – Who has overall responsibility for the insurance arrangements and for ensuring that they remain in force as long as necessary? What procedure is to be followed for supplying information to the Insurers, and for reporting claims? Such questions may seem obvious, but are easily overlooked or not given sufficiently early attention.

The following are examples of potential "trouble spots" in connection with the operation of insurance cover:—

(i) In the case of contracts involving the partial handover of the works, the insurers must be informed when the terms for cover are negotiated in the first instance. They must also be told if a section of the works, or part of a structure, will be taken into use before the final completion of the whole contract.

(ii) How long should the insurance cover remain in force? The answer may be given in the conditions of contract, but it may be prudent to have some form of cover in force after the termination of the maintenance or defects liability period, to take care of possible outstanding liabilities.

Where a number of firms are engaged on parts of the same contract, their insurances may well be limited to the periods during which they are operating, and cease to apply when their work is handed over. It is therefore essential to co-ordinate the insurance arrangements, and to ensure that there is no time when proper cover is not in force. Here again, it is a matter of making it absolutely clear who has overall responsibility. If this is not done, and the various parties assume that someone else is looking after the insurance position, then it must follow, as the night the day, there will be trouble sooner or later in the event of loss or damage.



"Ironically it's after that when the real trouble starts"

(iii) If a Project Insurance is arranged, details of the cover, and the policy wording, should be supplied to all the Contractors and Sub-Contractors involved, and in sufficiently good time for any necessary alterations to be made in their own existing insurances. Also, the calculation of the premium under the Project Insurance must be known at the tendering stage, so that it can be taken into account in costing.

Amongst the most common causes of trouble are ambiguity and failure to allow adequate time for proper attention to be given to insurance matters. As to ambiguity, this can arise simply from obscure or vague phraseology – Confucius is said to have observed that – "If language is not correct, then what is said is not what is meant; if what is said is not what is meant, then what ought to be done remains undone". It can also result from the following:—

the deletion or alteration of certain clauses in the contract conditions – or the insertion of fresh clauses in, say, the Bill of Quantities – without appreciating the effect on other clauses or conditions;

failure to realise the difference between an insurance and a guarantee;

the insertion of insurance requirements which are unreasonable in view of the Contractor's legal and contractual liabilities, and which may be impossible to implement.

In any case, if insufficient time is allowed for such matters to be studied and sorted out, loss or damage may occur whilst discussions are still in progress, and it may then be found that the insurance cover is either inadequate or non-existent.

The Role of the Insurance Broker

The broker acts as an intermediary between the Building and Engineering world and the Insurance Market. In the case of cover arranged at Lloyd's, a broker is essential, as Lloyd's policies can only be effected through authorised Lloyd's Brokers. The broker has considerable independence, as he is not bound to any one Insurer, or group of Insurers, his duty being to maintain such contact with the whole of the Insurance Market that he can advise his clients on the most suitable Insurers, having regard to his client's activities and the areas where they operate. Large broking firms today have overseas offices, and are equipped not only to provide service for international firms, but also to deal with insurance markets abroad. Even where national insurance institutions exist in some countries the broker can still play a valuable part, not only by representation in the territories concerned but also by handling reinsurance in the U.K. market for the national insurance companies.

As well as arranging cover, the broker deals with the presentation of claims and negotiates settlement. In cases where a number of different types of insurance are involved in the same accident, the broker is in an unrivalled position to negotiate with all the Insurers concerned.

The current emphasis on Risk Management illustrates some of the services which qualified and experienced broking firms can supply. These include the identification and assessment of risks, advice on their reduction or removal by risk control, and the extent to which self-insurance may be desirable.