

# Professional Liability Insurance – A Primer

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Prepared by the FIDIC Standing Committee on Professional Liability

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## Foreword

Professional Liability is a term used to recognize the obligation of a person or firm to compensate those who suffer loss or damage as a result of the negligent performance of the professional services they have provided.

Professional liability insurance, more commonly referred to as Professional Indemnity Insurance, is a mechanism to transfer all or part of the risk to an insurance company for payment to those who are entitled to be compensated for, their losses due to the negligent performance of a duty of care by the professional.

Since FIDIC members practice in many countries, with differing laws and conditions of practice, a publication of this type can provide only broad and general information. To that extent, the reader is cautioned to recognize that the discussion under each heading may or may not be totally applicable or appropriate to the conduct of a professional practice in a particular- country or situation.

Before acting on any specific points covered in this publication, the design professional should check with his or her member association, and with legal and insurance advisors to determine the most appropriate course of action.

# 1 Introduction

The development of this publication was undertaken for the purpose of providing information to members of FIDIC and others on an important topic that has caused some concern to those who provide design services to the public. That concern, which has grown at an alarming rate in the past ten years, poses one of the most serious issues facing consulting engineering firms in their daily practice.

The cost of procuring professional liability insurance in some countries ranges up to 4-5% of the gross billings of design firms for a medium level of insurance and deductible, with even higher costs for firms in high-risk categories. In addition, dealing with liability claims involves extensive time and effort by principals of a design professional firm. Growth in liability claims also impacts on the reputation of the firms in relation to clients and the general public.

The causes for the growth in liability claims and costs are many and varied. Many believe that the fundamental cause has been a significant change in the attitude of society as a whole.

In the past there was a more understanding attitude toward the services of all professionals, including doctors, dentists, lawyers, accountants and others. These professionals undertake to provide their professional skills in fields of endeavour which deal with the inexact, and for which there cannot be any guarantee that the result will always be completely favourable to the patient or client. Today, there is a much more pronounced attitude that for every harm there must be a remedy, even if there is no clear evidence that the professional service was rendered negligently, that is, outside the accepted standard of care of the particular profession.

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A second most-cited cause of the liability explosion has been the attitude of the courts in the processing of professional liability claims. Increasingly, the courts tend to look sympathetically towards the client or patient who has suffered harm and to find novel ways to accommodate the legal rules to provide economic benefits to those who claim damages from the professional. This has become known as the "deep pocket" rule or "richesse oblige" - the party best able to bear the economic burden should be made to pay for the loss or damage without much regard to fault.

The deep-pocket syndrome was stated most clearly and forcefully more than forty years ago in a famous product liability case, an area outside of the professions:

Even if there is no negligence .... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market, It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk or, injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is in the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection., " (Escola vs. Coca-Cola Bottling Co., 1.50 P.2d 4.36, 1944)

A third factor cited to explain the growth in liability claims and costs is the various laws which govern liability litigation. In recent years, however, there has been a strong movement to review and revise these laws to provide a fairer balance between the rights of plaintiff's and defendants in professional liability judicial proceedings. "Tort reform", as the new movement has sometimes been called, focuses on such areas as

- sanctions against initiating unjustified (frivolous) actions where there is no reasonable basis to find negligence on the part of a professional;
- better methods of dispute resolution, such as mediation or arbitration in place of full-scale litigation;

- placement of limits on the amounts of awards to counter the trend set by the occurrence of sensationally high damage awards in some past cases;
- controls on or elimination of the contingent fee system allowed in some countries, whereby a lawyer will take on a dubious case for a plaintiff in the hope of securing a large judgement in which he will share;
- reduction in the allowable use of punitive damage awards, which provide large sums of recovery for plaintiffs over and above actual economic loss;
- limitation on the amounts which may be awarded a plaintiff for "pain and suffering" in injury cases;
- elimination of the rule of joint and several liability, which permits two or more defendants who share any degree of fault, to each be individually liable for the full amount of the damages if the other parties are unable to pay their, proportionate share.

Some progress has been made in balancing liability laws through tort reform. However, discernable reduction in professional liability costs will take some time to appear, to the extent that improvements in tort law are accomplished in particular countries.

The primary purpose of this publication, however, is not so much to reflect on the background of the professional liability problem, which is here and is not likely to change fundamentally in the near future. Rather, the intention is to outline various aspects of professional liability insurance as the only current vehicle available for firms to protect their financial interests from catastrophic losses, in the event of a successful claim for damages flowing from the rendering of professional services.

The following points and comments with regard to the overall liability insurance picture are based mainly on the experience in common law countries, such as the United Kingdom, United States, New Zealand and Australia and may not entirely fit countries which adhere to a different legal structure, such as those using the Civil Code.

A bibliography is included for those interested in reading more about professional liability and insurance coverage.

## 2 Professional Liability Defined

Professional liability is a term used to recognize the obligation of a person or firm to compensate those who suffer loss or damage as a result of the negligent performance of the professional services they have rendered.

For liability to apply, there must be a duty to the other party, whether by contract or by operation of law, a breach of that duty by the professional and damage to the other party arising from the negligent conduct of the professional.

In addition to professional liability involving injury to other persons or damage to property arising from the negligent conduct of the professional, a legal action may be, and often is, based on alleged breach of contract. While breach of contract actions are technically different from professional negligence actions, such actions are more significant in terms of numbers than those involving bodily injury or death. Overall, property damage claims account for two thirds, or more, of all claims, while injury or death claims involve only about twenty percent of liability claims. Also, many courts recognize an overlap between a negligence action and a breach of contract action, particularly where a claim alleges both forms of action. One court recently commented on "... the conceptual barriers between contract and tort deemed so sacred in law school curricula and legal digests, but in few other places."

A glossary of terms is contained in Appendix 1 to assist in understanding the meaning of insurance terms generally in use.

### 3 Risk Transfer Mechanisms

In reaction to the worsening liability picture over recent years, the different parties to a project have sought means to protect their respective interests by use of a variety of contract arrangements.

#### INDEMNIFICATION BY THE CONTRACTOR

One of the more common examples of a contract indemnification clause provides that the contractor will indemnify (hold harmless) the owner and the engineer, and their respective consultants or, agents, for all damage or loss arising out of the performance of the work by the contractor which is deemed to be the fault of the contractor. However, to deal with the concern of the contractor that he not be held responsible for damages arising from the negligent preparation of designs or, specifications, the contract will usually add a paragraph to that effect.

How this relationship works in practice, when the facts indicate that the damage might have been due to the fault of both the professional and the contractor in varying degrees, is determined by the applicable law of the particular jurisdiction. There appears to be a general trend in such cases to allocate the respective financial responsibility in accordance with the degree of fault of each party, as determined by a court or a jury under the common law doctrine of comparative negligence. However, a major problem occurs when the contractor disappears, leaving the design professional to carry the full extent of loss.

#### INDEMNIFICATION BY THE DESIGN PROFESSIONAL

More recently there has been a move by owners, in some cases, to seek indemnification from the design professional. The essential concern when the owner makes this request is to identify precisely in words the liability of the design professional to the owner in the event of damage arising out of the professional's service. If the damage arises from negligent performance by the design professional, the design professional is liable, as is well established in all jurisdictions. The professional should have no concern over an indemnification clause which limits his liability to his own work, since it merely states what is already the law.

A problem arises, however, when the owner seeks indemnification language which tries to make the design professional responsible for any damage or loss suffered by the owner, regardless of the fact that it may not be caused by, or even related to, the services provided by the design professional. A typical clause of that type might read

"The engineer shall indemnify and hold harmless the owner and his consultants, agents and employees, from and against all claims, damages, losses and expenses (including court costs and legal, fees) arising out of or resulting from the performance of the services of the engineer. "

The unwary design professional might pass over such a contract provision offered by the owner. The professional may not realize that a broadly worded clause may be construed by the courts or an arbitrator to mean that the design professional accepts liability for any damage or, loss to the owner, even if that damage or loss had nothing to do with and was not caused by the activities of the professional. When the design professional is confronted with that type of indemnification clause he must insist upon the insertion of the key word, "negligent", to limit his responsibility to damage or loss caused directly by his professional failures.

A further important reason to resist this kind of open-end indemnification clause is that the professional liability insurance policy may not protect the design professional in such circumstances. A professional liability insurance policy usually contains a specific exclusion against assuming the liability of others, except for liability caused by the wrongful acts of the policyholder.

#### SHARED RISK ALLOCATION

More recently, the idea has emerged of contracting for the owner to share in the risk by agreeing to a limitation of liability clause in the contract. Typical language which has been suggested for this purpose reads:

"The owner agrees to limit the engineer's liability to the owner due to the engineer's professional negligent acts, error's or omissions, such that the total aggregate liability of the engineer to those named shall not exceed (\$           ), or the engineer's total fee for services rendered on this project, whichever is greater."

Such a provision does not extend to third persons who are not party to the agreement. It does not normally apply to claims arising from other, negligent acts of the design professional, such as injuries to construction workers or member's of the general public, or claims by contractors for, delay damages caused% by the alleged negligence of the design professional. A recent court decision in the United States construed the limitation language to not apply to a claim for, damages caused to a client for failure to complete the engineering services on time, as stipulated in the contract. As a consequence, some proponents of the shared risk allocation concept have advocated that the language be extended to include claims for breach of contract as well as negligent performance. The 1990 edition of the Client/Consultant Model Services Agreement, published by FIDIC, recommends two specific clauses dealing with limitation of liability. One deals with the duration of liability, and the other, the maximum limit on the amount of liability.

The concept is supported by noting that, by definition, construction involves substantial risk and that the primary beneficiary of a construction project is the owner, whereas the designer receives only a relatively small fee for his or her part of that risk. Therefore, it is argued that it is fair that the owner should share in the risk borne by the designer. While the traditional view of courts has been to look with disfavour on agreements whereby one party is benefited or protected from its own negligence, they have, in particular cases, upheld such arrangements provided they have been agreed to as a result of "arms-length" bargaining between both knowledgeable and sophisticated parties.

A variation of the kind of shared risk allocation clause cited above, and one which has been upheld in reported cases by the courts, involves an agreement between the engineering firm and the client to limit the liability of the engineer to the amount of insurance for that single project, as negotiated by the parties and stated in the contract. This kind of limitation agreement is fundamentally different in its impact, in that the owner does not share the cost of damage caused by the engineer's negligence or breach of contract. Rather, the owner is "made whole" by recovering the amount of damage from the insurance fund, assuming that a sufficient amount of insurance has been agreed.

## 4 Insurance as a Risk Transfer Mechanism

### INSURANCE CONCEPT

Persons or organisations face a degree of risk in their every-day activities, ranging from sickness, to damage to real property or possessions of all types. For 500 years or more there have been systematic arrangements of great variety whereby those concerned with dealing with their risks have banded together to share the risk among a large group facing similar potential problems. In its simplest form, this approach to management of commonly shared risks is called insurance.

Insurance has certain basic characteristics in common, whether for, family protection to cover medical costs or death, the loss of ships during storms (the oldest form of insurance), or, in the course of practice of a profession, to alleviate costs resulting from negligent action causing damage to clients or others or for breach of contract.

First, the risks to be covered under an insurance policy must have a common basis for a defined group, who share the same type of activity or loss exposure. Consulting engineers, even though their practices may vary widely as to type of specialty, location, or size of firm, are a typical group with essentially the same kind of liability exposure. Thus, they form a viable group for insurance purposes. Such a grouping may well include closely related professional activities, for example, the practice of architecture for clients.

Second, the group must be large enough to spread the risk. No one can know in advance which persons or firm may face a liability claim. However, on the basis of established statistical data, it is reasonably predictable that a certain number of liability claims may be made against members of the insured group. From these statistical data it is then possible to develop an actuarial basis to set the financial requirements to make the insurance program financially sound, and able to weather the ups and downs of claims over the years. Premiums to fund the liability claims and administrative costs are revised from time to time, on the basis of actual experience.

There has been a trend among clients in recent years to require the consulting firm to show evidence that it carries liability insurance. In those cases, the clients feel that although the firm is directly liable for damage caused by its negligence or breach of contract, the firm may not have the resources to respond to the amount of damage. Thus, it relies on availability of an outside source for those funds, usually through an insurance carrier. In some instances the client will stipulate the amount of insurance to be carried by the firm, and that the insurance be maintained during the assignment and for a set period thereafter.

### PRIMARY INSURANCE / REINSURANCE

Worldwide insurance markets provide liability insurance of almost every kind. One of the essential features of this broad insurance market is the widespread use of reinsurance as a vehicle to further spread the risk. The reinsurance market operates in much the same fashion as do primary insurance carriers, in that the reinsurance companies take on part of the risk to which the primary carrier is obligated.

The allocation of risk between the various insurance carriers is handled through direct negotiations between the primary insurance company and one or more reinsurance companies, many of which operate out of the United Kingdom, Germany, Switzerland and several other countries. These arrangements are spelled out on a regular basis, under what are called "treaties". However, individualised policies can also be tailored through the use of reinsurance.

Reinsurance is used very widely for a number of reasons, including increasing the capacity of any one insurance company, stabilising individual losses, adjusting the mix between various kinds of insurance coverage, and achieving a better spread of the risk geographically. Most importantly, reinsurance is used to protect the primary insurer against catastrophic exposure.

The importance of reinsurance for the design professional market is demonstrated by a recognition that without reinsurance arrangements, basic insurance company underwriters would be seriously limited in the amount of coverage that could be offered. Insurance companies are limited by law in the amount of risk they can carry, consistent with their financial capacity.

However, by being able to transfer part of that risk, which may be in the order of two to one or even more, the primary underwriting company can offer the insured in the professional indemnity or other markets significantly higher limits of coverage.

## SELF-INSURANCE

One alternative to liability insurance is what is called "self-insurance". However, this is merely a term used where there is no insurance in force. Should the firm be liable for any damages found against it, funds would be provided from its own resources. Some firms, however, deal with this risk by setting up in their account books reserves identified as self-insurance funds. These funds are fully under the control of the firm, but in most countries are not a deductible business expense for, tax purposes. Professional indemnity insurance premiums, on the other hand, are normally tax deductible.

## CAPTIVE INSURANCE

Another approach is for firms to establish a "captive" insurance company, if they are able to. That is, one which the firm or firms own or control. From both a business and tax standpoint, this is a complex arrangement, requiring careful study of the applicable laws and the limitations on the use of this device from a tax standpoint. It is well worthwhile considering and pursuing if there is cooperation within the members of 'a group of professionals, and between the group and an insurer.

## 5 Professional Liability Insurance

### STANDARD POLICIES

Standard insurance policies for design professionals cover the professional firm itself, whether it is a sole practitioner practice, a partnership or a corporation, together with all of the principals of the firm and employees acting on behalf of the firm. The policy does not cover construction nor manufacturing activities of the firm, or subsidiaries of the firm unless specifically listed in the policy. It does not cover other firms involved in a joint venture arrangement unless the other parties to the joint venture are named in the policy.

Insurance is a highly competitive business. In virtually all countries, professional liability insurance for engineers and other professionals is available from a number of insurance companies. The extent of that availability varies from time to time as market conditions dictate the ability of insurance companies to offer coverage, and, if so, on what terms and cost. In past years, for example, as many as twenty insurance companies have entered the architect-engineer liability insurance market in the United States. Many of them ceased offering coverage during periods of a tight market and heavy underwriting losses, and at one point in the recent past there were only two American companies offering design professional liability insurance. More recently the world market has eased to some extent, but the past record indicates that it is time related and likely to continue to be restricted in numbers and extent of available coverage.

Two sample professional liability insurance policies are included as Appendices. Appendix 2 contains a typical policy applicable in countries operating under a Common Law legal system. Appendix 3 contains a sample policy applicable in a Civil Code country.

Except where there is a requirement by statute or by the rules of the relevant professional association, the decision of whether or not to carry professional liability insurance is a matter of voluntary decision by each firm. However, as previously noted, there is a trend toward clients, both public and private, requiring a demonstration of the firm's liability insurance coverage through a certificate from the insurance underwriter. In some instances, the client may require the insurance to continue in force for a stated period following completion of the project.

### CLAIMS MADE PROVISIONS

Most professional indemnity policies are written on a "claims made" basis. Under a "claims-made" policy, the following two conditions are a prerequisite to the existence of coverage

- The policy has to afford coverage for, the time period during which the services giving rise to the claim were rendered, and
- Coverage has to be in, force when the actual claim is first made.

This is not to be confused with more traditional coverages for, Comprehensive General Liability, Homeowners, and Automobile, which are written on an occurrence basis. Under occurrence forms, a policy only has to be in force when the accident or occurrence giving rise to the claim occurs, regardless of when the claim is first made.

Understanding the difference between claims-made and occurrence policies is a critical step in understanding and evaluating professional liability insurance policies. First, there can be considerable time lags between when the services are rendered and when the claim is actually brought. Second, most professional liability claims against design professionals are brought not only after they have rendered their services, but also after the substantial completion of the project. If a policy is not in force when the claim is made, then there will be no coverage for that claim even if the policy was in force when the services giving rise to the claim were rendered.

### COVERAGE EXCLUSIONS

A professional indemnity insurance policy does not provide total protection against all liability exposures. Insurance carriers can determine that some kinds of risks and liability exposures are either uninsurable or are too severe to be covered within the limits of the policy. Thus, there are exclusions in every professional liability insurance policy. The list exclusions should be reviewed carefully by the professional firm.

Most notably, these exclusions may relate to business risks such as bankruptcy, copyright infringement, loss of documents, failure to complete drawings on time, accuracy of cost estimates, discrimination, liability of others, and warranties or guarantees. Other exclusions from the insurance policy relate to libel or slander, dishonest activities of principals or employees, punitive damages, fines or penalties imposed by law, or failure of a client to pay all or part of the professional fee. Some of these exclusions may be reinstated at an additional premium. Business risks, which are inherent for every kind of business, should be covered by commercial insurance policies geared to those exposures.

More recently, professional liability policies have often excluded claims arising out of pollution, hazardous waste and asbestos. There is worldwide recognition of the enormous exposure for those who have any connection with claims for damages due to pollution of water, air or land, and the high cost of dealing with the handling and cleanup of hazardous waste or removal of asbestos. These newer exclusions reflect the same kind of risks which led years ago to a broad exclusion for claims arising out of nuclear activities. The risk potential in these areas is so great that the insurance carriers are unable to predict with any degree of certainty that the premium structure could withstand the potential claims.

## POLICY LIMITS

An insurance policy contains a specified limit of indemnity. This limitation is either imposed by the insurer or is a tailor-made agreement between the insurance company and the policyholder. It reflects the extent of risk which the insurer is prepared to cover, or that which the insured feels is adequate to deal with the individual exposure possibilities balanced with the related cost of the coverage.

The insurance company must balance the degree and extent of covered risk against the premium income associated with that risk. Insurance carriers limit the amount of coverage to the extent that their total obligation does not exceed the available funds to pay the potential losses for the entire group of insureds.

## POLICY DEDUCTIBLE

A further area of limitation is the "deductible" or "excess". The deductible, required in every policy, represents a figure the insured is required to pay from its own resources, apart from the insurance payments, to settle a claim. It reflects, again, an amount tailored to each policyholder. The amount of deductible may be as low as U.S. \$1,000 for smaller firms and smaller policy limits or as high as U.S. \$1.0 million for larger firms and policies.

The major reason for the inclusion of a deductible in a policy is to involve the insured financially in any potential claim and thus encourage a sense of responsibility, a commitment to quality work, and an adherence to high standards of loss prevention activity within the firm.

The use of a deductible also tends to prevent abuse of the insurance fund for relatively small claims or problems faced by the design firm in its day-to-day activities. These kinds of "job interferences" usually involve issues which can be resolved quickly by direct payment of a relatively small amount of money within the deductible limit by the insured firm. It is less expensive overall than if there was formal filing and handling of many small claims by the insurer.

## OTHER POLICY FEATURES

There are other special features of a professional liability insurance policy which are important. They, along with other special insurance needs of the professional firm, should be reviewed with the insurer. Some of these are:

- Automatic reinstatements - Automatic reinstatements may be included by payment of an additional premium should the aggregate of the policy be used during the policy year
- Extension of cover beyond national boundaries - The policy for, firms which operate internationally, should identify the geographical areas of coverage. The insurer may require an additional premium to waive exclusions for work in certain countries.
- Run-off cover for former principals - Special coverage is often available to cover claims arising from work of principals who retire or terminate.

## ROLE OF PROFESSIONAL SOCIETIES

The role of professional societies in the availability and administration of liability insurance schemes has been a major factor since their introduction many years ago.

The company first offering broad and general liability insurance to engineers and architects in the United States did so only with the support and open endorsement of the leading professional societies in their respective professions, The American Institute of Architects and the National Society of Professional Engineers. The American Consulting Engineers Council likewise worked with a risk management company to endorse the formation of a separate company to provide professional liability insurance to engineering firms. Those societies do not directly control or issue policies, nor do they have any financial obligations under the program or share in the financial results, whether good or bad. Each society, however, maintains a special committee of members who oversee the program and meet regularly with the chief executive of the insurance company and its managing agent. The committees are given detailed information on all aspects of the program and are encouraged to provide suggestions for policy language, the handling of claims and program administration in general.

In other countries there is a different pattern. The Association of Consulting Engineers New Zealand requires that members maintain a policy of professional liability insurance to a minimum specified level. This is the amount stated in the recommended terms of engagement as a limit of liability. A similar arrangement exists in Australia under which members of the Association of Consulting Engineers are required as a condition of membership to demonstrate either professional liability insurance cover or equivalent asset backing.

Several professional societies have sponsored or endorsed group insurance programs. Participation in some of these programs is voluntary while in others, mandatory. Included are:

- The Association of Consulting Engineers Australia
- Association of Consulting Engineers of Canada
- Foreningen af Raadgivende Ingeniører (Denmark)
- Verband Beratender Ingenieure - VBI (Germany)
- The Association of Consulting Engineers New Zealand
- Radgivende Ingeniørers Forening (Norway)
- The South African Association of Consulting Engineers
- Association Suisse des Ingenieurs-Conseils (Switzerland)
- The Association of Consulting Engineers (United Kingdom)

Information may be obtained through the FIDIC Secretariat.

## 6 How Premiums are Determined

The premium for a design professional liability policy is determined from the information provided in the application and in supplementary information submitted by the firm. This provides the basis to depict the liability exposures of the design firm. The premium review process is highly individualised and requires careful detailed evaluation of the information submitted.

The premium is directly affected by the limited coverage and by the amount of deductible carried by the firm.

Within the underwriting rules and relevant laws, a number of major factors are employed to arrive at a premium to be offered to the applying firm. Foremost among these is the firm's total annual fee income for professional services during defined previous periods, particularly the past twelve months. The detailed breakdown of that figure would show fees paid to outside consultants and income from joint ventures. The fees paid to outside consultants would not be deducted from the base figure under jurisdictions where the prime professional firm remains potentially liable for errors and omissions of its consultants. However, fees received by the firm apart from design or construction related services, such as studies, planning assignments, reports or interior designs, are often discounted to a large extent because those fees do not represent the same degree of liability exposure as do those relating to design and construction phase services.

Other factors in the premium calculation include the location of the firm, reflecting different loss experience in different geographical areas, and the proportions of service undertaken between such primary areas as architecture, electrical engineering, civil engineering, mechanical engineering and structural engineering. Historically, firms rendering primarily structural engineering services have had the most severe claims experience, while firms in the electrical engineering field have the most favourable claims experience.

Another important consideration is the firm's claims experience. The severity of a firm's claims experience is determined by comparing the amount of money paid as a result of claims made against the firm, including the total amount set aside as reserves for pending claims, to the total premium paid by the firm over a period of time. The result is a percentage identified as a firm's incurred loss ratio. Payments made by an insured within the deductible are not included in the calculation. Consideration is also given to the frequency of claims by the firm. Although the reporting of possible claims does not have an adverse effect on premium calculation, an excessive number of such reports may indicate quality control problems.

Other points which enter the evaluation are the types of projects handled by the firm, and those which are considered to be high risk. In-house quality control of the firm should be taken into consideration, as well as the firm's use of standard contract documents published by the professional societies.

All of the steps in the process are reviewed for each policy period at the time of renewal. Although the rates may not increase from year to year, the total premium will increase as the firm's total billings increase, or as higher limits of coverage are desired.

## 7 Role of the Insurance Broker

Liability insurance for design professionals is marketed primarily through licensed insurance brokers. Design professional firms initiate contact with the insurance company through a broker of their choice. This choice is an important one for the firm because the experience, background and skill of the broker will often make a major difference in securing prompt and efficient service for procuring the policy as well as annual renewals.

The primary factor to be considered in selecting a broker is a review of the broker's understanding of the design firm's activities. The broker should help the firm in completing the application form and providing the kind of detailed information which is required for an objective appraisal by the insurance underwriter. Timely assistance, in processing the application form and with any subsequent requests for additional information, is an important function of the broker.

The design firm should expect the broker to remain in close regular communication, particularly during the period when renewal is pending. The broker should consult with the principals of the firm to stay abreast of claims development, and to provide assistance to the design firm in promptly processing information regarding those claims. The broker also needs to know, at least in a general way, the trend in claims by number and severity to have a feel for trends in the profession as a whole.

Above all, the broker should be intimately familiar with the insurance policy. He or she should know what is covered, and what is excluded from coverage. There are many questions which arise in the interpretation of insurance policy coverages, such as what does the insurance policy cover or exclude if the firm, or its principals, hold an equity interest in the project. The broker should know the procedures used internally by the insurance company to resolve coverage questions.

Likewise, the broker should be expected to be familiar, with the underwriting process and how the premium is determined. The broker should be knowledgeable about non-traditional forms of coverage, such as project insurance, joint venture arrangements, construction management operations, and design/build arrangements.

All of this background information is intended to benefit both the broker and the design firm. It should be expected in return for the substantial commissions paid to brokers for processing the liability insurance policies of their client firms.

In a number of countries, liability underwriters and administrators meet with brokers and exchange information on the relationship between brokers, their client firms and the insurance company.

## 8 Project Liability Insurance

Professional indemnity insurance policies carried by most firms normally have a yearly term and cover events arising during that year from the professional work of the firm. However, for some projects this is not always the most desirable form of protection for the design professional and owner. This recognition has led to the development of special arrangements known as project liability insurance.

Project liability insurance may take various forms, but the main application is on an individual project basis to provide protection only for that single project. It is applied to the specific project and covers both the prime professional and all of the consultants on the project, together with the prime contractor and subcontractors. It extends through construction and for an agreed period usually up to five years after project completion. Project insurance is not subject to annual renewals as is a regular policy. The resource of the project insurance policy is limited to that one project and is not subject to erosion by claims or payments arising from other projects of the involved firm.

The premium for the project insurance policy is negotiated individually and is not subject to increase during the policy life. The cost of project insurance is normally covered as part of the owner's total construction budget. The fees generated from that project are excluded from the gross fees of the design professional firm in calculating the premium for its regular liability policy used to cover other projects.

The project policy is adaptable for owners' multi-project insurance, that is, for multiple projects under concurrent development by an owner. The same features apply as those for the individual project policy and new projects can be added to the policy on a reporting form basis.

## 9 Decennial Liability Insurance

One risk transfer mechanism used in a number of countries is a system of decennial insurance. Such a system has existed in France since 1804 and has been followed since in many other countries in Europe and elsewhere.

Decennial liability varies from country to country in its detailed application. However, the basic concept from the standpoint of the design professional is that the designer is jointly and severally liable to the owner for ten years after acceptance of the construction by owner for defects which jeopardize its functional integrity for the purpose for which it was intended. Decennial liability is backed up by insurance taken out by any one of the owner, contractor, suppliers and others stated in the law. The insurance applies during its term without regard to any determination of fault or negligence during the ten-year period.

An essential point of the decennial liability system is that the ten-year period of liability cuts off any right of action against the design professional at the end of that time. This was recently illustrated in a court decision interpreting the decennial liability law in Puerto Rico, following a major hotel fire causing extensive damage and death and injury claims from patrons of the hotel. Applying the decennial liability law of that jurisdiction, the court upheld it as constitutional and interpreted it to mean that following the ten-year period, there is absolute immunity for the design professional without any inquiry into fault.

Decennial liability is closely related to statutes of repose as enacted in many jurisdictions. These statutes establish a cut-off period, following substantial completion of construction, after which the right of action is barred, whether against the design firm or the contractors who built the project. The cut-off period varies from country-to-country and state-to-state in the United States where statutes exist. These kinds of statutes have been widely challenged on legal grounds, but have been upheld in a large majority of the cases.

## 10 Insurance of Other Risks

All construction projects require the use of various kinds of insurance about which the design firm should be aware even if not necessarily directly involved. These insurance provisions are quite comprehensive and detailed.

The design professional is normally not trained nor experienced in insurance matters and should accordingly refrain from providing insurance advice or counsel to the owner or the contractor. Owners and contractors should retain their own insurance advisors to assist them in determining the appropriate type and amount of coverage.

### OWNER'S INSURANCE

Requirements for insurance are usually spelled out in some detail in the general conditions of contract for the project. Usually, the owner purchases property insurance upon the work at the site to the full insurable value. This insurance should include the interests of the owner, contractor, subcontractors and the design professional. The property policy covers such risks as the perils of fire and extended coverage, and includes "all risk" insurance for- physical loss and damage, including theft, vandalism and malicious mischief, collapse, water damage, and such other perils as may be required. The general conditions may also call for insurance provided by the owner for his own liability and for such boiler, machinery and other insurance as may be required by laws or regulations issued by the public authorities.

With these arrangements in place it is important that the general conditions contain provisions to the effect that the owner and contractor waive all rights against each other for all losses and damages caused by any of the perils covered by the stated insurance policies. They should also waive all such rights for losses and damages against the subcontractors, design professionals and their consultants and all other parties named as insureds in such policies.

A recent court decision has suggested that a particular waiver clause did not necessarily protect the design professional because of its vague wording, which related to the separate requirement that the design professional carry professional liability insurance for the particular project. To meet this problem it has been suggested that there should be explicit wording added to the waiver clause to the effect that it is the intent of the parties that the property insurance waiver, shall not provide any rights of recovery by the insurer for monies it paid for property damage under the policy.

### CONTRACTOR'S INSURANCE

The contractor is required under the general conditions of contract to obtain comprehensive general liability insurance and such other insurance as is appropriate for the contractor's work.

These coverages include claims by workers for disability benefits and other employee benefit laws, and claims for damages because of bodily injury, occupational sickness or disease or death of the contractor's employees. Also included are claims for damages due to bodily injury, sickness or disease or death of any person other than the contractor's employees, claims for- damages insured by personal injury liability coverage which are sustained by any person directly or indirectly related to the employment of such person by the contractor, or by any other person for any other reason. The required coverage further includes claims for - damages because of injury to or destruction of tangible property including loss of use, other than to the work itself. Coverage for damages because of bodily injury or death of any person or property damage arising out of the ownership or use of any motor vehicle by the contractor is normally carried.

### ALL RISKS INSURANCE

In many European countries there are other forms of required insurance, such as erectors-all-risks, or contractors-all-risks, both of which have certain similarities to the "all risk" or "builder's risk" insurance policies in Common Law countries.

Some studies have been made to develop a concept of "unified risk insurance", aimed at covering design professionals, contractors, owners and all other parties involved in a project. However, to date those studies have not indicated a viable form of coverage to accomplish the purpose.

### DESIGN PROFESSIONAL'S INSURANCE

The design professional is also required to maintain his own insurance in such areas as public liability, worker compensation, and such property or building insurance as may be appropriate for the protection of the design firm.

## 11 Insurance Claims

The professional indemnity insurance policy is triggered when a claim is filed against the insured design professional.

Under the insurance policy, the insured professional is required to promptly notify the insurer in writing when a claim is filed, providing at that time such details as are then available. The nature and background circumstances and the basis for the claim must be advised. Failure to report a claim and thereafter provide full information regarding the issue as it develops will be detrimental for both the insured professional and the insurance company.

A claim is defined as a demand for money or services naming the insured party and alleging a wrongful act. It is sometimes difficult to know exactly when this definition applies in a particular situation because most questions or problems which arise during the course of a project do not finally give rise to a claim. While there are no hard and fast guidelines on when to file notice of a potential claim, the wise course of action is to submit at least preliminary advice in the nature of an "alert" to the insurer to indicate the reason for believing that a claim may possibly be filed.

It is important that a series of actions be taken when a claim is first made known:

- The insurance company should be promptly notified with information about the project, the nature of the claim and the circumstances leading to the problem. This information will have to be supplemented as the processing of the claim develops.
- When the claim involves property damage or injury to third parties, all pertinent data should be assembled encompassing the cause of the damage or injury, including field notes, photographs of the scene immediately following the damage or injury, and pertinent contract provisions indicating the role of the design professional in the construction process.
- The insured should be prepared to meet with representatives of the insurer or the lawyer appointed by the insurer, to review all of the pertinent facts and data. This may entail the assembly of written material and job notes in a chronological form.
- If a formal complaint and summons has been issued by a court, the insurer should be promptly advised and provided with a copy of the legal documents.

It is important in assembling documents and notes to be objective. Only the facts as they are known should be provided. Comments or opinions should not be inserted in the material. Sound documentation of the facts of the case and the attendant circumstances are most important. In the long run it will prove to be the major basis upon which an ultimate decision will be made, whether the case is resolved by voluntary settlement, mediation/conciliation, arbitration or litigation.

## 12 Dispute Resolution

### LITIGATION

Formal litigation has been a traditional method of resolving disputes through the court system which cannot be resolved by voluntary settlement. In the United States, where use of litigation has been so pronounced, former Chief Justice Warren E. Burger has stated:

- "A host of new kinds of cases has flooded the courts. A large part of all the litigation in the courts is an exercise in futility and frustration. These protracted cases not only deny parties the benefit of a speedy resolution of their conflicts, but also enlarge the costs, tensions and delays facing all other litigants waiting in line. The anomaly is that there are better ways of doing it. We've got to move a large volume of cases out of the courts and put them into arbitration."

Leading figures have noted the disadvantages of formal litigation and have advocated alternative methods of dispute resolution to avoid long delays and reduce costs in achieving settlements.

### ARBITRATION

Arbitration is a long established and widely used alternative method of resolving a dispute.

Most countries have developed rules and procedures for the conduct of commercial arbitration. The standard contract documents issued by many architectural and engineering societies throughout the world include arbitration clauses under which either party to an agreement may invoke the arbitration process when a dispute is not otherwise settled by voluntary agreement.

The International Chamber of Commerce (ICC), with headquarters in Paris, is recognized as the leading body in international commercial arbitration. The ICC Rules of Conciliation and Arbitration are widely used in resolving disputes of an international nature. The Rules provide the procedures to be followed in submitting a case to the ICC. The ICC Rules may be obtained from the International Chamber of Commerce, 38, Cours Albert ler 75008 Paris, France (Publication No. 447).

It should be noted that arbitration is not without its critics and to what extent arbitration is superior to litigation as a method of dispute resolution is the subject of continuing debate.

Those who endorse arbitration point to a number of factors in its favour:

- It is usually, faster and less costly than litigation.
- It provides for a decision by one or more arbitrator's from a panel of persons skilled and experienced in the technical and legal aspects of the construction process, compared to the knowledge and legal expertise of a judge or lay members of a jury.
- It is a private proceeding, not exposing the parties to the glare of the public spotlight as does a court procedure.

The critics of arbitration respond:

- There are instances where arbitration is a long drawn-out process and more costly than litigation.
- There is no appeal from the decision of the arbitrators as there is in the judicial system.
- The arbitration rules do not provide, for mandatory discovery procedures whereby the parties may obtain copies of essential documents.
- Arbitration procedures do not, follow the legal rules of evidence and may therefore admit extraneous information into the process.

While this debate between the proponents and opponents of arbitration goes on, it becomes the responsibility of each party to a construction project to decide on whether to use the method of arbitration to resolve a dispute within the coverage of the insurance policy. Some insurers tend to prefer that arbitration as a mandatory method be limited to the "smaller" cases, and that the "larger" cases be subject to resolution only through formal litigation procedures.

## MEDIATION / CONCILIATION

Professional societies have embraced and promoted alternatives to litigation and arbitration. Two processes in wide use, which show great promise, are those known as mediation and conciliation

Mediation is an informal procedure under which the parties to a dispute agree to bring in third party whose purpose is to promote and induce a voluntary settlement. The mediator, unlike the arbitrator, does not make a decision on the merits of the case. The mediator assists the parties in understanding the facts of the case, weighing the merits of their respective positions, and in reaching a solution which will be acceptable to all the parties. Mediation, if successful, creates a "win-win" atmosphere and avoids the cost, time and frustration of litigation or arbitration.

Conciliation is a similar process to mediation with the role of the third party "peacemaker" falling between that of the mediator and the arbitrator, but without the binding effect of the arbitrator's decision. FIDIC documents advocate conciliation as a first step before arbitration.

The ICC Rules cover conciliation, as well as arbitration, as do procedures for arbitration, conciliation and mediation published by a number of national organisations. The ICC Rules specifically note that conciliation remains entirely optional between the parties. The Rules permit conciliation to be attempted without any requirement to engage hereafter in arbitration if the conciliation effort is not successful.

## MINI-TRIAL

A still more recent form of alternative dispute resolution is the "mini-trial". It too varies to fit the needs of the parties.

The idea of a mini-trial is to have the parties participate in an abbreviated "trial", before a "jury", which is intended to resemble the deliberations of a real jury. The parties, either directly or through their attorneys, present the basic evidence and arguments for their respective sides without the formality of legal rules of evidence. The "jury" then renders a judgment which is only advisory. This judgment can be rendered immediately after the "trial" or at a later stage once the parties hear the other side and restart voluntary settlement discussions.

The successful outcome of a mini-trial is usually the result of a realistic recognition of the strength or weakness of the case of each side, and the presumption that in a real trial the judge or jury might well reach the same conclusion. An essential feature of a mini-trial is that a principal of each contending firm should attend the hearings and thereby be forced to recognise the full set of facts, whether favourable or unfavourable. Under this kind of process, the parties will most often settle the case short of litigation or arbitration.

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# APPENDIX 1

## GLOSSARY OF INSURANCE TERMS

The following Glossary of Insurance Industry Terms has been assembled from a variety of sources and reflects definitions generally used in practice. Meanings may differ from one geographical location to another and across various professions. FIDIC cannot assume responsibility for the completeness or preciseness of the glossary term definitions.

### ARBITRATION

A non-litigate method of settling disputes between parties in which the parties have agreed that an arbitrator or a panel of arbitrators, selected for specific knowledge in the field in question by the parties, hears the evidence and renders a decision.

### ASSURED

A person or organization who has been insured by an insurance company or underwriter against loss.

### BINDER

A temporary agreement which obligates the insurance company and the insured if loss insured against occurs before the policy is written. This temporary agreement is sometimes referred to as a "cover note."

### BREACH OF DUTY

Any act or omission in violation of a legal obligation.

### CALENDAR / ACCIDENT YEAR

A calendar year during which policy premiums are earned and claims are reported.

### CAPACITY

The maximum amount of insurance that a company is willing to write.

### CAPTIVE

An insurance company formed and owned by one or more entities to insure specific risks of the entities. A captive is a separately capitalized corporation existing only to provide insurance to the owners of the captive.

### CASE ESTIMATES (RESERVES)

The insurance company's estimate of its anticipated indemnity and expense payments on a claim subject to coverage by the policy.

### CIVIL CODE

A body of private law developed from Roman law as set forth in the Justinian code. It is based on the, judicial application of a certain legal code to a particular case by learned jurists and theorists, in conformity with logical and systematic deduction.□

## CLAIM

A demand for payment of damages by one party against one or more other parties.

## CLAIM EVENT

The event triggering the claim against the insurer.

## CLAIM EXPENSE

As defined in the insurance policy, the costs associated with the handling of a claim. This often includes defense attorney fees, investigation costs and expert witnesses. Not included normally are the salaries of insurance company employees and direct expenses which they may incur in performing their duties.

## CLAIMS-MADE INSURANCE

A type of insurance whereby the claim has to be made while the insurance policy is in force for coverage to apply. A claims-made policy without retroactive coverage does not cover claims arising out of services performed prior to a date stated in the policy that defines when the coverage commences.

## CLIENT

The entity for whom the work or project is produced.

## COMBINED RATIO

The sum of an insurance company's incurred loss and expense divided by its earned premium.

## COMMON LAW

The body of legal principles and rules of action that derive their authority solely from a society's usages and customs or from the judgements and decrees of the courts.

## COMPENSATORY DAMAGES

Those losses which can readily be proven to have been sustained, and for which the injured party should be compensated as a matter of right.

## CONSEQUENTIAL LOSS

Loss occurring after, and as a result of, some other loss.

## CONSTRUCTION CONTRACT

The agreement or contract between owner and contractor for construction of a project, or portions of a project.

## CONSULTANT

A person or entity who provides professional advice or services.

## CONTRACT DOCUMENTS

The owner/contractor agreement, the conditions of the contract (general, supplementary and other conditions), the specifications, drawings, bills of quantities, all items specifically included and all addenda issued prior to and all modifications and variation orders issued after execution of the contract.

## CONTRACTOR

The person or entity whose tender has been accepted by the owner and the legal successors in title to such person or entity.

## COVERAGE

The insurance afforded by the policy.

## DAMAGE

An injury to property or person, or loss of money.

## DAMAGES

The amount claimed or allowed as compensation for injuries sustained or property damaged or money lost through the wrongful acts or negligence of another; an award.

## DEDUCTIBLE

That portion of a loss payable by the insured, the insurance being coverage over the amount of the deductible. In some geographic locations the term excess is used in lieu of deductible.

## DEFECT

The fact that a portion of the work, as actually constructed, does not conform to recognized rules, to qualitative or quantitative specifications or, in case the same are insufficient, is not fit for its purpose.

## DEFENDANT

A party against which a complaining party brings a lawsuit.

## DESIGN

The process of applying engineering principles in a disciplined way to provide a practical and economical solution to a required task or process.

## DESIGN PROFESSIONAL

A designation, applied to a person or organization professionally qualified and duly licensed to perform architectural or engineering services, which may include, but not necessarily be limited to, development of project requirements, creation and development of project design, preparation of drawings, specifications and bidding requirements, and provision of professional services during the construction phase of the project.

## DIRECT LOSS

Loss resulting directly and immediately from the hazard insured against.

## DISCLAIMERS OF RESPONSIBILITY

Contract language that disclaims partial or all responsibility.

## DUTY OF CARE

The legal requirements for a professional to exercise his expertise in such a way as to avoid physical or financial damage of injury to any other person, or to conduct his profession consistent with accepted standards of quality.

## EARNED PREMIUM

For each day a one-year policy is in force, the insurance company earns 1/365 of the premium.

## ENDORSEMENT

A written amendment affecting the declarations, insuring agreements, exclusions or conditions of an insurance policy; a rider.

## ERROR

Any departure or omission from requisite design or construction requirements.

## ESTIMATE

An opinion, based on the design professional's technical expertise and experience, of the probable construction costs, time requirements of all or part of a project, the work or various alternative schemes, at different stages of investigation and/or different levels of design completion or during construction.

## EXCESS

In some geographic locations, the term excess is used in lieu of deductible to describe that portion of the loss payable by the insured before the insurance limits apply. Alternatively, an excess liability insurance policy is a separate policy of insurance that provides coverage for damages exceeding the normal or primary policy.

## EXCLUSIONS

Risks, perils or other exposures that are not covered by an insurance policy.

## FIDUCIARY

A person or corporation having the duty created by his undertaking to act primarily for another's benefit, or an agent or trustee handling the business of another when the business he transacts or the money or property he handles is not his own or for his own benefit.

## FINAL COMPLETION

When the work has been fully completed in accordance with the contract documents.

## FREQUENCY

The measure of claim count per unit(s) of exposure over a given time period.

## HAZARD

A condition that creates or increases the probability of a loss.

## INCURRED LOSS

The total of paid losses (indemnity plus expenses) plus the case estimates (reserves) on open claims.

## INDEMNIFICATION

A contractual undertaking by one party (the indemnitor) to reimburse the other party (the indemnitee) against liability or, loss.

## INDEMNITY

A payment to a third party by an insurance company and/or the PAYMENT insured in satisfaction of 'a claim made against the insured.

## INSPECTION

Examination of a specific aspect of the work completed or in progress to determine if it conforms to the requirements of the contract documents.

## INSURANCE

An economic device whereby the individual substitutes a small certain cost (premium) for a large uncertain financial loss (the contingency insured against). An economic device for reducing the risk through the process of combining a sufficient number of similar exposures into a group in order to make the losses more predictable for the group as a whole.

## INSURED

A person or organization who has been protected by an insurance company against loss.

## INSURER

The party to an insurance policy who undertakes to indemnify the other, (the insured), against damage or loss arising out of or, on the happening of certain events in consideration of a payment received, (a premium).

## LATENT DEFECT

A portion of the work, not in conformance with the contract documents, that is concealed or not noticeable by visual inspection.

## LEVEL OF PERFORMANCE

The measure of execution of design or construction in meeting contractual, legal and professional requirements.

## LIABILITY

A debt or responsibility; subjection to an obligation; an obligation which may arise by a contract made or by a wrong committed.

## LIQUIDATED DAMAGES

A sum established in a construction contract, usually as a fixed sum per day, as a genuine pre-estimate of the damages which will be incurred by the owner due to the failure to complete the work on schedule.

## LOSS

The unintentional decline in, or disappearance of, value.

## LOSS ABATEMENT

The process whereby the potential for loss is identified and analyzed and procedures are followed to eliminate or mitigate known risks or hazards.

## LOSS PREVENTION

The use of effective work practice to avoid circumstances that might contribute to loss of life, personal injury, damage to the work or other property or financial disadvantage to another party.

## MEDIATION

A voluntary non-binding technique utilizing an impartial third party to assist in settling disputes between parties which may, by agreement, become binding on the parties.

## NEGLIGENCE

Failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under similar circumstances.

## NON-CONFORMITY

The non-fulfilment of specified requirements.

## OBSERVATION

A function of the design professional, requiring visits to a construction site, to become generally familiar with the progress and quality of work and to broadly determine if the work is proceeding according to the contract documents.

## OCCURRENCE INSURANCE

A type of insurance whereby coverage is provided for a claim stemming from an event when the insurance policy was in force even if the claim is made after the policy expires.

## OMISSION

An oversight on the part of the engineer which constitutes a breach of professional duty.

## OWNER

An individual or entity that initiates a construction project and is responsible for financing the project.

## PARTY

Each of the signatories, individuals or entities to a contract or an agreement.

## PATENT DEFECT

A portion of the work, not in conformance with the contract documents, which is noticeable by visual inspection.

## PEER REVIEW

A structured independent review of an organization or project by a team of experts who are completely external to the subject under review and with at least the same level of expertise and experience as those who are responsible for the practice or project. Peer reviews usually cover all aspects and are intended to improve the overall quality of the service or project.

## PLAINTIFF

A party to a law suit who brings claims against another party called the defendant.

## POLICY

The written contract of insurance which is issued to the insured by the insurer.

## POLICY HOLDER

The party to whom the insurer pays in case of a loss.

## PREMIUM

The amount paid by an insured for the coverage to be provided by an insurance company.

## PRODUCT LIABILITY

A generic term used to describe the onus on a producer, manufacturer or supplier to make restitution for loss related to personal injury, property damage or other harm caused by work, service or product.

## PRODUCT LIABILITY INSURANCE

An agreement by an insurance company to reimburse an insured for losses or damages caused by the insured products.

## PROFESSIONAL INDEMNITY INSURANCE

Insurance written to cover losses incurred by a design professional for, errors and omissions. In some geographic locations, professional liability insurance, is used in lieu of professional indemnity insurance.

## PUNITIVE DAMAGES

Damages which are awarded separately from compensatory damages. Punitive damages are awarded based on a finding of malicious or wanton misconduct on the part of the defendant, and are intended to serve as a punishment and a deterrent to others.

## QUALITY

The totality of features and characteristics of work, service, systems, component, or product that bear on its ability to satisfy stated or implied requirements.

## RATE

The premium charged per unit of exposure at the limit of the insurance coverage purchased by the insured.

## REINSURANCE

A transaction whereby one insurance company agrees to accept all or part of the risk originally assumed by another insurance company.

## RETROACTIVE COVERAGE

Provides coverage for claims made during the policy period arising from negligent acts, errors or omissions occurring before coverage commenced, if the insured had no prior knowledge of a claim or potential claim arising out of such negligent acts, errors or omissions.

## RISK

The combined effect of the probability of occurrence of an undesirable event and the magnitude of the event; the possibility of loss or injury.

## RISK TRANSFER

The use of a contract to allocate project risks to the various participants assigning particular risks either to those participants who should properly bear them or to those participants who are best able to manage the particular risks assigned to them.

## SUBROGATION

The right of an insurer, after paying a loss, to pursue the person or entity who was responsible for the loss.

## SUPERVISION

Direction and coordination by the contractor of the construction work forces and construction means, methods, techniques, sequences and procedures and safety precautions and programs incident thereto.

## TERM

The length of time covered by an insurance policy.

## THIRD PARTY

Any individual, firm, corporation, partnership, joint venture, governmental agency or authority or entity, however designed who or which is not a signatory to a contract or an agreement.

## TORT

An obligation that is imposed by the common law to avoid injury to persons or property, for which damages may be claimed.

## ULTIMATE LOSS

The sum of claims incurred and actuarial adjustments attributed to each calendar/accident year.

## UNDERWRITING

The process by which an insurance company determines whether or not and on what base it will accept an application for insurance.

## UNDERWRITING EXPENSE

The costs incurred by the insurance company to write a particular line of business. Included are commissions to agents, company claim handling expenses, premium taxes and general overhead expenses.

## UNDERWRITING PROFIT (LOSS)

The "bottom line" results for an individual year or period of years. Profit or loss is calculated by subtracting ultimate losses and underwriting expenses from earned premium.

## VOID

Of no legal effect; a nullity.

## WAIVER

Intentionally, with full knowledge of the facts, giving up or not insisting on some right, claim or privilege that one is otherwise entitled to enforce. It may be implied by conduct warranting an inference of the relinquishment of such rights.

## WAIVER OF SUBROGATION

Waiver by the insured in favour of a third party of the insurer's right to proceed against such third party to recover a payment made on behalf of the insured under the policy.

## APPENDIX 2

### SAMPLE PROFESSIONAL LIABILITY INSURANCE POLICY

(Common Law Application)

### DESIGN PROFESSIONALS

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# PROFESSIONAL LIABILITY - CONSULTING ENGINEERS

## DECLARATIONS

### AGENCY BRANCH PREFIX POLICY NUMBER

Insurance is provided by

ACME CASUALTY COMPANY, 1, Main Street,  
CHICAGO Illinois 60600. A Stock Insurance Co.  
Herein called WE, US, or OUR.

## NOTICE

THIS IS A CLAIMS MADE POLICY PLEASE READ THIS POLICY CAREFULLY AND DISCUSS THE COVERAGE WITH YOUR INSURANCE AGENT.

- 1 NAME INSURED:
- 2 POLICY TERM: TO: at 12.01 AM Standard Time at your address  
show below.
- 3 ADDRESS:
- 4 EFFECTIVE DATE: is the effective date of the first policy issued and  
continuously renewed by us
- 5 DEDUCTIBLE: \$ \_\_\_\_\_ Purchased Deductible  
\$ \_\_\_\_\_ Deductible Credit  
\$ \_\_\_\_\_ Is Deductible per claim (including claims  
expenses).
- 6 LIMIT OF LIABILITY: \$ \_\_\_\_\_ is the maximum we will pay all claim and claim  
expenses during this policy term.
- 7 CANCELLATION : \_\_\_\_\_ days notice will be given to you in accordance  
with policy Condition M appearing on page .....
- 8 Insured's liability arising out of joint ventures is not covered
- 9 \$ \_\_\_\_\_ Reported Total Billings  
\$ \_\_\_\_\_ Reported Construction Values
- 10 PREMIUM: \$ \_\_\_\_\_ Standard  
\$\$ \_\_\_\_\_ Reserve Premium  
\$ \_\_\_\_\_ Total Premium  
\$ \_\_\_\_\_ Basic Premium
- 11 INSTALLMENT PREMIUM PAYMENT
- 12 Except as disclosed to us in the application for this policy:
  - A No claim such would be covered by this policy has been made against any of you.
  - B During the past 5 years no insurer has cancelled any similar insurance issued to you.
  - C You, and/or your predecessor(s) in business has/have no knowledge of any wrongful act that could be a basis for claim under this policy.

- 13 Endorsements attached at inception:
- 14 If, prior to the beginning of the Policy Term stated earlier, we have adopted revised provisions for this policy in order to afford, without additional premium, broader insurance to the types of professionals covered by this Policy, the insurance afforded for the Policy Term stated herein shall be construed in accordance with the provisions of such revisions.
- 15 If, subsequent to the issuance of this Policy, we revise the coverage afforded under the Policy, we, upon renewal, will substitute the current Policy Form.

Countersigned by Authorized Representative

Your professional liability insurance is written on a claims-made basis and only applies to wrongful acts which happen, and for which claim is first made against you, while this insurance is in force. No coverage exists for claims first made against you after the end of the policy term, unless, and to the extent, and extension of coverage applies.

We are the stock insurance company named on the Declarations. We agree with "you" as follows:

## I. COVERAGE AGREEMENTS

- A. We will pay all amounts in excess of the deductible up to our limit of liability, which "you" become legally obligated to pay as a result of a "wrongful act" occurring anywhere in the world.
- B. The "wrongful act" must happen and "claim" therefore must be made on or after the "effective date" and before the end of the policy term stated on the Declarations.
- C. If "claim" is made seeking amounts which are payable under the terms of this policy, even if any of the allegations of the "claim" are groundless, false, or fraudulent:
  - 1 within the United States of America, its territories or possessions or Canada, then we shall have the right and duty to defend any "claim" and we shall, if necessary, designate the attorney to defend such "claim";
  - 2 elsewhere than as above:
    - a. then we shall have the right but not the duty to investigate, defend, or settle such "claim";
    - b. If we do not exercise this right, "you" shall, under our supervision, make or have made such investigation and defense as is reasonably necessary. Subject to prior written authorization by us, "you" may also effect settlement. We shall reimburse "you" for the reasonable costs of such actions, subject to all other provisions of this policy.
- D. We will not be obligated to defend any suit or pay any "claim" or "claim expenses" after the applicable limit of our liability has been exhausted by payment of "claim" or "claim expenses".
- E. We will not settle any "claim" without your informed consent. If we recommend a settlement to "you", which is acceptable to the claimant, and "you" elect to contest the "claim" or continue any legal proceedings in connection with the "claim", our liability is reduced to the total of the amount for which the "claim" could have been settled plus the amount of "claim expenses" up to the time we made the recommendation.

## II. EXCLUSIONS

We will not defend or pay under this policy for:

- A. "claim" and "claim expenses" arising out of:
  - 1 "your":
    - a. insolvency or bankruptcy;
    - b. infringement of a copyright, trademark, or patent;
    - c. advising, requiring, or obtaining of any form of insurance, suretyship, or bond, or failure to do so;
    - d. failure to complete drawings, specifications or other instruments of service, or failure to process shop drawings on time, or within a defined period of time. This exclusion shall not apply if the failure is the result of a "wrongful act" in the preparation of drawings, specifications, or other instruments of service, or in the processing of shop drawings;
    - e. providing of or revising estimates or statements of probable construction costs or cost estimates, or failing to do so

- f. actual or alleged discrimination because of race, religion, colour, sex, national origin, age or handicap against a past or present employee or office of, or applicant for employment with "you";
- 2 liability of others which "you" have assumed under a contract or agreement. This exclusion does not apply to the liability of others which "you" assume under a written contract provided such liability is caused by "your" "wrongful acts";
- 3 professional services performed by "you" as part of a joint venture or by any other member of such joint venture, unless named in this policy. This exclusion does not apply to joint ventures formed prior to the date stated on the Declarations;
- 4 plagiarism, industrial piracy, unfair business practices, or unauthorized activities in connection with client's trade secrets;
- 5 express warranties or guarantees;
- 6 personal injury sustained by any employee of "yours" while engaged in employment by "you";
- 7 any obligation for which "you" or any party must pay under any unemployment, Workers' Compensation, disability benefits, or other similar laws;
- 8 any dishonest, fraudulent or criminal act, error or omission, or those of a knowingly wrongful nature committed intentionally by or at "your" direction;
- 9 projects for which:
  - a. the professional services are performed by "you", and
  - b. any construction, erection, fabrication, installation, assembly, manufacture, or supplying of equipment or materials incorporated therein, is wholly or partly performed by:
    - (i) "you" or a subsidiary of "yours";
    - (ii) any "entity" under common ownership, management or control with "you";
    - (iii) any "entity" acting in the capacity of "your" subcontractor; or
    - (iv) any "entity" that owns "you";
- 10 the design or manufacture of any goods or products which are sold or supplied by "you" or by others under license from "you";

**B. "Claim" made against "you" and any related "claim expenses":**

- 1. by a business enterprise that:
  - a. is wholly or partly owned, operated, or managed by "you", or in which "you" are an officer or director; or
  - b. wholly or partly owns, operates, or manages "you"; or
- 2. by an employee of such business enterprise, or their executor, administrator or next of kin; or
- 3. their subrogees or assignees;
- C. punitive or exemplary amounts except where such amounts arise solely out of "claim" for, libel or slander, and payment of such amounts by us is not held to be against public policy;
- D. fines or penalties assessed against "you", or failure or refusal by a client to pay all or any part of "your" fee;
- E. "claim" or "claim expenses" for- which "you" are insured under any other professional liability policy for, a specific project. This exclusion applies even if "claim" and "claim expenses" are not covered in whole or in part by that policy for any reason, including but not limited to:

1. an exclusion;
  2. a reduction or exhaustion of the limit of liability; or
  3. the amount of the applicable deductible;
- under such other policy.

### III. LIMITS OF LIABILITY

#### A. All Claims

The limit of liability shown on the Declarations is the maximum we will pay for any one or more "claim" made during this policy term. This limit applies as excess over any deductible amount.

1. Our obligation to pay is further limited to:
  - a. the amount of the limit of liability in effect at the time of the actual or alleged "wrongful act"; or
  - b. the amount stated as the limit of liability for this policy term, whichever is less.
2. If a "single claim" is made in different policy terms, the limit of liability shall not exceed the amount stated for the policy term in which the "single claim" is first made.
3. If the "wrongful act" causing the "claim" occurred prior to this policy term and after the "effective date", it will be subject to the deductible and other provisions of this policy term, except for the limit of liability.

#### B. Claims Expenses

"Claims expenses" are subject to and included within the applicable limit of liability.

#### C. Deductible

1. "You" shall have the obligation to pay the deductible amount as the result of a "single claim". The amount shall not exceed the amount stated on the Declarations.
2. The deductible:
  - a. applies to the total amount paid as the result of "claim" and "claim expenses" combined;
  - b. does not apply to any "claim" which involves only body injury, sickness, or resulting death.

#### D. Reimbursement

If, at our option, we have paid any amounts for "claim" and "claim expenses" in excess of the applicable limit of liability, or within the amount of the deductible, "you" shall jointly and severally be liable to us for any and all such amounts, and upon demand, shall pay such amounts to us.

#### E. More than one Insured

The inclusion of more than one of "you" shall not operate to increase either the applicable deductible or, limit of liability.

### IV. DEFINITIONS

Words shown in quotes in the text of this policy are defined. The definitions are as follows and apply as if the definition was actually included in each place where the defined word appears.

"Claim" means the receipt of a demand for money or, services, naming "you" and alleging a "wrongful act".

"Claim expenses" means:

- A. fees charged by an attorney we designate, and
- B. all other fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a "claim" if incurred by:
  - 1. us;
  - 2. any attorney designated by us; or
  - 3. by "you" with our written consent.

"Claim expenses" does not include salaries of our employees or officials, or, fees and expenses of independent adjusters.

"Effective date" means the inception date of the first policy issued and continuously renewed by us.

"Entity" includes an individual, partnership, joint venture, or, corporation.

"Named Insured" means the "entity" named in Item 1 on the Declarations of this policy.

"Personal Injury" means:

- A. bodily injury, including sickness, disease, death, mental anguish and emotional distress;
- B. false arrest, detention or imprisonment, wrongful entry or eviction or, other invasion of private occupancy;
- C. malicious prosecution; D. humiliation;
- D. libel, slander, or other disparaging comments or, materials in violation of an individual's right of privacy.

"Professional Services" means those services which "you" are legally qualified to perform for others in "your" capacity as an:

- A. architect or engineer;
- B. land surveyor;
- C. landscape architect;
- D. construction manager; or
- E. as specifically defined by endorsement to the policy.

"Single claim" means one or more claims arising out of 'a single "wrongful act", or out of related "wrongful acts".

"Wrongful act" means a negligent act, error or omission, by "you" or, any "entity" for whom "you" are legally liable, arising out of the performance of or failure to perform, "professional services".

"You" and "Your" means: A. the "named insured";

- A. the "name insured";
- B. any past or present partner, officer, director, stockholder, or, employee of the "named insured" while acting within the scope of their duties for "you" as such.

#### IV. CONDITIONS

##### A. "Your" Duties

If there is a "claim", "you" must do the following:

- 1. Notify us by writing as soon as possible. This notice must:

- a. be given to us during the term of this policy or within 60 days after the end of the policy term, unless an extension of the reporting period applies,
  - b. be sent to the attention of "Claim Manager", ACME Casualty Co., 1 Main St., Chicago, IL 60600,
  - c. contain details which identify "you" and also reasonably obtainable information concerning the time, place and other details of the "claim".
2. Immediately forward to us every demand, notice, summons or other process "you" receive.
  3. Not admit any liability, assume any obligation, make any payment or incur any expense without our prior written consent.

B. Assistance and Cooperation

1. "You" shall fully cooperate with us or our designee in:
  - a. the making of settlements;
  - b. the conduct of suits or other proceedings; and
  - c. enforcing any rights of contribution or indemnity against another who may be liable to "you".
2. "You" shall also:
  - a. attend hearings and trials;
  - b. assist:
    - (i) in securing and giving evidence;
    - (ii) obtaining the attendance of witnesses; and
  - c. make available to us, at our request, "your" records and documents as they may relate to the "claims" against "you".

C. Premium

1. All premiums for this policy shall be computed in accordance with our rules, rates, rating plans, and minimum premiums applicable to this insurance.
2. If the amount of the premium basis reported to us is incorrect we shall be entitled to an additional premium or "you" shall be entitled to a premium refund, which will be based upon the correct amount of the premium basis.
3. "You" shall maintain records of such information as is necessary for the premium computation. "You" shall send copies of such records to us at the end of the policy term and at such times during the policy term as we may direct.

D. Reserve Premium

If a reserve premium is charged for this policy it will be returned to "you" or "your" principal successor firm, except for that portion used to pay "claim", "claim expenses", and earned but uncollected premiums. The formula for determining the amount of return is set forth in an agreement between the commencing organization and us. The relevant portions of the agreement, and any amendments, are made a part of this policy.

E. Examination and Audit

"You" agree to allow us to examine and audit "your" financial books and records that relate to this insurance. We may do this at any time during the policy term or any extensions, and up to 3 years after the end of the past policy term.

F. Arbitration

If "you" have the right under any contract for professional services to either reject or demand the arbitration of any "claim" made against "you", "you" shall only do so with our written consent.

G. Legal Action Limitation

"You" may not bring any legal action against us concerning this policy until:

1. "you" have fully complied with all the provisions of this policy, and
2. the amount of "your" obligation to pay has been decided. Such amount can be set by judgment against "you" after actual trial or by written agreement between "you", "us" and the claimant.

Any "entity" or their legal representative is entitled to recover under this policy after they have secured a judgment or written agreement. Recovery is limited to the extent of the insurance afforded by this policy. No "entity" has the right under this policy to include us in any action against "you" to determine "your" liability, nor will we be brought into such action by "you" or "your" representative. If "you" or "your" estate becomes bankrupt or insolvent, it does not change any of our obligations under this policy.

H. Other Insurance

If "you" have other insurance which applies to the "claim", the other insurance must pay first.

I. Rights of Recovery

If we make any payment, we are entitled to recover what we have paid from other parties. Any person to or for whom we make payment must transfer to us their rights of recovery against any other party. This person must do everything necessary to secure these rights and must do nothing after payment that would jeopardize them.

J. Severability of Interest

The term "you" is used severally and not collectively.

K. Changes

Notice to any of our agents or knowledge possessed by any such agent or any such other person shall not act as a waiver or change in any part of this policy. It also will not prevent us from asserting any rights under the provisions of this policy. None of the provisions of this policy will be waived, changed, or modified except by written endorsement issued to form a part of this policy.

L. Transfer of Interest

"You" must first obtain our written consent to transfer or assign this policy. If "you" die, the policy will continue for the remaining part of the policy term; first for the benefit of "your" representative while acting within their duties as such; and second, for the benefit of anyone having proper temporary custody of "your" property until a legal representative is appointed.

M. Cancellation

This policy can be cancelled by either "you" or us.

1. "You" may cancel this policy at any time. To do so, "you" must:
  - a. return the policy to us or any of our authorized agents, or,
  - b. mail a written notice to us, telling when "you" want the cancellation to be effective. We must receive the policy or written notice before the cancellation date.

2. We can cancel this policy by giving written notice to "you" before the effective date of cancellation. This notice will:
  - a. contain the effective date and hour of cancellation;
  - b. be sent to "you" at the address shown in the policy at least:
    - (i) 10 days in advance if "you" have not paid the premium, or
    - (ii) the number of days shown on the Declarations, if the cancellation is for any other reason.
3. Delivery of a written notice by either "you" or us is the same as mailing.
4. We will make the premium adjustment with "you" at the time that cancellation is effective, or as soon as practicable after that time. Premium return will be computed pro-rata, but if "you" cancel, only 90% of that amount will be returned to "you". Premium adjustment is not a condition of cancellation.

N. Sole Agent

If there are more than one of "you" named in this policy, the first named "entity" in Item 1 of the Declarations shall act for all of "you". Notice of cancellation will only be sent to that "entity" and will serve as notice to all of "you". Any premium refund will be sent to the first named "entity".

O. Extended Reporting Coverage

If the policy is terminated for any reason other than:

1. failure to pay the premium; or
2. expired and renewed by us, then

"you" have the right to purchase an extended reporting period. To use this right, "you" must:

1. not have purchased insurance as a replacement for the terminated policy;
2. write to us within 60 days of the termination telling us "you" want the extension, and
3. pay the premium to us promptly when due.

This policy shall not be valid unless countersigned on the Declarations by a duly authorized representative of this Company.

Chairman of the Board

Corporate Secretary

## NUCLEAR ENERGY - LIABILITY EXCLUSION

In addition to all other exclusions of this policy, we will not defend or pay under this policy for any "claim" or "claim expenses":

- A. with respect to which "you" are also an insured under a Nuclear Energy Liability policy issued by:
  - 1. Nuclear Energy Liability Insurance Association;
  - 2. Mutual Atomic Energy Liability Underwriters; or
  - 3. Nuclear Insurance Association of Canada;or would be an insured under any such policy if it had not terminated due to exhaustion of its limits of liability; or
- B. resulting from the "hazardous properties" of "nuclear material" and with respect to which:
  - 1. any entity is required to maintain financial protection pursuant to the Atomic Energy Act of 1954 or any of its amendments, or
  - 2. "you" are, or absent this policy, would be entitled to indemnity under any agreement entered into by the United States of America or any of its agencies with any entity.
- C. resulting from the "hazardous properties" of "nuclear material" if:
  - 1. the "nuclear material":
    - a. is at any "nuclear facility" owned or operated by or on "your" behalf; or
    - b. has been discharged or dispersed therefrom; or
    - c. is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of by or on "your" behalf; or
  - 2. injury or damage arises out of "your" furnishing of services, materials, parts, or equipment in connection with the planning, construction, maintenance, operations, or use of any "nuclear facility". If such facility is within the United States of America, its territories, possessions, or Canada, this subparagraph C 2 applies only to injury or damage to property at such "nuclear facility".

The following definitions apply to this exclusion:

"Hazardous Properties" includes radioactive, toxic, or explosive properties.

"Nuclear Facility" means:

- A. any "nuclear reactor";
- B. any equipment or device designed or used for:
  - 1. separating the isotopes of uranium or plutonium,
  - 2. processing or utilizing "spent fuel", or,
  - 3. handling, processing, or packaging "waste";
- C. any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in "your" custody at the premises where such equipment or device is located consists of or, contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;
- D. any structure, basin, excavation, premises, or place prepared or used for the storage or disposal of "waste".

"Nuclear Facility" also includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear Material" means "source material", "special nuclear material", or "by-product material".

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"Property damage" includes all forms of radioactive contamination of property.

"Source material", "special nuclear material", and "by-product materials" have the meanings given them in the Atomic Energy Act of 1954 or in any of its amendments.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or, exposed to radiation in a nuclear reactor.

"Waste" means any material:

- A. containing "by-product material" other than the tailings or "wastes" produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content;
- B. resulting from the operation by any entity of any "nuclear facility" described in items A and B of the definition of "nuclear facility".

## APPENDIX 3

### SAMPLE PROFESSIONAL LIABILITY INSURANCE POLICY

#### (Civil Code Application)

Contract of Liability Insurance

between A B Engineering

[named insure] and

Contract of Liability Insurance between

[named insure] and IC Assurance, Paris, France

[insurer]

Effective date and renewal date 04-01-1991, noon - 04-02-1994, noon

Premium Ir. Pounds 60,500.

Contract of insurance no. 35 10 15 1478

1. Insurer :
  - I C Assurance, Paris for 66 2/3%
  - V B Versicherung, Munich for 33 1/3%
2. Named insured : A B Engineering
3. Project : YZ Sub-Station
4. Effective date : 04-01-1991, noon.
5. Period of insurance :
  - 25 months construction
  - + 12 months' maintenance.
6. Expiry date : 04-02-1994, noon.
7. Limit of liability of any one professional error or omission:
  - Ir. P. 1,000,000.- in respect of bodily injury, property damage and pure financial loss (hereinafter of be called "loss").

The aggregate amount for which the insurer is liable in respect of all damages paid in the period of insurance is limited to: Ir. P 2,000,000.-.

8. Excess:

The insurance cover within the scope of this policy is granted up to the amount Ir. P. 10,000.-. mentioned under 7. but in excess of an amount of:

If the insurer's liability for any one professional error or omission exceeds the amount mentioned in the first paragraph, cover is granted for the excess up to an amount of Ir. P. 1,000,000.- in respect of bodily injury, property damage and pure financial loss.

In the following cases the excess will only apply once:

- (a) if a professional error or omission leads to one or more losses or
- (b) if several professional errors or omissions lead to one loss.

The excess shall not apply to bodily injury.

9. Premium

The deposit premium is payable in advance and shall be calculated on the contract value. At the end of the period of insurance the named insured shall declare the actual contract value to the insurer, so as to enable him to calculate the actual premium.

Rate of premium: 4.07%

The deposit premium amounts to: Ir. P. 60,500.-.

Paris, January 26th, 1991

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# CONDITIONS

## 1. DESCRIPTION OF THE ACTIVITIES INSURED

Design planning and supervision. The Insurers have noted the description of the named insured's activities under the contract (attached).

## 2. SCOPE OF THE INSURANCE COVER

The insurer shall grant the named insured cover under the policy if the named insured is held liable by third parties in respect of professional errors or omissions committed in the conduct of his business activities insured during the design period or during the currency of the insurance by virtue of legal liability clauses or rules in the sphere of private law and/or by virtue of the engineers'/architects' contract conditions customary in the Netherlands or in other countries, it being in the discretion of the named insured not to invoke subsequently any contract conditions limiting the named insured's liability to a certain amount or to a certain period.

The named insured's principals are also considered to be third parties.

The insurance covers professional errors or omissions committed between the beginning of the design period and the expiry date of the contract of insurance provided these errors are notified to the insurer before the expiry of the contract of insurance.

## 3. OBLIGATIONS OF THE INSURER

1. The obligations of the insurer include the investigation of the question of who is liable, the payment of the damages, for which the named insured is liable by virtue of an acknowledgement given or approved by the insurer, a compromise made or approved by the insurer or a legal decision, as well as the defence against unfounded claims.

If in respect of 'a criminal suit on account of a professional error, which might result in a claim for damages covered under the policy, the appointment of a defending counsel for the named insured be required or approved by the insurer, then the insurer shall bear the usual costs or the higher costs if a special arrangement has been made with him to that effect.

2. In respect of the limit of liability reference is made to page 1 sub 7 of this contract of insurance.
3. The insurer's expenditure in respect of costs will not be considered to be part of the limit of liability.

If the claims for damages exceed the limit of liability, the insurer shall pay only a pro rata share of the expenses in litigation, even when there are several lawsuits arising out of one professional error. In such cases the insurer is entitled to be released from further obligations to perform by paying the limit of liability as well as a pro rata of the costs incurred to that date.

4. If the named insured can claim damages from a third party, such claim shall pass to the insurer, insofar as the insurer indemnifies the named insured for the loss. The insurer cannot claim this subrogation to the detriment of the named insured. Should the named insured waive his claim against third parties or a right protecting such claim after a loss has arisen, then the insurer shall be released from his obligation to pay damages to the extent of his possibilities of recourse by virtue of that claim or that right.
5. The performance of contracts and any indemnity in substitution thereof are not the subject of the liability insurance.

The insurance cover includes claims in respect of defects of and damage to the buildings and installations erected in accordance with the named insured's designs, if and insofar as the damage or defects have been caused by a professional error committed in the conduct of his business.

6. In the event of the damages having to be paid outside the German Federal Republic or the Netherlands, the insurer shall be deemed to have fulfilled his obligation to pay the moment when he pays over the equivalent of the amount of the claims (as per conversation table) to a German or a Dutch foreign trade bank.

#### 4. CO-INSURED PARTIES

Within the scope of this contract of insurance the legal liability arising out of professional errors of the following parties is included:

1. the legal representatives and partners of the named insured as well as persons the named insured has appointed to manage or supervise the insured business or a part thereof, as such.
2. all other subordinates as well as employees of outside companies whose services are used in the named insured's business in respect of losses caused by them in the course of their activities on behalf of the named insured's business.

#### 5. LIABILITY FOR SUB-CONTRACTORS

The insurance includes the named insured's legal liability for other companies performing services for the benefit of the insured business. The legal liability arising out of professional errors of those other companies and their employees is excluded from the insurance.

#### 6. ARBITRATION BETWEEN THENAMED INSURED AND THE PRINCIPALS

An arbitration agreement shall not affect the insurance cover detrimentally. The named insured shall immediately inform the insurer that arbitration proceedings have been instituted and enable the insurer to render assistance in the arbitration suit in conformity with the insurer's assistance in ordinary lawsuits.

This undertaking is only given subject to the condition that the contract provides for European arbitration rules.

#### 7. EXCLUSIONS

The insurance excludes:

1. claims for damages resulting from all professional activities of the named insured in respect of construction operations carried out by them for their own account (as contractor) or carried out by a contracting company managed or predominantly influenced by the named insured,
2. claims for damages which result from acting as an intermediary in the conclusion of monetary and real estate transactions, cash deficiencies, infidelity, loss of money, documents or value and valuable objects, errors estimates when making payments, the exceeding of credit limits, cost estimates as well as statements with reference to the construction period and other delivery periods,
3. claims for, damages resulting from losses which have arisen from the non-performance of obligations incidental to another profession,
4. claims for damages which result from keeping, using, putting into operation or operating motor vehicles, aircraft or vessels, irrespective of by whom, for what reason or for what purpose such motor vehicles, aircraft or vessels are put into operation or operated,
5. claims to insurance cover made by any persons who have caused the loss by intentionally acting in breach of the law, a prescribed rule or a duty,
6. claims for damages resulting from losses, directly or indirectly connected with high-energy ionizing radiation (e.g. alpha, beta and gamma rays, emitted by radio-active substances as well as neutrons or rays, emitted by radioactive substances as well as neutrons or rays generated in particle accelerators),

7. claims of several named insured under the same contract of insurance against each other, claims of members of the board, managing directors and liquidators and of partners who are personally liable as well as their next-of-kin,
8. punitive damages, fines and the like,
9. occurrences in the USA and Canada and claims for damages subject to USA and Canadian law,
10. claims for, damages resulting from losses caused by design or engineering methods, the use or choice of which, having regard to the actual purpose for which they are intended, have not been tested in accordance with the recognized technical or scientific rules.

## 8. EVENTS COVERED UNDER THE POLICY AND OBLIGATIONS OF THE NAMED INSURED

1. For the purposes of this policy an "event" is the professional error which might lead to claims for damages being made against the named insured.
2. Any occurrence which might lead to the insurer's being liable to pay damages, shall be reported to the insurer in writing without culpable delay.
3. Should civil or criminal proceedings be instituted against the named insured, the named insured shall immediately notify the insurer, even if he has already reported the event itself to the insurer.
4. With due observance of the insurer's instructions, the named insured shall prevent or minimize the loss as much as possible and do everything to clarify the facts of the incident insofar as nothing unreasonable is required of him. He shall assist the insurer in resisting the claim, in ascertaining the cause of the loss and in adjusting the claim, send him detailed and accurate reports, inform him of all facts relevant to the incident and send all documents which in the insurer's opinion are material to the assessment of the incident.
5. If legal proceedings should be instituted about the claim, the named insured shall leave the conduct of the litigation in the insurer's hands, give a power of attorney to the lawyer appointed or, designated by the insurer and give all information which is considered necessary by the lawyer or the insurer. Without waiting for the insurer's instructions, he shall within the prescribed time appeal against orders relating to indemnifications issued by a court or by the authorities or take the required legal remedies.
6. Without the insurer's previous consent, the named insured shall not acknowledge or settle a claim for, damages in whole or in part or by way of compromise. Should the named insured contravene this duty, the insurer shall be released from his obligations.
7. Insofar as the insurance applies to claims for damages made against persons other than the named insured, all provisions made in the contract of insurance with respect to the named insured shall be similarly applicable also to those persons. Only the named insured is entitled to exercise rights under the contract of insurance and the named shall remain responsible for the performance of the obligations, concurrently with the insured.

## 9. OTHER INSURANCES

When reporting an occurrence or a claim for damages the named insured shall notify the insurer of all other insurances relating to the construction project or the contractual or legal liability of the parties involved in the construction.

In addition to any applicable legal provisions, it is hereby expressly agreed that this insurance excludes all claims in respect of losses covered under other insurances (including e.g. C.A.R. insurances).

## 10. PAYMENT OF PREMIUM

1. Unless otherwise agreed, the contract of insurance becomes effective when the premium, the policy-fees and any taxes are paid.

2. The insurer charges the brokers CDE Assurantien B.V in account current for the premium due hereunder, thus discharging the insured towards the insurer.

Without prejudice to the obligation of the insured to pay the premium and costs due hereunder to the brokers, this insurance will be in force only for, the period for which the premium and costs have been paid to the brokers as well as for the period for which the brokers have allowed credit to the insured.

With regard to the foregoing it is understood and agreed that the insured will be deemed to have been allowed credit unless explicit notice of withdrawal of credit has been given to him.

It is hereby agreed between the insured and the brokers CDE Assurantien B.V. that by acceptance of this policy, the brokers are authorized by the insured to cancel this insurance with insurers at any time in the event of the insured or, his agents failing to pay the premium to the brokers.

It is agreed that with regard to the application of this clause the term insured is deemed to include the party who takes out the insurance as well as the party which is liable for the payment of the premium.

It is agreed and understood that the brokers CDE Assurantien B.V will only exercise their rights under this clause after, consultation with the leading insurer(s).

## 11. FINAL PROVISIONS

1. The insurer, is authorized to make any statements he considers appropriate when settling or resisting a claim in the named insured.

CDE Assurantien B.V., are authorized to receive all communications, statements and payments intended for transmission to the insurer. They shall without delay forward them on to the insurer.

2. Claims to insurance cover cannot be assigned without the insurer's express consent, before they have been definitely established.
3. If the insurer should refuse insurance cover the claim in dispute must be enforced by lodging a complaint with the court within a period of 6 months, in order to avoid loss of insurance cover.

The period commences on the day when the written advice of the refusal has been received by the named insured.

4. In respect of disputes arising from this contract of insurance the competent court will be the competent court in the United Kingdom.

This contract of insurance is subject to Dutch law.

5. Insurers participating in this insurance:

IC Assurance as leading insurer      with 66 2/3%

VB Versicherung                              with 33 1/3%

Each insurer binds himself for the percentage underwritten by him. Notifications to be given by the named insured, particularly the notification of claims as well as the payment of premium will be deemed to have been made to all insurers when they have been made to IC Assurance. Claims will be handled by the leading insurer (IC Assurance) also in the name and for, the account of the other participants.