ARCHITECTS

´PRACTICE RISK & INSURANCE MANAGEMENT GUIDELINES

These Guidelines represent a general overview and recommendations to assist the Architect in dealing with Professional Liability Risks and Professional Indemnity Insurance.

The Guidelines are of a general nature only and do not represent a legal opinion or advice. If you have any queries *consult with…your Institute …or … Chris Pearson at NMG Risk Managers* who are advisors to the APIGIS Architects Professional Indemnity facility.

In the Guidelines we deal with:-

1. **Contractual Conditions and Risk:**
   1.1. General Conditions,
   1.2. Duty of Care requests from Clients, Funders, Developers or other Parties, 1.3. Admission of Liability,
   1.4. Architects and/or Technologists certification of plans,
   1.5. Sub-contracted Duties.
   1.6. Liability and Indemnification including, where possible, Limitation of Liability,
   1.7. Design & Construct/Build Contracts and Procurement Services and Products Liability.

2. **What does a Professional Indemnity Insurance Policy cover**. NB: policies vary from Insurer to Insurer and cover and information may or may not apply. But these are the essential components of what should be contained in a standard policy.
3. **What are some of the other benefits?**
4. **What is the Limit of Indemnity** – What does "Each & Every Claim" and "In the Aggregate" mean?
5. **What is the Retroactive Date?**
6. **What does "Claims Made" mean?**
7. **What is the definition of "Negligence"?**
8. **What is "Contractual Liability" as opposed to "Delictual Liability"?**
9. **What to do in the event of a Claim.**
10. **Legal Expenses.**

ARCHITECTS. PRACTICE RISK & INSURANCE MANAGEMENT GUIDELINES

1. Contractual Conditions and Risk.

1.1 General Conditions

It may sound obvious but it is important to ensure that Contracts/Client Engagements are in writing and clearly define the services to be provided. However, this is an area which is often the source of disputes, especially with Clients that are not experienced in procuring professional services. In these circumstances, in the absence of written parameters, Clients may expect to receive more than they are actually paying for.

You should also be satisfied that you are only undertaking to provide services which you are capable of delivering, in terms of both expertise and resources, or where you are sub-contracting the delivery of a service (or services) to specialist sub-contractor(s) or sub-consultant(s), that you have taken appropriate steps to ensure their competence. We return to this issue later in this guide.

It is also important to check that the Parties signing the document are those that you expect. If a Client suddenly changes its name, is there a reason and is the new organisation going to be responsible for paying any outstanding fees?

1.2 Duty of Care

Many Architects are being requested by Financial Institutions (which could extend to include Developers and Property Owners) to sign what are generally termed "Duty of Care" Agreements whereby the Architect acknowledges that he/she is aware of the interests of the Financial Institution in the Project because of their loans or funding arrangements with the mutual Client. The Agreement then goes on to request the Architect to undertake to perform or give certain undertakings and acknowledge a liability to the Financial Institution for the due performance of their services. These are referred to as "Collateral Warranties" in the UK and Europe.

The Architect, in fact, owes no contractual Duty of Care to the Institution. His/her only contractual Duty of Care lies with the Client in terms of the Client/Architect Agreement. The PI policy specifically excludes any liability arising from a Contract or Agreement that extends the Architects liability beyond that which would have existed had the additional Contract/Agreement been signed.

The strict Common Law legal position is that everyone owes a Duty of Care, in some form or fashion, to their fellow man. But a claimant/Plaintiff would have to prove that the Duty of Care existed between the Plaintiff and Defendant. By signing the Institutions Contract/Agreement it removes, to large extent, the need for such proof. However the Institutions Contract/Agreement is very wide reaching in many cases and could extend to matters beyond that covered by the Standard Client/Architect Agreement. The general approach recommended by Insurers is 2 fold:-

i. Refuse to sign as a first response but if that does not stand up then,
ii. Sign but subject to your liability being no further extended than the cover provided by

your Professional Indemnity policy.
There are regrettably many variations to these situations so it is advisable to contact us if you have any questions.

1.3 Admission of Liability

PI Insurance policies all contain a Condition that precludes the Insured from any admission of Liability. However in the course of rendering services to the Client the Architect many find him/her self in a position of have to provide information which could amount to an admission of Liability.
Below is a general approach/comment by Insurers in such cases. We suggest you discuss with us or your Insurers.

Query/Scenario:
Where an Architect in the performance of his/her contracted duties ~~to his Client (say in terms of~~ a PA contract) finds himself in the position of having to give an "adverse" report or finding on his/her own performance which could possibly be interpreted by Insurers as a breach of the Conditions of the PI Policy
regarding "non-admission of Liability", then will Insurers agree not to treat this as a breach of the policy Conditions.

General Response from some Insurers:
If an Architect is requested to provide a report relating to the project to his client in his capacity as Architect or PA he is obliged to provide such report as part of his professional services.
Our recommendation would be that when such Architect is approached to provide such report that he remains factual in nature as to the situation on the project. Insurers will not seek to avoid cover based on alleged admission of liability if the report is factual in nature.
The Insured should however refrain from using terms such as "we accept responsibility "or "we are liable" etc. If the insured is unsure whether he infringes that line he should look to his brokers for guidance who will refer the matter to insurers for their guidance on how to approach the situation.

Having said the above if a situation arises that is perceived to be an admission of liability then insurers cannot seek to avoid cover if liability would have attached in any event in the absence of such perceived admission.

Relevant Policy Condition:
1. The Insured shall not admit liability or settle any claim or incur any costs or expenses in connection therewith without the written consent of the Insurers, who shall be entitled at their own expense at any time to take over and conduct in the name of the Insured the defence or settlement of any such claim.

2. The Insured shall give written notice to the Insurers as soon as reasonably practicable of any claim or intimation to the Insured of a possible claim made against the Insured or upon the Insured becoming aware of any circumstances which might give rise to a claim under this Policy regardless of any Excess and the Insured shall upon request give to Insurers all such information and assistance as the Insurers may reasonably require and as may be in the Insured's power to provide and will in all such matters do and concur in doing all such things as the Insurers may require.

If in any doubt contact us.

1.4 Architects and/or Technologists certification of plans.

The question often arises as to who may certify plans as regards the cover under the PI policy.
The answer is given below:-
"If he/she is a qualified PrArch in terms of SACAP regulations, then the answer is yes.

ARCHITECTS. PRACTICE RISK & INSURANCE MANAGEMENT GUIDELINES

If he/she is qualified as an Architectural Technologist in terms of SACAP regulations, then he/she is only authorised to certify certain categories of building plans. It is up to the Employer and the Insured to determine that what they are certifying falls within those categories. If they do, then the PI policy covers those activities. If they do not fall within those categories then the PI Policy may not cover them."

1.5 Sub-contracted Duties.

The APIGIS PI policy includes cover, for The Insured Architect, in the event of the appointment of other sub-Consultants/Contractors. However the Insured is obliged to ensure that only suitably qualified Professionals are appointed and they maintain their own PI insurance (there is no specific Limit of Indemnity they must carry). The Insured's policy will however only provide Indemnity to the Insured and your Insurers will seek to recover any damages, costs or expenses from the sub-Consultant.

1.6 Liability and Indemnification including, where possible, Limitation of Liability.

Many Contracts/Agreements (e.g. PROCSA type) seek to Limit the Liability of the Architect, some times to a multiple of Fees or a specific amount. It is quite in order to accept these Clauses. However this only Limits the Liability between the Contracting Parties and not the Liability to a Third Party. If there is also sometimes a Clause specifying a particular amount of PI cover that the Architect is required to provide. But this does not preclude the Client from instituting an action for a higher amount. Particularly if there is no Limitation of Liability or the claim comes from a Third party.

1.7 Design & Construct/Build Contracts and Procurement Services and Products Liability.

- In the case of Design & Construct/Build Contracts the Insurers must be advised beforehand and the policy specifically endorsed to include certain additional clauses that such Contracts require.
- If the Architect also undertakes Procurement Services (e.g. in the case of Interior Design and/or Fit-out and/or Turnkey Contracts etc) it is important to note that a PI Policy DOES NOT PROVIDE COVER FOR ANY GOODS, MATERIALS OR PROPERTY, SOLD, MANUFACTURED, SUPPLIED, INSTALLED or ERECTED by the Insured. Essentially it does not cover Products Liability.

  Even if sub-Contracted. The sub-Contractors extension will exclude these risks. Cover can be arranged by PIFRS.

2. What does the PI Scheme Policy cover?

The policy covers you against claims instituted by Clients or Third Parties alleging Negligence or Breach of Professional Duty. It provides cover for, inter alia, :-

- Legal Defence Costs,
- Damages, Compensation and/or Awards made against you,
- Dishonest or Malicious acts by Partners, Directors or Employees,
- Loss of Documents,
- Fee recovery (where Client alleges Negligence as reason for non-payment),
- Copyright infringement.

3. What is the Limit of Indemnity (sum insured)?

This is the maximum amount you would be covered for in the event of a claim.

What Limit should I buy?

You need to consider the profile of your Practice, the Clients you engage with and the Markets/Fields in which you operate, for example;

- How many professionals and technically qualified people are in your Firm and what "peer reviews" processes do you have inplace?
- What types of Projects do you undertake? Are they mainly Residential or Commercial/Industrial? Single or Multi-storey (over 4 storeys)?
- Do you use any "proto –type" on untested methodologies ordesigns,
- What is the average and maximum construction values of theProjects.
- Do your Contract Conditions Limit your Liability.
- What sort of Clients do you have e.g.; are they Private, Corporate, Foreign or of a litigious nature,
- Are your Fees being put under heavy pressure which may cause an inability to devote sufficient attention to theProject?
- What services do you provide e.g.; Stages 1 through5,
  - Conceptual Designs/Feasibilityonly,
  - Final Designs Drawings,
  - Supervision (risk increases),
  - Principal Agent, C.A. and I (risk increases).

What could happen in a " worst case" scenario and what would it take to fix?

Also bear in mind that the Limit of Indemnity must be sufficient to cover Legal Fees as well. These are currently in the region of R250 000 per day in court excluding pre-trial and other costs plus possibly the Plaintiff's costs as well if you lose the action.

Many Professionals try and Limit their Liability to 2 x Total Fees on the Project but often the Client will insist on a certain Limit. Even if the Client accepts the 2 x Fees Limit, that does not prevent him claiming a higher amount in the case of alleged gross negligence or if the claim comes from another Third party who is not bound to the contractual amount

The Limit of Indemnity can be applicable on 3 bases:-

- Each and Every Claim – which is the best and applies to the APIGISScheme,
- In the Aggregate for the policy period – theworst,
- In the Aggregate plus “automatic reinstatements’ – the secondbest.

What do the above mean?

- Each and Every Claim means that your Limit of Indemnity remains intact no matter how many claims you have,
- In the Aggregate means that the Limit of Indemnity is the TOTAL amount for which you will be covered during the policy period for all claims against you. The major problem with this is that once a claim or circumstance is reported to insurers, even if it is a spurious or an unlikely claim, insurers will “reserve” an amount against the Limit of Indemnity and you may then not be covered for a subsequent more “serious”allegation.
- In the Aggregate plus automatic reinstatements means that insurers will “reinstate” or “top- up” your Limit of Indemnity up to a pre-agreed (and pre-paid for) number of times in the event of claims. Again, if you may be subjected to multiple claims your Limit of Indemnity could be exhausted.

Unless you specifically ask for it, Insurers will in most cases apply the “In the Aggregate” basis. The APIGIS/PIFRS Scheme automatically provides the Each & Every basis.

4. Retroactive Date

What is the Retroactive Date?

Provides cover for Services rendered, Claims or Circumstances that occurred prior to the Inception date of the policy or the Renewal date?

You will never lose your Retroactive Date of Cover with APIGIS/PIFRSprovided you do not allow your policy to expire. If you are a new policyholder transferring to the APIGIS/PIFRS Scheme you will keep the same Retroactive date as your previous policy.

What about Prior Acts or Services provided before the policy period?

This is covered by the provision of a RETRO-ACTIVE date.

ARCHITECTS. PRACTICE RISK & INSURANCE MANAGEMENT GUIDELINES

What does the RETRO-ACTIVE date mean?

There are 3 scenarios:-

1. When a policy is taken out for the first time the cover will be effective either from the first day of the policy period or from a RETRO-ACTIVE date that you may choose. Normally a RETRO-ACTIVE date is selected by a Professional who has been delivering services to Clients over many years and wishes to be covered for any actual or alleged errors that might have occurred prior to the first policy period but which he is not aware of at the time of taking out the insurance. There is a once-off additional premium forthis.

2. When a policy is renewed or even moved to a new insurer you still benefit from the same RETRO-ACTIVE date you chose on your first policy. And this will continue for as long as you maintain your cover in force, no matter how many years back it mightbe.

Again, the timeous reporting of claims or circumstances is extremely important.

3. If a policy is allowed to lapse you will lose the benefit of the automatic "free" RETRO-ACTIVEdate. If you wish to re-instate the cover you will have to apply for a new RETRO-ACTIVE date (if that is what you require) and there will be an additional once-off premiumpayable.

5. Claims Made

A PI Policy provides cover on a "CLAIMS MADE" basis.

What does " CLAIMS MADE" mean?

The policy provides cover for "claims made" (and reported to insurers) during the period of the insurance policy only.

A claim or circumstances that the insured was aware of before the policy period would not be covered. Similarly a claim after the policy period has expired would not be covered.

It is therefore of the utmost importance to report matters to insurers as soon as you become aware of them. This could be in the form of a summons, allegations of negligence, threats of legal action or even just verbal criticism.

Even if you renew your policy any known matters must be reported prior to the renewal. If you intend changing insurers this is even more important.

Once a claim or circumstance has been reported then insurers are obliged to protect the insured even though the policy period might expire and not be renewed.

6. What is the definition “Negligence” or “Negligent Act” ?

The commonest definition is “when a person has departed from the conduct expected of a reasonably prudent person acting under similar circumstances” - he may then be accused of Negligence or guilty of a Negligent Act in law this is termed “Delict”.

The hypothetical “reasonable person” provides an objective by which the conduct of others can be judged.

The law considers a variety of factors in determining whether the person has acted as the hypothetical reasonable person would have acted in a similar situation. These factors include:-

- The knowledge, experience and perception of theperson,
- The activity the person is engagedin,
- The special skills required. If a person engages in an activity requiring special skills, education and training, the standard against which his conduct will be measured is the conduct of a reasonably skilled, competent and experienced person who is a qualified member of the group engaging in that activity – often an authorised group (by statute of law) such as Architects, Engineers, Lawyers, Doctors, Financial Services Providers andAccountants.

7. What is Contractual Liability as opposed to Negligence or Delictual Liability?

Contracts between Parties often impose additional obligations on Parties that go beyond what is normally contemplated in Common Law.

A PI policy will not normally cover liabilities arising under Contract (as opposed to Delict) as they extend the potential liabilities of the Parties (and their Insurers) beyond what Insurers are prepared to underwrite and accept. In certain circumstances Insurers are prepared to underwrite the Contractual Risks provided they are given all the information they require to either accept or reject the risk. For example: Warranties, Indemnities and Guarantees.

8. What to do in the event of a claim, accusations from a Customer or another Party or you become aware of potentially damaging circumstances?

1. Do not make any statements or admission of liability orblame.
2. Contact NMG Risk Managers immediately you are able. We will assistyou.
3. Do not enter into any correspondence regarding the accusations or allegations – refer the matter to NMG Risk Managers. We will deal with it.
4. Try to stay on reasonable terms with the Plaintiff – avoid “roadrage”.
5. Do not make reference (to the Plaintiff or anyone else) to the fact that you have“insurance.”

ARCHITECTS. PRACTICE RISK & INSURANCE MANAGEMENT GUIDELINES

9. Legal Expenses

Your PI policy will cover Legal Expenses incurred in defending or settling a claim against you.

But they must be pre-agreed by insurers and/or the matter must be handled by Insurers.

Do not incur legal costs without insurers consent in writing or they may not be recoverable under you policy.