

Common Insurance & Contractual Terms

Ab Initio	This Latin term means from the beginning. If a policy of insurance is declared to be void <i>“ab initio”</i> this means the contract of insurance is deemed not exist from the beginning.
Adjectives	Word selection is an important issue in contract. A contract is a complete understanding of the agreement. Architects should be cautious about the insertion of any extreme adjectives such as <i>“all”, “every”, “best”, “highest”</i> or similar in any contract of engagement. Such words can have absolute meanings in contract as distinct from a more loose meaning in everyday usage.
Agent	One party who acts for another. It may include not only employees but also sub-consultants and other parties.
Aggregate Liability	The maximum total liability of an Insurer for all claims reported under a contract of insurance.
<i>“Arising out of” or “arising from” or “in connection with”</i>	Words to be avoided in any contract of engagement if followed by the words <i>“the professional services”</i> or <i>“breach of the contract”</i> or similar. The preferable words in substitution would be <i>“to the extent caused by”</i> . As an example: <i>“Where the architect breaches this agreement the architect is liable to the client for reasonably foreseeable damages to the extent caused by the breach.”</i>
Automatic Reinstatement	Where a liability insurance is extended to include an extension for automatic reinstatement of the amount of insurance, the maximum aggregate liability of the Insurer for all the claims made during the period of insurance is increased by the number of reinstatements.
Aviation Insurance	Aviation Insurance may be required for the hull and/or liability risks associated with the use of any airborne craft in relation to a construction project. <i>Also refer to Charterers’ Liability</i>
Building Certifier Insurance	A special type of Professional Indemnity Insurance for Approved Building Certifiers coupled with a bond securing payment for ten-year <i>“Run Off”</i> coverage as may be approved of by the Building Industry Authority for the purposes of Part VII of the Building Act 1991.
Calderbank Letter	A written communication between legal representatives in which an offer of settlement is made. The terms of which, in the event the matter proceeds to trial, are not to be disclosed to the Court, except on the question of costs.

Cause of Action	The ground upon which an action for damages can be maintained.
Charterers' Liability	If waterborne or airborne craft are chartered for the purposes of a project this may create liabilities for the charterer as distinct from the liabilities of the "owner" of the vessel or craft. Charterers' Liability Insurance applies to cover the liabilities of a charterer for the use. <i>Note:</i> Most forms of General (Public) Liability will exclude such risks, except in some circumstances for the use of small watercraft. <i>See also Marine Insurance.</i>
Claims Made & Notified	If an insurance policy is so designated as a "claims made & notified" contract of insurance, then the policy only responds to claims first made against the Insured and which are notified to the Insurers during the period of the insurance.
Co-Insurance	This is applicable where an insurance policy assumes liability only for a percentage of the sum insured and a percentage of any loss as insured is to be borne by either other Insurers or in some instances by the Insured.
Common Law	The law embodied in judicial decisions as opposed to statute law – often referred to as case law.
Comply	To act in accordance with a wish, command or the law etc. A word to be avoided in any contract of engagement as it may be synonymous with a performance guarantee that may be uninsured.
Concealment	A wilful act of non-disclosure.
Consequential Loss	A term which refers to economic loss which flows as a consequence of the occurrence of direct loss or damage (<i>e.g. the interruption to a business following a fire in the premises occupied by the business</i>).
Contra Proferentem	A rule of construction relative to documents whereby any ambiguity is to be read against the party who drafted the document.
Contract	A contract arises when an oral or written instruction is accepted by one party to perform a service for another party for a consideration
Contract Works Insurance	A modern term which describes what has often been referred to in the past referred to as "Contractors' All Risks Insurance". Contract Works Insurance may be taken out by a principal or a contractor to cover loss or damage to the works whether in part or in whole during the construction and maintenance period. A Contract Works Insurance if arranged by a "Principal" is referred to as a "Principal Controlled Programme". Some of the important exclusions may be:

	<ul style="list-style-type: none">• Consequential losses which are the subject of another important form of insurance known as "<i>Advanced Profits</i>";• loss or damage due to "<i>faulty design</i>" or "<i>defective material</i>" although flow damage from such may be able to be insured;• loss or damage due to "<i>faulty</i>" workmanship or electrical/mechanical breakdown or wear and tear or deterioration, although flow damage may be able to be insured;• loss or damage to adjoining buildings or contents, although such loss or damage may be able to be insured. <p>More sophisticated policies can include:</p> <ul style="list-style-type: none">• a third party liability section (i.e., general public) liability) arising from the performance of the principal and the other parties to the insurance with a cross liabilities clause relating to the liabilities of the parties named as joint-insured one to the other as if a separate contract of insurance existed in each of their names;• an extension for architects/surveyors fees, or other professional fees for reconstruction following loss or damage to the works;• an extension relative to the hand over period (<i>usually related to the repair & maintenance period</i>);• an automatic increase clause related to the effects of inflation during the construction period or maintenance period or reconstruction period following loss or damage;• a breach of warranty clause protecting innocent parties against breach of any conditions by other parties to insurance contract;• an extension to keep the coverage in force if there is any delay in the commissioning of the project or part of the project;• a non-cancellation clause which prevents the Insurer from cancelling the contract during the construction/maintenance periods;• a destruction of sound property clause which allows demolition of sound property following loss or damage for reconstruction purposes;
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	<ul style="list-style-type: none"> • an expediting costs clause which allows for the additional expense, overtime, express carriage or air freighting of essential materials or plant for reconstruction following loss or damage; • removal of any "average" condition (<i>i.e., co-insurance by the Insured for any degree of under-insurance</i>); • an extension coverage for completed works following partial commissioning; • coverage for cessation of work other than cessation following loss or damage to the works; • full cover for earthquake or volcanic eruption or similar perils. <p><i>Note:</i> This list is not exhaustive and many extensions can be negotiated with Insurers as may be required for a particular project.</p>
Contractors' Plant & Equipment	<p>Most Contract Works Insurance contracts exclude coverage for the Contractor's plant and equipment used on site.</p> <p>Most construction contracts contain a requirement for a separate material damage insurance to be arranged by the Contractor in this regard for reasons of financial security regarding completion of the work.</p>
Contributory Negligence	<p>A common law principle whereby if more than one party contributes towards a loss there may be contribution in a ratio according to the degree of culpability between the parties.</p>
Costs Exclusive Deductible or Excess	<p>This means the self-insured deductible or excess in a policy does not apply to the legal or other defence costs and expenses incurred with an Insurer's consent.</p>
Costs Inclusive Deductible or Excess	<p>This means the self-insured deductible or excess in a policy also applies to the legal or other defence costs and expenses.</p>
Cross Liabilities Clause	<p>A clause in a policy which provides collective cover for joint-insured parties which allows for claims to be made for liabilities between them, one to the other(s).</p>
Damages	<p>The monetary satisfaction as awarded by a judge or jury in a civil action. Reference in a contract of engagement to the architect being liable to the client for "<i>claims, damages, liabilities, losses or expenses</i>". These words all fall under the general head of damages and should preferably be deleted and substituted by the word "<i>damages</i>" only.</p>

Deductible or Excess	<p>This is an agreed first amount of any loss borne by an Insured at his or her own risk and is, in effect, totally uninsured.</p> <p>An Insured is only entitled to indemnity in terms of the policy for the amount of the loss up to the total sum insured <u>less</u> the given Deductible or in excess of the given Excess.</p>
Deed of Continuity	<p>A principal may require a head consultant or a contractor to procure such a deed from a sub-consultant for the benefit of the principal in the event that the head consultant or contractor's agreements are terminated.</p> <p>Architects should ensure there are no terms in a deed of continuity that extend liability or the scope of work beyond the original contract of engagement. Particularly that there are no higher standards of care or warranties and the limitations within the original contract of engagement are carried over into the deed of continuity.</p>
Defamation	<p>A libellous or slanderous statement made to a third party who causes injury to the honour or reputation of another party.</p>
Defence Costs	<p>An expression utilised in insurance policies which often may include not only legal expenses associated with a claim, but also technical and investigation expenses.</p>
Directors' & Officers' Liability Insurance	<p>A form of liability insurance providing protection to directors and officers of corporate entities for liabilities arising from wrongful acts committed in their capacities as such.</p> <p>Its relevance to a construction project is if the directors and officers of a company are facing claims for this type of liability for which they are entitled to indemnity from the company this can weaken the financial security of a company.</p>
Disclaimer of Liability	<p>A provision in a contract which purports to exclude or remove liability which would otherwise attach to a contracting party.</p>
Discovery	<p>The obtaining of information on oath from a party to legal proceedings.</p>
Duty of Care Deed	<p>A principal may require a contractor under a design and build contract to procure such a deed from a sub-consultant for the benefit of the principal.</p> <p>Architects should ensure there are no terms in a duty of care deed that extend liability or the scope of work beyond the original contract of engagement.</p> <p>Particularly that there are no higher standards of care or warranties, and that the limitations within the original contract of engagement are carried over into the duty of care deed.</p>

Earthquake & War Damage Cover (EQC)	A term which refers to the statutory coverage as was originally provided under the Earthquake and War Damage Act 1944; since superseded by the Earthquake Commission Act 1993. Statutory coverage under the 1993 Act was phased out for " <i>commercial property</i> " by 31 December 1996 but still applies to some extent for " <i>residential property</i> " as defined in the Act.
Employers Liability Insurance	In respect of the Accident Rehabilitation & Compensation Act 1992 and the replacing legislation the Accident Insurance Act 1998 with subsequent recent amendments, there are some circumstances that fall beyond the scope of the definition of an " <i>accident</i> ". This form of insurance provides for the Employer's costs of defence and certain awards made against an Employer for injuries beyond the scope of the legislation.
Employment Practices Liability Insurance	This is also described as 'Employment Dispute Insurance' by some sectors in the insurance market. This form of insurance provides for the Employer's costs of defence and certain awards made against an Employer for breach of employment contracts or breach of certain provisions of the Human Rights Act 1993 or the Privacy Act 1993.
Ensure	To make certain. A word to be avoided in any contract of engagement as may be synonymous with a performance guarantee.
Estoppel	A rule of evidence which precludes a party from denying that the facts are not otherwise than his or her words or conduct have caused another party to believe, and which has induced the other party to act on that belief.
Ex Gratia Settlement	A gratuitous settlement for which an Insurer may not be liable for under the terms of a policy.
Fidelity	An expression referring to a form of insurance commonly known as Fidelity Guarantee. It may be in stand alone form as a separate contract, or as an extension to other forms of liability Insurance, including Professional Indemnity Insurance. It provides for the loss of money or property belonging to a practice or held in trust. The cover may relate only to a guarantee of the fidelity of Employees, but may be extended by negotiation with an Insurer to include the Principals of an Insured Firm.
Fraud	A deliberate deception to gain unfair or unlawful advantage.

General Liability Insurance	<p>General Liability Insurance Policies (<i>often described as Public Liability Insurance</i>) are concerned with accidents or other events or occurrences causing death of, or bodily injury to, or damage to the property of members of the public.</p> <p>Most policies are underwritten on an "<i>occurrence</i>" basis. The feature of this is that the event which gives rise to a claim must have occurred during the period of the insurance.</p> <p>The policies may be "<i>stand alone</i>" contracts or appended to a Contract Works Insurance as a separate coverage specifically relating to the particular project.</p>
Indemnity	<p>A contract by one party to keep the other harmless from loss. A broad form indemnification in a contract of engagement may require the Architect to cover client's costs even when the problem has been caused by the client. This can create a contractual liability that is uninsurable.</p>
Indemnify	<p>This means to make good a loss another party has suffered.</p>
Guarantee	<p>A binding promise to be answerable for the debt or obligation of another. To be avoided in any contract of engagement as it is likely to be uninsurable.</p>
Joint-Insured	<p>Parties who are collectively insured under a policy and entitled to share in the indemnity available.</p>
Jurisdiction	<p>A special clause in insurance policies that defines under which country's jurisdiction any disputes between an Insurer and Insured are to be resolved.</p>
Limitation of Liability	<p>An agreed monetary or time limit in a contract which places a limitation on the liability of a contracting party.</p> <p>The Limitation Act 1950 provides for the limits in time in which a civil action may be commenced. In contract it is six years from the date of the act or omission. In tort it is six years from the date the damage is discovered or may reasonably have been discovered.</p> <p>The Building Act 1991 provides that no civil action may be commenced more than ten years after the date of the act or omission, referred to as a "<i>long stop</i>".</p>

Marine Insurance	<p>Marine Insurance for a construction project can be broadly divided into two main areas:</p> <ul style="list-style-type: none"> • Hull and Liability Risks This form of insurance has relevance to wet risks (i.e., bridges, sewerage outfalls, offshore pipelines, wharves, docks and the like where the use of waterborne craft is involved). • Transportation Risks Transit risks within New Zealand for the materials to be incorporated into a project are often insured by agreement with the contract works Insurer. <p>Overseas importations are not usually included and marine cargo insurance may be necessary for importation of any materials, plant and equipment, including the engineering risks for the positioning and testing and commissioning of the plant or equipment. Delay in commissioning due to marine perils can be insured under a special marine insurance known as "<i>Advanced Profits</i>".</p>
Material Fact	A fact which if known of by an Insurer at the time of entering into an insurance contract would have affected a prudent Insurer in deciding whether to accept the risk or not or accept subject to special conditions.
Misdescription	An error, mistake or misstatement in the description of any property, interest or liability which may allow an Insurer to avoid a contract of insurance.
Mifeasance	The improper performance of a lawful act.
Motor Vehicle Third Party Liability	<p>This form of insurance is concerned with accidents or other occurrences causing death of, or bodily injury to, or damage to the property of members of the public arising from the use of motor vehicles. Most policies are underwritten on an "occurrence" basis. The feature of this is that the event which gives rise to a claim must have occurred during the period of insurance.</p> <p>Motor Vehicle Third Party liabilities are often excluded under General (Public) Liability Insurance Policies, hence the need for separate liability coverage relative to motor vehicles used in connection with construction projects.</p>
Must	" <i>To be obliged to</i> " or " <i>to be certain to</i> ". A word to be avoided in any contract of engagement as it may be synonymous with a performance guarantee and may be uninsured.
Negligence	A failure to exercise reasonable care so as not to cause damage or loss to any other person.

Non Cancellation	A term which usually refers to the absence of any express cancellation rights in a policy either by an Insurer or by an Insured and/or both during the currency of a policy.
Non Disclosure	A failure to disclose the existence of facts which are material to the acceptance of a contract of insurance by an Insurer
Nonfeasance	Neglect or failure to carry out something that ought to be done.
Novation	An assignment of a contract of engagement from an original party to another. Typically from a client to a contractor in conjunction with a design and build construction contract. Architects should ensure there are no terms in a deed of novation that extend liability or the scope of work beyond the original contract of engagement. Particularly that there are no higher standards of care or warranties and that the limitations within the original contract of engagement are carried over into the deed of novation.
Onus of Proof	The burden or responsibility of proof.
Professional Indemnity Insurance	A special type of liability insurance covering loss caused by a legal liability to pay compensation to a client or other third party arising from a breach of professional duty. Such policies are usually underwritten on a " <i>claims made & notified</i> " basis in contrast with the " <i>occurrence</i> " basis of other forms of liability insurance. A policy may be of the traditional type responding to legal liabilities caused by " <i>negligent</i> " acts, errors or omissions in the performance of professional duties or it may be a more modern and wider " <i>civil liabilities</i> " contract.
Project Insurance	A term which refers to an especially tailored policy, or policies, which relate solely to the insurances arranged for a specific project, often covering the collective interests of the various parties involved in the project.
Proximate Cause	The immediate cause leading directly to a loss as distinct from a remote cause which only indirectly causes a loss.
Public Liability Insurance	Refer to " <i>General Liability Insurance</i> "
Reasonable Skill Care & Diligence	The established common law duty of care is to act with reasonable skill, care and diligence. Words in contracts of engagement that extend this liability to perform the services to " <i>the highest standard</i> " or " <i>the best</i> " or similar are to be avoided as they are uninsurable.
Reasonably Foreseeable	Something which is ordinarily, properly, or fairly capable of foresight. One of the common law tests of negligence.

Reasonable Person	<p>A person who has the faculty of reason and engages in conduct in accordance with community standards.</p> <p>In negligence law, liability depends on what a reasonable person would have foreseen, or realized, or how a reasonable person would have acted in the same given circumstances.</p>
Retroactive Date	If applied to a contract of liability insurance the policy will only respond to loss arising from acts, errors or omissions which have occurred after this date.
Solicitor/Client Costs	The inclusion of these costs in the liability clauses of a contract of engagement should be strongly resisted. What it means is that an architect would be funding the other parties' costs in suing the architect.
Statutory Liability	This form of insurance relates to the costs of defence and insurance of certain fines or penalties under various statutes. This is in contrast to " <i>civil liabilities</i> " as may be insured under other forms of liability policies
Strict Liability	A liability owed to another party under special circumstances, even though the event took place without negligence or intent.
Subrogation	In insurance terms this means that upon payment of a loss under a policy the Insurers are entitled to stand in the place of the Insured to pursue any recovery against other parties who may have caused the loss.
Territorial Limits	<p>Insurance contracts may define or restrict territorial limits off-shore beyond New Zealand or Australia in which the indemnity may apply. Such a clause may also define the jurisdictions under which the policy will apply and only cover claims from work performed within the territorial limits.</p> <p>Liability Policies issued in New Zealand invariably exclude claims arising from operations or exports of products or services to or within the territorial limits or the legal jurisdictions of the United States of America, Canada or their territories or protectorates.</p>
Tort	A civil wrong for which the remedy is a common law action for damages.
Uberrimae fidei	A Latin term meaning " <i>utmost good faith</i> " which is an inherent principle of all insurance contracts as between Insurers and the Insured.
Ultra Vires	Any action in excess of legal authority.
Vicarious Liability	A legal liability for the acts of other parties such as a principal for an agent or an employer for employees.

Waiver of Subrogation	The foregoing or abandoning some right or benefit against other parties.
Warranty	An undertaking as to the title, quality or quantity of something being sold or that the subject of a contract is as it appears to be or as it has been represented. A word to avoid in any contract of engagement as it will be uninsurable.