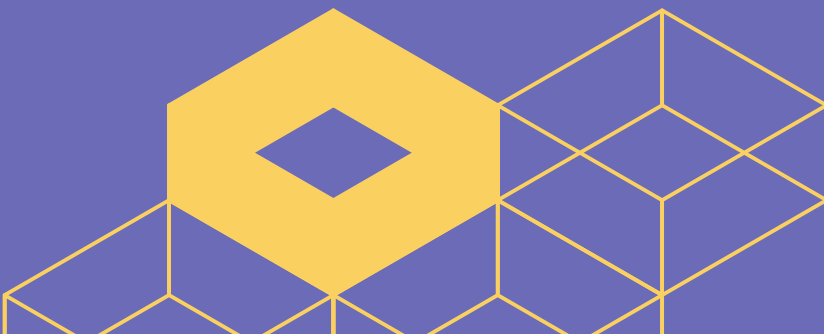


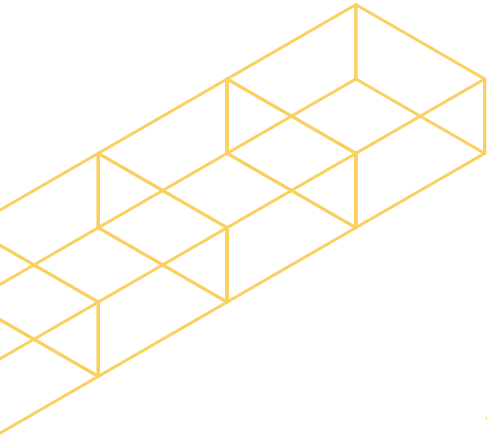


**RiskBox**



**A Guide: How to Cross-Refer Insurance  
Cover With a Client Contract**





## Note



RiskBox are not solicitors, we are commercial insurance brokers. We do not provide legal advice.

This guide is not exhaustive. It is a handy tool to help you identify some of the most common areas to consider before signing client contracts.

When it comes to the fine print and legal opinion, always engage a specialist solicitor. The information below should give you a clearer idea of your rights when you read contracts for the first time and help you communicate information to solicitors with clarity, reducing their time spent and hopefully your legal fees as a result.



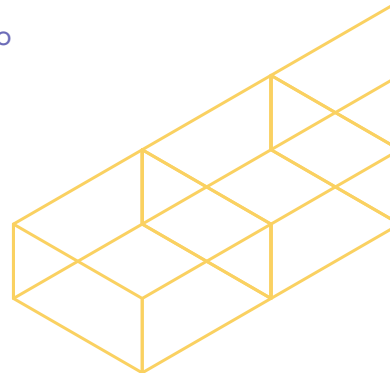
## Introduction: Resisting The Urge

When a high-profile client puts a lucrative-looking contract in front of you, your first inclination as an agency owner will be to sign it.

You've worked so hard for this offer and know it could lead to excellent revenue, perhaps even raising your company profile in the process. After all, big deals often turn heads. But it's vital you resist the urge to sign on the dotted line straight away.

The implications of signing an onerous contract can be serious – leaving you with additional work, unexpected costs and, in extreme cases, the inability to get insurance in the future.

Failure to have the insurance required under contract will leave you in breach from day one, so you need to make sure you take the right steps.





## Example

A digital agency was engaged to produce a video for their client. The project was the biggest and most exciting they'd ever commissioned: producing a montage from various animators.

As part of the work, they were asked to sign a contract for the shoot itself – which they quickly agreed to. Then, one day before production was due to commence, the agency was informed that their insurance needed to be increased.

The onerous contract was a production specialist form, and it required the agency to take out completely separate additional insurance for Producers Indemnity with a high limit of indemnity.

This is not something the agency had ever needed before, given their limited experience working on small-value shoots. They hadn't budgeted for it at all.

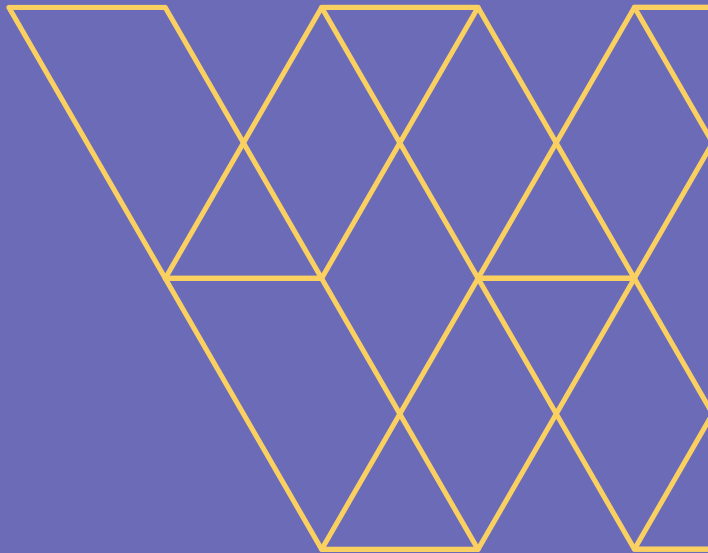
Even more frustrating was the fact that there was little to no risk involved as the agency had a wealth of content to draw upon. Even if some of the animators did not deliver on time, the agency would still have enough to deliver a strong digital film and fulfil their obligations.



If the agency had pushed back before signing the contract, the client would arguably have agreed that the cover was excessive for the project.

In the end, the agency ended up with an unexpected bill for cover they didn't even need.

All because they signed a contract without checking it first...





## Whose Contract?



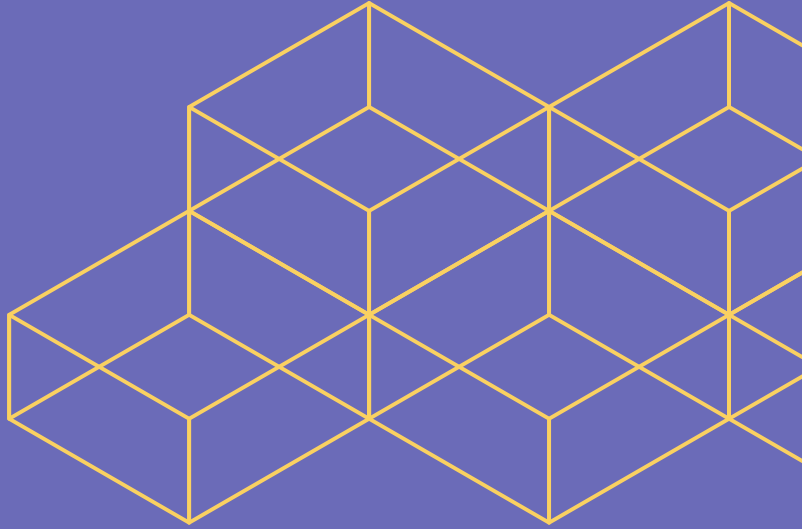
First and foremost – always have a written contract in place. We recommend that there is a written agreement when producing any form of creative content or providing any type of digital service. This reduces confusion about the type of content being delivered and keeps everyone on the same page.

The average business owner does not always fully understand or appreciate the work undertaken by digital agencies...

Gaps between expectations and reality lead to expensive disputes. From our experience, this type of misunderstanding accounts for more Professional Indemnity claims than any other.

Having effective Professional Indemnity insurance with full breach of contract cover removes a lot of this pain, but not all of it...

Every time there's a dispute with a client on what needs to be delivered, it costs you time and money as an agency owner. It's also highly stressful and can result in a damaged reputation. Relying on contracts provided by clients is dangerous. The contracts will all be different, drawn up by a range of solicitors with varying aims. Some might be generic, whereas others will have bespoke and onerous clauses included.



## Example

A financial advisor firm recruited a digital agency to build a combined SEO and content marketing programme that would put them high in Google's rankings for certain keywords and phrases.

Despite explaining over coffee how the algorithms work (and the timeline involved), the agency was berated by their client as they weren't at the top of Google within two months.

These things take time – and a written contract would have prevented this confusion.



## What You Will Need



Once your contracts are drawn up, you may get a client who won't agree to your terms and conditions. When this happens, you should check the obligations of that contract against the insurance you hold.

To cross-refer your contract, you will need the following:

### The contract

This should include any appendices, schedules or scopes of work.

### Insurance documentation

Most contracts will consider your liability only (though there are exceptions), so the documentation will normally relate to:

- Professional Indemnity/Errors & Omissions
- Employers' Liability
- Public Liability
- Product Liability
- Cyber & Data Liability
- Commercial Crime
- Management Liability/Directors & Officers Liability
- Producers Indemnity

This list isn't exhaustive by any means, but it should cover the relevant policies for almost all contracts concerned.





For each policy, you need to have the most recent copies of:

- Schedules of Insurance
- Policy Wording
- Endorsements (changing the insurance cover)

## Contact numbers

Whilst you can use this guide to compare your insurance against contractual obligations, be aware that this is a complicated process that's subject to change. For that reason, it's always worth having a couple of key numbers on speed dial:

- A specialist solicitor
- A specialist insurance broker

If you don't have suitable contacts, contact Michael Henderson at RiskBox on 07815 617740.



## The Review



Right. You've got all your documentation ready, a quiet place to concentrate, and a strong cup of coffee. Now you can cross-refer your contract.

## Cover types

Many clients treat terms and conditions like standard documents that require a quick scan and sign.

However, it's important to remember that contracts vary considerably – and not everything necessarily fits the standard contract easily. That's why irrelevant insurance is so common.

At this stage, all you need to do is point out to the client that you don't have the insurance in place to help – nor do you need it to fulfil the contract. For example, the contract might require you to have US auto insurance, but you won't be working in the US so will never be driving a vehicle as part of the contract. Point it out and get that requirement removed.

## Mind the language

Insurance is an industry that seems to take great pleasure in creating its own language, making things as difficult to understand as humanly possible.

To make matters even more complicated, other countries use very similar terminology for similar or the same cover.



## Example

Public Liability in the UK can be stated as General Liability or Casualty insurance when, in essence, it's the same.

Where the UK refers to Employers' Liability, many other countries will refer to Workers' Compensation. Though similar, there are some distinct differences between the two.

Professional Indemnity can be referred to as Errors & Omissions and Professional Liability, which is like a hybrid between Professional Indemnity and Public Liability.

*Take care to check the kind of cover you are being obliged to hold.*



## Cover specifics

Sometimes, the contract will drill down into the specifics of the protection required.

### **Example**

An agency signs up to a contract that stipulates they have Professional Indemnity, incorporating IP Infringement, Cyber Liability and Theft by Employee.

Most Professional Indemnity policies for agencies include IP Infringement, so they are probably fine in this regard. Decent Professional Indemnity policies also include some aspects of Cyber Liability, such as negligent virus transmission. However, that's unlikely to meet the contract requirements.

Theft by Employee cover is included within all decent Professional Indemnity policies but is often sub-limited to low levels. Even household-name insurers such as Hiscox pull this back to a fraction of the main limit (at present, it is normal practice for Hiscox to sublimit this to £10,000). This can be a problem if the contract expects the agency to have cover to the full limit required under the Professional Indemnity.

Sometimes, the contract will drill down into the specifics of the protection required.



## Limits

Occasionally, the contract won't detail a specific limit of insurance required – only that you need to have that type of protection in place. This is the best-case scenario as it gives you the freedom to purchase a limit you feel appropriate and affordable.

Usually, though, the contract will state that you are obliged to hold a certain limit of indemnity.

As well as the limit figure requested, you also need to be aware of the following:

### 1. Aggregate vs Any One Claim

Sometimes the contract will drill down a bit further, stating specifically what the limit needs to be for any one claim, and the minimum acceptable aggregate limit (i.e. the total amount the policy will pay out any one year). You need to check the limit basis – usually found on the Policy Schedule.

### 2. Costs Inclusive

Occasionally the contract will also make reference to whether the limit is allowed to include legal costs within it, or whether they should be protected in addition. Again, this is usually found on the Policy Schedule.



### 3. Excess

Excesses aren't normally referred to within the contract and will be mentioned fleetingly at most. If the contract ever specifies a level of excess, or if it includes costs, then again refer to your Policy Schedule.

### 4. Currency

One final consideration for limits: be aware of other currencies. If the contract limits are stated in US dollars, ask for the contract to be changed for a similar limit in sterling. If they refuse, err on the side of caution with your limit; round up to allow for an exchange rate fluctuation in your cover.

### Fines or penalties

When reviewing the contract, don't agree to accept more liability than what your insurance policies provide.

Most of your insurance policies will cover most of your legal liability to third parties – but not everything. For example, fines and penalties are generally not insurable (to do so would be considered against the public interest and encourage unethical practices). Think very carefully before agreeing to them under contract as you'll be on the hook.

Another area to consider is consequential loss. Clients may ask you to accept liability for their consequential loss irrespective of whether their loss was your fault – and often for extremely high limits.



Can you afford to agree to these onerous consequential loss clauses?  
You could be left to pick up the tab when something goes wrong...  
Set an appropriate limit when negotiating contracts – ideally pinned to  
the value of the agreement itself.



## The fine print: Clauses

Insurance policies are often long and difficult to read – but it's worth persevering. Skim, and you could miss something important. When reviewing the contract, you need to be sure there are no unfair clauses imposed upon your agency or unusual exclusions and conditions which would affect compliance with the contract terms.

### Onerous contractual terms

Terms within a contract can be an insurance minefield; small, seemingly insignificant words can cause serious damage.

US contracts in particular tend to incorporate terms that are designed to restrict the rights of agency insurers. These terms can take the form of waivers of subrogation and adding the client as an additional insured. This can prevent successful recouping of losses.

### Example

An agency is engaged to produce a website, with the client providing the assets. The client didn't check the assets properly and it turns out they are identical to a similar business.

The similar business in question successfully sues the agency for breach of intellectual property from the assets provided by the client. The insurers of the agency pay the third party, but they are prevented under contract from looking to recoup their losses from the client who provided the assets in the first place.





When you find these clauses within your contract, you will need to either negotiate their removal or contact your insurers to amend the policy to accommodate.

Sometimes, insurers will refuse to do this (leaving you to find alternative cover fast or risk being in breach of contract). On other occasions, they will just charge additional premium and amend terms. It will likely depend on the size of the contract, who it is with, and what work is to be undertaken by the agency.

Another onerous area to be aware of, and often seen in agency contracts, is the insurance of the contractors and freelancers engaged.

You probably use freelancers or sub-contractors in some capacity – whether that’s for specialised tasks or just to scale up when the volume of work is high.

Some contracts impose a minimum level of insurance to be held by contractors too, often asking for it to match the level of the agency signing the contract.

This causes a few problems with contractors.

### **1. Expense**

If the contractor doesn’t have the same level of insurance, extending their cover may not be cost-effective, leading them to decline the work.



## 2. Time

The contractor needs their insurance to comply with any onerous terms in the same way as you and your agency. This extra hassle could lead them to decline the work.

## 3. Effort

Your agency could get caught short if the contractor doesn't read the contract or ignores it completely. The contractor is then without adequate insurance – and you're in breach of contract.

We recommend getting this type of sub-contractor clause removed from the client contract. It makes your obligations more reasonable. You should ensure all contractors are reasonably insured for the work undertaken on your behalf – keeping records and data to prove it.



## Policy exclusions, conditions and extensions

The devil is in the detail when it comes to policy exclusions. This is what can trip you up and leave you uninsured when you thought you were protected.

Policy exclusions can live as bespoke exclusions, normally labelled as endorsements, on the Policy Schedule. They can also hide within the Policy Wording itself as these differ considerably between insurers (they can even vary with the same insurer).

Check the Policy Wording and Schedule, along with any endorsements, together. Often, they will refer to each other (so what might look like it is excluded under the Policy Wording may be brought back in by endorsement, and vice versa).

### Exclusions

When checking the policies against the contract, go through every single exclusion and make sure it doesn't leave you in breach.

#### **Example**

Manual activities away from the office might be excluded under the Public Liability, which would be an issue for an agency producing any filmed content.



## Conditions

As well as understanding what is excluded, you need to check the conditions and that you can comply with them.

### Example

A Professional Indemnity policy could have a condition that you are obligated to check and record the insurance of all contractors used.

## Cover and extensions

Finally, you need to check that the policy coverage protects you for all the activities required.

Sometimes the contract will be quite vague, merely asking you to have Professional Indemnity. That's fine, but they need to explain why this is required and then refer to other things – such as defamation, privacy protection and intellectual property.

This is crucial as Professional Indemnity varies considerably. There is no guarantee that everything referred within the contract is incorporated (and sometimes insurers will even refuse to extend to include the required covers).



If the contract asks for specifics when stating what policies are needed, cross-refer the contract against the part of the policy which states what is covered (and run your eyes over the extensions too, as they do just that – extend the coverage).





## Geography

Where your client is based matters – a lot.

When reviewing the proposed contract, you need to cross-refer the location of the client themselves, the area where any work will be carried out, and if work will be conducted under that country's law.

If the contract includes any reference to cyber risks, you also need to be aware of how data will be used as the owner's rights and your obligations vary (as does how your insurance responds).

Basically, be extra careful if you work with overseas clients as they aren't always included within your insurance. Two key areas to check under your policy are geographical limits and jurisdictional limits, which are outlined briefly below:

### **Geographical Limits**

This mainly concerns where your clients are based, though it also refers to where you are insured to physically operate.

The geographical limits on your insurance therefore need to be at least wide enough to cover where the end client is located (for things such as Professional Indemnity) and where you will carry out your work, even if it is just a few meetings (for things such as Public Liability).

If the geographical limits are not wide enough, get them extended. Doing this rarely costs much, if anything at all.



## Jurisdictional Limits

This is a more complicated issue as it refers to which legal jurisdiction you operate under, and where any disputes would be heard.

Usually, Professional Indemnity covers a minimum of EU jurisdiction, and quite often on a worldwide scale (excluding the US and Canada). Be sure to double-check, though, as this can change depending on the insurer.

As a rule, it is extremely rare for US/Canada jurisdiction to be covered as standard.

When checking the contract, locate the jurisdiction clause (which is normally easy to find and understand). If it says any disputes will be heard in a New Jersey court, for example, you know you need US jurisdiction cover and the policy will likely need extending.

Including US/Canada jurisdiction generally costs more as the environment is litigious with higher legal costs. It's worth thinking twice before signing such contracts.

If you need to extend the jurisdiction, go back and cross-refer any changes made to the terms by insurers against the contract. Normally, there will be alterations to the limit basis and size of excess.



## Insurer

Contracts sometimes make reference to the financial security of the insurer – stating a minimum rating level (usually with either Standard & Poor’s or AM Best).

This is another area you must examine for all insurers concerned. It’s not unusual for an apparent insurer to actually be an agent acting on behalf of an insurer. In these scenarios, you need to track down the original provider.

To complicate matters further, insurers do have a habit of changing their names (anyone remember when AIG were Chartis for a short period after the 2008 crash?). They’re often structured with a raft of subsidiaries sporting slightly different names with their own separate credit rating.

## Your Response



You’ve spent a few hours going through the contract and comparing it against your insurance policies. What next?

Your response should follow three steps:

### 1. Negotiate

Where your current insurance doesn’t meet the obligations, the first step is to negotiate where possible. Try to remove irrelevant or unreasonable terms and reduce excessive limits.





For US clients, get the jurisdiction moved to UK law wherever possible and insist they lose any conditions that remove the rights of your insurers.

Don't be afraid to push back. Show you are taking the contract seriously as this will give you greater credibility with your client.

## **2. Extend**

For the areas where you don't comply with the contract, look to extend your insurance.

Get in touch with your broker (or insurer) as early as possible. Provide a copy of the contract and point out areas you believe need altering.

In some instances, current insurers will not be able to make all the changes needed. Be prepared to obtain alternative insurance or additional policies where necessary.

## **3. Get advice**

As stated from the outset, there is no substitute for expert advice.

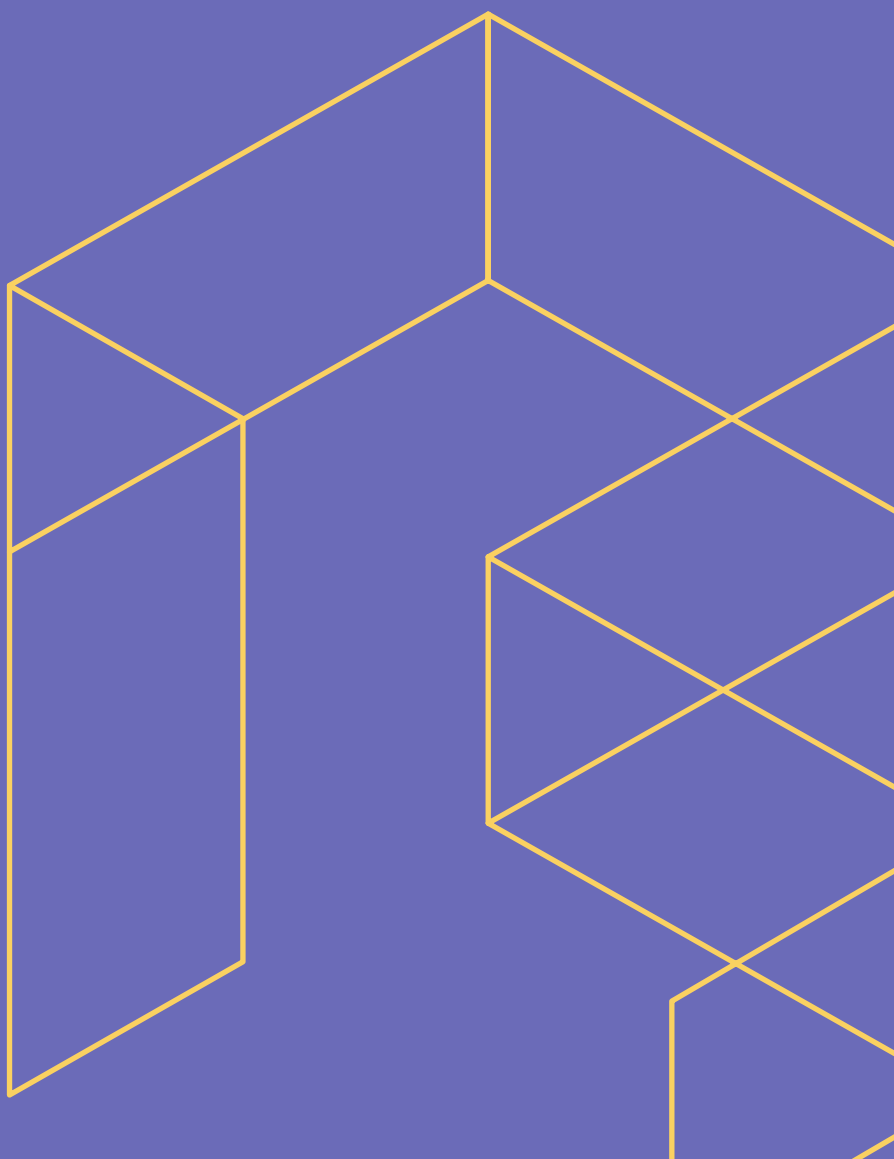
We recommend speaking to both your insurance broker and solicitor before you make negotiations and seek changes.



If you transact your insurance direct and don't use a broker, be cautious – those insurers are only permitted to discuss their own products. This means they cannot point you in the direction of more appropriate and cost-effective solutions.

Using this guide gives you the basics to be able to make this process quicker and simpler, but a professional can guarantee a good outcome when you need it most.

Contact our team for more information.





# Choose Riskbox

Choose RiskBox for the peace of mind you need to keep doing what you love. Get in touch with us for more information.



Michael Henderson - Director

Call: **07815 617 740**

Email: **[michael@riskboxuk.com](mailto:michael@riskboxuk.com)**

Sam Johnson - Commercial Account Holder

Call: **07975 091 063**

Email: **[sam.johnson@riskboxuk.com](mailto:sam.johnson@riskboxuk.com)**