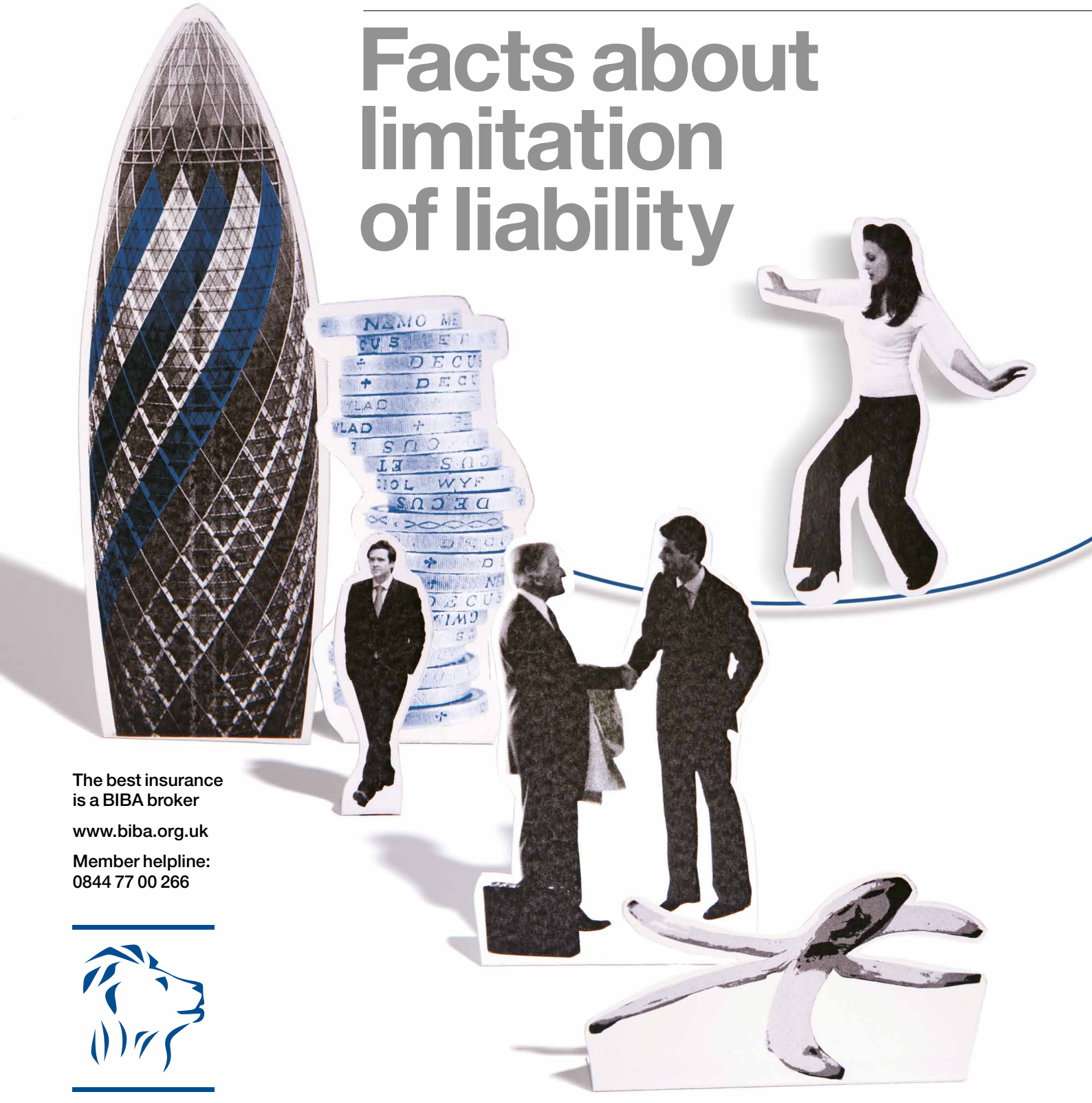
Volume 4

British Insurance Brokers' Association

Professional indemnity initiative

Facts about limitation of liability



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Eric Galbraith,
BIBA Chief Executive

Foreword

This is BIBA's fourth professional indemnity insurance initiative publication for members, and looks at the issue of brokers limiting their liability when advising clients. This is essentially a risk management exercise, and is a tool brokers can use to ensure the financial risk on them is proportionate to the client engagement; indeed, many brokers already include a **limitation of liability clause** in their **terms of business.**

BIBA aims to provide confidence in insurance brokers. The Association often receives enquiries from member brokers asking for help in understanding the issues involved in limiting their potential financial exposure when advising clients, whether those clients be individuals or businesses. This publication is intended to provide background on the regulatory and legal position, information on what a **limitation of liability clause** or agreement might contain and what it should not contain.

BIBA would like to point out that this is a very complicated subject, fraught with potential pitfalls. There are both legal and regulatory restrictions to limiting liability and **BIBA RECOMMENDS THAT YOU SHOULD ALWAYS SEEK YOUR OWN SPECIFIC LEGAL ADVICE BEFORE ENTERING INTO ANY AGREEMENT WHICH INCLUDES A LIMIT OF YOUR LIABILITY.**

BIBA wishes to make it clear that this publication provides only general information about using **limitation of liability clauses**. It sets out certain laws and regulations which are relevant to BIBA members should they choose to include a **limitation of liability clause** in any **terms of business**. It should not be read as providing any guidance or advice on the use of those clauses in any specific circumstances, nor as a recommendation that brokers limit their liability. **Neither BIBA nor its advisers who were involved in the preparation of this publication, can accept any liability for the use of its content in any particular circumstances; this means that BIBA is not responsible for your use (or non use), drafting or negotiation of any limitation of liability clauses in any agreement.**

You should also remember that competition law requires that you should not agree with any other brokers (whether expressly or tacitly) how you will limit your liability with your clients. **In particular, you must not agree any particular use (or non use) of any limitation of liability clauses with other brokers.**

Eric Galbraith
BIBA Chief Executive

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2. Introduction

2.1 This publication has several aims:

2.1.1 to explain what a limitation of liability clause is, taking into account the ethical, legal, and financial risks that you face when advising a client

2.1.2 to provide a broad description of the legal and regulatory background to limiting your liability

2.1.3 to offer a more detailed technical analysis of a standard limitation of liability clause

2.1.4 to make brokers who limit their liability aware of the practical considerations.

2.2 In the Annexes to this publication you will find some details on where to look to find further information. In Annex 1, there is a summary of the legal and regulatory framework; links to relevant reference materials; and Annex 2 contains the contact details of BIBA's panel of Accredited Professional Indemnity insurance brokers who can advise on these issues with regard to brokers' management of their own professional indemnity insurance. In the Acknowledgements there are contact details of the solicitors who worked with BIBA to produce this publication, and who may be able to assist you further with the issues raised in this note.

2.3 There is also a Glossary (in Annex 3) containing explanations of some of the technical phraseology used in this note. Technical terms explained in the Glossary are **highlighted in bold** throughout the note.

2.4 **The legal and regulatory framework that applies to limitation of liability clauses is complex, and you should carefully consider your position before using them. There are clear benefits to using a well drafted, reasonable, and proportionate clause to aid in managing your risks, but any such use should only be made after careful consideration, and taking appropriate legal advice where necessary.**

2.5 The Financial Services Authority (**FSA**) has identified the following risks associated with the use of an unfair or unreasonable **limitation of liability clause**:

2.5.1 **Legal Risk** – the clause may be unenforceable or in any event may be interpreted in favour of the client;

2.5.2 **Prudential Risk** – if the clause is unenforceable you may be exposed to unexpected costs;

2.5.3 **Operational Risk** – management time spent in drafting new terms and conditions if a clause is found to be unreasonable or unfair, and the associated cost of distributing new **terms of business** to clients;

2.5.4 **Reputational Risk** – clients may not trust a firm that relies on unfair or unreasonable terms, particularly where complaints are publicised in the media.

3. What is a limitation of liability clause?

3.1 A **limitation of liability clause** is a clause in an agreement that seeks to exclude or limit the extent of potential liability owed by you to a client. That is, it seeks to exclude any responsibility to pay compensation to a client, or at least reduce the amount you may have to pay, if you break your **terms of business** with your client, or if other things go wrong.

3.2 A **limitation of liability clause** can achieve this in a number of ways:

3.2.1 by restricting the *types of wrongdoing* you will, and will not, be responsible for.

For example: **breach of contract**, **negligence**, **breach of duty**, or **breach of trust**.

3.2.2 by restricting the *types of losses* that are recoverable from you by the client:

This may be by using legal classifications as to the cause of loss: direct losses, indirect losses, or consequential losses.

Or, it may be by particular types of loss such as property damage, data loss, loss of profits, or third party claims.

3.2.3 by applying a financial cap on the total amount that may be recovered from you by the client.

This could be by reference to a percentage or multiple of the fee paid by the client for your services, by reference to the level of **professional indemnity** cover that you have in place, or could simply be a fixed sum.

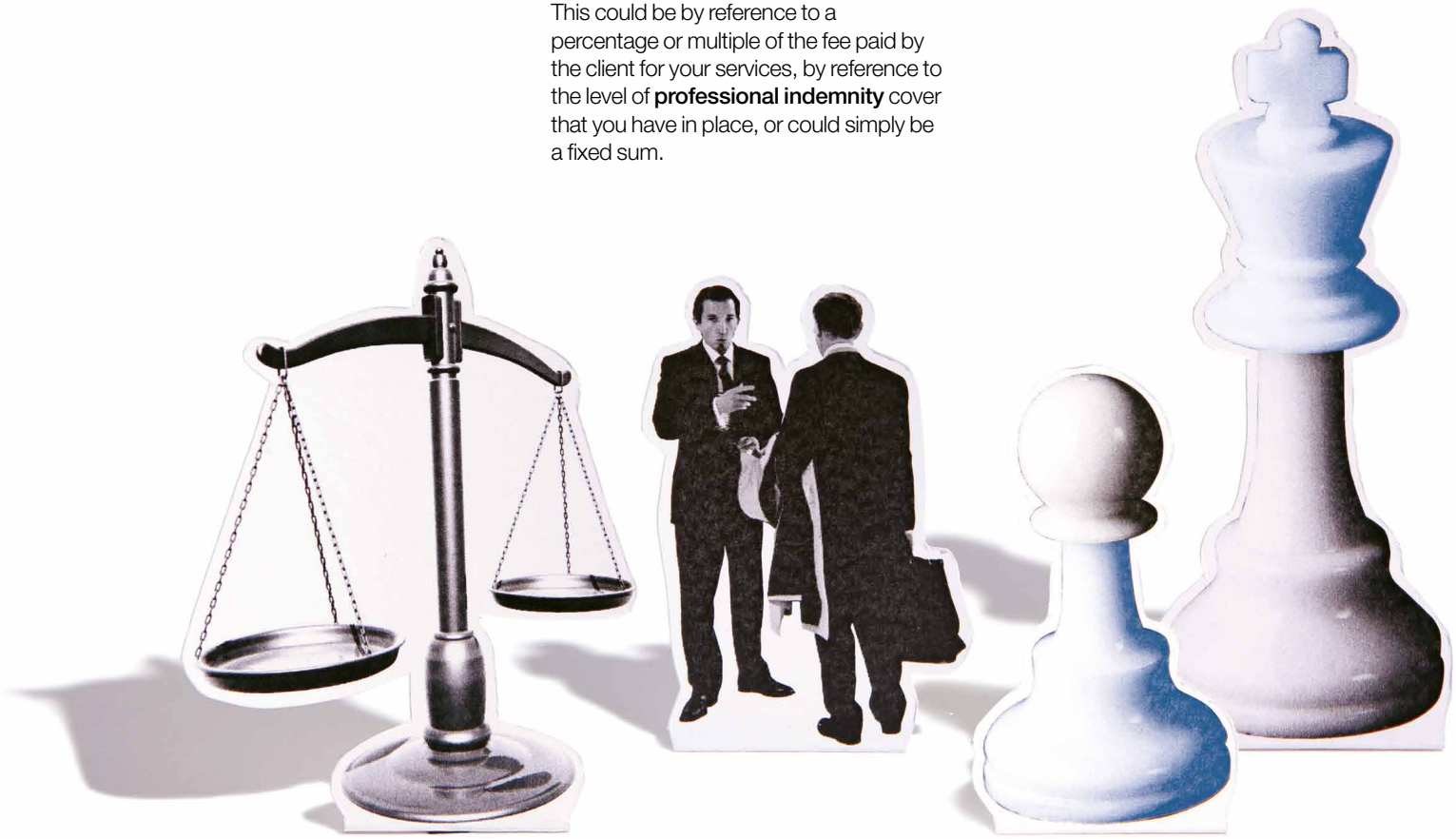
3.3 Often a **limitation of liability clause** will be a combination of all three types of limit. There is no universally standard clause. They can and should be considered in relation to the particular circumstances of each case and consequently can vary widely in content.

3.4 A **limitation of liability clause** can be incorporated into your relationship with your client in a number of ways, but will usually be achieved through:

3.4.1 including it as one clause in your **terms of business** between your firm and the client (this would be the usual method); or

3.4.2 having a standalone agreement relating solely to **limitation of liability**.

3.5 You can find more detail as to how **limitation of liability clauses** work in Section 9.



4. Why limit your liability?

4.1 Part of the purpose of a **limitation of liability clause** is to ensure good risk management and appropriate allocation of risk between you and your client. It helps to ensure that your financial risk is proportionate to the client engagement. Therefore you should carefully consider what risks you are exposed to in each particular client relationship, and whether there are any practical ways in which you can manage or limit those risks.

4.2 Common reasons why brokers and other trades and professions may restrict their liability to a client include:

4.2.1 Where the risk/reward ratio is out of alignment

If there is the potential for your client to bring a claim against you for a significant (uninsured) loss, then you may seek to cap your liability to balance the ratio more favourably.

Often the best way to limit your exposure to uninsured risks is to clearly state in your **terms of business** what you will and will not do for your client as part of your engagement. Your services should clearly only extend to those risks which are covered by your insurance.

4.2.2 To match your potential exposure to the limit of your own professional indemnity insurance policy

For example, if you have £2 million of professional indemnity cover on an each and every claim basis, you might be reluctant to accept in your **terms of business** a potential liability to the client of £3 million for each claim.

In some cases it is a requirement of professional indemnity insurers that you use reasonable efforts to obtain a proportionate cap on liability.

Many brokers only insure for the minimum **professional indemnity insurance** cover required by the FSA, which is currently:

(a) 1,120,200 euros for a single claim; or

(b) 1,680,300 euros in aggregate.

BIBA encourages you to review the extent of your insurance cover with a suitable professional indemnity insurance provider. BIBA has accredited three **professional indemnity insurance** brokers who can advise you (see Annex 2 for further details). You should consider in particular whether the sums you are insured for are sufficient to realistically cover the extent of your actual risks. The FSA requirements are only minimum regulatory requirements and may not provide you with adequate protection.

4.2.3 To manage business and personal risk

If a client brings a successful claim against you in relation to, say, your **breach of contract** or **negligence**, to the extent that the claim is not covered by your **professional indemnity insurance** or other insurance it would have to be met out of your firm's resources. Depending on the scale of the claim, this could obviously cause severe financial difficulty, including in some cases potential insolvency or bankruptcy.

If you are a limited company, provided that any **terms of business** are properly set up between your limited company and the client, then any liability should usually fall on the company itself, and not any individual or employee. They should clearly state that the contract is with the limited company, with its registered number and address.

5. Your key contractual risks

5.1 In order to determine which potential liabilities you are, and are not, willing to accept, you must first consider the kinds of risk that you face from each client engagement. These risks will vary depending on the types of service and products that you offer, and taking into account your client profile. Potential risks could include:

5.1.1 There is an error or omission by the broker resulting in the insurance sold providing insufficient cover, or being inappropriate for the client, or not selling an insurance product at all, and the client suffers uninsured losses.

The loss in this instance is likely to be the discrepancy between the sums insured and the actual cost of damage.

5.1.2 Overpayment by the client for levels of insurance that are higher than necessary or inappropriate.

The loss is likely to be the amount of overpayment of insurance premiums.

5.1.3 There is an error by the broker in selling insurance cover which is not in fact required, in part or in whole.

The loss again is likely to be the amount of overpayment of insurance premiums.

5.1.4 Failure to obtain correct information from the client leading to one of the circumstances above.

These risks are likely to be amplified where the insurance product or risk to be insured is unusual, bespoke, high value, or where there is an international element to the advice.

6. What do our professional colleagues do?

6.1 Other professions, such as auditors, solicitors, accountants, architects, and surveyors, may also seek to limit their liability to clients. In some cases there are no prohibitions laid down by the professional regulator as to whether or how, liability can be limited, but in other cases professional restrictions do apply.

6.2 Auditors can under the terms of the Companies Act 2006 (and subject to certain procedural requirements), limit their liability to a company client provided that any limitation would be “fair and reasonable”.

6.3 The Solicitors’ Code of Conduct 2007 allows solicitors to limit their liability provided that such limitation is not below the minimum level of cover required by the Solicitors’ Indemnity Insurance Rules (£2 million for sole practitioners and £3 million for Limited Liability Partnerships and corporates). Any limitation must be brought to the client’s attention and evidenced or confirmed in writing.

6.4 Until recently it was felt that capping liability in this way might affect a solicitor firm’s professional reputation. However, evidence now suggests that liability capping is becoming an accepted safety net for law firms, and is not seen as impacting on the quality of advice.

7. Legal and regulatory framework

7.1 **Overview**

7.1.1 The regulation of **limitation of liability clauses**, and standard terms of business is complex. There are a myriad of laws, regulations, and regulatory guidance to deal with. **If you are unsure about any written document, agreement, or commercial practice then BIBA advises that you obtain independent legal advice**. The consequence of failing to get it right can render any **limitation of liability clause** useless, and leave you open to the full value of any claim, with potentially disastrous financial consequences.

7.1.2 The main principles, regulations, rules and guidance applying to the use of exclusion and **limitation of liability clauses** can be found in:

(a) The FSA Handbook and in particular the Principles for Business ("**PRIN**"); the Insurance Conduct of Business Sourcebook ("**ICOBS**"); the Conduct of Business Sourcebook ("**COBS**"); the Mortgages and Home Finance: Conduct of Business Sourcebook ("**MCOB**"); the Unfair Contract Terms Regulatory Guide ("**UNFCOG**"); and the FSA's Treating Customers Fairly requirements

(b) The Unfair Contract Terms Act 1977 ("**UCTA**"); and the Unfair Terms in Consumer Contract Regulations 1999 ("**UTCCR**")

(c) Office of Fair Trading ("**OFT**") and FSA Guidance.

7.1.3 In Annex 1 there is a summary of the legal and regulatory framework.

7.2 **Key principles:**

These are key principles based on the current legal position and FSA and OFT guidance.

7.2.1 All **limitation of liability clauses** must:

(a) expressly not restrict liability for death or personal injury caused by negligence

(b) expressly not restrict liability for fraud or fraudulent misrepresentation

(c) expressly not restrict liability for regulatory obligations

(d) only exclude negligence if reasonable (in Scotland if fair and reasonable)

(e) only exclude responsibility for using reasonable skill and care in providing your services if reasonable

(f) be drawn to the client's attention

(g) avoid ambiguity as they will be interpreted in favour of the client.

7.2.2 All Consumer Contracts & Standard Terms and Conditions: The **limitation of liability clause** must:

(a) be fair and reasonable. In Scotland you cannot exclude liability for breach of contract if it is not "fair and reasonable"

(b) be in plain English (with no jargon)

(c) not exclude liability below the responsibility to provide a reasonable service;

(d) reflect your **professional indemnity insurance** cover

(e) be proportionate to the fee charged.

7.3 Businesses and consumers

7.3.1 The legislation and regulations applicable to **limitation of liability clauses** vary depending on whether you are advising a consumer or a business – and is usually more restrictive for contracts with consumers.

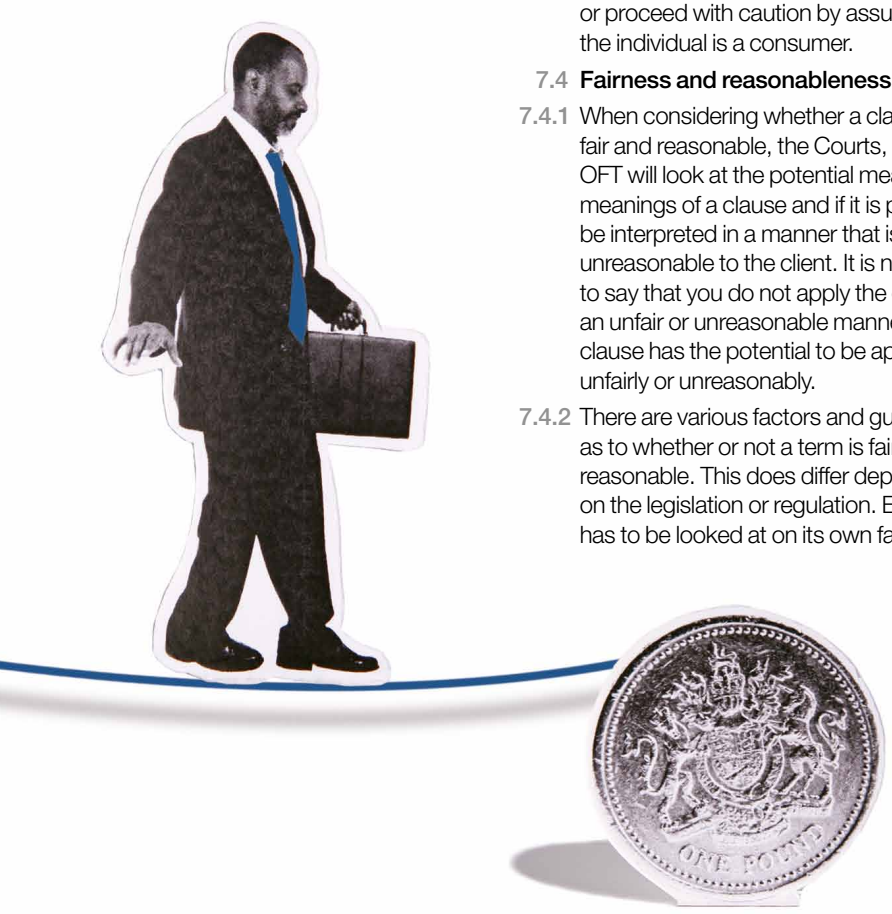
7.3.2 Broadly a consumer is an individual who is not dealing in the ordinary course of a business, but for personal or domestic purposes. For example a client who is looking for pet insurance is very likely to be a consumer. However, individuals may act in a number of capacities and it may be difficult on occasion to properly ascertain whether you are advising a consumer or a business. For example, an individual client may be purchasing motor insurance for a car which he or she uses for both personal and business use, or his contents insurance may cover equipment he uses while working from home.

7.3.3 If you are in any doubt as to whether your client is a consumer or a business client, then you should either take legal advice, or proceed with caution by assuming that the individual is a consumer.

7.4 Fairness and reasonableness

7.4.1 When considering whether a clause is fair and reasonable, the Courts, FSA or OFT will look at the potential meaning or meanings of a clause and if it is possible to be interpreted in a manner that is unfair or unreasonable to the client. It is no defence to say that you do not apply the clause in an unfair or unreasonable manner if the clause has the potential to be applied unfairly or unreasonably.

7.4.2 There are various factors and guidance as to whether or not a term is fair and/or reasonable. This does differ depending on the legislation or regulation. Each case has to be looked at on its own facts.



7.4.3 If we look across the rules and guidance the key factors for both fairness and reasonableness are:

(a) What circumstances were known (or should have been known) by you and your client at the time the contract was made?

(b) What were the bargaining positions of you and your client?

(c) Were there any alternatives open to the client?

(d) Could the client insure against the risk?

(e) Could you or the client more easily insure against this risk?

(f) Was any inducement given to the client to agree to the term?

(g) Could the client have entered into a contract with another broker without having to accept a similar term?

(h) Did the client know (or should the client reasonably have known) of the existence of the term?

(i) What is customary in your sector?

(j) Was there previous course of dealing between you and the client?

(k) What are the other contract terms?

(l) What liability is there left on you if the exclusion applies? You are expected to retain at least a reasonable proportion of responsibility for the quality of your service.

7.5 Consequences of Breach

7.5.1 In addition to enforcement action (see Section 8) the key implication of breaching the law and regulations are that the limitation of liability is not enforceable. You may therefore be liable for the full extent of the loss.

7.5.2 Historically, the courts have severed the unreasonable elements from a **limitation of liability clause**, leaving the remainder of the clause intact.

7.5.3 However in a recent case *(Lobster Group Ltd (formerly Lobster Press Ltd) (In Liquidation) v Heidelberg Graphic Equipment Ltd [2009] EWHC 1919 (TCC))* the courts decided that where one element of the clause was unreasonable this rendered the entire limitation of liability clause invalid. This emphasises the need to ensure that the whole of the clause is correctly drafted.

8. Enforcement

8.1 When we talk about enforcement this generally relates to enforcement of the UTCCR and related FSA rules.

8.2 Although the OFT is the principal enforcer of the UTCCR, the FSA is a "Qualifying Body" and is primarily responsible for considering the fairness of terms in contracts issued by FSA regulated firms. The FSA can refer matters to the OFT to deal with, if it thinks it appropriate (BIBA is not aware of any such referral).

8.3 The FSA regards the fairness of your **terms of business** as being a key indicator of whether you are Treating Customers Fairly. The FSA will look at whether the terms of your agreements could ever be applied unfairly (notwithstanding whether you ever do or would).

8.4 The UTCCR does not apply to "core" terms, that is the terms which set out the commercial deal between the parties, for example the services to be provided and the fee. However, the FSA's remit extends beyond those limits, so it can consider the fairness of the fee, or the subject matter of the engagement.

8.5 The FSA (or OFT) will investigate if a complaint is made about compliance with the UTCCR. The FSA does not have the power under the UTCCR to fine firms or make them pay compensation to clients. However it does have the power to fine firms for breach of the FSA Rules, including failure to Treat Customers Fairly.

8.6 Usually the FSA will discuss any potential breach of the UTCCR with you and give you the opportunity to respond. Often the FSA will seek an undertaking from you to cease using any offending terms in new contracts, and to cease relying on them in existing contracts (the terms of the undertaking will be published on the FSA's website). If a firm refuses to give an undertaking, the FSA can apply to court for an injunction to prevent further use.

9. How does a limitation of liability clause work?

9.1 You can find examples of **limitation of liability clauses** in many contracts, from the terms and conditions of the purchase of goods and services, to consumer guarantees, to 'conditions of carriage' on trains. Brokers applying a limitation of liability cause in their **terms of business** should take legal advice.

9.2 Most **limitation of liability clauses** will include some or all of the following components:

9.2.1 **A statement to draw attention to the clause**: such as **"IMPORTANT: THE CLIENT'S ATTENTION IS PARTICULARLY DRAWN TO THIS CLAUSE"**. This is important because it indicates that you have not attempted to hide the effect of the **limitation of liability clause** from your client, but rather have been open and honest about the existence of the clause and its effect.

9.2.2 **Provisions specifying what liability is not excluded:**

There should always be a clause that states that the **limitation of liability clause** does not exclude or restrict liability for death or personal injury caused by the broker's negligence, or for fraud or fraudulent misrepresentation. This is very important for the purposes of UCTA, as otherwise it could invalidate the whole of the **limitation of liability clause.**

There may also be a statement that the **limitation of liability clause** does not exclude specific statutory or regulatory obligations.

Sometimes clauses will state that the contract does not exclude any liability "which cannot be excluded by law". This is permitted for business contracts, but if the client is a consumer it would be invalid, unless you also refer the consumer to where he or she could easily find out what those liabilities are.

Section 13 of the Supply of Goods and Services Act 1982 imposes on you an obligation to provide your services with

reasonable care and skill: this obligation can be excluded, but only to the extent that it is reasonable to do so. It is unlikely to be reasonable in your consumer and **standard terms of business**. While this provision does not apply in Scotland, there are equivalent obligations under common law, and to exclude them would have to be fair and reasonable.

In addition, the FSA rules prohibit the exclusion or restriction of any regulatory obligations.

Sometimes a **limitation of liability clause** may specify that it does not exclude liability for the Broker's negligence. This is in response to a court ruling that excluding liability for negligence is likely to be unreasonable, and therefore **UNENFORCEABLE FOR A CONSUMER CONTRACT** and for business standard terms and conditions.

9.2.3 **Exclusions of liability for types of wrongdoing:**

For example:

(a) excluding losses unless there has been **negligence**. Alternatives would be excluding losses unless there has been gross negligence or wilful misconduct. Gross negligence is negligence where the action was deliberate or reckless. Wilful misconduct is similar, in that it implies that the action was undertaken with knowledge that it was a **Breach of Contract**, **Breach of Duty** or **Breach of Trust**.

(b) excluding losses that are contributed to by the client's own negligence, breach of the agreement with you (and in this respect it is vital that your agreement as a whole establishes clearly what the client's obligations are), or by their failure to provide pertinent information.

9.2.4 **Exclusions of liability for specific types of loss:**

For example:

(a) (using legal classifications) excluding **indirect losses or consequential losses**. The OFT has ruled that simply referring to **indirect or consequential losses** is insufficiently clear for consumer contracts. Therefore it is sometimes worded as losses that are not a reasonably foreseeable consequence of the breach. In law this is not as extensive an exclusion of **indirect and consequential loss**, but it is at least enforceable in a consumer contract

(b) (using descriptions of the losses) excluding property damage, data loss, loss of profits, lost savings or third party claims. It is considered to be reasonable to exclude business losses in consumer contracts, as it is reasonable for the broker not to expect his consumer clients to have business losses.

You should take care to ensure that the loss which is excluded would not be the client's main loss if you do something wrong. For example "lost savings" if a broker negligently advised a client to take out a more expensive policy.

9.2.5 **Financial caps of liability:**

These can either be used as a simpler alternative to the specific exclusions in Paragraph 9.2.3 above, or as catch-all for all residual liability after those specific exclusions have applied. Financial caps have not been scrutinised to the same extent by the FSA or the OFT: however, it is important that the level of the cap is appropriate in the circumstances, as the lower the cap, the more likely the provision might be considered to be unreasonable.

The main options as to how to draft a financial cap of liability are:

(a) you can set an overall limit of £X. You should discuss the amount with the provider or broker of your own **professional indemnity** cover.

(b) the cap can be set by reference to the amount of fees paid to you by the client. This can be the fees paid under the agreement as a whole, or perhaps if you have an ongoing retainer, could be limited to any fees paid during the past twelve months. It can also be a percentage of the fees (overall or in the past 12 months) such as 50%, 150% or 200%.

9.2.6 These limitation of liability clauses are often the most likely to be challenged by a regulator as potentially unfair or unreasonable. Therefore you should consider very carefully the suitability of these clauses in your particular circumstances, and indeed for each client (or at least type of client). Remember that the more broadly a clause is drafted, the more likely it is to be found to be unreasonable by a court or by the FSA or the OFT.

10. Limiting liability: practical matters for consideration

As we have seen, limiting your liability to your clients is a complicated area, but if, having considered the risks and benefits, you wish to incorporate a **limitation of liability clause** into your terms of business, you may wish to bear in mind our top ten practical points.

10.1 Clearly set out in your **terms of business** what services you are going to provide, and **any limits to those services**, i.e. what you will and will not do. You cannot then have failed to provide services which you have said you will not do.

10.2 In your **terms of business**, clearly **describe the responsibilities** of the client. For instance, it is likely that your ability to offer sound financial advice will be dependant on the client giving you a full and honest account of their financial or business circumstances. Make it clear that you expect the client to do these things to enable you to provide a proper, professional service.

10.3 In some cases the rules and regulations apply less onerously to terms and conditions that have been individually negotiated. So, where possible, take into account any comments or proposed amendments that your client may have on your standard **terms of business**. Keep **evidence** showing this, and that the client understood and appreciated the effect of the clause.

10.4 Any terms and conditions or **terms of business** should use **plain English** and you should avoid using unnecessarily technical legal language. Avoid ambiguous language, as this will always be interpreted in favour of the client.

10.5 Review your processes when taking on a new client engagement to ensure that the client is both provided with a copy of your **terms of business**, and also signs them to indicate acceptance of your terms: **keep a copy of the signed document.**

10.6 Any **limitation of liability clause** **should be prominent** in the **terms of business**, or as a minimum no less prominent than the other clauses. The client should be advised to read and understand the clause before signing the agreement. You may want to print the **limitation of liability clause** in a larger font size or a different colour. Do not attempt to hide the clause by using small or dense text.

10.7 **Keep up-to-date with legal changes** in this area, and with updated guidance from the OFT and FSA: both have web pages dedicated to the topic (see Annex 2), and will regularly publish undertakings given by other businesses which will indicate wording that the OFT/FSA does not approve of.

10.8 Review your **professional indemnity cover to** ensure that it complies with minimum regulatory requirements, and is otherwise suitable for your needs.

10.9 **Never agree with another Broker** (expressly or tacitly) your approach to **limitation of liability** clauses, nor to use particular wording. In fact it is safer not to even discuss this except in the broadest terms.

10.10 If, having reviewed this note and the other resources referred to in the Annexes, you wish to either add a **limitation of liability clause** to your current agreement:
BIBA RECOMMENDS THAT YOU TAKE APPROPRIATE LEGAL ADVICE DUE TO THE COMPLEXITY OF THE ISSUES INVOLVED.

Annex 1 - Summary of legal and regulatory framework

Source	Summary of key rules or principles
Unfair Contract Terms Act 1977 ("UCTA")	**Application:** all clauses in your agreements that seek to exclude, limit, or restrict liability with both consumers and businesses. **Key rules:** 1. Terms seeking to exclude or limit liability for negligence or misrepresentation with consumers or businesses must satisfy the "reasonableness test" set out in UCTA or in Scotland be "fair and reasonable". 2. Terms seeking to exclude or limit liability for breach of contract with consumers must satisfy the "reasonableness test" or in Scotland be "fair and reasonable". 3. Terms seeking to exclude or limit liability in standard terms (with consumers or businesses) must also satisfy the "reasonableness test" or in Scotland be "fair and reasonable". UCTA does not set out a precise "reasonableness test" but courts usually take into account: – what information was available to both parties at the time – whether the contract was negotiated or in standard form – whether the client had the bargaining power to negotiate better terms. Scottish courts take a similar approach when considering whether a clause is "fair and reasonable". which is generally taken to mean fair and reasonable in comparison with similar suppliers. 4. Terms seeking to exclude or limit liability in relation to death or personal injury arising from your negligence will never be effective (with consumers or businesses). **Consequences of breach:** The limitation of liability is not enforceable by you. Any ambiguity in the clause will also be interpreted against you.
Unfair Terms in Consumer Contract Regulations (UTCCR)	**Application:** all terms in contracts between you and a consumer, including limitations of liability. UTCCR does not apply to: 1. Core terms which set out the commercial deal. For example what the goods or services are and what the fee is; and 2. Individually negotiated terms. **Key rules:** Contractual terms must not be "unfair" that is contrary to good faith which causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. UTCCR also imposes a general duty on you to use clear and intelligible language for any written terms provided to consumers. Any ambiguity in terms is construed in favour of the consumer. **Consequences of breach:** An unfair term is not binding on the consumer, but is on the supplier. The contact shall continue to bind the parties if it is capable of continuing in existence without the unfair term. The FSA can require undertakings to change unfair terms, which it can publish on its website. **Further guidance:** The following principles have been outlined by the OFT and FSA: 1. Do not use legal or industry jargon such as "indemnity" or "statutory rights". 2. Ordinary words should be used as far as possible in their normal sense. 3. A term that is ambiguous may be unfair. Any such ambiguity would be construed in favour of the consumer. 4. Print should be legible in both in terms of font size, background, paper quality and colour. 5. Consumers should be given the opportunity to examine all the terms. 6. Include a notice that the consumer should carefully read any terms and conditions provided.

FSA Principles for Business ("PRIN")	**Application:** all dealings with clients. **Key rules:** Principle 1: a firm must conduct its business with integrity Principle 6: a firm must pay due regard to the interests of its customers and treat them fairly Principle 7: a firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading. These overlying principles, which should be borne in mind in all your dealings with your clients, will also apply to limitations of liability. **Consequences of breach:** FSA enforcement and fines. **Further guidance:** The FSA's view is that fair contract terms are a key element in firms satisfying the principle of Treating Customers Fairly.
Insurance Conduct of Business Sourcebook ("ICOBS")	**Application:** all dealings with clients in relation to non-investment insurance contracts. **Key rules:** ICOBS 2.5.1: A firm must not seek to exclude or restrict, or rely on any exclusion or restriction of any duty or liability it may have to a customer or other policyholder unless it is reasonable to do so and the duty or liability arises other than under the regulatory system. ICOBS 2.5.2: the general law including the UTCCR also limits the scope for a firm to exclude or restrict any duty or liability to a customer. This means that regulatory obligations cannot be excluded at all. Other obligations can only be excluded or limited if it is reasonable to do so, and the exclusion or restriction is allowed under general law (including the UTCCR). **Consequences of breach:** FSA enforcement and fines.
Conduct of Business Sourcebook ("COBS")	**Application:** all dealings with clients in relation to designated investment business and long-term insurance business in relation to life policies. **Key rules:** COBS 2.1.2: A firm must not, in any communication relating to designated investment business seek to: (1) exclude or restrict; or (2) rely on any exclusion or restriction of; any duty or liability it may have to a client under the regulatory system. COBS 2.1.3: (1) In order to comply with the client's best interests rule, a firm should not, in any communication to a retail client relating to designated investment business: (a) seek to exclude or restrict; or (b) rely on any exclusion of; any duty or liability it may have to a client other than under the regulatory system, unless it is honest, fair and professional for it to do so. (2) The general law, including the UTCCR, also LIMITS THE SCOPE OF A FIRM TO EXCLUDE OR RESTRICT ANY DUTY OR LIABILITY TO A CONSUMER. This means that regulatory obligations cannot be excluded or limited at all. Other obligations can only be excluded or limited if it is honest, fair, and professional to do so, and the exclusion or limitation is allowed under general law (including the UTCCR). **Consequences of breach:** FSA enforcement and fines.

Mortgages and Home Finance: Conduct of Business Sourcebook ("MCOB")

Application:
all dealings with clients in relation to home finance activities.

Key rules:
MCOB 2.6.2: A firm must not, in any written or oral communication, seek to exclude or restrict, or to rely on any exclusion or restriction of, any duty of liability it may have to a customer under the regulatory system.

MCOB 2.6.3: A firm must not, in any written or oral communication to a customer, seek to exclude or restrict, or to rely on any exclusion or restriction of, any duty or liability not referred to in MCOB 2.6.2R unless it is reasonable to do so.

Regulatory obligations cannot be excluded at all. Other obligations can only be excluded or limited if it is reasonable to do so, and the exclusion or restriction is allowed under general law (including the UTCCR).

Consequences of breach:
FSA enforcement and fines

Unfair Contract Terms Regulatory Guide ("UNFCOG")

Application:
all your contracts with consumers.

This sets out guidance as to the application of the UTCCR to regulated firms and in particular how it will apply its powers.

UNFCOG also sets out how the FSA and OFT will separate their obligations as enforcers of the UTCCR: in general you should expect any enforcement action for breach to be taken by the FSA rather than the OFT.

Key rules:
UNFCOG 1.3.2: Terms are regarded as unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

UNFCOG 1.3.3: FSA may request a copy of the document used in dealings with consumers and information about how such documents are used.

UNFCOG 1.3.4: FSA will generally write to discuss unfairness possibly ending with an undertaking from the company to stop using an unfair term but may apply to the courts for an injunction.

UNFCOG 1.6.1: FSA can apply to the courts for restitution or redress where the breach of the FSA Rules causes loss to a consumer.

Further guidance:
FSA will consider the following points in deciding whether a term is unfair and what action to take:

1. Whether they are satisfied that the contract terms are unfair within the meaning of the UTCCR.
2. The extent and nature of the detriment to consumers resulting from the term.
3. The potential harm to the consumer which could result from the term.
4. Whether the firm has fully co-operated with the FSA in resolving their concerns about the fairness of the particular contract term.

Office of Fair Trading ("OFT") Unfair Contract Terms Guidance (Guidance for the Unfair Terms in Consumer Contracts Regulations 1999) (September 2008)

Application:
all your contracts with **consumers**.

The OFT has provided important guidance as to how the UTCCR should be interpreted.

The OFT states that in considering the fairness of a term they will consider general principles of transparency and differences in bargaining positions between the parties. The OFT will also consider how a clause could be used in practice, not only whether the terms of the clause itself are acceptable. Therefore if a limitation clause is drafted broadly such that it could be used in an unfair way it will be considered to be unfair, even if there is no intention to use that clause unfairly.

Key messages:

1. An exclusion for death and personal injury as a result of negligence will always be unfair. It will also be ineffective further to UCTA.
2. A consumer who purchases services from a business can expect those services to be carried out to a reasonable standard. This should apply to all services provided (including those that are provided free of charge).
3. A term which could (regardless of intention) serve to relieve a supplier of services of the obligation to take reasonable care in any of its dealings with consumers is particularly liable to be considered unfair.
4. The addition of drafting to the effect that "statutory rights shall be unaffected" will not render an unfair clause fair.
5. It may be acceptable to disclaim liability where the supplier is not at fault, or liability which was not foreseeable when the contract was entered into.
6. The OFT have raised concerns about clauses that seek to exclude liability for indirect and consequential loss. Under ordinary rules of law, compensation is awarded for loss that the parties could reasonably have been expected for foresee and consumers ability to claim damages should not be further limited.
7. Clauses that limit ability to claim damages with respect to an unduly short period of time may be considered to be unfair.
8. In addition it is worth noting that a clause that permits the supplier to unilaterally vary the terms and conditions (for example to vary the level of any cap on liability) is also likely to be considered unfair under UTCCR.

Financial Services Authority – Fairness of terms in consumer contracts – Statement of Good Practice (May 2005)

Application:
all your contracts with **consumers**.

Key messages:

1. Firms should take into account consumers' legitimate interests in relation to contracts over which they have had no influence but to which they will nonetheless be bound.
2. Fairness is not contrary to the prudent management of the business but part of it.
3. Dwelling on narrow technical arguments to justify a contract term that in fact may be unfair, risks future challenge.
4. The fact that a variation clause does not offend any of the terms listed in Schedule 2 of the UTCCR may not, of itself remove the risk of unfairness. Firms need to assess whether a term is fair using the UTCCR as a whole and in the context of the particular service.

The FSA also issued a "Statement regarding terms which use the phrase 'consequential loss' in general insurance contracts". The note states that the term 'consequential loss' is a technical legal term which may not be understood by the public, and as such cannot be "plain and intelligible" as required by the UTCCR. This statement has been reflected in undertakings received by the FSA in relation to the use of the phrase 'consequential loss', and its use should therefore be avoided.

Unfair Contract Terms Act 1977 ("UCTA")

Financial Services Authority
www.fsa.gov.uk/Pages/Doing/Regulated/uct/index.shtml

Office of Fair Trading
www.oft.gov.uk/advice_and_resources/small_businesses/issuing-contracts

Annex 2 - BIBA professional indemnity insurance initiative and accredited brokers

The BIBA professional indemnity insurance initiative
www.biba.org.uk/BrokersPIInitiative.aspx

The BIBA professional indemnity insurance initiative (the "BIBA PI insurance initiative") offers members help with Professional Indemnity Insurance related risk and claims management.

The BIBA PI insurance initiative aims to assist members to:

1. Obtain optimum protection for its professional liability risks.
2. Fully appreciate the risks associated with being an insurance broker.
3. Avoid breaches of regulation and claims of negligence.
4. Access specialist support in notifying, managing and negotiating complaints and claims.
5. Benefit from an effective approach to liability risk management.

The BIBA PI insurance initiative has been created in response to feedback from members and following wide consultation with stakeholders, including PI underwriters, brokers, the FSA and the FOS. BIBA is committed to supporting its members in all aspects of broker practice and compliance and welcomes your comments.

Accredited professional indemnity brokers

As part of the BIBA PI insurance initiative, BIBA has appointed three accredited brokers as providing professional indemnity cover which meets the specific requirements of brokers at competitive rates. A team of PI experts has additionally been appointed to provide members with specialist services including risk management, claims mediation and legal assistance.

Each of the accredited brokers have been selected for their proven knowledge of professional indemnity insurance and the markets available. The brokers represent both London and regional interests and, between them, a wide range of insurers representing a full cross section of the market.

There is no attempt by BIBA to promise the lowest premium and terms. This is a matter for each member to negotiate with the market but we are confident that the accredited brokers have the skill and incentive to serve BIBA members well.

The three accredited brokers are listed below.

Howden Insurance Brokers Limited
Bevis Marks House
24 Bevis Marks
London
EC3A 7JB

Tel: **020 7648 7210**
Fax: **020 7623 3807**
Email:
biba@howdengroup.com
meld@howdengroup.com
Website:
www.howdengroup.com

Lockton Companies International Limited
Lockton House
6 Bevis Marks
London, EC3A 7AF

Tel: **020 7933 2558**
Fax: **020 7933 0739**
Email:
neelay.patel@uk.lockton.com
brian.boehmer@uk.lockton.com
Website:
www.lockton.com

Towergate Partnership Limited
Suite 4B
1 Portland Street
Manchester
M1 3BE

Tel: **0844 892 1789**
Fax: **0844 892 1796**
Email:
alan.eyre@towergate.co.uk
paul.kirkham@towergate.co.uk
Website:
www.towergateprofessionalindemnity.co.uk

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Annex 3 - Glossary

Word or Phrase	Meaning
breach of contract	This is where a party to a contract fails to comply with its obligations contained in that contract. This could be by act or omission.
breach of duty	This is a breach of a duty with which a party should comply that is set out in legislation or statute.
breach of trust	This is an act (or omission) by a party, that is unauthorised, careless or self-serving in relation to a matter that has been entrusted to it. This could occur if a party does something that is not authorised (when it should have been).
direct loss	This will refer to any loss that derives directly and naturally resulting from a breach of contract – that is reasonably foreseeable losses.
indirect loss and consequential loss	There are many cases which give various nuances of meaning for these two terms. In broad terms indirect losses are losses which are not reasonably foreseeable. Consequential losses are a type of indirect loss, which are not reasonably foreseeable unless the client has drawn a particular risk to your attention. For example if the client needs insurance to cover an unusual type of event – you would not normally be liable if you failed to recommend an insurance policy which provided that cover unless the client had told you of that requirement.
injunction	A court order prohibiting a person from taking a particular action (a prohibitory injunction) or requiring them to take a particular action (a mandatory injunction).
limitation of liability clause	A clause included in terms of business that seeks to limit the extent of potential liability owed by one party to the other.
negligence	Any act or omission which falls short of a standard to be expected of "the reasonable man". There is a general requirement that a duty of care is owed, and that there is sufficient proximity between the parties for the scope of the duty to be a reasonable one in the circumstances.
professional indemnity insurance / insurers	Insurance that gives protection against legal liability for damage or compensation arising out of any neglect, error or omission committed by or on behalf of the insured in connection with their professional business, and the insurance companies that provide such insurance.
terms of business	A document used by a broker to set out the nature of the relationship with their client and describe what services the adviser will provide to the client, including any limitation of liability provisions.

Acknowledgements

BIBA would like to thank Beachcroft LLP for its assistance in putting together this publication.

Beachcroft LLP is one of the largest national commercial law firms in the UK. With more than 1,500 employees, including over 800 lawyers and 140 partners, it provides commercial legal advice and litigation services from seven UK locations – London, Birmingham, Bristol, Leeds, Manchester, Newcastle and Winchester, and Dublin. Working with both national and international organisations, excellent service delivery and in-depth insight into clients' businesses are at the heart of the firm's strategy.

Beachcroft's Financial Institutions Group provides expert legal advice focused on four major sectors of the financial services industry: general insurance, life and pensions, fund management and banking.

For further advice on any aspect of the matters raised in this note, please contact:

Emma Bate
Partner
Beachcroft LLP
100 Fetter Lane
London EC4A 1BN

Telephone: 020 7894 6740
Email: ebate@beachcroft.com

Annex 4 - About BIBA

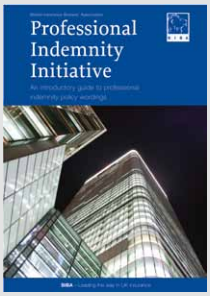
The British Insurance Brokers' Association (BIBA) is the UK's leading general insurance organisation representing the interests of insurance brokers, intermediaries and their clients.

BIBA membership includes 1,700 regulated firms. Insurance brokers distribute nearly two-thirds of all UK general insurance. In 2007, insurance brokers generated £1.5 billion of invisible earnings and they introduce £22 billion of premium income into London's insurance market each year.

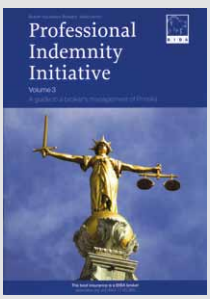
BIBA is the voice of the industry, advising members, the regulators, the Government, consumer bodies and other stakeholders on key insurance issues. BIBA provides unique schemes and facilities, technical advice, and information on regulation and business support and is helping to raise, and maintain, industry standards. BIBA works closely with the Chartered Insurance Institute to provide training to those working in the industry and actively participates in helping the industry and its clients deal with some of the major issues of the day.

BIBA members provide professional advice to businesses and consumers, playing a key role in identification, measurement, management, control and transfer of risk. They negotiate appropriate insurance protection tailored to individual needs and operate to a very high standard of customer service with the aim of ensuring peace of mind, security, financial protection and the professional advice required.

Volume 1
- The BIBA professional indemnity insurance initiative



Volume 2
- An introductory guide to professional indemnity policy wordings



Volume 3
- A guide to a broker's management of PI risks

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For information on BIBA's *professional indemnity insurance initiative*, please contact:

Graeme Trudgill,
BIBA's Technical and
Corporate Affairs Executive
020 7397 0218
trudgillg@biba.org.uk

British Insurance Brokers' Association
8th Floor
John Stow House
18 Bevis Marks
London EC3A 7JB

Find a Broker helpline: 0870 950 1790
Member helpline: 0844 77 00 266
Fax: 020 7626 9676
enquiries@biba.org.uk
www.biba.org.uk

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