

Insurance issues in contracts

Comcover Seminar

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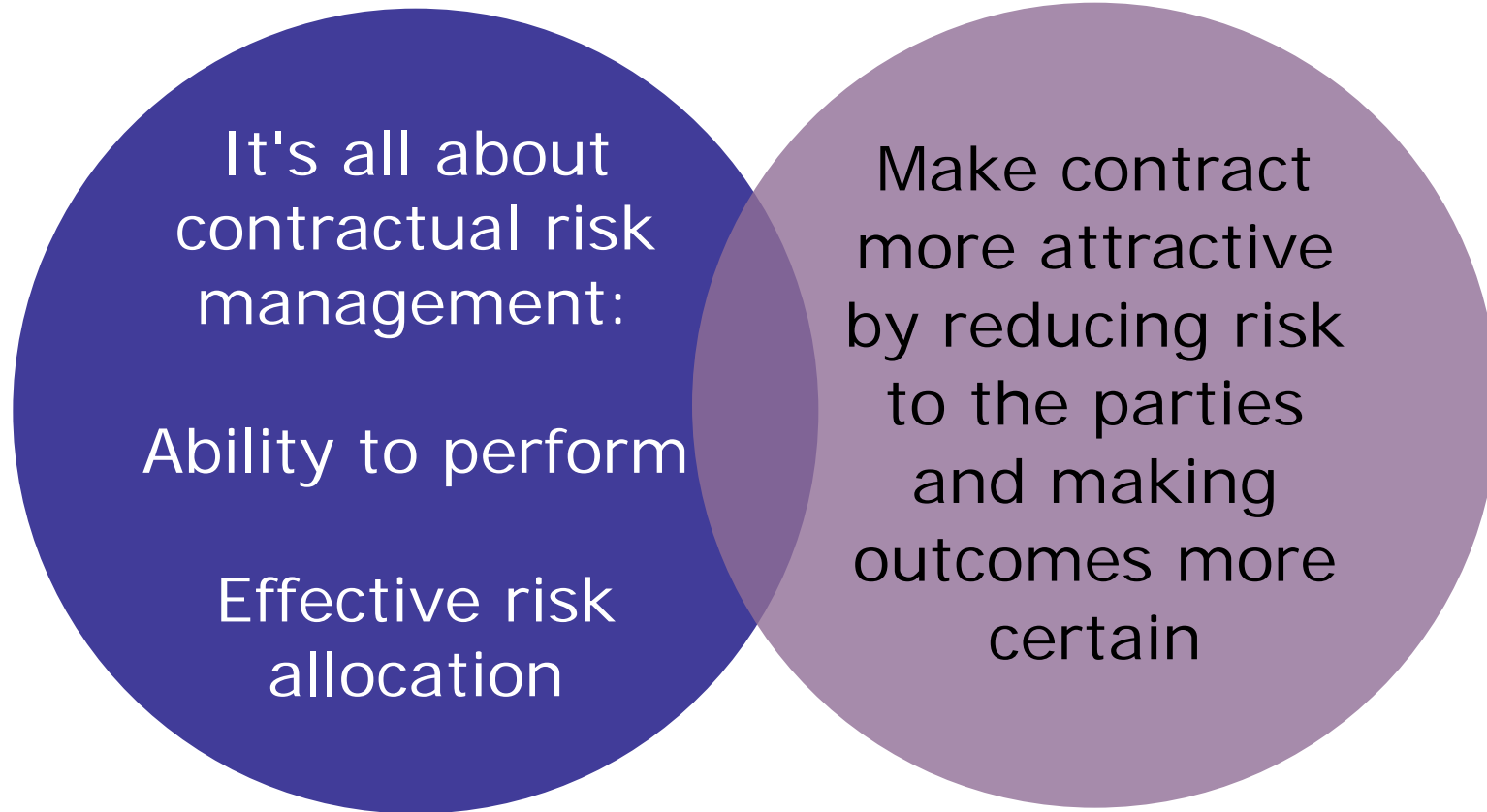
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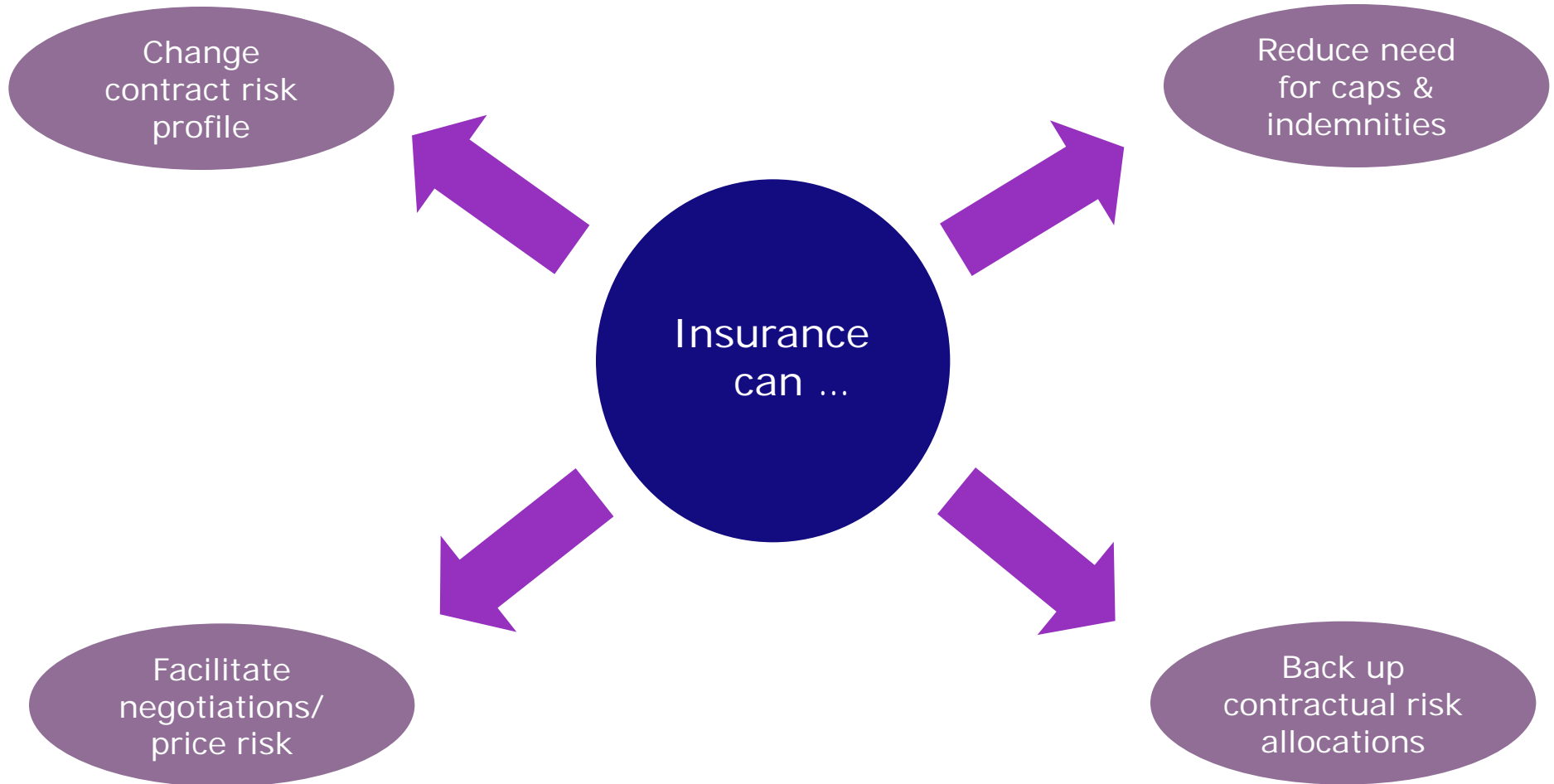
Overview

- Role of insurance
- Relationship to the rest of the contract
- Common issues
- Drafting approach
- Consider both Principal and the Contractor
- Consider both Government and Private Sector
- Ways to make it easier

Role of insurance in contracts



Functions



Why principal's require insurance

Due diligence:
Indicates
the insured
is well
managed


Part only of a
holistic
contractual risk
management
strategy

Other options



Bank or parent Guarantee or surety bond

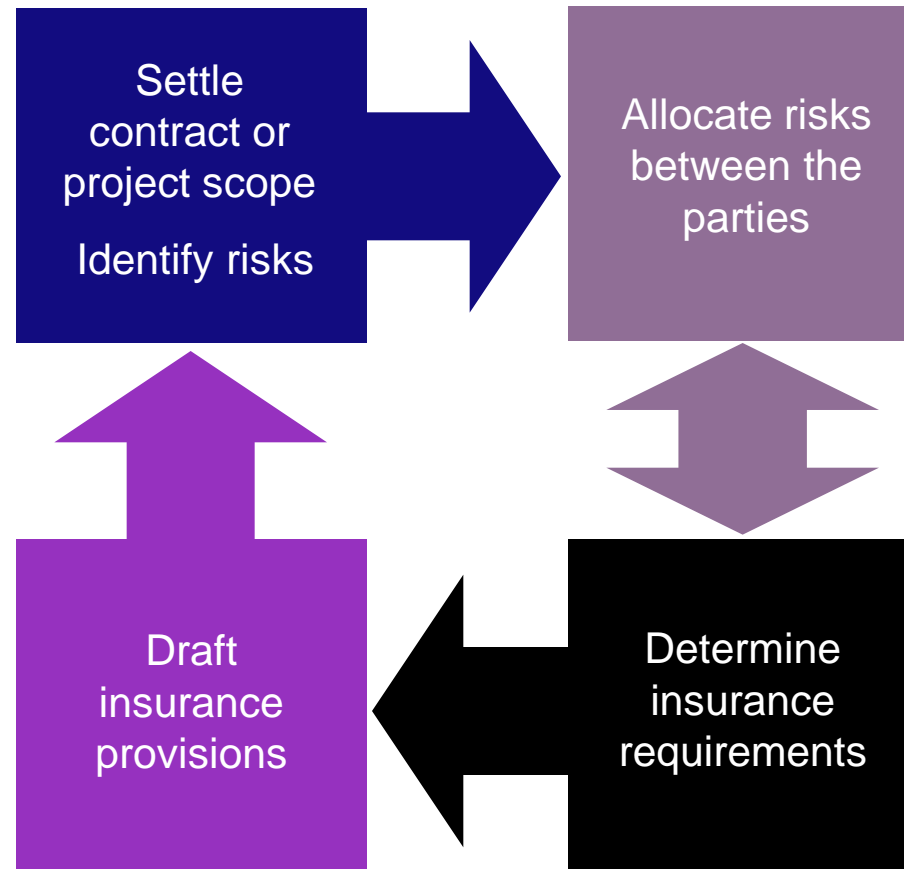
Requires default?
Usually repayable



Indemnities, releases, waivers,
hold harmless provisions

Moves risk **between** the parties
Does not bind 3rd parties
Ability to pay?

Iterative process



Insure against all risks?

- **Cannot** insure **all** risks arising under a contract, risk allocation clause or indemnity
- **Beware of contractual obligations that cannot be fulfilled!**
 - Breach of contract may give rise to rights (eg damages or termination rights)

Liabilities assumed by contract

May be excluded from cover by exclusion or waiver of subrogation eg

- higher duty of care
- proportionate liability regime excluded
- knock for knock

Party giving up rights to recover from another party may find themselves with an **uninsured (possibly uninsurable) liability**

Back to back contractual obligations ensure insurance cover for Principal, Contractor and subcontractors

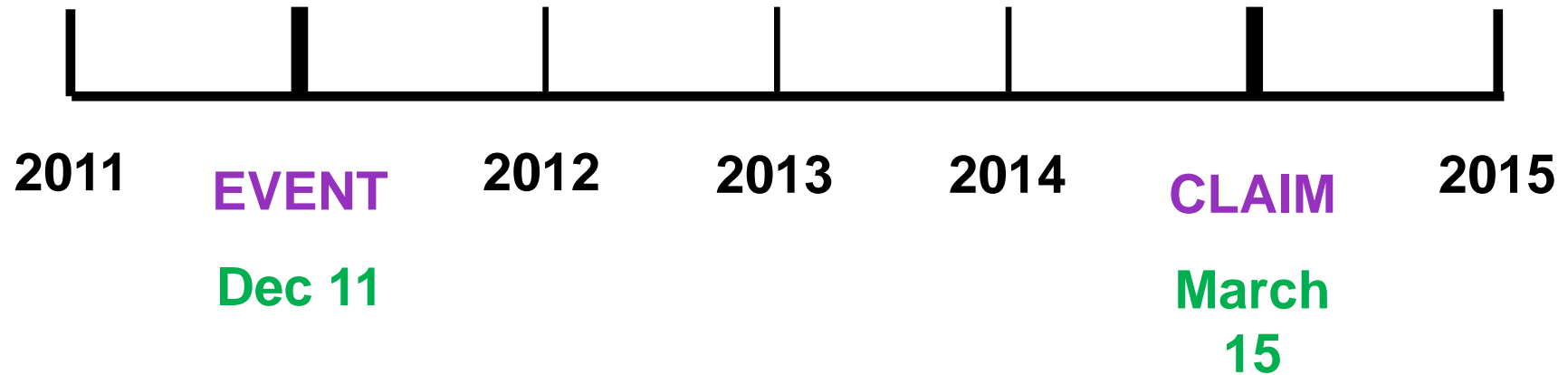
May increase risk retained by the parties to the contract



Useful definitions

- Insurance v reinsurance v retrocession
- Broker v Insurer
- Insurer v Underwriter
- Non-imputation
- Cross liability clause
- Subrogation
- Excess, deductible, self-insured retention, co-insurance
- Limit of liability
- Certificate of currency
- First Party v third party/liability insurance
- Claims made v occurrence

Period of insurance



Occurrence Policy - 2011/2012 policy year responds

Claims Made Policy - 2014/2015 policy year responds*

*Provided circumstance which gives rise to the claim was not previously known and no retroactive date

Common insurances

Property All Risks

Loss/damage to insured property.
Reinstatement/ replacement versus indemnity value?
Loss of use?
Finished works?
Surrounding property?
Plant, equipment and machinery?
Unregistered vehicles?
Insure Principal, Principal Contractor, Security Trustee, D&C Contractor, Subcontractors

Occurrence Policy.

Business Interruption

Economic loss arising from insured property loss or damage.
Increased costs of working. Loss of profit.

Insure (Principal), Principal Contractor, Security Trustee, D&C Contractor.

Occurrence Policy.

Contracts Works

Loss/damage to property under construction.
Reinstatement/ replacement versus indemnity value?
Plant, equipment?
Removal of Debris.
In land transit.
Professional fees.
Consultant's fees.

Insure Principal, Principal Contractor Security Trustee, D&C Contractor, Subcontractors

Welcar Policies

Occurrence Policy.

Advanced Consequential Loss

Economic loss due to delay in completion arising from loss or damage to insured works.
Increased costs of completion. Loss of profit. Financing costs.

Claims Preparation.

Insure Principal Contractor, Security Trustee

Occurrence Policy.

Same insurer – completed operations (ISR)

Same insurer – construction (CAR)

Common insurances

Public Liability

Third party injury and tangible property damage. Each occurrence limit. Excludes product liability, workers compensation claims. Defence costs?

Property in care, custody or control of insured?

Insure Principal contractor, D&C Contractor, Subcontractors. Principal's liability of Principal.

Occurrence Policy.

Products Liability

Third party injury and property damage caused by insured's products. Manufactured, installed, repaired, distributed, supplied etc

Limit each occurrence limit and in the aggregate.

Tangible IT products? Insure Principal, D&C Contractor, Subcontractors. Principal's liability for State.

Occurrence Policy.

Professional Indemnity/ Errors & Omissions

Liability for breach of professional duty/error or omission in judgment.

Defence costs
TPA cover.
IP infringement.
Intangible IT risks.

Economic loss.
Limit each claim and in the aggregate.

Insure D&C Contractor. Principal's liability of any Principal contractor.

Claims Made policy.
Runoff Cover.

Often combined – (PPL / Combined General Liability / Legal Liability)

Common insurances

Transit (Marine Cargo)

Risk of loss or damage during transit.

ISR cover?

Insure Principal, Principal Contractor, Security Trustee, D&C Contractor. Subcontractors?

May need to declare 3rd parties to be covered.

Occurrence policy.

Workers Compensation/ Employer Liability

Liability for injury to workers.

Statutory cover.
Common law cover.
Self insurance license?

Foreign jurisdictions?

Insure each employer.
Principal's liability?

Occurrence Policy.

Motor vehicle - CTP

CTP – Injury to persons caused by registered vehicles.

Registered owner effects policy.

Occurrence Policy.

Motor vehicle comprehensive

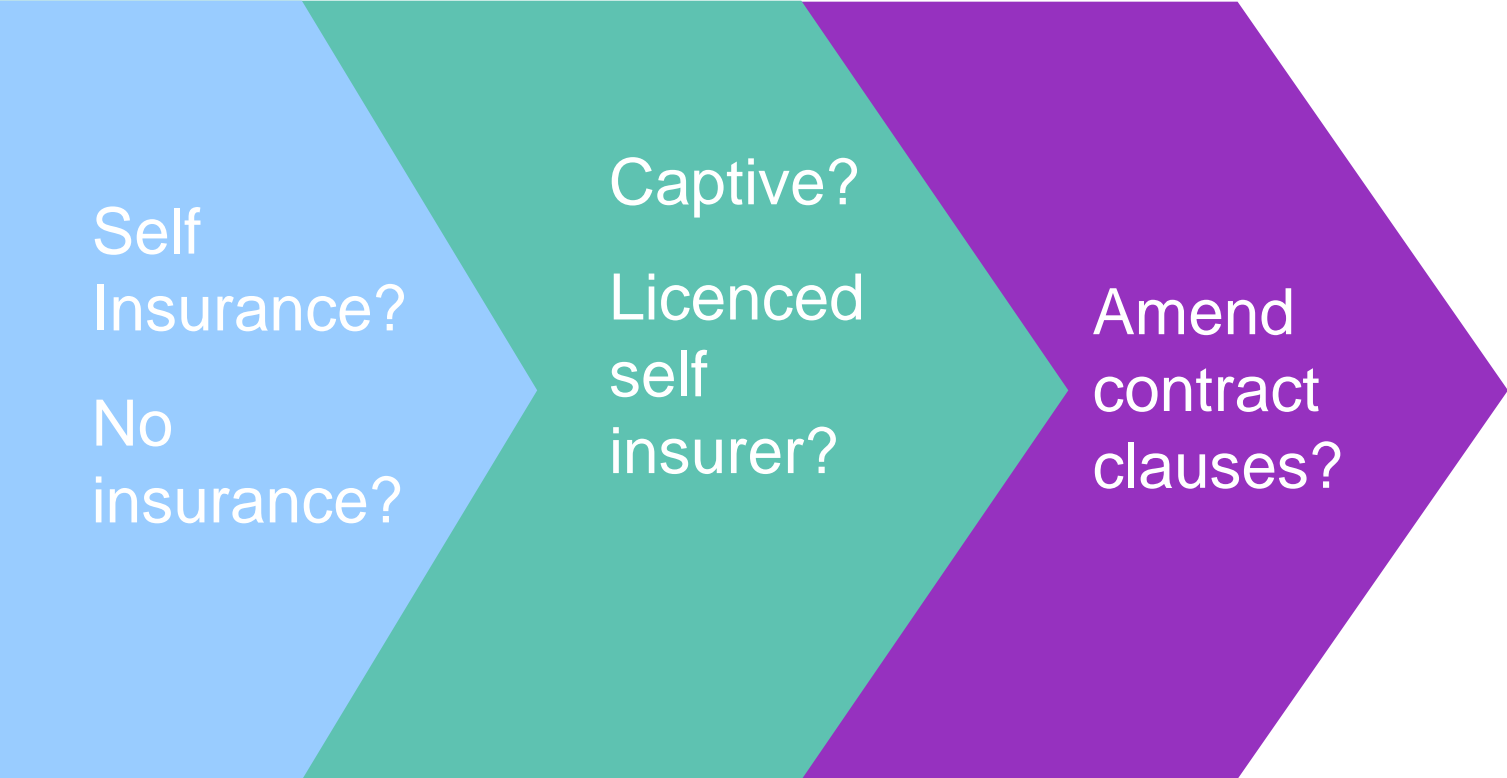
Injury to persons caused by reg'd vehicles and plant off public thoroughfares (and sometimes unreg'd vehicles. Alternatively may be under public liability).
Third party property damage or loss.
Loss of or damage to insured vehicle.
Owner, lessee, hirer is insured.

Occurrence Policy.

Other policies or extensions of cover?



Other Arrangements...



Who should effect the insurance?

The insured does not have to effect the insurance

- Consider who is best placed to effect insurance
 - Principal arranged insurance
 - Contractor effected insurance
 - Subcontractor effected insurance
- Obligation to ensure that required insurances are effected and maintained, not "to effect" insurance

Principal Arranged Insurances (PAI)

- Increasingly popular
- Policy certainty
- ACL cover easier
- Transparency of costs
- Lower costs?
- Claims control
- Ownership of insurer relationship

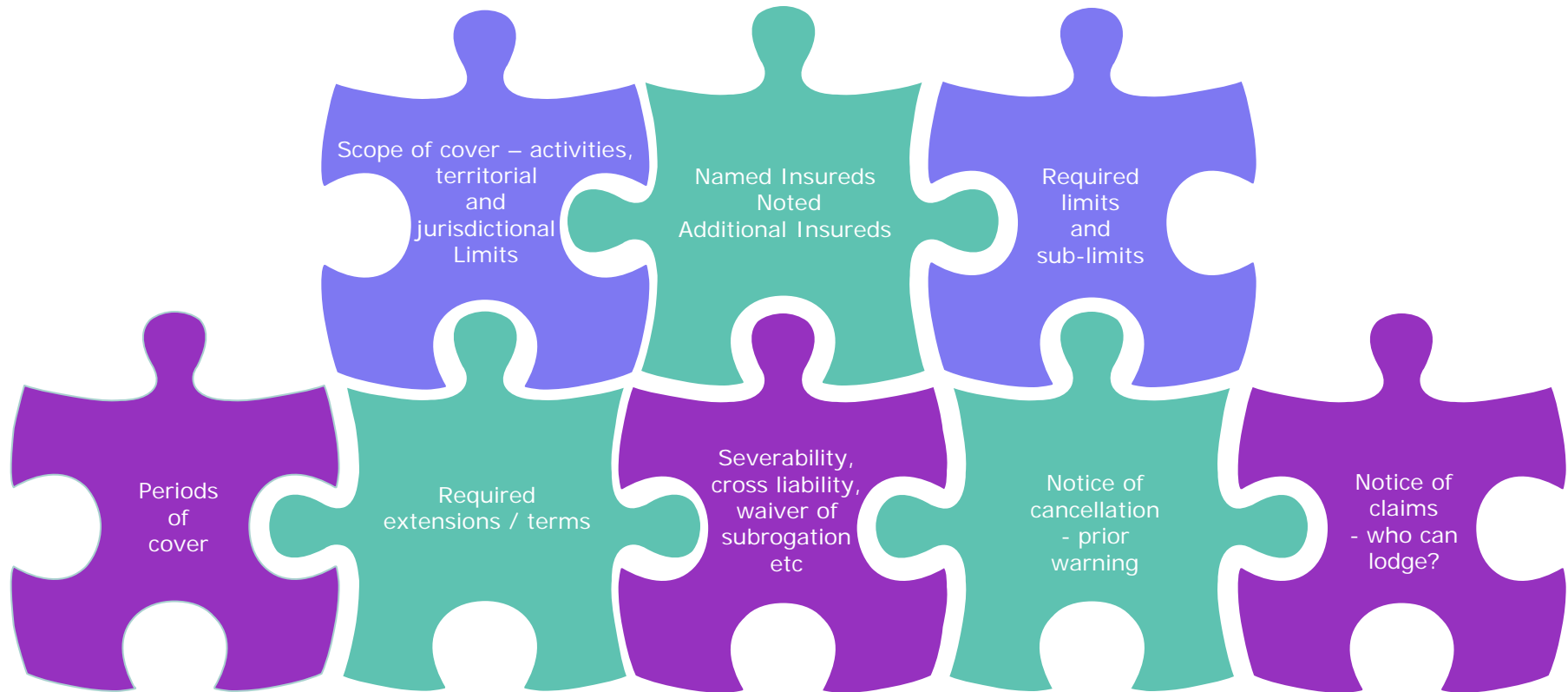
BUT:

- Cost risk
- Duty to place
- Contractor may have more bargaining power

Example:

PRINCIPAL/CUSTOMER	CONTRACTOR
<p>To effect:</p> <ul style="list-style-type: none">• Contract Works*• Public and Products Liability (on site)• Transit <p>* Defects coverage LEG 3</p>	<p>To effect:</p> <ul style="list-style-type: none">• Property (equipment)• Workers' Compensation• Motor Vehicle Liability• Professional Indemnity• Public Liability (offsite)

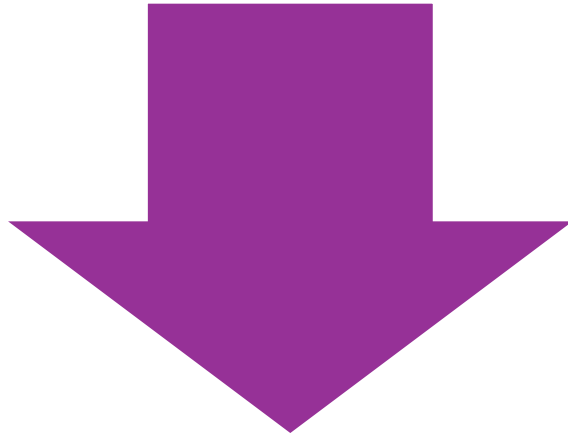
Specify policy terms



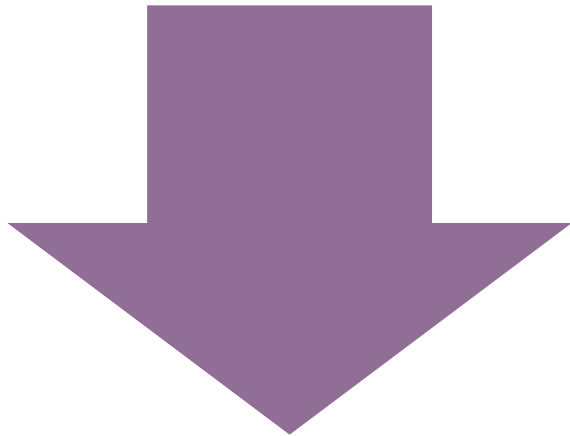
The period of insurance

- Occurrence versus Claims Made
 - Don't assume traditional basis for cover (eg public liability)
- Retroactive Date
 - May require cover for acts before contract execution (eg design)
- Run-off Cover
 - Limitations periods
 - Foreign exposures
 - Enforcement of Compliance

Example Periods of Insurance



Public (if occurrence based wording),
WC/EL, MV, ISR:
Contract Term + Defects
Liability Period



Public (if claims
made), **Products,**
PI/E&O: Contract
Term/end of services + 7-10
years or life of product

Limit of liability

- Each claim versus each occurrence/event
- Each situation or related claims
- Aggregate limits / sub-limits
 - Care, custody & control
 - Rights of reinstatement
 - Contract specific - Guaranteed limit versus cost
- Basis of settlement - Property
 - Reinstatement or replacement value
 - Indemnity value
- Average provisions - Property

Examples of Liability Limits:

- ❑ **ISR:** Full reinstatement or replacement value of plant and equipment, BI 24 months
- ❑ **CW's:** Full reinstatement or replacement value of works, ACL 12 months
- ❑ **Transit of Goods:** Full reinstatement or replacement value of goods
- ❑ **PPL:** \$50m each occurrence for Public, any one occurrence and in the aggregate for products (\$100m+ for high value contracts)
- ❑ **PI:** \$10m for any one claim and in the aggregate each policy period/one reinstatement
- ❑ **WC/EL:** As required by law, common law liability for the customary amount (\$50m WA)
- ❑ **MV:** \$20m to \$30m each and every occurrence for liability, replacement or market value for vehicles

Who should be insured?

- First party loss versus third party liability policies
- Insured
 - Policyholder
 - Named insured
 - Co-insured / joint insured
 - Additional insured
 - "Noted"
 - Insured for "respective rights and interests"
- Principal's liability cover
 - Workers compensation – in Australia: NT, Tas, WA
 - Professional indemnity – beware the insured versus insured exclusion
- Consider each parties own insurances
 - avoid unnecessary double insurance and contribution issues

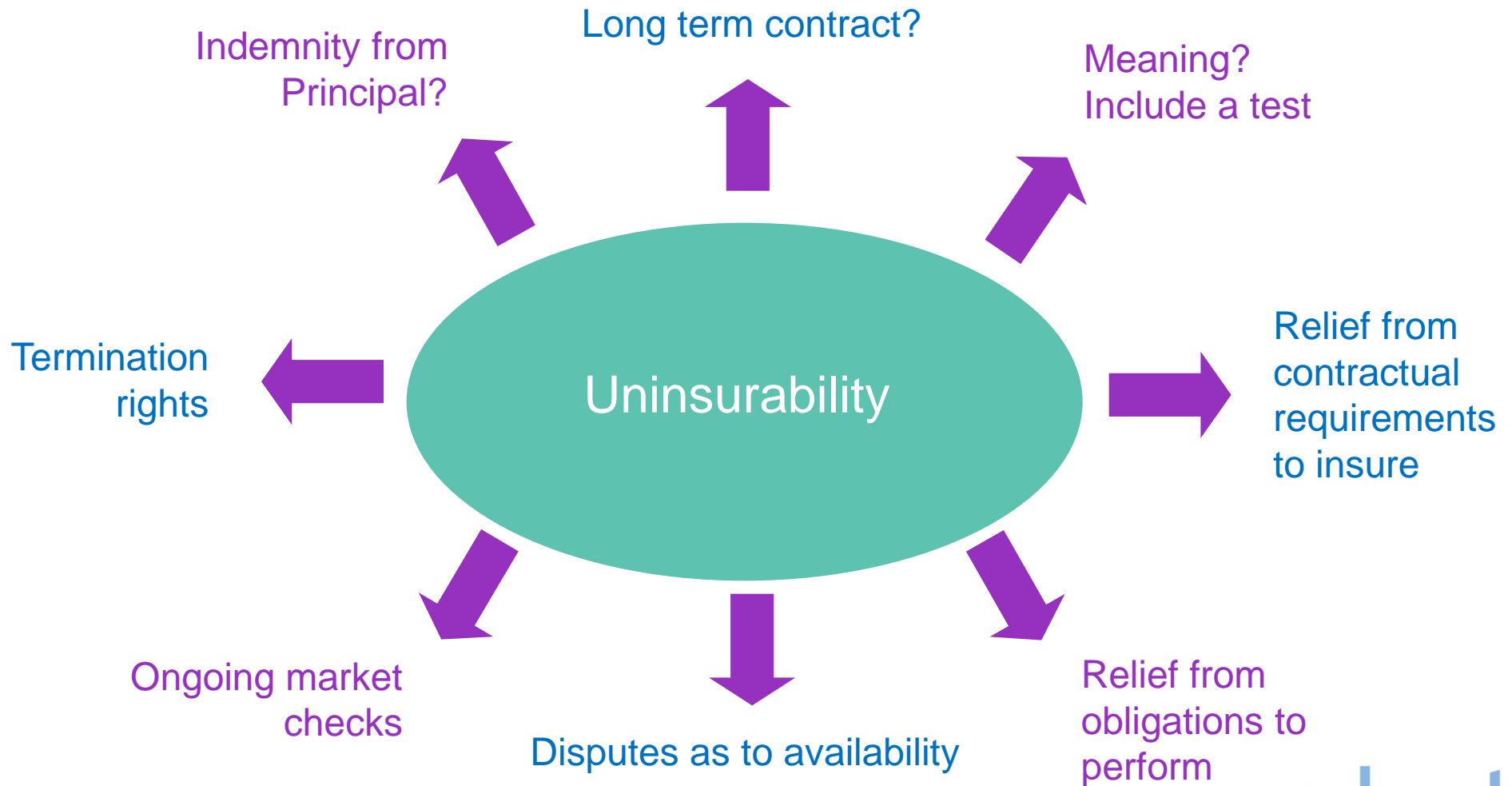
Insureds

- Loss payee
 - Paid a claim under a first party loss policy
 - Cash settlement at insurers discretion and for indemnity value only
 - May compromise ACL or BI claim
 - Security Trustees / Financiers/ Principal or Customer?
- Multiple insureds – protective clauses
 - Severability (including cross-liability)
 - Non-imputation of knowledge
 - Waiver of subrogation

Ongoing costs / mid-term changes

- Rights to review required insurances – may increase or decrease
- Changes in required levels and types of insurance
 - How determined? (Not CPI)
 - How often?
 - Who pays?

Uninsurability – what next?



Right to approve insurer & terms

- Beware **third line forcing** – right to approve insurer
- **Insurer financial security:**
 - "A-" or better (S&P, AM Best etc)
 - Regulated entity eg in Australia, APRA authorised
 - Lloyds Underwriters (Central Fund)
 - Statutory insurers
 - Captives
 - Licensed self insurer

Back to back provisions

- Ensure consistency
- Pass through obligations
- Ensure other parties comply
- Ensure the rights needed to meet obligations up the chain

Check other parties' insurances

- Principals/customers, subcontractors and suppliers

Are policies which meet the requirements of the contract actually effected?

- Review and approve insurances
 - Copy or inspection?
 - Certificates of currency second best
- Ensure required insurances are maintained
 - Diarise renewal dates
 - Require annual proof of cover for material insurances

Alternative approaches to Contractor Insurances

- Pre approval of contractors
 - eg Approved Contractor Insurance Program (ACIP) run by Defence for its largest contractors
- Floater policy effected by the principal
 - eg floater policy program run by Roads and Maritime Services In NSW) insuring all contractors in construction projects for contract works, public liability and professional indemnity

Making it easier

- Robust and commercial template clauses
- Handbooks and Guidance
- Training
- Centralised area of expertise
- Centralised checking of currency
- Be consistent in approach

A final word of caution

- Negotiate insurance provisions early
- Be alert for issues
- A role for both lawyers and brokers

Presenter:



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Rehana is a leading advisor on drafting and negotiating insurance provisions for acquisition, supply and service contracts including for construction, infrastructure, mining and resources projects.

She also advises the general and life insurance industry on regulatory compliance, establishing general and life insurance operations, reinsurance operations, distribution and agency agreements, and policy wording development and interpretation. She is also

Rehana is recognised as a leading insurance lawyers by Chambers Global 2014, Chambers Global Asia Pacific 2015, APL 500 2014, The Legal 500 2014, Best Lawyers Australia 2014, EuroMoney and the International Who's Who of Insurance & Reinsurance Lawyers 2014 (which ranked her in the top 30 insurance lawyers in the world). Rehana was rated as an Outstanding individual by Chambers Global and Chambers Asia-Pacific in 2013 and 2014, the only Australian insurance lawyer ever to attain this rating.

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