



LIABILITY CLAIMS *TAKEAWAYS*

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Welcome to the September edition of 'Liability Claims Takeaways' – our monthly insights from industry stalwarts.

A Professional Indemnity Insurance:

WHAT WAS THE CLAIM?

The Insured is a wholly-owned subsidiary of a European parent company. The Insured is in the business of data analytics and preparation of financial statements for submission to regulators. The business of the group was structured in such a manner that the European parent would receive a contract for work, which would be completely sub-contracted to the Indian Insured. Pursuant to a customer contract, the European parent entity was slammed with a suit on account of the errors identified in the report prepared for the said customer.

KEY ASPECTS TO CONSIDER:

1. Requirement to add the European parent as an additional insured in the policy availed by Indian Insured:

The claim was made by the customer against the European parent because the customer's primary contract was with the parent entity. The work, however, was done by the Indian Insured due to the subcontracting structure. Given this business arrangement, it was clear that any legal proceeding or claim that the European entity may face on account of the work done, was invariably going to be a result of an alleged or actual, error or omission of the Indian Insured. However, since the European policy did not cover the wrongful acts of Indian Insured, no claim could be brought under that policy.

The Indian Insured was able to successfully pursue the claim under its local Professional Indemnity Insurance Policy (**PI Policy**) because the European parent entity was added as an additional insured under the PI Policy. As the broker for the Indian Insured, we advised the Indian Insured to add the European entity as an additional insured in their policy which allowed for a claim against the European parent by a customer, resulting only due to an error by the Indian insured, to be picked up under the Indian PI policy.

Seeking sound advice at the time of policy placement is highly underrated and the importance thereof, needs to be recognised and implemented.

2. Policy deductible should not be disproportionate:

The Indian Insured (who earlier availed insurance without an intermediary's help) had a policy deductible of INR 10,00,000. However, given the claims trend witnessed by the Insured in the financial year, value of most claims made against the Insured was far below the INR 10,00,000 deductible. An insurer will only reimburse those costs which are above the policy deductible, which meant that all such claims automatically stood unpaid under the policy and the Insured had to bear the cost of the same. Accordingly, as the Insured's brokers, we restructured the Insured's insurance program and requested for a lower policy deductible. This of course resulted in an adjustment of the premium, but also led to more claims being paid under the insurance policy. The Insured also recognised that the adjusted premium was economically worth it, given the claims that were being covered under the policy.



B

Commercial General Liability Insurance:

WHAT WAS THE CLAIM?

The Insured is in the business of manufacturing precision screws and parts. The Insured manufactured and supplied one such lot of precision screws, as per its customer's specifications, to Denmark. However, upon delivery of shipment, the customer rejected the goods on account of the difference in the coating of the adhesive on the screws supplied and asked the Insured to have the goods sent back to India. The Insured notified the claim under its commercial general liability insurance policy (CGL Policy).

KEY ASPECTS TO CONSIDER:

1. Importance of a product guarantee, product recall, and financial loss extension in a CGL Policy:

The Insured incurred significant costs in *inter-alia* replacing the rejected goods, arranging the return of goods from its customer to the site of disposal, and also with respect to a claim of damages by the customer on the Insured due to a back-to-back monetary claim by customer's ultimate client on the customer. Therefore, the Insured's claim was divided into several parts, all falling under different and distinct extensions of product guarantee, product recall and financial loss, that were carefully included in the Insured's CGL policy.

Without these extensions, the above costs would not have found cover under the CGL Policy on a stand-alone basis. Taking appropriate advice from experienced insurance brokers helped the Insured in this case, to utilise their insurance policy effectively.

2. Freight (in an FOB contract), and GST will not be reimbursed under the policy:

Typically, in an FOB contract, the seller is free of any obligation to pay freight. It is also assumed that the buyer is incorporating the necessary cost within the overall price for the goods he supplies.

In this instance, since the contract between the Insured and their customer was on FOB, the Insured was responsible to bear the freight and it was built into their pricing. Accordingly, when the Insurer assessed their loss, and reimbursed the cost of replacement of goods, the Insured's claim for freight was not paid over and above the invoice value that the Insured had claimed as a loss.

B Commercial General Liability Insurance:

Similarly, GST for which the Insured was already taking input credit, was also deducted from the overall sum payable under the policy, because including it in the reimbursed value would have resulted in the Insured making profit through insurance, which contradicts the intention of insurance.

3. Efficient survey and salvage disposal process:

Once the defective goods were received by the Insured, they served no purpose, and were destined to be sold as scrap. Given the COVID restrictions, an onsite survey was not possible anytime soon and the storage cost of the goods was adding up for the Insured. Accordingly, the surveyor, Insurer, insurance broker, and Insured discussed the matter and an online survey was arranged. The Insured also provided full support by submitting all necessary documents for the surveyor's perusal, including, but not limited to comparative quotes for salvage purchase, details relating to the quantity of the goods, the quality, the purpose for selling the goods, reasons for reduced value of the goods, utility description, etc. Basis the quotes, parties agreed to the sale value of the salvage upfront. This allowed the Insured to sell the goods, receive money, and also save on storage costs. Timely discussion, advise, and experienced approach in this case, left the Insured with a positive experience.

C Employment Practice Liability Insurance:

WHAT WAS THE CLAIM?

The Insured was the Indian branch office of a foreign company. The employees of the company filed a case in India against the directors and officers of the foreign company and impleaded the branch office in the said proceedings. The Insured had a local directors and officers policy along with an employment practice liability extension, which covered the Indian branch office as the Insured. A claim was notified under the said insurance policy.

KEY ASPECTS TO CONSIDER:

1. **Branch Office coverage:**

Under the extant Indian law, a branch office is not considered to be a legal entity in itself. Therefore, employees are usually employed by the host company. In the instant claim, the employees filed an action against the branch office as well as officers who worked at the Indian branch but were employed by the foreign entity.

Given that the officers were not employed with the Indian branch, a claim against such officers in India did not find cover under the said policy. When structuring such policies, care needs to be taken to understand the typical nature of claims the organisation faces and whether such claims will find cover vis-à-vis the manner in which the policy is worded.

In this case, the claim against the employees was then notified under the policy availed by the host entity.

2. **Standard retainerships without basis for charge, are not considered reasonable:**

The Insured had a host of empaneled legal counsel, one among whom were engaged by them for this matter. At the time of intimating and handling the claim, the Insured submitted the lawyer's retainerhip agreement to the Insurer, which was questioned by the Insurer. A typical retainerhip arrangement results in a minimum guaranteed fee to the service provider irrespective of the work done.

A liability policy assumes that the Insured will only incur reasonable and necessary costs in relation to a claim. A mandatory retainerhip conflicts with this requirement. Upon review of the engagement terms, we advised the Insured that for handling and representing the Insured in this claim, the lawyers be engaged on the basis of work done and fee be charged per stage of work, in consultation with the Insurer. As the Insured's brokers, we read through all the documents exchanged and were able to help the Insured in successfully implementing an alternate arrangement with their lawyers, which was to the Insurer's satisfaction. We also convinced the Insurer about the advantages of appointing empaneled lawyers, *inter-alia* time and cost efficiency and avoidance of duplication.



We are sure you found the anecdotes interesting and got some key points to take away.

Stay tuned for the next edition!

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- Arranging the most cost-effective cover from Indian and international markets
- Ensuring contract compliance for your insurable indemnities
- Offering 360° claims management by the largest claims team across any broker in India
- Providing global solutions through the strongest international alliances

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