SPEAKMAN LAW

Indemnities – What to look for?...

A standard form indemnity will extend to "any liability, loss, costs or expenses incurred as a result of or in connection with any breach of this contract by, or the negligence of, the supplier, or any breach of a law by the supplier".

Commonly, such indemnity is unlimited in the sense that a claim may be brought at any time and for any amount.

Where an indemnity gets tricky (for the person giving it) is where the wording includes "any indirect, incidental or consequential losses, or damages, including without limitation, damages suffered due to loss of profits, loss of customers or clients, loss of business or goodwill" (or similar wording).

An indemnity of this type is awfully open-ended for the person giving it and should be avoided if at all possible – particularly regarding exposure to damages based on loss of profits. Likewise exposure to consequential losses should be avoided; these could include downstream losses suffered by your customer under any open ended indemnity that your customer may have given in the course of its business.

If the circumstances of your bargain leave you no choice but to accept this wording (ie the customer requires you to lump it), there are three things you could try and do:

1. Seek a limitation in amount, to "the invoiced price for the supplier's products with respect to which damages are claimed" (or similar), or to a fixed dollar amount. Or impose a timeframe of perhaps 12 to 18 months, within which a claim may be brought;

2. Obtain specific insurance for indemnity exposures; or

3. Establish a separate subsidiary company for this contract (and like ones) so that any exposure arising from it is ring fenced.