ITIC
SPECIALIST PROFESSIONAL INDEMNITY INSURANCE

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# Claims Review

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ITIC IS MANAGED BY **THOMAS MILLER**

**Welcome to the Spring edition of ITIC's Claims Review. The Claims Review provides a selection of cases recently handled by ITIC. We hope that these case histories will be of interest to members and will also help them to identify potential problems in order to avoid these types of situations occurring.**

**We have also introduced an "ask the editor" section, so we look forward to receiving your claims related queries and answering these in future editions. Please send any questions that you may have to askeditorCR@thomasmiller.com**

**The Editor**

# Lumbering payments

**A port agent was owed US$ 190,000 by a lumber company, the consignee of a cargo of lumber, in respect of both storage and demurrage charges.**

The port had invoiced the agent directly for these charges and in turn the port agent passed the charges to the lumber company for reimbursement. However, despite requesting payment on several occasions nothing was received.

ITIC contacted the lumber company on the agent's behalf and also received no response. As a result lawyers were appointed to pursue matters further. A demand letter was sent advising that further action would be taken if no payment or response was received.

The lumber company appointed counsel to represent them and indicated that they wanted to settle the claim amicably. Their issue was that they had not been put on notice by the agent of the significant increase in the port's costs. However, the agent advised that they had passed on information regarding the increase, but that the lumber company had not responded. In any event, these costs were set by the port, not the agent, and the tariff was public knowledge. Ultimately, it was for the company using the port to check these costs.

A court ordered conference took place and the judge advised that if a settlement wasn't forthcoming then the matter would be set down for mediation.

A number of months later, a settlement offer of US$ 60,000 was received. This was rejected and the matter proceeded to mediation where it was eventually settled for US$ 160,000.

**The legal fees covered by ITIC were US$ 11,800.**


# Trading places

During the course of fixing a ship, the owner's commercial manager provided a warranty to the potential charterer that the ship had not traded to Sudan in the past three years. However, the commercial manager had not properly checked the ship's past trading and they missed the fact that it had traded to Sudan during the relevant three year period.

The charterers made a claim against the owners, alleging they had lost business as a result of the ship being rejected by potential receivers. Their claim was for almost US$ 500,000. In turn, the owner looked to recover this from the commercial manager.

**Ultimately, a settlement of US$ 200,000 was agreed with the charterer. ITIC covered the settlement.**

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"During the rail transit, the shipper requested that the consignee and notify party both be changed."

# One cargo, two owners

**Prior to a cargo arriving the local agent received an enquiry from the shipper asking whether the original consignee on the bill of lading could be changed. The agent advised that as long as all the parties were in agreement, it could be done.**

The cargo arrived and a notice of arrival was sent to the original consignee. Meanwhile the shipper requested that the cargo be placed on hold in the terminal. This was arranged.

Eventually the cargo was customs cleared by the original consignee and they requested that the cargo be released to them. However, the agent advised that the shipper had placed a hold on the cargo and they were unable to recover it. Eventually, the shipper advised that the hold could be released. As a result the container was sent by rail to the original consignee.

During the rail transit, the shipper requested that the consignee and notify party both be changed. Again, a hold was placed on the container when it arrived at the rail depot. The agent was then advised that the original bill of lading had been surrendered at the load port.

The new consignee was given an arrival notice for the cargo, but the original consignee had already collected the container. The agent advised that the confusion occurred due to receiving conflicting e-mails from different parties.

The agent contacted the original consignee and the original notify party to request the return of the cargo so it could be delivered to the new consignee as per the shipper's request. However, the original consignee claimed that they had already paid for the goods and refused to return the container.

The shipper made a claim against the carrier for US$ 250,000 in respect of wrongful delivery of their cargo (although customs valued the cargo at only US$ 125,000). **A negotiated settlement was achieved with the shipper in the sum of US$ 36,000, which was reimbursed by ITIC.**

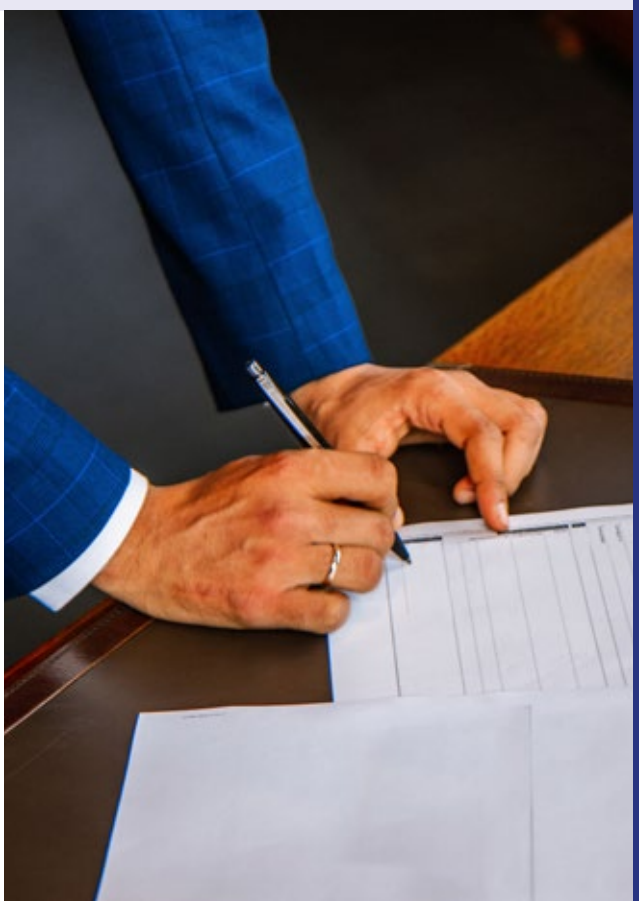
## Pretend payments

The employee of a ship agent created false payment documents in respect of a genuine supplier to the agent. The employee provided all the necessary (false) documentation (including falsified operational approvals) before passing it onto accounting for payment.

The accounting department checked the documentation and as it all appeared to be in order, the payment was approved and made.

After the payment was made, the employee would perform a reverse entry cancelling the supplier's account payable and then hack into the system to modify the reports so it would look as if the transactions had never occurred. It was only when external auditors checked the accounts and could not verify them with the transactions that the employee's fraud came to light.

As a result, the agent has put stronger systems and controls in place. The employee was sacked and faced criminal charges. **The claim was settled for US$ 170,000 (including legal fees and expenses), for which the agent was reimbursed by ITIC.**



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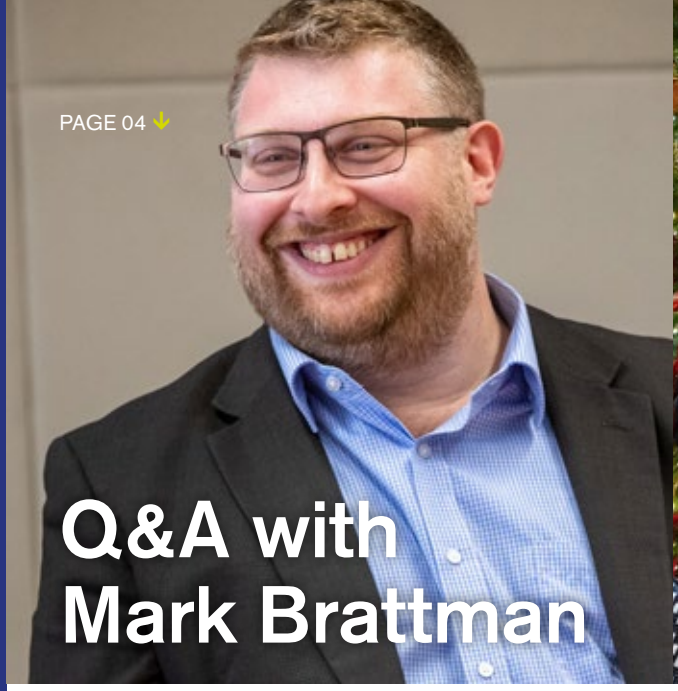


# Q&A with Mark Brattman

**The first in a regular series, we get to know ITIC's claims handlers. In this interview, ITIC's Legal Advisor and the new Editor of the Claims Review, Mark Brattman, outlines the most memorable claim he has handled and why not always having a pound coin in your pocket can prove to be very annoying!**

**How long have you worked at ITIC?**
15 years. Prior to joining ITIC I worked in private practice at a law firm that specialised in aviation insurance claims.

**What is the biggest challenge when it comes to claims?**
It's not necessarily the biggest challenge as each individual claim has its own specific challenges, but generally being trained as a lawyer, I have to remind myself to look at claims commercially, and not just focus on a strict legal view.

**What is the most memorable claim you have handled?**
There have been many memorable claims over the years. The three most memorable are:

The largest claim; This was a claim of GBP 60m made directly against ITIC, following the insolvency of our member. We managed to successfully defend this claim at an arbitration.

My first ever ITIC claim; This was supposed to be a simple introduction to the job. However, the day before the court hearing, I realised that the member no longer existed! As you can imagine, this caused quite a bit of panic. The member had been paying an agent to maintain them on the company register. However, instead the agent had been pocketing the fees for themselves and as a result the member had been struck off the register a number of years beforehand. Unfortunately, this meant the claimant's claim was against nobody and the member's solicitor was on the hook for all of the costs. Luckily, on the steps of the court, we were able to negotiate a settlement which kept all parties happy.

The oddest: A surveyor member had undertaken a survey of a canal barge. They had not inspected underneath the carpets where the wood had been rotting. The report clearly stated that the surveyor had not lifted the carpets and inspected underneath them. The claimant then advised that the smell was so overpowering there was no way a competent surveyor could miss it. To this the surveyor advised that he had lost his sense of smell in a fight when he was 15 years old.

**What is your favourite saying?**
"Never hate your enemies – it clouds your judgement" – Mario Puzo from the Godfather.

**What are your hobbies and favourite pastimes?**
Following Tottenham Hotspur – it's not for the weak of heart. I have also started attending the gym in an effort to get a bit fitter.

**What is your favourite food?**
This is difficult as I like most foods, but probably a good fillet steak.

**What is your favourite film?**
Serious film; The Godfather. Fun film; Back to The Future.

**What is the last book you read or music you downloaded?**
The last book I read was "Down and out in London and Paris" by George Orwell. A real eye opener. I mainly stream Spotify these days. It was probably a random classic rock play list whilst on the treadmill.

**Any pet hates?**
Needing a pound coin for a supermarket trolley and not having one.

**What is your favourite place in the world?**
I have recently just come back from Disney World in Florida. That is certainly the happiest (and costliest) place on earth. I love it there because my children love it there!

**If you weren't working at ITIC, what would you be doing?**
I always thought I'd have made a good advertising executive. Although that might be influenced by having watched too many episodes of "Mad Men".

## Making a fishmeal of it

A chartering broker described the ship's four previous loads as being "grain". On this basis, the charterers confirmed the fixture with the owners. However, the last cargo was actually fishmeal, and this would not have been acceptable. Therefore the ship was not suitable and had to be cancelled.

There was a EUR 5,000 fee to do so, which the charterer claimed back from the broker. They alleged the broker had been negligent in telling them the last four previous loads had all been grain, when actually they were; grain, grain, grain and fishmeal. The broker had made an error and simply had not noticed the most recent cargo had been fishmeal.

**The claim of EUR 5,000 was settled by ITIC.**

"The yard threatened to commence proceedings in the USA. However, ITIC believed that English law and jurisdiction should apply."

# Taking on water

**A UK based naval architect was appointed by a shipyard in the USA to design a vessel, of which more than one was due to be built.**

One of the vessels suffered an incident in bad weather. The vessel took on water and eventually sank. It was recovered and repaired by the yard. The repairs cost US$ 150,000. The yard then tried to recover these costs from the naval architect, alleging that they had not been advised of the down flooding points and that was why the vessel took on water. The claim was rejected.

As is usual, the vessel was designed with various openings in the hull. These openings could be used for many reasons, for example, plumbing pipes or exhaust pipes. The naval architect would not know which was the down flooding point until after the yard had built the vessel and attached the relevant piping. The contract called for the naval architect to provide a drawing showing the down flooding points on an "as built" basis. This meant this could not have been undertaken until after the vessel had been built. The naval architect had not been asked to view the vessel after it was built for the purpose of providing this "as built" drawing.

The incident was caused when the pipe attached to one of the hull openings came away at the fastening because the yard had used a very weak material. Their argument was that if they had known this opening was a critical flooding point, they would have made the fastening much stronger.

The response to this argument was (a) the naval architect would not have known what material the yard would use until they had already built the vessel (b) the naval architect would not know which pipes were where and how they had been connected until after the vessel was built and finally (c) there were ISO rules in place that governed such fastenings, and this particular fastening was in breach of those rules.

The yard threatened to commence proceedings in the USA. However, ITIC believed that English law and jurisdiction should apply. In order to avoid proceedings, which would have included a dispute over jurisdiction, taking into account that there was a small litigation risk and that costs are unrecoverable in the USA, **the matter was settled by ITIC on a costs of defence basis for US $40,000.**

# Gift of the grabs

**A ship manager was appointed as a new building supervisor by an owner in respect of two ships they had under construction in a Chinese yard with the intention that they would become the managers of both ships upon delivery. Unfortunately, the owner filed for insolvency before either of the ships were delivered.**

A claim against the ship manager was brought by the supplier of two grabs which had been purchased for the ships. The ship manager was under the impression they had ordered the grabs as an agent on behalf of the owner, whereas the supplier claimed that the grabs were ordered directly by the ship manager in their own name. The price of the grabs was US$ 710,000. The supplier claimed the price, plus interest and costs to which they believed they were entitled.

Lawyers believed the ship manager had made their position clear, but even if they had not expressly stated that they were the agents of the owner, the underlying circumstances were clear to all parties. On this basis it was decided that the supplier's claim should be defended, but if a sensible settlement could be achieved, this should be considered.

Meanwhile, the grabs themselves remained on the two ships. Chinese legal advice was that the yard would have acquired good title to the grabs when their contract with the owner was terminated following their insolvency. To further complicate the issue, the yard itself filed for insolvency. The bottom line was that the neither the supplier nor the ship manager would be able to recover the grabs.

Eventually, the matter was heard at an oral hearing which appeared to go well for the ship manager. The court even assessed the matter as 60/40 in their favour. However, when the judgment was handed down a few months later, the court found fully in favour of supplier. They stated the ship manager had not sufficiently shown that the relevant order confirmations were made in the name of, or on behalf of, the owner. The total judgment against the ship manager was approximately US$ 900,000.

The matter was appealed and upon the filing of the appeal, the supplier offered to settle for US$ 500,000.

**This was rejected, but eventually a settlement of US$ 420,000 was agreed between the parties. ITIC covered this settlement and also paid the legal fees of US$ 70,000.**

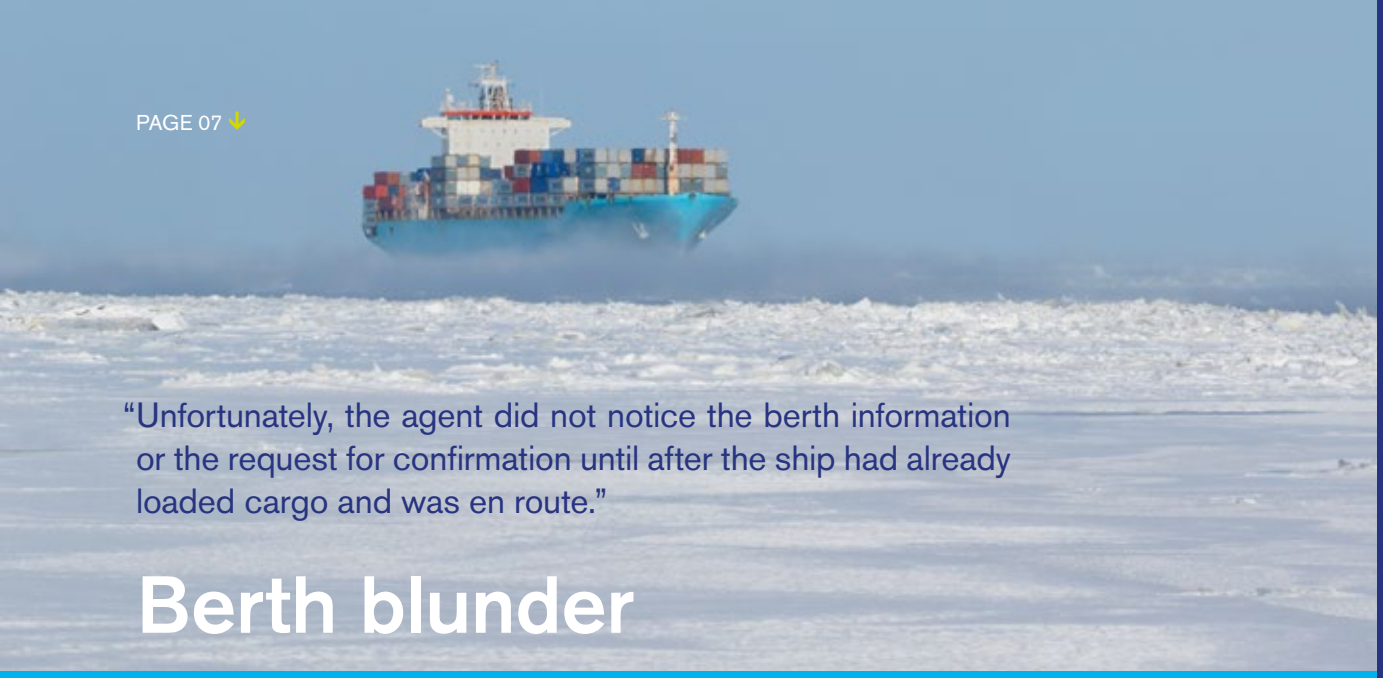
## Error in drafting re-cap

When reaching the final stages of a negotiation for the charter of a ship trading from the Black Sea to Spain, a ship broker applied laytime provisions which had recently been used in a previous fixture where NOR was tendered in China.

The Chinese provisions allowed for NOR to be tendered up to 2359 on the day of arrival. However, in Spain, it is usual practice for NOR to be tendered only up to 1700 and then again from 0800 the next day.

The ship arrived at 2155 on a Friday, but could not berth until 2000 on the following Monday. Owners attempted to tender NOR at 2155 on Friday upon their arrival. Both parties agreed that Saturday and Sunday were excluded from laytime calculations, even if used. However, the owners argued that the laytime clock started running upon tendering of NOR at 2155 until 2359 on the Friday and then continued again from Monday 0000. However, charterers argued that time did not start running until 0800 on the Monday as that was the first time owners could officially tender NOR. This was roughly a ten hour difference.

This issue led to a dispute over the amount of demurrage that was due to the owners. There was a difference of just over US$ 50,000 between owners and charterers positions. Eventually a tripartite agreement, between owners, charterers and the ship broker was concluded in which each party contributed a third towards the disputed amount. The ship broker therefore paid an additional US$ 17,000 to owners (as did charterers) to resolve the matter. **The ship broker's share of the agreement was covered under their policy with ITIC.**





"Unfortunately, the agent did not notice the berth information or the request for confirmation until after the ship had already loaded cargo and was en route."

# Berth blunder

**A ship was being fixed to transport a cargo of caustic soda.**

During the negotiations, the ship owner contacted the local port agent to enquire as to the restrictions, if any, at the port. There were two berths at the port, A and B. As A was the more popular berth, the agent only provided information in respect of this berth. However, the agent was unaware that caustic soda could not be discharged. Furthermore, there was a draft restriction in place at that berth B of 6.3m but the agent failed to mention it.

Despite only being given the details for berth A, the ship was fixed to discharge at berth B, as this is where the charterer always discharged their cargo. The ship owner then officially nominated the agent for the call.

The nomination advised that the ship would be berthing at "berth B" and asked the agent to confirm that there were no draft restrictions.

Unfortunately, the agent did not notice the berth information or the request for confirmation until after the ship had already loaded cargo and was en route.

When the ship arrived, she could not enter the berth as her draft was too deep. It was agreed that the berth would have to be dredged by the Port. This was carried out and completed four days later. The Port then advised that a survey would need to be carried out to make sure the dredging had been successful. There was a further delay as the Port's survey vessel had broken down. Eventually the survey was completed and the result showed that there was more than sufficient draft. The ship finally berthed and discharged cargo nine days after arriving. The ship was off hire for those nine days. The ship owner held the agent liable for the loss they suffered.

It was clear the agent would be held responsible for this loss because if the ship owner had been informed of the berth restrictions, they would have been able to use a smaller ship or load less cargo.

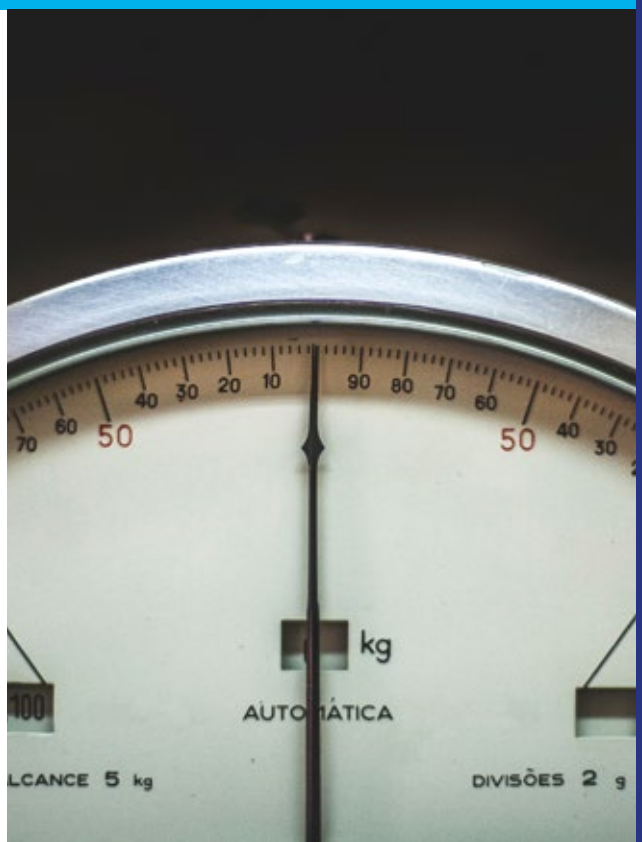
**Therefore, the matter was settled for a sum in respect of the nine day off hire period. This was EUR 110,000. ITIC covered this settlement.**

## Weight watching

A ship agent manifested cargo incorrectly due to converting the weight into the wrong unit of measurement. The agent converted kilograms into metric tons instead of imperial tonnes as required by local customs regulations. The weight was 21,898,594 Kgs and the agent simply divided that number by 1000 to arrive at 21,898.594 metric tons. They then filled in the imperial tonnes box with this figure. However, the correct weight in imperial tonnes should have been 21,551.73.

The ship agent tried to obtain a permit from the local customs authority to correct the manifest as otherwise it would not have been possible to unload the cargo at the designated port of discharge.

Due to a public holiday there was a delay in receiving a response from the authorities to make the corrections. Eventually, the permit was granted but the delay meant extra time was spent in the port. **The agent was held liable for these additional costs which were in excess of US$ 40,000, which was reimbursed by ITIC.**



# Coronavirus fraud alert

**ITIC has been receiving an increasing number of reports of fraudulent invoices being submitted to vessel owners and managers for medical testing services following the outbreak of the coronavirus.**

For the shipping industry, the impact of the coronavirus is still largely unknown but a number of countries, ports and organisations have implemented preventative measures to minimise the impact of the outbreak.

With more than 170,000 people infected worldwide, and sadly more than 6,000 people losing their life to the virus, providing medical tests to seafarers is one measure that is being widely adopted by owners and managers.

ITIC has noted that fraudulent invoices often contain errors which can be easily detected by those responsible for settling disbursement accounts. For example, a recent case involved an invoice where the vessel was listed with an incorrect flag. By simply checking with the vessel's master it was quickly confirmed that the invoice was fraudulent.

**Members responsible for settling disbursement accounts, especially ship managers are urged to be vigilant.**

## Ask the Editor

If you have any claims related questions or queries please let us know on **askeditorCR@thomasmiller.com** and we will do our best to answer them in the next edition.

One question we are often asked is **"when should I report a claim to ITIC?"**.

The answer is as soon as possible. Please remember that what may be a difficult or stressful situation for you is probably a circumstance ITIC has seen many times before. We are here to help and it is always better to be safe than sorry. Remember, notifying us of any possible claim will not affect your claims record, unless we have to incur costs. There is also an obligation under Rule 14.1 to inform us promptly in respect of any claims made against you and immediately on becoming aware of any circumstances which are likely to give rise to a claim under the insurance. We have produced an e-learning seminar about reporting claims which you may find helpful. You can find it here: **https://www.itic-insure.com/knowledge/e-learning/reporting-and-handling-a-claim/**

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