

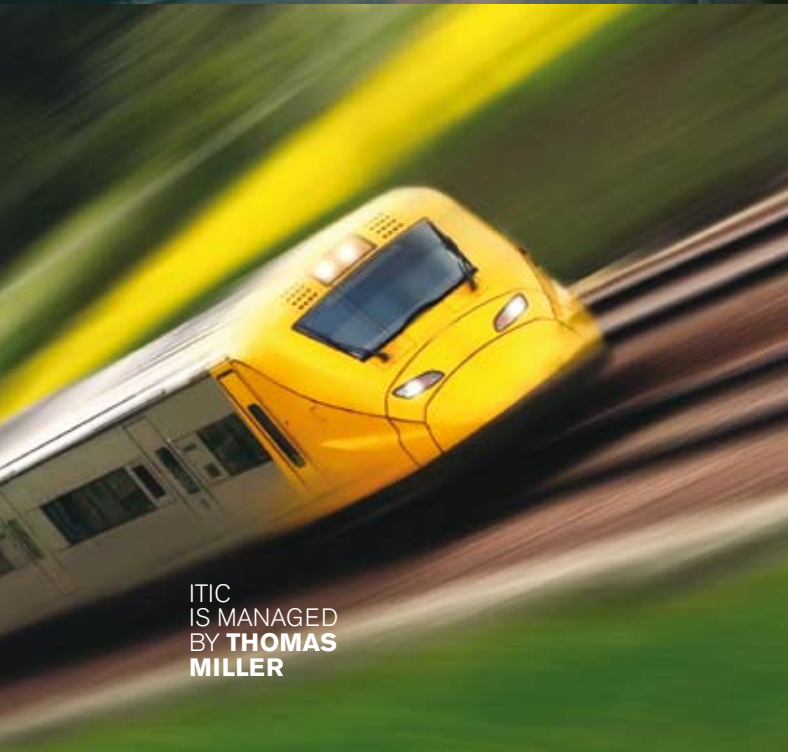


THE
PROFESSIONAL
INSURER



ITIC Forum 2008

Reporting and Managing a Claim



ITIC
IS MANAGED
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Reporting and Managing a Claim

1 Inform us immediately

You must inform ITIC as soon as you receive a claim or become aware of circumstances which might lead to one. It is a requirement of your insurance to do so. The early reporting of claims saves you time, trouble and costs. Remember, whatever the circumstances, we have probably seen something similar before.

2 Do not admit liability

You must not make an admission of liability or settle any claim without ITIC's approval. Even an apology to your client could be considered an admission of liability. All liability insurances contain a provision prohibiting you from admitting liability. An admission may remove all prospects of a negotiated settlement and the claim amount can increase significantly as a result. At the same time, you could prejudice your right to recover from ITIC.

We do not expect you to offend your client by rejecting liability when you are clearly at fault. It should be enough to provide a simple acknowledgement of the claim, confirmation that you have passed it to ITIC and that you cannot comment further. In fact, this will be in the claimant's best interest, as you may not be covered if you admit liability.

3 Prepare the claim

The better presented the claim is, the quicker it can be dealt with. Please do not send a string of email exchanges with a note marked "claim attached".

Prepare a summary while events are still fresh in your mind, setting out the circumstances which have led to the claim against you, and send it to ITIC with all relevant documents. It is difficult to give a comprehensive list of documents required, but the following is a list of suggestions:

- copy of the communication from the claimant setting out their alleged claim
- copies of emails, faxes, etc. relating to the error (if any) and the claim
- bills of lading, manifests, agency agreements, etc. (ship agents)
- charterparties, fixture files (chartering brokers)
- sale file, memorandum of agreement, (sale and purchase brokers)
- management agreement (ship managers)
- survey report (marine surveyors)
- scope of work, GA, drawings and designs (naval architects)
- contract with your client
- terms and conditions.

You should pass this summary only to ITIC.

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Handling the claim

If the claim is covered by your insurance policy, ITIC will work with you to decide the best way forward. The options include paying the claim, attempting settlement negotiations or disputing liability on your behalf.

What happens in each scenario?

- If ITIC considers that you have a liability to the claimant, ITIC will authorise you to settle the claim. Once the claim is settled, ITIC will indemnify you, less your deductible.
- If liability is in doubt or there are mitigating circumstances which may serve to reduce liability, ITIC will recommend settlement negotiations. Depending on the circumstances, these could be between the parties directly, between ITIC and the claimant or ITIC may appoint lawyers on your behalf to conduct the settlement negotiations. Once the claim is settled, ITIC will indemnify you, less your deductible. Sometimes, it may not be possible to negotiate a settlement and a form of dispute resolution will be needed to conclude the matter.
- A claim can be brought incorrectly against you. In these circumstances, where ITIC considers that you do not have any liability to the claimant, ITIC will deny liability on your behalf. If the claimant does not agree with this assessment of liability, it is likely that they will proceed with a form of dispute resolution.

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Working in partnership with ITIC and lawyers

Dispute resolution can take various forms. Litigation is the most well known but alternatives include arbitration, adjudication, expert determination and mediation. If a form of dispute resolution is needed, often a lawyer will be appointed to defend you. Once a lawyer is appointed, you will be expected to work closely with the lawyer to ensure that the best possible outcome can be secured. Whilst ITIC and the lawyer will undertake most of the work necessary in the preparation of the defence of the claim, you will be required to cooperate at all times. For example, you may be asked to:

- provide proper and timely information so ITIC can give instructions to lawyers
- provide information about the claim specifically or the business generally
- attend meetings
- attend court hearings
- provide dates for your availability for future hearings/trial dates
- comply with any relevant court orders.

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Types of dispute resolution

The form of dispute resolution chosen will depend on the facts of the claim, for example, the amount in dispute, the relationship between the parties, the need for privacy, the financial status of the parties, the location of the parties or simply what the parties have agreed in advance.

Litigation and arbitration are the most formal types of dispute resolution. In both scenarios, a binding ruling is given by a judge or arbitrator. There are less formal ways of having a dispute decided by a third party, such as adjudication or expert determination. Mediation and conciliation, where no decision is forced upon the parties, but rather they are free to come to their own agreement, are the least formal approaches.

The parties may have no choice as to which type of dispute resolution is used; for example, you may have a contract which contains an arbitration clause or a judge may refer a dispute to mediation. Equally, you may suddenly find a writ on your doorstep without any prior warning.

The three most widely used forms of dispute resolution are:

Litigation:

This is the most costly and formal choice. Once a claim has been issued, the court will manage the claim. If the claim does not settle a trial will take place, and the judge will rule on the case. Reasons why a party would consider using litigation:

- it may be the only choice against an opponent who is refusing to cooperate in any way
- if successful, you can be awarded your costs in certain jurisdictions
- it can be the only option if you require injunctive relief
- a judgment may be easier to enforce, either at home or abroad, than an arbitration award or an agreement reached at mediation.

However, it should be remembered that litigation:

- can be a long and time consuming process
- can be very expensive – especially if expert witnesses are required
- can be even more expensive if you are the losing party
- involves “litigation risk” i.e. no matter how good you think your case is, you could still lose
- is pursued in the public domain.

Arbitration:

This is similar to litigation in many respects. The main difference is that unlike litigation, the parties must both agree to arbitrate. It is therefore usual to find an arbitration clause in many commercial agreements. Arbitration clauses will also detail a choice of law and venue and the number of arbitrators to be appointed to the arbitration panel. The arbitration panel will give a binding decision based on the facts. This is difficult to appeal. Unlike litigation, arbitration is private and the award/decision will remain private.

Mediation:

A neutral third party will assist the negotiations between the parties. Before the mediation begins, each party will provide the mediator and other party with a mediation statement, setting out the dispute as they see it. At the mediation, the mediator will preside over a joint session where each party will put forward their case. Each party will then retire to separate rooms, and then the mediator will act as a shuttle between the parties. The mediator's role is not to make decisions but to assist the parties reach their own agreement. If litigation has been commenced, the judge can instruct the parties to attend mediation in order to resolve the dispute without the need for a trial. The benefits of mediation are:

- the mediator can be an expert in the area of the dispute
- the mediator does not make any decisions and agreement is reached by the parties
- the mediation is private
- the parties can come to any agreement they like, which could incorporate ideas which a court or arbitration panel could not reach.

There are some disadvantages to mediation, such as:

- unlike litigation or arbitration, there may be no “result” on the day
- the parties may be forced to mediate by the court and have no intention of settling the matter.

Disclosure obligations

If litigation or arbitration is used, then the parties must consider their duty to formally disclose documents to the other side. Disclosure is the process a party must go through to reveal to their opponent:

- the documents that they intend to rely on
- documents which adversely affect their own case and documents which either adversely affect or support their opponent's case
- any documents required to be disclosed by the Court.

Documents do not simply mean written correspondence, and can include:

- correspondence between the parties (and copies of the same)
- notes of meetings, notes of telephone conversations, diary entries, day books
- accounts
- drawings, plans and designs
- charterparties, bills of lading, contracts, terms and conditions
- tape recordings (of phone calls or meetings)
- emails, computer discs, computer files, back up data, video, film, microfilm and photographs.

Each party will be expected to make a "reasonable" search for these documents. The court will decide what is reasonable depending on the facts of the claim, including the amount in dispute, the complexity of the issues, the number of documents and the ease and expense of retrieving the documents.

Therefore you must keep relevant information safe, so that it can be retrieved and provided when required.

If you are faced with a claim ITIC offers you the following practical advice:

- do not destroy any information or documents (even ones which are not beneficial to your case)
- do not write in manuscript on any disclosable documents (or copies of them)
- do not tamper, change, edit or amend any files or documents
- do not make copies of documents.

Finally, if you are faced with a claim, do not panic. Inform ITIC of the situation and follow these guidelines.

The information and opinions contained in this booklet are for general information purposes only, are not intended to constitute legal or other professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. Those requiring legal advice should consult their company lawyer.

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