

MALAYSIAN BAR  
Mandatory PII SCHEME  
**DID YOU  
KNOW?**

## Your failure to cooperate could jeopardise your PII claim!

Any insurance policy is a contract between two parties where the Insurer agrees to provide indemnity to the Insured subject to specific terms and conditions. One of the conditions of your Professional Indemnity Insurance ("PII") Policy as an Insured Practice ("IP") is the requirement for your firm to provide all supporting documents and details related to the notification to the Insurer and Panel Solicitor ("PS").

Under **Clause 15 of the 2014 Certificate of Insurance ("COI")**, the Insurer can decline your claim if you refuse cooperation with the Insurer and/or their authorised representatives who could be the Claims Administrator, Panel Solicitor, Loss Adjuster and other parties deemed necessary.

The authorised representatives are defined under **Clause 35(a) of the 2014 COI** as the "employees and management of Jardine Lloyd Thompson Sdn Bhd, Echelon Claims Consultants Sdn Bhd and any legal practitioner and any other person retained by us."

**Clause 14 of the 2014 COI:** As a condition precedent to liability it is your duty to provide full disclosure of all relevant facts and circumstances, whether specifically requested or otherwise, which is known or becomes known to **you** any time before or after a **claim**. It is furthermore your duty to render at your own expense all reasonable assistance and co-operation to **us** or our **authorised representatives** which includes but is not limited to:

- (a) providing all relevant information, documents and data in whatsoever form; and
- (b) attending meetings, mediation, court hearings and appearing as a witness to give evidence or testimony if required.

**Clause 15 of the 2014 COI:** If after three written requests for **you** to comply with Clause 14, **you** fail to respond in a timely manner or in a manner satisfactory to **us** or our authorised representatives, your inaction shall be deemed as total or gross disregard or avoidance and shall entitle **us** to decline to indemnify **you** in relation to such **claim** except when the failure was due to circumstances beyond your reasonable control.

**Clause 16 of the 2014 COI:** **You** further agree to waive any legal professional privilege to the extent of your duties described at Clause 14, if any, and generally in relation to a claim.

It is equally imperative that you reveal any awareness of a notifiable circumstance or claim against you while completing the proposal form:

**Clause 29, COI:** The due observance and fulfilment of Clauses 13(a), 14, and 15 in so far as they relate to anything to be done or complied with by you and the truth of the statements and answers in the proposal form shall be condition precedent to our liability to make any payments under this insurance.

### Illustration I: Clause 14 and Clause 15

Benny, a lawyer with Messrs Benny & The Jets ("the IP") notified Jardine Lloyd Thompson ("JLT") of a writ against them. JLT submitted that notification to the Insurers; and on behalf of Insurers, Echelon Claims Consultants ("Echelon") issued a letter to the IP acknowledging the notification and requesting the IP to complete the Claim Notification Form, chronology of events and to provide all supporting documents.



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With no reply from the IP, Echelon sent a reminder to the IP to request for the supporting documents. As they did not respond again, Echelon followed up with telephone calls and a further two reminders to the IP. In all letters, the IP was clearly informed of the impact of Clauses 14 and 15 of the 2014 COI. Not only did the IP fail to reply to any of Echelon's letters and provide documents, they also failed to submit the completed Claim Notification Form and chronology of events.

The IP's duty under Clause 14 of the 2014 COI requires their full cooperation in, inter alia, providing Insurers and their authorised representatives ALL information and documents in relation to their notification. The IP's failure to do so falls foul of Clause 14 of the 2014 COI.

Furthermore, the IP's failure to reply to Echelon's letters despite having received three written requests entitles Insurers to decline the claim under Clause 15 of the 2014 COI.

**Illustration II: Clause 14**

Messrs Franklin & Associates ("the IP") was served with a writ against their firm. A PS was appointed to defend the IP. The PS advised that the best strategy was to attempt a settlement of the claim, Insurers agreed and the PS was instructed to proceed with a settlement. However, the IP was adamant on having the case litigated. Without the knowledge of the PS and the Insurers, the IP wrote to the claimant's solicitor to disregard the PS' settlement offer.

Under Clause 18 of the 2014 COI, Insurers have the right to take over conduct of a claim against an IP including its settlement, subject to Clause 21 of the 2014 COI. However, in practice, Insurers will usually obtain the IP's agreement on whether a claim should be settled or litigated. By writing to the claimant's solicitor without the knowledge of the PS and Insurers, IP's action can be deemed as a failure to render their co-operation as per the duty to cooperate under Clause 14 of the 2014 COI. The IP should have exercised his right under Clause 21 of the 2014 COI, instead of writing to the claimant's solicitors.

**Illustration III: Clause 29**

On 10 Oct 2010 Messrs Lennon & Associates ("the IP") discovered that a judgment in default of appearance was granted against their client due to the legal assistant's failure to attend court on 16 Aug 2010. This discovery came about when the opposing counsel sent them the draft judgment to approve!

When completing the PII proposal forms for the 2011, 2012, 2013 and 2014 renewals, the IP did not reveal their awareness of the potential claim against them. In 2014, the IP was sued by their Client and only then did they notify JLT of the writ.

The IP should have notified in 2010 in accordance with Clause 13(b) of the 2010 COI. Their failure to disclose their awareness of a potential claim in their proposal forms entitles Insurers to decline the claim as the truth of the statements and answers given in the proposal form is a condition precedent to Insurers' liability in accordance with Clause 29 of the 2014 COI.





## What Should You Do If You Disagree With The Insurer's Decision To Have The Claim Against You Litigated or Settled?

1. Write to the Insurer to request for the decision to be reconsidered.
  2. Approach the PII & Risk Management Department to assist in your appeal to have the claim against you litigated or settled.
  3. Invoke Clause 21 of the 2014 COI
    - Clause 21 provides that in a dispute on whether a claim should be settled or litigated, advice will be taken from a senior member of the Malaysian Bar.
- The senior member of the Malaysian Bar will be appointed by both the Insured Practice and the Insurer.
  - In the absence of a mutual agreement on the appointment of the senior member of the Malaysian Bar, the appointment will be made by the President of the Malaysian Bar.
  - An IP wishing to invoke Clause 21 must do so within 30 days of the written notification of the Insurer's decision on whether a claim should be settled or litigated.



## What Happens If The Insurer Decides To Decline Your Claim For Breach Of The Clauses Stated Above?

1. The PS assisting you will be instructed to discharge himself from further acting in your claim within **10 working days** from the date of the Insurer's decline letter.
2. You will be fully responsible to defend any legal action against you arising from the claim.



## What Can You Do If You Disagree With The Insurer's Decision To Decline Your Claim?

1. You can appeal against the Insurer's decision by writing to JLT or by contacting the PII & Risk Management Department
2. You can invoke Clause 24 of the 2014 COI (or the corresponding clause in the COI for the year your claim is registered under) to have the matter arbitrated.

NB: Under the Mandatory PII Scheme, cover is subject always to terms, exclusions, limitations and conditions of the relevant Certificate of Insurance.

The Bahasa Malaysia translation on pages 28-30 relating to the Master Policy, Certificate of Insurance and illustrative examples is for guidance only. In the event of inconsistency between the English version and the Bahasa Malaysia version, the English version will prevail.