Are marine warranty surveys meeting expectations?



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Marine and energy underwriters are commonly asked to underwrite projects with a high degree of technical sophistication and complexity. To protect their interests, underwriters will stipulate that the insured project is subject to review by a marine warranty surveyor (MWS), whom they expect to provide comfort that work is being carried out to objectively acceptable standards and so ensure that the risk of an insurance loss is being managed appropriately.

There are, however, some pitfalls to be avoided in drafting MWS clause and matters can be complicated by the fact that the MWS, despite being a requirement of the underwriter, is often chosen, employed and paid by the assured. We explore these issues in this article and ask whether underwriters' expectations of the MWS process are being met.

The MWS clause

Underwriters will wish to ensure that, if there is a breach of the MWS clause and a loss results, they will not have to provide cover for that loss. MWS clauses will therefore usually be either warranties or conditions precedent to cover and so, if breached, the assured will not be covered – at least in respect of losses that flow from the breach. Accordingly, compliance with the MWS clause tends to be scrutinised closely following a loss and misunderstandings about the requirements of the clause and the recommendations of the MWS can lead to disputes.

For example the WELCAR 2001 clause states that it is a condition precedent to the attachment of coverage that all items in the scope of work have been complied with before a project activity starts, even though it is possible (and common with some types of project) for the recommendations to relate to future conduct (ie. how the assured and its contractor(s) are to carry out the project). That might be considered to create a tension if the works are not carried out in compliance with those forward-looking recommendations – and so, if a loss results, a dispute about whether the assured has complied with the MWS clause.

The scope of work

The scope of works usually focuses on the MWS doing one (or more) of reviewing, attending, approving and/or issuing certificates of approval in relation to listed items described with varying degrees of specificity. An MWS would be forgiven for seeing the role as to tick the boxes he has been asked to tick.

That is, however, inconsistent with underwriters' expectation that the MWS will provide a more comprehensive "eyes and ears" service and catch everything to do with the project that might be problematic and so ought to be done differently to minimise risk. Underwriters may try to resolve that disparity by wording the scope of work widely. Unfortunately this can lead to arguments later.

For example, in *Kircaldy v Walker* (QBD, February 9 2009) the clause provided for a "condition survey" to be carried out, but did not specify what was meant by that term. Following loss of the dry dock that was the subject of the insurance, underwriters asserted a breach of the requirement for a "condition survey" and a dispute ensued as to what was meant by that term. While underwriters were ultimately successful in demonstrating that, whatever the term "condition survey" meant, nothing matching the description had been carried out, they incurred substantial delay, uncertainty and expense in having to litigate the issue.

To avoid these problems, effective communication between underwriter, assured and MWS is vital.

Appointing the right MWS

While the MWS survey is necessary because underwriters require it, and can use it to assert breaches if something goes wrong, that does not necessary mean that the MWS is an unwelcome imposition from the assured's point of view.

The relationship between the assured and the MWS can be a positive and valuable one if the MWS commands the respect of the assured for his expertise and competence. However, the practice of allowing the assured to appoint the MWS who they then pay for does not necessarily encourage the selection of the best qualified MWS as cost and perceived "interference" with the project may form part of the decision making process. Where the "wrong" MWS (in terms of qualifications and experience) is appointed, the process will be more frustrating for the assured, faced with an MWS who cannot keep up technically with those who are to execute the project. It will also mean that the value of the MWS process to underwriters is diminished – as is, potentially, the protection and comfort afforded by the survey. That in turn suggests that underwriters ought to consider a more "hands on" role in the appointment process.

The role of the MWS is becoming an increasing focus in the marine and energy insurance market, with various market organisations now printing draft clauses and codes of practice for the appointment of the MWS and the scope of the works that are to form part of the survey. These are a useful focal point around which the market may consider whether it is currently getting the best out of the MWS process, and what might be done to enhance its value and ensure risk is managed appropriately in carrying out complex projects. ●

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