

Construction All Risks WELCAR update

Welcome to our webinar hosted by Paul Reed QC, Jeffrey Thomson and Katie Lee. This webinar will be recorded.

Please make sure your microphones are muted and your full name is on display.

Thank you!



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Construction All Risks Webinar Programme

This is the fourth webinar in a series of six considering current issues regarding Construction All Risks Insurance.

Still to come...

14 December 2021 | LEG clauses - the latest thinking

16 February 2022 | Coinsurance and the rights of contractors

The recordings of the previous sessions can be found on our website.

The speakers

- **Paul Reed QC** is a construction and insurance practitioner.
- **Jeffrey Thomson** is a specialist in marine, energy and construction insurance and reinsurance, shipping and international trade.
- **Katie Lee** is a commercial barrister with particular expertise in construction, engineering, energy and technology-related law.

JRC Renewables Endorsement and MWS Documents

- JR 2021-028A (Renewables MWS endorsement)
 - JR 2021-028 (Renewables MWS CoP, SoW and CoA Requirements)
 - 27 May 2021
-
- Based on JR 2019-006 and JR 2019-007
 - Highly detailed and prescriptive in re surveyor's role and activities to be surveyed
 - Tight and formal practice in re issuance of COAs

Renewables MWS endorsement JR 2021-28A

Joint Rig Committee Renewables Marine Warranty Survey Endorsement

- 1) Coverage under this Policy for project activities is conditional upon:
 - a. a Marine Warranty Surveyor (MWS) Company or Companies being appointed by the Assured from the following panel: *{insert names of MWS Companies below}*

on or before __ / __ / 20 __ *{insert date}*;
 - b. the Code of Practice (COP) and Scope of Work (SOW) to be used by the MWS is the most recently issued JRC Renewables COP and SOW (unless a different project specific COP and/or SOW is specified below). **Any material change to the project will require a review of the SOW.**

 - c. a kick off meeting is required: Yes / No *{select as appropriate}*;
 - d. the issuance of the Certificates of Approval (COA) by the MWS as identified in the SOW specified in item 1)b. of this Endorsement.
- 2) The Marine Warranty Survey shall be conducted in accordance with the COP specified in item 1)b. of this Endorsement.
- 3) The COP and SOW are to be found on the “Technical Documents” section of the JRC page on the LMA website: www.lmalloyds.com/joinrig
- 4) It is the duty of the Assured to ensure compliance with all recommendations, requirements or restrictions of the MWS within the specified timescales. In the event of a breach of this duty, Underwriters shall not be liable for any loss, damage, liability or expense arising from or contributed to by such breach.

Renewables MWS Code of Practice

- 'First in series only' COAs
- 'The purpose of this COP is to:
... e. where applicable, outline the basic requirements for the Certificate(s) of Approval (COA) and establish the definition of "first in series" as detailed in the JRC MWS COA Requirements section below.'



'1.5.4 COA requirements

The number of COAs required are as follows:

1.5.4.1 For [Wind Turbine Generator] Foundation installation COAs shall be issued for 20% of all foundations of the same design and/or installation method. Different installation methods include drive vs drill/drive, different design includes a variance of more than 15 metres in the overall length of the foundation, or changes in the design of secondary steel work for different vessel embarkation approaches.

1.5.4.2 For WTG topside installation COAs shall be issued for 20% of all WTGs.

1.5.4.3 Every [Offshore Sub Station] foundation and topside installation shall have a separate COA issued.

1.5.4.4 For Inter Array Cable laying COAs shall be issued for 20% of all cables.

1.5.4.5 Every Export cable installation shall have a separate COA issued.

1.5.4.6 Every cable joint shall have a separate COA issued.

1.5.4.7 For Floating Offshore Wind, every unit will have a COA issued.

The above requirements are also applicable to decommissioning activities.'

Renewables
MWS CoP
(cont'd)

Renewables MWS Scope of Work

JR2020-028
27th May 2021

Scope of Work (SOW) 2:

Fixed Bottom Offshore Wind Farm (WTGs foundations, WTGs, OSS foundations, OSS topsides)

Activity	Review & Approve Procedures / Drawings / Design Calculations	Attend	Issue Certificate of Approval (COA)
1. WTG foundations			
1.1 Fabrication and Loadout			
Loadout Procedures Manual: Trailered/skidded/lifted etc.	X	X Check Compliance	
Motive power systems (trailers, SPMTs etc.)	X		
Structural strength of skidding system or trailers for required operation	X		
Quayside Capacity for Load	X		
Link beam/bridge design	X		
Rigging and lift point design	X		
Capability and certification of cranes	X		
Grillage structural checks	X		
Water depth, tidal limitations	X		
Certification of all loadout equipment	X		
Emergency contingency plans	X		
Ballast system trials	X	X	
Loadout operation (tide, ballasting and Loadout operational limitations)	X	X	X
As-built dimensions of foundation / WTG/ transition piece (if applicable) interfaces	X		

MWS SoW: 'First in series' activities?

- - Positioning systems, etc.			
Static and dynamic hook load calculations (single and dual crane lifts) including considerations for lifting through water. The independent calculations performed shall include environmental limitations and be in accordance with the approved crane(s) curves. All lifting factors shall be approved by MWS	X		
Installation vessel position, monitoring and control	X	X	
Foundation Installation: <ul style="list-style-type: none"> - Foundation launch operation - Foundation upending - Foundation lift <small>(Strength Check verifying capability of withstanding installation forces including Hydrostatic Collapse Checks for leg collapse and checks on single compartment damage stability)</small>	X	X	X See section 1.5 regarding first in series COA to be provided for and prior to sequence of irreversible operations
As-built dimensions of foundation/WTG interfaces	X		
Piling operations including calculations, analysis and Installation Manuals	X	X	X COA to be provided for and prior to sequence of irreversible operations
Foundation/transition piece/platform connection including: <ul style="list-style-type: none"> - System integrity - Grouting operations (if applicable) - Confirmation of grout strength (if applicable) - Testing of grouting pumps under full load (if applicable) 	X	X	X COA to be provided for and prior to sequence of irreversible operations
Cathodic protection system installation			
Scour protection installation			
Hook-up and commissioning	X	X	

Renewables MWS COA Requirements

traceability as to the Policy to which the COA pertains.

Notes:

1. COA for the “first in series only”:

When approval for a repeated operation is required, for instance, to approve the installation of twenty monopiles, then the operations approved must be identical in all material respects to the first operation otherwise individual COAs are required for each operation. For instance, the foundation installation method, securing arrangements, vessel ballasting and trim condition, weather window and limiting weather criteria must all be the same. No additional cargo, change of securing practices, change of route, change of tug, barge or transportation vessel, or other alteration, compared to the initially approved condition, may be permitted without reference to the MWS. Where the change(s) are acceptable the MWS must endorse the original COA or issue a new COA. However, if multiple tugs, barges (or other vessels) or equipment have been approved for use in various combinations with MWS approval, then this is acceptable. If a loss or ‘near miss’ incident occurs during a repeat operation then the COA shall be suspended until the MWS is satisfied that the key root causes have been satisfactorily addressed. For operations involving greater value, loads, ‘at the edge of the envelope’, and/or greater complexity then full attendance is required and issuance of COA shall be made in each case.

2 Failure to Issue COA:

Recent WELCAR judgments

- *Lloyd's Syndicate 457 v FloaTEC LLC*, 921 F 3d 508 (2019) (US CA 5th circuit)
- *Munich Re Capital v Ascot* [2019] EWHC 2768 (Comm)



*Lloyd's
Syndicate 457 v
FloaTEC LLC,
921 F 3d 508
(2019) (US CA
5th circuit)*

- Chevron project 'Big Foot', Gulf of Mexico
- 2015, lost of tension legs / tendons
- Lloyd's u/ws paid, pursued subrogated recovery against tendon engineers
- FloaTEC argued they were 'Other Assureds', had waiver of subrogation

Other Assureds

- (iii) Project managers.
- (iv) Any other company, firm, person or party (including contractors and/or sub-contractors and/or manufacturers and/or suppliers) with whom the Assured(s) named in i, ii, iii and iv have entered into written contract(s) ~~directly~~ in connection with the Project.

2. SUBROGATION

Underwriters shall be subrogated to all rights which the Assured may have against any person or other entity, other than Principal Assureds and Other Assureds, in respect of any claim or payment made under Section I or Section II of the Policy. The Assured shall execute all papers required by the Underwriters and shall co-operate with the Underwriters to secure their subrogation rights.

3. WAIVER OF SUBROGATION

Underwriters agree to waive rights of subrogation against any Principal Assured(s) and/or Other Assured(s). The Assureds shall not grant any waiver of subrogation to drilling contractors and/or their sub-contractors without obtaining Underwriters' agreement to a specific endorsement to this Policy prior to the commencement of operations.

~~As a condition precedent to their benefiting from the automatic waiver of subrogation in this clause, Other Assureds must perform their operations according to Quality Assurance/Quality Control system(s) that comply with the Quality Assurance/Quality Control provisions passed on by the Principal Assureds through each and every written contract awarded within the scope of insured works as scheduled under the Policy.~~

2. SPECIAL CONDITIONS FOR OTHER ASSURED

~~It is a condition precedent for any party identified in Other Assureds definition clause iii. and iv. above to benefit from the Other Assureds status under the Policy that they perform their operations according to Quality Assurance/Quality Control system(s) which comply with the Quality Assurance/Quality Control provisions passed on by the Principal Assureds through each and every written contract awarded within the scope of insured works as scheduled under the Policy.~~

The interest of the Other Assured(s) shall be covered throughout the entire Policy Period for their direct participation in the venture, unless specific contract(s) contain provisions to the contrary. The rights of any Assured under this insurance shall only be exercised through the Principal Assureds. Where the benefits of this insurance have been passed to an Assured by contract, the benefits passed to that Assured shall be no greater than such contract allows and in no case greater than the benefits provided under the insuring agreements, terms, conditions and exclusions in the Policy.

*Munich Re
Capital v Ascot*
[2019] EWHC
2768 (Comm)

- 'Big Foot' again — FloaTEC tendon loss again
- Chevron (insured) —> Munich Re (reinsured) —> Ascot (reinsurer)
- Original Project period:
'until ... 30th March 2014 but **not beyond ... 30th September 2014**'
- Maintenance Period (slip):
'Coverage shall continue during the maintenance period(s) [~~of specific contracts~~] (subject to the terms, conditions and exclusions in the wording), **up to a period of 12 months after expiry of the Project Period.**'

WELCAR Section I, 'Maintenance' (unamended)

19. MAINTENANCE

The cover provided hereunder shall be no wider than that contained elsewhere in the Policy. Coverage under Section I only shall continue during the maintenance period(s) specified in individual contracts but not exceeding a further 12 months from expiry date of the Project Period as set out in Item 3 of the Declarations. During such maintenance period(s), coverage is limited to physical loss or physical damage resulting from or attributable to:

- (a) faulty or defective workmanship, construction, material or design arising from a cause occurring prior to the commencement of the maintenance period; and
- (b) operations carried out by Other Assureds during the maintenance period(s) for the purpose of complying with their obligations in respect of maintenance or the making good of defects as may be referred to in the conditions of contract, or by any other visits to the site necessarily incurred to comply with qualifications to the acceptance certificate.

WELCAR Scope of Insurance – Clause 2

Paragraph 1:

“It is a condition precedent for any party identified in Other Assureds definition clause iii. and iv. above to benefit from the Other Assureds status under the Policy that they perform their operations according to Quality Assurance/Quality Control system(s) which comply with the Quality Assurance/Quality Control provisions passed on by the Principal Assureds through each and every written contract awarded within the scope of insured works as scheduled under the Policy. “

Hongfa Shipping v Amline Marine, MS Amlin Marine *Underwriting* [2021] EWHC 999 (Comm)

- C traded chartered vessels. D were underwriters of C's Marine Liability Policy.
- Cargo stowed, lashed and secured under the supervision of the ship's crew damaged.
- Claimant sought an indemnity under the policy.
- The defendant refused indemnity relying on its construction of cl.28.1(4) of the policy, which stated:

28.1 The Assured shall not be entitled to recover under any part or Class of Insurance, if:

28.1.4 The claim or dispute arose out of or consequent upon the Insured Vessel carrying illegal goods, contraband, blockade running or the Assured recklessly or intentionally employed or caused the Insured Vessel to be employed in an unlawful or unduly hazardous or improper trade or voyage or that the Cargo carried and/or the method of its securing or unsecuring, carriage, loading, discharging, inspection, maintenance, treatment or lack thereof during the voyage was unduly hazardous, patently inappropriate or improper; ..." [emphasis added]

The arguments

- D - the stowage, lashing and securing of the cargo was carried out by or on behalf of the claimant "... negligently and/or without reasonable care and was unduly hazardous, patently inappropriate and/or improper ..."
- C - Clause 28.1(4) excludes cover only where 'the assured recklessly or intentionally ... caused ... that the cargo carried and/or the method of its securing ... was unduly hazardous, patently inappropriate or improper.'

Judgment

- *"... the rule that one does not construe a condition as repugnant to the commercial purpose of the contract ..."*
- absence of clear words excluding liability
- no logic in treating losses more narrowly than those arising from the cargo being carried, or its method of loading and discharge
- Otherwise implied requirement that if the exception was to apply, insurer would have to establish that the danger posed by the cargo being secured in the manner alleged was recognised by the insured as posing a danger and that the insured ignored that fact

Contrast *Aspen Ins v Sangster & Annand* (2019)

- policy contained a standard hot works clause
- “... where the Insured is using any process which involves the application of heat, oxyacetylene, electric arc or similar welding cutting grinding or other spark emitting equipment away from the Insured’s own premises unless 7 detailed steps/requirements had been taken/met”
- major fire at a Hotel. On the day of the fire, the insured had been carrying out hot works
- insurers brought proceedings seeking a declaration they had no liability to indemnify the insured as a result of the fire

Judgment

- precautions set out in Exclusion 10 *“redolent of the typical industry guidance which applies to the undertaking of hot work”*.
- Exclusion 10 was not exclusion, but defined scope of cover.
- Recklessness not required to establish a breach of Exclusion 10. The decisions on recklessness (including [Tate Gallery \(Board of Trustees of\) v Duffy Construction Ltd and another](#)), were all concerned with general “reasonable precautions” clauses, whereas Exclusion 10 was a:
“... highly defined and circumscribed set of particular safeguards which have to be put in place, drawn from industry guidance.”

Sompo Ins Singapore v RSA [2021] SGHC 152

- Government of Singapore contracted with Geometra to move cargo
- Geometra agreed to provide an unconditional performance bond
- Sompo issued a bond in favour of the Government.
- Government purchased insurance policy with RSA to cover damage to the cargo.
- During transportation, the cargo was damaged.
- RSA agreed to indemnify the Government.
- RSA commenced subrogated recovery action and called on the performance bond. Sompo refused, arguing RSA had no right to call on the performance bond

Judgment

- Judge confirmed subrogation grants insurer entitlement to every right the insured has to recover in respect of a loss.
- Confirmed right of subrogation not limited to the wrongdoer, and RSA had the choice to either pursue Sompò or Geometra.

Summary

Thank you!

Any questions?

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