

Offshore Construction Coverage:

Munich Re Capital Ltd v Ascot Corporate Name Ltd

[2019] EWHC 2768 (Comm)

While the dispute related to a reinsurance policy, the case of Munich Re v Ascot raises certain points of note for direct policyholders concerned with purchasing insurance coverage in respect of offshore construction risks. In particular, this article addresses issues relating to policy periods and width of coverage.



Background

Munich Re participated in an Offshore Construction insurance contract affording coverage to Chevron Corporation and others in respect of Project Bigfoot, a Tension Leg Platform destined for installation in the Gulf of Mexico.

The floating Tension Leg Platform was designed to be tethered to the sea floor via a series of tendons. The tendons had been anchored in place offshore in advance of the arrival of the platform. Unfortunately, the buoyance system, intended to keep the tendons in position in advance of the arrival of the platform, failed. A number of the tendons collapsed to the seabed resulting in a significant claim under the Offshore Construction insurance policy.

Munich Re had purchased a facultative reinsurance policy in relation to their interest in Project Bigfoot and pursued a claim against reinsurers Ascot.

The period of the reinsurance policy reflected the initial position under the direct insurance policy. Namely that coverage under the main policy period was to remain in force until 30th September 2014. Thereafter, the policy period may be extended at “*terms and premium*” to be agreed by underwriters.

In accordance with standard market practice, the insurance policy also expressly provided coverage during a “*MAINTENANCE PERIOD*”.

By 9th May 2015 all 16 tendons had been anchored to the seabed piles and were awaiting connection to the platform. However, by the beginning of June 2015 the buoyancy system had failed and 9 of the tendons had collapsed to the seabed. Due to prior delays, the express policy expiry date of 30th September 2014 had been extended until 30th September 2015 and was in fact extended again, on a number of occasions, up until 31st December 2018.

Unfortunately, no contemporaneous extensions were sought under the reinsurance contract. Accordingly, reinsurers Ascot resisted settlement of Munich Re’s claim under the reinsurance policy.

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Munich Re contended that the claim was recoverable under the reinsurance contract, notwithstanding the fact that the collapse of the tendons took place after the expiry date of the main policy period as expressly stated in the reinsurance policy. Munich Re's position being that the collapse of the tendons had taken place during the 12 month "Maintenance Period" expressly referred to within the reinsurance policy, commencing on expiry of the main policy period and running concurrently with the policy Discovery Period.

However, it was held that the "Maintenance Period" did not commence until the project was completed. Accordingly, Munich Re's claim under the reinsurance policy did not succeed.

Maintenance Period

The WELCAR 2001 Offshore Construction Project Policy is the standard policy form upon which most underwriters will provide coverage for offshore oil & gas platform and pipeline construction risks.

In accordance with the standard WELCAR 2001 policy form, physical damage to the subject-matter insured must be sustained during the main policy period which is a defined "Project Period". So far as the "Project Period" is concerned, the standard policy terminology makes provision to declare an "expected not later than" date. As was the case with the Project Bigfoot coverage,

it is common market practice for underwriters to strengthen this standard terminology with provisions such as "not beyond" appearing before an express expiry date.

The Maintenance clause within the WELCAR 2001 policy form extends the requirement for physical damage to be sustained during the main policy period in two instances.

Firstly, the Maintenance clause provides cover in respect of physical damage sustained by the subject-matter insured during the "maintenance period" when caused by a fault or defect in workmanship, construction, material or design prior to the "maintenance period".

Secondly, the Maintenance clause responds to physical damage sustained by the subject-matter insured during the "maintenance period" when caused by the negligence of maintenance contractors and the like.

The Maintenance clause under the standard WELCAR 2001 policy form defines the "maintenance period" as being "the maintenance period(s) specified in individual contracts but not exceeding a further 12 months from the expiry date of the Project Period". The terminology of the Maintenance Period within the standard WELCAR 2001 policy form reinforces this definition.

Accordingly, depending on the maintenance periods specified in the individual contracts entered into with the relevant contractors,

the potential exists for coverage to be extended beyond the express expiry date of the main policy period. Albeit that such extended coverage would be on a named perils basis, as opposed to the "All Risks" coverage afforded under the main policy period.

However, policyholders should be mindful of the fact that if any individual maintenance periods commence **prior to** the expiry of the main policy period then underwriters may contend that coverage, from the commencement of the applicable individual maintenance period, is based on named perils and **not** "All Risks".

For the avoidance of any doubt, it is advisable to review the applicable contractual terminology, prior to drafting the policy documentation, in order to ensure that full "All Risks" coverage remains in force for the duration of the main policy period. Upon reviewing the applicable contractual terminology, it may transpire that an amendment to the standard policy wording is not necessary.

It is interesting to note that, in respect of the policy underwritten by Munich Re (and the corresponding reinsurance provisions), the standard WELCAR 2001 Maintenance Period and Maintenance clause terminology was amended so as to provide that the coverage afforded by the Maintenance clause did not commence until the "Project Period" expiry date.

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Expiry Dates, Extensions & Ongoing Duties

The case of *Munich Re v Ascot* highlights the importance of carefully monitoring the progress of projects against expiry dates expressly stated in direct Offshore Construction policies and corresponding facultative reinsurance contracts.

For the avoidance of any doubt, the “not beyond” style terminology employed by underwriters, in relation to the main policy period, should be treated as an absolute expiry date for the “All Risks” coverage afforded by the policy.

When seeking an agreement from underwriters, at inception, to provide any extensions to the main policy period, policyholders would be advised to seek clarity regarding the basis for any such extension. For example, is the extension only contingent upon an additional premium being agreed or are underwriters reserving the right to renegotiate the width of coverage as well?

Ordinarily, policyholders and their advisers will seek to ensure that any extension to the main policy period need only be agreed by a defined set of “Leading Underwriters”. However, policyholders should remain mindful of the fact that, faced with significant extensions to the initial policy period, following market underwriters participating in the policy may consider such extensions to be material circumstances meriting their agreement.

Furthermore, it is important for policyholders to recognise that, via the Project Alterations and Amendments clause, underwriters subscribing to the WELCAR 2001 policy form expressly impose an ongoing duty of disclosure. Accordingly, while the overall policy period may not require an extension, periods of work within the policy period may have changed. Such changes could be deemed to be material, thus requiring a declaration to underwriters. For example, work may be taking place in fundamentally different weather windows than those initially envisaged.

Discovery Period

The policyholder is required to notify underwriters of potential claims promptly. Furthermore, via the Discovery Clause and Discovery Period, the standard WELCAR 2001 policy form imposes a time limit for potential claims to be notified to underwriters.

The standard Discovery Clause and Discovery Period could be interpreted so as to require potential claims to be notified to underwriters concurrently with individual maintenance periods, **up to 12** months after the expiry of the main policy period.

Accordingly, depending upon the commencement and duration of maintenance periods within individual contracts, the time limit to notify underwriters of potential claims could be contended to be

less than 12 months from the expiry of the main policy period.

Therefore, it is advisable that policyholders seek an amendment to the standard Discovery Clause and Discovery Period terminology, so as to ensure a minimum notification period of 12 months applies from the expiry of the main policy period.

Reinsurance Policy Periods

The facultative reinsurance contract entered into between *Munich Re* and *Ascot* was a form of risk transfer within the London underwriting market. However, oil & gas companies engaged in offshore construction projects may also be faced with the mechanics of a facultative reinsurance contract.

For example, local restrictions may require overseas project risks to be fronted by a domestic insurer. The domestic insurer retaining an amount of the project risk for their own account and facultatively reinsuring the balance into the international underwriting markets.

The drafting and ongoing administration of such facultative reinsurance policies require close attention in order to ensure effective protection remains in force for the duration of the project risk.

With regards to the terminology of the reinsurance policy period clause, a “School of Thought” exists that such terminology should be a simply stated timeframe from

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inception to expiry. Specifically, reflecting a belief that Maintenance and Discovery Periods do not expressly belong within the period clause of the reinsurance policy. The expiry date of the reinsurance policy corresponding with the maximum duration of the Maintenance Period under the direct policy i.e. 12 months from the expiry of the main policy period. (Or more than 12 months if a longer Maintenance Period is negotiated with underwriters.)

Accordingly, if the main policy period under the direct insurance is extended (thus extending out the latest possible expiry date for the Maintenance Period) then, contemporaneously, a corresponding extension should be sought in respect of the expiry date under the facultative reinsurance policy.

Further Details

Please do not hesitate to contact Trident, should you wish to discuss any of the issues raised in this article. Our team has many years experience advising policyholders in respect of Offshore Construction coverage.

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Contact

David Hallows
+44(0)7815 319143
dhallows@tridentclaims.co.uk