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## ***IRDA Regulations for Surveyors Need Review***

This article highlights the challenges posed to Indian Licenced Insurance Surveyors appointed by Indian Hull & Machinery (H&M) Insurers for claims reported under H&M Policies, and Policy Holders, due to the dichotomy between the law and practice referred to in H&M Policies of Insurance and the Regulation of the Insurance Regulatory Development Authority (IRDA) with specific reference to the Duties and Responsibilities of Licenced Surveyors. Policies of H&M Insurance issued in India by Indian Insurers, are invariably on “Institute” wordings, whether relating to Builders' Risk Clauses, Time Clauses, Voyage Clauses, Port Risks Clauses, Fishing Vessel Clauses or Yacht Clauses. All “Institute” Clause have a Law and Practice Clause which states, *“This Policy is subject to English Law and Practice”*.

Although the principles of insurance are common to both Marine and Non-marine Insurances, their interpretation as well as the practices of these two classes of insurance businesses are glaringly different. Such differences relate not only to underwriting practices but also to claims processing. Under English Law and Practice, the role and function of Surveyors appointed by Insurers for Marine Hull Claims are different from that of Surveyors appointed by Insurers for Non-marine Claims. In English Insurance Practice, the nomenclature of “Loss Assessor” is different from that of “Loss Adjuster”, the former being appointed by the Assured while the latter is appointed by the Non-marine Insurer for Claims. Similarly, under English Law the Shipowner Assured has the prerogative of appointing an “Average Adjuster” while the H&M Insurer reserves the right to appoint a Surveyor to report on the nature and extent of damages and agree or disagree with the allegation of the cause of the loss / damage made by the Assured.

“Insurance Surveyors and Loss Assessors (Licencing, Professional Requirements and Code of Conduct) Regulations 2000”, issued by IRDA specifies the Duties and Responsibilities of Surveyors. These Regulations make no distinction between Marine and Non-Marine Insurance Claims – thus the requirements are dichotomous with English Law and Practice of Surveyors appointed for Marine Hull Claims.

This article also touches upon the issue of qualification of Marine Hull Surveyors in IRDA Notice No. 4 of 2002, and suggests remedial measures in the larger interest of the Policy Holders as well as all the other stakeholders.

## 1. Introduction

- 1.1 In the period prior to nationalization of Insurance Companies, the emphasis was on specialization. Transfers of personnel between Marine and Non-marine departments were rare. This was because the practices of Marine Insurance were distinct from that of Non-marine portfolio.
- 1.2 An important position in the Claims Department of most Insurance Companies in those days was that of the Claims Adjuster – a person specialized in processing claims pertaining to his area of specialization – Marine Insurance or Non-marine Insurance.
- 1.3 With the dawn of Nationalization, the emphasis shifted from specialization to generalization. Transfers across all portfolios of insurance became the norm. When the pre-nationalization specialists retired, there were no trained or experienced personnel to replace them and eventually the Claims Adjuster became extinct in the Indian Insurance Market. With the diminution and dilution of domain expertise, decision making with regard to admissibility of liability became a challenge for Insurers and they hence progressively relied upon Surveyors to comment on aspects of liability under the Policy.
- 1.4 As far as Non-marine Insurance portfolios were concerned, such reliance by Insurers on Surveyors is not unusual since, London Insurance Market Practice was for Insurers to appoint “Loss Adjusters” to carry out both survey and adjustment of the loss in

accordance with the terms of the Policy, including commenting on aspects of liability. In Non-marine Claims, the Assured was free to appoint a “Loss Assessor” to represent him and liaise with the “Loss Adjuster”. The fees of the “Loss Assessor” were borne by the Assured and the Insurer paid the professional fees and expenses of the “Loss Assessor”.

- 1.5 The London Insurance Market Practice for marine hull claims is for Insurer to appoint “Surveyors” to carry out a survey and to report on the cause, nature and extent of damages and comments on the allegation of the cause of the loss made by the Assured. The Surveyor also approves the claim bills as, *“Fair and Reasonable, subject to Adjustment in the customary manner”*, but does not comment on aspects of liability under the terms of the Policy.
- 1.6 The above practice is referred to by J. Kenneth Goodacre in his book Marine Insurance Claims, 2<sup>nd</sup> Edition (1981), where he states, with reference to the role of Surveyor that they are, *“...not concerned with determining liability against Underwriters or with deciding what may be recoverable under the policy.”*
- 1.7 The Assured is empowered to appoint, if he so desires, a Surveyor referred to as “Owner's Surveyor” to represent him and liaise with the Surveyor appointed by the H&M Insurer, referred to as “Underwriter's Surveyor”. In such cases, the Assured paid the fees of the “Owner's Surveyor” which is reimbursed to the Assured in case there is liability under the Policy.
- 1.8 It is usual for the H&M Insurer to pass on a copy of the Survey Report to the Assured in case the Assured wishes to appoint an “Average Adjuster” to prepare a Statement of Adjustment, which he is entitled to do. In case the claim is admissible under the terms of the H&M Policy, the professional fees of the “Average Adjuster” is reimbursed to the Assured if paid by him or is paid directly by Insurers to the “Average Adjuster”. An “Average Adjuster” would not issue a Statement of Adjustment unless there is liability under the policy of insurance. Although the Statement of Adjustment has no legal authority, it is rarely challenged by the Insurer.

- 1.9 The above London Insurance Market practice was generally followed in Indian Insurance Companies for Marine Hull Claims after Nationalization with regard to Ocean Going Ships. As far as Sailing Vessels, Fishing Vessels and Inland Vessels were concerned, it was customary for Insurers to decide aspects of liability except for the more complicated cases, when the Insurer would refer the matter to an Average Adjuster.
- 1.10 Gradually, however, the practice of appointing Average Adjusters declined and some Insurers relied on Surveyors to advice on aspects of liability under the Policy, and with the passage of time, this became the accepted practice except for Ocean Going Ships where the Shipowner Assured appointed an Average Adjuster.
- 1.11 In November 2000, IRDA issued, “Insurance Surveyors and Loss Assessors (Licencing, Professional Requirements and Code of Conduct) Regulations 2000”, which amongst other things, specified the “Duties and Responsibilities of Surveyors and Loss Assessors” in Chapter IV.
- 1.12 These Regulations make no distinction between Marine and Non-Marine Insurance Claims, requiring Surveyors to comment on aspects of liability and similar issues, which as far as a Marine Hull Claim is concerned, conflicts with English Law and Practice, specified in Marine Hull Policies issued on Institute wordings.
- 1.13 IRDA Regulations make no reference to an Average Adjuster or even to General Average, thus creating a dichotomous situation!

## ***2. IRDA Regulations 2000 – An Overview***

- 2.1 IRDA has laid down the “Duties and Responsibilities” of Surveyors and Loss Assessors in exercise of the powers conferred by Sections 42D, 64UM and 114A of the Insurance Act 1938 (4 of 1938) and Section 26 of IRDA Act (41 of 1999), which was published as a Government of India Gazette Notification on 20<sup>th</sup> November 2000, wherein 16 (sixteen) duties have been laid down.

- 2.2 In the above Notification, no differentiation has been made between Marine and Non-Marine Claims. The Notification is silent on the Average Adjuster and Loss Adjuster, and has clubbed “Loss Assessor” with “Surveyor”, defining neither of these terms. No reference has been made to “General Average” or other types of Marine Claims.
- 2.3 Taking into consideration the role of Surveyors and Average Adjusters under English Law and Practice, discussed in paragraphs 1.4 to 1.7, the following 6 (six) of the 16 (sixteen) duties are highlighted in ***bold underlined italics***, of the IRDA Regulations on Duties and Responsibilities of Surveyors and Loss Assessors are not in line with English Law and Practice:
- (iv) examining, inquiring, investigating, verifying and checking upon the cause and circumstances of the loss in question including extent of loss, ***nature of ownership and insurable interest.***
  - (vii) advising the insurer and the insured about loss minimization, ***loss control, security and safety measures,*** wherever appropriate, to avoid further loss.
  - (viii) ***commenting on the admissibility of the loss as also observance of warranty conditions under the policy contract.***
  - (x) ***assessing liability under the contract of insurance.***
  - (xi) ***pointing out discrepancies, if any, in the policy wording.***
  - (xiv) ***giving reasons for repudiation of claim, in case the claim is not covered by the policy terms and conditions.***
- 2.4 Each of the above Duties and Responsibilities of Surveyors and Loss Assessors will be individually discussed in the following paragraphs.

### ***3. Comments on the Above Six Items***

- 3.1 With reference to six items highlighted in the previous paragraph, namely, items (iv),

(vii), (viii), (x), (xi) and (xiv), the reasons why these conflict with English Law and Practice are discussed below:-

3.1.1 Item (iv) of the Duties and Responsibilities

(iv) *examining, inquiring, investigating, verifying and checking upon the cause and circumstances of the loss in question including extent of loss, **nature of ownership and insurable interest**.*

3.1.1.1 As far as the examining, inquiring, investigation, verifying and checking on the circumstances leading to the loss / damage and determining the proximate cause of the loss are concerned, there is no conflict with English Law and Practice. However, under English Law and Practice the Surveyor is not required to examine or verify or comment on the “nature of ownership” and on the “insurable interest” issues. This is the duty of the Claims Adjuster or other person representing the Insurer to verify based on documents to be obtained from the Assured. The issues pertaining to “nature of ownership”, and “insurable interest” are aspects requiring legal knowledge and it is submitted that a Surveyor and Loss Assessor is not competent to do so. In fact, despite this requirement, it is rare to find a comment on “nature of ownership” and / or “insurable interest” in a Survey Report issued in India by a Licenced Surveyor.

3.1.2 Item (vii) of the Duties and Responsibilities

(vii) *advising the insurer and the insured about loss minimization, **loss control, security and safety measures**, wherever appropriate, to avoid further loss.*

3.1.2.1 Advising the insurer and the assured about measures to minimize the loss is in accordance with English Law and Practice. However, advising on “loss control” (which is to be differentiated from “loss minimization”) as well as advising on “security” and “safety” measures are not in accordance under English Law and Practice, since these aspects require specialized knowledge

which it is submitted that a Surveyor and Loss Assessor usually does not possess.

3.1.3 Item (viii) and item (x) of the Duties and Responsibilities

(viii) **commenting on the admissibility of the loss as also observance of warranty conditions under the policy contract.**

(x) **assessing liability under the contract of insurance.**

3.1.3.1 The above two similar items, are in total contravention of English Law and Practice which every Marine Hull Policy in India is subject to, by virtue of the fact that all the Marine Hull wordings are on Institute wordings. This is the dichotomy that requires to be addressed to urgently. One of the main reasons for repudiation of marine hull claims by Indian Insurers is that the Surveyors appointed by them have attempted to tread where angels fear to trod and have blatantly without the competence or credibility, opined on non-admissibility of claims, one of which reached the Hon'ble Supreme Court of India which has given judgement in favour of the Assured – albeit after 14 long years or more of the claim was repudiated on the recommendations of the third Surveyor appointed by the Insurer, (who issued an unsigned Report on his Company's letter head), based on which the claim was repudiated by the Insurer, overruling the Statement of Adjustment issued by the Average Adjuster despite the Insurer having approved in writing the appointment of the Average Adjuster. This case may be read and / or downloaded (free of cost) from:

**<http://www.scribd.com/doc/53348505/Supreme-Court-Judgment-on-VLOO-ARUN>**

3.1.3.2 What is a fact and is overlooked, is that the Syllabus for Marine Hull Surveyors as laid down in IRDA Notice No.4 of 11-Feb-2002, relating to ***“Approved syllabus for practical training applicable to applicant surveyors and loss***

***assessors for licensing requirements in terms of Insurance Act, 1938 and regulations made thereunder”, does not cover the several topics notably the York-Antwerp Rules and the Rules of Practice both of which is essential knowledge for anyone attempting to comment on aspects of liability or quantum thereof for claims pertaining to General Average. How would a Surveyor not equipped with the knowledge relating to General Average comment on the adjustment of a General Average claim?***

3.1.3.3 It is submitted that these two items relating to Duties and Responsibilities as given by IRDA in their Regulations require urgent review keeping in mind that these are against the interest of the Policyholders of Marine Hull Policies.

3.1.4 Item (xi) of the Duties and Responsibilities

(xi) ***pointing out discrepancies, if any, in the policy wording.***

3.1.4.1 The rationale of the above as a duty and responsibility is not understood. On what basis is a Surveyor and Loss Assessor considered competent to, “*point out discrepancies in the policy wording*” –which is properly the function of an Internal Auditor of the Insurance Company or the Assured, irrespective of whether it is Marine or Non-marine Insurance? Apart from a Surveyor and Loss Assessor being incompetent to comment on underwriting aspects, this does not speak well for the checks and balances (quality control and quality assurance systems) that must exist in Insurance Companies to ensure that prior to the issue of a Policy to a Policy Holder, there are no discrepancies whatsoever. Expecting a Surveyor point out discrepancies of insurance policies apart from being unrealistic is against the interests of the Policy Holder, whose welfare IRDA is very much concerned with.

3.1.5 Item (xiv) of the Duties and Responsibilities

(xiv) ***giving reasons for repudiation of claim, in case the claim is not covered by the policy terms and conditions.***

- 3.1.5.1 The above item is similar to items (viii) and (x), and is also in contravention of English Law and Practice which every Marine Hull Policy in India is subject to. Apart from the submissions made earlier under paragraph 3.1.3, this item requires to be discussed separately. Insurance is a contract of Utmost Good Faith between the Insurer and the Assured and repudiation of a claim under the contract of insurance is a serious matter requiring knowledge of Insurance Law and Practice which is the sole domain of an Insurer and / or their Legal Advisors. It is not understood on what basis a Surveyor and Loss Assessor is competent to advise an Insurer or give reasons to the Insurer to repudiate a claim under the contract of insurance, when the Surveyor comes on the scene only when there is a claim. What is the competence of a Surveyor on matters of insurance law when nothing of insurance law or interpretation of insurance contracts is in the syllabus referred to in paragraph 3.1.3. It is submitted that this item in the IRDA Regulations on Duty and Responsibility of Surveyors and Loss Assessors, require urgent review, keeping in mind that this is against the interest of the Policyholders of all Insurance Policies - Marine or Non-marine.
- 3.2 Although the submissions made in the earlier paragraphs with regard to Regulations (iv), (viii), (x) and (xiv) relating to Duties and Responsibilities of IRDA Regulations 2000, were made with specific reference to Marine Hull Claims, they are nonetheless equally applicable to Marine Cargo and Marine Freight and Marine Liability insurance Claims as well.
- 3.3 Because the IRDA Regulations 2000 require Surveyors to comment on policy liability, insurable interest and related issues relating to aspects of liability under the Policy of Insurance, a number of claims (both Marine Hull and Marine Cargo) have been repudiated by Insurers on the strength of the Survey Reports.
- 3.4 An impartial examination of these repudiations makes it abundantly clear that the Surveyor based their decisions on insufficient knowledge of Case Laws, Institute Clauses, the Marine Insurance Act, all of which requires years of training to master, which most Surveyor do not have, how could they be qualified or competent to comment on aspects of liability under the Policy of Insurance.

- 3.5 Such Surveyors know that Insurers, particularly those in the Public Sector will not settle a claim if there is an adverse comment in the Survey Report. Further the Surveyors also know that in the event the Policyholders seek justice in a Court of Law (in the only option – in the absence of a Dispute Resolution Clause), it would takes decades for justice to be obtained. Such Surveyors hope to get more work for their misplaced loyalty to the Insurer who appointed them!
- 3.6 Keeping in mind the Mission of IRDA, the questions to be answered are: Is this protection of the interest of the Policyholder? Do these Regulations secure fair treatment to Policyholders?

#### **4. Technical Qualifications – Marine Hull Surveyors**

- 4.1 IRDA Notice No.4 of 11-Feb-2002, relating to *“Approved syllabus for practical training applicable to applicant surveyors and loss assessors for licensing requirements in terms of Insurance Act, 1938 and regulations made thereunder”*, begins with laying down the technical qualifications of a Marine Hull Surveyor which is given as. *“B.E. / B. Tech. / B.Sc. (Engg.) / A.I.M.I.E or its equivalent thereof (Marine Engineering / Naval Architecture).*
- 4.2 **What is conspicuous, is the total absence of sea-going qualifications and experience in the above Notice. None of the technical qualifications specified in the Notice refer to ex-seafarers – whether from the Merchant Navy or the Indian Navy.**
- 4.3 **What was the rationale for specifying these technical qualifications (all of which are land-based) while at the same time omitting sea-going qualifications? How would a Surveyor who has never served on board a ship and been to sea, be able to survey a loss or damage of a Ship? What experience, can one with the qualifications specified, gain of ships and cargoes without having been to sea as a seafarer in the first place?**
- 4.4 The qualifications specified in IRDA Notice No.4 contravenes Section 56-A of the Insurance Rules 1939, which refers to the “Additional technical qualifications for

Surveyors and Loss Assessors”, which at sub-section (h) states: “*A Certificate of Competency as Master of Ships or as First Class Marine Engineer issued by a recognised authority*”, which are the qualifications of sea-farers and can only be obtained by serving on board ships of the Merchant Navy. It was under this provision that Master Mariners and Marine Engineers obtained their Licence as Surveyors and Loss Assessors.

- 4.5 Further, sub-section (k) states: “*Any technical qualification recognized by the Government of India as equivalent or superior to the qualification listed in terms (b) and (c) of sub-section (i) of Cl. (d) of sub-section (1) of Sect. 64 UM of the Act.* It was under this provision that Officers and Artificers obtained their Licence as Surveyors and Loss Assessors and present IRDA Category “A” Marine Hull Surveyors belong to this category of professionals. The present list of IRDA Category “A” Marine Hull Surveyors has Naval Officers and Naval Artificers.
- 4.6 The present list of IRDA Category “A” Surveyors in Marine Hull comprise almost exclusively of Master Mariners, Marine Engineers and Naval Artificers who obtained their Licences under sub-sections (h) and (k) of Section 56-A of the Insurance Rules 1939 as discussed above.

## 5. Conclusion

- 5.1 Two issues have been discussed in this article – one referring to the IRDA Regulations of 2000, on Duties and Responsibilities of Surveyors and Loss Assessors vis-à-vis the dichotomy relating to Marine Hull Insurance Claims – and the second relating to qualification of Marine Hull Surveyors as stipulated in IRDA Notice No. 4 of 11<sup>th</sup> February 2002, which has omitted the additional qualifications stipulated in the Insurance Rules 1939, with specific reference to Master Mariners, Marine Engineer and Naval Artificers.
- 5.2 It is submitted that with regard to the IRDA Regulations 2002 on Duties and Responsibilities of Surveyors and Loss Assessors, apart from challenging the Marine Hull Surveyors, goes against the grain of the contract of insurance which specific a

- practice different from the Regulations. This has created disputes on the settlement of claims as Surveyors are expected to go beyond their scope and function commensurate with their knowledge, skills and competence requirements laid down by IRDA in the Syllabus.
- 5.3 Such lacunae have led to disputes. In the light of the fact that Marine Policies do not have a dispute resolution clause, and taking into consideration the time taken by Indian Courts for deciding a case, the Policyholders are the biggest sufferers.
  - 5.4 It is further submitted that with the IRDA Notice No. 4 of 11-Feb-2002 excluding the qualifications of seafarers from Merchant Navy and the Indian Navy, the future of Marine Hull Surveying is in peril, again with detriment to the Policyholders of Marine Hull Policies.
  - 5.5 It requires to be highlighted that the average age of IRDA Category “A” Surveyors is + 55, which indicates the urgency in reviewing the qualifications stipulated in Notice No. 4, which is in contravention of Insurance Rules 1939.
  - 5.6 The time is ripe for IRDA to review both the Regulations of 2000 on the Duties and Responsibilities of Surveyors as well as their Notice No. 4 of 2002 specifying the qualifications of Marine Hull Surveyors. This can best be done by inviting suggestions from all stakeholders to ensure the Policy Holder is not the sufferer as a result of the present status of Regulations and the Notice No. 4.
  - 5.7 There is scope for improving the clarity of the Regulations on the Duties and Responsibilities of Surveyors and Loss Assessors and opportunity should be taken of tidying up the same while making amendments as a result of the interaction of all stakeholders suggested in the previous paragraph.
  - 5.8 Such a review of the Regulations of 2000, alone will effectively protect the interest of the Policyholder and will realistically secure fair treatment to Policyholders, in accordance with the Mission of IRDA.

