Standard Bulletin:
Latin America Special Edition

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The Standard
for service and security

The Standard

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In this edition

Welcome to this special edition of the Standard Bulletin, focusing on Latin America.

The club has an expert team to support and service its Latin American members. The team is headed by Constantino Salivaras (Manager, based in Rio de Janeiro), supported by Silvia Mahringer (Claims Executive) and Alexia-Anna Kalafati (Claims Assistant) who are both based in London. Eddy Morland is the Underwriting Director for the region. Latin American members also enjoy access to The Standard Club's global network of correspondents and offices (principally in New York, London, Piraeus, Singapore and Hong Kong), so that help is on hand wherever an incident may arise.

Opening a Latin American office to provide first-rate local service to members and a platform for business development was a natural evolution of the club's presence in the region. Located in the heart of Rio de Janeiro's Botafogo business district, the office boasts P&I and defence claims handling, as well as adjusting capabilities. A note on Charles Taylor Adjusting can be found towards the end of this bulletin.

Staffed by experienced personnel with extensive knowledge of the Latin American market, the Rio de Janeiro office provides members and clients with access to the high-quality services synonymous with Charles Taylor and The Standard Club in this important regional hub. The office services not just Brazil but also the wider Latin American region.

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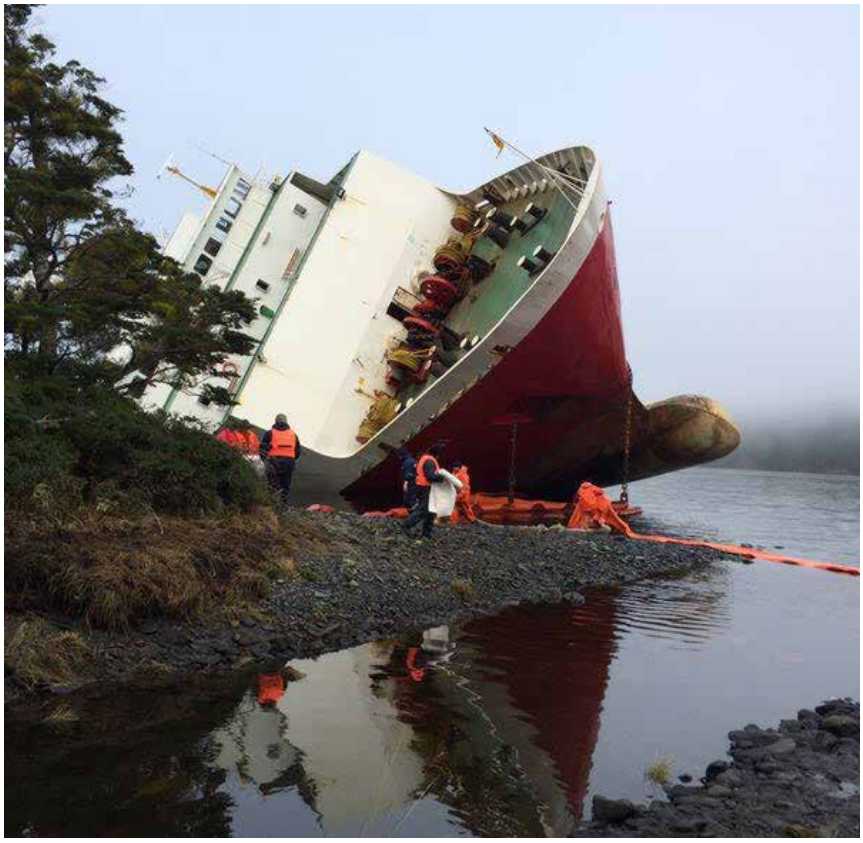
Latin American forum
On 27 November 2014, The Standard Club hosted its first Latin American forum for members, brokers and other industry professionals. The forum was an opportunity for attendees to meet, share ideas, discuss industry issues and generally get to know each other better.

The forum opened with introductions to The Standard Club and Charles Taylor Adjusting. We also explained the broad range of insurance cover the club provides to members, including those operating in the specialist offshore sector. Presentations were then given by the Latin American team, highlighting the key features of the cover we provide and the expertise we use when handling claims for our members.



Recent case study
The importance of our regional office was highlighted recently, on 18 August 2014, when a ferry owned by one of our members ran aground and partially sank in an environmentally sensitive and remote tourist area in southern Chile. We deployed a representative from our Rio office to attend with our local correspondents, a marine consultant and a representative from the pollution experts, ITOPF. The team worked closely with the member and local lawyers to co-ordinate the initial response in conjunction with the Maritime Authority. In particular, this included managing the oil spill response, the tender for the bunker removal operations and, following the successful completion of those operations, the tender for the removal of the wreck itself.

Drawing on the assistance of our London and New York offices, the club's team was also able to help the member with the initial flood of other matters requiring urgent attention. These included dealing with the immediate needs and subsequent claims of the crew and passengers, media enquiries, complex tax issues and cargo claims.

Litigation and settlement in Brazil

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Those contemplating litigation in Brazil need to be aware of the potential for delay, escalating claim costs, liability issues and the formal requirements of concluding a settlement.

Introduction

Later in this bulletin, Constantino Salivaras refers to the importance of the Brazilian market in the Latin American region. However, one aspect of international trade is the potential for litigation when commercial partners have a dispute. In this article, we explore the key issues that those contemplating litigation in Brazil should be aware of.

Delay

Litigation in Brazil can be prolonged because of the time involved in taking procedural steps. For example, appealing first instance decisions. The first step in this process involves appealing the first instance decision to the relevant court of appeal – each state in Brazil has its own. From there, a further special appeal lies to the superior courts, the Superior Court of Justice and the Supreme Federal Court, the latter dealing only with constitutional matters.

In order to appeal to either the Superior Court of Justice or the Supreme Federal Court, cases must first pass an admissibility test determined by the relevant court of appeal. However, even if a case doesn't pass the test, the unsuccessful party can request the superior courts to review the decision not to allow the appeal which can ultimately result in the special appeal being heard in any event.

There is also the potential for delay arising out of the various types of application that parties can pursue during the course of litigation, for example, an application seeking clarification of a particular issue.

Claim costs

A claim pursued through the Brazilian court system has the potential to almost double over a five year period as a result of interest and monetary correction. At present, interest of 12% and a monetary correction of approximately 6% a year are applied to sums claimed. The effect of this is magnified as a result of the inherent delays in the Brazilian court system described above.

Liability issues

Cargo carriers have an obligation to deliver goods in the same condition as they were in when they were received. This means that in the event of alleged shortage or damage, cargo interests must only prove that there was shortage or damage and the onus is on the carrier to establish a defence such as force majeure or causation. If liability is established, a defendant cannot limit its liability with reference to the Hague or Hague-Visby rules because Brazil is not a signatory. Additionally, general principles of package limitation are not well recognized by the Brazilian courts.

Settlements

Parties involved in litigation in Brazil who wish to settle their claims need to ensure the settlement agreement includes certain details for it to be effective. Specifically, the agreement must discontinue the court proceedings on foot and make provision for lawyers' fees and other costs. These details must be set out clearly in the agreement, whether it is concluded in Brazil or elsewhere.

If a settlement agreement does not include the above details the parties may find the court proceedings are not discontinued. Also, it leaves a defendant exposed to a claim for legal fees by the plaintiff's lawyer for up to 20% of the amount of the settlement, as lawyers have an independent cause of action for fees.

Conclusion

It is vital for those contemplating pursuing their disputes through the Brazilian court system to be aware of its unique features and consider how they could affect the result they are trying to achieve. Familiarity with the system is of critical importance. The potential for delay and – for defendants – the potential for the amount in dispute to escalate may mean alternative modes of dispute resolution merit consideration. Defendants in cargo claims should also be aware of the relatively low threshold of liability and inability to limit in Brazil based on the Hague and Hague-Visby Rules.

There is hope for the future though: the Brazilian Congress is reviewing new civil procedure rules designed to simplify and speed up proceedings in Brazil. It will be interesting to see if they have the desired effect once implemented.

Latin America – An overview

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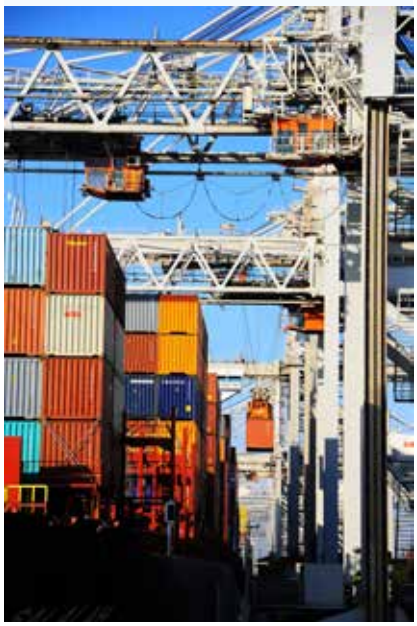
The shipping sector, including ports and terminals, is a high-growth, profitable business in Latin America. Trading in this area, however, still faces numerous challenges. Inefficient transport infrastructure, bureaucracy, complex and deficient legal regimes, social and political unrest, unstable economies and inflation are ongoing problems. However, a series of public and private investments in the region are under way to modernise the Latin American shipping sector in response to global business trends and to enable it to become competitive.



Brazil

Brazil is the key regional market for ports and the shipping sector. During the last decade, the country has seen a big boost for dry bulk shipping in response to strong demand from China and other trade partners.

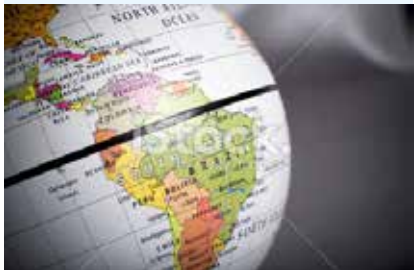
The country's two largest ports at Santos and Salvador have experienced an unprecedented tonnage growth in recent years. Whilst, economically, Brazil is consistently growing, it still faces serious infrastructural challenges. Brazilian ports are in need of modernisation and deepening, and many terminals struggle to manage the volume of vessels calling at Brazilian ports.

There are several projects under way to upgrade port facilities to accommodate large-sized container ships. With Brazil having hosted the World Cup in 2014 and hosting the Summer Olympics in Rio in 2016, there has already been a focus on infrastructure upgrades in relation to the country's ports, railroads and roads.

The new port law, which was introduced on 28 June 2013, is a promising piece of legislation aiming to reduce congestion problems and increase the efficiency of port operations by granting the handling of the port and terminals to the most efficient port operators through a bidding process. The Ports Minister announced that up to 159 container terminals will be offered to private operators in an effort to reduce delays due to bureaucracy. For further information on the new port law, please refer to "***Brazil's new port law***" in the September 2014 issue of the Standard Bulletin.

Furthermore, an emphasis has been placed on the potential of waterways as an alternative means of transport. Brazil has 20,000km of navigable waterways. Of these, 16,000km are part of the Amazon, which crosses the north of Brazil. A description of the benefit of waterways can be found in the January 2014 Standard Bulletin Article "***Rediscovery of the South American Waterways***".

Last but not least, investments related to the global offshore sector are forecast to keep growing strongly in Latin America over the next few years, especially in Brazil.



Colombia

The outlook for Colombian ports and shipping is encouraging. Investments are key to Colombia's trade growth as they will help resolve traditional infrastructure problems. Two of the world's biggest port operators have decided to collaborate in the development of facilities at Buenaventura to develop a multi-user container terminal. In addition, Buenaventura Port Society has devised a modernisation plan, investing about $450m in infrastructure, equipment and dredging.

In relation to the Cartagena port, Colombia and Chile announced a partnership for the development of an integrated logistics centre, including warehouses and distribution centres and yards for containers.

Chile

Chile has been one of Latin America's best-performing economies for more than two decades. Chile's largest general cargo port is San Antonio, which accounts for 16.67m tonnes of bulk cargo and 1.07m TEUs annually. Activity levels at the port of Valparaiso are expected to grow following the construction of a new container terminal capable of accommodating post-Panamax vessels.

The Chilean shipping industry will also benefit from the mergers of two of the most important Chilean shipping operators with major European shipping companies.

Argentina

Argentina is well known for the grains trade through many of its ports such as Buenos Aires, San Lorenzo, San Nicolas, Rosario and Bahia Blanca.

The brown water trade is also developing and the use of the Parana-Paraguay Waterway connecting Argentina, Uruguay, Paraguay and Brazil is growing with the presence of various tug and barge operators trading in convoys. For further information, please refer to the January 2014 Standard Bulletin Article "***Rediscovery of the South American Waterways***".

Peru

The Peruvian government awarded a $182m port construction and operation contract near Pisco to a Brazilian-Spanish Consortium. The aims are to speed up mineral shipments from the Andean country's southern mines, and to develop and improve connectivity with Brazil.

The expansion of the Panama Canal

The Panama canal plays a pivotal role for Latin American and global shipping. Around 5%-6% of the world's trade is shipped through the canal. The current project to widen the canal is of strategic importance to Latin American shipping. The $5.25bn expansion project aims to construct a new canal able to accommodate Post-Panamax ships with a carrying capacity of between 5,000 and 12,600 TEUs. Post-Panamax ships carry 45% of the world's box cargo trade.

The Nicaragua Canal

There are also plans for a new canal running through Nicaragua under a $40bn project put forward by a Chinese company. The project envisages the construction of deep-water ports, an airport, an oil pipeline and a railroad. However, there is still scepticism among shipping analysts as to its economic viability and whether there is a need for an additional canal in Central America.

Conclusion

One of Latin America's main problems is its lack of infrastructure and, historically, the lack of solid policies to overcome such deficiencies. However, it seems that now not only local governments but also the rest of the world have their eyes on the region with a legitimate interest in its development and integration both at a regional and worldwide level.

Offshore contracting pitfalls

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Ideally, contracts should be fair and balanced, clearly and comprehensively drafted, and reflect a realistic assumption of risk and reward. Unfortunately, not all contracts are well drafted and even small amendments to standard form contracts can result in potentially large exposures for the parties that might be uninsured. This article examines some of the potential pitfalls that can expose members to disproportionate levels of commercial risk or potential liability.

Introduction

When working in a global, high-risk industry, it is vital that offshore members negotiate appropriate contractual terms that provide as much protection as possible from disproportionate liabilities. They also need to have sufficient insurance for those contractual risks that they do assume and be able to avoid risks that they cannot insure.

Ideally, contracts should be fair and balanced, clearly and comprehensively drafted, and reflect a realistic assumption of risk and reward. Neither party should be exposed to disproportionate levels of commercial risk or potential liability.

Unfortunately, not all contracts are well drafted and even small amendments to standard form contracts can result in potentially large exposures for the parties that might be uninsured.

Offshore contract review

The Offshore Syndicate annually reviews in excess of 550 contracts for its members and has considerable expertise in all aspects of offshore contracting. The purpose of contract review is to proactively advise members on the effect of contractual arrangements they're negotiating regarding normal poolable cover and draw attention to any extra extensions to cover the contract may require.

Contracting pitfalls

During the contract review process, we see a number of pitfalls repeated, some of which are discussed below. Whilst this article looks to concentrate on drafting pitfalls, members may also incur non-pool liabilities under a contract for other reasons, perhaps because the work they are carrying out qualifies as a specialist operation or the ship is involved in drilling and production operation. If in doubt, members should contact the club for advice.

Knock-for-knock provisions

Traditionally, the offshore industry has dealt with the apportionment of liability between parties on a knock-for-knock basis, whereby each party assumes responsibility and indemnifies the other for liabilities relating to the indemnifying party's own property and personnel and those of his subcontractors, regardless of negligence.

As a general rule, the club will approve knock-for-knock contracts for poolable cover, provided they are balanced and do not expose the member to wider liabilities than those imposed on their contractual partner, and they have the right to limit liability under applicable law.

There are, however, numerous ways in which knock-for-knock clauses can be eroded or otherwise made defective so as to place the member outside poolable P&I cover; for example, where the member is required to take responsibility for the property and personnel of his contractors and subcontractors with no similar assumption of liability by the charterer.

Gross negligence/wilful misconduct

A common feature in amended knock-for-knock contracts is an exception for claims arising out of one party's gross negligence or wilful misconduct. Such amended clauses are inadvisable. The Marine Insurance Act provides that insurers will not be liable for losses arising out of the assured's own wilful misconduct. In the unlikely event that a court finds that, because of his wilful misconduct, a member cannot recover under a contract liabilities that should be for his contractual partner, he will therefore be liable for losses for which *prima facie* he is uninsured.

A further problem is that there is often either no definition of gross negligence/wilful misconduct in the contract or such definitions are poorly drafted. This means loss of certainty and clarity in the allocation of liabilities, which can lead to litigation, undermining an advantage of knock-for-knock regimes, namely the avoidance of time-consuming and costly disputes.

Third-party liabilities

Members' liability for third-party claims must be fault based in order to be poolable. Unfortunately, many contracts use language that exposes them to wider liability than they would otherwise have. The wording may simply provide that the member will be liable and indemnify the charterer for all third-party claims without reference to negligence or the position at law, or may even go so far as to provide that the member will be liable for third-party claims regardless of the negligence of the charterer or his other contractors

and subcontractors. Poolable cover will not respond if the member is liable under a contract for third-party claims arising out of the charterer's or any other party's negligence.

Members should also be wary of third-party liability provisions that are widely worded or unclear; for example, those that provide that the member will be liable for all claims caused by him or his ship. Without a specific reference to negligence, the member could be held liable for claims regardless of whether he is negligent or not; for instance, if the ship drops an anchor on a pipeline because the charterer has given the member incorrect information. Claims arising under such provisions will not be poolable if they expose the member to claims wider than those for which he would be liable in the absence of the contract.

Pollution

Clauses in respect of pollution should be carefully examined as they can expose a member to non-poolable liabilities. Normal P&I cover will respond to loss or damage caused by pollution from the entered ship and the costs of cleaning up such pollution, regardless of fault, provided that the member has not waived his right to limit liability. Clauses that allow the charterer to conduct the clean-up and bill the member for the cost and for any claims arising from the pollution may cause difficulty if the owner's right to limit is not preserved. The charterer may not be able to rely on the same limitation of liability as a shipowner, or may be unwilling to do so, but the additional exposure may not be poolable since a member should not take on contractual liability greater than he would have had in the absence of the contract.

Wreck removal

Similarly, poolable P&I cover extends to the costs of removing the wreck of an entered ship and cargo on board when required by a competent authority or because the wreck is a danger to navigation. Many contracts include clauses whereby the member also agrees to pay for the cost of removing the wreck of the ship if it interferes with the charterer's operations. If there is no wreck removal order and the wreck is not causing any danger to navigation such liability goes beyond poolable P&I cover and therefore will only be covered under an extension.

Conclusion

As outlined above, there are numerous contracting pitfalls that can expose members to disproportionate levels of commercial risk or potential liability. Even small amendments to standard form contracts can result in potentially large exposures for the parties that might be uninsured. The advantage of the club's contract review service is that we can flag contracting pitfalls before potential liabilities arise and assess if usual cover is sufficient.

As part of the contract review process, we will highlight any contractual liabilities that may expose the member to risks requiring extensions to cover. In this regard, the club can provide a number of comprehensive and tailored insurance products specifically designed for shipowners operating in the offshore oil, gas and alternative energy industry with high limits up to $1bn to meet a member's specific needs whilst minimising gaps in coverage.

Spotlight on Charles Taylor Adjusting

Charles Taylor Adjusting is one of the leading international loss adjusting businesses. We focus on commercial losses and claims in the aviation, energy, marine, property, casualty and special risks markets, many of which are large and complex in nature. These include onshore and offshore energy claims, maritime casualties, aircraft losses, large infrastructure claims and financial lines losses.

We have operated in Latin America for 15 years, having opened our first office in the region in Mexico City in 1999. This was followed by establishing a business in Bogotá, Colombia in 2012 and by opening an office in Rio de Janeiro in 2014 in partnership with Charles Taylor's P&I team.

Latin America is an important and fast-growing market for insurance services. Our regional adjusting offices in Mexico City, Bogotá and Rio de Janeiro provide insurers and reinsurers with access to the resources they need to handle larger and more complex losses insured in local and international markets. We also offer local markets access to our international network of 60 offices in 25 countries. This means we can respond to claims quickly and effectively wherever they occur in the world.

We offer insurers, reinsurers, owners, operators and their professional advisers a comprehensive claims adjusting service. We work in close partnership with all parties to quickly resolve complex matters in a constructive, professional and technically accurate manner. Our principal services in Latin America are loss adjusting, average adjusting, claims management, damage surveys and dispute resolution together with specialist technical engineering and surveying services.

Our Latin American operations are headed by Felipe Ramirez, Regional Director, Latin America and Head of Charles Taylor's Mexico City office. Our Bogotá office is led by Marco Montenegro and the new Rio De Janeiro Adjusting office is managed by Alejandro Martínez.

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