

# Latin American Bulletin

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**The Standard**  
for service and security

**The Standard**



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In this third Latin American special edition of The Standard Bulletin, we wanted to focus on a common theme that we believe is affecting many countries in the region: shipping legal updates and reforms.

Latin American jurisdictions are undergoing some legal changes. Many countries are trying to update and strengthen their legal institutions and regulations to align them with international practices, focusing on integration, security and certainty:

- integration – at regional and international levels;
- security – by having a more robust legal system;
- certainty – by developing and improving the laws to be applied by judges.

In this bulletin, we focus on Chile, Brazil, Uruguay and Argentina, as these are some of the countries that are making changes.

For example, Brazilian Congress is revising the Commercial Code that has been in existence since 1850. The code may be amended to include a chapter on carriage of goods by sea and would also allow the right to limit in Brazil, amongst other reforms. Likewise, Uruguay has enacted a new 2014 law, which has reduced time bars from 20 to two years.

The articles in this bulletin look at these developments and others that aim to align Latin American jurisdictions with the rest of the world.

However, these legal updates are yet to be tested by the local courts, and they cover only a small part of the region, which, as a whole, requires substantial changes to be implemented if Latin America is to maximise its potential.



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# Arbitration: a solution to Brazilian judiciary crisis?



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In light of the difficulties that Brazilian courts are facing, arbitration seems to be the best method of dispute resolution to reduce time and costs, and to obtain sound judgments.

- Brazilian courts are overloaded because of the delay in solving claims
- Brazil has introduced Act 9307 dated 1996 for conflict resolution through arbitration, but some obstacles still need to be tackled for its use in sea carriage
- This article makes some recommendations for the application of arbitration in disputes connected to sea carriage

## The current issue

Brazilian courts are congested to the point that a dispute often lasts for between five and seven years – and sometimes even longer – before a final judgment is reached. During this time, the claim could be increased by indexation of approximately 12% per annum. The defendant (owner/carrier) may therefore feel pressure to solve the dispute through settlement due to the punitive cost of defending a claim for this length of time. This is emphasised by the fact that, since Brazilian courts are not specialised in maritime law, decisions in favour of the defence are not guaranteed, regardless of the strength of their argument.

Several steps are being adopted to reduce the duration and cost of disputes in court. One example is a new Civil Procedural Code, which was recently approved and will come into force on 1 March 2016. Unfortunately, the steps taken suggest that greater importance has been placed on speeding up the resolution of claims rather than on improving the quality and/or correctness of the judgments.

## The case for arbitration

In September 1996, Act 9307/96 was enacted in Brazil to regulate the resolution of disputes through arbitration. The Brazilian arbitration model is similar to other international models. Brazil has also joined the 1923 Geneva Protocol, which makes arbitration clauses binding on the parties, rendering them unable to submit their dispute to judicial proceedings.

In 2002, Brazil joined the 1958 New York Convention, recognising the validity and accepting enforcement of arbitral awards rendered abroad.

The new Civil Procedural Code emphasises that an arbitration clause shall prevail, preventing the parties from filing a judicial dispute. Additionally, it establishes that those claims filed in courts will need to have a preliminary hearing to attempt an agreement before filing the defence.

However, although arbitration seems to be the right choice for dispute resolution in Brazil, there are still some barriers preventing wider use of it, especially related to sea carriage.

#### **Difficulties of arbitration**

Brazilian law establishes that parties should clearly agree to an arbitration clause signed by all parties. However, this does not happen when the clause is introduced through a bill of lading (BL) or without the signature of cargo interests, either of which would cause it not to be accepted by Brazilian courts.

Another grey area that needs to be clarified by Brazilian courts is when acting as subrogated to the insured's rights. Cargo underwriters have been successful on many occasions in making an arbitration clause not applicable to them, since they are neither party to the contract nor have they signed any agreement for arbitration.

Conversely, it has been alleged that subrogation entails a conveyance of rights and commitments between the insured and the carrier. This is an issue under dispute at the Superior Courts that is awaiting a final interpretation.

#### **Finding a way to validate an arbitration clause contained in a BL**

Firstly, it is necessary that a BL covering cargoes bound for Brazil includes a Brazilian arbitration clause, where specialised maritime arbitration associations already exist. It is not advisable to elect arbitration abroad, since Brazilian laws and courts stipulate that Brazilian jurisdiction and laws will apply to claims involving obligations performed in Brazil (discharge or loading in Brazilian ports). Mention of arbitration abroad might render the clause null and void.

In order to offset the shipper's missing signature, it is recommended that the shipper provides a signed letter with an express agreement to the arbitration clause inserted in the BL and that such undertaking is also passed on to the consignee/receiver as well as to the subrogated insurer upon transference of the original BL.

Following this process means that there will be a good chance of enforcing the arbitration clause, which also binds the cargo insurers.

#### **New Maritime Cargo chapter under discussion**

There is a proposed bill under discussion in the Brazilian Congress to implement the new Commercial Code, which would include a specific chapter on the carriage of goods by sea. This specific chapter was amended by a specialised commission within the Brazilian Maritime Law Association (ABDM) and the adjustment aims to make Brazilian legislation comparable with other nations.

The amendment contains a rule regarding arbitration in Brazil, which sets out that, when paying the insured, the insurer will subrogate not only to the insured's rights, but also to his obligations and commitments. Amongst other commitments, the insurer would be bound to the arbitration clause.

#### **Conclusion**

The measures adopted so far in Brazil have not been sufficient to reduce the duration of the disputes in the judicial courts pertaining to cargo claims, which results in a large number of claims with several years of indexation and interest.

Arbitration seems to be the best way forward and all efforts should be concentrated to that end.

# Introduction of a new right to limit liability in Brazil – implications for the offshore sector



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It is important for shipowners to be able to rely upon the maritime right to limit liability, especially for those operating in the offshore sector where they can face potentially onerous financial exposures. We expect our members to rely upon the right to limit, in jurisdictions where it is available, as a condition of P&I cover.

## Introduction

A new Commercial Code which will introduce the right to limit liability in Brazil is currently being considered by the Brazilian Congress. If it is introduced, it will make Brazil a more attractive market for offshore contractors and their insurers, as it will protect shipowners from unlimited exposure to liability following a casualty and provide greater legal certainty. It will also mean that Brazil is aligned with international maritime practice.

## Current law

There is, in fact, already a right to limit liability in Brazil, under the 1924 Limitation Convention<sup>1</sup> (which is based on the principle of abandonment, i.e. the value of the vessel plus freight post-casualty), but it has very limited application as it can only be invoked by shipowners from a country which is a party to the Convention.<sup>2</sup>

## New Commercial Code

The right to limit which will be introduced under the new Commercial Code in Brazil will be similar to the system that already applies under the 1957 Limitation Convention<sup>3</sup> and the 1976 Limitation Convention<sup>4</sup> (as amended by the 1996 Protocol), whereby the limitation figure is calculated according to the tonnage of the vessel, and the unit of measurement is the Special Drawing Right (SDR), whose value is based on a basket of international currencies. The

limits that shall be applied in respect of SDRs will be similar to those provided under the 2012 amendment to the 1996 Protocol (to the 1976 Limitation Convention). This amendment increased the limits under the 1996 Protocol and came into force on 8 June 2015.

The original draft bill for the new Commercial Code, which was submitted to the Brazilian Congress for consideration, provided that shipowners shall be able to limit their liability for maritime casualties that involve loss of life/personal injury or loss/damage to cargo or other property. It also contemplates that the owners of offshore vessels such as drilling rigs and floating production storage offloading units shall be able to rely upon the right to limit. However, amendments to the bill are currently under discussion, which will mean that loss of life/personal injury is excluded from limitation. It is also evident that it will not apply to wreck removal or pollution claims. This is because both are viewed as public policy issues under Brazilian federal law, whose central aim is protection of the environment.

## Environmental concerns

Although Brazil has ratified the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC), which applies to ships that carry oil in bulk as cargo and allows shipowners to limit their liability based

on the gross tonnage of the vessel, it has never been applied by the Brazilian courts. The new Brazilian Constitution dated 1988 stated that the environment was a public asset that must be preserved for present and future generations, which allowed strict environmental legislation to be passed at federal and state level. This has resulted in the '*polluter pays*' principle being applied under Brazilian civil law, i.e. anyone who contributes, even indirectly, to the occurrence of environmental damage is considered to be a polluter and consequently is liable to pay compensation for damage to the environment (Federal law no. 6.938/1981, article 3, IV). Shipowners are therefore strictly liable for any oil pollution that escapes or is discharged from their vessel. This includes the pollution clean-up costs and any property damage claims (which may include loss of income/business interruption type losses) that arise as a result.

### Conclusion

Oil pollution is the most onerous potential exposure faced by our members who operate offshore Brazil in terms of the value of environmental damage claims (apart from the level of financial penalties that may be imposed by the federal or state authorities). Although the right to limit liability will offer our offshore members some level of protection, in terms of reducing their potential exposure in relation to cargo or other property damage claims, they will still face unlimited liability for pollution. At this stage, it is still unclear when the right to limit will come into effect (or if it will come into effect) and how wide-ranging it shall be in terms of the types of claims that may be subject to limitation. We must await the outcome of the deliberations of the Brazilian Congress, but hopefully Congress will decide in favour of its introduction under the new Commercial Code, which will update Brazilian maritime law and bring it in line with international practice.



- 1 The 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Sea-going Vessels.
- 2 It is still in force in Belgium, Dominican Republic, Hungary, Madagascar, Poland, Portugal and Turkey. Although these states have adopted subsequent Limitation Conventions, they have not denounced the 1924 Limitation Convention.
- 3 The Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957.
- 4 The Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 as amended by the 1996 Protocol.

# Latest developments in Chilean Shipping Law



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Chilean maritime law is essentially contained in Book III of the Code of Commerce and in Decree Law N° 2,222 enacted on 31 May 1978 (the 'Law of Navigation'). Irrespective of the 2013 update, the whole body is in need of substantial reform.

## **An update to Chilean insurance law**

Act N° 20,665, enacted on 9 May 2013, involved a major update in respect of Chilean insurance law. As far as maritime insurance is concerned, the most significant changes brought by the Act are:

- the reinforcement of the duty of utmost good faith;
- the inclusion of a reference to the principle of '*lost or not lost*';
- the fact that a H&M policy will be presumed to be '*valued*' simply because the parties have stated an insured amount;
- that the meaning of marine insurance now includes '*installations and machinery gear to perform loading, unloading and stevedoring operations and any other property that the parties believe is exposed to risks associated with marine risks*';
- that the definition of '*constructive total loss*' includes the word '*finally*', which should mean that the abandonment of the vessel now has to be both reasonable and definitive;
- the fact that all disputes between the insured (or their beneficiary) and the insurer will be resolved by an arbitrator;

- a slight amendment to Article 1201, which continues to state that, in the case of marine liability insurance, there will be no direct action against the insurer unless the insurer has issued a guarantee (normally, an LOU) to cover the liability of the insured; and
- that the new Article 584 should be seen as a favourable development towards adopting English case law regarding the meaning of reinsurance clauses such as claims control/co-operation clauses, following the settlement clauses, aggregation of losses, etc.





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### **The '*pay to be paid*' rule continues to exist**

The Act also eliminated the insured's obligation to pay compensation for damages to a third party in order to claim compensation and reimbursement of expenses incurred.

In other words, the new Article 1200 of the Code of Commerce eliminated the '*pay to be paid*' rule, which lies at the heart of P&I insurance.

Despite this, the reality is that the Chilean marine insurance norms only apply in a suppletory capacity. As a result, provided the contract of marine insurance incorporates this '*pay to be paid*' rule, then such rule will continue to exist among marine insurance contracts, especially in respect of P&I insurance.

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### **Limits of liability for marine pollution under the CLC 92 have increased**

Chile has been a state party to the 1992 Civil Liability Convention covering liability for marine pollution. However, very recently, Chile enacted the amendments of the limitation amounts adopted by the IMO on 18 October 2000, thereby amending Article 6 (1) of the 1992 CLC Protocol and increasing the limitation amounts in line with the amendment.

### **Conclusion**

Chilean maritime law has not changed significantly and is in need of more substantial and internationally aligned reform, which raises questions about the possibility of comprehensively reviewing both Book III of the Code of Commerce and the Law of Navigation.



# Uruguayan Shipping Law update



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Recent legislative initiatives aim to bring the maritime legal framework of Uruguay in line with the needs of the shipping industry. This article looks at the introduction of Law No 19.246.

## Maritime law in Uruguay

As part of the Mercosur trading bloc (as discussed in *Standard Bulletin, Latin America Special Edition, July 2015*) and soon to be a trade partner of the EU, Uruguay is a key maritime player in Latin America. It is one of the most attractive locations for investment in Latin America since, by and large, it enjoys freedom from corruption, a relatively stable economy and constant growth.

Maritime law in Uruguay has been regulated by its Commercial Code, which dates back to the 19<sup>th</sup> century. The Uruguayan Maritime Law Association (MLA) has been engaged in legislative initiatives to update the maritime legal framework and bring it in line with the needs of the shipping industry of today.

Uruguay is not a party to major conventions that regulate the limitation of a carrier's liability and, therefore, major aspects of maritime law are regulated by national law.

Recently, the MLA concluded a project that was the driving force behind the passing of Law No 19.246 (September 2014), which deals with four key aspects of maritime law:

- cargo inspection;
- expert surveys;
- time bars;
- security and injunction bonds.

## Cargo inspection

According to Article 1, there is a presumption that the carrier has delivered the goods in accordance with the bill of lading, irrespective of whether there is loss of or damage to the goods. However, there are two exceptions where the presumption shall not apply:

- a) If the goods have been directly delivered to the consignee and the consignee makes note of the defect at the time of receipt of the goods (in the same way as an LOP).
- b) If the goods were not delivered directly to the consignee and the consignee notifies the carrier in writing of the loss or damage the day after they receive the goods.

In both of the above cases, when the damage is not easily ascertainable, the consignee is entitled to notify the carrier within five business days of the day of the delivery of the goods.

Notice of loss of or damage to goods is not necessary where a joint inspection is arranged. Joint surveys are mandatory if requested by any of the involved parties.

## Expert surveys

Private experts' findings can be used in trials as evidence when defending a claim (*conf Art 2*). Foreign experts' reports are admissible with the assistance of a local surveyor.

Thank you for the assistance of Florencia Sciarra Marguery of Sciarra of Sciarra & Asociados and Captain Alejandro Laborde of Chadwick Weir in preparing this article.



### Time bars

The most revolutionary change brought by the new legislation is that relating to time bars. Previously, under article 1018 of the Commercial Code, all claims that derived from commercial obligations had a 20-year time bar. Hence, a carrier remained exposed for a very long time after the incident occurred. This led to uncertainty and unfairness, and a demand for change.

According to the new Article 3 of Law No 19.246, the time bar has been reduced from 20 years to two years for all actions, including:

- cargo claims;
- collision;
- assistance and salvage;
- towage contracts; and
- General Average.

### Cargo claims

The two-year time counts *from the date the goods were delivered or should have been delivered* (in case the goods are lost). The recovery action of the carrier or of the vessel against the shipper, subcontracted operators or third parties may be brought even after the expiration of that term, *within six months of being notified of the lawsuit or of having paid either in court or out of court*. In such a case, a carrier can file a recovery action in two ways:

- When responding to the plaintiff's claim, the carrier can also include the recovery action (30-day period).
- After the proceedings have been concluded and indemnity has been paid, the carrier can file a recovery action within a six-month period.

The purpose behind this provision, which uses the wording of article 3(6) of the Hague-Visby rules and article 294 of the Argentinean Law of Navigation, is twofold:

- To protect the carrier in case a claim/lawsuit is pursued in a foreign jurisdiction and either the lawsuit against the carrier is served, or a settlement is made after the case is time barred in Uruguay.
- To give the carrier the opportunity, when proceedings take place in Uruguay, to file a new recovery action in case they omitted to include in the same writ the response to the plaintiff's claim, within six months after the trial has finished and indemnity has been paid.

### Other claims arising from maritime law

Any other claim arising from maritime law, from navigation or assistance services in connection thereto, shall also expire two years from the moment it becomes enforceable (*conf* Art 3).

### Security and injunction bonds

Article 4 makes clear that a P&I club's letter of undertaking (LOU) will be sufficient for releasing a vessel's arrest. However, the security must be subject to Uruguayan jurisdiction to allow enforcement, and the club should fix a domicile in the country for such a purpose. If a vessel is arrested at a Uruguayan port, local courts will have authority to adjudicate on the primary cause of the lawsuit, although the defendant can request to bring the lawsuit to another jurisdiction, provided sufficient security is being issued. This is regulated in law 18803, which came into force in September 2011.

### Conclusion

Law No 19.246, which was introduced on 9 September 2014, is a promising piece of legislation aiming to reduce bureaucracy, delays and costs, and to increase the competitiveness of Uruguayan trade. It remains to be seen how the courts will interpret the new provisions, in particular, in relation to time bars and provision of security.

# New Argentinian Civil and Commercial Code



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On 1 August 2015, the new Argentinian Civil and Commercial Code (the 'New Code') came into force. The New Code contains a chapter that covers the carriage of passengers and goods in general terms, without making a specific reference to the mode of transport, i.e. by sea, road or air. Below, we consider how the New Code might affect maritime law in Argentina and, in particular, shipowners' rights, defences and liabilities.

## The Navigation Act

Shipping matters in Argentina are regulated by the Navigation Act (Law 20,094) of 1973 (the 'Navigation Act'), which incorporates the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the 'Hague Rules') into national law.

The Navigation Act establishes in its first section that all shipping issues will be regulated by its provisions, by complementary laws, by use and practice, and, finally, by general civil and commercial law. The relevant chapter of the New Code, in turn, sets out that the principles contained therein will only apply where 'special laws', such as the Navigation Act, are silent. It also expressly sets out that multimodal carriage will be regulated by special laws.

It therefore appears that the Navigation Act, being a 'special law', will continue to apply to the carriage of goods and passengers by sea.

Argentina is also a party to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974. Where the Navigation Act is silent and no other complementary laws or use and practice apply, the provisions of the new Civil and Commercial Code will apply.

Although it is unlikely that the New Code will apply to carriage by sea, members should be aware of the changes introduced by the New Code that may potentially affect their liability, limitation of liability and time bars.

## Liability

According to the provisions of the New Code, the liability strictly lies with the carrier for any passengers or for loss of or damage to goods during carriage. This is the opposite of the Navigation Act, where liability is fault-based.

## Limitation

Under the New Code, the carrier cannot limit its liability for carriage of goods and passengers, and any contractual clauses that purport to limit the carrier's liability will be deemed as never written.

## Time bars

The time bar introduced by the New Code for contractual claims is two years as opposed to the one-year time bar in the Hague Rules and as per the Navigation Act. While the one-year time bar will continue to apply to maritime claims, it is yet to be seen whether a judge may decide to apply a more favourable time bar in case of dispute between the parties as to the applicable time bar.

Thank you for the assistance of Gustavo Ruggiero and Ramiro Fernández Llorente of Ruggiero & Fernández Llorente Abogados in preparing this article.

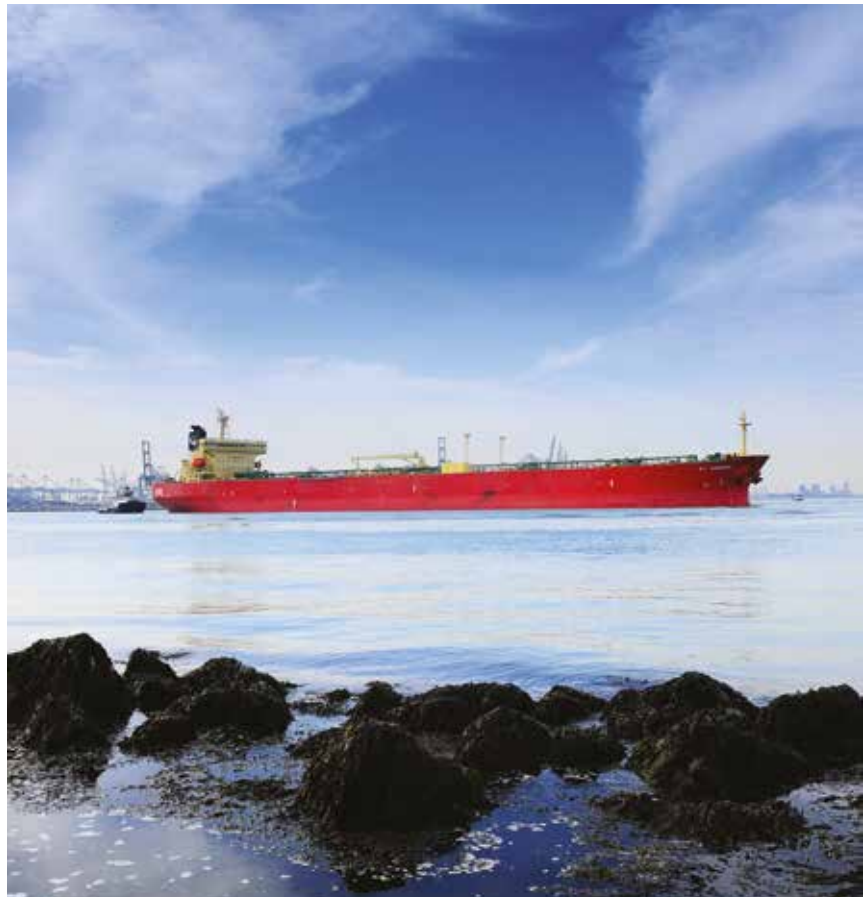
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### **Conclusion**

The provisions of the New Code on liability, limitation and time bars are more stringent for carriers than those of the Navigation Act. However, it appears that shipping matters will continue to be regulated by the Navigation Act, which incorporates the provisions of the Hague Rules, including all its rights and defences, into domestic law.

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As the New Code has only recently come into force, it remains to be seen how the courts will interpret certain provisions, in particular, in relation to liability, limitation and time bars. We will continue to update members on any developments in this regard.



# Map of Latin American countries covered in legal overview





# Property cover from The Standard Syndicate



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The Standard Syndicate offers property cover as one of its six main classes of business. This article explains more about the cover available.

## Introduction

The Standard Syndicate was launched on 1 April 2015 and operates at Lloyd's in London as well as having direct access to Europe, Asia and the USA via International Service Companies. Standard Club members and non-members in Latin America can approach the Rio de Janeiro office directly to be put in touch with the correct contact at the syndicate.

The syndicate provides a broad range of covers to clients in the marine and energy industries, with a particular focus on six main classes: Hull and Machinery, Energy, Cargo & Specie, Marine and Non-Marine Property, Liability and Corporate lines. One of the most valuable aspects of The Standard Syndicate model is our ability to develop complementary packages of cover across classes.

## Vision for the syndicate

Our aim is to develop products and services that will benefit existing members of The Standard Club as well as attracting new opportunities. This will be implemented by leading placements so that we can drive service, handle claims and influence risk management to develop long-standing relationships.

## Focus on Property

### Marine Property

The Standard Syndicate offers 'all risks', including Natural Catastrophe, cover for physical loss or damage to port and terminal operations, including handling equipment and business interruption or the increased cost of working following a physical loss, vessel impact or port/berth blockage. Typical requests are for container terminals, dry bulk terminals, wet bulk terminals (including pipelines and loading/unloading facilities) and shipbuilders/dry-docks located either on the coast or on inland waterways and lakes. Commercial exclusions will apply.

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The Standard Syndicate now also offers cover for physical loss or damage to non-marine property, including business interruption, machinery breakdown and equipment damage. Typical accounts include, but are not limited to, manufacturing plants, refineries, mining and forestry products as well as head office premises. Commercial exclusions will apply.



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The Standard Syndicate has the ability to offer both Marine and Non-Marine Property cover under the same policy for those risks that have exposure on the seafront as well as inland, for example, storage facilities away from port areas, which has proved successful in Latin America.

#### The Team

Tom Graham (Marine Property) and Ioanna Romanou (Non-Marine Property) have seven years of relevant underwriting experience of various types of property in South America, with most success in Brazil, Chile, Ecuador, Mexico, Panama and Peru.

#### How do I access The Standard Syndicate?

To access The Standard Syndicate, you can call your club relationship manager who will be able to help set up an initial meeting with the syndicate underwriters to discuss your needs. Alternatively, if you have an existing relationship with a Lloyd's broker, please ask them to visit us at the box: 4th Gallery, Lloyd's of London, Boxes 435 and 436. To find out more about Property cover, contact Tom Graham directly.



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