

LONDON MARKET REINSURERS MAY NEED TO ACT AS PARTNERS WHEN COVERING LATAM RISKS

It is important reinsurers are aware of the terms of the local insurance policy and what it provides in terms of scope of cover, timeframes and deadlines, interest and monetary correction, dispute resolution and governing law

Carriers providing coverage in the Latin America market need to be aware of legal, regulatory and claims handling issues

Reinsurers providing coverage in the Latin American market need to be aware of legal, regulatory and claims handling issues, which define the relationship between the local cedant insurer and the policyholder.

Although each jurisdiction is subject to its own particular set of rules, there are trends that exist across the region.

As is well known, fronting relationships are common across the Latin American region, whereby the risk is insured locally, often with a policy subject to local law and jurisdiction, which is then reinsured into the London market. Therefore, anything that frustrates the orderly handling of the claim, while ostensibly the problem of the cedant, will eventually present a potential difficulty for London reinsurers.

The issues range, for example, from the operation of warranties and conditions precedent under local law; misrepresentation and non-disclosure; the use of claims co-operation or control clauses; follow the settlements language; and the enforceability of arbitration clauses.

Deadlines

In many Latin American jurisdictions there are tight and strict deadlines in the claims process, for notification of a claim, for insurers to respond to the notice of loss or to a loss adjuster's report and to raise any coverage issues or request further information.

It is not uncommon for claims to be deemed covered and accepted if there is no response from insurers within the set time limits (and the ability to extend the deadline or to "reserve rights" may be very limited). This is the case in Argentina.

By way of further example, in Brazil the general rule is indemnity payment under the policy must be paid within 30 days from receipt of the documentation and information required to determine liability and quantum, suspended only by a reasonable and justifiable request for additional documents from the insured.

The consequences of failure then to make payment of an accepted claim is also significant. In Brazil, this comprises monetary correction on the amount due (intended to make good losses caused by inflation, approximately 5%), late payment interest (at a rate, according to some courts and commentators, of 12% a year) as well as other loss or damage. This can add very significantly to the sum due, especially in a context where litigation in many Latin American jurisdictions is slow.

It is important London reinsurers understand the claims handling landscape. Most of the issues are recurring and are best dealt with at the time of drafting the policy wording. After a claim occurs, brokers and reinsurers must work together to ensure the necessary information is received promptly and decisions, such as the need to appoint a loss adjuster, are made on a timely basis and communicated back down the line.

Opening a constructive dialogue between insured/insurer/reinsurer is the best way to achieve this, although it can sometimes be difficult to achieve where the insurer is focused on the inwards claim. A claims protocol can help to clarify the procedure to be followed, providing for the exchange of information and documents and, if appropriate, incorporating a mediation escalation clause. A proactive claims broker is of pivotal importance.

Reinsurer liability

If insurers' liability to cover the claim is crystallised, are reinsurers bound to meet the claim? This will of course depend on the wording of the reinsurance policy and a number of issues will be relevant. First, is the policy back-to-back? Is there a claims co-operation or a claims control clause, has the reinsured breached this and is it a condition precedent to liability? If so, how do conditions precedent operate under local law?

Is there a follow the settlements clause?

If there is, the question that must be asked first is whether the terms of the clause are satisfied. Under English law a reinsurer is bound to cover the settlement unless the reinsured has not taken proper or business-like steps or acted honestly in settling the claim or the claim does not fall within the scope of the reinsurance. If there is no follow the settlements clause then it is necessary for the reinsured to show the loss falls within both the underlying policy and the reinsurance policy.

What can be done in advance to try to avoid some of the difficulties that have been outlined?

It is important to be aware of the terms of the local insurance policy and what it specifically provides in terms of scope of cover, timeframes and deadlines, interest and monetary correction, dispute resolution and governing law. It is key to make sure any translations are accurate and, if the placement is made "back-to-front", the original policy is compliant with local law and regulations.

The drafting of the reinsurance policy is also important and the role of the placing broker is key. In addition to the points raised above, important terms include the law and jurisdiction clause. London reinsurers may wish to consider applying English law as the law of the contract, if this is permitted by local law in the relevant jurisdiction.

Consideration should also be given to referring any disputes to arbitration, ideally with an English seat and an express choice of law clause, to avoid any uncertainty – an arbitration clause is usually separate and independent from the main contract.

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This article first appeared in Insurance Day on 1 November 2023 and is reproduced with their kind permission.

HFW, in cooperation with CAR and other correspondent lawyers, have created an on-line interactive map setting out key (re)insurance law and claims handling considerations in 16 jurisdictions in Latin America. If you would like to request a copy, then please complete a copy of our request form [here](#).

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