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The New Chilean Insurance Law and its implications for the Shipping Industry

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Introduction

In early 2012 the Chilean National Congress proposed a bill to replace the provisions on general and non-marine insurance contained in Chile' Commercial Code (the "Code"), which were enacted almost 140 years ago, so that Chilean insurance law could be updated in line with current trends and market practice.

On May 9 2013 this bill was approved and become law (20,667). Its enforcement will become valid as of December 2013.

We set out below the key provisions that affect overseas insurers and reinsurers that do non-marine and marine business in Chile.

Defining insurance for the modern market place

In article 512, the Code now incorporates a new definition of the insurance contract which acknowledges how insurance policies have become more sophisticated since the 19th Century. The amended law expressly recognises different classes of insurance and differentiates between "damage" insurance (for example, fire, theft or civil liability insurance) and "individual" insurance (for example, life insurance or income protection insurance). Article 513 sets out some limited definitions of common insurance terms such as "Deductible", "Endorsement" and "Insurable Interest".

Validity of a policy

Articles 520, 521, 523 provide that for a policy to be valid there must be agreement on the insured risk, levels of premium and the insurer's obligation to indemnify the insured. The terms and existence of a policy can be proved by electronic documents, under article 515. If there is no insurable interest or it ceases to exist during the term of the contract, the policy will be terminated and the insured will receive a refund of the balance of the premium.

Disclosure

Articles 524 and 539 provide that the insured must respond to an insurer's request for information about a risk by honestly disclosing the information requested, to allow insurers to identify the object of the insurance and assess the nature of the risk. If the insured provides information that is false, the insurer can avoid the policy and return the premium. As noted below, the insured must also disclose circumstances that increase the risk during the policy period.

Termination of the policy and aggravation of the risk

A policy will be terminated if the risk is extinguished after the policy is entered into. If the risk increases, the premium will be adjusted. If the insured fails to pay premium, the policy

will be terminated. Under article 526, the insured must inform the insurer of circumstances that substantially aggravate the risk within five days. However, this provision applies only to risks that the insurer could not have discovered in another way.

Insurers' duties

Under Article 529, where insurance is taken out directly as opposed to through a broker, insurers are obliged to take account of the insured's interests and advise it as to the most suitable form of coverage for its needs. Insurers must also provide assistance to the insured in the event of a loss. Having said the above, it is worthy to note that the main obligation of the insured remains to pay the indemnity.

Subrogation

Article 534 provides that the insurer will take over the rights of the insured against third parties on payment of the indemnity. The insured has an obligation for its own acts and omissions to ensure that it does not compromise the insurer's subrogation rights.

Gross negligence and recklessness

Insurers can decline to indemnify the insured if the loss is triggered by an act of recklessness or gross negligence on the part of the insured, unless the policy provides otherwise (article 535).

Limitation period

Article 541 states that the limitation period applicable to insurance contracts is 4 years from the date on which the insured had an enforceable right under the policy. However, for life insurance, the term will run from the date that the insured had knowledge of the right to claim under their insurance, but this period shall not exceed 10 years from the date of loss.

Interpretation of insurance contracts

The provisions of the new law are in general mandatory, unless stated to the contrary (article 542). However, if a clause is deemed to provide an insured with a greater benefit than is provided under the law generally, the specific terms of a policy will prevail over the Code.

Levels of indemnity

Insurers can claim a reimbursement from its insured if an insured receives a payment for a value higher than the amount of its loss. If it appears that the insured has acted in bad faith, insurers can seek damages and / or press for criminal proceedings. Article 550 states that an insurance contract can never constitute an opportunity for enrichment or gain. Under article 563, the policy will provide for an indemnity in money, unless the policy provides that insurers will replace or repair the item insured.

Co-insurance contracts

Where co-insurers jointly cover the same insured interest, the insured can claim against

any of the co-insurers.

Third parties

Article 513 may be seized upon by third parties to argue that they have rights under insurance policies. The Code now includes a definition of a beneficiary as a person who is not insured but is entitled to an indemnity if an accident occurs. Also, the law now provides that insurers will pay third parties direct where the insurer has approved a settlement or a judgment orders the insured to indemnify a third party.

Reinsurance contracts

For overseas insurers based in London and elsewhere, the greatest impact of the legislation may be felt at the reinsurance level. Reinsurance contracts are specifically referred to in statute in more details than the old provisions of the Code. Article 584 appears to provide that reinsurers' obligations will be limited by the policy and will not be triggered until the reinsured incurs an indemnifiable loss. The Code now states that international custom and practice regarding reinsurance will influence the interpretation of reinsurance contracts. The Code states at article 585 that insurers cannot cite their outwards reinsurance as grounds for refusing to make a payment at the direct insurance level.

Dispute resolution

As regards non-marine insurance, the new law states that insurance disputes will usually be resolved through arbitration, although an insured has the right to make a claim in the local courts where sums under around US$ 500,000 are at stake (UF10,000). Insurers are now obliged to provide authorised copies of final arbitral awards to the regulator, with the aim of improving the scope of jurisprudence available for parties to consider in the event of a dispute. Arbitral awards will not be binding but we expect that this provision will improve certainty over policy interpretation.

As regards marine insurance, Article 1203 of the Code establishes the general principle that the resolution of any maritime dispute, including those relating to marine insurance, is subject to mandatory arbitration - that is, almost all maritime disputes must be resolved by an arbitrator. One exception concerns claims in which the amount at stake is less than 5,000 special drawing rights (SDR), as defined by the International Monetary Fund, provided that the claimant submits its claim before the ordinary courts. Therefore, marine insurance disputes are not subject to the new aforementioned

Impact on shipping industry

The law contains a number of amendments to the existing marine insurance provisions, all of which have been in force since 1988. Some of the main features of the law that affect the shipping industry are as follows:

- In addition to relating directly to ships, marine insurance will apply to facilities and machinery used for loading, unloading and stevedoring operations, and will cover other goods or assets that the parties consider to be exposed to marine risks (new Article 1160).
- The new law expressly provides that a marine insurance contract is consensual. Its

existence and terms can be evidenced by all legal means of proof, provided that a principle of written evidence is contained in a document, whether digital or electronic (new Article 1173, in conjunction with Article 515).

- The obligation of utmost good faith has been reinforced (new Articles 1176 and 1177).
- The concept of total loss now includes assimilated total loss when the insured object is reasonably and finally abandoned. This may happen either because the effective total loss cannot be avoided or because the costs involved in avoiding such loss are greater than the insured value of the object (new Article 1189).
- The new law removes the current obligation for the insured first to pay compensation for damages to a third party in order to obtain compensation and reimbursement of expenses incurred (new Article 1200).

Comment

(1) The amendments to the provisions of the Chilean Commercial Code that govern insurance contracts appear to have two aims: first, to bring statute law into line with modern insurance practice; and secondly, to provide consumers with greater protection.

(2) For the London insurance market, the amendments seeking to modernise the law may prove to provide greater certainty as to the rights and obligations of insureds, insurers and reinsurers. Modern insurance models were already part of doing insurance business in Chile. The new law seems to be designed to reflect this reality, for example by allowing terms of insurance contracts to be agreed over email.

(3) Overseas reinsurers may benefit from the level of detail set out in the Code. In the event that a reinsurer asserts control over a claim, a number of the provisions noted above may advantage the insurer and reinsurer in a coverage dispute with the insured - for example, regarding the insured's duty of disclosure at placement or its duty to disclose circumstances that aggravate the risk.

(4) The changes in the law provide reinsurers with greater certainty as to when insurers can terminate a policy or refuse to indemnify the insured: for example, if the insured provides false information, the loss is triggered by an act of recklessness, the insured fails to pay premium or fails to advise insurers of circumstances that have aggravated the risk.

(5) Although the definitions of common insurance concepts are not set out in much detail, we can envisage circumstances where disputes could be resolved by reference to the definitions set out in the Code.

(6) Hitherto, the lack of guidance in the Code over reinsurance contracts has created uncertainty for the London market. The new provisions stating that "international standard practice" will be relevant to interpreting reinsurance contracts may herald an improvement, although there will inevitably be disagreements as to what practice should be followed. Nevertheless, if a reinsurance policy is placed by brokers in London and uses standard London wording, reinsurers will be able to cite the amended Code to argue that evidence of London market practice will be

key to resolving disputes at the reinsurance level.

(7) In the past, disputes at the reinsurance level may have been difficult to resolve as there was little case law to provide guidance. Whilst the arbitral awards that will be lodged with the regulator will not bind parties in future disputes, we welcome the initiative to create a bank of arbitral decisions which can be referred to in subsequent proceedings.

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