



## TT Live – Series 1: episode 3 – 25/11/2020

### Unfamiliar jurisdictions

#### Mitigating the risks

In this episode, Mike Yarwood, Managing Director Loss Prevention, talks with Julien Horn, Senior Underwriter, about the risks of conducting business with unfamiliar jurisdictions.

**Mike:** “Welcome to this edition of TT Club’s Podcast TT Live. In this session, we are going to consider the risks around doing business in unfamiliar jurisdictions. My colleague Julien Horn, Senior Underwriter at TT Club, joins me to discuss this topic.

The globalised nature of the supply chain has seen many logistics operators invest in exploring lucrative opportunities in emerging markets, such as the Middle East. Markets in certain sectors in emerging countries continue to out-perform the global average. Extensive investments made in the creation of new infrastructure, give rise to large-scale expansion. Logistics operators as many other businesses rely on such regions for growth opportunities.

In a sluggish global economy, such opportunities are rare and the potential for rapid growth is extremely enticing. Expansion of operations into such markets, however, does not come without risk, comprehensive due diligence should be completed prior to your business making contractual commitments in what might be considered unfamiliar jurisdictions. Doing so will assist in avoiding unwelcomed surprises.

Julien, welcome and thank you for joining us for this session. I think it would be fair to say that TT have seen a number of its Members over the years venture into unfamiliar markets with the clear objective of expansion. Often these ventures are incredibly successful, however in business, there are risks to be taken and without being empowered to correctly assess those risks, some have very negative and costly experiences.”

**Julien:** “Thank you Mike. As you know I recently relocated to the UK after spending six and a half years living in the Middle East looking after not only the Middle East and African members but also supporting some of our global members who have operations in the GCC. We have seen operators achieve mixed success but almost without exception seen even well prepared and experienced operators face unexpected challenges whether in the physical operations or in coping with some of the nuances of a particular jurisdiction.”

**Mike:** “Investments in taking on new contracts of course might not simply involve committing to shipping or storing a certain volume of cargo, for more complex operations, capital investment might be required in property and people to deliver contractual obligations. Having to enter into a long term property lease commitments or recruiting a number of staff may be risks operators are willing to take if the perceived benefits appear to be sufficient. It is often when there is a dispute or a problem that requires legal intervention, when the true challenges present themselves.”

**Julien:** “I agree yes, more often than not, when business activities are free from dispute all will appear straightforward and smooth sailing. It is when disputes arise that challenges can present themselves, be extremely costly to resolve and in extreme cases put the ventures commercial viability in question. There are a number of factors that businesses should familiarise and satisfy themselves with before making such commitments.”



**Mike:** “As you say there are numerous factors at play here, perhaps one key general factor to consider at the very outset is the general ease of doing business in the proposed country.”

**Julien:** “Yes, this would be a good starting point and could serve to influence the proportionality of your further due diligence checks. A thorough assessment of how easy it is in practice to conduct day-to-day business in the chosen country will be a valuable measure. An initial source of information could be the World Bank’s ease of doing business index. This is a freely available resource & could provide high level guidance however it should only be considered a starting point.”

**Mike:** “Agreed, from a practical standpoint, particularly for specialised operations, the availability of a skilled local workforce would be another key consideration. Depending on the size of the operation, you might be required to build and sustain, being able to adequately staff the operation is obviously vital. I have known businesses either temporarily or permanently relocate key members of staff to the new location to oversee, train and influence the operation; this too can result in mixed success. Cultural and operational differences can on occasion be counter-productive. What is certain though is that businesses should not simply expect that there is a readily available skilled workforce that they can access which mirrors that to which they have become accustomed in their current operations.”

**Julien:** “Absolutely, another consideration at the outset is looking at a longer-term view, where is this opportunity likely to go in five or ten years?”

Will there be strong growth, will there be the need to recruit and employ more personnel?

If sufficient skilled personnel are not available, it might be necessary to carry out appropriate training.

This might be conducted in-house, you mentioned businesses relocating certain members of staff, but the availability of local training should also be a consideration. You mentioned culture earlier and this is another valid point. It is important to assess whether the local workforce will find the proposed roles attractive. Skilled manual roles, may simply not be attractive if the wider workforce have become accustomed to office based roles.

A common challenge in certain jurisdictions, if a business wishes to parachute in a non-local employee, can be that securing a residence visa or work permit is no guarantee and doing so quickly even less likely.

We have seen examples of senior managers being forced to undertake an international commute or simply give up on their first choice appointment as obtaining the long term visa was not possible.”

**Mike:** “Training of personnel can present another challenge. Where there is the need for training, consideration should be given as to how this can be achieved and what the local customs in this regard are. What are the local legal health and safety regulations and expectations. Do the local regulations require formal certified training, or can this be provided in-house by your own experts. Does your business require local accreditation to perform intended tasks? There is importance in fully understanding both the legal minimum requirements but also the expected morale obligations to safeguard your workforce.

In terms of workforce, another consideration might be the local wage expectations and payment structures. These obviously differ from jurisdiction to jurisdiction and have the potential to be problematic and expensive if not fully understood at the very outset.”



**Julien:** “Remuneration expectations and structures around income tax, insurance & pension (or the local equivalent) are absolutely a consideration that should be explored.

Is the local expectation for example to have full health insurance included in an employment package and if so at what cost?

If there is a fundamental requirement to bring a skilled workforce from local or regional operational centres, to support training, operations or growth, consider what Visa requirements are in place; as mentioned earlier some jurisdictions maintain a complex and costly Visa system. In the case of an urgent need to relocate personnel, such restriction may present unexpected challenges and costs.”

**Mike:** “Where businesses are required to accommodate buildings, whether offices or warehouses and operate vehicles or other carrying equipment, checks should be made to ensure you are able to meet the local legal requirements to do so.”

**Julien:** “Yes, this is something we have seen in the past, certainly where vehicles are concerned. Understanding the local requirements for licencing, maintenance and rules of operation are vital.

It might for instance be a difficult and lengthy process to obtain an operators’ licence, which could affect your ability to perform your contractual obligations from day one.”

**Mike:** “A further prudent consideration is how a given market is structured. Some markets are substantially centralised, others more fractured, but in any situation, there may be unfamiliar stakeholders holding influence over market conditions. It is frequently the case that mature global markets are influenced by multi-national shippers, whereas emerging markets may have a different structure, perhaps being heavily influenced by a much larger number of smaller entities.

Whilst this inevitably creates a more difficult and less certain platform for your business to operate, broader considerations arise, such as the predictability of a given entity to satisfy its legal and financial exposures. It can also prove difficult to perform simple business searches in certain jurisdictions, such that you are unable to clarify whether you are trading with a financially stable, asset driven business or what is essentially a 'paper' trading company.”

**Julien:** “Market structures are important to understand, knowing who plays what role in the sphere of influence is vital. So too is understanding the interactions with the local authorities and the influence they exert.

From a business investigation perspective, you mention the ability to perform background checks on would be customers, contractors or even your local partners. In many jurisdictions this is a given, it is relatively low cost and much of the information is readily available. There are however cases where by it is extremely difficult, time consuming and expensive to obtain such information, if even possible. On several occasions when seeking recovery, we have tried to undertake such searches to assess the viability of incurring legal costs and it can be very challenging.”

**Mike:** “Despite the challenges in undertaking business searches, where businesses take the decision to expand into unfamiliar jurisdictions, there is a fundamental requirement to know your customer.

Be certain who you are trading with and ensure that all available background checks are completed. Conduct local investigations and seek to obtain references



for the companies with whom you intend to trade. Notwithstanding the expense, consider meeting with the company at their primary place of business. Secure details such as their full trading style(s) both in English and local language, the names of Directors, banking details and original copies of insurance documents.

The role of due diligence holds great importance.”

**Julien:** “In addition, it is prudent to always formalise contractual arrangements with each party signing an agreement, even where short term or spot hire arrangements are concerned.

Where possible, seek to incorporate a familiar law and jurisdiction clause although this may not be possible depending on the local law.

Where disputes arise, such documents are essential in evidencing a contractual relationship between your business and your customer. Whilst this may sound an obvious requirement, this will often be a fundamental standard to evidence what service each party contracted to undertake and form the basis to apportion liability.

The absence of such documentation, where for example a business arrangement has been finalised through a series of emails, can be fatal to a dispute in certain jurisdictions, either leading to vastly increased legal costs in trying to establish a contract or simply result in the case failing.”

**Mike:** “As with many aspects of business, proportionality is of importance. For example, providing shipping services in the capacity of an agent, is very different from providing equipment, storage and full distribution services. Therefore, businesses need to consider what their potential exposures are when undertaking these due diligence checks.”

**Julien:** “Yes, where high value cargoes, contracts or the use of assets are concerned, it would be prudent to exercise heightened levels of vigilance.

For cargo shipments, consider engaging pre-shipment surveyors to ensure adequate stowage and securing is in place.

Where carrying equipment is concerned and where appropriate, you could obtain and analyse pre-shipment samples of the cargo to provide a degree of certainty that the description offered by the shipper meets your expectation and is compatible with the equipment.”

**Mike:** “In the case of a loss or claim, stakeholders can find themselves in an unenviable position in terms of their ability to recover their losses. Practically, in the event that there is an issue with either the cargo, carrying equipment or a combination of both during transit, the maritime carrier will generally have no contractual relationship with the actual shipper and will therefore seek recourse from the NVOCC/freight forwarder.”

**Julien:** “Correct, and where due diligence has not been fully performed, this can leave the latter with the unenviable task of attempting to recover losses from a company which either has no means or insurance to meet the claim, or is domiciled in a jurisdiction where it proves financially unviable to make a recovery.

Again, such incidents are not uncommon, frustrating and often costly.”

**Mike:** “An item we touched upon there, and businesses often need to rely upon when disputes arise, is the underpinning local legal system. It is prudent to investigate and understand the local legal system and regulatory environment, how it operates and whether each are conducive for your company to undertake its intended



business activities. Some jurisdictions have extensive requirements to complete the simplest of tasks, with powers of attorney often required, all of which can come at an unexpected expense even for very modest matters. Additionally, take account of the fact that many jurisdictions have no provision for recovery of legal costs for a successful litigant, whether bringing or defending a claim.”

**Julien:** “This as you say is a very important and sometimes overlooked aspect of the exploratory process. In addition to the items you mentioned, cost and expertise are other key metrics.

The rates of legal services and the structure thereof can be surprising in some jurisdictions, even where other services appear to be comparatively inexpensive. The expertise of a lawyer can attract a disproportionate cost.

Expertise itself is also a factor, understanding the maturity of the maritime legal regime in the country could be valuable. Some large jurisdictions have very little expertise in the handling of international maritime disputes. This too adds uncertainty of outcome, cost and time.”

**Mike:** “It is natural that businesses will inevitably take risks to grow or maintain their current standing. Doing so in unfamiliar jurisdictions can present a wide array of additional risks that without a thorough understanding can give rise to significant losses. Of course, there might be very lucrative propositions and competitors waiting in the wings if you do not take the opportunity. Julien do you have any final thoughts that stakeholders should perhaps consider when looking to venture into unfamiliar jurisdictions?”

**Julien:** “Yes, from a liability insurers perspective, where businesses do venture into new contracts in potentially unfamiliar jurisdictions, it is imperative for businesses to notify their insurer. Ensure that they are aware of the new activity and in doing so provide the opportunity to raise any concerns beforehand.

If for example there is an underlying warranty under the policy which restricts certain activities or trading in certain jurisdictions, then without prior consultation and agreement, in the event of a loss, there is a real risk of dispute, which has the potential to add further risk and complexity.”

**Mike:** “In conclusion, when considering new business opportunities in unfamiliar jurisdictions, undertaking well considered checks on the general ease of doing business is a good starting point and will provide a high level indication as to the potential risks involved. Proportional due diligence checks focused on the market structure, workforce, culture, regulations and legal system will all assist in providing a platform from which informed business critical decisions can be made, prior to committing your business. Finally, as Julien rightly pointed out in his final comment there, engage with your liability insurer to ensure certainty regarding insurance coverage to further protect your business.

While the recommendations in this discussion provide useful general guidance, each business case has to be considered on its own merits, as highlighted, proportionality is key. The overarching message is to be proactive in approach seeking assistance and practical guidance from local experts, thus ensuring you are as well informed as possible, prior to making contractual commitments.

Thank you once again to our guest speaker, Julien Horn and thank you for listening. Please tune in next week when Andrea Gentile will be discussing due diligence and the potential risks associated with sub-contracting final mile deliveries.”