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Amendments to Canadian Legislation affecting Marine Insurance

Presentation to Canadian Board of Marine Underwriters

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FEDERAL LEGISLATION

Insurance Companies Act Amendments

Traditionally, marine insurers exempt from Part XIII of the *Insurance Companies Act* (ICA)

An Act to Amend the law governing Financial institutions

- amends Part XIII of ICA
- comes into force on January 1, 2010
- eliminates traditional exemption
- subjects marine insurers, including H&M underwriters and P & I Clubs, to federal prudential oversight regime.



FEDERAL LEGISLATION (cont'd)

Insure in Canada a Risk

Foreign entity shall not “insure in Canada a risk” unless:

- authorized to do so by Order of Office of Superintendent of Financial Institutions (OSFI) and
- risk falls within class of insurance specified by Order

Foreign entity

“an entity incorporated or formed by or under the laws of a country other than Canada, and includes an association and an exchange”

All aspects of foreign entity’s business in Canada subject to ICA e.g. record-keeping, vesting of assets in trust in Canada, solvency, reporting, maintenance of reserves, etc.



FEDERAL LEGISLATION (cont'd)

OSFI Advisory - “Insuring in Canada a Risk”

- “Insuring in Canada a risk” not defined
- OSFI Advisory issued in September 2007 interpreting the term
- Advisory revised in May 2009.
- Foreign insurer means entity incorporated or formed by or under the laws of country other than Canada that insures risks, including
 - an association and an exchange
 - agent acting on its behalf (e.g. MGA)
- agent means person with authority to bind or stand in shoes of foreign insurer



FEDERAL LEGISLATION (cont'd)

Insuring In Canada A Risk

OSFI May Advisory

To determine whether a foreign insurer is “insuring in Canada a risk” does a representative:

- (a) promote the foreign insurer or the foreign insurer’s insurance products through communication that is primarily circulated, transmitted, broadcasted or otherwise accessible in Canada
- (b) directly incite a person located in Canada to request insurance coverage and person is provided with the means to make a request for insurance coverage (e.g. telemarketing, door-to-door solicitation, direct/targeted mail)



FEDERAL LEGISLATION (cont'd)

- (c) receive in Canada a request for insurance coverage
- (d) negotiate from Canada the terms and conditions of insurance coverage
- (e) decide in Canada to bind the foreign insurer to insurance coverage
- (f) communicate from Canada an offer to provide insurance coverage, acceptance of a request
- (g) receive in Canada an acceptance of the foreign insurer's offer to provide insurance
- (h) receive in Canada payment for insurance coverage
- (i) interact in Canada with the policyholder in the provision of services (e.g. providing information and receiving claims)



FEDERAL LEGISLATION (cont'd)

Application of Indicia

- each business assessed on own components
- indicia not necessarily exhaustive
- OSFI considers foreign insurer to be insuring in Canada a risk where business model encompasses:
 - two or more activities referred to in any of items (b) to (h).
 - any of the activities in items (b) to (h) and both of activities in items (a) and (i).
 - reaching agreement on most or all of the material terms and conditions of the insurance coverage i.e. item (d) and one additional activity in items (e) through (g).
- foreign insurer not insuring in Canada a risk where business model encompasses only one of the activities.



BRITISH COLUMBIA LEGISLATION

Financial Institutions Act (FIA) Amendments

FIA amended by Bill 5 (*Financial Statutes Amendment Act*, 2009)

- 1st Reading 15/9, 3rd Reading 6/10; Royal Assent 29/10

Purpose Of Amendments

- require registration in BC of insurers (including marine) underwriting risks located in BC
- regardless of where the underwriting activities are conducted.



BRITISH COLUMBIA LEGISLATION (cont'd)

Policy Reasons

Policy reasons for Bill 5 amending the FIA re marine insurance appear to include:

- some vessels (notably, pleasure craft) were not adequately insured
- marine insurance industry hard to govern where marine insurers based in one province marketed insurance in other provinces
- to eliminate gaps between federal regulation of insurers (ICA, Part XIII) and BC's regulatory system

BUT insurance of merchant vessels **not** a problem



BRITISH COLUMBIA LEGISLATION (cont'd)

Possible Unintended Consequences

- absence of coverage for B.C. (and Canadian) shipowners, operators and charterers
- Canada's obligations under some international maritime law conventions.



BRITISH COLUMBIA LEGISLATION (cont'd)

Business Authorizations

To carry on “insurance business” in BC a “business authorization” from BC’s Financial Institutions Commission (FICOM) is needed by:

- an insurance company; or
- an extra-provincial insurance corporation

Insurance Business

- “undertaking or offering to undertake to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed”.



BRITISH COLUMBIA LEGISLATION (cont'd)

Such activities, whether or not conducted in B.C., are:

- conclusively deemed to constitute the carrying on of insurance business in BC if risk or peril is located in BC .

Extra-provincial insurance corporation means:

- (a) a corporation that is an insurer and is incorporated by or under the laws of a jurisdiction other than British Columbia and

is, under those laws, licensed, registered or in any way authorized to carry on activities that are substantially the same as insurance business

or

- (b) an insurance association



BRITISH COLUMBIA LEGISLATION (cont'd)

Exceptions And Exemptions

- A licensed insurance agent authorized by a BC resident to effect a contract of insurance may negotiate or procure such a contract with an insurer who is prohibited from carrying on business in BC (i.e. an insurer without a “business authorization”), “subject to the requirements or conditions, if any, imposed by regulation.”

Regulations also establish “circumstances that must be present, before, during or after negotiating or procuring a contract of insurance”.



BRITISH COLUMBIA LEGISLATION (cont'd)

- Insurer may, without a business authorization, enter into a contract of insurance in certain circumstances
- Person or insurer is exempt from requirement to have business authorization to carry on insurance business when permitted by regulations
- exemption may be unconditional, conditional or in specified circumstances

Foreign insurers (P & I Clubs, H&M underwriters) might benefit from exemption.

BUT regulations not yet drafted



BRITISH COLUMBIA LEGISLATION (cont'd)

Impact

P&I Clubs could cease insuring members and risks located in B.C. (or throughout Canada) unless regulations exempt them from obtaining business authorizations under FIA

Canadian shipowners (e.g. BC Ferries Corporation) lose access to P & I cover offered by IG Member Clubs.

No equivalent cover is available in Canadian market.



BRITISH COLUMBIA LEGISLATION (cont'd)

Canada's International Obligations

If IG P & I Clubs cease offering BC or all Canadian shipowners adequate protection against pollution risks, there will be:

- uncertainty as to basis for Transport Canada issuing certificates of financial responsibility to shipowners
- difficulty for BC or Canadian shipowners to obtain adequate pollution coverage to comply with CLC 1992 and Bunkers Convention 2001 (and other international instruments in future)
- potential difficulties for successful third-party claimants in recovering full damages in major incidents
- potential failure by Canada to comply with its international obligations



BRITISH COLUMBIA LEGISLATION (cont'd)

Australian Legislation – Potential Solution

- Pre-2007 no requirement for authorization to conduct business in Australia by “direct offshore foreign insurers” (DOFI’s) (overseas insurers carrying on direct insurance business in Australia that had no subsidiary or branch there)
- Australian *Financial Sector Legislation Amendment*
 - amended Discretionary Mutual Funds and Direct Offshore Foreign Insurers Act
 - DOFI’s carrying on “insurance business” in Australia, directly or through an intermediary, became subject to Australia’s “Regulatory Regime” for insurers (reporting, solvency, reserves, etc.)



BRITISH COLUMBIA LEGISLATION (cont'd)

Exemption Of Contracts For Certain Risks

Atypical Risks

- Regulations exempt various kinds of “contracts of insurance for an atypical risk” from Regulatory Regime
- includes contracts insuring “liability and expenses arising from a person owning, chartering, managing, operating or being in possession of a vessel, other than a pleasure craft



BRITISH COLUMBIA LEGISLATION (cont'd)

Unreasonable Placement Risks

- exemption for insurance that cannot reasonably be placed with Australian insurer
- requires certification by broker
- broker to be satisfied that:
 - no Australian insurer will insure against risk, or
 - terms (including price) on which Australian insurer will insure are: substantially less favourable than those of unauthorized foreign insurer, or



BRITISH COLUMBIA LEGISLATION (cont'd)

- Australian insurance would be substantially less favourable than with unauthorized foreign insurer because of other circumstances (e.g. a pre-existing relationship between the insured which results in significant benefits for insured)
- broker to make reasonable inquiries and keep written records and, if requested by the insured, must provide copy of certificate



QUEBEC LEGISLATION

Proposed Quebec Insurance Act Amendments

An Act to amend various legislative provisions principally to tighten the regulation of the financial sector (Bill 74)

- First reading: Nov. 12, 2009.
- will amend many Quebec financial statutes, including the Québec Insurance Act (QIA) re foreign insurers
- Basic purpose is to require foreign insurers to maintain “adequate assets” in Quebec and Canada



QUEBEC LEGISLATION (cont'd)

Insurers To Maintain Adequate Assets

- Every insurer to maintain in Québec and in Canada adequate assets in relation to its operations in Québec
- Insurers must maintain:
 - ❖ adequate capital base consistent with “sound and prudent management”;
 - ❖ adequate liquid assets to ensure “sound and prudent management”.
- provisions extended to foreign insurers



QUEBEC LEGISLATION (cont'd)

Written Instructions By The *Autorité Des Marchés Financiers* (AMF)

- AMF may give written instructions to an insurer concerning adequacy of:
 - ❖ its capital base and elements composing it;
 - ❖ its liquid assets.
- Prior to issuance of instructions, AMF must:
 - ❖ notify the insurer
 - ❖ give it an opportunity to submit representations
- provisions extended to foreign insurers



QUEBEC LEGISLATION (cont'd)

Guidelines By The AMF

- AMF empowered to issue guidelines on “maintenance of adequate assets in Québec and Canada”
- Guidelines are not regulations, but pertain to carrying out, interpretation or application of certain matters
- Failure to comply with guidelines constitutes failure to adhere to “sound and prudent management practices” and renders insurer subject to recourse by AMF for injunctive relief

Reinsurers Exempt From Complaints Against Insurers

- insurer that transacts exclusively in reinsurance exempt from provisions of QIA on examination of complaints.



QUEBEC LEGISLATION (cont'd)

GOD BLESS CANADA

What do insurance legislation and language rights have in common?

Both are constitutional issues



QUEBEC LEGISLATION (cont'd)

Marine insurance held to be field of exclusive Federal jurisdiction under the *Constitution Act* (Section 91(10) - “Navigation and Shipping”)

- *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd.) v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283
- *Ultramar Canada Inc. v. Mutual Marine Office Inc.*, [1995] 1 F.C. 341 (TD)
- *Marine Insurance Act*, S.C. 1993, c. 22.



QUEBEC LEGISLATION (cont'd)

Provinces have exclusive jurisdiction over property and civil rights (Section 92(13) of the *Constitution Act*), including licensing of businesses carried on in the province, including that of insurance agents and brokers

- Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3.



QUEBEC LEGISLATION (cont'd)

QUAERE:

Would constitutional doctrines of interjurisdictional immunity and paramountcy apply in this case so as to require the amendments to provincial legislation to be “read down” or to render it inapplicable to the maritime industry generally and marine insurers in particular ?

You be the judge – I’m just the lawyer !!



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Thank You and Season's Greetings!

