Structuring Multinational Insurance Programs:

Insights into Cross-Border Insurance Regulation in Canada

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Overview

The international risk management community is eager to understand how to buy insurance seamlessly, cost-effectively and in a compliant manner for multinational enterprises with risks in Canada. Companies, insurers and insurance brokers may be subject to taxes or penalties if they fail to consider the country's two-tier regulatory scheme, which includes federal taxing authority and an array of different insurance regulations in the provinces and territories. While Canada is unique in some respects, its regulations are not all that different from other places around the world, including states and territories of the United States. The key to successfully structuring and implementing global insurance programs with Canadian exposures is to recognize the regulatory perspective of each province where risks are located. Various consequences, some intended and others unintended, could result depending on how the insurance transaction is structured and implemented.

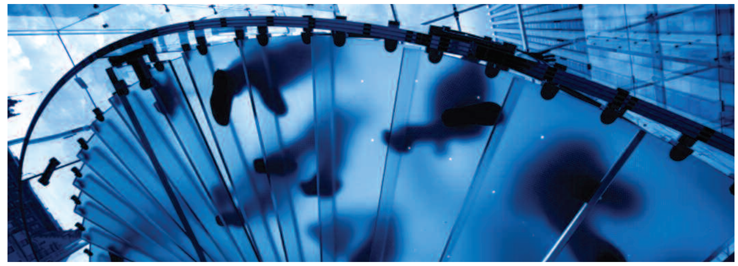
When developing a global insurance strategy, multinational clients try to balance three core objectives: maximizing global insurance capacity, minimizing cost, and maintaining centralized control over their insurance programs. Today, sophisticated buyers design programs to retain much of the risk. They justifiably expect that by leveraging their company's central control of insurance terms and limits, consolidated loss information, consistent loss control procedures and corporate buying power, they can simplify the placement of global insurance coverage and win favorable risk transfer terms and pricing. However, when it comes to multinational insurance programs nothing is simple, and developing a compliant insurance program in Canada's sophisticated and diverse regulatory environment presents particular challenges. While these challenges can imperil an insurance program or create unexpected tax liabilities, they can be overcome with forethought, consultation and expertise.

The ideal solution to cross-border regulatory, tax and execution challenges would seem to be a single policy that insures the multinational company's global risks, which the policyholder could claim upon in either the country where the multinational's headquarters are located or where the claim occurred. In this ideal solution, a single insurance policy would insure the risk of the multinational's affiliated entities—the parent as well as worldwide subsidiaries, affiliates and joint ventures.[1] Ideal though it may sound, this approach is neither realistic nor materially compliant. For one, it does not consider many of the restrictions, controls and uncertainties inherent in insurance regulation in countries where insured risks are located. Many countries prohibit residents from purchasing insurance from anyone other than an "admitted" insurer, meaning an insurer that is locally established, authorized or licensed. Other countries, while allowing insurance to be purchased from non-admitted insurers, impose taxes, penalties or other restrictions that may discourage the practice. Various other factors also affect the parent company's ability to obtain worldwide consistency in coverage. Language and regulatory differences, for example, make it generally impossible to ensure the terms of each local policy are consistent with the terms of others issued as part of the program.

Global insurers have historically fulfilled the multinational company's request for worldwide coverage and consistent limits by offering a "broad-form" master policy — one policy insuring a parent and its subsidiaries and affiliates located anywhere in the world. The master policy may be the only policy providing insurance or may operate in excess of and in addition to local policies covering the parent and its affiliated entities. It fills coverage gaps in the local policies (with a feature known as Differences in Condition, or DIC) and provides consistent limits (with a feature known as Differences in Limits, or DIL). The master policy would cover risks not covered by a local policy and possibly pay claims in the country where the claim arose, subject to local laws. Assume, for example, that insurance regulations in a particular country limit the amount of earthquake coverage that can be offered in a policy and restrict the coverage conditions. The master policy can be tailored to provide expansive coverage the insured requires as well as higher limits above those offered by the local policies. Consequently, a master policy fills gaps when local insurers lack the ability to offer limits as high or conditions as broad as those desired, particularly for specialty lines of insurance coverage. While the master policy can provide a neat solution to a multinational company's insurance challenges, this approach overlooks one important consideration: the obligation of the insurer, broker or insured to remit premium taxes that may be due in jurisdictions where risks are located. Reconsidering the master policy's broad-form coverage and adopting the concept of "insurable interest" is an important and prudent first step in designing a global program that addresses many of the regulatory and tax issues.[2] This is true even in countries like Canada where unlicensed insurers are allowed to insure local risks.[3]

This report explores many of the regulatory and execution challenges faced in the multinational insurance marketplace when insuring risks in Canada. By also putting those challenges in an international context, this paper should prove helpful to multinational enterprises, brokers and insurers. More specifically, this paper:

- Distinguishes between those Canadian provinces that regulate the broker and those that regulate the local insured when it comes to the placement and taxation of non-admitted insurance. By comparing those provinces to other countries, this paper shows how many of Canada's provincial insurance regulations are based on principles substantially similar to other insurance regulations around the world.
- Introduces the idea that many regulators view global programs from the perspective of the local affiliated entity (over which they have direct jurisdiction) rather than from the perspective of a parent company. This local perspective guides many of the provincial regulatory and tax obligations required of Canadian-based affiliated entities.
- Explains the excise tax imposed by the federal government of Canada and administered by the Canada Revenue Agency (CRA) on insurance premiums paid to a non-admitted insurance company and the potential relief from having to pay this tax.



- Highlights the importance of understanding that each of Canada's 10 provinces and three territories regulate insurance independent of each other—not unlike the 50 U.S. states. For each province and territory, the primary focus of regulating the placement of Canadian risks with unlicensed insurers is not on unlicensed insurers. Regulation focuses on the local broker unless the local subsidiary of the multinational enterprise directly procures unlicensed insurance.
- Explains how applying the principles of "insurable interest", a principle also recognized in Canadian jurisprudence, can provide measurable compliance and forms the basis for providing consistent terms and coverage to the parent company for its risks located in Canada.
- Provides a checklist that every international risk management professional should consider when designing and implementing a defensible multinational insurance program in Canada.

Discussion

Multinational insurers with risks in Canada must adapt to a two-tier insurance regulatory regime.

Canada and its provinces and territories have among the world's most sophisticated regulatory regimes overseeing the purchase and execution of insurance programs. In many ways, Canadian provincial insurance regulations are comparable to those of the United States and member countries of the European Union. Unlike many of these countries, however, Canada regulates cross-border insurance on two levels: provincial and federal. In provinces that allow non-admitted insurers to cover local risks, regulation focuses on either the locally licensed broker or the local insured. The various provincial and territorial governments, acting independently of the Canadian federal government, regulate and tax the purchase of insurance under their own laws. Meanwhile, the federal government of Canada also has the ability to tax certain insurance premiums under the Excise Tax Act.[4] Current efforts to streamline insurance regulation and taxation in the United States and Europe are unlikely to influence the approach in Canada in the near future.

First, consider the current U.S. landscape. In passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), U.S. lawmakers enacted significant insurance regulatory reforms to make buying and servicing insurance more efficient for organizations with risks in multiple states. Despite these efforts, no reforms to date have weakened the dominance of state-based regulation. The major impact of the recent reforms under the Dodd-Frank Act is on the non-admitted excess and surplus lines market, according to Dan Brown, an insurance partner with SNR Denton and a former counsel to the California Surplus Lines Association. Although many key issues remain at the discretion of the various state regulators and legislatures, Brown explains that the new federal legislation provides some degree of clarity about how state surplus lines taxes will be assessed and allocated and to which state the surplus lines broker placing insurance with an eligible non-admitted insurer will remit such tax.[5]

In Europe, member countries of the European Union have agreed on a uniform principle to regulate insurance. In most cases, EU directives govern insurance regulation and premium taxation (proposed rules under Solvency II being an exception[6]). Under the current tax regime, a premium tax is assessed by an EU member state in the country where the insurance risk is located. There are no plans, under Solvency II or otherwise, to assess a European-wide tax on premiums, according to Ashley Prebble, a partner in the insurance practice group of Norton Rose in London.

Canada takes a different approach. Due to the division of powers enshrined under Canadian law between the federal and provincial governments,[7] it is unlikely that provincial regulation of insurance in Canada with central, federal oversight will be streamlined in the near future. A multinational insurance program insuring Canadian risks must balance the requirements of provincial insurance law and federal tax rules.

Like various countries around the world and jurisdictions within the United States, Canadian provinces and territories vary in how they regulate the placement of foreign, unlicensed insurance to cover local risks.

Under certain conditions, most Canadian provinces allow foreign unlicensed insurers to insure local risks.

When insuring their local exposures in Canada, risk management professionals must review the laws of those Canadian provinces or territories in which the risks are located to answer two key questions:

- Does provincial law permit that type of insurance to be placed through an unlicensed insurer?
- Are there other conditions that must be fufilled before a risk in Canada may be insured with an unlicensed insurer?

Like various countries around the world and jurisdictions within the United States, Canadian provinces and territories vary in how they regulate the placement of foreign, unlicensed insurance to cover local risks. While a few ban non-admitted insurance outright, the regulatory approach in jurisdictions that allow the practice ranges from very restrictive to relatively permissive. The more restrictive jurisdictions may require written consent from the insured, an arduous due diligence process to document the unavailability of local coverage, or paying additional taxes or penalties. Even the more permissive jurisdictions may impose certain conditions and costs that must be considered before insurance is placed with an unlicensed insurer.

Nova Scotia, New Brunswick and Prince Edward Island are the only provinces that essentially ban the use of foreign unlicensed insurance to cover risks located within their borders, though all three make very limited exceptions. Nova Scotia makes an exception for fire insurance written through an exchange. New Brunswick limits unlicensed insurance to fire and marine coverage for property and Prince Edward Island limits unlicensed insurance to property only.[8]

Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Ontario and Yukon allow local risks to be insured with unlicensed carriers after a local, licensed broker has conducted due diligence and determined that local capacity is either cost-prohibitive or the policy conditions unacceptable.[9]

By contrast, Québec, Newfoundland, Alberta, as well as the Northwest Territories and Nunavut do not make accommodations for price or policy terms; they allow for placement with unlicensed insurers only when local capacity is unavailable.[10]

When a local broker is used to procure unlicensed insurance, the broker must receive written consent from the prospective insured to solicit the unlicensed market. In some provinces, the broker may also be required to demonstrate that the prospective insured has been notified of the unlicensed insurance transaction.[11]

These consent and due diligence requirements are not designed to prevent the purchase of foreign unlicensed insurance. The purpose of the due diligence requirement is to demonstrate that sufficient insurance could not be obtained from the admitted market because of unreasonable terms or a scarcity of local capacity. The consent requirement ensures that the prospective insured has been advised of the potential risks in purchasing unlicensed insurance as well as federal and provincial tax consequences, according to Crawford Spratt, a senior insurance law partner at the Toronto law firm of Blaney McMurtry LLP.

As in Canada, states and territories within the United States vary in their approaches to the use of non-admitted insurance for local risks. All U.S. jurisdictions recognize that some risks may be unacceptable to admitted insurers in that state for various reasons and that "exporting" these risks to insurers unlicensed in their state is the only way to procure insurance for them, according to Brown of SNR Denton. New York, California and at least 16 other states have streamlined the process for accessing unlicensed insurance. These states have a predetermined "export list" of coverages that lack available local, licensed insurers. A special class of broker, known as an excess and surplus lines broker, may place such risks with an insurer that is eligible in those states to write non-admitted insurance without checking to see if the admitted market would underwrite the risk.[12] The export lists are dynamic, with lines of business being added or removed by the states' insurance regulators based on changes in what is available in the admitted markets.

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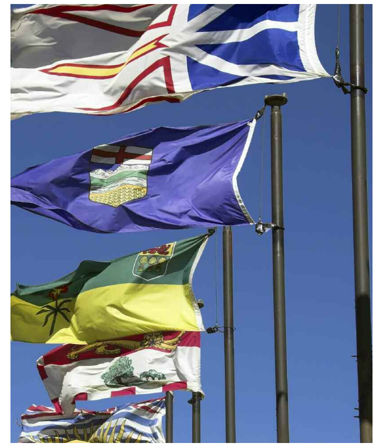

Among the provinces in Canada that allow the use of unlicensed insurance, Alberta imposes some of the tightest controls when it comes to costs and administration.[13]

In other provinces, placing foreign unlicensed insurance triggers certain tax consequences. In Ontario and Yukon, for example, the local broker has the legal obligation to collect and remit the insurance premium tax after receiving written consent and informing the insured of the risks of purchasing a non-admitted policy.[14]

Based on this analysis, the international risk management community should consider the insurance and tax regulations of each Canadian province or territory individually and independently of one another. Pinpointing the primary focus of regulation is a key element of this analysis.

Depending on the province, the primary focus of the regulation of unlicensed insurance in Canada is either on the local insured or the local broker.

Multinational enterprises consider it convenient and economically efficient to have the parent company centrally purchase a master DIC-DIL policy and include Canadian affiliates as additional named insureds (as well as other subsidiaries and affiliates around the world). However, Canadian tax authorities could take the position that the premium associated with that policy may be subject to federal excise tax. This arrangement may have important implications for compliance with Canadian provincial and federal law.

As in many other countries, Canadian federal, provincial and territorial insurance regulations are not designed to directly regulate the foreign unlicensed insurer unless the insurer were to directly solicit, negotiate terms, issue policies, collect premium, or otherwise transact the business of insurance within Canada.[15]

While Canadian federal law and most provincial insurance rules allow a foreign unlicensed carrier to insure Canadian risks, the primary focus of regulation of unlicensed insurance is on the person or entity over which they have direct jurisdiction.[16] This is generally the Canadian affiliate of the multinational enterprise or the Canadian local broker placing local risks with the foreign unlicensed insurer. While some provinces permit a Canadian resident to insure local risks with a foreign unlicensed insurer without the use of a broker—a practice known as direct or independent procurement [17]–other provinces generally require the purchase be made through a local broker.[18] The broker is charged with understanding the regulatory requirements to ensure that the purchase is conducted in a compliant manner.

The following sections will discuss those provinces that focus regulation on the local broker and those that focus regulation on the local insured.

Regulation on the Broker

In some provinces, multinational enterprises insuring Canadian exposures must use a licensed local broker to procure non-admitted insurance because local entities are not allowed to procure non-admitted insurance directly. The provinces that do not allow direct procurement are Newfoundland and Labrador, Manitoba, Prince Edward Island and Québec. As such, local affiliates of multinationals must retain a broker that is authorized to place non-admitted insurance in the provinces where the risk is located. That broker must also collect and remit the provincial tax to the appropriate authorities.[19]

Although actual practice in administering unlicensed insurance in the provinces may not be consistent with applicable legislation, in provinces that permit direct procurement, the local insured has a choice. It can obtain unlicensed insurance directly without the use of a broker. However, if the insured does not wish to go that route, it must use a local broker whose conduct will be governed by the insurance regulations in these provinces.[20] (Direct procurement is discussed further in the next section.)

When insuring the local risks of a global multinational program in provinces that focus regulation on the broker, the local affiliate, the parent, and the non-Canadian broker should be aware that regulation will most likely view the insurance placement covering the Canadian risk from the perspective of the local affiliated entity. Non-compliance with the provincial rules for purchasing unlicensed insurance may increase the ultimate cost of the insurance placement by subjecting the local affiliate to additional taxes, fines and penalties.

This approach to regulating unlicensed insurance is similar in some respects to the approach in the U.S., where the primary focus of regulation of non-admitted insurance is on the surplus lines broker. The selective placement of business with non-admitted insurers through special brokers is referred to as excess lines in New York and as surplus lines in California and nearly all other states, according to Brown of SNR Denton. In the U.S., only an authorized excess or surplus lines broker can place a risk with a qualified non-admitted insurer, unless the non-admitted insurance is directly procured from outside the state or specifically exempted by state law. In most states, these risks may be placed only with non-admitted insurers that have been qualified or "white-listed" by the state's insurance regulator.[21] In New York and California, for example, an excess or surplus lines broker may place the risk with an eligible non-admitted insurer only after receiving three declinations from licensed insurers. However, if the line of business is pre-authorized in the export list, no declinations are required.

As in the Canadian provinces that focus regulation on the broker, in every U.S. state the surplus lines broker has primary responsibility for collecting and remitting the appropriate premium taxes to state authorities. The Dodd-Frank Act requires changes in U.S. state surplus lines laws that will streamline the allocation and remittance of surplus lines premium taxes. One provision removes the need to receive three declinations for exempt commercial purchasers as defined under the Act.[22] Another prohibits states from imposing additional demands on non-admitted insurers domiciled outside the United States if they are listed in the Quarterly Listing of Alien Insurers maintained by the National Association of Insurance Commissioners.[23] None of the changes, however, shift the regulatory focus away from surplus lines brokers.[24]

When a multinational enterprise is seeking to use foreign unlicensed insurance to insure risks in Canadian provinces in which legislation does not permit direct procurement, the global parent, the local Canadian affiliate and the local Canadian broker must recognize that the focus of regulation of non-admitted insurance is on the local broker. Retaining a local Canadian broker before the commencement of the underwriting process to

In some provinces, multinational enterprises insuring Canadian exposures must use a licensed local broker to procure non-admitted insurance because local entities are not allowed to procure non-admitted insurance directly.

coordinate placing and binding non-admitted insurance can help the enterprise anticipate many of the regulatory and tax issues that might otherwise arise from the use of foreign unlicensed insurance as part of the greater multinational insurance program. But, as will be discussed later, the use of a local broker must be done with care.

Regulation on the Insured

In provinces that regulate the insured, it is possible for a local insured — including the local affiliate of a multinational — to directly or independently procure non-admitted insurance with or without the use of a local broker. Many jurisdictions around the world allow direct procurement by certain insureds under specific circumstances.[25]

Whenever local insureds directly procure unlicensed insurance without a local broker, regulators place the primary focus of insurance regulation and the burden of remitting premium taxes on the local insureds. This is true in Alberta, British Columbia and Saskatchewan.

Alberta and Saskatchewan have laws that expressly allow direct procurement. When procuring unlicensed insurance directly from a carrier, the local affiliate of a multinational enterprise is responsible for remitting the insurance premium tax to the appropriate superintendent of insurance.[26] While British Columbia appears to allow direct procurement, its law seems ambiguous about whether a broker is required.[27] However, the responsibility to remit the premium tax for unlicensed insurance is clear: the obligation rests with the multinational's affiliate located in British Columbia unless it authorizes an agent to remit the premium tax on its behalf. [28]

Even though Alberta law allows for direct procurement, the practice triggers unique tax consequences that make it unappealing. That's why it is advisable for a multinational enterprise to use a local intermediary known as a "special broker" to place foreign unlicensed insurance for a multinational's affiliate in Alberta. Using a special broker should allow for a substantially lower provincial tax on the portion of DIC-DIL premium allocated to the local risk. The tax is 50 % if the insurance is directly procured, but 3% if placed through a special broker who complies with proper regulatory protocols.[29]

The laws in Saskatchewan, British Columbia and Alberta are similar to laws in some U.S. states and European, Latin American and Asian countries. In all of the places that allow direct procurement of unlicensed insurance, the primary focus of regulation is on the insured.

New York State, for example, allows its residents to directly procure insurance for a New York risk from an unlicensed insurer, provided the placement of insurance takes place, in its entirety, outside the state without any solicitation by the unlicensed insurer and without the use of a broker.[30] New York also requires that the local insured remit the appropriate premium tax to state authorities.[31] Laws in some other states, such as California, Illinois, Texas and Florida, either permit, or do not prohibit, the purchase of unlicensed insurance provided all contact and the placement take place outside the state,[32] according to Stephen Schwab, a senior insurance law partner with DLA Piper LLP (US) in Chicago, who is experienced in global insurance regulatory compliance matters. In most cases, the burden of remitting premium taxes also falls on the local insured. This makes sense because the state has jurisdiction over the local insured, but not over the unlicensed insurer unless the insurer transacts the business of insurance by soliciting, issuing a policy, collecting the premium, or adjusting or paying claims in the state,[33] according to Schwab. Under reforms mandated by the Dodd-Frank Act, an insured procuring insurance independently from a non-admitted insurer must report premium to such insured's home state to ascertain the applicable tax.[34] How the tax will be allocated remains to be determined through additional legislation or regulation.

In addition to their similarities with some U.S. state laws, the non-admitted insurance placement and taxation rules of Canadian provinces that allow for direct procurement are analogous to laws governing the direct procurement of foreign unlicensed insurance in other jurisdictions, such as Germany, Peru and Singapore.

Like Alberta, which makes it prohibitively expensive to directly procure unlicensed insurance, Germany discourages direct procurement of unlicensed insurance even though the law does not expressly prohibit the practice. German insurance law makes clear that insurance buyers resident in Germany that place their business with insurers abroad are purchasing the insurance at their peril, waiving their rights to the protection provided by the German supervisor, according to Susanne Ullrich, a partner in the Düsseldorf office of Wilhelm Rechtsanwälte.[35]

Whenever local insureds directly procure unlicensed insurance without a local broker, regulators place the primary focus of insurance regulation and the burden of remitting premium taxes on the local insureds.

In Peru, a local affiliate of a multinational enterprise is allowed to purchase insurance from a foreign, unlicensed insurer to insure its Peruvian exposures so long as the unlicensed insurer did not directly solicit, offer or sell insurance in the country without authorization from the Peruvian insurance supervisor.[36] However, a Peruvian affiliate that purchases insurance from a foreign unlicensed insurer will have to pay the income tax on the premium sent out of Peru to the foreign insurer.

While Singapore's regulation of the placement of non-admitted insurance allows a local resident to procure foreign unlicensed insurance directly, unlicensed insurers are generally prohibited from selling insurance to cover local risks through a broker (though exceptions are allowed in certain circumstances). Despite these restrictions, Singapore is in many ways far more permissive in its regulation of non-admitted insurance than other jurisdictions. For one thing, there are no insurance premium taxes in Singapore. And while only registered insurers can solicit insurance business and issue policies in Singapore, the law focuses on where the policy is executed, according to Matthew Skinner, the principal insurance and reinsurance partner with Allens Arthur Robinson in Singapore. If the policy is executed overseas, the policy is not considered to have been issued in Singapore.[37]

In the overwhelming majority of circumstances, almost all of the Canadian provinces and most major countries where multinational insurance is regularly conducted will permit local risks to be placed with an unlicensed, foreign insurer under certain conditions. These conditions may include one or more of the following:

Consent: Regulatory or insured consent for procuring unlicensed insurance may be sought and then granted.

Capacity. Local capacity is inadequate or lacking.

Direct solicitation: The unlicensed insurer makes no direct solicitation of local risks.

Remittance of taxes: When the appropriate party to the transaction — the insured local affiliate or the licensed broker —remits applicable premium taxes.

It is imperative for multinational brokers, risk managers and insurers to consider how local regulators may redefine the procurement of unlicensed insurance. Instead of a central purchase of insurance by the parent for its global exposures, including a Canadian component, regulators may recast the premium in connection with the insurance placement as a local purchase by the local affiliated entity. This recasting of the multinational insurance program brings into focus the local placement and taxation rules governing the insurance of the local entity.

Canada is not unique in imposing a federal excise tax as well as a provincial premium tax for unlicensed insurance placements.

Multinational insurance buyers that have risks in Canada must recognize the two-levels of taxation on placing insurance with foreign unlicensed insurers. In addition to provincial taxes imposed on premiums paid to unlicensed insurers, the Excise Tax Act provides for a federal excise tax of 10 percent on insurance premiums paid to an unlicensed insurer for certain kinds of insurance. The excise tax must be paid to the Canada Revenue Agency by the insured.[38] The Canadian affiliate of a multinational may also owe excise tax for an insurance policy issued by an authorized Canadian insurer if the policy is entered into or renewed through a broker or agent outside Canada.[39] Finally, the excise tax applies when a foreign broker and a Canadian broker are both involved in arranging insurance for a Canadian affiliate of a multinational enterprise. But there is an important exception: the excise tax will not apply if the insurance is placed through a local Canadian broker or agent who is directly retained or instructed by the Canadian affiliate and not through any other broker or agent.[40] The excise tax also does not apply if that particular class of insurance is not available from any insurer licensed in any province of Canada.[41]

To further complicate the matter, even when the Canadian affiliate purchases insurance from an *admitted* Canadian insurer, it may still be obligated to pay the excise tax if CRA rules pertaining to the involvement of a local broker are not effectively followed and documented.

While retaining a local broker is crucial, taking this step will not, in and of itself, mitigate the excise tax.[42] The local broker must initiate the placement for the Canadian-based risks. This is a departure from the way many multinational enterprises insure the risks of affiliates in foreign countries. The typical scenario for a multinational program needing to insure a risk in Canada would have the foreign parent company contact its global broker to buy insurance to cover the local risks of its Canadian affiliate as well as risks of its affiliates in other jurisdictions. The global broker retained by the parent company may not be licensed and located in Canada, so it, in turn, retains a licensed broker in Canada to purchase the insurance for the Canadian affiliate. In such an instance, excise tax may apply to the premium placed with the unlicensed insurer to cover risks of the Canadian affiliate, because the first broker retained by the parent was not licensed in Canada. To mitigate the application of the excise tax, the Canadian affiliate must directly retain a local Canadian broker and direct that broker to place the insurance for the risks of the Canadian affiliate.

To further complicate the matter, even when the Canadian affiliate purchases insurance from an admitted Canadian insurer, it may still be obligated to pay the excise tax if CRA rules pertaining to the involvement of a local broker are not effectively followed and documented. The CRA has held that just "having an insurance brokerage office in Canada is not, by itself, sufficient to establish that the broker retained is not outside Canada."[43]

Although the international risk management community may view Canada's provincial and federal taxation of insurance to be unique and cumbersome, Canada is not alone in having a two-tier taxation for risks insured by foreign unlicensed insurers.

The U.S. imposes a federal excise tax in addition to state premium tax in specific situations. Any multinational enterprise placing its U.S. risks or the risks of its U.S. affiliate with an unlicensed insurer located outside the United States must pay the Internal Revenue Service a tax of 4 percent of the premium paid outside the United States. This tax is at a lower rate of 1 percent for reinsurance premiums and life insurance premiums. It is waived if there is a double taxation treaty exemption between the United States and the country in which the unlicensed insurer is domiciled.[44]

Unlike Canada, the U.S., absent a treaty exemption, won't waive the tax if that particular class of insurance is unavailable from an authorized insurer in the country, according to Schwab of DLA Piper. Even if the insurance is a direct procurement by the insured or procured through a qualified surplus lines broker, the excise tax applies in addition to the state premium tax or the surplus lines tax.[45]

Multinational enterprises conducting business in Canada and insuring their local Canadian exposures with foreign unlicensed insurers must comply with the local provincial rules for placement of local risks with unlicensed insurers. In addition, they must be aware of the potential liability under the Excise Tax Act. Otherwise the Canadian affiliate of the multinational enterprise may be ultimately responsible for paying the provincial tax in addition to the 10 percent excise tax on premiums paid to the foreign unlicensed insurer.

Considering "Insurable Interest" when structuring multinational insurance programs with risks located in Canada.

Provincial and federal regulations in Canada create a challenge for multinational organizations seeking to insure Canadian-based risks in a consistent and cost-effective manner. However, a multinational insurance program may be designed in a way that satisfies the need for consistent coverage and limits for an organization's worldwide and Canadian operations and that exhibits deference to the tax and regulatory requirements in Canada.

In addition to the local affiliates purchasing local policies in Canada, the parent company may purchase an excess policy (whether DIC-DIL or otherwise) to effectively insure coverage gaps and provide adequate limits. To provide a logical response to the regulatory and tax challenges in provinces that prohibit non-admitted insurance or impose conditions on brokers and insureds that use it:

- The policy should be issued to the parent company as the sole insured in the parent's jurisdiction.
- The policy should exclude any of a parent company's subsidiaries, affiliates, and joint ventures located in provinces that do not permit non-admitted insurance and in provinces that impose conditions on brokers and insureds when non-admitted insurance is procured.
- The policy could insure the parent company's insurable interest in the properties, shareholdings or legal and contractual obligations of the excluded subsidiaries, affiliates, and joint ventures, consistent with laws of the parent company's domicile.[46] However, certificates of insurance issued in Canada may only reflect the terms, conditions and limits of the local policy and may not include that of the excess policy.
- The principles of insurable interest are also recognized under Canadian jurisprudence and could be considered by a Canadian enterprise seeking a multinational insurance program for its risks outside Canada.[47]

In substance, this solution may provide the coverage and terms that satisfy the participants in the multinational program while mitigating the risk of unauthorized insurance penalties in Canada. Through inter-company allocations and appropriate transfer-pricing documentation based on the actual experience of the multinational enterprise, the costs and benefits of the global insurance program may be allocated to the appropriate entities in a transparent and materially compliant manner.[48]

Conclusion

One of the most important jurisdictions for multinational enterprises to conduct business, Canada is also one of the most sophisticated jurisdictions regulating the purchase of unlicensed insurance. Both provincial and federal regulations impose a cost for placing Canadian risks with an insurer that is not licensed in Canada. When thoroughly analyzed, Canada's complex and comprehensive system of insurance regulation and tax regime is comparable to many other countries.

In Canada, as in other jurisdictions, regulation of non-admitted insurance is on that entity over which Canada and its provinces have direct jurisdiction. The purpose is to protect sovereign and policyholder interests. When participating in a multinational insurance program that has Canadian touch-points, specific attention must be paid to the following:

- Canadian federal, provincial and territorial insurance regulations are not designed to directly regulate the foreign unlicensed insurer unless the unlicensed insurer were to directly solicit, negotiate terms and conditions, collect premium or issue policies in Canada. In such circumstances the foreign insurer must be licensed in the province where the risk is located; may fall within the scope of Part XII of the Insurance Companies Act, and be found to be insuring a risk in Canada. Consequently, it will also require an Order from the Superintendent of Financial Institutions (Canada).
- Canada imposes specific obligations on the multinational's local Canadian affiliate and the local Canadian broker. The obligations depend on the province or territory in which risks are located.
- Careful consideration must be given to provincial insurance and tax laws as well as the laws governing the federal excise tax. These laws will ultimately govern how Canadian risks may be added compliantly as part of the greater global insurance program. In reviewing the applicable regulatory framework, it is important to recognize that tax law may not be administered consistently with insurance law and discrepancies between the two may exist.

Although these rules may appear cumbersome at first, they are specifically articulated in provincial regulations as well as in federal law and ultimately hinge on the course of conduct of the insured, the broker and the insurer.

When designing and implementing a multinational insurance program that insures Canadian risks, clients, brokers and insurers should be aware of how Canada regulates unlicensed insurance. Buyers and brokers of any multinational program should work with a global insurer and independent financial, legal and tax advisers that maintain a local presence in the major jurisdictions where the multinational enterprise has interests. An experienced, independent team of accounting, legal, tax and financial specialists can help structure a comprehensive and global insurance program that fits the specific needs and goals of a multinational enterprise. Attention to the requirements of Canada's provincial and federal laws — and the need for documentation and supporting contractual arrangements — should result in a measurably compliant international insurance program that ultimately satisfies the collective objectives of the client, the broker and the insurance carrier.

Checklist for Canadian provincial and federal regulation on unlicensed insurance

With a clear understanding of the Canadian federal and provincial laws, risk managers, brokers and insurers can effectively navigate the multifaceted landscape of non-admitted insurance in Canada. The following checklist is one interpretation of the guidance provided by the Canada Revenue Agency and the provincial statutes. It offers relevant questions to ask when structuring and implementing a multinational insurance program that includes risks in Canada. A thorough review of multinational insurance programs should be conducted with the advice of local Canadian counsel and tax and finance consultants in the context of the multinational enterprise's corporate structure and cash flows.

1. In which Canadian provinces are risks located? Do the provinces in which the risks are located allow an unlicensed insurer to insure such risks? Are there any limitations on the lines of insurance that may be placed with an unlicensed insurer? Does the province permit the direct purchase of unlicensed insurance by a Canadian affiliate or does the province require a broker licensed under the laws of the appropriate province or territory to purchase the unlicensed insurance? If the province allows the direct purchase of unlicensed insurance, does the Canadian affiliate have the infrastructure and the resources to pay any applicable provincial insurance premium taxes to the appropriate authorities?
2. If a broker licensed in the province or territory is used to place the local risk with a foreign unlicensed insurer, does the broker have to be directly retained by the Canadian affiliate rather than through a foreign broker retained by the parent outside Canada? Does the local Canadian broker have to conduct the necessary due diligence and document its fulfillment of the applicable provincial requirements (e.g., no capacity is available or insurance is not available at reasonable rates or in the form of contract required by the Canadian affiliate)? Does the local Canadian broker complete the necessary provincial filing requirements on the use of unlicensed insurers and collect and remit the applicable provincial insurance premium taxes?
3. Do the lines of insurance placed with a foreign unlicensed insurer trigger the federal excise tax? If the required insurance is not available in Canada, before binding, who has to file the appropriate forms and receive approval from the CRA to qualify for an exemption from the excise tax? If there is licensed capacity and/or an application for exemption has been denied, does the multinational's Canadian affiliate that purchases unlicensed insurance complete the requisite tax forms and remit the appropriate federal excise tax to the CRA?
4. Multinational enterprises that insure their Canadian risks with a carrier licensed in Canada may still owe the federal excise tax unless the local Canadian broker is the broker directly retained and instructed by the Canadian insured. To establish whether the Canadian broker is the broker directly retained and instructed, risk managers and international brokers should consider the following questions before placing Canadian risks with licensed insurers:

a. Is the local Canadian broker directly appointed, retained and instructed by the multinational's affiliate in Canada for the Canadian risk?

b. Are the insurance documents and communi cations exchanged directly between the multinational's local Canadian affiliate and the Canadian broker and then from the Canadian broker to the Canadian insurer?

c. Is the Canadian broker the only adviser to the local insured throughout the insurance placement process?

d. Are payments related to the insurance placement in Canadian funds?

e. Will the Canadian broker be contacted by the multinational's local Canadian affiliate for any queries following the placement of insurance?

Whether the federal excise tax applies to local licensed placements is a question of facts and must be demonstrated by course of conduct. Simply placing a local Canadian policy to cover local risks of a foreign multinational company, without considering many of these questions and the activities required locally between the multinational's local Canadian affiliate and the local Canadian broker, may not relieve the local Canadian affiliate from the obligation to pay the excise tax.

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Endnotes:

1 For purposes of this article, we assume that the majority shareholder in a joint venture is responsible for the contractual or legal obligation of purchasing insurance for the joint venture, however, parties to a joint venture may contract for any partner in the joint venture to assume this obligation.

2 The laws in many jurisdictions around the world recognize the principle of insurable or financial interest that a parent company has in its ownership or contractual interests in its subsidiaries, affiliates and joint ventures. This is true, for example, under English Law; the insurance laws of New York, Pennsylvania and California, the laws of most countries in continental Europe and many countries in Asia; the laws of Australia and New Zealand; as well as laws in Argentina, Brazil and Mexico. *See,* Beyond Non-Admitted: A Closer Look at Trends Affecting Today's Multinational Insurance Programs; Structuring Multinational Insurance Programmes: Addressing the Current Challenges in Europe; Structuring Multinational Insurance Programmes: Current Challenges in Australia, New Zealand and the Asia-Pacific Region; and Structuring Multinational Insurance Programs: Current Challenges in Argentina, Brazil and Mexico at http://www.acegroup.com/Media-Center/ACE-Perspectives/ACE-Perspectives.html (last visited October 31, 2011).

3 The following provinces and territories do not restrict the placement of Canadian risks with foreign unlicensed insurers subject to the payment of taxes and/or fulfilling various requirements prior to the placement of the insurance: The provinces of British Columbia—see *Financial Institutions Act s. 76(1)(c) and Ministry of Finance Bulletin IPT 002*, at http://www.rev.gov.bc.ca/documents_library/bulletin/ipt002.pdf (last visited October 31, 2011) Alberta---see *Insurance Act s.61(1) and 61(3) and s.63*, Saskatchewan—see *Insurance Act s.464.1*, Manitoba—see *Insurance Act s.381*, Ontario---see *Registered Insurance Brokers Act Reg 991 s.10(1)* and for direct procurement *Insurance Act s.113*, Québec—see *Act Respecting Insurance s. 204*, Newfoundland and Labrador see—*Insurance Adjusters, Agents and Brokers Act s.25(3) and 25(4)*, and the three territories, Yukon see---*Insurance Act s.21, s.238(1)*, Northwest Territories and Nunavut—see *Insurance Act s. 31 and s.224* do not restrict the placement of Canadian risks with foreign unlicensed insurers subject to the payment of taxes and/or fulfilling various regulatory requirements prior to the placement of the insurance. The provinces of New Brunswick---see *Insurance Act s. 83 and 84*, and Prince Edward Island---see *Insurance Act 356(1)* permit foreign unlicensed insurers to only insure certain lines of business namely property against fire and marine risks in New Brunswick and property in P.E.I. subject to the payment of tax and the fulfillment of regualtory requirements prior to the placement of insurance, while Nova Scotia's insurance regulations do not permit a Nova Scotia resident's purchase of insurance from an insurer unlicensed in Nova Scotia---see *Insurance Act s.6(1), 41 and 334*(other than to fire insurance in an exchange).

4 *See specifically* s. 4 (1) (a) and (b) and s. 4(4) of the Excise Tax Act.

5 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 USCS § 8201 et seq. (effective 21 July 2011).

6 *See* Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:335:0001:0155:EN:PDF (last visited October 31, 2011).

7 See *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 s.91, s.92

8 See New Brunswick's *Insurance Act s.355(1)-(4)* and Prince Edward Island's *Insurance Act s.356(1)*.

9 *See Saskatchewan Insurance Act s.464.1, Manitoba Insurance Act s. 382(1), Yukon Insurance Act 238(6), New Brunswick Insurance Act s.355(1)-(4), Prince Edward Island Insurance Act s.356(1), Registered Insurance Brokers Act of Ontario Reg. 991 s.10(1)(c).*

10 See Newfoundland and Labrador's *Insurance Adjusters, Agents and Brokers Act s. 25(3) and 25(4)* Quebec's *Act Respecting the Distribution of Financial Products s.42* and the Northwest Territories' *Insurance Act s. 224(1)*, which also applies to Nunavut, and Alberta's *Insurance Act s.63(1) and 63(2)*, Although they allow for the purchase of unregistered insurance, laws in these provinces and territories state that insureds are permitted to purchase unlicensed insurance only when local insurance capacity is either unavailable or insufficient. Considerations relating to reasonableness of the rate or whether it is in the form of contract required by the insured are not valid reasons for purchasing insurance from outside these provinces and territories with an unlicensed insurer.

11 See Alberta's Insurance Act s.63(1) (2); Insurance Council of British Columbia *Council Rules Rule 7 (11.1)*; Manitoba *Insurance Act s.382(2)*; New Brunswick *Insurance Act S.355(1)-(4)*; Newfoundland and Labrador *Insurance Adjusters, Agents and Brokers Act s.25(4)*; Northwest Territories and Nunavut *Insurance Act s.224(2);*, Ontario *Registered Insurance Brokers Act (Reg 991) s.10(1)*; Prince Edward Island Insurance Act s.356(1); Québec An Act Respecting the Distribution of Financial Products s.43; Saskatchewan *Insurance Act s. 464.1(b)*; Yukon *Insurance Act s.238(6)*.

12 For example, see Cal. Ins. Code § 1763.1(a); New York Ins. Law § 2118(b)(4); See California Surplus Line Assn. Bulletin 1219 (Nov. 8, 2010); and 11 NYCRR § 27.3(g) (Reg. 41).

13 See Alberta Insurance Act s.61 and 63.

14 See the *Ontario Corporations Tax Act s.74.3(3)* tax payment and collection of tax on any insurance premium paid to an insurer that is not licensed in Ontario must be entered through an insurance broker and the premium tax shall be remitted by the broker who "shall act as agent of the Minister to collect the tax and pay it over to the Minister." In addition to requiring them to collect and remit unlicensed insurance premium taxes, Ontario insurance law places further responsibility on the brokers that procure unlicensed capacity. Regulation 991 under the *Registered Insurance Brokers Act* prohibits the broker from acting or assisting in the placement of insurance with an unlicensed insurer unless the broker first informs the insured of the risks of entering into a contract of insurance with an unlicensed insurer. Under Yukon's law the broker "...shall pay any taxes that would be payable if the premiums had been received by a licensed insurer..." See *Yukon's Insurance Act see 238(6) and 238(9)*

15 *See* Part XIII of the *Insurance Companies Act* (Canada) and the *Advisory on Insurance in Canada of Risks* issued by the Office of the Superintendent of Financial Institutions.
For example, see *New Brunswick Insurance Act s.84* (Notwithstanding anything in this Act any person may insure property situated in the Province against fire or marine risks with an unlicensed insurer, if such insurance is effected outside the Province and without any solicitation whatsoever directly or indirectly on the part of the insurer.)

16 See Note 3. See also Information INS-06-010 issued by Financial Institutions Commission of British Columbia entitled *Placement of Risks with Unauthorized Insurers (clarifying section 76 of the FInancial Institutions Act).*

17 The following provinces and territories allow for direct procurement of unlicensed insurance: *Alberta Insurance Act s.61(1) and 61(3)*, *Ontario Insurance Act s.113* (limited to property), *New Brunswick Insurance Act s.83,s.84* (Limited to insuring property against fire and marine risks), Yukon Insurance Act s.40 (Limited to insuring property against fire), *Northwest Territories and Nunavut Insurance Act s.31*(Limited to insuring property against fire), *Saskatchewan Insurance Act s.464.*

18 The following provinces generally require the use of a broker. The provinces of British Columbia—*see Financial Institutions Act s. 76(1)(c) and Ministry of Finance Bulletin IPT 002*, Manitoba—see *Insurance Act s.* 89 and s.382, Ontario—*see Registered Insurance Brokers Act Reg 991 s. 10(1)*, Québec—see *Act Respecting Insurance s. 41*, New Foundland and Labrador see—*Insurance Adjusters, Agents and Brokers Act s. 24 and s.25*, and the three territories Yukon—see *Insurance Act s. 238(1)*, Northwest and Nunavut—*Insurance Act s.224(1)*. In the Provinces of New Brunswick—see *Insurer Act s. 83 and 84*, and Prince Edward Island see—*Insurance Act s.73(1)*, 356(1).

19 **Newfoundland and Labrador** Newfoundland and Labrador *Insurance Adjusters, Agents and Brokers Act s. 24(6)* is placed on the broker who ...shall pay to the Department of Finance the taxes that would be payable if the premiums had been received by a licensed insurer. **Manitoba** Under s.3 of the Insurance Corporations Tax Act, there is a tax on special brokers—those brokers that are specifically authorized in Manitoba to place insurance with unlicensed insurers. "Each special broker" according to Manitoba law, "is liable for, and shall, as herein provided pay to Her Majesty a tax equal to the total of (a) 2% of the premium charged to the policyholder in respect of each contract of accident insurance, life insurance and sickness insurance; and (b) 3% of the premium charged the policyholder in respect of each other contract of insurance; negotiated, affected or procured by him in each year with an insurer not licensed to carry on business in the province, whether the contract is an original one, or is a renewal, continuation, or extension, f an existing contract." **Quebec** *Act Respecting Insurance s.201, 204, Act Respecting the Distribution of Financial Products s.41.*

20 **Yukon** *Insurance Act 238(9)* the broker..."shall pay any taxes that would be payable if the premiums had been received by a licensed insurer..." Under the ***Ontario*** *Corporations Tax Act s.74.3* Tax payment and collection of tax on any insurance premium paid to an insurer that is not licensed in Ontario must be entered through an insurance broker and the premium tax that is to be remitted shall be remitted by the broker who "shall act as agent of the Minister to collect the tax and pay it over to the Minister." In addition to the collection and remittance of unlicensed insurance premium taxes, Ontario insurance law places further responsibility on the broker when such broker is procuring unlicensed capacity. ***Saskatchewan*** *Insurance Act s. 464* Every person who enters into a contract of insurance with an unlicensed insurer shall, unless the contract is effected by a licensed agent, forthwith deliver to the superintendent a return thereof in such form, and verified by affidavit or in such other manner, as the superintendent may determine, and remit therewith the amount of the tax payable. ***New Brunswick*** *Insurance Act s. 355(4)*. In respect of all premiums of insurance effected under a special broker's license, the licensee shall pay to the Province such taxes as would be payable of such premiums had been received by a licensed insurer. ***Northwest Territories*** *Insurance Act s. 224(6).* In respect of all premium on insurance placed under subsection (1), a broker shall payto the Superintendent, at the time of making a monthly return, the taxes that would be payable if the premiums had been received by a licensed insurer.

[21] Although not directly regulated by the individual states, non-admitted insurers may apply to specific states to be "white listed" which means they are qualified to write non-admitted insurance in that state. For example, *see* Cal. Ins. Code §§ 1760, 1761, and 1765.1.

[22] *See* §525 Streamlined Application for Commercial Purchasers of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 USCS § 8205).

[23] *See* §524(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 USCS § 8204(2)).

[24] *See*, e.g., Ala. Code § 27-10-26; D.C. Code Ann. § 35-1544; Ga. Code Ann. § 33-5-25; Haw. Rev. Stat. § 431:8-302215 Ill. Comp. Stat. Ann. § 5/445(1) Neb. Rev. Stat. § 44-5508; NY Ins. Law § 2118; S.C. Code Ann. § 38-45-90; Wyo. Stat. Ann. § 26-11-107.

[25] *See* notes 35, 36 and 37.

[26] Alberta *Insurance Act s. 61(1) and 61(3)*, Saskatchewan *Insurance Act s.463*

[27] See *s. 76 Financial Insittutions Act* (B.C.)

[28] British Columbia's Ministry of Finance Bulletin IPT 002 at http://www.rev.gov.bc.ca/documents_library/bulletin/ipt002.pdf (last visited October 31, 2011)

[29] See Alberta Insurance Act s. 61 and s.63

[30] New York Ins. Law § 1101(b)(2).

[31] New York Tax Law §§ 1551-54.

[32] Cal. Ins. Code § 1760(a); 215 Ill. Comp. Stat. 5/121-2; see F.S.A. § 626.938 (implicitly endorsing independent procurement rights; See Tex Ins. Code § 101.053(b)(4)).

[33] *See generally, State Bd. Of Ins. v. Todd Shipyards Corp.,* 370 U.S. 451 (1962); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see, e.g.,* 215 Ill. Comp. Stat. 5/121-3 (defining "transaction of insurance business"), 5/121-7 (act of transacting insurance business effects appointment of agent for service of process), and 5/445(3)(c) (tax may be charged to and collected from surplus lines insureds).

[34] *See* §521(c) of 15 USC§8204(2)

[35] Germany discourages direct procurement even though the law does not expressly prohibit the practice , according to Susanne Ullrich, a partner in the Düsseldorf office of Wilhelm Rechtsanwälte,. German insurance supervisors prohibit the unlicensed insurer from directly soliciting in Germany and mandate that the insurance be procured directly by the multinational's local affiliate, which is also responsible for paying all applicable premium taxes, fees and surcharges to the appropriate German authorities. *See* Sections 105, 111 German insurance supervisory law *(Versicherungsaufsichtsgesetz)*, Sections 7 para 3 German insurance tax law *(Versicherungssteuergesetz)*.

[36] In Peru, a local affiliate of a multinational enterprise is allowed to purchase insurance from a foreign, unlicensed insurer to insure its Peruvian exposures under certain circumstances, states Jorge Harten Costa, an insurance partner with Estudio Rodríguez Larraín Abogados in Lima, Peru. First, the unlicensed insurer must not directly solicit, offer or sell insurance in the country without authorization from the Peruvian insurance supervisor. See s. 10 of Law 26702--Ley General del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca y Seguros. However, a Peruvian affiliate that purchases insurance from a foreign unlicensed insurer will have to pay the income tax on the premium sent out of Peru to the foreign insurer. See s. 48 a) and 56 i) of the Income Tax Law of Decree Law 774 --*Ley del Impuesto a la Renta*. Section 10 of Law 26702, *Ley General del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca y Seguros*.

[37] In Singapore, there is no general restriction on a resident of Singapore purchasing insurance from an overseas insurance company not licensed in Singapore. However, an insurer cannot carry on any class of insurance business in Singapore as an insurer unless registered with the Monetary Authority of Singapore *(MAS)* in respect of that class of business. *See* (s. 3(1) of the *Insurance Act (Cap. 142).* For the purposes of the *Insurance Act*, explains Matthew Skinner, the principal insurance and reinsurance partner with Allens Arthur Robinson in Singapore, references to carrying on insurance business, or any class of insurance business in Singapore, means the receipt of proposals for, or issuing of, policies in Singapore or the collection or receipt in Singapore of premiums on insurance policies. *See* (s. 2(5) of the *Insurance Act*). The Insurance Act contains a general prohibition against a registered insurance broker negotiating any contract of insurance with an insurer (directly or indirectly) except with a registered insurer. *See* (s. 35ZE(1)). The general prohibition referred to above does not apply to reinsurance, business relating to risks outside Singapore or such other risks as may be prescribed. *See* (s. 35ZE(2)). The *MAS* may where it is satisfied that, by reason of the exceptional nature of the risk or other exceptional circumstances, it is not reasonably practicable to comply with section 35ZE, permit a registered insurance broker: (a) to negotiate the contract of insurance with such insurer as the insurance broker sees fit; and (b) if in the opinion of the *MAS* the case requires it, to effect the contract of insurance and receive premium in Singapore on behalf of such insurer. *See* (s. 35ZF). There is a general prohibition against soliciting insurance business for any insurer other than a registered insurer *See (s. 6 of the Insurance Act)*. The prohibition applies to both insurance brokers and any unregistered insurer procuring insurance business directly.

[38] See Subsection 4(1)(a) of the *Excise Tax Act* (Canada).

[39] See Subsection 4(1)(b) of the *Excise Tax Act* (Canada).

[40] See Subsection 4(4) of the *Excise Tax Act* (Canada).

[41] See subsection 4(1)(a) and 4(2)(b) of the Excise Tax Act. To apply for an exemption, the insured must submit *Form E638A - STATEMENT OF AVAILABILITY OR DECLINATION FROM AUTHORIZED INSURERS – TAX ON INSURANCE (Part 1 of the Excise Tax Act).* The insured provides this form to authorized Canadian insurers to support its claim for an exemption from the tax imposed.

[42] EXCISE TAX INTERPRETATION Part 1 of the Excise Tax Act, s. 4(4) of Excise Tax Act RITS/No: 59118, File No.11601-3.

[43] This odd result has its genesis from s. 4(4) of the Excise Tax Act (Canada) which addresses the situation where there is more than one broker involved in the insurance purchasing transaction wherein the legislation provides that "…the contract is deemed to have been entered into …through the broker directly retained or instructed by the insured and not through any other broker." The administrative position of the CRA suggests that for a Canadian broker to be considered as the broker of record, the Canadian broker must be the "initial contact and stay involved as the primary contact of the insured until the completion of the transaction." In making its determination on which broker is the one directly retained and is the initial contact and primary contact of the insured, the CRA suggests that it could review various documents, including but not limited to the insurance contract, the invoice, the broker to whom the payment was made, the currency used, the communications that occurred between the parties or any other relevant facts.

[44] For example, the Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains (Treaty Doc. No. 107-19 (2001)) has such an exemption.

[45] *See, e.g.,* 215 Ill. Comp. Stat. 5/445(3)(a) (surplus lines tax of 3.5%); see also 26 U.S.C. § 4371 (federal excise tax of 4%).

[46] See note 2.

[47] See also *Kosmopoulos v. Constitution Insurance C., [1987] 1 S.C.R. 2* at http://scc.lexum.org/en/1987/1987scr1-2/1987scr1-2.html (last visited November 10, 2011). The Supreme Court of Canada held that if an insured can demonstrate some relation to, or concern in the subject of insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring, that insured should be held to have a sufficient insurable interest.

[48] *See* Structuring Multinational Insurance Programs: Addressing the Taxation and Transfer Pricing Challenge at *http://www.acegroup.com/Media-Center/ACE-Perspectives/ACE-Perspectives.html (last visited October 31, 2011).*

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