

Outline for Panel Presentation Entitled *Insurance: Cross-Border Challenges*

This program will feature a moderated discussion of various challenges arising with respect to cross-border insurance disputes. There will be four panelists as well as a chair. Each of the four panelists will address significant cross-border insurance issues. After each, the chair will lead a discussion concerning the issues and questions from the audience will be accepted.

The four panelists are Jemieson Halfnight of Lerner LLP; Glenn Smith of Lenczer Smith; Brian Rosenbaum of Aon; and Scott Schwartz. Mark Rosenberg of Sullivan & Cromwell LLP is the chair.

I. Halfnight Presentation

Mr. Halfnight's presentation will focus on the following two topics:

A. Choice of law in insurance policies:

Where the policy does not specify the applicable law, how does the Canadian approach to the choice-of-law question compare to that typically taken in the U.S.?

B. Direct loss under fidelity insurance policies:

It is a fundamental feature of the scope of fidelity coverage that it is limited to only "direct loss" caused by dishonest employee acts. What differences are there between the Canadian and U.S. approaches to the interpretation of this wording?

II. Smith Presentation

Glenn Smith's presentation will focus on the following issues:

A. In Policies Containing Arbitration Provisions, Which Arbitration Regime Applies?

- In Ontario there is a domestic Arbitration Act (the "*Domestic Act*") and an International Commercial Arbitration Act (the "*International Act*")

- If the arbitration clause, in the insurance agreement, is silent; then which Statute applies?

B. Consolidation?

- If there are multiple insurers/re-insurers does the Court have jurisdiction to consolidate all the several arbitration proceedings into one arbitration under the *International Arbitration Act*?

III. Rosenbaum Presentation

Mr. Rosenbaum will discuss the following issues:

A. Insurability issues and policy wording in international programs

1. Fines/penalties/punitives-differing policy wording, what jurisdiction determines insurability, who has the onus on establishing insurability

2. Intentional/willful wrongdoing-what does intentional or willful mean, exceptions to exclusions providing defence costs until final adjudication

B. The Concept of D&O Indemnification:

-- **Statutory Indemnification in Canada v U.S. v elsewhere**-what are the differences, how does the D&O insurance policy interact with the indemnification obligations of the company

IV. Smith Presentation

Mr. Smith will discuss:

A. Fidelity Insurance Coverage Issues: What happens if the person signing the application is himself or herself a wrongdoer?

B. Defense Costs: U.S. vs. Canadian view of pre-tender defense costs, and why jurisdiction can be so important for this issue.