

FAQ ON GLOBAL D&O PROGRAMS, PART II

Global opportunities are increasingly important to many companies looking to grow and expand their businesses. To do this strategically means understanding both the new exposures in these markets and how best to transfer these risks - for your executives and the firm itself.

As part of our series of *Alerts* examining the optimal structure for Directors & Officers Liability insurance in a global environment, we offer our latest set of Frequently Asked Questions below.

Question: My local subsidiary or joint venture is a private company; do I still need local D&O coverage?

Answer: Please note that *almost all* of our local D&O placements are for private companies, as the local country subsidiaries are typically wholly or majority-owned subsidiaries of their parents – which means that even if the parent organization is public, the local entities are mostly private companies.

Whether the parent company is public or private generally has little impact on local country exposures. (Occasionally, a public company is dual-listed in the local country, or floats debt securities, but this is the exception rather than the rule.) So the answer is, “Yes, private companies have local D&O exposures as well.”

Question: What if we only have employees with no local directors or officers, do we still have any local D&O risks?

Answer: Generally, from a D&O coverage standpoint, we start to analyze foreign exposures from the locations in which one has formal local operations, which usually requires a local corporation, partnership, joint venture or the like, organized under local law. If such exists, even if there are no individuals on the ground who are formally “officers,” there are usually what we refer to as “local equivalents.” These are individuals who may be called “local country managers” or “project managers” with the right to speak on behalf of the organization (enter into contracts, hire/fire employees, etc.). So



even where there are no official local officers, directors, partners or trustees on the ground, often there are “local equivalents” that might be targets of local legal actions.

Question: What if we are not incorporated or registered in a country?

Answer: As mentioned above, when considering local D&O exposures, we start with locations where the company has a local legal entity (even if this is a joint venture with a local partner organization). Where there is or was no local legal entity, we generally do not place local D&O coverage. If there is local exposure, this may be where an appropriately crafted contract of indemnification can best supplement a global D&O program.

Question: What if we are incorporated or registered in a country?

Answer: Then you are likely to have a local legal entity with directors, officers, partners, trustees, or equivalents on the ground – which makes this a country of interest for our exposure and coverage review. (Please review our separate discussion piece: *Assessing Your Local Country Exposures*.)

Question: What if we are incorporated or registered but have no assets and no direct employees in the country?

Answer: Here is where our primary focus would be on determining what coverage you might expect under your current global D&O program. Without people and/or assets on the ground it is difficult (but note: not impossible) for there to be local exposure.

Question: What if we are incorporated/registered in one country, but our directors and officers reside in a different country?

Answer: Broadly speaking, we look to locally admitted D&O policies to ensure that D&O claims can be paid on the ground; in other words, locally. So in this instance, we have to ask where the claim is likely to arise – as this is where it will most likely need to be paid.

This is likely to be the jurisdiction in which the alleged wrongful act occurred, but it could alternatively be where the claimant resides (often an unknown) or where the executives (and their assets) reside, as suggested in this question.

If the country in which the individuals reside permits non-admitted coverage, the policy issued where the entity exists can pay locally. So the question really becomes relevant where both the D&O claim occurs and the

directors or officers reside outside the “home” country. To date, absent a local legal entity (corporation, partnership, etc.), D&O carriers have not issued local policies. This may be an instance where an appropriately crafted contract of indemnification can best supplement a well-designed global D&O program.

Question: Can’t we just locally indemnify all of our local directors, officers (and global equivalents)?

Answer: The short answer is, “Don’t count on it.” The ability of a local subsidiary to indemnify its directors, officers and equivalents is dependent on local law. In most jurisdictions this law is untested. In many locales it may be unproven when faced with the complexity of modern litigation and local public policy concerns, and in other places it may be non-existent. For example: historically, local D&O claims were associated with either criminal charges or the insolvency of the organization. Where there is no money, indemnification may be worthless. In jurisdictions where an individual may be assumed guilty until proven innocent – indemnification might prove unlikely if not impossible. Knowledgeable legal counsel should be consulted in this regard. Our working hypothesis is to assume that local indemnification may not be likely. Even in the U.S. where there is a tradition of indemnification based on local (state) law, organizations purchase D&O insurance to be certain.

Question: Can’t we just globally, as the parent organization, indemnify all of our local directors, officers (and global equivalents)?

Answer: Most organizations have been hesitant to do this on a broad, global basis, especially after consulting with legal counsel. While the parent organization may occasionally place individuals on a limited number of local boards or has an officer acting in a dual role for a local firm, as a general matter, the local organization is a separate legal entity from the parent, organized under separate (local) law. The directors and officers of the local entity are therefore NOT, as a general matter, directors, officers or equivalents at the parent organization.

As such, the parent would appear to be indemnifying the directors, officers and equivalents of the local board in their capacity *as agents of* the parent organization. This can lead to legal concerns that are not present when a locally admitted D&O policy is placed.



If you find this *Alert* of interest, you may also be interested in our other publications on this topic, including:

- “F-Cubed Suits After the Recent U.S. Supreme Court Decision,” (*Morrison v. National Australia Bank*), August 2010
- “Using Captives for A-Side D&O Coverage,” March 2010
- “D&O Deductibles Required in Germany,” August 2009
- “How Global Has Your Global D&O Program Become?” July 2007
- “New Canadian Securities Law = Potential for Greater Personal Liability,” May 2006
- “How Global Is Your Global D&O Program? FAQ in Navigating Executive Risks Coverage in a Global Environment,” January 2006
- “Directors & Officers Coverage in Brazil,” January 2006
- “How Global is Your Global Directors & Officers Policy?” March 2004

All of these publications and more can be found at

http://www.willis.com/What_We_Think/Publications/.

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