Liability risks for managers increase worldwide

BY HEIKO WÜRTZ, HEAD OF D&O INSURANCE

European small and mid-sized companies have now had globally networked supply chains and sales structures for a long time. When the reach of companies extends beyond national or European borders, the compliance requirements for companies and their managers also increases. Compliance with the relevant economic, supervisory and fiscal regulations is required in each country. Embargoes and Sanctions resulting from political disputes, such as the current ones imposed on Russia, can involve additional consequences for supply and business relationships.

Many governments are also taking up the fight against corruption and bribery. Striking examples of this are the "UK Bribery Act" in the United Kingdom and the "Foreign Corrupt Practices Act" in the USA. The US Federal law imposes punishments even for attempted bribery of foreign officials. The British ant-corruption act goes even further. It punishes the failure to prevent bribery or if no appropriate precautions have been taken within the company.

Our analysis indicates that these developments have resulted in increased liability risks for managers in Europe and overseas. However, companies can put robust insurance cover in place against these risks with a D&O insurance policy.

The political barometer on these issues did an about-turn in Europe. At the same time, there are still regions in the world in which companies are only able to obtain public contracts with the assistance of certain payments. For this reason, there are calls within industry for standardisation of international compliance rules. Otherwise, there is no means of averting a competitive divide between countries with strict compliance rules and those countries adopting a rather lax approach to business practices of this kind.

Managers are at risk of punitive fines and prison sentences

The fact is that the applicable compliance standards do not simply impact on the companies and their local subsidiaries or locations. The sale of products through a third-party country to the relevant country or the existence of business relationships there may be enough to initiate investigations by the prosecuting or supervisory authorities if there are any grounds for suspicion. If a conviction results, the affected managers can expect punitive financial penalties and prison sentences lasting several years. If according scenarios lead to financial losses for companies, shareholders or third parties, responsible executives as a result are going to be sued frequently.

The liability risks for managers in many countries are intensified by a further special feature. A claim can easily be filed against them directly by third parties and shareholders if any loss or damage has been caused by their actions or omissions. If a manager has to answer charges relating to breaches of compliance at a location abroad, it is not possible to place the blame on the responsible employees working there. The manager can also be held accountable for activities abroad under a general responsibility for organisation. And that is not the only liability. Following the so-called "Neubürger" judgement by a German appeal court, the management of companies has an obligation to implement systems which facilitate global identification and simultaneous prevention of compliance breaches. This also covers the selection of business partners, such as suppliers.

However, routine everyday business demonstrates that although liability risks are limited, they can never be entirely excluded. Members of management boards, supervisory boards and advisory boards are therefore not the only executives who are relying increasingly on D&O insurance cover (Directors & Officers). Managing directors and managers of small and medium-sized companies are also being confronted with compliance issues in the course of their business activities. They therefore also require a robust safety net.

Liability risks can catch up with managers even after an intervening period lasting years

During the recent past, media reporting has increasingly focused on possible misconduct by managers and the resulting liability risks. The willingness to consider D&O insurance cover is increasing as a result. The risks really are considerable. Corporate officers on executive bodies can be held liable by their companies and by third parties for financial losses incurred – and this liability is personal and unlimited in relation to their private assets. And it is largely unknown that managers can be subject to these liability risks many years after the event, even if the manager is no longer exercising the function they had when the breach was committed under his or her watch.

As far as global companies are concerned, these developments reveal three main factors for insuring D&O risks if they want to provide cover for their decision-makers:
1. The insurance cover should extend to protection for foreign activities as far as possible.
2. Local regulations, in particular the individual statutory regulations for liability and supervisory requirements should be fully taken into account.
3. It should be possible to comply with far-reaching liability and coverage requirements, particularly in so-called non-admitted prohibited countries. This generally happens by implementation of local policies on the ground.

Local policies are particularly necessary in emerging economic regions which are very attractive as locations for western companies, such as the BRIC countries of Brazil, Russia, India and China. These policies are also required in other countries where the insurance of supervisory issues is fraught, for example in Switzerland. Insurance markets are frequently heavily protected in these non-admitted prohibited countries, and insurance policies underwritten by foreign providers are highly regulated, only allowed with significant restrictions, or even banned altogether.

This is a further reason why international insurance programmes provide a good framework for insuring D&O risks. However, this places increased requirements on insurers. They need to have significant financial strength and a broadly based global network. They also need experienced employees and partners on the ground. Apart from close cooperation in the insurance of risks, it is vital especially in the event of a claim that there should be professional and fast settlement locally for the loss or damage.

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Contact:

Talanx Group Communications / Pressestelle HDI Global SE

Martin Schrader

Phone: +49 511 3747-2749

E-mail: martin.schrader@talanx.com