

An Increasingly Foreign Concept

by James H. Proferes

There was a time when the words “class action lawsuit” were rare in countries outside the United States. Today, a surge in corporate scandals as well as more stringent corporate governance and the adoption of new laws in countries around the world have created a changed environment.

A recent settlement by Royal Dutch Shell with its European investors for \$400 million, as well as other settlements in excess of \$100 million in Canada, Germany and the Netherlands, demonstrate that directors and officers (D&O) liability lawsuits are becoming more common and more expensive outside the United States.

Simply put, U.S. companies are more at risk of a foreign D&O liability lawsuit. Business is “going global” at a frantic pace. According to the 2007 Chubb International Risk Survey of U.S.-based companies, C-level executives and risk managers reported that about 75% of the companies plan to expand their foreign operations or introduce new products outside the United States.

As businesses go global, U.S.-style litigation is following on their heels, which means risk managers have more to worry about. In fact, more than half (55%) of C-level executives and risk managers believe that D&O liability is becoming a more significant source of risk outside the United States and Canada, according to the Chubb survey. Risk managers have naturally begun asking questions like, “Will my U.S. policy cover me in India or China?” and “Will our D&O coverage work as intended?” Local country managers are asking their head offices, “Do I have D&O coverage?”

Protecting a company from a D&O liability lawsuit in countries outside the United States can be complicated. In some countries, such as Brazil, individual risk can be amplified. If a locally admitted D&O liability insurance policy is not provided and the

company cannot indemnify the director or officer, the individual may not have protection beyond his or her assets. Further, it is possible that the regulator may have the ability to freeze the personal property and bank accounts of local directors and officers who are being sued.

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What is important for risk managers to recognize is that although the biggest cases tend to draw the

• If the bylaws are silent or there are none, is indemnification presumed available as a result of local country law?

Second, select a D&O liability insurance solution. With the answers to these questions in hand, risk managers should reach out to their agent or broker for guidance on selecting the right coverage from the right insurer. Key considerations include:

- Does the insurer have a broad international presence for both underwriting and claim handling?
- What is the insurer’s capability for providing local D&O liability coverage in the identified countries?
- Is the insurer’s capability through

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most media attention, any company can be sued inside or outside the U.S. Even a small to midsize business with a handful of offices in one or two foreign countries faces a rising D&O liability risk.

A two-step analysis can help determine a company’s vulnerability and its international D&O liability coverage requirements. First, determine the company’s current situation. Start by constructing a matrix that includes all of the foreign countries in which the company has operations and address these questions:

- In which countries does the company have operations?
- What are the legal requirements for admitted insurance?
- How do these requirements apply to D&O liability insurance?
- What is the company’s practice for indemnification of directors and officers in each country?
- Is indemnification stated in the local company bylaws?

company-owned offices or affiliate insurer relationships? (This may affect the insurer’s ability to provide service and to manage claims.)

- What service expectations can be set with the insurer for quote, bind and issuance of a local policy in each country?
- Can the agent or broker provide local country support through an owned or correspondent relationship? (This is particularly valuable in reviewing local policies written in the local language.)
- Does the insurer have the capability to provide difference in limits/difference in conditions coverage to ensure the U.S. D&O policy provides the same broad protection in conjunction with the local D&O policy? ■

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