



Safe Passage



LOBETROTTING COMPANIES FACE CONSIDERABLE RISKS IF THEY DON'T PROPERLY INSURE THEIR EMPLOYEES.

By JAMES PROFERES

American media companies have been on an expansion mode for decades, turning what at one time were primarily domestic businesses into global brands. One need only look at MTV Networks, which now has 27 overseas MTV services and a host of other channels branded with its VH1, Comedy Central and Nickelodeon monikers, to understand how deeply entrenched some companies have become. Even U.S. broadcasters that have traditionally had a very low profile overseas are getting in the act. For example, last year CBS acquired British music and social-networking site Last.fm.

As U.S. media companies go for the international gold, they should take a close look at their insurance policies to ensure that the senior executives of those foreign operations are protected from liability.

The top officials of overseas offspring may find themselves with deep troubles if their companies do not have locally admitted directors and officers (D&O) liability policies, which are issued by a locally licensed insurance companies. It's very possible that the company's home country policy may be limited or barred from responding locally without one.

Worse, some countries have laws that limit or even prohibit the use of company assets as indemnification to executives.

Growing Threat

Because most countries do not make D&O policies compulsory, companies run the risk of not realizing there's a gap in their coverage. This is a growing

Abroad

concern, because media companies are deepening their interest in overseas assets at the same time cross-border D&O liability risk is on the rise.

Until recently, the D&O liability risk outside the United States had been relatively low. But that has started to change in the past few years as a of tougher governance and regulatory standards and an increase in scrutiny in foreign jurisdictions.

For instance, there was a complete overhaul of Japan's Commercial Code in recent years. In 2005, the code was streamlined, and new corporate governance measures were implemented. The revisions enabled Japanese companies to structure themselves according to a U.S.-style governance model, and some measures require greater transparency and more internal controls.

In general, shareholder lawsuits are not a major concern for the international units of U.S.-based companies focused on cable systems, TV and radio, because they are too small to have a significant impact on the parent company's stock back in the United States

In addition, while content can often be a major source of risk, coverage for those losses typically falls under a company's errors and omissions liability policy rather than the D&O liability policy. As a result, some media companies may overlook or may not recognize the need for multinational directors and officers liability insurance protection.

The Risks

Overseas D&O liability issues can arise in several ways. Typically, they have to do with the challenges of regulatory compliance, strategic investments or alleged breaches of contractual obligations.

Cross-border merger and acquisition activity, for instance, is itself a source of potential liability. Deals typically need regulatory approval, and regulators – under pressure to protect national interests – will sometimes take a harder look at cross-border investments. Senior executives are also at risk if there are disputes over compliance with a country's accounting and tax laws.

The following examples demonstrate what can happen:

- A U.S. consumer products firm ran into trouble when local police and Federal Revenue Service officials raided the offices of its Brazilian unit and arrested top executives as part of an ongoing probe into a tax fraud scheme. Police accused the firm's em-

ployees of setting up a scheme to evade local sales and corporate taxes. Police arrested the firm's Brazilian CEO and other company executives.

- A German conglomerate's engineering subsidiaries in the U.S., Europe and the Middle East became the focus of a bribery investigation. Prosecutors alleged the firm used a system of bribes to buy its way into contracts worldwide. Two of the firm's senior executives were arrested and convicted of bribery.



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While these examples aren't specific to the media industry, they show how companies can suffer significant disruption and loss.

Another risk for media companies could arise from disputes over investments in foreign businesses or ventures. For instance, if a U.S. company makes an investment in a foreign joint venture and later decides to divest its ownership interest, the venture partner could sue the U.S. company and bring a claim against the company's local officers for breach of an actual or implied agreement.

To Do List

To reduce the risk of a D&O liability claim, companies should make sure that their internal audit department is a key part of the company's international expansion. Many times as companies expand, their internal controls do not keep pace with the expansion. By making their foreign operations part of the corporate

audit cycle, companies not only deter the possibility of fraudulent or illegal behavior, but they also assure that the appropriate taxes are paid and local regulations are met.

As noted earlier, companies also need to take a close look at their D&O liability insurance policies to make sure they will perform as expected and will provide protection for the officers of foreign subsidiaries. Because the home country policy may not respond, and because foreign countries sometimes prohibit indemnification from assets outside the country, companies should purchase a locally admitted D&O liability policy.

When in the market for a locally admitted policy, companies should be sure to look for an insurer that has a global footprint. It should have company-owned offices as well as affiliate insurer relationships in many countries around the world. Company-owned offices should have claims handling expertise in house, and particularly in the country itself.

What's more, buyers should be sure that the insurer has expertise in underwriting locally admitted policies as well as expertise in D&O liability products in case specific local-company risks need to be reviewed, or coverage tailored.

It is strongly recommended that media companies consider using an agent or broker that has either the support of a company-owned global network or belongs to an affiliated global network to support the local purchase of insurance protection. The process of obtaining a locally admitted policy can be slowed considerably if the agent or broker does not have a broad reach and is not familiar with the foreign country requirements.

The media company may also want to seek out and consult with an attorney familiar with global insurance and tax requirements to ensure that the firm is complying with local country laws and regulations.

While locally admitted D&O liability policies are usually not compulsory, operating without one could place senior executives – and the units they run – at significant risk in foreign jurisdictions.

James Proferes is a vice president and deputy directors and officers liability underwriting manager for Chubb Specialty Insurance. He can be reached at JProferes@chubb.com or (215) 981-8233.