

Director and Officer's Insurance

A Global Perspective


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Quick Facts

Will the British Petroleum oil spill affect the insurance industry?

BP is self insured for business risks and only buys insurance for risks that are required by law. BP uses Jupiter Insurance (a division of AIG) for their required insurance. Jupiter's maximum payout per event is \$700 million dollars which is a "drop in the bucket" compared to the overall cost.

Source: "The Source" based in London

Director and Officer's Insurance - A Global Perspective

*Contributed by Rodney Choo, Esq.
The AssureTech Group*

We are frequently asked how best to address the Director and Officer (D&O) exposures of foreign subsidiaries of US companies; more specifically, is it necessary to place a local admitted policy with an insurance company in the foreign country. Given that most countries prohibit the use of non-admitted carriers - which means a local admitted carrier in that jurisdiction should be providing the policy - the technical answer is yes. The practical reality, however, is that most companies today do not do this and for the most part this is probably the rational decision.

The fact remains that the risk of D&O liability outside the US is low, with the exception of a few countries in Western Europe, and, increasingly Australia. That said, the trend towards more countries adopting multi-plaintiff style actions and greater shareholder activism is increasing. Further, many of the leading developing countries, particularly Brazil, Russia, India and China, have very strict rules about placing insurance with local companies within their country.

Although most companies are likely to avoid any significant negative short-term consequences from relying solely on their US policy, the issue is not going away. Many companies may decide that the consequences of being in non-compliance, which vary from minor to severe, do not justify the cost of putting in place a proper global policy; particularly private companies. It is important that you conduct the necessary due diligence in order to understand the pros and cons of your ultimate decision. To do so, we are providing a high level analytical framework to help guide the process.

Basic Framework

An *international needs analysis* is, by definition, dynamic, taking into consideration multiple factors. Working closely with your broker, you should start with some basics questions:

- In which countries do you operate?
- What is the nature and scope of those operations by country? (common criteria, both to determine need and to calculate local country premium allocations, includes employee base and revenues; but these are not exclusive).
- Who qualifies as an insured by country (e.g., the local foreign director, officer)?

With that basic information, you should work with your broker to conduct a country-by-country analysis that includes, at a minimum:

- Is indemnification permitted and/or are there unique rules, laws, etc. that could impact it?
- What is the practical litigation risk (private and governmental)?
- Are there corporate structure or governance issues that could complicate the language of a US-based policy (are we losing something in translation)?
- Is there a requirement for a local admitted policy and what are the consequences if you do

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not have one?

- What are the tax implications?
- Is stateside payment allowed?
- What currency controls exist in the country, and can you get the money in?
- What is the cost of putting in place a global D&O program?
- Do you need local representation?
- Is there a clear process for reporting/servicing claims?

Solutions

The proper solution will depend on your particular company and your international needs analysis. Given its robust international network; TechAssure is uniquely situated to effectively handle the “globalization of D&O.”

Should you add additional insureds?

*Contributed by Noel Bertman
Chubb Group of Insurance Companies*

Risk managers, CFOs and CEOs are routinely asked by their clients to obtain additional insured status under their liability policies. Too often, this request is agreed to and passed through to the insurance company without thought of the consequences to your company.

Some points to consider before you act on the next request:

- **Limits of Insurance**
Have all considerations been undertaken to ensure that you are not giving away the coverage you’ve purchased for your own defense? Many insurance policies will defend and indemnify your client if you agreed to do so in a written contract. The money spent on defending your client could potentially be reducing your liability limits (in policies where defense expenses reduce the limits). By accepting only the liability for exposure within your control, you can retain the most value from the coverage for yourself. An example might be limiting status to financial interest only.
- **Reporting**
Some policies have provisions that all insureds (includes additional insureds) have the duty to report claims in a timely manner to the insurance carrier. For example, can the additional insured prejudice my coverage by untimely reporting?
- **Separation of Insured Provision**
If your policy contains this coverage, you may be allowing the additional insured (your client) to use your own policy to bring suit against you.
- **Blanket Additional Insured Wording**
Most contracts require you to indemnify and hold your client harmless. Many blanket additional insured provisions are very generic, and can apply to many different situations.

Therefore, you need to make sure that the additional insured provision is tailored to comply with your contract. It is always best to review the additional insured provision and ask yourself, “Are there limitations in the policy regarding retention of defense counsel and control of a suit that require certain pre-loss agreement that is not in the contract?”