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Rising claims, class actions and coverage concerns – the world view of D&O

Global Insurance Law Connect lawyers from across the globe give a snapshot of the directors' and officers' insurance picture from their country

UK: Growth potential

There is still space for growth in parts of this market. The awareness of directors' and officers' (D&O) liability insurance as a product is perhaps heightened among publicly listed and large privately owned companies, as they tend to possess sophisticated in-house financial, legal and compliance functions.

However, in contrast, among small to medium-sized enterprises there is still a significant minority that consider D&O does not apply to them at all on the basis their board's exposure emanates from shareholders alone and is, therefore, negligible. Here is a group of companies that may now begin to see more reason to purchase D&O cover.

New entrants are also shaking up the market to the benefit of buyers. There are early, tentative signs market conditions may be beginning to soften gradually, as a number of insurers unburdened by historic claims losses have spotted an opportunity to enter the D&O market, drawn to the level of premiums they can command. ■

Alex Traill, BLM

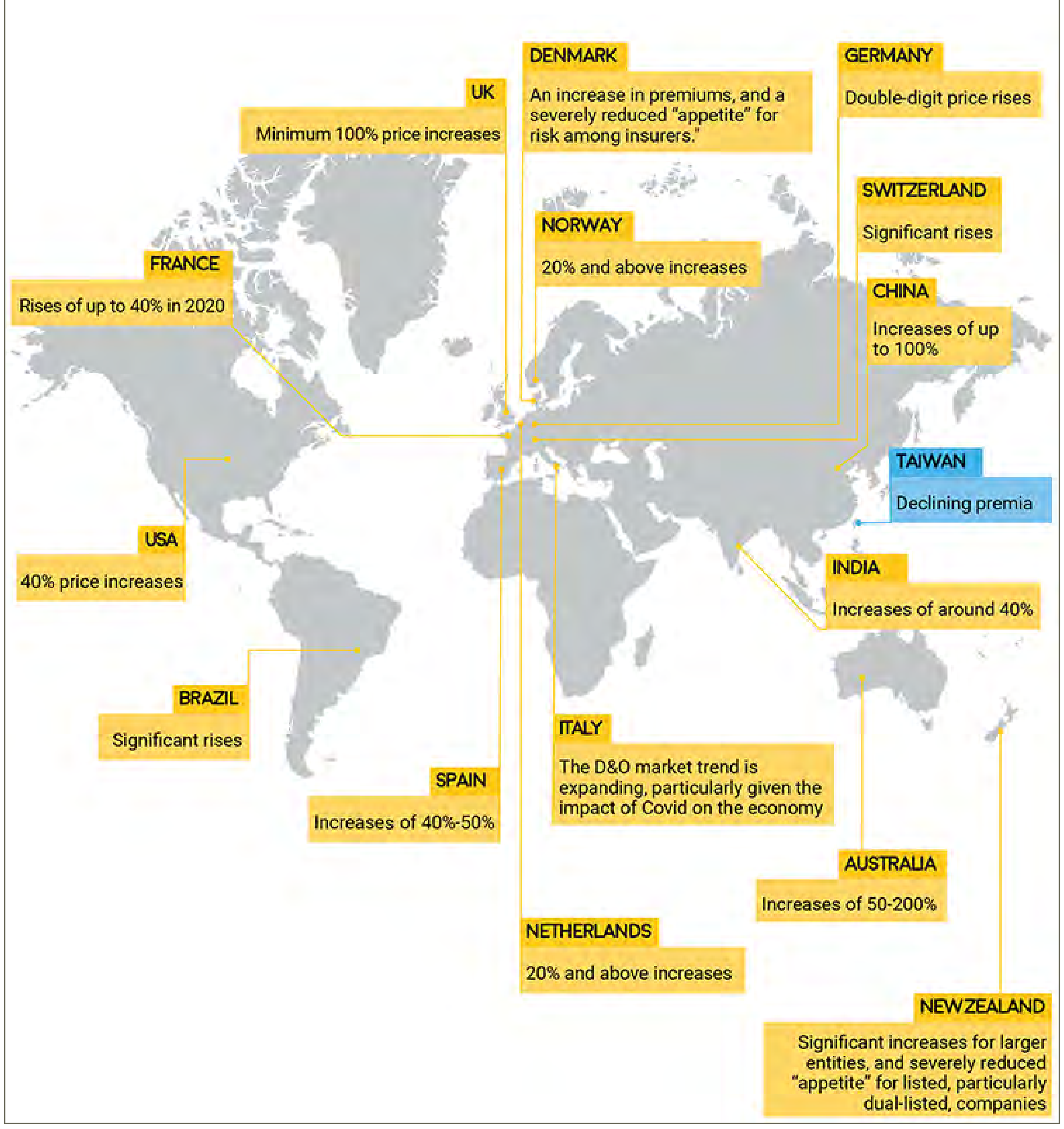
Denmark: Rising claims

While D&O markets in other countries in the past year underwent periods of turmoil, with increased claims activity, premium rates increasing at an unprecedented pace and insurers reducing their exposure, there has seemingly not been an increase in the number of reported claims in Denmark. However, it is possible the trend we see in other countries at present has not reached the Danish market yet, considering the main factors that causes the trend (for example, strict legal requirements, class actions and litigation funding) have not fully struck through on a national level.

The impact from Covid-19 has been rather negligible. However, we anticipate a significant impact on D&O policies in form of increased claims activity, higher premiums and sharply reduced available cover, when the number of bankruptcies is expected to rise sharply starting late 2021/early 2022, due to the end of government subsidies and other measures during lockdowns and restrictions. ■

Jesper Ravn, ARK Law

Directors' and officers' trends around the world



Norway: Creditor loyalty

There has been an increase in the number of claims and the claims are getting higher. The litigation points are complex and vary. A general topic seems to be loyalty to the creditor and the board's task of following the company's financial position closely.

The Norwegian economy has not been affected too badly during the pandemic, but perhaps is still too early to see the effect it might have. Every drop in the economy gives ground for an increase in claims against insurers. ■

Joachim Dahl Wogstad Skjelsbæk, Advokatfirmaet Riisa & Co

Germany: Event-driven claims

The trend in D&O claims of recent years include above all the increase in the significance of claims in connection with corporate insolvency. Event-driven claims are also gaining importance.

Contrary to general expectations in mid-2020, the pandemic has not yet led to a further increase in insolvency-related claims, as the obligation to file for insolvency was temporarily suspended. However, as this regulation has now expired, an increase in claims can be expected. At the same time, the importance of environmental, social and governance (ESG) issues is also expected to grow in the context of D&O insurance due to corresponding court decisions.

In addition, it remains to be seen whether the restructuring of the economy caused by climate change will not also lead to loss scenarios that are also reflected in D&O insurance. ■

Dr Quirin Vergho, Arnecke Sibeth Dabelstein

Switzerland: Personal liability

In the Swiss market there is strict liability for directors and officers for social contributions that have to be paid as a corporation. If you are too late in declaring insolvency, this brings a personal liability for directors and officers to pay social security contributions and this can be expensive. We have seen big stresses due to Covid-19. If this puts a company out of balance, this comes with the risk that sooner or later someone will be held responsible.

We have not seen D&O claims yet, but we have seen claims for business interruption as lots of property policies included it. Pure financial losses are often not covered and many companies were not aware of that. We only have one or two court decisions so far. There is a pilot case that suggests insurers are unlikely to have to pay. ■

Clemens von Zedwitz, gbf Attorneys-at-law

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Taiwan: Coverage issues

The biggest litigation points in D&O appear to be interpretations of certain insurance policy provisions, such as whether an insured exclusion applied to preclude claims from coverage.

We understand the pandemic continues to challenge enterprises and uncertain environment for businesses may result in a series of new risks to the D&O insurance market; however, as Taiwan's condition is relatively more stable since the outbreak, at this point we do not observe any significant impact on D&O insurance market or seeing increasing claims involving D&O.

Still, as Covid-19 cases are rising in the global community, we could foresee the pandemic will keep creating heightened risks for directors and officers, with the possibility the liability claims against them are set to rise, which therefore may affect the D&O insurance market. ■

CT Chang, Lee & Li

The Netherlands: Tough renewals

The market seemed to be gearing up for another tough renewal season at the end of 2021. The hardening of the insurance market has had a serious impact on premium but also on available coverage. Insurers are limiting their presence in the D&O market and there is less underwriting capacity. This process is ongoing and not expected to change very soon.

The impact of the pandemic on D&O claims still has to materialise. Under Dutch law, insolvency poses the biggest risk for D&O claims. The government's extensive financial injections for businesses struggling due to the pandemic prevented many from insolvency scenarios – the number of insolvencies being significantly lower than before the pandemic. This development is reason to expect something of a "catching up", with a possible rise in insolvencies and a rise in D&O claims. ■

Harriët Delhaas, WIJ Advocaten

France: Insolvencies

The Covid-19 pandemic triggered a major economic downturn on most global markets, including France, where the economic outlook is highly volatile.

Insolvency is traditionally the foundation of many D&O claims and bankruptcy and insolvency are the leading grounds for D&O claims in France. An increase of insolvent or bankrupt companies owing to the pandemic would be expected to correlate with the growth of D&O claims.

D&O claims in the next two years could consist more and more of insured against insured claims as companies scrutinise their directors and directors act against directors. Furthermore, many D&O claims are likely to be driven by ESG factors. ■

Robert Byrd, Byrd & Associates

China: Securities disputes

The pandemic is one of the indirect reasons for the rise in D&O insurance premiums. Insurers tend to be more cautious when accepting new applications from listed companies in epidemic-related industries.

In addition, it is foreseeable in the next two years the number of securities disputes related to the epidemic will increase significantly and the cause of action will also be from misrepresentation or violations in information disclosure.

Although China's economic trends are still being affected by the epidemic, financial inputs and capital markets performed better than expected in the first half of 2021, according to officially released data. With the optimisation of economic trends and legal environment in China, it is expected in the next two years D&O insurance will be in the spotlight again after a long period of silence. ■

Jan Holthuis, Buren

Spain: Increased risks

It is still too early to see the real impact of the pandemic on D&O-related claims. However, we believe the pandemic has accelerated the risks of the insurance sector, reducing its financial capacity and complicating underwriting for insurers. This has led to an increase in premiums, also affected by the increase in taxes on insurance premiums.

All crises have a common denominator: lower income and the assumption of greater risks. Exposure to greater risks can lead to the commission of various types of negligence. A clear example can be given in the case where a company absorbs another to grow in its market inorganically. If months or years later the absorbing company fails to make the investment profitable and its income declines, we could see many shareholders demanding responsibilities. These types of situations are what we expect in the next two years. ■

Fernando Blanco Giraldo, Blanco y Asociados Abogados

Italy: Climate change

The Italian D&O market trend is expanding. The biggest considerations are providing adequate coverage for legal expenses, privacy, cyber risks and ESG (and climate change). In particular, climate change is rising to the top of boards' risk registers; failure to disclose climate change risks may drive future litigation. According to reports, Italy will be one of Europe's worst-affected countries in terms of climate change.

With regards to litigation Italian courts are becoming more confident with D&O policies (and coverage rules), so it is easier to explain the correct application of coverage criteria (and renewals). On the other hand, the tendency is to ask insurers to open settlement discussions at the litigation phase. ■

Giorgio Grasso, BTG Legal

India: Risk management

In the next two years there could be a decline in D&O claims owing to the preparedness of organisations and better foresight to spot potential mismanagement.

Even though it is in recovery, the economy is growing at a slower pace. In an economic downturn, it is common for litigation to be more prevalent as parties are motivated to seek compensation to recoup their losses.

Seeing the recent economic trends, the directors and officers of an Indian company can no longer afford to turn a blind eye to the rapidly changing and stricter regulatory environment in India and globally. It is expected organisations will be taking precautionary measures to avoid liabilities, leading to reduction in the number of D&O claims in the upcoming years. ■

Sakate Khaitan, Khaitan Legal Associates

Brazil: Claims stabilisation

The pandemic directly affected the D&O market, increasing the claims ratio, which was already at a high level in 2019. The perception of risk related to financial issues arising from the pandemic ended up projecting itself on the demand for D&O coverages.

In the next two years, we expect to see a stabilisation in the rise of claims, due to a better economic situation, and a better adaptation of D&O cover to the new risks. In addition, we expect a better market response, with more coverages offered and new players entering this business, meaning some easing of prices should follow.

We expect to see an increase in cases related to cyber issues and environmental liability, as well as a greater presence of claims related to regulatory questions and a reduction to the level of claims related to corruption in the past year due to Operação Lava Jato and others. ■

João Marcelo dos Santos, Santos Bevilaqua

New Zealand: Class actions

New Zealand does not have legislation that provides a framework for class actions or commercial litigation funding. In the absence of formal frameworks, the courts and opposing parties have sought to navigate these two issues and establish rules for much of the past decade. At the start of December 2020, the New Zealand Law Commission released an issues paper on these two issues and been consulting on how these should be regulated.

There was an expectation there would be increased activity in claims against directors arising out of insolvency from the start of 2021. However, the New Zealand government implemented a series of measures to address the impact of Covid-19 for companies and these measures appear to have minimised any material increase in such claims. These initiatives included a "safe harbour" regime, which provided some interim protection for directors from personal liability under the reckless trading provisions of the Companies Act 1993. ■

Aaron Sherriff, Duncan Cotterill

Australia: Maturing claims

The Covid-19 pandemic appears to have created a volatile and uncertain environment for businesses. On the D&O market side, insurers are continuing to grapple with maturing claims portfolios. It is anticipated the market will stabilise and soften in the next two years. This optimism is attributed to (now past) increases in premiums together with the apparent slowing of certain types of claims (namely, securities-related litigation).

There has been a decline in securities and insolvency-related investigations and claims in the past 12 months. Early in the pandemic, legislative changes were made in the area of insolvency and other legislative changes and government support assisted companies. This led to a decline in insolvencies. There is usually a delay between a corporate insolvency and insolvency-related claims against company directors. Even so, the decline in corporate insolvencies appears to have reduced claims in this area. ■

Dino Liistro, Sparke Helmore