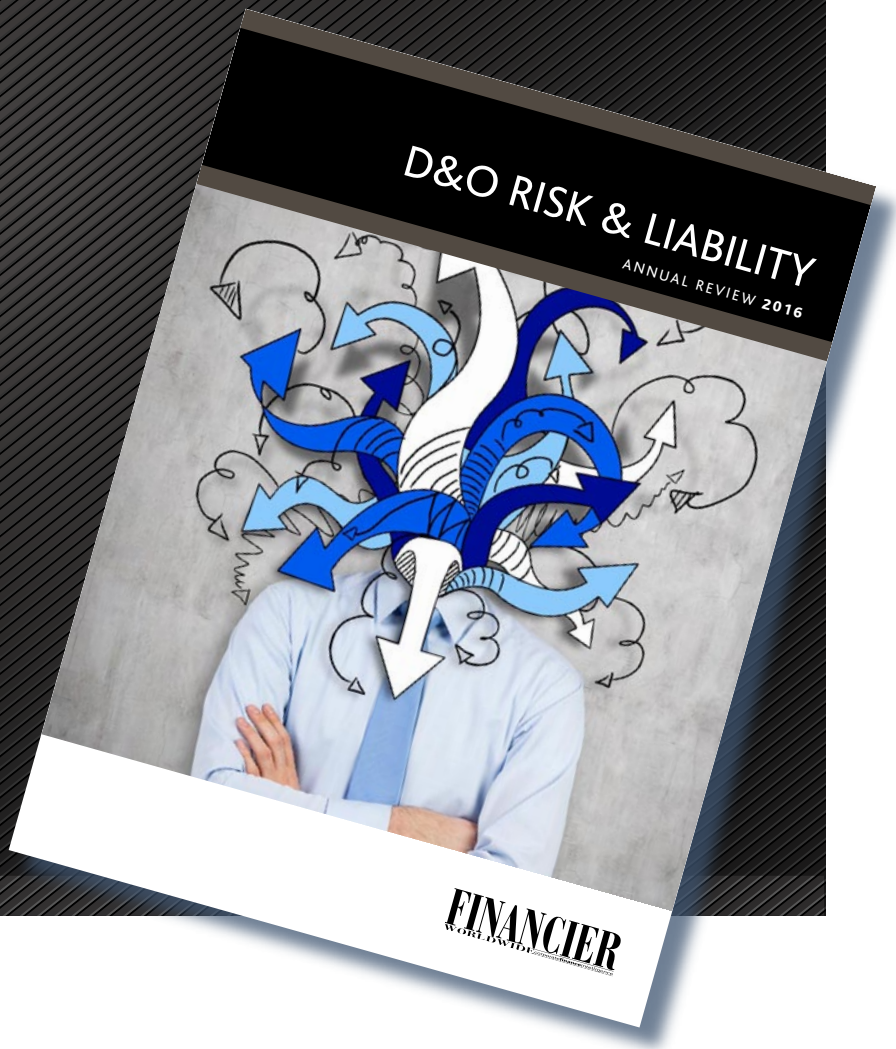
ANNUAL REVIEW

D&O RISK & LIABILITY



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SWITZERLAND

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Q IN WHAT WAYS ARE THE PRESSURES EXERTED BY REGULATORS, CREDITORS, CUSTOMERS AND SUPPLIERS INCREASING THE PERSONAL RISKS FOR CORPORATE DIRECTORS AND OFFICERS (D&OS) IN SWITZERLAND?

GRABER: There has been a striking increase in corporate disputes that are fought on the D&O battlefield. In my experience, there has been a rise of insured vs. insured claims, for example in the form of liability claims of the corporation against former management or former members of the board of directors. More and more, these claims are reciprocal in nature, taking the form of claims and counterclaims. This is the case, for example, if the current board of directors accuses the former board of directors of squandering company assets in costly proceedings involving substantial legal fees and business assessment costs, while the former board of directors then turns around and accuses the current board of directors of doing the same by initiating these proceedings in the first place. This type of dispute is fought at the expense of the D&O insurer. However, nowadays, insurance coverage of insured vs. insured can be considered a standard product without which a D&O insurer would not be competitive any more. This increase of insured vs. insured claims has manifested even though the Swiss federal Supreme Court has explicitly recognised the so-called business judgment rule in 2012. Other areas also see a tendency toward D&O claims, for instance in the case of lawyers which are increasingly recognised as de facto company directors and held responsible as such. This applies mainly to individual partners or associates but can also apply to a law firm as a whole. Lastly, pension funds have also recognised the advantages of liability claims, mainly against auditors and pension fund experts.

Q WHAT TYPES OF CLAIMS ARE BEING BROUGHT AGAINST D&OS IN SWITZERLAND, INCLUDING ISSUES ARISING FROM BUSINESS DECISIONS, FINANCIAL PERFORMANCE AND BANKRUPTCY, THROUGH TO ALLEGED FRAUD AND CORRUPTION?

GRABER: The types of claims we are seeing are mainly in the field of corporate disputes. For instance, disputes arising in connection with the strategic focus of the company are increasingly brought before the courts in the form of corporate liability claims. Furthermore, the field of bankruptcy and composition proceedings has seen a rise of liability claims. In the spirit of 'no harm in trying', these are typical attempts to recover losses by way of liability proceedings against former company D&Os or auditors.

Q GIVEN THAT VIRTUALLY EVERY M&A TRANSACTION NOW SEEMS TO DRAW SOME FORM OF LITIGATION – PERHAPS RELATING TO DISCLOSURES, CONFLICTS OF INTEREST, ERRORS AND OMISSIONS, OR ANOTHER ISSUE – WHAT IS YOUR ADVICE TO D&OS ON MANAGING POTENTIAL LIABILITIES ARISING FROM A DEAL?

GRABER: Besides including relevant provisions in the M&A agreements themselves – such as limitation of liability, indemnification obligations, and so on – it is vital that the D&O insurance includes a severability clause. Severability clauses provide, basically, that disclosure of information and the knowledge of each insured has to be treated separately. As to the question whether or not an insured person is covered, the misrepresentation of a significant risk factor or the fraudulent justification of the insurance claim by an insured person must not be attributable to the other insured persons. Further, every insured person should be in possession of a copy of the policy and be aware of all terms and conditions relevant to the notification of claims and duties of cooperation.

"In my experience, there is an elevated risk of D&Os of Swiss companies having actions brought against them abroad, particularly in the field of fiscal offences."

Q TO WHAT EXTENT IS THE LITIGATION LANDSCAPE CHANGING? FOR EXAMPLE, ARE YOU SEEING MORE SECURITIES CLASS ACTION LAWSUITS AGAINST D&OS IN SWITZERLAND?

GRABER: Even under the new Swiss Civil Procedure Code, which entered into force on 1 January 2011, the concept of class action is foreign to Swiss law. The closest procedural instrument to class action under Swiss law is the joinder of parties, through which two or more persons whose rights and duties result from similar circumstances or legal grounds may jointly appear as plaintiffs or be sued as joint defendants. However, in my experience, there is an elevated risk of D&Os of Swiss companies having actions brought against them abroad, particularly in the field of fiscal offences. Furthermore, supervisory proceedings also seem to be on the rise.

Q HOW WOULD YOU DESCRIBE THE DEFENCE COSTS ASSOCIATED WITH DEFENDING CLAIMS AGAINST D&OS? ARE THESE COSTS ON THE RISE?

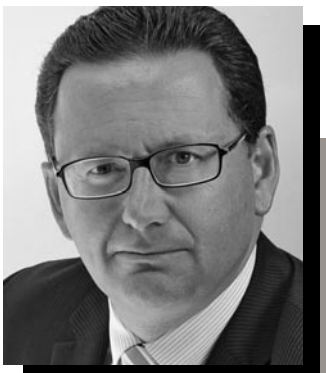
GRABER: Defence costs are clearly rising. As liability cases often have international ties, they need to be analysed from the angles of different jurisdictions. This implies the involvement of several law firms – at least one per jurisdiction. Further, there is a tendency for each defendant to retain separate counsel. As potential conflicts of interest often cannot be ruled out, a law firm seldom represents more than one defendant in the same matter. Lastly, there are often large PR or communication costs, which, depending on the particular policy, may also be covered by D&O insurance.

Q IN YOUR OPINION, HOW IMPORTANT IS D&O LIABILITY INSURANCE AS A TOOL TO MITIGATE THE PERSONAL RISKS TO BOARD MEMBERS? DO YOU BELIEVE ENOUGH ATTENTION IS PAID TO THIS ISSUE IN SWITZERLAND?

GRABER: D&O liability insurance is crucial. This is especially true regarding defence cost coverage, as costs for defence incurred in the early stage of a dispute – such as for analysis of facts and framing of legal issues – can be extremely high. Also, D&O liability insurance serves as a war chest for settlement negotiations. The sum insured should at least be high enough to allow for a realistic settlement.

Q WHAT IS YOUR ADVICE TO COMPANIES AND THEIR D&OS WHEN ASSESSING THE TERMS, COVERAGE AND PRICING OF A D&OS INSURANCE POLICY?

GRABER: Evidently, the terms and conditions of the policy are of great importance, as is the inclusion of a severability clause. Other important elements are a waiver to reduce coverage for acts of gross negligence and a renouncement to stipulate a retroactive date which would exclude coverage for breaches of duty committed prior to a specific date in claims made policies. In the event of a change of insurer, there is the risk of a coverage gap, which can occur if agreeing to a retroactive date or when switching from a loss occurrence policy to a claims made policy. Lastly, actions of recourse should also be covered under the policy. As a general rule, the content of the policy is more important than pricing, as in my experience the differences in pricing are far less pronounced than the differences in conditions.



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Christoph Graber is member of the management committee and head of Prager Dreifuss' Insurance & Reinsurance team. He advises domestic and foreign insurers and reinsurers on contentious and non-contentious matters, and represents them in litigation in Switzerland or in international arbitration proceedings. Mr Graber has vast experience in the field of banking and financial services (PI and fidelity bonds), D&O, product liability, aviation and maritime insurance. He also advises insurers and reinsurers in regulatory matters in connection with corporate transactions on their conduct of business in Switzerland.

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