Introduction

Directors and officers (D&O) liability in the United States is the subject of numerous articles, blogs, and books; however, the number of resources focused on international directors and officers liability and insurance is limited. This book is intended to provide an overview of the directors and officers landscape within and outside of the United States, with particular emphasis on those jurisdictions where the majority of business interests are non-U.S. based.

D&O liability and insurance in the United States differs from that of most other jurisdictions largely due to the fact that the United States is a common law country, whereas most other countries outside of the UK and the Commonwealth are statutory law jurisdictions. Key differences between the two forms of law include the following:

- Juries can hear civil cases in the United States, whereas most non-U.S. jurisdictions that allow jury trials limit that right to criminal cases.
- Most U.S. jurisdictions allow courts to award punitive damages; most non-U.S. jurisdictions do not.
- Most, if not all, jurisdictions in the United States allow attorneys to be awarded contingency fees, but most jurisdictions outside of the U.S., with the exception of Australia and to some degree the UK, prohibit contingency fees or any type of champerty arrangement.
- Where permitted, class actions in non-U.S. jurisdictions frequently provide for only equitable remedies, with no monetary damages awarded to the class, and can only be pursued by shareholders’ associations empowered to represent the interests of all class members. Class actions in the U.S. are also opt-out proceedings, meaning that members of a certified class are automatically included in the class unless they expressly ask to be removed from it (“opt out”). Most non-U.S. jurisdictions, in contrast, require members of the class to affirmatively opt-in, which typically limits the size of, and damages awarded to, the class.

From a corporate governance perspective, there are again several distinctions between D&O liability and insurance for U.S. corporations and D&O liability and insurance for non-U.S. corporations:

- Indemnification of corporate directors and officers in the United States is authorized by state statute and granted by corporate bylaws. In most other jurisdictions, indemnification is a contractual grant, and in some jurisdictions, such as France, it is prohibited as a violation of public policy.
- The types, availability, and applicability of D&O insurance coverage differs from country to country. Claims-made policies, for example, are prohibited in certain non-U.S. jurisdictions.
- Finally, the primary constituents to whom corporate directors and officers are liable in the United States are the shareholders, who are empowered to sue them directly though shareholder securities actions or indirectly through shareholder derivative actions. Other countries have a two-tiered management structure wherein the supervisory board of
directors is the primary corporate constituent empowered to sue managing directors and officers. This management structure creates different reporting obligations and shareholder rights and remedies. This book will address D&O liability and insurance from the perspective of the corporation’s constituents, the responsibilities owed to those constituents, and the resulting liabilities when corporate directors or officers breach those responsibilities.

A few comments are in order regarding this book. First, the reader will note that, where possible, we have striven to follow the same organizational format within each country-specific article addressing D&O law. The included topics in each article are: Statutory and Regulatory Framework, Indemnification, Regulatory Proceedings, and Shareholder Representative Actions; Insolvencies, Arbitration, and Alternative Dispute Resolutions (ADR); and Insurance Issues. This format was adopted to enable readers to quickly and effectively determine the similarities/differences in D&O liability and insurance law among those jurisdictions that affect their businesses or practices.

Second, the reader will note that we have allowed each of the authors of the discrete chapters in the book to express themselves in English, although in many cases, English was not the authors’ first language. It is hoped that the reader, in reviewing these chapters, will thereby be able to glean not only the differences in D&O law from jurisdiction to jurisdiction, but also some of the diverse cultural influences that affect those substantive law approaches.

Third, the information and opinions provided in this book are current as of the date written, but may have changed between the book’s preparation and its publication. Any facts or opinions found in the book are for informational purposes only and do not constitute financial, legal, tax, investment, or other advice. Information provided by third parties is not guaranteed to be accurate or complete.

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