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DIRECTORS
INSTITUTE**

Executive Exchange

International Issues in the Board Room

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International Issues in the Board Room

November 4, 2015

Panelists

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Eversheds
- **Andrew Estill**
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- **Michelle Gourley**
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Protecting Yourself When Doing Business Internationally

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Be Prepared

- Negotiate with a view to things going wrong
- Be practical – know the Contract terms and follow them
- Be aware of local custom

What happens if the deal goes wrong?

- Is this dealt with in the Contract
- Negotiation between the parties
- Mediation
- Expert determination
- Arbitration – institutional or ad hoc
- Litigation

What law governs the parties' rights and obligations?

- Choose a governing law you understand and have confidence in
- Ensure it is in the Contract
- If not be aware of potential laws that could govern the dispute

The place of the dispute and getting your money

- Is this dealt with in the Contract
- If not where is contract performed
- Avoid forum disputes
- Think about enforcement early

Conclusion

- Be aware of your legal system before you start
- Always get your retaliation in first.



Duties of Oversight of Directors of Companies with Operations Abroad

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Duties of Oversight of Directors of Companies with Operations Abroad

- Two Recent Delaware Cases
 - In re Puda Coal Stockholders' Litigation
 - Rich v. Chong
 - Both cases involve Delaware corporations with significant operations in China.
 - The cases involve allegations that the independent directors breached their fiduciary duty of loyalty – in particular, the duty of Delaware directors to exercise reasonable oversight over the corporation.
 - The courts denied the independent directors' motion to dismiss the lawsuits.

Duties of Oversight (cont'd)

- Pursuant to Puda Coal: if a Delaware corporation's assets and operations are situated in China, the director of the corporation better:
 - have your physical body in China an awful lot;
 - have in place a system of controls to make sure that you know that the corporation actually owns the assets;
 - have the language skills to navigate the environment in which the company is operating; and

Duties of Oversight (cont'd)

- have retained accountants and lawyers who are fit to the task of maintaining a system of controls over a public company.
- Independent directors who step into these situations have a duty not to be dummy directors.

Duties of Oversight (cont'd)

- Under Rich v. Chong:
 - “When faced with knowledge that the company controls are inadequate, the directors must act, i.e., they must prevent further wrongdoing from occurring.”
 - Referencing the Puda Coal decision, stating that “U.S.-based directors of companies with substantial operations outside the U.S. ... must actively monitor the extraterritorial operations of the Delaware entity.”

Duties of Oversight (cont'd)

- Lessons learned
 - Before accepting a board nomination, potential directors should conduct appropriate due diligence on the company, its management and its board.
 - When acting as a director, actively monitor the company’s foreign assets and operations to fulfill the directors’ duties of oversight.
 - In a crisis situation, consider options that are available and seek competent professional advice.



Determining if the Director of a Foreign Subsidiary Needs D&O Insurance

Lee Lindsay, Esq. – November 4, 2015

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Due Diligence Process – Factors to Consider

- Although most insurance underwriters would have you believe it is as easy as determining whether a country requires admitted insurance, that is inaccurate.
- Each company must engage in a due diligence process in order to make an informed decision. Ultimately the decision is as unique as the company.
- Several factors must be considered in order to accurately determine if a company needs to purchase a foreign D&O policy and if so – where.

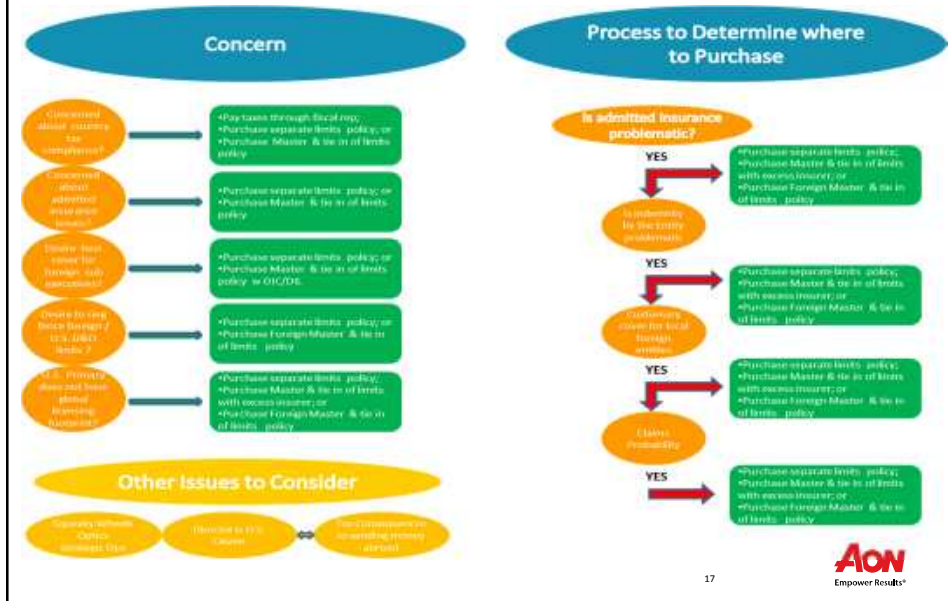
FOR EXAMPLE:

- Estimated revenues in country
- Estimated assets in country
- Is the entity a branch, joint venture, sub or other structure?
 - Joint venture – who has management control
- Is the entity publically traded?
- Are the parent's indemnification provisions meant to extend to foreign subs.?
 - On a mandatory or permissive basis
- Do the foreign subsidiaries by-laws (art. of assoc.) grant indemnification?
- Does the individuals employment contract grant indemnification?
- Are there indemnification agreements?
- Are the directors local nationals? If not what is there citizenship?

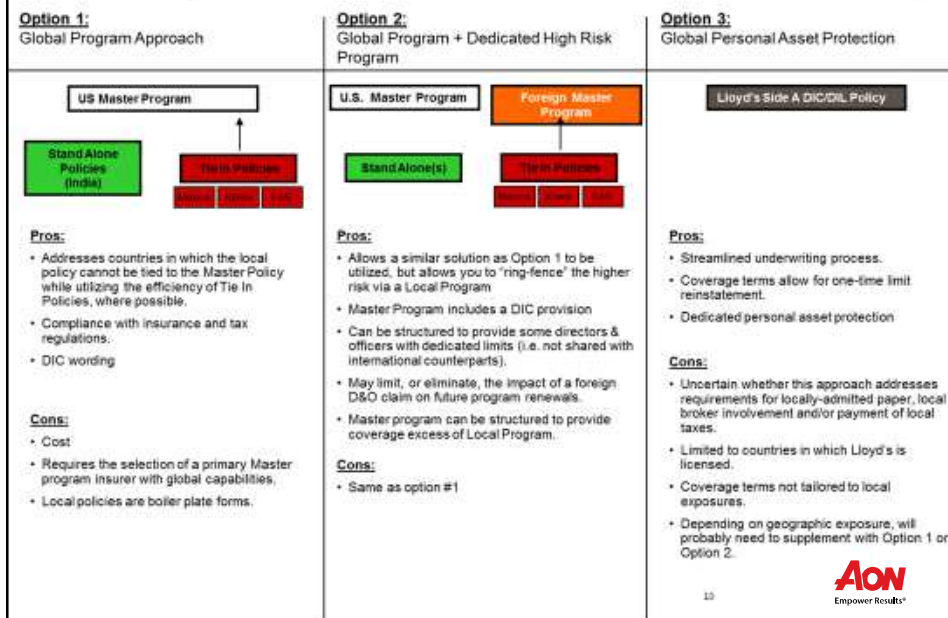
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Due Diligence Process – Identify Concerns



Due Diligence Process – Consider Structure



Acquisition of Companies with Foreign Subsidiaries

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Issues to Consider

- Acquisition Goals:
 - Is an acquisition the best way to achieve the goals of the prospective acquirer?
- Alternative Structures:
 - What is the best structure?
 - Does the country in which the target/foreign subsidiary allow an alternative structure that may be more beneficial than the recognized U.S. structures?

Case Study: India

1. Foreign Investment Controls

- Is 100% foreign ownership permitted?

2. Employee Benefits

- What payments/benefits are required to be extended to employees?

3. Taxes, Taxes, Taxes

4. Governing Law/Dispute Resolution

- Local law/local courts versus foreign law/arbitration

The Global Approach to Managing Risks – Program Performance

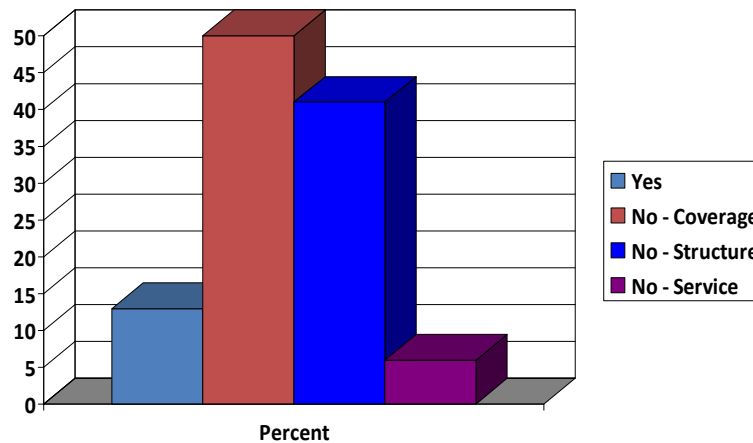
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Client Needs – Address Change

- ✓ **Compliance** – continues to be an issue with evolution of “real” situations for clients impeding claims settlements, resulting in tax consequences, fines
- ✓ **Program Performance** – will the program structure provide desired response pre- and/or post- event and in a manner consistent with corporate objectives
- ✓ **Insurer Trends** – Capping of Limits, Financial Interest Wordings, Continued Use of “Good Local Standard”, Interplay Between Excess and Primary Liability, And implications on program design and performance
- ✓ **Evolution (or non-) of Risk Management Outside US** – Increased use of Western Style Contractual Risk Management Techniques Including Demand For Higher Limits, Ability of US “Forms” To Address International Nuances Including Coverage On “Each and Every” Basis or Provide Region Specific Limits (PFL)
- ✓ **Increasing Claims Values, Frequency, & Insurance Response** – Employers Liability, Subrogation From State Funds Where Negligence Alleged to Exist, Contingency Based Legal Practices
- ✓ **Mergers & Acquisitions** – Integration, Due Diligence
- ✓ **And**

Program Performance

Do you believe your multinational insurance program is well constructed to your needs?



Source: ACE European Risk Briefing 2012



Global Risk Management Survey 2015

Prepared by Aon Risk Solutions
Global Risk Consulting



Survey overview

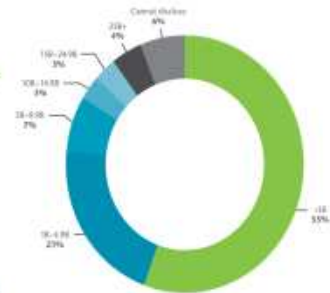
- Aon's 2015 Global Risk Management Survey, the fifth of its kind since 2007, is designed to offer organizations the insights necessary to compete in an increasingly complex business environment.
- Conducted biennially, the survey gathered input from 1418 respondents at public and private companies of all sizes around the world.
- The 2015 findings from the survey, which was conducted in 11 languages and completed by respondents from multiple countries, underscored that companies are grappling with new risks and that there are differences of opinion on how to best prioritize and respond to them.
- The survey covers the following topics:
 - Top risk concerns companies are facing today and in the future
 - How companies identify and assess risk
 - Approach to risk management and board involvement
 - Risk management functions
 - Insurance markets
 - Risk financing
 - Multinational programs
 - Captives

Respondent profile

Survey respondents by region



Survey respondents by revenue (in USD)



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Top ten risks

- | | | | | | |
|---|--|---|----|--|--|
| 1 | | Damage to reputation/brand | 6 | | Failure to innovate/meet customer needs |
| 2 | | Economic slowdown/slow recovery | 7 | | Business interruption |
| 3 | | Regulatory/legislative changes | 8 | | Third-party liability |
| 4 | | Increasing competition | 9 | | Computer crime/hacking/viruses/malicious codes |
| 5 | | Failure to attract or retain top talent | 10 | | Property damage |

Global Risk Management Survey risk ranking

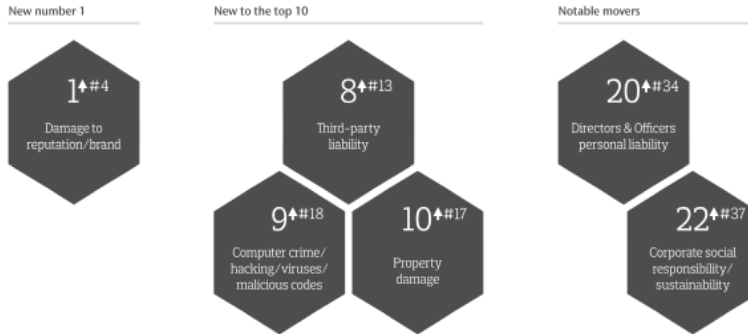
Global Risk Management Survey 2015



Global Risk Management Survey all risks ranking

1	2	3	4	5	6	7	8
9	10	11	12	13	14	15	16
17	18	19	20	21	22	23	24
25	26	27	28	29	30	31	32
33	34	35	36	37	38	40	41
42	43	44	45	46	47	48	49
50	51	52	53				

Risks increasing in prominence



- Ranking in the Global Risk Management Survey 2013

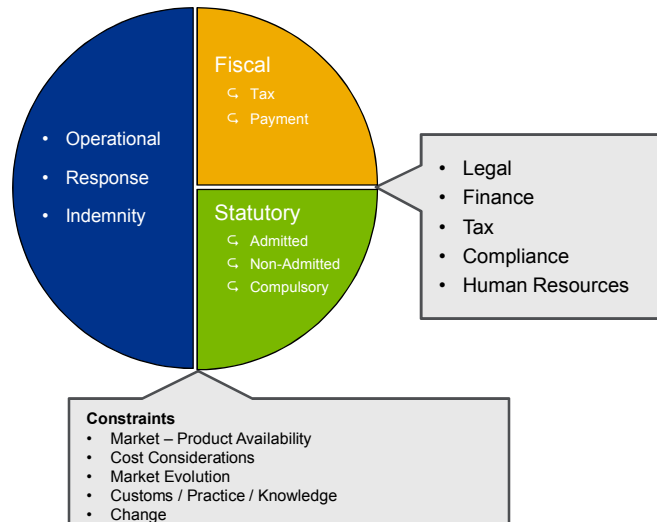
Difference in Risk Perception



To Take Away



Compliance - The Challenge



Beyond Compliance...

Real conversation moves beyond “compliance” to ensuring international program performance, including:

- Ability to efficiently manage international data
- Access to information on local customs/practices
- Clear understanding of coverage/retention levels and areas of intentionally uninsured risk
- Local broker service model that supports business needs, including communication, contract review, claims and counsel
- Insurance markets capable of offering consistent, controlled solutions
- Appropriate local policy terms/conditions that meet business requirements
- Effective management of third party contracts and transfer of risk
- Issuance of certificates of insurance or other evidence of coverage on a timely basis
- Ability to demonstrate proper premium allocation methodology and IPT payment in the event of a local audit
- Risk strategies linked with corporate Tax strategies
- Efficient loss adjustment process
- Claims payment aligned with Risk Management objectives

Seven Dimensions of Successful Global Program

