

ADVISER

UNDERSTANDING MINING DIRECTORS' AND OFFICERS' PERSONAL LIABILITY EXPOSURES – ARE **YOU** ADEQUATELY COVERED?

The global mining risk landscape continues to evolve rapidly with companies seeking long-term sustainability and organisational resilience. However, strategic change at a time of economic and political uncertainty, downward financial pressures, and fluctuating investor confidence brings with it closer scrutiny.

Meanwhile, the growing burden of regulatory duties imposed upon directors and officers, coupled with an expansion of regulatory powers to seek redress from both the company and the individual, increases executives' exposure to potential litigation and the related financial consequences.

INDEMNIFICATION – UNDERSTANDING THE COVERAGE GAP

As a company director or officer you have a fiduciary duty as well as statutory liability under local and/or international laws and may be held personally liable for your actions.

You may be offered, or may seek to include in your contracts, indemnity provisions for liabilities and defence costs against claims that may be brought against you personally. However, in most jurisdictions there is no statutory obligation for companies to offer these, even if provisioned for under their articles of association.

The UK Companies Act 2006 permits wider-ranging indemnities but these are, in the main, restricted to indemnification against claims brought by third parties; indemnifying you against your liability for negligence, default, breach of duty or breach of trust in relation to the company, or an associated company, is prohibited until innocence is established by final adjudication.

Protection gaps arise when:

- Certain conduct is precluded from indemnification under company law.
- A dispute arises over an obligation to provide an indemnity.
- A company may be financially unable to provide an indemnity, e.g. administration, receivership, or insolvency.
- Defence costs are financially crippling for a company.
- The company itself is the party making the claim against you.

IDENTIFYING DIRECTORS AND OFFICERS (D&O) RISK TRIGGERS IN THE MINING INDUSTRY

The following table summarises key challenges and related director and officer exposures (D&O) you may currently face which may increase your potential exposure to litigation.

STRATEGIC
<ul style="list-style-type: none"> • Corporate activity: increased regulatory, investor, employee, or media scrutiny as a result of corporate M&A, divestitures, rights issues, or cash calls (many D&O claims are still linked to corporate activity).
<ul style="list-style-type: none"> • Stock market listing, suspension of trading, delisting, and shareholder activism: dual listings (e.g. the Toronto Stock Exchange (TSX)), minority and activist shareholders.
<ul style="list-style-type: none"> • Run-off considerations: board changes, retiring directors, and corporate activity.
<ul style="list-style-type: none"> • Delivery: projects, exploratory or expansive, can take years to complete and/or become operational. Inaccurate reserve, ore grade and resource estimates.
<ul style="list-style-type: none"> • Execution risk: successful entry into new and developing markets or strategic shift.
<ul style="list-style-type: none"> • Breach of fiduciary duty: including anti-trust/competition violations, bribes, actions for personal gain.
REGULATORY
<ul style="list-style-type: none"> • Regulatory scrutiny intensifying: compliance locally and across international jurisdictions as appropriate. Includes the UK Bribery Act, US Foreign Corrupt Practices Act, and sibling anti-bribery legislation. Greater international coordination and cooperation amongst regulators.
<ul style="list-style-type: none"> • Regulatory obligation: e.g. the UK Corporate Governance Code.
FINANCIAL
<ul style="list-style-type: none"> • Financial performance and liquidity: counterparty and trade credit risks, and additional responsibilities in the event of bankruptcy, administration or insolvency, e.g. legislated regard for creditors' interests.
<ul style="list-style-type: none"> • Capex programmes: delivering strategic and financial targets against investor returns and maintaining operational standards and efficiencies.
<ul style="list-style-type: none"> • Remuneration: scrutiny against financial performance, dividends, and assumed return on investment by shareholders, markets, and/or media.
<ul style="list-style-type: none"> • Accounting irregularities: appropriate disclosure and reporting against a heightened reporting landscape, e.g. the EU Accounting and Transparency Directives, violation of applicable securities laws, diverted profits tax legislation.
OPERATIONAL
<ul style="list-style-type: none"> • Licence disputes: evolving mining and tax laws, local government posturing, regulatory agency unpredictability, systemic corruption, revocation of mining licence.
<ul style="list-style-type: none"> • Environmental exposures: evolving regulation, historical and indirect considerations, site rehabilitation. Risk of criminal prosecution for pollution incidents resulting from operations, tailings dam failures, etc.
<ul style="list-style-type: none"> • Supply chain: customer/supplier dependencies, contract disputes, reputational and financial impact of business interruption scenarios.
<ul style="list-style-type: none"> • Employment practices: adherence to local employment laws promoting equal opportunities, and prohibiting sexual harassment, wrongful termination, and discriminatory practices.
<ul style="list-style-type: none"> • Health and safety: ensuring workforce practices that would otherwise result in injury or death to employees or third parties.
<ul style="list-style-type: none"> • Increasing cyber exposures: security of commercially sensitive and personal information and security of automated control networks.
<ul style="list-style-type: none"> • Political instability: often prevalent in jurisdictions where miners are exploring, developing, or operating.
<ul style="list-style-type: none"> • Currency volatility: remains difficult to manage.

ESSENTIAL MECHANICS OF A D&O LIABILITY POLICY

D&O insurance aims to provide indemnity against liabilities which the company cannot cover and comprises three sections:

- **SIDE A** provides cover to you, the individual director or officer, in the event that the company cannot indemnify you. No retention applies to this coverage.
- **SIDE B** reimburses the company when it has indemnified you, the individual director or officer, in the event of a claim. Self-insured retentions typically apply to this coverage for which the company is responsible.
- **SIDE C** reimburses the company in the event of a securities claim. Self-insured retentions apply to this coverage for which the company is responsible.

KEY D&O INSURANCE DRIVERS

- Your personal liability is unlimited and your personal assets are therefore at risk.
- Legal costs can be incurred for alleged breach of duties in various jurisdictions; policies need to be issued in territories where exposures arise (admitted basis).
- Defending any allegation of corporate wrongdoing, however spurious, is typically very expensive and it is an increasingly litigious environment.
- Lack of indemnification provisions under law or company statute may prevent reimbursement of costs.
- Corporate governance is under increasing scrutiny; failure to meet increased regulatory requirements may trigger litigation.

D&O POLICY HEALTH CHECK

You and your organisation should regularly review your indemnities and any D&O insurance coverage, seeking specialist risk management advice to ensure adequacy of cover, minimise duplication of cover, and close coverage gaps. Several points you should be considering include:

- Who is covered, e.g. directors and officers only or all employees.
- What is covered, e.g. Side A only.
- Ensuring that your D&O programme can respond to claims in another jurisdiction. Many countries – Brazil, Russia, India, and China – prohibit non-admitted insurance.
- Understanding how the policy can be accessed, i.e. can you notify of a claim or must you go through the “policyholder” (almost always the Company).

Checks should be made to ensure the policy:

- Is on an any-one claim basis, i.e. is not limited during any one period of insurance.
- Does not contain a pollution exclusion.
- Has a bodily injury/property damage exclusion which provides cover for shareholder claims and regulatory investigation costs.
- Contains favourable personal conduct exclusionary language.
- Offers affirmative cover for violations of the Corporate Manslaughter Act (UK).
- Contains a non-cancellation provision in the event of insolvency or where an administrator is appointed.
- Provides multi-year, pre-agreed, run-off provisions in the event of insolvency.
- Provides for defence costs payments in the event of violations of anti-bribery legislation.
- Does not cease when an administrator is appointed.
- Allows for the appointment of separate defence counsel where conflicts of interest might arise amongst insureds.
- Extends cover for extradition proceedings.
- Encompasses local admitted policies for territories where indemnification and advancement costs are prohibited and admitted insurance is required.

HOW MARSH CAN HELP

Marsh's Mining team combines broking excellence with industry best practice and knowledge from across our global mining practice.

We also offer financial lines insurance solutions for mining clients via our dedicated financial and professional lines (FINPRO) team, offering proprietary and bespoke policy wordings for companies' directors and officers. This includes our recently launched third-generation Side A difference-in-conditions policy (Alpha[®]) which, among other features, contains no pollution exclusion, and allows for ten years of run-off at no cost in the event of a policyholder insolvency.

FINPRO has expertise in other financial line product classes, including commercial crime (fiduciary guarantee), employment practices liability, pension fund trustees liability, professional indemnity, and cyber liability.

THE MARSH CLIENT ADVANTAGE

- Global network of offices and affiliates servicing clients across 130 countries, including some of the world's largest mining companies.
- In-depth mining industry knowledge at the heart of our approach. 270 mining industry specialists worldwide.
- Marsh has had a dedicated financial and professional services team for 35 years.
- Marsh's FINPRO team advises almost 40% of FTSE 100 companies and over half of the top 20 European companies by market capitalisation.
- More than 50 D&O professionals with 1,600 D&O clients across the UK.
- A specialist D&O claims advocacy unit to help clients navigate complex claims.

For further information please contact:

DAVID BENNING
Mining Practice Leader
(Europe)
+44 (0) 20 7357 5870
+44 (0) 7825 782 539
david.benning@marsh.com

DAVID FRANKLAND
Senior Vice President
+44 (0) 20 7357 5869
+44 (0) 7825 116 694
david.frankland@marsh.com

JUSTIN SAUNDERS
Client Adviser
+44 (0) 1603 203764
+44 (0) 7467 441 265
justin.saunders@marsh.com

ROSA WILDY
Client Executive
+44 (0) 20 7357 2191
+44 (0) 7818 520 562
rosa.wildy@marsh.com



The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such.

Marsh Ltd is authorised and regulated by the Financial Conduct Authority.

Copyright © 2016 Marsh Ltd All rights reserved GRAPHICS NO. 15-0949