

# D&O MESSAGE

## RISK AND INSURANCE 2019

### DEVELOPMENTS IN DIRECTORS' AND OFFICERS' LIABILITY (D&O) CLAIMS

#### WALLISER KANTONALBANK (WKB)

In an independent investigation on behalf of WKB, Ernst & Young reviewed the context of a large loan granted to the insolvent company Alkopharma, which had falsified the expiration dates of a cancer medication between 2007 and 2011. The legal experts arrived at the conclusion that the circumstances were sufficient to establish liability against the responsible parties. As a result, WKB has now filed a civil liability suit for CHF 21.6 million against Jean-Daniel Papilloud for the loss suffered. At that time, he worked as CEO and was Chairman of the bank's Board of Directors until 2018.

#### SAASTAL BERGBAHNEN AG

In 2016, Saastal Bergbahnen launched a special offer for a season ticket for CHF 222. The special offer was declared valid even though only 75,000 tickets were sold and despite the limit having originally been set at 99,999. It also turned out that the results of the special offer had been embellished by insider transactions, which led to a considerable loss. A capital reduction and newly issued shares of CHF 6.2 million made it possible to save Saastal Bergbahnen. Two former members of the Board of Directors, Pirmin Zurbriggen and Rainer Flaig, were denied discharge at the 2019 annual general meeting. Several shareholders are considering a lawsuit against the pair.

#### SWISSAIR

This is the 18th time we are reporting about the liability proceedings in connection with the SAir-Group insolvency. A final liability proceeding against former Swissair directors and officers is currently pending before the Swiss Federal Supreme Court. All previous liability proceedings in Switzerland and abroad have been rejected.

### AMERICAN DEPOSITORY RECEIPT (ADR)

Swiss companies with sponsored Level 1 ADR programs have been newly classified as high risk by D&O insurers. An ADR is a security tradable in the US that represents a specific number of escrowed shares in a foreign company. Court decisions on matters involving securities lawsuits against non-US companies now indicate that the US Securities Act also applies when non-US companies engage in OTC trading in ADRs in the US. The Toshiba case is particularly surprising since Toshiba merely has an unsponsored ADR program. In this case, the ADR is initiated solely by an American custodian bank or a dealer and can be set up without the knowledge of the foreign company. According to [adr.com](http://adr.com), more than 40 companies in Switzerland have an unsponsored ADR program in the US.

### LEGISLATIVE AMENDMENTS

#### COMPANY LAW

The ongoing revision of the company law, specifically the financial distress law, will be of interest to the directors of the boards. The provisions are intended to increase awareness with respect to liquidity and capital coverage by expanding flexibility and specifying obligations on the board of directors. The Swiss National Council essentially followed the recommendation made in the 2016 draft and introduced an additional criterion, threatened insolvency, along with loss of capital and over-indebtedness. It is noteworthy that the National Council refrained from imposing an obligation to create a liquidity plan.

#### CIVIL PROCEDURE CODE (CPC)

The Swiss Federal Council adopted a consultation draft for the CPC in 2018, which was intended to facilitate access to the courts, reduce cost barriers, facilitate collective redress and simplify coordination of lawsuits. In addition, the new group insolvency pro-

ceedings were intended to enable collective settlement of disputes for all damaged parties by mutual consent. The announcement is expected to be publicized in September 2019 and then discussed in parliament.

## D&O INSURANCE MARKET DEVELOPMENT

### DEALING WITH NEW RISKS

Some insurers are attempting to create more clarity in their D&O wordings by explicitly including coverage, i.e. affirmative coverage, for claims against directors and officers as a consequence of a particular event (e.g., a cyber incident). We will have to wait and see whether this new practice will become commonplace. It is certain that the expectations on companies' due diligence are increasing. This is shown by many new D&O litigations that are derived from a cyber incident (e.g., the Yahoo case). The #MeToo movement has also led to significant D&O claims payments. This shows that a continued high frequency of D&O cases can be expected and that it will become increasingly difficult to anticipate the origin of a D&O claim.

### D&O MARKET TREND

In the last three quarters of 2018 the D&O insurance market in the US continued to show premium increases of 0.9% to 1.5%. This is primarily due to the global increase of the insurers' claims ratios. The

trends in the D&O insurance market indicate continued high claims frequencies for 2019. We will have to wait and see whether and to what extent Swiss clients will be confronted with them. The consolidation of the insurance market is leading to a reduction in overall capacity. In general, insurers are being more restrictive in dealing with high capacities.

### BENCHMARK LIMITS OF INDEMNITY

Our clients are taking out D&O insurance policies with the following average limits of indemnity (May 2019):



In general, the figures have increased slightly year-on-year. Larger companies in particular have purchased additional limits of indemnity that are available exclusively to their directors and officers (Side A). In addition, higher limits of indemnity are being placed due to the many new claims.

### ABOUT KESSLER

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