

Decisions around  
**protection** and **growth**  
have never been  
more critical.





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# Directors and Officers Liability Insurance In Czech Republic 2024





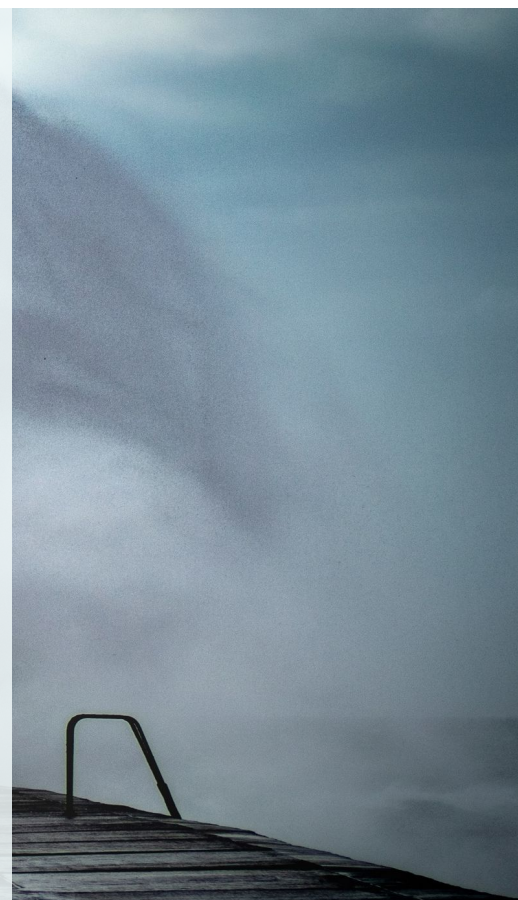
# D&O Insurance Highlights - Exposure and Coverage

What does D&O Insurance **provide cover for?**



- **Cover for loss** (financial loss and legal expenses) as a result of a claim made against the Directors and Officers arising from a wrongful act committed in their capacity as Directors and Officers
- **Claims made** – policy responds to claims made during the policy period and the retroactivity (where applicable) and agreed territory (worldwide jurisdiction of the claim)
- **Insured** – are any person who is currently or who has been in the past or who becomes a Director or Officer of the Insured Company, this can also include: shadow directors, de facto directors, employees acting on behalf of a Director or Officer and any equivalent position under the laws of any jurisdiction, including any member of the supervisory board or management board of the company, Outside Directorship




What D&O Insurance **DOES NOT provide cover for**



- Prior and pending litigation and claims already notified
- Known or reported circumstances
- Uninsurable by law fines and penalties
- Bodily injury, sickness, disease, emotional distress, death, damage or destruction of tangible property including loss thereof
- Professional services carried out by the company
- Illegal and improper personal profit and remuneration
- Deliberate dishonest or fraudulent acts (the costs of a successful defence, however, can be covered)
- Pollution and/or contamination, although defence costs are available

# D&O Insurance Highlights - Exposure and Coverage

Who does D&O Insurance provide coverage to?

<p><b>Side A</b>  Directors and Officers Liability</p>	<p>covers <b>liability of Directors and Officers</b> that is not indemnifiable by the company (no policy deductible)</p>
<p><b>Side B</b>  Company Reimbursement</p>	<p>indemnifies the company to the extent that it has lawfully indemnified its Directors and Officers (substantial policy deductible)</p>
<p><b>Side C</b>  Entity Coverage for Securities Claims (optional)</p>	<p>protects the company for claims against the company itself, or against the company and its directors and officers together, and relating to Securities issued by the company on the financial markets (substantial policy deductible)</p>



## D&O Insurance Highlights - Exposure and Coverage

The main sources of claims against **Directors and Officers** (D&O):

Claims by the Company	Claims by Shareholders	Claims by third parties	Insolvency claims	Criminal proceedings	Regulatory
Main potential source of liability, but claims often only happen after a substantial reconstitution of the board	Majority shareholders can force company to bring a claim against Directors and Officers. Minority shareholders may try to bring proceedings, forcing Directors and Officers to incur defence costs	The company owes duty to third parties, but claimants may seek to attach liability where company has ceased to exist	Liquidators have broad powers to bring claims against Directors and Officers for their past actions (e.g., wrongful / fraudulent trading) – there is limitation in coverage in proposed program in this relation	Defense costs	Defense costs

**„Most cases of Claims arise from Shareholders, Regulators and M&A related claims“**

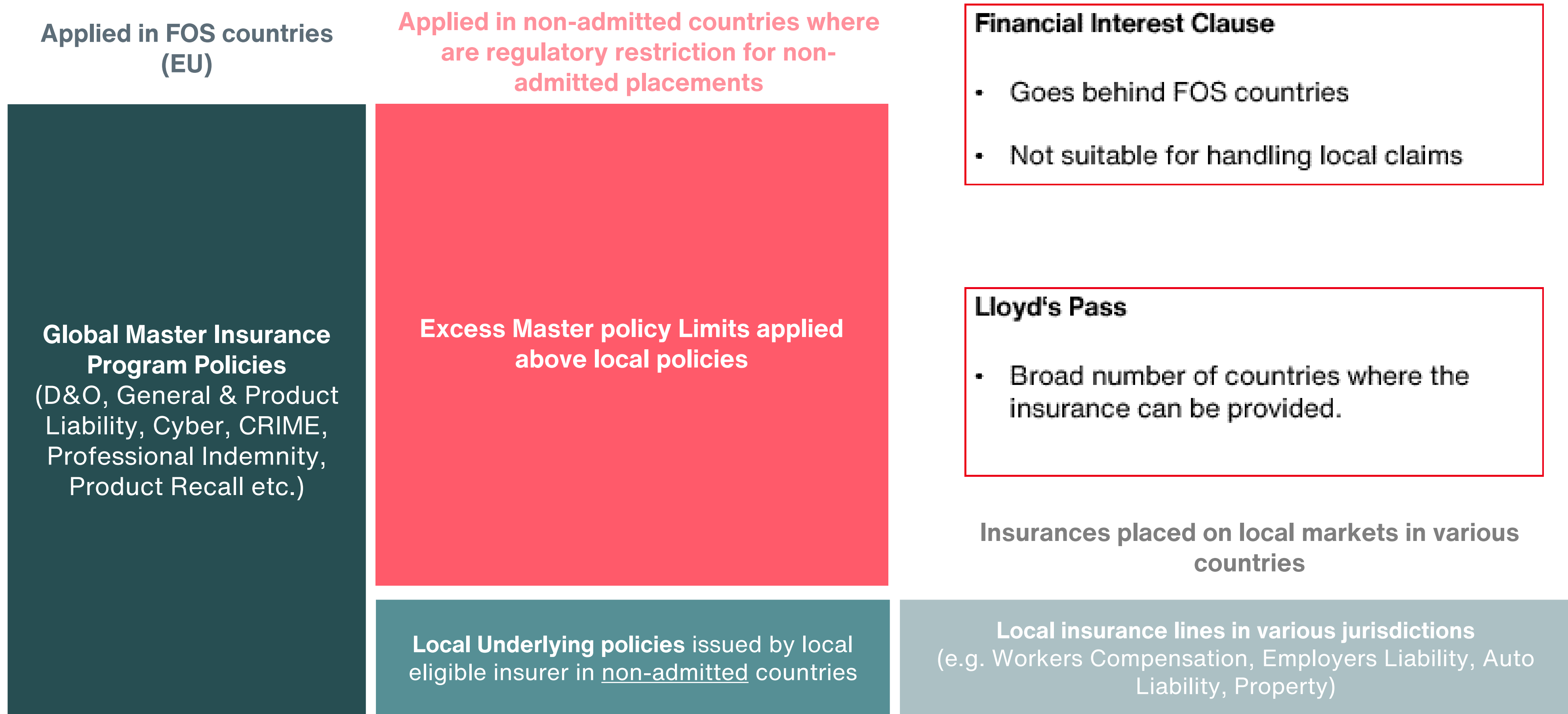


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# **Connectivity with International Entrepreneurship**



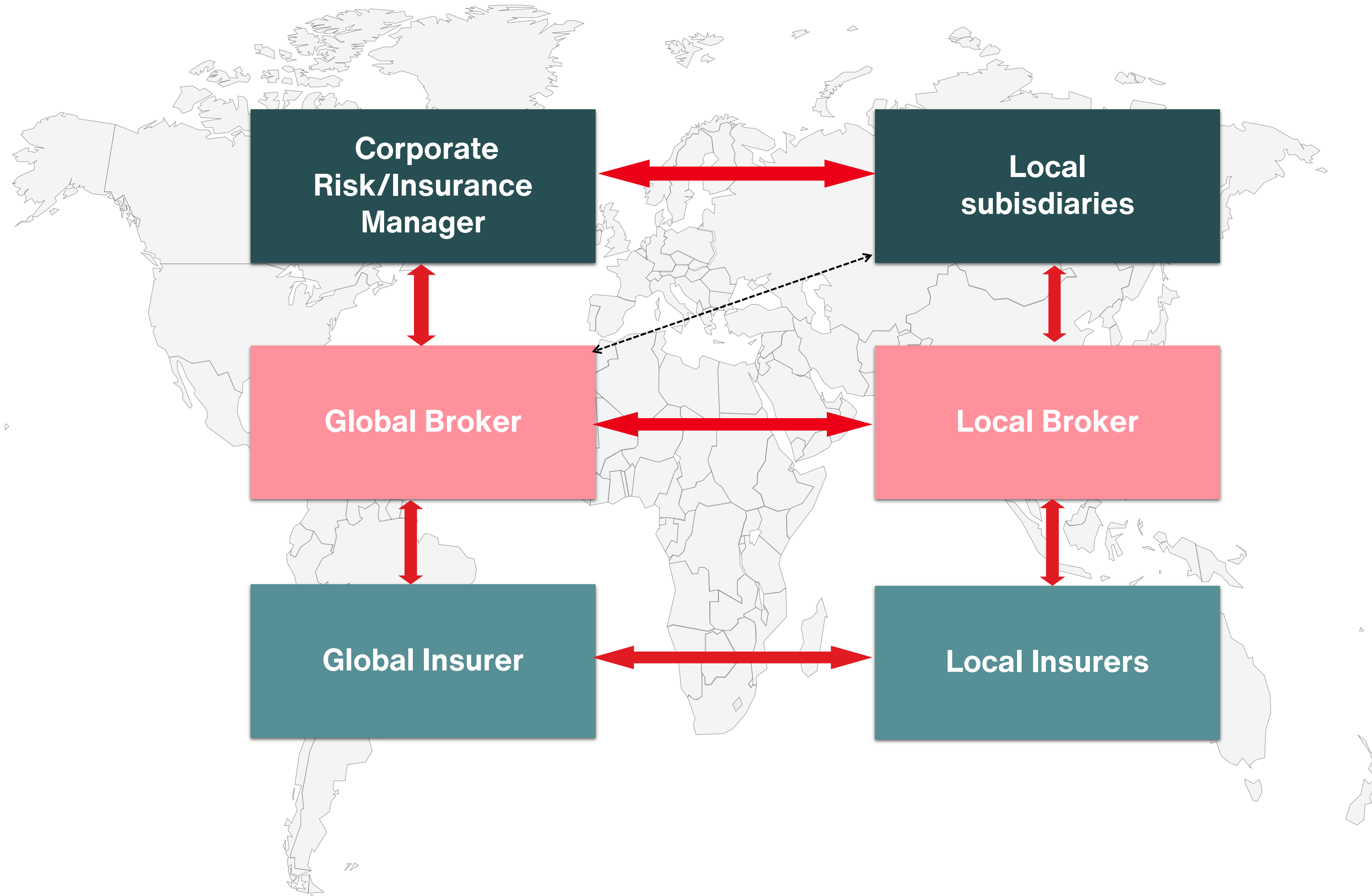
# Observation of General International Insurance Program



*Non-admitted insurance refers to the placing of insurance outside the regulatory system of the country where risk is located. In some countries outside of the EU are strictly prohibited such placements, hence local policies have to be always issued through local registered insurer (e.g. Switzerland, Serbia, Russia among any others).*

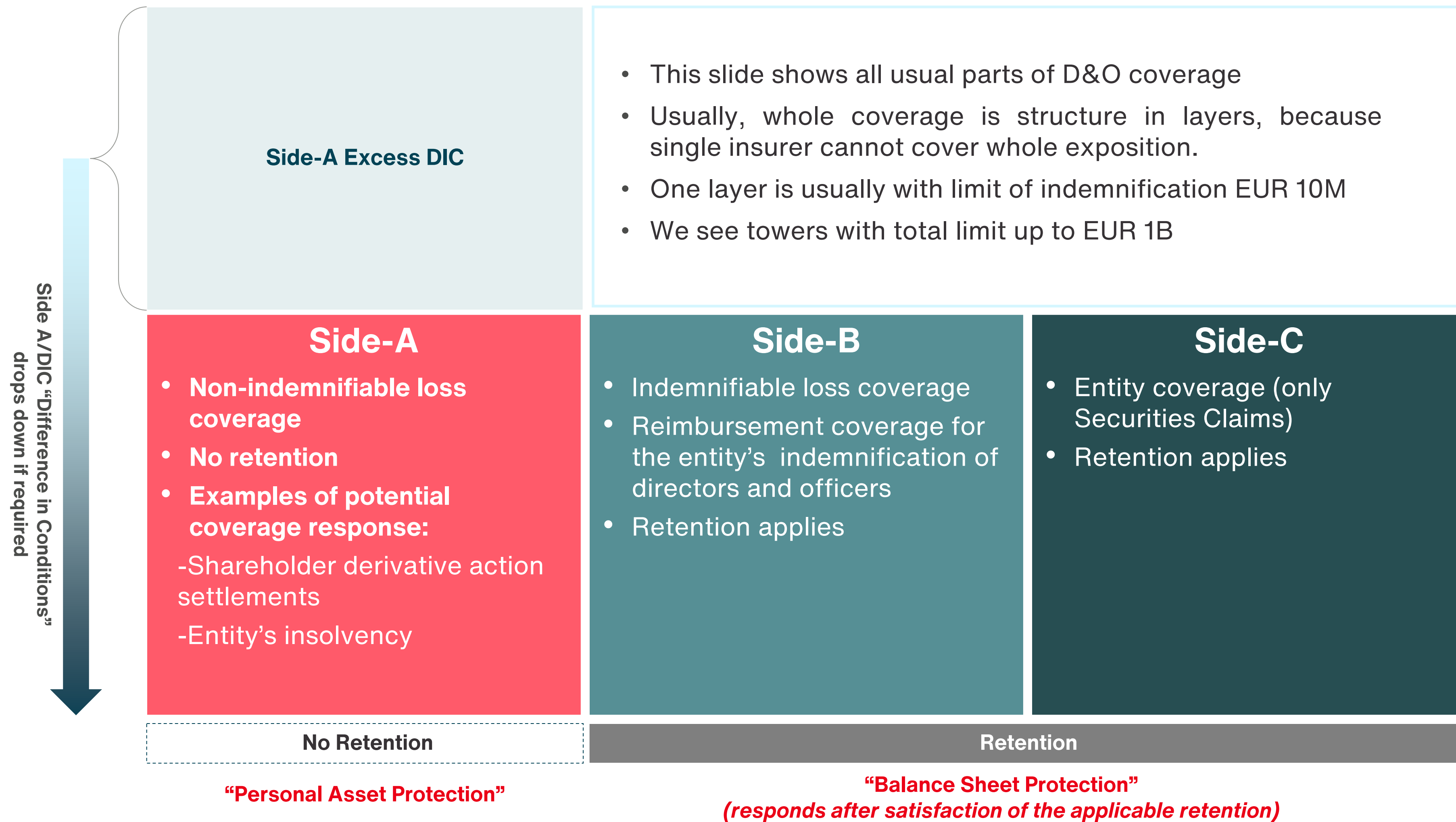


# Scheme of Global Insurance Coordination





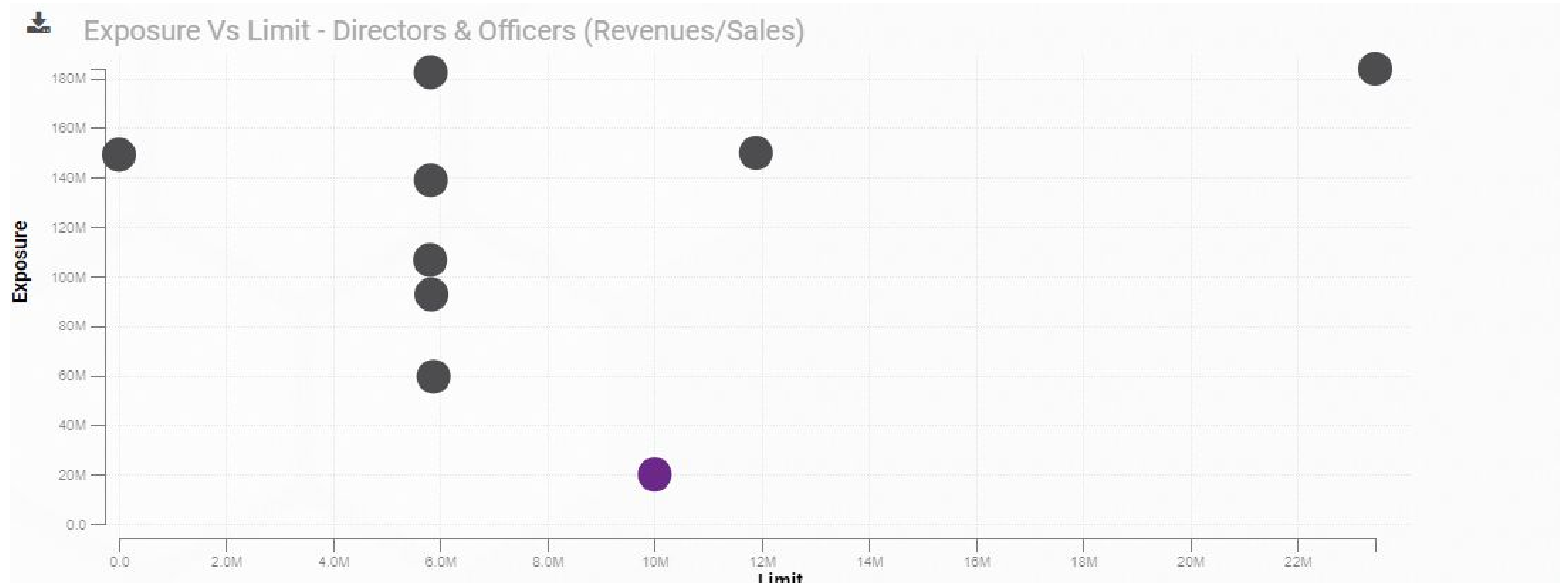
# D&O Insurance Policy Structure in General





# How to set up limit of indemnification

Amount of total assets in BS; Amount of total revenues in PL Statement are good guidelines.



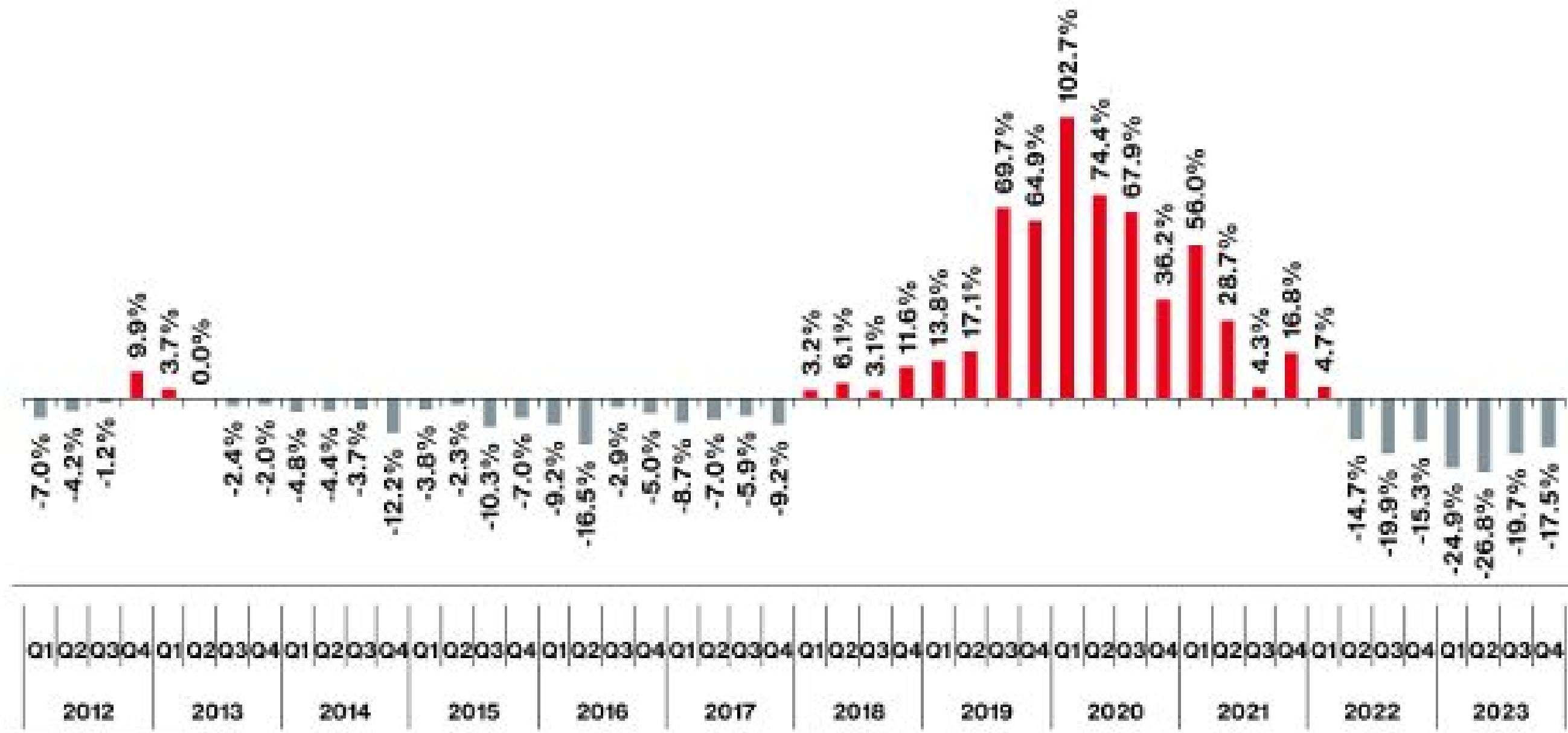


# Global D&O MARKET Update

Source: Aon Quarterly D&O Pricing Index (Q4 2023)

## Quarterly Year-Over-Year Price Changes

Q1-2012 Through Q4-2023



### Impact of market conditions on D&O Insurance in CZ

- Rates of D&O insurance go down worldwide for 7 consecutive quarters. Trend shows stabilization around flat renewals in next periods.
- Good time for buyers now



# About us

Aon exists to shape decisions for the better — to protect and enrich the lives of people around the world.

We provide our clients with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

**Aon is in the business of better decisions.**





# **D&O Insurance**

## Business Judgement Rule in Practice

**JŠK, advokátní kancelář**

Marta Fišnerová



12 March 2024



# Director's Liability

Are company directors liable for damages caused by their business decisions? Under what circumstances?





# Fiduciary Duty

## → 159(1) of the Civil Code

Who accepts the office of a member of an elected body, must carry out such office with necessary loyalty, adequate knowledge and diligence.

## → 51(1) of the Corporations Act

Diligently and with adequate knowledge acts him, who could have in relation to a business decision in good faith reasonably anticipated that he acts well-informed and in justified interest of the business corporation; this does not apply if such decision was not made with necessary loyalty.

## → 159(1) OZ

Kdo přijme funkci člena voleného orgánu, zavazuje se, že ji bude vykonávat s nezbytnou loajalitou i s potřebnými znalostmi a pečlivostí.

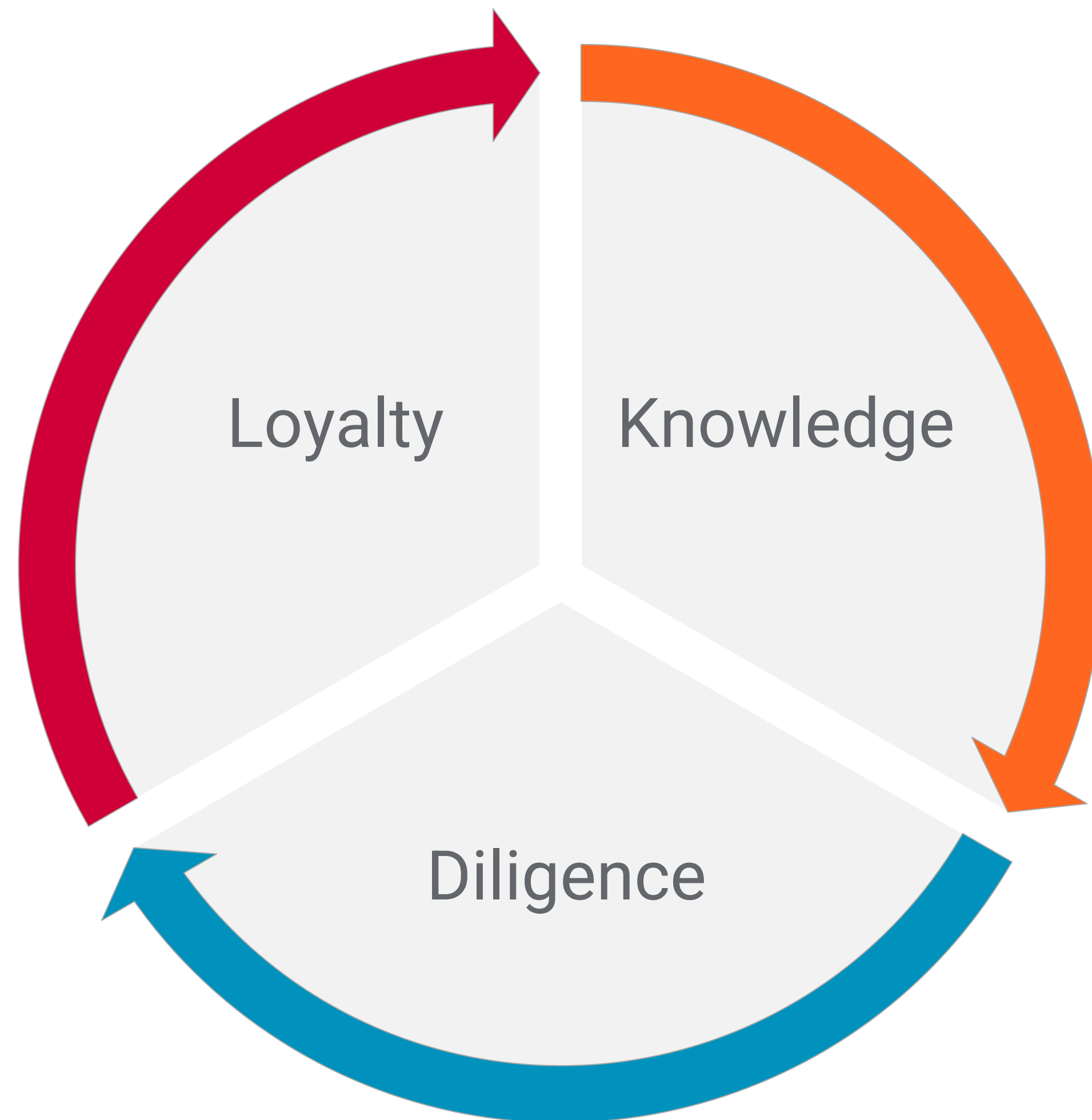
## → 51(1) ZOK

Pečlivě a s potřebnými znalostmi jedná ten, kdo mohl při podnikatelském rozhodování v dobré víře rozumně předpokládat, že jedná informovaně a v obhajitelném zájmu obchodní korporace; to neplatí, pokud takovéto rozhodování nebylo učiněno s nezbytnou loajalitou.





# Fiduciary Duty Basics





# Loyalty / Interest of the Company

→ NS 29 Cdo 3235/2016

The fact that the members of the board of director extended a free-of-charge loan to a different company does not automatically mean a breach of the duty of due care. If the members of the board of directors decide after due deliberation based on available information and keeping the interest of the company in mind that the company might benefit otherwise than by acquiring interest, their decision and consequent extension of a loan may not be considered as being in discrepancy with the due care duty only because of the lack of charge.

→ NS 29 Cdo 3235/2016

Skutečnost, že členové představenstva akciové společnosti poskytli za společnost jiné společnosti bezúročnou zápůjčku, nepředstavuje bez dalšího porušení péče řádného hospodáře. Rozhodnou-li se členové představenstva na základě dostupných informací, po jejich pečlivém zvážení a s ohledem na zájmy společnosti, že pro společnost bude výhodnější získat místo odměny v podobě úroků jinou výhodu, nelze jejich rozhodnutí ani následné poskytnutí zápůjčky považovat za odporující požadavkům péče řádného hospodáře jen proto, že zápůjčka byla poskytnuta jako bezúročná.



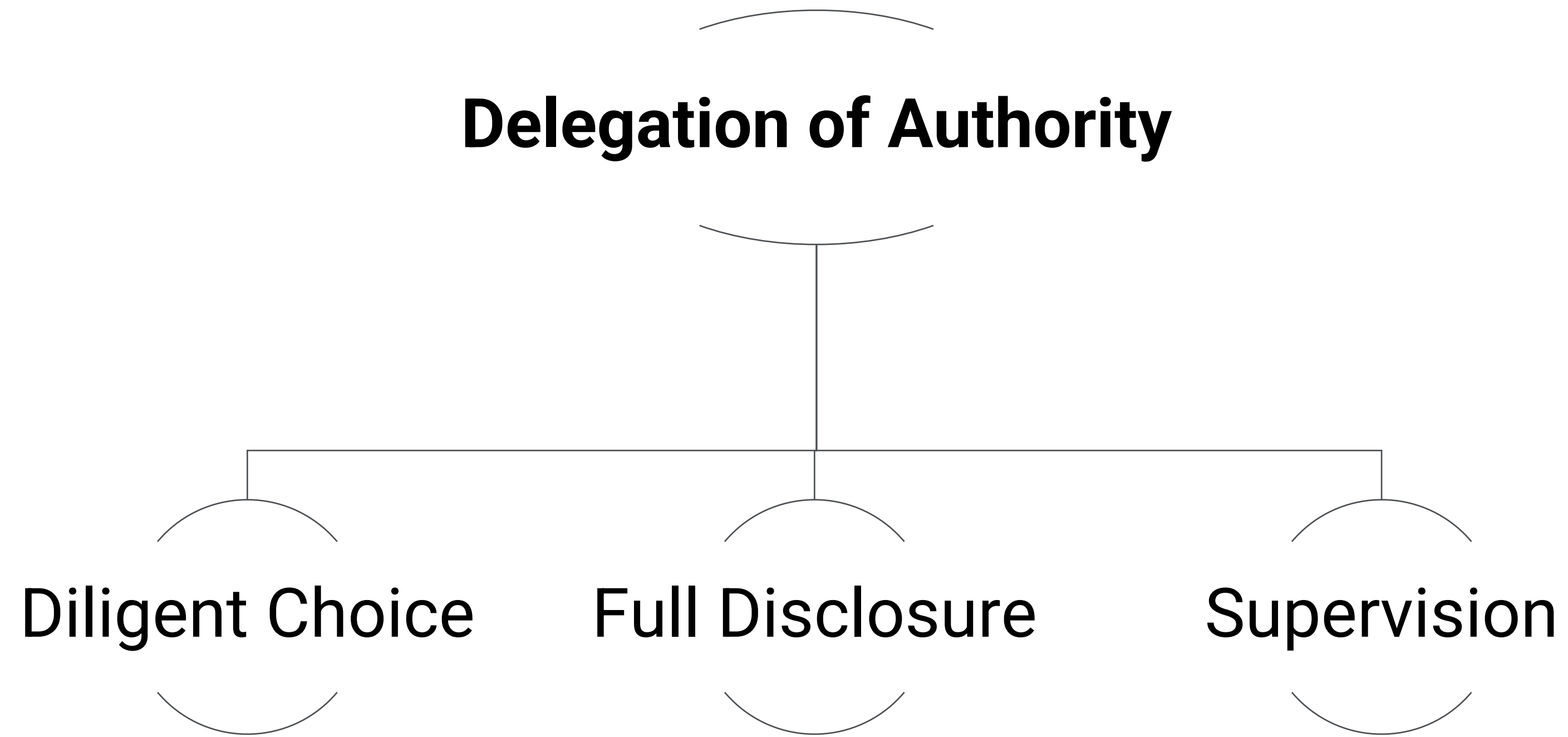


# Adequate (reasonable) knowledge

- An executive director of a limited liability company does not have to possess all professional knowledge, abilities or skills necessary for execution of all the competences falling within the capacity of the statutory body; as part of the duty of due care, a director must recognize, which competences he is not equipped for and which professional knowledge he lacks. (NS 27 Cdo 90/2019)
- Members of a board of directors do not have to carry out all competences falling within the capacity of the board of directors personally but may ensure their execution by third persons. Nevertheless, if a member of the board of directors possesses certain professional knowledge, abilities or skills, it may be, based on the due care requirement, argued, he is obliged to use them to his best capability. (NS 29 Cdo 1262/2006)
- Jednatel společnosti s ručením omezeným nemusí být vybaven všemi odbornými znalostmi, schopnostmi či dovednostmi, potřebnými pro výkon veškerých činností, spadajících do působnosti statutárního orgánu; součástí péče řádného hospodáře je schopnost rozpoznat, které činnosti není s to vykonávat či které potřebné znalosti a dovednosti nemá. (NS 27 Cdo 90/2019)
- Činnosti spadající do působnosti představenstva nemusí členové představenstva vykonávat vždy osobně, ale mohou je zajistit i prostřednictvím třetích osob. Má-li však člen představenstva určité odborné znalosti, schopnosti či dovednosti, lze z požadavku náležité péče dovést, že je povinen je při výkonu funkce v rámci svých možností využívat. (NS 29 Cdo 1262/2006)



# Delegated Powers



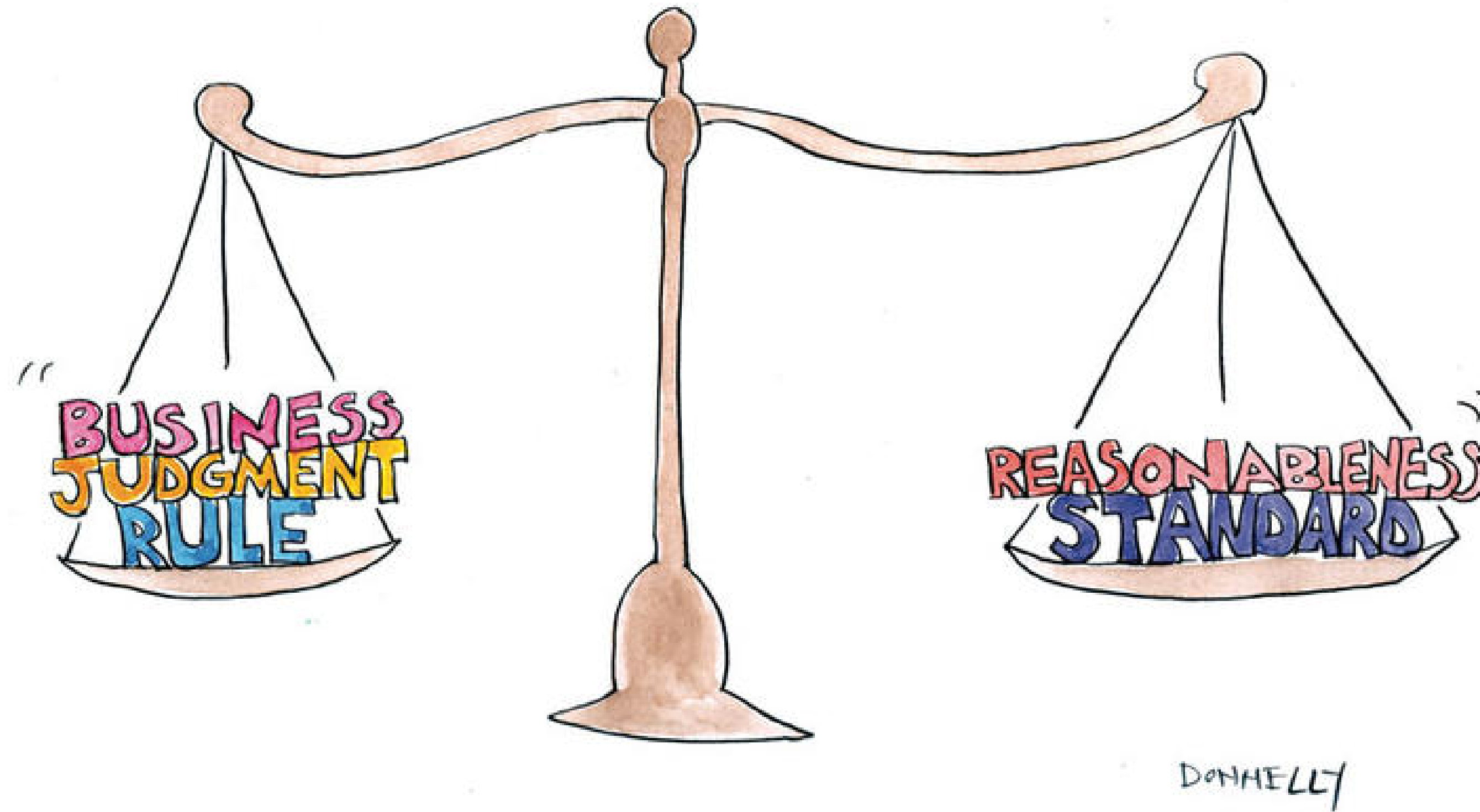


# Diligence

- Directors are not liable for the result of their decisions but for due procedure; a result is irrelevant when judging the due care duty
- Diligence to recognize a threatening damage and act upon it; the property of a company should not suffer loss due to its reduction or depreciation
- Diligence consists also in increasing of the property of a company, which should be multiplied in maximum possible extent
- Nejde o odpovědnost za výsledek, ale za řádný postup; není rozhodné, k jakému výsledku rozhodnutí vedlo
- Pečlivost rozpoznat hrozící škodu a podle toho se zachovat; na majetku společnosti by neměla vznikat škoda jeho úbytkem či znehodnocením
- Pečlivost při správě majetku společnosti spočívá i v jeho zhodnocování, v tom, aby byl rozmnožován v maximální možné míře dosažitelné v daném momentu



# Business Judgment Rule





# Court Practice Essentials

- Facts not known at the time of the decision-making may not be taken into account when judging a decision (Monday Morning Quarterbacking)
- Causal Link
- Burden of Proof and its reversing
- Evidence; maintaining the possibility to reconstruct the decision-making process - email communication and other correspondence or documentation (including minutes of meetings), witness evidence, accounting records / obligation of the company to handover proof
- Nelze posuzovat přístupem po boji generál, tedy zohlednit okolnosti, které nebyly v době rozhodnutí známy (pohledem ex post)
- Příčinná souvislost
- Důkazní břemeno a možnost jeho obrácení
- Důkazy; zachování možnosti rekonstrukce rozhodovacího procesu – emailová komunikace a jiná korespondence či dokumentace včetně záznamů z jednání, svědecké výpovědi, účetní záznamy / ediční povinnost společnosti





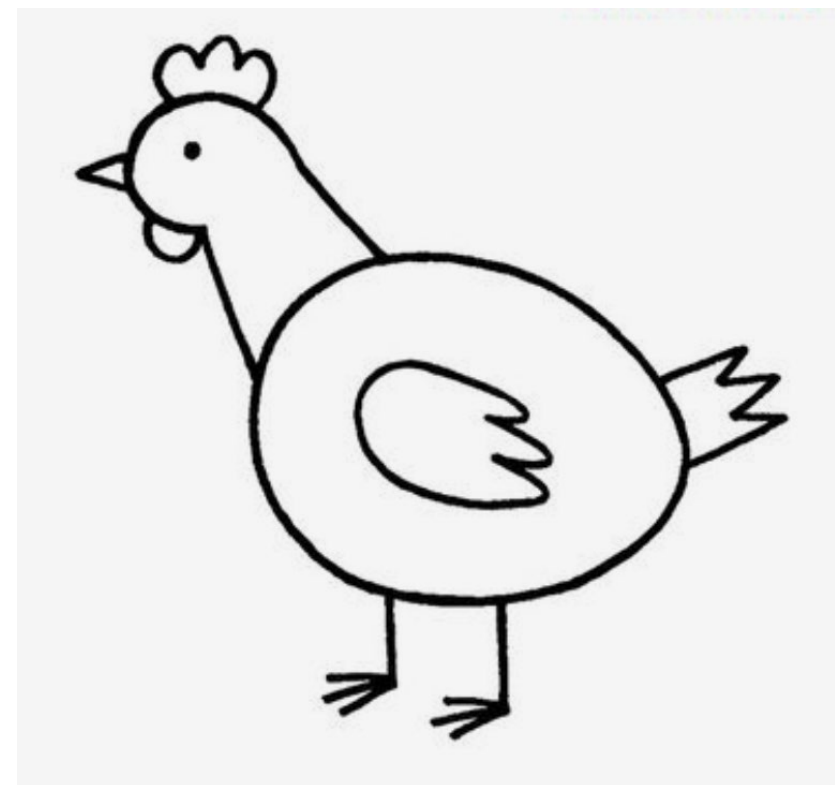
# Practical Examples of D&O Claims

What are common claims? How do courts tend to decide and why?



# First Business with an Unknown Partner

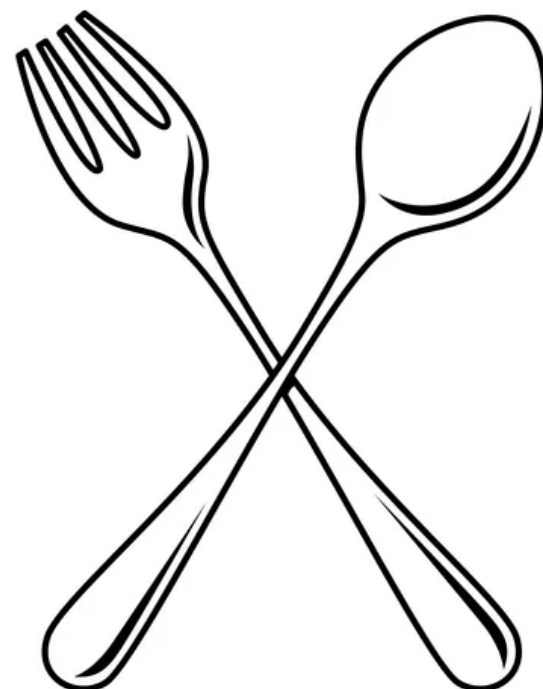
- Producer of chicken feed concluded a long-term supply contract with a new partner who failed to pay
- Outside the usual region of sale
- Lack of verification of financial standing
- Two months payment period
- No security
- Decrease in sales, necessity to compensate the fixed costs
- The director carried out an on site inspection of the premises of the business partner
- Security was not common in the field (unfeasible)
- Two months payment periods were linked to sales
- Lack of Causal Link – at the time the contract was made more detailed check of financial standing would not show any results





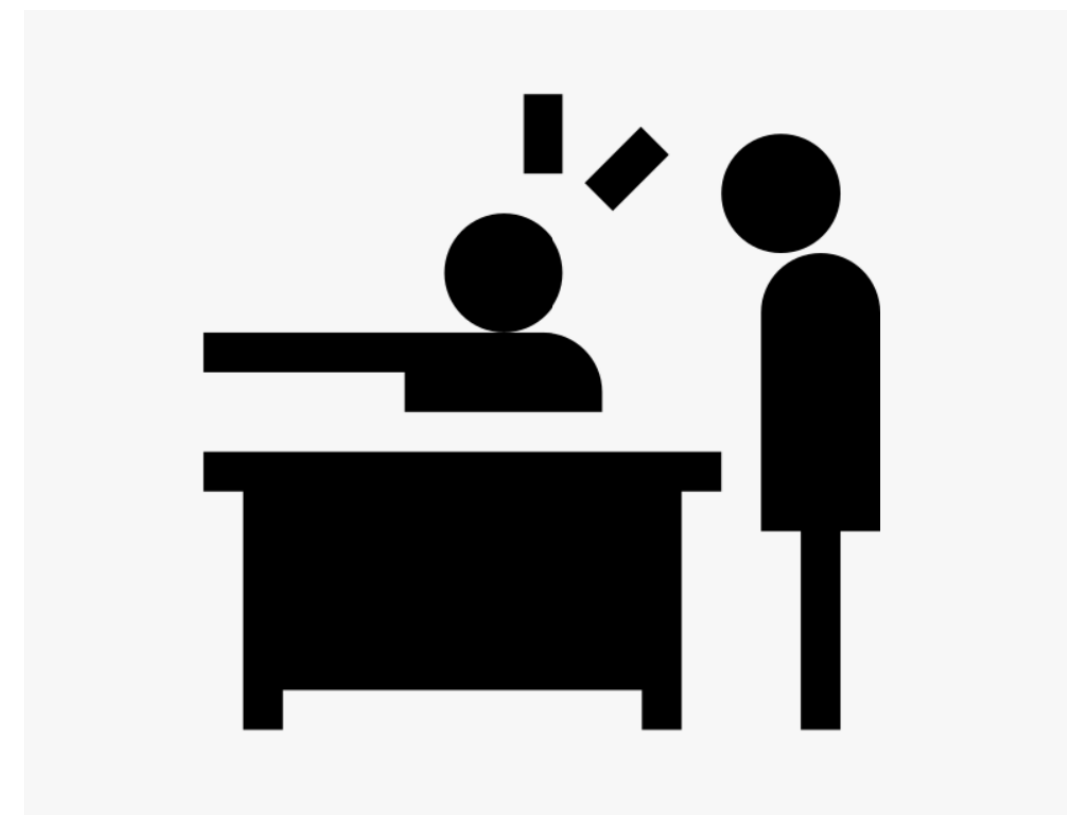
# Fraudulent Business Scheme

- Sale of cutlery with a new business partner abroad (ASDA stores) which proven to be a fraudulent scheme
- Insufficient verification (email address did not match as well as certain other details)
- No previous meeting or at least a video call
- Advance payment was not required
- Lack of security
- Due delegation of authority to a competent employee (and formerly even manager) of the Sales Department
- Regular discussions within the whole department and reporting to the director
- Insurance of due payment with EGAP



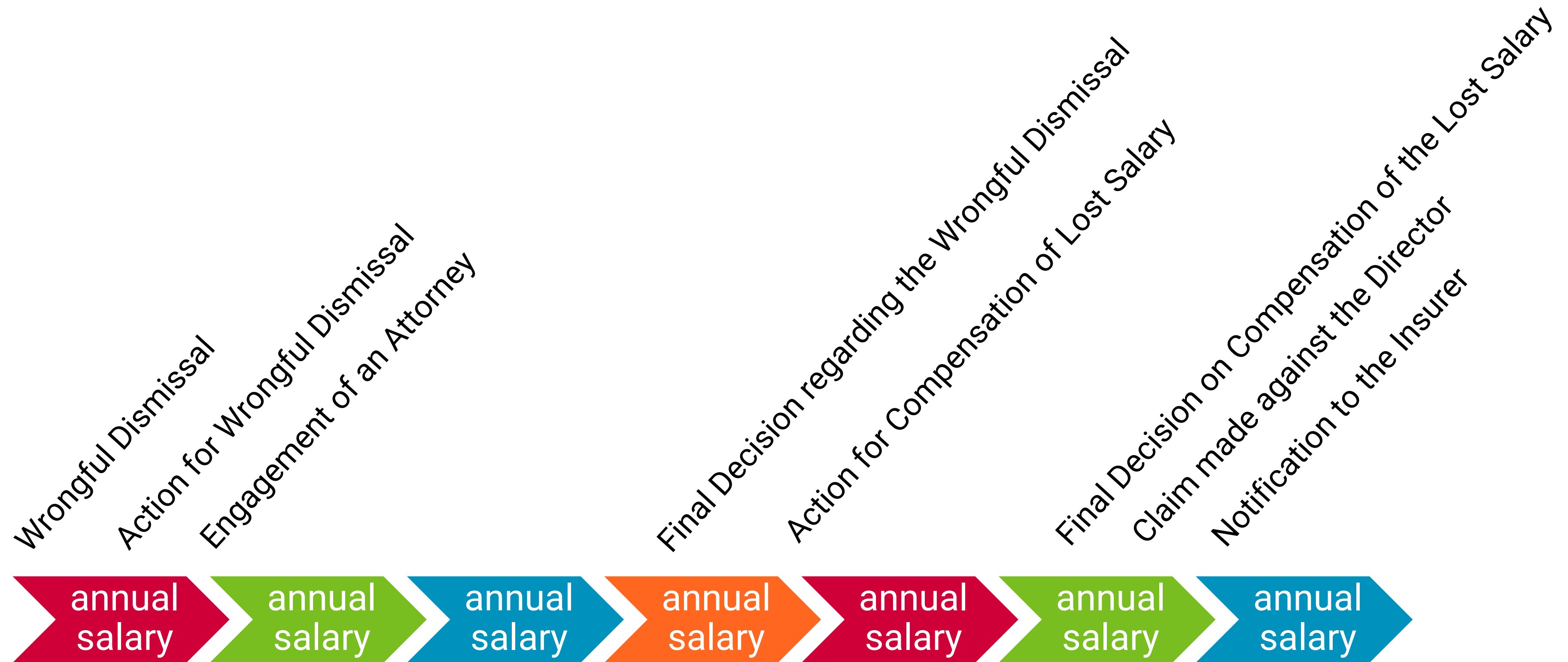
# Wrongful Dismissal

- Wrongful dismissal of an employee for redundancy
- The director failed to consult the dismissal with the company's HR department or a lawyer
- Resulted in years of lawsuits, first ascertaining legitimacy of the dismissal and consequently awarding compensation of salary
- Although the dismissal was actually the result of the director's decision without proper consultation with a competent person, an attorney was later engaged when court proceedings against the company were commenced
- At the time the attorney took over the dispute, there was an established court practice explicitly proving illegitimacy of the dismissal
- The Director was not responsible for greater part of the damages





# Timeline of the Claim



# Tax Arrears on Bonuses

- A company was ordered to pay tax arrears including penalties in relation to a special bonus scheme connected to unit linked insurance
- The company blamed the directors for not arranging due filing of the tax return



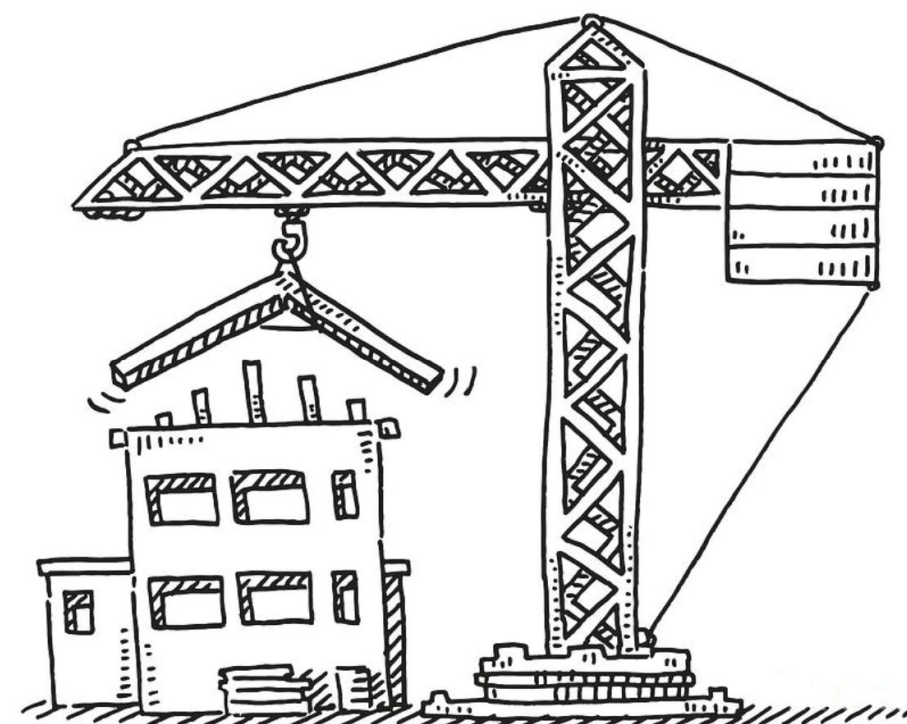
- The delayed tax payment may not be considered a damage payable by the directors but the penalties possibly could
- The company had an HR Department as well as Financial Department responsible for tax agenda which was delegated into their authority
- The directors did not, however, set out specific internal rules governing the issue of bonuses, thus it could be argued they breached their duty of due care





# Unfavourable Contractual Conditions

- A director of a construction company signed a contract for works
- The company failed to finish the works in time and faced major contractual penalties
- The other directors argued that the delivery date was unrealistic amount of the contractual penalties agreed was excessive
- The director had reasonable expectation that the works will be finished in time but unexpected circumstances occurred during the execution of the works
- The main issue therefore proven to be in the wording of the contract for works which the director, however, consulted with a lawyer
- Regarding the contractual penalties, the director was able to prove that he tried to negotiate a reduction but was not able to and the company needed the job
- Timely notification to the insurer was an issue / Refusal of indemnity



# Criminal Proceedings

- The directors were accused of a fraud relating to a public tender for hospital supplies
- There were criminal proceedings pending against the directors
- The criminal court referred the claimants with their claim for compensation of damages to civil proceedings
- The insurer financed defence of all of the insured directors in the criminal as well as civil proceedings
- In case the directors were found guilty of an intentional crime, they would have to return the paid legal representation costs to the insurer







# Díky za pozornost



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PONTES

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