International Governance:
The Risks You Face as a Global Director

As companies look for opportunities in global markets, directors are increasingly sought to work in different, often unfamiliar territories. Before they begin work it's critically important they understand the local risk landscape. IR Global members explain some of the pitfalls.

IR Global - The Future of Professional Services

IR Global was founded in 2010 and has since grown to become the largest practice area exclusive network of advisors in the world. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

Multi-Disciplinary

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

Niche Expertise

In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

Vetting Process

Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

Personal Contact

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

Co-Operative Leadership

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

Ethical Approach

It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

Strategic Partners

Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.

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FOREWORD BY EDITOR, ANDREW CHILVERS

International Governance: **The Risks You Face as a Global Director**

As companies continue to look for opportunities in global markets, directors from diverse jurisdictions are hired to serve on the boards of foreign businesses as well as domestic ones that have operations and assets in other countries.

Enterprises across the world look for directors from other jurisdictions for any number of reasons. Hiring board directors from other countries can help to build investor confidence, for example. Likewise, an enterprise that is headquartered in a different jurisdiction but with a subsidiary in the US or Europe could seek directors to gain expertise and credibility. The director may have valuable international or local geographic expertise regarding business objectives, strategy, operations and risk management.

Nevertheless, serving as a director on the board of a global enterprise can bring major challenges. It's true that during the past few years corporate governance laws and regulations have started to converge across regions, but there remain critical international differences regarding the responsibilities and liabilities of directors.

These risks can be formidable for the unwary and the range of liabilities faced by a board director can be significant and extensive. Directors can be accountable for a host of often unforeseen issues, some obvious but others maybe not so. These can include fraud, competition and anti-trust issues, health and safety, financial reporting matters, tax issues, environmental law, data protection regulations and local litigation rules, to name but a few.

Consequently, directors have to be acutely aware of their roles and obligations when working in a different jurisdiction. They need to surround themselves with international and, importantly, local advisors who will be able to help them understand and navigate the local risk environment.

These local advisors will be able to consider the risks and ensure board directors unfamiliar with local laws and regulations put the most effective risk and insurance solutions in place. They will give directors the risk insights they need to make strategic decisions for the business without compromising best practice.

Local legal advisors will be well versed in domestic corporate governance structures and will be able to help with business planning strategy, risk strategy and mapping, and key management decisions. They will ensure directors unfamiliar with the territory are aware of responsibilities and mechanisms that are in place to protect them. Discussions between legal advisors and board members should focus on building awareness of the risks they face and consider how those risks should be best dealt with. In addition, advisors will help to ensure the correct frameworks are in place to prevent issues occurring that could easily have been avoided.

It's important that anyone thinking of serving on foreign boards or boards of companies with foreign operations need to:

- Understand local culture. Other jurisdictions may have different expectations of directors and cultures of governance.
- Quickly grasp the local laws that govern directors' roles and responsibilities and the potential for liability.
- Understand how business is conducted in that particular jurisdiction.
- Ensure they have all the useful local contacts to understand their risk landscape. This is key as local knowledge is invaluable, built up over years of experience.

Despite issues such as the financial crisis of 2008 and the COVID-19 pandemic, it's clear globalisation is set to continue as businesses look for market opportunities in different jurisdictions. This has led to a greater demand for directors with international and sector experience (often in countries the company operates in rather than its jurisdiction of incorporation).

Board directors' roles are becoming ever more complex as rules and regulations in different jurisdictions evolve. Understanding the obligations in each jurisdiction is not only key to ensuring the liability of the directors is managed, but also essential for the protection of the clients of the business or investors. As a result, the role of the legal advisors on the ground has never been more vital.

What follows is the expert opinion on the roles of global directors from x18 IR Global members from across the world. They address critical issues for global directors relating to their own jurisdiction, from corporate governance to business culture. Their responses demonstrate the huge number of differences that directors face worldwide.

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IR Global - **Contributors by Region**

The IR Global cross-border Commercial Law group has member firms in 125+ jurisdictions around the world and is one of the most active group's at IR. They aim to lead the industry and are at the forefront of the constantly developing legislation in their respective jurisdictions. They see a wide variety of cases handled all over the world and their success can be attributed to their emphasis on cost effective solutions, personal service and seamless communication when acting on issues spanning multiple jurisdictions. The IR Commercial Law Group is fast becoming the '*go to*' global alternative for international businesses. Get in touch and see how they can help you.

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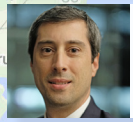

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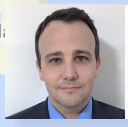

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Colombia has a very robust data protection legislation. It emerged from article 15 of 1991's Political Constitution along with the enactment of laws 1266 of 2008, 1581 of 2012, and regulatory decrees 1727 of 2009, 2952 of 2010, 1377 of 2013 and 886 of 2014.

These norms impose many obligations on companies. They must have a policy for data protection and can only process data after obtaining an informed consent that can be consulted. The data processing must adhere to approved purposes, a notice of privacy ought to be granted, security measures should be guaranteed and the development of a risk management system is required. Furthermore, the international transfer of data requires a signed agreement between the data processing controller and processor; or a declaration of conformity regarding the data protection level of the country of destination, issued by the Superintendence of Industry and Commerce (SIC).

Other obligations include the registering of databases and reporting security incidents regarding processing of personal data to the SIC.

Thus, knowledge of foreign legislation is required for the transfer and transmission of international data in order to comply with the verification requirement that the countries receiving the information have levels of protection that are deemed adequate by the Colombian authority. Thereby, it is possible to confirm that in Colombia there is familiarity with other jurisdictions at least regarding organisations that carry out multinational or global management or have international interaction.

Colombian law applies to the processing of personal data performed in Colombian territory, abroad by entities established in Colombia and when applicable under international treaties to controllers or processors not established in Colombia. Therefore, a violation of the Colombian regime in a foreign territory, in the mentioned cases, can be investigated by the SIC, or questioned by the affected data holders.

Habeas data is a fundamental right recognised in Colombia's national constitution which allows a particular action established in Law 1581 of 2012. This action requires a prior exhaustion of the process of consultation or claim before the entity that carried out the habeas data violation. If there is no attention to the claim, the complaint can then be made to the SIC, which has the power to investigate and impose economic sanctions on the offending company.

As for class actions, we have no knowledge of any being filed in Colombia in relation to habeas data. However, we consider this scenario to be perfectly plausible if there is a violation of subjective rights (which is the case of habeas data) to a group of individuals (which is possible considering the processing of personal data usually refers to several people) with the objective of obtaining the payment of compensation for suffered damages.

Company directors must be aware that the violation of data protection regulations can cause their companies and them, as individuals, significant economic damages. Not only because they are potential subjects of economic sanctions from the SIC, but because they can also be condemned to the payment of damages to data holders in class actions.

In Colombia there is a so-called Responsibility of the Administrators who must act in strict compliance with legal provisions. This requires them to act professionally, diligently and proactively so that their organisation complies effectively

and rigorously with regulations in general, which includes data protection regulations. They are jointly and unlimitedly liable for damages caused by negligence or fault, to the company, the partners, or third parties.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

As mentioned above, it is essential that both Boards and global directors understand the different governance cultures in other jurisdictions, so that global organisations build policies and procedures in compliance with local regulations of the countries in which they have operations or with which they interact.

It is also essential to have programmes that allow effective risk management and the effective and timely attention of complaints and claims regarding data protection, so that they can prove, in the event of an investigation or litigation, that their duty to act diligently and proactively was fulfilled; so they will not be involved in personal responsibility as administrators, given the responsibility of administrators established in Colombian law.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

In this case, 'tone from the top' is essential. A corporate culture that comes from headquarters is key for the implementation of risk control systems regarding personal data. These systems must allow the effective reception and response of requests, complaints and claims from data holders, and must guarantee the exercise of their rights. For example, when a data holder requests the deletion of their data in global databases, or when they request proof or evidence of having given consent, all this must be addressed in the term and manner established in Colombian law.

From our experience as legal advisors to multinational companies, we see that policies and procedures are usually coherent. However, since the rules given by headquarters are applicable to the entire organization, sometimes the particularities of local legislation are not considered, especially in terms of procedure.

A&C LEGAL

A&C Legal is a Boutique Law Firm incorporated in Bogotá, Colombia, since 2009, providing innovative and timely legal assistance as well as paralegal solutions. Our Business Process Outsourcing model promotes the efficiency of our service by working with our clients as an in-house legal department. This helps them to focus on the normal course of their business, while we take an integral care of their day-to-day legal requirements in areas such as corporate, contractual, commercial, labour, administrative, compliance and litigation.

A&C Legal is a visionary company aiming to achieve sustainability by integrating green-efficient practices and corporate diplomacy.

Recommended guidelines when investing in Colombia

1. Do understand the particularities of the Colombian foreign investment regime in order for you to make the investment in legal way, receive revenues for your activities in Colombia, and be able to return the invested capital.
2. Do plan ahead before you incorporate, so you can select the legal vehicle that best fits your needs, that will allow you to reach better risk mitigation. Your initial subsidiary may be small, but if your plans are to grow, or to have other subsidiaries in the rest of the country or the region, you may need a different type of legal entity than originally envisioned. Make sure that your outside counsel is aware of these plans to better serve your needs.
3. Do know the labour and tax regimen in Colombia and the associated costs and liabilities. The most you be aware of the labour and tax obligations and liabilities, the most you can plan the best way to set up and grow your subsidiary.

SOUTH KOREA

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The GDPR has obviously had a significant impact on South Korea, not least because it is a world leader in ICT with its global companies doing business with the EU and which see huge commercial benefits in potentially obtaining data from EU citizens. South Korea enacted its own iteration of that legislation – the Personal Information Protection Act 2011.

There are of course broad similarities in the impact of technology as it pertains to privacy and data protection in liberal democracies in the EU and in South Korea. There are, however, differences in the way data is treated legally. One is that in broad terms in South Korea, if consent has been given, data can be transferred out of the jurisdiction. The authorities no longer have any control (or interest) over how that information is used. This contrasts with the approach in the EU.

The South Korean framework is regarded as one of the strictest in the world, but it has not prevented scandals. In 2014, for example, there was a massive leak of personal information by a credit card company. The law, of course, is relatively new. There has not been that much litigation, relatively speaking. Litigation has generally related to the definition of personal information, data breaches, what constitutes informed consent and data sharing.

Notwithstanding, corporations and their managers should always be alert to changes in legislation and the legal (and other) ramifications for their business. In general terms, Article 399 of the Commercial Act provides that if a director acts in a negligent manner, then he will be liable to the company. It provides further that if the negligent act is the result of a BoD resolution, then the directors who have assented to it will be jointly and severally liable to the company.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Corporations are becoming increasingly global in their outlook and operations. A company may therefore establish a legal presence outside its home jurisdiction whether this be a Liaison Office, Branch, or subsidiary, wholly owned, or otherwise. A global director might therefore include a person appointed by the home company to be a representative in one of its foreign entities. In practical terms, the expression "global director" could also apply to senior managers in similar positions; and likewise to companies which have business with another territory, say online, but have no physical presence there.

The law pertaining to the administration of companies in South Korea is governed by the Commercial Act. The corporate forms permissible in South Korea and the rules governing them are broadly analogous to other jurisdictions. The jusik hoesa is the main corporate form and is similar to a US corporation, UK limited company, or GmbH. The acts of the company and its directors are regulated by the company's AOI, company Resolutions and any additional company regulations. It is, however, worth noting that there is no specific Corporate Governance Code in South Korea.

Whilst the laws relating to corporations are relatively similar, the foreign directorial appointee should live by the maxim "similar but different". It is also a truism that if the appointee is from a different jurisdiction, he will need to become familiar with the local laws, regulations and customs which pertain to it.

On a different note, there has been a recent trend in South Korea towards greater transparency and participation. The new Enforcement Decree of the Commercial Act 2019 has brought in significant changes. These include the expansion of electronic voting, strengthening the requirements to become external directors, the submission of business reports before shareholders' meetings and the filing of corporate governance reports for listed companies.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

It might be propitious to consider briefly what corporate governance is and also its purpose. Corporate governance may refer to the laws and regulations which regulate a company's affairs both internally and externally. The purpose might broadly be stated as the measures to protect and balance the interests of the various participants for the better performance of the company.

In a way, corporate governance is simply a framework and to that extent it should neither be overstated, nor understated. Intrinsic in a framework is that it needs to be underpinned by real life actualities, one of which might be corporate culture.

A company's culture may be good or bad or as in most cases somewhere in between. The corporate culture may be driven by the company's leaders. In a best case scenario, those leaders would be honest and ethical and always act with integrity. These are, of course, universal qualities which pertain beyond a company's existence; however, if those qualities are espoused throughout the organisation, they can give the best expression to "corporate governance".

Of course, there will always be bad apples in any organisation. It might be that with a good governance system these apples can be plucked and discarded at an earlier stage. In the same way, we like to advise our clients on both commercial and legal risk as one tends to impinge on the other.

It is not possible to eliminate commercial risk by endeavouring to eliminate legal risk, but again one does impact the other. For example, if a BoD can be shown to have acted in good faith and in compliance with all laws and regulations, it will attract less condemnation if the company fails for some business reason. The conclusion is perhaps that in all things, you need to be strategic. Good corporate governance is not the panacea, but it is the essential bedrock of any well run and successful organisation.

AHNSE LAW OFFICES
KOREAN AND INTERNATIONAL LAWYERS

Ahnse is a boutique Seoul-based firm which has been providing quality legal services to foreign clients for over 15 years. We have and continue to represent numerous well known multinational companies. Our Senior Partner is also outside counsel to a number of different government departments and NGOs. We advise our clients on both commercial and legal risk; we like to have an understanding of our clients' strategy – when we have a better appreciation of what our clients are trying to achieve, we can provide better advice on business risk.

Recommended guidelines when investing in South Korea

Be strategic. The purpose of good corporate governance is the better management of the company for its better performance. Good corporate governance is not the great panacea; it is simply framework. Attention needs to be given to each facet of the business.

Communicate. General Mattis articulated the aphorism: "What do I know? What do I need to communicate?" A good corporate governance culture needs to be given its fullest expression throughout the organisation. Its leaders therefore need to identify what outcome is desired and communicate that properly throughout the organisation so it is achieved.

Excellence. I attended a seminar. A lawyer friend who is in a senior position in a large international law firm said: "We strive for excellence." It jarred. It was a useful reminder. It is our purpose to do be the very best we can be for ourselves and others.

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

In Mexico, personal data protection among individuals and companies is similar, if not identical, to the provisions set by the other countries that form part of the OECD. It's mainly regulated by the Federal Law for the Protection of Personal Data held by Private Parties ("LFPDPPP"), published in 2010; however, there are also some provisions found in the Criminal Code in relation to sanctions, as well as complimentary rules found in the Civil and Commercial Code and the Federal Consumers Law.

According to the LFPDPPP, all companies and individuals in possession of third parties' personal information are obliged to issue a document called a Privacy Notice containing the basis regarding the methods or mechanisms in which the third parties' information is to be securely held, and the authority in charge of scrutinizing its compliance is the National Institute of Transparency, Access to Information and Personal Data Protection ("INAI"). This is entitled to impose administrative sanctions up to the equivalent of $1 million for breaches of the law in question, but if the personal information is also used to obtain a profit, the offender will be held accountable for criminal sanctions as well.

In order to determine accountability as to applying the aforementioned sanctions, the LFPDPPP clearly distinguishes two types of subjects; the "controller" and the "processor", being the first the one who decides the treatment of personal data and the second, who decides over personal data on behalf of the controller. Thus, the authority will determine in each case if the breach was committed by the controller, or processor, or the processor on behalf of the controller, which is a case in which both will be held accountable. Therefore, the board or sole administrator, acting as the controller, should carefully develop a strategy and appoint the person to serve as processor, as any bad behaviour or simple mistake could involve them as well.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

With the advantage of having highly homogeneous governance rules, principles and fiduciary duties around the globe, international companies have bet on the incorporation of foreign jurisdiction directors to form part of their boards.

The demand for such directors doesn't come as a surprise as the benefits of it are significant. Whether the company is seeking to venture in a new country, or already operating there, it could make a huge difference in the decision making as the board would be provided with foreign political views and market knowledge and experience, as well as a powerful network. In addition to this, to seek a director from abroad provides you with a wider variety of candidates to consider for the position, increasing the chances to find the person who suits the company's needs.

It is certainly difficult to appoint a director who is willing to travel overseas on a regular basis, and to manage the language barrier of participating in highly technical board meetings in a non-native language; however, it is possible due to the strong similarity of the fiduciary duties that most of the countries share.

Mexico, which received $32.9 billion of direct foreign investment just in 2019, should expect high demand of local directors to form part of foreign companies' boards in order to provide them with an important insight into the Mexican market, whether to start investing, or to improve their ongoing operations.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

Good corporate culture not just protects the value of the company, it also increases it substantially by aligning the interests of the investors, board and other stakeholders. Thus, by implementing the core principles of good corporate governance, and adopting a long-term strategy, it should increase the chances of the company to grow by attracting new investors, help prevent bad or unethical conduct within the company, or in case this happens, to facilitate accountability. It might not shield the company nor the board for fraudulent or illegal operations committed by them, but it would certainly protect them in case that lower lever members of the company incur in individual wrongful practices.

The previous certainly applies for Mexican companies, as its legislation follows the same principles or standards of good corporate governance just as the other member countries of the OECD. Hard-law provisions that set the basis for company governance are encompassed in the General Law for Commercial Companies ("LGSM)", and Securities Market Law ("LMV") when it comes to listed companies. However, the corporate governance voluntary principles are to be found in the Best Corporate Practices Code, which is an identical copy of the well-developed UK Corporate Governance Code.

The implementation of these practices is somehow recent in this country, but it has become more significant as the number of international companies and investors that venture into the Mexican Market has substantially increased. Therefore, corporate structures that were to be found only on big publicly traded companies are being adopted with more frequency on private medium-sized corporations. Hopefully, such a trend will continue to increase in order to help companies subsist in light of the current global crisis.

COLTER CARSWELL & ASOCIADOS

Colter Carswell & Asociados is a Monterrey - based law firm specializing in Corporate and Commercial Law. With more than 20 years' experience providing high quality legal advice to the most demanding national and foreign clients, the firm has accomplished an outstanding reputation among its competitors by following the principles of ethics and quality.

With offices in Monterrey and Guanajuato, the firm is able to cover the most important industrial regions in the country by our attorneys who advise on innovative and complex legal matters, always following the most responsible and accurate course of action.

Recommended guidelines when investing in Mexico

- Select the proper type of company according to their one kind of industry and global operation, prior to incorporating in a certain country.
- Retain an International Law and Accounting Firm prior to incorporating in a certain other countries to search and investigate all legal, fiscal, financial and accounting obligations to be complied under such jurisdiction.
- Verify all tax and fiscal obligation in such a country to avoid any kind of assessment and also requirements to return earnings to the parent company.

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He is passionate about Privacy and Technology, having completed an Advanced Course in Data Protection Compliance in the European Union (EIPA – Maastricht) and a Cybersecurity course (from University of Coimbra). He also holds Post-Graduations in Sports Law and Arbitration in the Sports Arbitration Court.

Besides his vast experience in employment law and privacy operations, he works regularly on several projects regarding data protection compliance and software or forensic audits.

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

With the introduction of GDPR, the privacy and protection of personal data became a much debated topic in 2018. Despite a lot of inaccurate information being shared at the time, the new regulation generated a lot of discussion on the topic, particularly at board level.

The major change from the previous directive to the current regulation is related to the creation of a level playing field for all organisations in the EU (as well as overseas via representativeness of EU citizens and EU markets). Today we all work within a dense and complex legislative framework with identical terms and rules across the EU that facilitates global and cross-border action allowing for a clarity in decision-makers.

Compliance in terms of privacy is here to stay and can no longer be underestimated by organisations when making decisions. Simply put, the new self-regulated system transfers to the heart of organisations the responsibility of documenting evidence of compliance and, above all, the ability to make decisions based on risk assessments that have been carried out.

On the other hand, the existence of a similar legal framework throughout the EU will also increase the liability of organisations in eventual contingencies as, for example, for imposing fines on the global revenue of company. In addition to the financial impact that fines may have, there's also the reputational damage done to a company or brand. Additionally, there's a growing trend of class actions and/or claims from data holders for compensation for the illegal treatment of their personal data. Although we haven't seen, to date, a large number of convictions, it is likely there will be an increase in judicial and administrative litigation in the near future.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Economic globalisation has meant that companies have expanded across borders. As a result, the management of these local subsidiaries and branches raises challenges for which more traditional boards of directors may not be prepared. Hence, the growing demand for global directors whose profiles, training and competence guarantee a coherent line of action and understanding. Perhaps the most valued quality in these global directors is the ability to adapt to new environments, corporate cultures, countries and jurisdictions.

In fact, empirical evidence shows that management cultures and regulatory frameworks vary from country to country, and it is necessary to understand the ownership and business structure of each region. Nevertheless, it is always possible to identify fundamental principles of action of the boards, regardless of the number of jurisdictions involved. Most corporate governance rules, in the form of law or (self) regulation, impose two basic (fiduciary) duties on managers: loyalty and due care or diligence. These duties emanate from the international recommendations on corporate governance, namely from the G20 and OECD Corporate Governance Principles.

The duty of loyalty implies, simplistically, that decision-makers act in the best interest of the company (i.e., shareholders, workers, creditors and the public interest) and not according to any other interests (mainly their own). The duty of due care requires board members to act (at least) in good faith, and in an informed and diligent way. As some authors have already mentioned, the duty of due care requires (only!) that managers be present, attentive and try to make rational decisions, by reference to the standard of a reasonably prudent person placed in similar circumstances. It is more or less unanimous in all jurisdictions that a director should not be personally responsible for taking risks, even though his or her business strategy may be considered bold and the outcome negative. Thus, only in cases of gross negligence, deceit or pure irrationality can directors be held responsible.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

The international body for recommendations and guiding principles on corporate governance now exists in most jurisdictions, in the form commercial, corporate or securities laws. In addition, most countries have been adopting corporate governance codes that are based on international principles, although duly adapted to the corporate realities to which they are directed.

Corporate governance aims at building an environment of trust, transparency and integrity, which promotes long-term investment and the stability of companies. Boards know that if they want to exploit the full potential of the global capital market, they must follow credible, understandable and internationally accepted corporate rules, only thus generating confidence in investors. Hence, it has become increasingly important for boards of directors and companies to follow high ethical standards, where they take into account the interests of all stakeholders.

When we are dealing with corporate groups, these concerns are even more pressing, as a transparent and ethical corporate culture common to all companies and all bodies is essential, and it is up to the parent company to set the tone within an organisation. Thus, good practices must respect a chain of command from top to bottom.

The implementation of the best international practices in the field of corporate governance by companies, although fundamental, may not be enough.

Firstly, too often the principles of corporate governance within organisations are nothing more than programmatic statements without true adherence to corporate culture. Thus, not even the most demanding body of rules can resist unless serious methods of enforcement are instituted by independent bodies.

Secondly, not even obedience to good international practices exempts boards of directors from strategic failures or bad business. In the business world, it is known that the existence of a crisis in an organisation is never a question of if, but a question of when.

Cerejeira Namora Marinho Falcão

Since 1992, Cerejeira Namora, Marinho Falcão has cemented an innovative and dynamic positioning, responding to all the challenges that are launched. What started 28 years ago with two founding partners and two areas of expertise, today is a Law Firm with multidisciplinary skills and transversal practice in all areas and for all business sectors. With a renewed brand, it distinguishes its people for excellence and professionalism, essential qualities to leverage the success of customers and support the community. Our clients benefit from our experience and our aim to achieve excellence at any time.

Moreover, in our ambition to grow, we have created the Law Academy, a professional orientated academy in charge of promoting knowledge in almost every field, with special emphasis in Labour Law, Tech, AI and the future of work. Labour2030 (labour2030.eu) is the result of that effort.

Recommended guidelines when investing in Portugal

- **Corporate System:** it is relevant to know the corporate forms and the limitations of credit liability.
- **Debt Collection System:** it is important to know how long it takes to collect a debt in the country where you are considering investing.
- **FDI Reception System:** jurisdictions that have administrative entities that deal with Foreign Direct Investment will be better prepared and better suited to receive operations and foreign capital.
- **Labour Relations:** the legal framework for employment relations in the context of a new investment operation should always be assessed, insofar as it is necessary, to ensure compliance with the minimum rules on working conditions, as well as considering the mandatory contributions to Social Security.
- **Tax System:** It is crucial to know the tax implications of the entire operation.

Clinton Morrow

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Clinton is a Hong Kong and Australian admitted lawyer whose practice focuses on corporate finance and commercial transactions, including public offerings and placings, structuring, mergers & acquisitions, takeovers, cross-border corporate transactions, private equity transactions and private funds.

Clinton's capital market experience includes acting for both issuers and sponsors, in respect of listings on the Stock Exchange of Hong Kong and as a Hong Kong advisor in respect of AIM and ASX listings and takeovers. Clinton's M&A and private equity practice has covered a range of sectors and clients including financial and fund services, health and medical, mining and resources, automobile manufacturers and dealers, information technology and media.

Clinton was named as a Rising Star Lawyer for Corporate/M&A for 2016, 2017 and 2018 and for Corporate/M&A and Capital Markets in 2019 and 2020 Asialaw Leading Lawyers together with being listed as a recognized practitioner in Corporate/M&A by Chambers and Partners in 2020.

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Generally speaking, I would not consider Hong Kong to have a litigious culture when compared to other jurisdictions. An example of this in the context of personal data is one of the most high-profile Hong Kong cases involving Hong Kong's flagship airline, Cathay Pacific. In 2018, the airline reported a data breach affecting some 9.4 million records. Notwithstanding the airline is based in Hong Kong and the majority of affected customers were in Hong Kong, reportedly the airline was not involved in any material litigation in Hong Kong regarding the data breach, with the biggest fine coming from UK regulators. This being said, the reputational damage to Cathay Pacific, mainly due to the handling and late reporting of the incident, was substantial and a reminder to Boards that potential regulatory liability is not the only factor when considering corporate governance and compliance.

Other than from a cultural perspective, one other reason that Hong Kong tends to be a less litigious environment is that class action law suits are not recognised (albeit joint plaintiffs are permitted under Order 15 Rules of the High Court (Cap. 4a)) and contingency fee arrangements are generally treated as illegal and unenforceable.

However, the world is increasingly becoming a smaller place and the risks associated with conducting cross-border activities means that Boards in Hong Kong must increasingly move to protect themselves as well as their companies against any such claims.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Hong Kong markets itself as "Asia's global city", which is no more evident than in the composition of the Stock Exchange of Hong Kong ("HKEx"). At the end of 2019 approximately 90% of HKEx-listed companies were incorporated outside Hong Kong. This, coupled with the cross-border nature of a large number of Hong Kong companies, has meant that there has always been a high demand for directors who have a global outlook.

To understand the corporate governance culture in Hong Kong it is important to recognise the influence of closely held shareholding groups. The OECD noted that about 75% of listed companies in Hong Kong have a dominant shareholder (e.g. family/individual or state-owned entity) owning more than 30% of issued shares. The prevalence of family-controlled listed companies, historical shareholder unwillingness to challenge management teams, and a cultural etiquette that discourages public confrontation have historically resulted in a dearth of shareholder activism. Therefore regulators, in particular the HKEx, have taken a fairly active approach in encouraging and implementing best practice corporate governance. For example, the HKEx Listing Rules adopt some of the most strict connected transaction rules globally.

The HKEx will often look to offshore jurisdictions and their corporate governance practices when reviewing and amending their Corporate Governance Code and their Environmental, Social and Governance Reporting Guide, which generally

require listed companies to take a comply or explain approach. An example of this was that the HKEx recently allowed technology companies with weighted voting rights to list as an exception to its one share/one vote requirement.

Given the approach taken by the HKEx and the potential ramifications for listed companies and Directors if they fail to comply with the Listing Rules and Codes, it is important for Boards in Hong Kong to be aware of relevant corporate governance requirements and the changing attitudes and standards towards corporate governance globally.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

The Hong Kong regulatory regime generally adheres to the core principles of international corporate governance and is made up of inter alia the Companies Ordinance, the Securities and Futures Ordinance, the Financial Reporting Council Ordinance and HKEx Listing Rules and Code on Corporate Governance.

Within Asia, Hong Kong prides itself on upholding the core principles of corporate governance and was ranked second behind Australia and ahead of Singapore by CLSA and the Asian Corporate Governance Association in its 2018 Corporate Governance Report. Given Hong Kong's position as an international financial centre, it is especially important for Hong Kong to have, and retain, the confidence of international investors when it comes to corporate governance.

Adhering and complying with core corporate governance principles is technically not a complete shield against litigation and potential director liability. Under Hong Kong law, a director of a Hong Kong company may be liable for offences committed by the company. Section 101E of the Criminal Procedure Ordinance provides that where a company commits an offence under any Hong Kong Ordinance and the offence was committed with the consent or connivance of a director, the director is also guilty of the same offence. While technically not a complete defence to liability, the requirement of the director's "consent or connivance" in practice means that a director would likely not be pursuing internationally accepted core corporate governance principles in committing the offence.

As such, for the purposes of compliance, avoiding potential liability and upholding investor confidence, following core principles of international corporate governance is of the upmost importance.

CHARLTONS
易周律师行

Charltons is a boutique Hong Kong corporate finance law firm with branch offices in Beijing, Shanghai and Yangon, Myanmar. Charltons focuses on Hong Kong corporate finance law and provides cutting edge legal advice to Hong Kong, PRC and international clients.

Charltons has a track record of over 20 years representing major multinational clients on complex cross border transactions as well as domestic transactions. The firm is experienced in advising local and international companies, controlling shareholders, sponsors and underwriters on initial public offerings on both the Main Board of The Stock Exchange of Hong Kong Limited, and the GEM market.

Recommended guidelines when investing in Hong Kong

- Understanding government, regulatory and currency risks – depending on the relevant jurisdiction, these factors can dramatically change the cost, risk profile and viability of the investment.
- Research and adapt to the local environment – while the world is increasingly becoming a global marketplace, it is important for clients to identify and adapt their business models to the new jurisdiction.
- Local experience – often the most successful expansions into foreign jurisdictions we have seen involve the client creating a joint venture with a local partner or otherwise at least taking on a local partner with aligned interests.

POLAND

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Robert is the founder and managing partner of Dr Lewandowski and Partners and head of the Warsaw and Wrocław offices. He previously worked for major legal firms in Warsaw and London and has written many legal books and taught university courses in English, German and Polish.

Robert studied mathematics and German philology at the University of Warsaw, before studying law at the University of Mainz and passing the second state legal examination in Mainz in 1998. He enrolled on the list of German attorneys in Frankfurt am Main (2000) and from 2001–2005 worked as a lawyer at Gleiss Lutz in Warsaw, which included a secondment to Herbert Smith in London.

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The GDPR, which is directly binding in Poland, does not determine the terms and scope of liability for breaches of regulations subject to the processing of personal data. This issue is left to EU member states that may, at their discretion, lay down rules on penalties for any violations of GDPR regulations. The Polish legislator took this opportunity and introduced rules on criminal liability through a Personal Data Protection Act, dated 10th May 2018.

In accordance with Article 107 of the PDPA, anyone who processes personal data where it is not allowed or without being authorised to process the data, can face a fine, restriction of liberty or imprisonment for up to two years. In addition, Articles 107 of the PDPA also foresees penalties for unlawful processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation (the so-called special categories of personal data).

This crime is subject to a fine, restriction of liberty or imprisonment for up to three years. The crime under Article 107 of the PDPA can be committed by anyone including directors (management board members) of entities and establishes their personal liability. Similar regulations have also been enacted by other EU member states in light of GDPR. As a result, directors acting in particular in the European legal sphere may acquire understanding of data protection regulations in other countries and should also be familiar with those statutes imposing liability on them for violations of data protection provisions. Furthermore, GDPR also imposes administrative penalties on entrepreneurs and these violations may lead to class action suits filed by injured persons from different European countries as they may have similar claims and sufficient financial interests.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Global directors are commonly in charge of directing all global international issues and projects for their company. The demand for global directors (as management board members) is increasing in size in Poland. Polish corporate law does not impose any further duties on global directors due to their diverse and multiple functions within a corporation. But additional duties (to those of local directors) might be imposed on global directors by the company on an individual basis through internal by-laws and/or managerial contracts and this is a common practice in Poland.

It is expected that a global director's main responsibility will include providing expert advice and making important business decisions based on market results, production numbers and customer feedback. In addition, introducing new company offerings to existing and new markets worldwide and generating more revenues while minimising the use of company resources.

Global directors must coordinate activities and oversee progress among many departments, divisions, and regions, countries of the company as well as use strategic thinking to negotiate with vendors, execute plans and create effective business models in the international environment. Global directors also evaluate business and employee performance to find areas of improvement. This list is not exhaustive but is designed to highlight areas of particular importance to responsible business behaviour of a global director.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

A director is not an ornament but an essential component of corporate governance. Consequently, directors must use their best business judgement and also follow recognised business rules.

Under Polish corporate law, a director within his/her activities must exercise due care, which also belongs to one of the fundamental principles of international corporate governance. As a general rule, directors owe that degree of care that a businessperson of ordinary prudence would exercise in the management of his or her own affairs. The nature and extent of this care depends on the type of corporation, its size, and its financial resources. For instance, a bank director is held to stricter accountability than the director of a small or medium-sized company.

In corporations invested with public interest such as insurance companies or financial institutions, rigid and specific regulations are usually imposed on directors and in the event of failure to exercise the requisite degree of care and skill, the corporation will have a right of action against him or her for any resulting losses. Many claims which may be asserted against directors of corporations due to bribery or bankruptcy rely on the assumption of the fault of the director in the given case. If the director, within litigation or criminal proceedings, succeeds in showing that his or her action was undertaken by exercising due care than this might be a legitimate defence against this suit as the duty to exercise due care is synonymous with a duty not to be negligent.

DR LEWANDOWSKI & PARTNERS
Dr Robert Lewandowski & Partners sp. k.

Dr Robert Lewandowski & Partners (formerly Derra, Meyer R. Lewandowski) has been advising clients for more than 15 years in all areas of commercial law. We offer clients legal services at the highest level.

We specialise in providing legal services to entrepreneurs and private individuals in the business sector. Our main fields of expertise include M&A, company law, financing, insurance law, real estate law, bankruptcy and restructuring law. Dr Robert Lewandowski & Partners offers legal advice to domestic and foreign entrepreneurs in local and cross-border cases, based on cooperation with international partner law firms in cooperation.

Recommended guidelines when investing in Poland

1. Acquiring an understanding of the current business and market situation, plus legal and tax regulations.
2. Obtaining information about the international agreements, treaties and conventions to which the foreign country is a party; about regional regulations (eg. EU), import and export controls, anti-trust laws and any other legal acts that might be relevant for conducting business in a foreign country.
3. Learning about customs and habits applicable in a foreign business environment.
4. Seeking the advice of legal advisers, tax advisers and auditors who are very foreign-country specific in that they have people on their staff who have worked in a foreign country, lived in that country or come from that country, in particular using the IR Global network to identify such advisers.
5. Contacting diplomatic missions such as consulates and embassies to obtain more information about the political, economic and judicial situation.

LUXEMBOURG

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Benoît Duvieusart is a recognised expert in alternative investment funds and assist fund promoters or managers in the setting up and governance of their project. He acted as legal counsel of several real estate and private equity funds as well as funds investing in tangible assets such as art funds or timber funds.

He regularly advises major international companies on the structuring of corporate reorganizations, mergers and acquisitions, leveraged buy-outs, private equity deals and group financings.

He is a member of IBA, the International Bar Association, ALFI, the Luxembourg Fund Association, and of ILA, the Luxembourg Institute of Directors. He is also a founding member of the Luxembourg professional association of portfolio managers (ALGAFI).

Benoît Duvieusart holds a Master's degree in law and an LL.M. from the University of Cambridge (United Kingdom).

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The Luxembourg Law implementing the GDPR entered into force on May 25, 2018.

Under the Luxembourg ecosystem, with many companies being members of foreign groups and delegating part of their support functions to external service providers or to another group company, the implementation of the new obligations regarding the processing of personal data may become particularly complex.

The directors must thus ensure that proper contractual agreements are put in place with these (internal or external) key service providers, that they receive regular reporting on the duties performed and that processes are in place that allow for timely reporting to the competent data protection authorities when there has been a personal data breach.

The Luxembourg National Commission for Data Protection (CNPD), the supervisory authority in matter of data protection, succeeded in pragmatically profiling itself more as a partner to consult to avoid breaches than as a sanctioning authority.

Interferences with other legal systems (e.g. non-EU mother companies) and culture still increases this complexity.

However, Luxembourg has been navigating in cross-border and international exchanges for decades and due to its size has integrated this complexity in its business model. Furthermore, for several years now many magic circle law firms have established offices in Luxembourg, moving experts from their home jurisdiction with their culture and expertise. The main advisory firms, whether from the 'Big Four' or not, have hired consultants gathering experience collected in most continents and cultures, enabling company directors to get access to the required advisors.

Luxembourg, as a true international financial as well as an industrial hub, has a community of company directors that reflects this diversity.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

As outlined above, Luxembourg, located at the heart of Europe, has a large and interconnected financial sector composed mostly of subsidiaries of other Member States or countries outside the EU. The country also hosts numerous service and industrial companies whose geographical activities are not limited to Luxembourg but are European and international. A global, multinational, multicultural and diverse composition of a board of directors is thus a common feature here. Many boards have resident and non-resident members.

The Luxembourg Institute of Directors (Institut Luxembourgeois des Administrateurs – ILA), which will celebrate its 15th anniversary this year, counts more than 2,000 members, representing about 40 nationalities, which may be either independent non-executive or as executive directors.

With regard to the concept of the directors' fiduciary duties, Luxembourg companies remain primarily governed by the Law of 10 August 1915 on commercial companies, as amended (the 1915 Act), and certain provisions of the Civil code relating to companies, according to which the "corporate interest" of a

company is to be analysed at the level of the company only, and not at that of the group it belongs to. Each company within a group constitutes a separate legal person so that, in principle, each "corporate interest" should be considered on a standalone basis.

Luxembourg case law, however, adopts a wider approach on what the "common interest of the parties" should mean and holds that this should be the interests of all concerned stakeholders (employees, creditors) and not just that of the company and its shareholders (stakeholder approach).

Some academic literature, however, insists on the importance of the interest of the owners/shareholders among the different interests to be considered in the light of Luxembourg's longstanding liberal approach.

This rigid approach is neither realistic nor desirable as companies which belong to a group, especially when they are 100 % owned, which is the case for many companies in Luxembourg, behave necessarily in a different manner from standalone companies.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

As already pointed above, Luxembourg has historically been opened (willingly or not, depending on the periods) on its neighbouring countries. As from 1929, Luxembourg adopted a favourable legal and tax regime for holding companies, thereby welcoming the headquarters or top holding companies for many foreign industrial or financial groups, many of which were French, German or even Belgian, thereby establishing, already in the first part of the 20th century, a strong corporate governance coloured by a multinational culture.

Luxembourg was opportunistic again in the late sixties, early seventies when it allowed the first issuances of euro-bonds and their listing on the Luxembourg Stock Exchange, also created in 1928, which then became by far the main listing exchange for international bond issues, instilling again a new level of multinational flavour in its local governance.

This opportunistic evolution continued in the eighties, when Luxembourg developed into becoming the second investment funds domicile worldwide and created a full-fledged industry with service providers offering a very complete panel of services and the ability to deliver them in the languages most used by their international clients. Luxembourg then kept that leadership when being one of the first adopters of the new and stricter fund governance rules introduced by the 2011/61/UE directive on alternative investment funds managers, with a particular focus on risk management.

Through this evolution, Luxembourg has emerged as one of the main locations to consider when setting up an investment vehicle, whether regulated or not, whether as the top joint venture or as an intermediate special purpose vehicle, where governance and risk management are built-in in the range of the services offered by the local providers.

Representatives of that industry are very active within the European or international fora where the new rules governing these activities are assessed and drafted, ensuring that Luxembourg remains at the forefront of the best practices.

ILA, the Luxembourg Institute of Directors, in partnership with ECODA, the European association of Directors, and INSEAD, provides education programs allowing its members to be fully and timely informed of these best practices.

Luxembourg has so far been spared the wave of lawsuits involving directors of companies for mismanagement, fraudulent bankruptcy or bribery.

Recommended guidelines when investing in Luxembourg

When considering joining the board of a Luxembourg company with international remit, whether because it is part of an international group or because its investments are spread out in different jurisdictions, ensure that:

- You truly understand the culture, purpose, ethics and practices of the group it belongs to or of its individual shareholders,
- The composition of the board appropriately reflects the complexity and diversity of the challenges it has to manage,
- The hard and soft skills and expertise of each member and his/her independence towards the C-executive,
- The frank and transparent interpersonal communication among the board members and with the chairman of the board,
- The company or group strategy is clearly spelt, transparently shared through the management chain, and globally adhered to,
- The board chooses solid and knowledgeable advisors and service providers,
- Appropriate risk monitoring processes and reporting tools are in place.

US - DELAWARE

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elliottgreenleaf.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Boards are not only judged for the way that they react to a crisis, but they are also exposed to liability for how they resolve a problem after the fact. In the United States, class actions regarding data breaches have failed to result in class action liability for fiduciary duty violations inside and outside of important jurisdictions such as Delaware, and almost all have been based on the reasoning that cyber-attacks are very difficult to defend against because of their frequency and the ingenuity of those committing the attacks.

However, there is a growing concern that failure to supervise vendors or the negligent hiring of third parties will survive the early stages of a class action. In addition to the sanctions for the legal entity, the CEO may be held personally liable. Failure to exercise due diligence in monitoring the implementation of data privacy compliance structures by employees or third parties could result in personal liability. Many jurisdictions inside and outside of the EU also have personal liability provisions, including criminal liability, under national data protection laws, including France, Canada, Hong Kong, the U.K., Singapore, Malaysia, Ireland, and the Philippines.

The GDPR also imposes strict limitations surrounding the transfer of personal data to third party countries that the EU deems to have inadequate protections of personal data. This makes it more important than ever to know the details behind where all your data resides and that jurisdiction's approach to data privacy.

A good illustration that shows how the GDPR might open up this liability for the negligent supervision or hiring of third parties is found in the EU Whistle-blower Directive, which was adopted on October 7, 2019, and requires a whistle-blower policy and procedures in place with all companies with more than 50 employees as well as financial service providers and municipalities with more than 10,000 inhabitants. Whistle-blower reporting channels must be secure to ensure the confidentiality of the identity of the whistle-blower, as well as third parties which are part of any whistle-blower report.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

The lack of confidence by consumers is watched and channelled by investors into activism, especially institutional investors. Shareholders are hoisting stakeholders onto their shoulders and moving away from the pure shareholder primacy model. Global investors are engaging in a dialogue that includes social value; longer time horizons, and environment, social, and governance ("ESG") reforms. The most critical issues to asset managers and asset owners who drive investment are climate change and sustainability and heavily influencing governance in many countries. Technology disruption and cybersecurity is also increasingly seen as relevant to ESG. Global directors are more and more being categorized as such, because they are sensitive to these ESG reforms. While ESG has plenty of critics, even they acknowledge that ESG has finally reached a tipping point.

Recently, no less than the now retired Chief Justice of the Delaware Supreme Court has called for companies to focus on their employees and move back towards the true purpose of corporate governance. He called for ESG to become "EESG" adding employees to the reforms, citing the statistic that since the late 1970s, worker productivity has grown nearly 70% while hourly pay has increased roughly 12%, and despite corporate profit eclipsing prior gains. He also cited that institutional investors who hold the savings of these same workers should be equally as concerned on this new focus on governance as they are using the earnings of these same workers to invest in corporations.

Various states in the US have taken the lead on new governance legislation. The Sustainable Investing Act, also known as HB 2460, which became effective in January 2020 requires all public or government agencies involved in managing public funds in Illinois to "develop, publish, and implement sustainable investment policies applicable to the management of all public funds under its control." Certain leading states are also looking to extend their ESG energy beyond public funds.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

The biggest push towards the harmonization of corporate governance standards internationally are investors and consumers. Directors face increased pressure to make sure their members have industry expertise, capital allocation experience, and vision. Institutional investors want not only their board members independent, but also the compensation and selection of the board to be made by independent board members. Issues related to executive pay, gender diversity of boards, independence of board members, and strengthening the voice of shareholders are global. Equally, compliance structures put into place by anti-corruption legislation, such as Sarbanes Oxley, were blamed for the delisting of foreign companies in the U.S. at first, but then seen as a necessity to attract investors.

The conventional wisdom was that foreign companies are declining to list their shares on US exchanges because of the spectre of class action securities litigation. International investors, however, demanded management accountability and pursued class actions both in the US and abroad, as many jurisdictions around 2006 passed legislation to facilitate derivative actions and other shareholder litigation in response to investor demands.

Any company with a dual listing on a US exchange that has 500 or more US-based shareholders needs to make itself compliant with SOX. Many foreign companies delisted and went private when they discovered SOX would affect them as well as US entities. However, over time, studies have shown that while foreign companies list with the UK more often now, as opposed to the US, after the passage of SOX, the foreign companies that listed in the US have an average return that is four percent higher after the passage of SOX. While insiders have the perception that SOX is too expensive, outside investors tend to see SOX as a way to increase investment value and act as a check on those same insiders.

Elliott Greenleaf

Elliott Greenleaf, P.C. has a national reach in many practice areas, including our Commercial Bankruptcy and Restructuring and Commercial Litigation Practices, but many of the world's largest business disputes take place in Delaware.

The Delaware Court of Chancery is the premier venue in the world for the resolution of corporate matters. Our Delaware office can navigate through the unique customs and practice of one of the world's busiest and innovative legal communities. The Delaware office includes highly experienced and accomplished lawyers and professional staff, who are all intimately familiar with the practice and procedure in Delaware.

Recommended guidelines when investing in the US - Delaware

- A circumspect fiscal and monetary policy is a necessary characteristic of a stable economic climate. Pro-economic growth policies support currency valuations and the prices of most equities and bonds.
- Equally important is to have a dedicated self-regulatory mechanism in place, either through trade groups or other commercial private entities, such as exchanges in addition to national legislation. These are a sign of a mature economy and a maturity in that industry, if it is industry specific.
- Self-regulation also helps with enforcement. PCI compliance is a great example of self-regulation in the area of merchant data breaches, where a merchant is simply fined heavily or denied access to the credit card system for violating PCI consumer privacy standards.
- Compliance with international governance models include diversified boards with a keen focus on independence and diversity of thought and relevant economic experience. Independence plays a big role in the audit, executive compensation, and general oversight that makes investment attractive to outside investors.

BELGIUM

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Stéphane Bertouille practises International Tax Law, Tax Litigation, Corporate Due Diligence and Transactions and Corporate Finance.

Stéphane Bertouille is fluent in French, Dutch, English.

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QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Actions for injunction and collective redress in order to obtain compensation for damage suffered by a group due to a breach of the Privacy Act (and since 2018, a breach of the GDPR) are possible in Belgium since 2014. Any action for collective redress must be initiated by associations which are active in the protection of personal data for at least three years, and only pertaining to damages suffered either by consumers or small or medium sized-enterprises.

To date, only a dozen actions have been launched in Belgium since the creation of this mechanism. To our knowledge, no collective legal action in GDPR matters has yet been tried. This is not in itself surprising given that the procedure might seem long and cumbersome.

The collective redress must be directed against the enterprise liable for the GDPR's breach (most likely the company acting as data controller, or as data processor), not directly against the director(s).

An infringement of the GDPR by a company can, however, result in a fine. Third parties could also seek to sue a director in case of damages suffered based on liability for torts.

It should be noted that the rules of directors' personal liability have been substantially modified by the Code of Companies and Associations ("CCA"). The three main changes are:

- The CCA provides expressly a 'test of reasonableness': directors are liable only for decisions that are obviously outside the scope of what a normally careful and prudent director, placed under identical circumstances, would have reasonably decided.
- The CCA extends to management faults the joint and several liability of the members of the collegial administrative body.
- The CCA introduces maximum amounts to directors' liability, both towards the company and towards third parties.

We strongly recommend our clients to revise their D&O liability insurance up to the amount of the cap and align any exclusion with this new framework.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Appointing global directors in a group of companies is obviously a matter of efficiency, but what should global directors know about their fiduciary duties under Belgian law?

Facing possible conflicts between the best interest of the Belgian subsidiary and the factual reality of corporate groups, Belgian courts have accepted that the strict application of the legal autonomy of companies should be reduced when confronted with the "group interest".

Several criteria have been developed by Belgian courts (influenced by the "Rozenblum" ruling of the French Court of Cassation in 1985) in order to keep a reasonable balance between the legal independence of subsidiary companies and the recognition of the interest of the group. It follows that certainty on whether intra-group operations are genuine under Belgian law will require:

i) an existing structured and organised group of companies which together contributes to a common policy;

ii) a fair balance between the various subsidiaries so that the Belgian subsidiaries would not be discriminated; and

iii) a proportionality in relation to the financial possibilities of the subsidiaries so that the Belgian subsidiaries would not be placed in a difficult financial situation.

The fiduciary duties of the directors (not the shareholders), vis à vis the Belgian subsidiaries under Belgian law, are subject to a sui generis status organised by the CCA and implemented also by the general principle governing the mandate under the Civil Code.

For global directors the duty to act in the interest of the Belgian subsidiary is de facto extended to the necessity to act in the interest of the group. What about the issues of corporate opportunities, when global directors have to decide to which company of the group to allocate a business opportunity likely to be in the best interest of various companies of the group?

The criteria stated above developed by our courts will help determine, for instance, to what extent a company may be compelled by a parent company to incur a loss, or to allocate part of its resources to the development of another affiliated company.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

The Belgian Corporate Governance Code of 2020 governs listed companies. The Buysse III Code recommends (not compulsory) practical guidelines and advices to entrepreneurs. Belgian corporate governance is largely inspired by the rules that have been enacted at the European Union level.

To what extent is a parent company able to enforce for the whole group a uniform application of a group governance policy?

In general, the shareholder who holds more than 50% of the voting rights at the general meeting freely decides on the appointment of the members of the Board of Directors and thus has a fundamental influence and may interfere on the management of the company subject to its control.

The right of a parent company willing to implement governance rules in respect to risk management, processes against bribery etc to interfere in the management of its subsidiaries being often considered as an exception to the principle requiring that the legal personality of a subsidiary be distinct from that of its parent company, can obviously not be unlimited or unconditional.

This right does not in any way exempt the corporate bodies of the subsidiary from operating within the bounds of the local law. The strategic policy decided by the parent company only becomes binding on the subsidiary if and insofar as the competent bodies of the subsidiary adopt themselves the decisions implementing this policy.

Moreover, if the right to interfere is justified by the interest of the group, it is unanimously accepted that the group interest is itself subject to limits and conditions as stated in Question 2 hereabove.

Recommended guidelines when investing in Belgium

- Make sure the global directors are covered by an adequate insurance policy.
- If the investment in Belgium is substantial, ensure you have among the directors a person familiar with Belgian law issues.
- Issue guidelines and policies that directors are to comply with. Almost all companies today have their own anti-bribery policies and client record tracking.
- Centralise the management of the statutory requirements of all the entities to gain time and avoid mistakes.

SPAIN

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He has long experience in advising national and international clients, as well as their representation before the Spanish Courts.

grupogispert.com/en

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Since GDPR was introduced the number of lawsuits filed in Spanish courts has increased, which is why companies should not be caught off guard and should comply with GDPR regulations. This applies to those companies that have a headquarters in an EU member state and also to those that offer services or goods in the EU or process EU residents' data. Currently, it is not usual for individual directors and officers to be liable for the costs of a data breach, although it is probable that these criteria will change in the future.

The liability risk which the board can face can be mitigated by taking proactive measures. It also should be taken into account that as a consequence of globalisation, where cross-border issues and transactions are common, directors that operate abroad are subjected to the duties and liabilities set in the jurisdiction of their home country. As a result, they should be aware of the possible differences of their potential liabilities in the jurisdiction from their home country and the one in which they operate.

Regarding any class actions, Spain hasn't yet seen major cases related to personal data security, and it is expected that cases will be increasing in the near future. One of the reasons why it is expected to increase is that the EU is preparing a new Directive which, among others, is planning to expand the class actions sector, allowing cross-border claims, which will result in a new wave of mass litigation. In consequence, data protection legislation is constantly being regulated and updated and for this reason we should be well prepared.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

As we live in a world of globalised trade, the risk oversight liabilities of the board have been increasing. It is fundamental for an effective governance of the company to be continuously adapted, to cope with different legal frameworks and cultures. It is helpful that in the EU the jurisdictions are increasingly similar to each other regarding regulations, and so the duties and liabilities of the board are not that different between one country and another.

Companies need to comply with the principles of good corporate governance of each country. Hence, an awareness of the fiduciary duties will reduce the company's exposure to litigation risk. It is also advisable to encourage a corporate culture in a company itself; it is important to set rules for a better cooperation in work when different cultures are involved. In that regard, it will also help to have a strong management framework and avoid facing legal action filed against the board. It should be noted that in Spain the corporate law gives a larger power to the shareholders over the board than in other EU States. In May 2005, a law was introduced to force a voluntary corporate code of governance that defines and recommends the boards duties, and this also applies to the controlling shareholders.

It is crucial for a successful and productive governance to be aware of the needs of each transaction; that is where it is taking place and who is involved in it. A wide cultural point of view will be the key to success as it will help to maximise the resources available, and allow the understanding of the different jurisdictions to minimise risks, making the transaction more productive and effective.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

It is essential to pursue principles of good corporate governance, as the trend in Spain is to tighten up the directors' liability regime. A good compliance programme and a risk map to define which situations may lead to directors' liability and to take appropriate protection measures is becoming increasingly important.

A compliance programme can limit or even eliminate criminal liabilities and a good health and safety policy can avoid personal sanctions in the labour and administrative field. This is a fundamental issue in cases of accidents at work, which can lead to serious sanctions, even criminal ones. As for the anti-bribery policy, the existence and enforcement of a compliance programme can avoid the criminal liability of the company and the board of directors in the event of a situation in which an employee of the company commits an illegal act.

In the area of bankruptcy, the Bankruptcy Law also provides for personal liability of the board of directors for unpaid debts, mainly in cases of accounting irregularities and delays in filing for bankruptcy. In order to avoid this, it is necessary to have an accurate control of the company's management and a full awareness of what is being done, as well as internal or external measures to control the business and evaluate risks (audits, risk prevention services...). The most common protection measures are:

- Civil liability insurance covering the actions of the board;
- Implementation of compliance programs;
- Distribution of liabilities on the Board;
- Implementation of health and safety policies.

The tendency is to harmonise these protection measures since the compliance legislation in Spain derives from the practice of common law countries and increasingly the interrelationship between countries leads us to adopt similar measures to protect the board.

Grupo Gispert is an independent law firm with over 75 years of experience comprising lawyers and economists; something that allows us to know our clients and the market, and offer them the best solutions.

We have a large team of specialists in corporate law, M&A, IP&IT, antitrust, litigation, insolvency and restructuring, tax, labor, tax and civil law amongst other areas. The firm has been ranked by the Spanish economic newspaper, "Expansión", among the 50 Spanish firms with more turnover; and has been recognised by 'Legal 500' and 'Chambers and Partners' since 2014. Some of our lawyers have also been ranked by Chambers and Partners, Who's Who Legal and Best Lawyers. Moreover, we are the only members in Spain focused on Corporate Law from the international lawyers' network, IR Global. This allows us to provide a full coverage of the needs of our clients in Spain and in other jurisdictions.

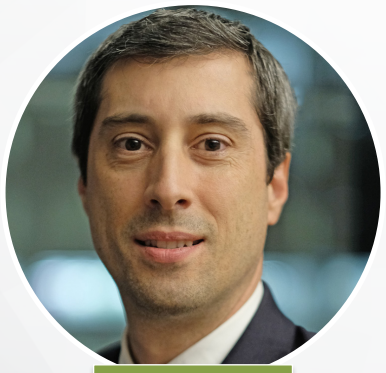
Recommended guidelines when investing in Spain

With whom? It is very important that before making any investment you make sure that you are aware who you are co-operating with. That is why it is very helpful to know your future partners, by checking them through public information which is available in the national trade registers.

In what? Before making a transaction, it is essential to know precisely where and for what your money is being invested, so it is highly recommendable to make a Due Diligence in order to prevent eventual outbreaks.

How? Being flexible is one of the most valuable conditions for a successful investment. The times in which we are living there is a constant change of circumstances, market and the laws. Thus, you need to be continually well advised by local experts in order to be always updated regarding the market situation and local lawyers who will help you to adapt your business to the changing law scenario.

Where? Barcelona and Madrid are the areas alongside the coast attracting more investment but depending on the sector other paces could be interesting.



BRAZIL

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With more than 15 years of combined in-house and law firm experience, Jonathan is a corporate law generalist with relevant experience in capital markets, M&A, compliance and risk management. Jonathan has advised large corporations in securities offerings, domestic and cross-border M&A transactions, supported business teams in key commercial agreement negotiations and defended companies in strategic administrative/judicial litigation and arbitrations.

Jonathan holds a bachelor's degree in Business Administration from Fundacao Getulio Vargas – EAESP-FGV, a bachelor's degree in Tax and Corporate Law (LL.B.) from University of São Paulo – USP, and completed a Risk Management specialization at Harvard Business School.

jlegalteam.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Although mandatory adoption of the Brazilian GDPR was recently again delayed, experts agree that once it enters into force, on May 3rd, 2021, this legislation will affect all organisations that collect, treat or store personal data in Brazil. The fact that the Brazilian data protection law is based on its EU equivalent does not necessarily mean that there will be an unusual increase in litigation or in the amounts of potential fines to companies or in personal liability to directors.

For global directors, it is important to be familiar with the more critical legal aspects of each country where their organisations conduct business. Having robust risk management frameworks and board supporting committees in place is also key to allow board members to focus on their mandates. In Brazil, for instance, certain tax and criminal matters can become a source of personal liability to board members, as well as civil/commercial, environmental, labour and consumer claims, in case the legal entity is considered an obstacle to the compensation of damages.

The ongoing and very high-profile case regarding the 2006 acquisition and subsequent investments of Brazilian oil giant Petrobras in US refinery Pasadena Refining System Inc., is an example of how fiduciary duties are currently enforced in Brazilian courts and how cross-border responsibilities are an increasing part of the risk equation. In summary, all nine board members at the time are now involved in multiple claims related to the alleged breach of their duty of care, which led to the approval of the acquisition at prices above market, thus not taking into account the best interest of Petrobras. As the company's securities are also traded on the New York Stock Exchange, after settling a class action lawsuit in the US, it also entered into agreements with the SEC and DOJ, which cost the company a combined amount in excess of $1 billion.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

As mentioned earlier, it is vital that board members of global organisations have a broad vision of the potential risks and liabilities that the organisation faces in each jurisdiction where it operates or plans to operate. There are no safe alternatives for sound local advice from each geography, well-structured risk management and compliance programmes, and periodic training for directors and officers.

The basic law to govern fiduciary duties in Brazil is the Civil Code (Law No. 10406/02, art. 927, sole paragraph), which in fact sets the obligation to repair damages caused by any unlawful act. Then, there is the Brazilian Corporations Law (LSA or Law No. 6404/76, Chapter XII, Section IV) which deals specifically with directors' and officers' duties and responsibilities.

In a nutshell, acting in good faith and with the best interest of the organisation in mind, while exercising the duties of care, loyalty and obedience seem to be relevant defence arguments for directors at Brazilian courts. From a practical perspective, administrative decisions from the Brazilian Securities and Exchange Commission (CVM) also bring forth important concepts, such as the business judgement rule created by the US courts and still infrequent in Brazilian judicial discussions.

As far as guidance on the expectations of directors is concerned, the precedents from CVM administrative rulings seem far more numerous and illustrative than their judicial counterparts. These tend to concentrate on tax, criminal, and the other types of claims mentioned before in which the legal entity is disregarded due to being an obstacle to the compensation of damages.

In addition to the legal requirements, there are two other sources of guidance on such expectations in Brazil: the best practices compiled by entities such as the Brazilian Institute of Corporate Governance (IBGC) and each organization's corporate governance documents.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

While there is no risk-free solution to global directors' liabilities, fostering a culture of ethics and compliance certainly helps to keep organisations on track and, in case something does go wrong, it also helps to contain the crisis and have better defence arguments. In this sense, there is no substitute for the tone at the top and boards are certainly a key part of setting the tone.

We have already seen the tough example of Petrobras. For a more virtuous example, we can look at the 2003 Coca-Cola Frozen Coke US scandal. This was a manipulation case that started by putting the company under the scrutiny of federal prosecutors and the SEC and ended with the replacement of their CEO. It also included a disclosure of the issue to markets, the restatement of earnings and a more active stance from its board with regard to strategy definition and management oversight.

Well-structured risk management teams and processes are also critical in helping organisations avoid foreseen operational and strategic risks, as well as to better tackle crisis events ranging from the ongoing COVID-19 pandemic, a bribery case in a foreign subsidiary or the materialization of an unforeseen risk, such as a next-generation cyber-attack that no one could predict its effects on the organisation. Integration between the risk management framework and the board is also key, as directors in Brazil are ultimately responsible, among others, for selecting and replacing external auditors, and approving the management's accounts and the organization's financial statements.

There is certainly a trend of corporate governance practices to become more aligned over time. Global investors and cross-border financing are both strong drivers of this process. Pressure from stronger economies, such as the US-sponsored Sarbanes-Oxley Act, as well as initiatives from international organizations, such as the G20/OECD, are also relevant.

The firm is structured to provide specialised legal services for players in the capital markets and wealth management industries, as well as for corporations, building true connections and real relationships with clients by overcoming the challenges presented on a daily basis.

It has developed an extensive network including corresponding offices domestically and globally to provide multidisciplinary work. This is key as most projects involve corporate, contractual, and tax aspects, as well as finance and accounting elements.

The firm's commitment to excellence and transparent communication enables it to simplify complexities and deliver tailor-made solutions, while also enhancing its understanding of the clients' businesses and, over time, developing long-lasting relationships as a valuable partner to its clients.

It is also noted for its experience in providing tax, governance and regulatory advice to local and foreign mutual funds, asset managers, institutional investors, individuals and corporations on financial markets, private equity and venture capital transactions, foreign exchange regulation, structured finance, as well as risk management and compliance.

Recommended guidelines when investing in Brazil

- Directors in Brazil are bound by the duties of (a) care, which includes making informed and reflected decisions; (b) loyalty, which includes abstaining from insider trading; and (c) obedience, which includes the prohibition from receiving any unauthorized advantages from third parties due to being part of the organization's management.
- Brazilian law makes explicit reference to the exclusion of personal liability in case the court is convinced the director or officer acted in good faith and in the best interest of the organisation. Such decisions may be protected by the business judgement rule in case they are informed, reflected and without conflicts of interest.
- Other important measures that board members should bear in sight with regard to their Brazilian operations include the adoption of adequate internal controls, compliance programs, ethics and conduct standards, audit committees, as well as the retention of capable internal and external auditors.

INDONESIA

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Rio Lassatrio is a founder and partner of LHBM Counsel.

He is a qualified lawyer with more than a decade of practice experience. He has extensive experience in representing and advising international companies in Indonesia. He has advised and acted as an Indonesian counsel related to M&A projects, syndicated financing projects, construction works and complex commercial litigations.

With his qualifications, Rio has been named as one of the Indonesia's A-list of top 100 lawyers for 2020 by the Asia Business Law Journal, named as Indonesia's Rising Star for 2019 by the Asian Legal Business, and chosen by his clients as Asialaw Leading Lawyers 2012 based on Asialaw Profiles Survey 2012. He is also endorsed by the Global Law Experts as recommended lawyer in the practice area of M&A.

lhbmlaw.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The Indonesian Company Law adopts a two-tier board system, which means the board of directors (BoD) performs managerial or day-to-day operational responsibilities, while the board of commissioners (BoC) has a supervisory function over the activities of BoD. The BoC and BoD are responsible to the general meeting of shareholders.

In terms of personal liability for BoD, the Company Law provides that the BoD can be held personally liable for any company losses, if he/she is found at fault or negligent in carrying out his or her duties in accordance with the purposes and objectives of the company. If there are two or more directors, the liability will be joint.

With personal liability at stake, the needs for BoD to be familiar or aware about personal data protection in Indonesia and in other jurisdictions where an extra-territorial provision could be imposed is significant. Under the Indonesian Laws, violation of personal data protection may lead to administrative and criminal sanctions. In addition, the injured party may also file a civil lawsuit against the company/BoD on the basis of unlawful act and demand for material/immaterial loses due to the breach of personal data protection.

Prior consent from the data owner is required for the use of any personal data. The consent must be in writing (meaning an express consent), whether manually or electronically, and in the Indonesian language (although there is no prohibition of a dual language format). Further, the consent is only effective after a complete explanation on the intended use of the personal data.

As for cross-border transfer of personal data, the prevailing regulation states that such transfer must:

i. be in coordination with MOCI or the official or institution being authorized for such purpose; and

ii. implementing the laws and regulations regarding the trans-boundary exchange of personal data.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

The members of BoD nowadays face increased scrutiny on how equipped they are with industry knowledge, skills, and transformation experience. BoD will also need to be vigilant on their duties, responsibilities, and restrictions, as the failure to properly address those matters may lead to possible sanctions under the prevailing laws (either administrative, civil, or criminal).

It should be recognised that directors' duties may vary from one jurisdiction to others. In terms of fiduciary duty, the Indonesian Company law provides that the BoD manages the company in the best interests of the company and in accordance with its purposes and objectives. In performing their management duties, BoD members can jointly and severally represent the company in its external relations unless specifically restricted by the articles of association of the company.

The BoD is accountable to the general meeting of shareholders and its work is supervised or overseen by the BoC. The Company Law and the company's articles of association regulate the authority of the board of directors, and the election and dismissal of its members.

The Indonesian Company Law provides the duties and responsibilities of BoD as part of performing its fiduciary duty, such as:

i. compiling the register of shareholders, the special register, the minutes of the general meeting of shareholders, and the minutes of meetings of the BoD;

ii. preparing the annual reports of the company.

iii. maintaining and keeping all the company's lists, minutes, and financial documents and other company documents e.g. company's permits and licenses.

iv. reporting to the Ministry of Law and Human Rights on any change of shares ownership, composition of members of BoD or BoC.

In addition, awareness from the BoD to certain obligations/restrictions as regulated by the prevailing laws is pivotal in the implementation of corporate governance.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

An effective member of BoD that follows core principles of international corporate governance is important.

Implementation of risk management is pivotal to good business management. Ability to identify and exploit key risks and opportunities for the business by the members of BoD may only be carried out if the company has a risk management policy in place. It is also prudent for the BoD to review any laws and regulations which may be applicable to the company's line of business, and comply with such laws and regulations.

To date, Indonesia has not yet enacted a statutory corporate governance code. However, there is a code of good corporate governance that was issued in 2001 and revised in 2006 by the National Committee on Governance. The code of good corporate governance is a set of non-binding principles and benchmarks for all companies in Indonesia (private and public). Although the code itself is non-binding, but the general principles of corporate governance have been reflected in the Company Law and further implemented by the Indonesia Financial Services Authority (Otoritas Jasa Keuangan – OJK) for banks and financial services companies.

Where it encounters what seems to be some inconsistency or ambiguity of different regulation, the BoD should try to clarify such an inconsistency or ambiguity, either by engaging the company's in-house legal department, internal compliance department, advice from the company's external legal counsel and clarification from law enforcement agencies or law-making agencies, to achieve full compliance with the law and best corporate governance practice.

At the end of the day, the BoD cannot be held liable for any corporate decision adopted in good faith, therefore affording greater protection to the parties involved.

LHBM COUNSEL

LHBM Counsel is a boutique law firm in Jakarta, Indonesia. We aim to provide an excellent, industry savvy and practical legal solution. We combine the strength of lawyers and in-houses. Our lawyers are dealing with complex and challenging transactions across a broad range of industries. They have also practiced in premier law firms and multinational companies. This combination offers not only high quality of legal service, but also practical legal solution that takes your business interest into account.

Our practice focuses primarily on Corporate and M&A, Banking & Finance, Digital Business, Project and Infrastructure, Healthcare, Regulatory Compliance, Intellectual Property; and Commercial Litigation.

Recommended guidelines when investing in Indonesia

- **Understand the type of presence to set up the investment.** There are two common forms of foreign investment in Indonesia. One is direct investment – where the investor invests capital in a new or existing company, and the other, portfolio investment – where the investor invests through the purchase of securities in the capital markets.
- **Identifying and understanding the applicable/relevant laws and regulations.** For potential direct investment, as not all business fields are open to foreign investment, one must check and refer to the so-called negative list in order to identify whether a particular business sector is either completely closed to investment or conditionally open. Portfolio investment should refer and follow the applicable laws and regulations in the capital markets.
- **Identifying risk. Set out the DOs and DON'Ts.** Once you start your investment in Indonesia, investors should prepare a checklist that set out the DOs and DON'Ts under key laws, regulations and best practices on how to run business in Indonesia. Engaging external counsel is advisable for comprehensive advice.

INDIA

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Ramanand Mundkur has more than 25 years of international experience in corporate law and finance. He is based in Bangalore and provides specialist advisory services on cross-border mergers and acquisitions, international agreements and collaborations for life sciences and healthcare companies, and on insolvency resolution and bankruptcy matters.

Ramanand is also a corporate governance and risk management specialist, advising listed and unlisted companies on complex and sensitive board and c-suite level corporate governance issues including addressing the discovery and reporting of material corporate fraud. In addition to his transactional work, Ramanand has appeared before various courts and tribunals in corporate and commercial disputes and is a commercial arbitrator with the Indian Institute of Arbitration and Mediation.

mundkur.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

For some time now, Indian law has contained provisions that make a director or officer of a company personally liable for offences committed by the company. Such provisions exist not just in company law, and securities regulations, but in other areas of law as well, including health and safety regulations.

In relation to personal data, the Personal Data Protection Bill, 2019 (that is currently being discussed by India's Parliament) has similar provisions. Therefore, if a company were to commit an offence under the proposed data protection law, a director or officer of the company could conceivably be made liable for the offence (including by way imprisonment or fine), particularly if the offence was committed with the individual consent or connivance of the director or officer, or if the offence is attributable to neglect on that individual's part. Such provisions appear to continue the approach to personal liability followed in other laws.

In addition, laws in India already require company directors to monitor the effectiveness of their company's governance norms, and to satisfy themselves as to the robustness of their company's risk management and control systems.

It is therefore debatable whether recent data protection legislation will, of itself, result in a more litigious culture in India - in any event, as the data protection legislation is still being developed it is perhaps premature to hazard a guess in this regard.

What is clearer, and probably more significant, is that the obligation of company boards to exercise more diligence and more oversight in relation to how a company operates (and not just on what results the company achieves) is growing in importance. Therefore, boards are expected to pay significant attention to compliance and controls and would do well to dedicate more time and resources to these aspects of doing business.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

It is important for global directors to be sensitive to both local cultural relationships, and global trends in corporate governance.

About 30 years ago, most boards in India could have been easily accused of being guilty of adopting overly 'promoter-friendly' approaches. That has changed now and it continues to change. After a series of corporate governance scandals in India in the last two decades, the laws have changed rapidly to fill in the gaps in corporate governance that existed previously.

The need for governance and controls is now mandated by various laws in India. For example, the law now sets out clear fiduciary duties and responsibilities of individual directors (this was previously unclear and left to judicial interpretation); the law also strictly regulates related party transactions and conflicts of interest; it mandates the appointment of more independent directors and more women directors in the boards of listed companies; and it even requires regular 'self-evaluation' of directors in listed companies. In addition, most Indian subsidiaries of foreign multinationals are familiar with Sarbanes-Oxley compliance requirements.

While these developments primarily concern publicly listed companies and subsidiaries of foreign multinationals, a similar trend is also being witnessed in privately held Indian companies. These smaller local companies are also adopting better corporate governance practices, either at the behest of financial investors or, in some cases voluntarily, in the hopes of becoming attractive to venture capital and private equity funding. Additionally, many Indian companies recognise that foreign laws like the FCPA and UK Bribery Act apply to the overseas operations of US and UK businesses, and are now comfortable signing on to compliance codes based on these foreign laws.

This said, applying international governance standards does not imply sacrificing local customs. For example, it has been a common cultural practice in India for businesses to give gifts to customers, vendors and even government officials during the annual Diwali festival. By applying clear, gift-giving codes and policies that include various controls, Indian businesses have been able to ensure that such gift giving does not result in bribery.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

In our experience, the benefits of following core principles of corporate governance go beyond shielding the board's directors from litigation. In a number of companies where boards consistently follow high standards of corporate governance, we have seen how employees (and in some cases even vendors dealing with company) see such board behaviour as defining the framework of their individual action. In other words, the consistent application of such principles has a long-term beneficial impact on the overall culture of the company (and even its wider ecosystem).

Admittedly, following core principles of corporate governance does not, of itself, guarantee sterling financial performance and therefore might not be a shield against bankruptcy. But it is often an effective shield against litigation and other issues such as allegations of bribery or tolerating an unsafe or unhealthy work environment.

As indicated, in response to the second question, above, global corporate governance practices and requirements are converging in many areas. Compliance therefore has the added benefit of de-risking international business transactions and thereby encouraging international trade and investment.

MLP
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Mundkur Law Partners is an award-winning corporate law firm based in Bangalore, India. The firm specialises in complex, international transactions and has a reputation for adding exceptional value in developing client strategies in transactions and disputes. The firm's clients range from listed multinationals to start-ups, with interests across diverse areas from brick and mortar manufacturing to cutting edge drug-discovery and technology-based businesses.

The firm's practice focuses on five areas: international M&A – including private equity and venture capital transactions – education law, life sciences and healthcare, insolvency resolution and complex commercial disputes. The firm values its reputation for exceptional client service and offers each client the assurance of complete partner involvement in every aspect of the engagement.

Recommended guidelines when investing in India

- Investors should familiarise themselves with local rules on individual liability for directors and officers and with local practices followed to mitigate this risk. For instance, many Indian companies obtain D&O (director and officer) insurance and public liability insurance to help defray risk of claims against their directors and officers. Similarly, documenting governance standards and ensuring implementation of those standards is also useful in protecting against personal liability - when things go wrong, such standards and implementation records can be used to demonstrate that the wrongful acts were not done with the director's or officer's consent or connivance or due to any neglect on the part of such individual.
- When investing in different jurisdictions, it is important to be sensitive to local cultural relationships. Conduct that is ignorant of local cultural norms and etiquette could set back working relationships and harm investments, even when such conduct might be undertaken with the noblest of intentions.
- As global trends in corporate governance converge, local cultural relationships should not be seen as a hindrance to applying international corporate governance standards—it is possible to work with local cultural norms, while also ensuring corporate governance practices are followed.

UAE

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He has an active role in several organisations in the UAE, including President of the Italian Business Council and Vice President of the Italian Social Club of Dubai. He is also listed as a lawyer at the Italian Embassy in Abu Dhabi, Italian Consulate in Dubai and the Italian Trade Commission in Dubai. Before moving to Dubai, Thomas was partner at Studio Legale Paoletti in Rome for more than 10 years. Thomas received his Law degree from the University of Rome, after completing his graduation thesis as a visiting scholar at Yale.

paoletti.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The UAE is an international hub interconnected with the rest of the world and capable of attracting great investments thanks to the different and various foreign direct investment policy and incentives that have been launched in the past few years. The UAE has not yet adopted a data protection law, but has taken the European GDPR as a case study to draft its own data protection law, which we all hope it will adopt soon. Dubai International Financial Center and Abu Dhabi Global Market have both adopted a data protection framework consistent with the EU and international standards.

Companies participating actively in the globalisation process require to have a physical office, manager, directors and operations in different countries. Clients, customers, employees, and stakeholders around the world now demand greater transparency and ethical behaviour from businesses with which they are engaged.

It becomes, therefore, more stringent for the headquarters to put in place a proper governance policy structure capable of covering all the different aspect of international governance, but at the same time capable of complying with the single legislation of each country the company is operating.

Responsibilities of the board members are not limited to follow the governance policy from the headquarters, but are responsible for proactively informing the company in the event a new rule, regulation or policy that is locally adapted for compliance. Being a qualified Italian lawyer, I have been asked on different occasions to provide a legal opinion on the corporate structure of the company based in the UAE to be in compliance with the Italian law n. 231/2001. Companies in Italy may be held directly liable for crimes of subjective intent committed either in Italy or abroad on behalf or for the benefit of a company by a class of person who is the operational authority and therefore liable on behalf of the company.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Firstly, global directors operating in the UAE have to comply with the recently introduced economic substance regulations (ESR, pursuant to the Cabinet of Ministers Resolution No. 31 of 2019,) which set out the requirements for entities to have an economic presence in the UAE. Key elements are:

- to conduct “core income-generating activities” in the UAE
- to manage the company in the UAE, e.g., hold board meetings with a quorum of directors physically present in the UAE
- to have an adequate number of full-time employees, expenses and physical assets in the UAE.

A company falling under the above regulation needs to adopt a proper governance structure as evidence that the company’s decisions are taken locally and not abroad.

The duties and liabilities of the directors and managers of onshore UAE companies are governed principally by the Commercial Companies Law (Law No. 5 of 2015) (“UAE CCL”) and the Civil Code (Law No. 5 of 1985). In addition, the UAE Penal Code (Law No. 3 of 1987) sets out criminal liability that may apply to the actions of directors and managers.

UAE Commercial Companies Law is not applicable to Free Zones, such as DIFC and ADGM, which have adopted their own regulations and guidance. The UAE Penal Code also applies to free zones companies.

The onshore UAE companies regime is based on a civil law legal system which doesn't recognise the concept of "fiduciary duty" for directors that is typical of a common-law system instead.

But the positive duty to act in the best interest of the company introduced by the UAE Commercial Companies Law in 2015 encompasses similar duties such as the duty to disclose conflict of interest and the duty not to misuse confidential information and makes the two legal frameworks very similar.

In some cases, at first sight, the liability of the directors under the free zones regimes can appear wider than the one of the onshore companies. Directors under UAE CCL regime will be liable to the company for such actions as fraud, abuse of power, breach of any law, memorandum of association or contract, gross error as well as to shareholders and to any third parties for fraudulent actions and any exemption from this liability is void. The free zones companies' legislation may not contain restrictions on indemnity for directors.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

Working in a global environment requires the adoption of standard corporate governance procedures to be adjusted in the different countries the companies are present in.

Corporate governance is the mechanism by which companies are directed and controlled on behalf of their owners. The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

Corporate governance involves shareholders (owners of the business), Board of Directors (who oversee the business) and the Executives (who run the business). There are different models of corporate governance (the Anglo-Saxon model, Continental European/German model, Japanese model), and the structure varies between countries. However, within countries there is a wide variety in practice (e.g. board size, the annual number of board meetings, percentage of women on board, etc.).

While structuring the corporate governance framework, it is wise to account for a company's specific aspects such as gravity centre (power), equity control (publicly listed, private equity, family business), company complexity, degree of evolution of governance, internationalisation and sector of activity. Conglomerates typically promote the principles of corporate governance of the parent company into all their subsidiaries.

The impact of corporate governance on investors' perception and on quality decisions is widely recognised. Companies with good corporate governance best practises helps to reduce the risk of exposure of the company and its management to the control of the local authorities and helps to comply with the more stringent new regulations including the anti-money laundering, which is very relevant in the UAE nowadays.

One important pillar of corporate governance is an effective risk management framework. Companies' risks are identified, assessed, constantly measured and mitigated through risk management plans; a clear responsibility for risk management is assigned within the organisation at different levels (committees, executives, procedures, etc.) and risk reports are periodically discussed at executive and board level.

Paoletti Law Group

Paoletti Law Group is a global legal and business services firm advising clients across the Middle East, EU countries and the rest of the world.

They provide value adding and cost-effective solutions for national and multinational businesses in a wide range of sectors including corporate domestic and cross border transactions, finance, new technologies, construction, and oil & gas. Headquartered in UAE, the firm maintains offices in Rome and Shanghai, and grants its clients access to a worldwide network with operational desks in key jurisdictions around the world.

Recommended guidelines when investing in the UAE

Due Diligence: by conducting a proper and thorough due diligence, investors will be able to avoid negative impact on their investment as well as financial exposure risk or have "adverse impacts" on matters such as human rights, labour, environment, bribery and other integrity impacts, etc.

Know Your Territory: any investment in a foreign country requires the investor to prepare himself and to know the legal environment he wants to do business with and therefore it is imperative to use the service of professionals in that country who know the rules, regulations and culture towards foreign investors.

Know Your Law: when investing in a foreign jurisdiction, be aware of what law, rules and regulations in your home country are applicable in a foreign investments and the investor should make sure to comply with.

NETHERLANDS

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Educated in Israel, the US and Amsterdam, I am a member of the New York and Israel Bars, and an international lawyer since 1986. I have lived and practiced law in the US for years, based in Amsterdam since 1991, and co-managing our Israel office since 1998.

My experience lies with cross border transactions, helping clients and colleagues bridge the legal culture gaps. I have done transactions and acted for clients in all parts of the world and in numerous industries: technology, pharmaceutical, real estate, energy, finance, various manufacturing and more.

My network of colleagues and friends is widespread, and my practice concentrates on seeking practical solutions in complex environments. I look for the joy of the practice and the position of win-win solutions that bring parties together, while using creativity and out of the box solutions.

sbl-lawyers.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

The GDPR has introduced onerous standards on companies which process personal data, with significant financial penalties for non-compliance. The GDPR further offers privacy activists as well as employees, litigants, consumers, shareholders and members of the media a strong tool to address privacy concerns or breaches.

The introduction of the GDPR signifies in itself a shift towards a more litigious culture with respect to the processing of personal data and may translate into an increased risk that board members are held personally liable. However, current Dutch case law published so far in relation to the GDPR mainly relates to the right to be forgotten (removal from Google searches or financial ratings data bases) and labour law cases regarding employee privacy concerns and up to this date has not led to liability of individual board members.

Nonetheless, the introduction of the GDPR and similar laws has caused substantial changes to the landscape of privacy law. Companies and their boards can no longer escape from their responsibilities and need to familiarise themselves with the regulations applicable across the various jurisdictions where their companies are active and ensure compliance. This means that boards of companies should ensure that IT systems are secured, processes are installed that enable timely detection of data breaches and ensure that these are dealt with appropriately internally and reported to the regulators when necessary.

Although regulatory action until now has been relatively limited, it has become evident that the Dutch regulator will become more active and issue significant fines (of up to EUR 20 million or 4% of global turnover) and it only seems a matter of time before class action law suits will be brought forward by affected consumers.

While regulatory actions are brought against the company rather than board members, such actions will put the spotlight on board members and whether they have fulfilled their fiduciary duties to comply with data protection legislation.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

In an ever-increasing digital world and era of faster globalisation companies operate in a more global context. This also drives the demand for directors with a global outlook. Global boards will need to have an extensive skill set to ensure that the company acts in accordance with the (fiduciary) rules and values in all jurisdictions where it is active as a board will strive to “think globally and act locally”.

While the OECD has developed Global Governance Principles to advocate a common global approach to directors’ fiduciary duties of care and loyalty, in the end governance practices will be anchored in the legislation of the country where the company is headquartered.

In the Dutch jurisdiction, the board carries a broad responsibility from guiding the interests of the company and its business to the interests of shareholders, employees, creditor, suppliers and society as a whole as well as compliance with a variety of good governance codes. In addition to personal exposure to all these groups, Dutch directors may, amongst other reasons, also become personally liable for the whole deficit in bankruptcy in case annual accounts have not been filed timely.

Dutch boards are expected to be populated with high performing directors who carry a broad responsibility. The expectations of high performance of a Dutch director should not be underestimated and underperformance may have severe consequences. Therefore, a foreigner who becomes a Dutch director who thinks of the board service as largely advisory or ceremonial may have little to contribute and be unqualified for such task and be exposed to significant financial consequences. A Dutch board is allowed to divide their duties among themselves. This can help the board to take away responsibilities from directors that have no affinity with certain subjects (f.e. GDPR or foreign/domestic matters).

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

Global leadership and corporate culture are closely connected and, therefore, it is paramount that directors create proactive oversight and take the lead in setting global corporate culture standards for the company to ensure effective implementation of corporate compliance. This is not only limited to risk assessment standards but applies to all fields that are relevant to the company, such as GDPR. Implementation of risk management frameworks not only mitigates the exposure of directors but may also avoid reputational damage to the company.

Whilst a variety of international bodies (such as IFC, ICGN and OECD) have been developing international standards for the harmonisation of governance codes that also affect the codes in the EU, governance codes remain fragmented from an international perspective.

As the applicable codes for global companies vary from jurisdiction to jurisdiction, compliance can be a daunting challenge. A combination of central top/top-down risk assessment and in-country/bottom-up risk assessment processes are generally viewed by directors as an effective approach for global companies. Creating an effective risk management system starts with leading by example and being armed with the right information from the right sources within the company. The Dutch Corporate Governance Code contains an extensive set of principles and best practices that help to implement an effective risk management system and uses a comply or explain mechanism which may help to balance the Dutch Code with other codes that may apply.

It goes without saying that complying with corporate governance codes mitigates the exposure to director's liability. That is not to say that the board can suffice with a check-the-box mentality. Boards need to keep up to date on governance developments within the regions the company operates and allocate enough time to be updated in this area on an annual basis.

Recommended guidelines when investing in the Netherlands

- Management's regular risk reports to the board should capture and summarise key information to enable the board to provide effective oversight and execute its risk-responsibilities.
- For effective oversight purposes prepare a dashboard including relevant qualitative and quantitative considerations and metrics that is updated regularly.
- For recruitment of new directors, the board should assess (i) what the company's definition of the term "global" is, (ii) what knowledge the board needs, (iii) should the board recruit a national or a foreigner, (iv) to what extent do candidates understand the business and (v) what kind of experience/expertise is the board looking for?
- Engage high quality external advisors to fill any knowledge gaps on the board.
- Understand the threat landscape and how companies are expected to respond under the law.
- Know the potential financial exposure and how they influence risk tolerance and consider taking out adequate insurance coverage.

CHANNEL ISLANDS

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Kate is an experienced financial services, banking and finance professional. As the Partner in charge of the Banking and Funds practices of Voisin, she advises on the establishment of investment vehicles ranging from single investor/corporate group structures to retail collective investment funds.

Kate's regulatory and funds practice specialises in the legal, regulatory and corporate governance aspects of investment vehicles, collective investment funds, holding companies and managers. Kate and her team aim to provide practical, honest solutions to what are often complex legal and regulatory issues. They aim to take the worry out of setting up these structures.

Kate's banking and finance practice focusses on advising on large corporate borrowing transactions, predominantly relating to commercial real estate groups borrowing from conventional lenders and debt funds. The debt is regularly £100m +, often involves 30+ corporate entities and multiple lenders providing senior and mezzanine debt at various points across the group.

voisinlaw.com

QUESTION ONE

With recent data protection legislation across different jurisdictions, companies are now being held to account regarding their use of personal data. Will this result in a more litigious culture for companies and what does this mean for boards?

Jersey has closely aligned itself to the United Kingdom's data protection regime with the adoption of the Data Protection (Jersey) Law 2018 (the "Law"). The Law adopts the 7 core principles of GDPR, thus aligning Jersey with Europe. Whilst there has no doubt been an increase in requests to remove information from databases (given that the process is far easier under the current legislation), we have generally seen companies in the jurisdiction work on an 'opt in' basis on the introduction of the Law, and therefore, whilst we do expect to see prosecutions for breach of the Law (with penalties for the breach of the law being up to €20m or 4% of annual turnover whichever is the greater), we would envisage that a case for claiming damages (although possible under the Law) will be rare and is likely to only be seen in high value or large group action breaches (which will have an international angle).

However, as a director of a Jersey company (which often have international operations) you do need to be mindful of the data protection rules both in Jersey and in other jurisdictions in which the company operates and how they impact upon your company.

Other jurisdictions will impose similar but slightly different obligations and often marrying those up can prove complex, with the result being the somewhat onerous double regulation of the entity under each regime. For any board they will need to put in place measures to assess where there may be regulatory requirements to comply with and ensure appropriate advice is taken. Once the advice is taken it is key for the advisors to work together to ensure that the regime is simplified so that it meets the criteria of the relevant jurisdictions without duplicating work or making the criteria too complex to comply with.

QUESTION TWO

With global directors now increasingly in demand, how important is it for boards and directors to understand the different expectations of directors and different cultures of governance?

Today more companies are operating on a global stage. For Jersey you could argue that our longstanding international outlook has meant that this has always been the case, but we are seeing a greater demand for directors with certain sector experience (often in the countries that the company operates rather than its jurisdiction of incorporation). It is essential for these directors to not only understand their duties and responsibilities in the jurisdiction in which they operate, but also in the jurisdiction(s) in which the company is incorporated.

This is particularly important where the entity in question is regulated (for example, a fund or financial services business) and operating in multiple jurisdictions. Understanding the obligations in each jurisdiction is not only key to ensuring the liability of the directors is managed, but also essential for the protection of the clients of the business or investors in the company. This issue does, however, highlight the benefit of a mixed board in terms of both jurisdiction and experience and relevant local advice and oversight.

Often my clients ask if they can control the board themselves with no Jersey-based directors and whilst for many structures there is no bar to this, in my experience the board runs more smoothly, with fewer issues, if there are Jersey–based directors on board. Whilst these measures will not absolve any director from familiarising themselves with the various laws, rules, regulations

and cultures of governance in the various jurisdictions in which a company operates, a mixed experience board, when it works collegiately, is far more stable and effective and creates far less risk for the company because there is a lower chance of the ball being dropped if there are experiences practitioners overseeing the functions.

QUESTION THREE

How important is an effective board that follows core principles of international corporate governance? Does this give boards a shield against litigation and other issues such as bankruptcy and bribery?

Jersey aligns itself to the UK standards of corporate governance, together with its own regulatory framework of governance requirements for regulated entities. Jersey has an advantage over some other jurisdictions as considering risk is ingrained in our regulatory system, which in turn feeds into the companies that are administered by our regulated service providers. It is usual for any company administered by a Jersey service provider to adopt the same procedures as the service provider, thus giving the basis for a strong corporate governance culture in the Island. However, I would add that this means that it is also prudent to carry out some checks on the service provider itself before investing, if nothing else to ensure that the support that they give suits your needs.

This does, however, highlight the fact that adopting international corporate governance standards as a blanket measure is not always appropriate. You can end up with a framework of corporate governance that cuts across local regulation. It is important for any board to consider its corporate governance framework and work with the company secretary or administrator to ensure that it is both suitable for the company. In considering any investment you would wish to see evidence of this board deliberation.

I would add finally that culture is equally important; there is no point in adopting rules that are ignored. The company will gain no protection against matters such as breach of fiduciary duty, litigation or bribery with a shiny set of policies which reside in a cupboard. Indeed, poor corporate governance could lead to claims of trading whilst insolvent or wrongful trading if the correct financial materials are not in place and transactions could be subject to attack in certain circumstances (for example an insolvency) if incorrectly authorised. In Jersey there are likely to be regulatory consequences for poor corporate governance and in some instances there may be criminal penalties.

Recommended guidelines when investing in the Channel Islands

- **Know your market**. Certain practices that may seem fundamental in your jurisdiction may not be commonplace in the jurisdiction in which you are investing. Ensure that when you do your due diligence you check that it is key to the company you are investing in.
- **Do your due diligence**. I dread the words 'it's a friendly deal, don't look at that', they often come back to bite the client.
- **Often documents are not available publicly in Jersey**. Don't be afraid to ask for them or be persuaded not to see them as they aren't public. Let local counsel guide you as to what it's normal to have access to.
- **Take local advice**. We often see parties presume that as the jurisdictions are similar they don't need Jersey advice. Each jurisdiction has its own nuances, and regulatory framework, don't be caught out!

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