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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?

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 experienced 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.