

# STRATEGY AND GOVERNANCE FOR GLOBAL COMPANIES: ASIA, EUROPE, AND EMERGING MARKETS

## National Directors Institute

### 2016 Executive Exchange

1. What are the Leading Issues Facing Boards of Global Companies/What Structural Issues May Differ from a “Normal” Board?
  - a. Independence and the Role of the Independent Director
    - i. Shareholders of global companies have expectations that there will be a “higher level” of board independence than we might normally expect due to the complicated nature of global companies and their operations.
    - ii. Current trend in the United Kingdom is for the chair of the board to be separate from the CEO to maintain and encourage more independence in board leadership.
    - iii. Boards are also more focused on training independent board members on maintaining such independence to ensure the integrity of the decisions of the board.
  - b. Shareholder Expectations
    - i. Similar to the expectation regarding board independence, shareholders of global companies have higher expectations for transparency.
    - ii. Activist investors have also gotten particularly interested in such transparency.
    - iii. Boards should focus on making their operations as transparent as possible to avoid active scrutiny by activist investors and to allow the board to operate proactively rather than defensively.
    - iv. In some jurisdictions, e.g. China, the state can be a major shareholder in the company, and therefore the issues driving the state (and the state’s involvement in the company’s operations) can differ widely from a normal majority or minority shareholder.
  - c. Diversity
    - i. To respond to global governance demands and complexities, the board of a global company is increasingly looking to diversify the composition of its members with an emphasis on geographic diversity and international experience.

- ii. Having a more diverse board can assist in understanding and approaching the unique issues that frequently arise in global companies operating in different countries with different legal systems and business culture.
- iii. Differing experiences and backgrounds can provide unique insight into the risk oversight issue faced by the board of a global company, which typically includes considerations such as geopolitical risks, regulatory issues, and local compliance issues.
- iv. While diversity of expertise on a board can always be helpful, global companies can particularly benefit if there are particular issues that face such a company.
  - 1. E.g., if a company operates in the defense industry, a particularized knowledge of selling, exporting or importing certain items across borders is especially useful.

d. Evaluation of Contracts

- i. Contracting and fulfillment of contracts can also be a unique challenge to global companies, depending on various jurisdictions' cultural attitude towards contracting and performance, currency stability and remedies for breach.
- ii. As a result, boards of global companies must more carefully review agreements and potential arrangements for particularized risks that may not be as important domestically, e.g. forum for disputes, governing law and mechanisms for enforcement of performance or collecting amounts owed.
- iii. As a result, boards must both have increased sensitivity to such issues (possibly as a result of past relevant experience that was considered in their addition to the board), and also must engage appropriate advisors with an eye towards such issues.

2. What Should Potential Board Members of Global Companies Consider Before Joining the Board?

a. Indemnification and Exculpation

- i. Board members are sometimes the target of litigation in their capacity as board members.
- ii. Different jurisdictions can have different obligations, permissions and limitations with respect to indemnification of board members in their capacity as such (see, e.g., a brief discussion of the *Puda Coal* case below in Item 4).

- iii. Potential board members should know and understand:
  - 1. the company's approach to director indemnification, including with respect to its articles, bylaws;
  - 2. what levels of director and officer insurance the company carries, the levels of coverage and any limitations on coverage;
  - 3. what the local jurisdictions have to say about duties owed by board members of companies that act in their jurisdictions, and local restrictions on indemnification and personal liability of directors of companies that act in their jurisdictions.
- b. Control Procedures for Information
  - i. Boards are the ultimate decision-makers for major issues and the direction of the company, and therefore need to have proper procedures to ensure they are receiving the pertinent information to make such decisions.
  - ii. Potential board members should know and understand what control procedures exist at the company for the evaluation of information and how communication channels work (or don't work).
- c. Due Diligence on the Company and its Board
  - i. Potential board members should have an understanding of the company's business and the markets in which it operates. They should also evaluate their own capability to be present in, and understand the language of, the main jurisdiction of operations if it is outside of the United States (see discussion of the *Puda Coal* case below in Item 4), as the fulfillment of their duties as directors to obtain pertinent information about the company may require as much.
  - ii. Potential board members should also conduct extensive due diligence on the board to make sure that it is the right fit for the potential member.
- 3. What are the Obligations of the Members of the Board of a Global Company? – a Look at the *Puda Coal* Case and Potential Implications.
  - a. In 2013, the Delaware Chancery Court considered the *Puda Coal* case (*In Re Puda Coal, Inc. Stockholders Litigation*, C.A. No. 6476-CS (Del. Ch. Feb. 6, 2013) (Bench Ruling)).
  - b. The case was a shareholder derivative suit that claimed director misappropriation of corporate assets of a Delaware corporation with significant business operations in China, and related to the duty of loyalty of the independent directors of the company.

- c. The Court stated that directors of foreign-based corporations that incorporate in Delaware cannot be “dummy directors” and advised independent directors who oversee companies situated in China that to meet the good-faith standard that they owe as board members, they must:
  - i. “Have [their] physical body in China an awful lot.”
  - ii. Have in place a system of adequate controls and retain accountants and lawyers who are equipped to maintain those controls.
  - iii. Possess “the language skills to navigate the environment in which the company is operating.”
- d. The Court went on to say that, by contrast, the directors cannot simply “sit in [their] home in the U.S. and do a conference call four times a year and discharge [their] duty.”
- e. The Court made clear in *Puda Coal* that the expectations of independent directors for international companies incorporated in Delaware are likely higher than those we see on a regular basis domestically.
- f. While the case was somewhat limited to China under its facts, we must now consider whether other jurisdictions merit similar attention and rigorous fulfillment of duties.