Model behaviour: Good conduct in the boardroom

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November 2017

Introduction

Over many years, directors of companies have developed a variety of unwritten procedures and practices so their meetings can be run in an efficient manner, whilst still accommodating the diverse differences of opinion and articulation of critical analysis which every well-run business should allow.

The ability to voice differences of opinion in the boardroom is of prime importance for directors. In the Dubai International Financial Centre jurisdiction, as in other legal regimes, directors are bound by responsibilities which they cannot neglect, or bypass by delegating to management.

Director's duties

The duties of a director in the DIFC are based on common law principles, but they are also laid out in the DIFC Companies Act:

'a director….., in exercising his powers and discharging his duties, shall:

1. act honestly, in good faith and lawfully, with a view to the best interests of the Company; and
2. exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

For any director to meet the requirements of the law, they must be able to exercise independent judgement and, through participation in meetings of the board, lend the weight of personal analysis and voice to any corporate decision taken in those meetings.

Principles of good governance

In many jurisdictions, consideration has been given by regulators, and by boards themselves, as to how the principles of management of the board, as the principal decision making organ of companies, can be formulated into written codes and procedures. The objective is that chairman and company secretaries will have a reference point in conducting meetings to ensure good corporate governance.

Collectively, directors are able to provide leadership whilst also imposing prudent controls which enable risk to be assessed and managed. The board should set the company's strategic aims, ensure that appropriate resources are in place, and that the company's values and standards are maintained.

Whilst not currently codified in the DIFC, the following principles have universal application and directors would be wise to consider their application in board meetings and committees of the companies they oversee, to ensure their obligations to the company and its shareholders are met.

The importance of meetings of the board

Whether or not the directors are exercising their individual and collective responsibilities to the company can be evidenced by whether or not board meetings are regularly held, how they are conducted and whether the decisions and discussions in those meetings can demonstrate that they are indeed discharging their fiduciary obligations to the company.

From the individual director's standpoint, voicing their opinion can also relieve them of personal liability for disastrous majority decisions, but only if they vote accordingly. So it is important to record objections in the minutes, in appropriate circumstances.

Below we set out some of the highlights of international critical thinking on the management of the board.

Is a written code desirable?

It is a good idea for boards to develop written codes of conduct to enable common ownership of meetings so that every director is aware of the expectations their colleagues have. Copies of the code should be given to each director and the chairman should take the trouble to secure 'buy-in' from all stakeholders.

As noted below, the existence of a written code will also be of great help to the chairman when required to rule on process.

Provision of information

No director can be expected to take important decisions as to the future direction a business should take without being fully informed of the facts. In providing information to directors, management must ensure that:

1. Each director should receive the same information at the same time;
2. Each director should be given sufficient time in which to consider the information; and
3. The board as a whole should allow sufficient time to discuss key decisions.

In one landmark US case, directors were sued successfully for approving an unwise merger deal, without any substantive discussion aside from asking the CEO and the external legal counsel whether the deal was in order and receiving positive responses.

Material decisions require board oversight

Boards should establish criteria to assess materiality of decisions so that management is fully aware of the requirement to obtain board approval prior to committing the company. In doing so, the company can set the parameters and remit of the board's engagement in the business of the company.

For example any contract considered material in the context of the company's day-to-day business, or indeed any contract which is not in the company's ordinary course of business, should be referred to the board for its review and approval, prior to any legal or contractual commitment in respect of that contract taking effect.

Failure by the company to ensure proper process in this manner could lead the directors to be in breach of their legal duties to the company, even in circumstances where the failure of the board to perform their oversight function was due to a failure in process (by not bringing the matter to the attention of the board) rather than a failure of the board itself.

To ensure that a consistent process is formed, terms such as ‘ordinary course of business’, and ‘material’ should be the subject of policy parameters so that management and other employees of the business are as aware as the directors as to when a particular contract or arrangement, to which the company would be bound, crosses that agreed threshold.

Of course, in the case of any uncertainty, it would be safe to assume that any contract requires board approval.

Preparing an agenda

Every meeting of the board should be preceded by an agenda. In order for directors to be forewarned and forearmed of the subject matter of any upcoming meeting, the company secretary, in conjunction with the chairperson of the board, should compile an agenda. Decisions regarding what should, and should not be included as agenda items should ultimately be for the chairperson of the board.

Whilst substantive commercial issues should only be discussed in detail if they have been included in the agenda, the chairperson should always permit any director (or the company secretary) to raise at any board meeting any matter concerning the company’s compliance with the written code, the company’s articles of association or any other legal or regulatory requirement.

Role of the chair

In simple terms, the chairperson’s role is to ensure both the smooth running of the meeting and that the meeting is conducted in an orderly fashion.

A chairperson must control the meeting and preserve order so that it can proceed effectively. The chairperson must act in a fair manner to all participants and their individual interests.

In practice, this means that the chairperson must allow all members a reasonable opportunity to speak, even if there is a clear majority of board members who have made up their mind. In giving time to board members to air their views, the chairperson must ensure that discussions stay on topic so as to ensure discussion which is not relevant to the matter in hand is avoided, if necessary by limiting the time that board members have to speak. Conversely, the chairperson should also protect the speaker from interruption to ensure a fair hearing for all voices. Finally, at the appropriate point in time, the chairperson must decide when a matter should be put to the board for a vote, and to ensure that voting is undertaken in accordance with the provisions laid down in the company’s articles of association and the law.

When the stakes are high tempers can sometimes become frayed and with that in mind the chairman must be prepared to call a board fellow member to order if there is a breach of etiquette or other inappropriate behaviour.

As mentioned above, having clear policies and procedures are a great help to the chairperson. By providing written rules which the members understand, the chairperson can provide clarity when meetings threaten to break down. The chairperson can also prevent misapprehension as to the powers available to participants in a meeting, in turn helping to avoid confusion and disorder.

In the absence of established rules, any difficulty may be overcome by the chairperson exercising common sense, bearing in mind that it is the chairperson's duty to ascertain the views of the meeting and act in a way that complies with statutory duties as a director of the company.

Role of the company secretary

The role of company secretary is of particular importance. The secretary's presence should be pervasive in all meetings of shareholders but also meetings of the board and committees thereof. The company secretary is charged with ensuring and enabling adequate information flows within the board and committees; they act as a conduit between the board and senior management and non-executive directors, as well as advising the board on all governance matters.

In particular, the company secretary is, together with the chairperson, responsible for the proper administration of meetings. To enable the company secretary to fulfil this function he should be present at all meetings. The company secretary should also ensure that minutes are produced for all meetings. Whilst it is not necessary to produce verbatim transcripts of a meeting, it is important that the minutes make an accurate account of the content of the meeting, and particular record key decisions having been properly considered, discussed and approved, including a distillation of the board's reasoning.

The company secretary should circulate the minutes to the board prior to the next board meeting and the opportunity should be given to directors at the next meeting to ask any questions that they may have on the minutes.

Conclusion

In all but the smallest companies, boards cannot take every decision for and on behalf of the company. Indeed, the presence of separate committees such as audit, remuneration and risk management can enable specific areas of the business of the company to be effectively managed. Notwithstanding effective delegation, a board that is cognisant of its responsibilities, has a well understood set of policies and procedures and a chairperson and company secretary who are fully conversant with that framework, will be best placed to discharge its duties and ensure effective leadership and oversight of the company's business.