

Corporate Governance

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Generally the powers of a company are exercised by the board of directors acting as a whole, subject to its articles of association. Usually those powers can only be exercised collectively by resolution at properly constituted board meetings or by written resolution of all the directors. Similarly any delegation of the directors' powers to others can only be authorised in the same way.

Notice of the holding of a board meeting must be given to all the directors. Whilst the directors are usually free to decide how to regulate their meetings and the nature and length of notice, good practice suggests that a notice is accompanied by an agenda so that each director can make an informed decision as to whether to attend.

THE REGULARITY OF BOARD MEETINGS

How often a board meeting should be held will depend on the nature and level of its business activities and the other individual circumstances of a company. Some companies have a more formal management style than others and prefer to have set meetings on a regular basis – maybe weekly, monthly or quarterly. Generally the larger and more publicly accountable a company is the more

it will tend towards the holding of regular, formal board meetings.

Other companies may prefer to have irregular and less formal meetings whenever the business needs of the company require it – for example, whenever they are considering the entry into any material commercial arrangement or when required to do so by third parties (e.g. by a bank on entry into a financing transaction). However, this should be regarded very much as a bare minimum. Board meetings can sometimes be held after the event to ratify entry into certain arrangements entered by individual directors purportedly on the company's behalf. However, that is not always the case due to changing circumstances or personnel, or intervening events such as insolvency. It is always preferable to hold board meetings in advance.

THE LEGAL REQUIREMENT FOR BOARD MINUTES

Jersey companies are obliged by Article 98 of the **Companies (Jersey) Law 1991** (the “Companies Law”) to keep board minutes. A failure to meet this statutory obligation is a criminal offence on the part of the company itself with every director in default.

Minutes generally should be prepared or taken by the company secretary and then approved at the next succeeding meeting before being formally signed by the chairman of the meeting. They should then be placed in the company's minute book. Once signed by the chairman, minutes should not be altered.

Auditors are entitled to inspect board minutes under Article 11 of the Companies Law. Board minutes are not open to inspection by shareholders. They are generally confidential to the directors (and the auditors). But they may be admissible in legal proceedings so considerable care needs to be taken in their preparation.

THE CONTENT OF BOARD MINUTES

Minutes should reflect the conduct of the meeting. They should record the decisions that have been taken and contain a sufficiently detailed summary of the discussions leading to decisions to give an understanding of how and why decisions were made. They need not include a verbatim record of the deliberations leading to those decisions (especially if the decisions were unanimous) but a dissenting minority of directors may want their dissent and the reasons for that dissent recorded in the minutes.

Minutes should record any action points and identify the persons who are responsible for carrying out any action points. They should detail any delegation of the directors powers and identify the persons to whom any authority has been given e.g. to execute agreements and agree amendments to agreements. Copies of any supporting papers, reports and draft agreements should be tabled and attached to the minutes.

The starting point for the production of a set of minutes may be the proposed agenda of the board meeting. Alternatively, draft minutes prepared in advance by the secretary in consultation with lawyers can often act as an 'aide memoire' for the directors to use when holding their board meeting. The directors should, however, take care not to overly rely on pre-prepared draft minutes. Any draft minutes prepared in advance in this way

should be amended to reflect the actual discussion of the directors that takes place.

THE ADVANTAGES OF BOARD MINUTES

The taking of accurate board minutes is important at a number of levels:

- Board minutes, once signed by the chairman of the meeting, are prima facie evidence of the proceedings that they record. They are therefore key to evidencing the directors' decisions on behalf of the Company to enter into transactions and execute documents. A prudent director tasked with carrying out an important function on behalf of the company would want to see his authority confirmed at a board meeting of the company and evidenced by means of the minutes of that meeting. Third parties entering into contractual arrangements with companies also often insist on seeing the relevant board minutes.
- The production of board minutes is evidence that the directors are discharging their statutory fiduciary duties to "act honestly and in good faith with a view to the best interests of the company" and that they are exercising "the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". They may also provide evidence of other specific requirements (for example, financial) being met, particularly on a subsequent insolvency.
- Directors of Jersey companies are under a statutory duty to disclose interests in transactions into which the company has entered or proposes to enter into and which materially conflicts or might conflict with the interests of the company. The general rule is that these interests must be declared at the first board meeting after the director in question becomes aware of the interest and the declaration must be recorded in the minutes of that meeting. Minutes are therefore evidence of the directors' compliance with the law in this regard.

- Well-kept minutes will be an asset on any due diligence enquiries carried out by third parties on, for example, a sale or a listing of a company or on insolvency by a liquidator etc.

The credit crunch has refocused many directors and investors minds on corporate governance. The regular holding and minuting of board meetings makes a critical contribution to good corporate governance.

Should you have any questions or requests for further information, please contact:

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