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Drafting Board Minutes: Best Practice

It is essential that company directors ensure that minutes are kept of all board meetings in order to comply with requirements set out in the Companies Act 2014. This note details these statutory requirements and highlights best practice to be adopted when drafting board minutes.

Introduction

Provisions with regard to proceedings of directors are set out in Chapter 4 of Part 4 of the Companies Act 2014 (the "Act"). All companies are required to keep minutes of the meetings of their directors. This is what is known as a "mandatory" provision of the Act, meaning that a company cannot deviate from this requirement by providing otherwise in its constitution.

However, certain other provisions relating to the conduct of directors' meetings are "optional" provisions, meaning that a company can choose to disapply or modify such provisions in its constitution. An example of an optional provision in this regard is section 160(2) of the Act which provides that decisions taken at a meeting of the directors must be decided by way of a majority of votes. A company is free to modify this in its constitution to stipulate alternative procedures by which decisions must be taken at board meetings. Therefore, it is important to have regard to both the provisions of the Act and the constitution of the company when dealing with any matters concerning directors' meetings.

Note that the rules and guidance in relation to the minutes of directors' meetings apply equally to minutes of meetings of any committee of the directors.

How should minutes of proceedings of directors be kept?

Minutes of directors' meetings must be kept in books held for that purpose and must be written up as soon as possible after the meeting/resolution concerned.

Board minutes need not necessarily be kept in a bound minute book and can be recorded "by some other means". If they are kept in another form, adequate precautions must be taken for guarding against falsification and facilitating the discovery of such falsification. The initialling of each page by the chairman would be a usual precaution in this regard.

Minute books may be held electronically, so long as the minutes are capable of being reproduced in legible form. The Act clarifies that minutes can be kept by way of cloud computing service, even where the server operating the service is located outside the State.

Inspection of minutes

It is important that minutes of directors' meetings and of shareholders' meetings are kept separately as the persons allowed to inspect each type of minutes are different. In the case of directors' minutes, a director is entitled to inspect the books and to take copies of the contents thereof. Minutes of

shareholders' meetings can be viewed by the members of the company, who may also take copies of such minutes.

A company should bear in mind that it may be required to produce its minute books to the ODCE for inspection.

What should board minutes record?

At the very least, the Act provides that minutes of directors' meetings must record:

- (a) All appointments of officers made by the directors
- (b) The names of the directors present at each meeting
- (c) All resolutions and proceedings at each meeting

Strictly speaking, minutes should only record decisions and the items set out at (a) – (c) above. However, it is quite common in the case of directors' meetings that they would record some element of the discussions taking place surrounding the issues as well as recording the decisions.

Standard items set out in board minutes include:

A statement as to who is present and who is in attendance. The convention is that directors and the secretary of the company are listed as being "present" and any other parties who are at the meeting are listed as being "in attendance". It is good practice to record in the minutes all of those who were present or in attendance and as mentioned above, the names of all directors present must be recorded in accordance with the Act. If persons are present by proxy or by way of alternate it is useful to recite the name of the proxy or alternate and who they are attending for. It is usual also to record apologies received for non-attendance. If a director is not present for part of the meeting, it is good practice to record this.

Location. Board meetings can take place over the telephone or by other audio visual means, provided that all persons participating in the meeting can hear each other. This is confirmed by the Act and so no longer needs to be explicitly provided for in the constitution of a company. Where a board meeting is held electronically, unless the constitution provides otherwise, the meeting will be deemed to take place:

- (a) where the largest group of those participating in the conference is assembled;
- (b) if there is no such group, where the chairperson of the meeting then is;
- (c) if neither subparagraph (a) or (b) applies, in such location as the meeting itself decides.

Chairman of the meeting. It is typical to state at the outset of the minutes the identity of the person who chaired the meeting. Usually this will be the duly elected chairman of the board but if he/she is not present within fifteen minutes of the time appointed for the meeting, the directors present are to elect one of their number to be chairman of the meeting, unless the constitution provides otherwise.

Declaration of interest. It is not unusual to see at the outset of a set of directors' minutes a declaration under section 231 of the Act. This section provides that a director who is directly or indirectly interested in a contract or proposed contract with the company must declare the nature of that interest. The declaration should be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration and so it is an important part of the formalities of a meeting. It is possible for a director to give a general declaration that he/she is a member of a particular company or is connected with a particular person for these purposes. The Act clarifies that the requirement to declare an interest does not apply to an interest that could not reasonably be regarded as likely to give rise to a conflict of interest. In addition, contracts entered into by directors with employees of their company are beyond the scope of the provision.

If there is a declaration of interest, it must be entered into specific books of the company kept for recording these declarations within 3 days. It should be determined whether the director who has declared an interest is entitled to actually vote on the contract. The Act states that a director may vote in respect of a contract, appointment or arrangement in which he or she is interested. However, this is an optional provision and accordingly the constitution of the company should be examined to determine whether it has been disapplied or modified. In addition, a director of a company limited by guarantee (CLG) or a PLC may not vote on such a contract.

Quorum. The general rule is that no business may be conducted at a meeting of the board of directors unless there is a quorum present. The Act provides that the quorum for a directors' meeting is two (unless the directors otherwise decide). In the case of a single director company, the quorum will be one. The constitution of the company may provide for a different quorum for directors' meetings.

Where the number of directors falls below the number required for a quorum, the Act allows the remaining directors to continue to act, but only for the purpose of increasing the number of directors or summoning a general meeting of the company.

Drafting and signing of minutes

Draft minutes should be circulated to attendees as soon as possible after the meeting and be clearly marked as draft. It is good practice to review technical content by specialist functions or executives. It is not normally appropriate to alter the original minute but it may be possible to add a post-meeting note, particularly to correct erroneous information quoted at the meeting. Under no circumstances should the minutes be altered to re-engineer the meeting to reflect post-meeting events. The draft minutes should be approved at the next board meeting.

The minutes should be signed by the person who chaired the meeting or the chairman of the subsequent meeting. The Act provides that a minute so signed is evidence of the proceedings.

Written resolution in lieu of meeting

The Act provides that a resolution in writing signed by all the directors of a company (or all the members of a committee of directors), who are entitled to receive notice of directors' meetings, will be valid as if it had been passed at a physical meeting duly convened and held. Directors who are not permitted to vote on the particular matter should not sign: instead, the resolution should state the names of any non-signing directors and the basis on which they did not sign.

The provision of the Act which permits written resolutions in lieu of meetings is an optional provision and so may be disapplied or modified in the constitution of the company.

Penalties

Failure to keep minutes as required under the Act is a category 4 offence for the company and any officer in default (i.e. directors and the secretary). The penalty for this on summary conviction is a maximum fine of €5,000.

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