MINUTES OF THE MEETING

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1. Introduction

Replying to correspondence which had passed regarding the failure of an organization to keep minutes, Stephen Cole of Biblios Pty Ltd, of Western Australia, wrote as follows:

“I do think that, if it hasn’t been a practice until now, you ought to institute the taking of minutes at your meetings. Quite apart from the fact that it can actually make things easier for you, you might just be making history here.

That being the case, posterity would love to be privy to your deliberations. If you’re concerned about encroachment on your freedom of frank expression (your ability to float silly ideas or to get stuck into someone when they’re not around, etc) that’s what corridors are for.”

2. South Africa

After the board meeting, it is the duty of the company secretary to ensure that the minutes of the meeting are prepared and circulated to the directors and pasted in the company's bound, numbered minute book within one month of the date on which the meeting was held (§ 204)[1]. Minutes generally record the decisions that were taken at the meeting with, if appropriate, some recording of the arguments that preceded the passing of a particular resolution, particularly where a matter has been intensely debated and there were strong opposing views.

For easy reference, an index to major resolutions may be kept in the minute book and updated with the subject and page number simultaneously with the minutes being pasted into the minute book - this is not, however, a statutory requirement. The correction of minutes may be effected either by altering the copy of the minutes appearing in the minute book (where the corrections are relatively minor) or by passing a resolution to deal with the corrections at the next meeting.

Apart from the corrections mentioned here, the minutes may not be altered in any manner after their approval. Any corrections that may subsequently become necessary must be dealt with by way of a resolution. It is considered improper practice for the chairman to sign the minutes where they have not been inserted in the minute book as prescribed by the Act.

Any change in the board of directors must be notified to the Registrar on the prescribed form (Form CM 29) within the prescribed time period (i.e. 28 days

[1] The Companies Act of the Republic of South Africa, Act No 61 of 1973, as amended (“the Act”)

after the appointment). Likewise, if a special resolution was passed at the meeting, a copy thereof must be lodged with the Registrar within one month of the date of the meeting.[2]

3. Corporate Minute Taking (in the United States of America): A General Counsel's Guide[3]

The post-Sarbanes-Oxley environment calls upon governing boards to place renewed emphasis on the proper role of corporate minutes as a record of organizational and board conduct. Indeed, the recently concluded Disney shareholder derivative litigation is the latest in a series of [Delaware] cases in which the state of corporate minutes played an important role in the court's decision.

While experts may disagree on the most appropriate style for minutes (e.g., "comprehensive" v. "minimalist"), there is virtually no disagreement on the Importance attributed to an effective minute-taking process. It is becoming increasingly clear that properly prepared corporate minutes can provide the organization and its board members with meaningful protection against certain liabilities, while inadequate minutes increase legal exposure. Given the regulatory pressures of corporate responsibility, traditional approaches to minute-taking may no longer be sufficient to serve the interests of the organization and the board.

Specifically, this renewed emphasis is likely to require a substantially increased role for both the general counsel in the minute-taking process and individual board members in the review and approval of draft minutes.

The goal of this discussion is to guide corporate general counsel as they advise executive leadership and the board on an updated, effective minute-taking process.

The Role of Minutes

How Minutes Can Help

The fundamental role of corporate minutes is to preserve an accurate and official record of the proceedings of a board or committee meeting. Well-kept corporate minutes serve as a record of corporate decisions, reflect director dissent where appropriate, offer guidance for future board action, serve as a valuable source of contemporaneous evidence in regulatory or judicial proceedings and reduce misunderstanding as to the intent of the board. Corporate minutes can document compliance by board and committee members with their fiduciary obligations. Furthermore, the maintenance of accurate, thorough corporate minutes is

[2] Ramani Naidoo *Corporate Governance*
[3] McDermott Will & Emery, Chicago

consistent with the Sarbanes-Oxley emphasis on greater accountability and disclosure.

How Minutes Can Hurt

Poorly kept corporate minutes deny the board a potentially dispositive resource from which to defend their conduct or to explain the full nature of a board decision. In addition, regulators and other plaintiffs will seek access to corporate minutes to bolster their arguments, and courts themselves will give substantial credence to the contents of minutes. Recent developments offer painful examples of the cost attributed to potential consequences of incomplete or insufficiently prepared minutes.

For example, the perceived limitations of the Disney Compensation Committee minutes (e.g., brevity, inconsistency with the subsequent recollection of Disney officers) played a major role in the ability of the plaintiffs to withstand a motion to dismiss and to proceed to trial. In addition, in the New York attorney general's challenge to the compensation of the former New York Stock Exchange, Inco's chief executive officer (CEO), a close review of board and compensation committee minutes served as a primary basis for the breach of fiduciary duty allegations. Similarly, much of the bankruptcy examiner's criticism of the WorldCom board of directors and its inattentiveness concerning corporate affairs was based upon its review of corporate minutes and similar records. In these and other high-profile cases, corporate minutes have provided damaging evidence of (or created unfavorable inferences concerning) breach of fiduciary duty and/or created confusion or misunderstanding concerning the intentions of the board.

Suggested Approach

In re-evaluating the sufficiency of its minute-taking process, the corporation's board and its general counsel may wish to consider the following approach.

Remember the Purpose

Well-prepared corporate minutes record principal actions taken at board and committee meetings. When well prepared, minutes can achieve the collateral purposes of reducing the board's liability profile and assisting director recruitment and retention efforts.

Practice Suggestion: Schedule a special educational session at an upcoming meeting to brief the board on the renewed importance of the minute-taking process and specific changes in board practices that may be required in response.

Length

While the fundamental purposes of minute-taking can be achieved by a "minimalist" approach, greater benefits are likely to be achieved by means of detail and elaboration. This does not mean minutes should be a "virtual transcript," but rather an elongated approach is more likely to establish the prudence and clarity of the decision-making process. After all, the very meaning of "minutes" infers a document that is a summarized record of actual events. A willingness to be expansive allows the scrivener to better reflect both the "flow" and "spirit" of the meeting, spending more time describing the discussion of more significant agenda items.

Practice Suggestion: Avoid artificial, officer-mandated limitations on the length of minutes, adopted primarily to facilitate "easy" director review. The length of the minutes should bear a direct relationship to the importance of the meeting agenda.

Reflecting Business Judgment

Demonstrate compliance with fiduciary obligations within the minutes by incorporating (i) the substance and tenor of the deliberations, (ii) an identification of the general amount of time spent on a particular issue In order to reflect the related level of attention provided by the board, (iii) a recitation of the material presented to the board for its review and (iv) confirmation (where accurate) the board received the material in advance of the meeting. Especially given the Disney court's focus on conduct of individual directors, each of these are matters in which each director will have an Interest in establishing an adequate record.

Practice Suggestions:

*Record the starting and concluding time of the meeting and the time spent by the board on each substantive item on the agenda to better emphasize the proportionate attention spent on material Items.
*Don't attempt to reflect all of the questions raised by board members in the context of a meeting but rather emphasize broadly the Involvement and "constructive skepticism" of board members (e.g., "a discussion [of 10 minutes] followed the chief financial officer's presentation").
*Note for the record where material that is the subject of discussion was distributed to the board in advance of the meeting and by what time.

Basic Features

Regardless of the subject matter discussed at a meeting, certain fundamental matters should always be reflected in the minutes: (i) the meeting date, time, duration and location; (ii) the nature (regular or special) of the meeting; (iii) a list of participants, separating officers and directors from Invited staff, advisors and

guests and those absent; (iv) presence (or lack of presence) of a quorum; (v) the names of all individuals making specific presentations; (vi) a list of all material distributed at the meeting; (vii) the general items of discussion, which may be satisfied by attaching a copy of the agenda and noting any deviation from it and (viii) confirmation of all action taken, Including adoption of resolutions.

Practice Suggestions:

*Be careful to explicitly reference (in the text or by footnote) the title of written and audio/Visual (e.g., PowerPoint) presentations made during the meeting, particularly as they may relate to a decision upon which the board is expected to render.
*Regardless of whether they are actually In attendance at the meeting, the minutes should reflect the names of all professionals and consultants who provided advice to the corporation on a matter presented to the board for consideration, including the nature and form of that advice.

Specific Decisions

Minutes should reflect the specific decisions taken at the meeting, whether they involved a decision to take action or not to take action. If necessary for compliance or fiduciary duty purposes, the minutes should reflect those specific factors that were material to the board's decision. In this regard, it may often be useful to record the board's consideration of advantages and disadvantages of, and alternatives to, a specific proposal.

Practice Suggestion: In relating specific decisions, be sure to acknowledge debate, e.g., "The chief financial officer identified the various assumptions on which her projections were based, and a discussion followed."

Recording Conflicts, Dissents and Abstentions

Minutes should reflect those directors who refrain from voting or participating in the discussion due to identified conflicts of interest, as it is vitally important to establish the disinterested nature of any board action. In addition, the current liability environment suggests accommodating the interests of individual directors who wish their dissenting vote or abstention be reflected for the record.

Practice Suggestion: An example of Identifying disinterest or dissent is "Director X was excused from participating in both the discussion of, and vote on, the matter. Directors Y and Z voted against the motion."

Attorney-Client Privilege

Those portions of board meetings devoted to discussion of attorney-client privileged matters should be noted as such In the minutes without further

elaboration, other than confirmation that the privileged discussion was conducted in the presence of counsel. If more elaborate minutes of privileged discussions are needed, they should be memorialized in separate minutes marked "Confidential-Attorney-Client Privileged," and kept apart from other minutes in a secure and confidential location.

Practice Suggestion: In referencing attorney-client privilege, specific language should be used, e.g., "Legal counsel for the corporation, John Doe, Esq., provided legal advice to the board concerning the proposal followed by a discussion between the board and counsel. Counsel Informed the board that this portion of the meeting was subject to the attorney-client privilege" or, alternatively, "A privileged discussion between the board and legal counsel for the corporation, John Doe, Esq., then occurred and for which separate privileged minutes were taken."

Key Committees

Particular attention to accurate minute-taking should be made for proceedings of committees with specific regulatory importance, such as audit, compliance and executive compensation. Minutes provide an opportunity to confirm, where appropriate, the consistency of committee action with "best practices" and satisfaction of regulatory "safe harbors" (e.g., the compensation committee and the "rebuttable presumption of reasonableness").

Practice Suggestions:

*Committee charters should specify that meeting minutes are to be taken.
*A process should be adopted for distribution of minutes outside of the committee upon request.

Executive Session

Increasingly popular as a "best practice," it may be unnecessary to take detailed minutes of executive sessions as long as some written record Is kept confirming the session was held, Its participants and the date, time, location and duration of the meeting.

Practice Suggestion: The general counselor, if not Invited, the board chair/lead independent director may choose to take notes of discussion topics, an oral summary (or portions) of which may subsequently be shared with the chief executive officer.

Secretary and Directors' Notes

Ideally, the minutes should be the only record of the board or committee meeting. While directors may wish to take notes regarding the meeting to which they can

refer when subsequently reviewing the draft minutes, there are liability risks associated with such practice. Rather, the director may prudently choose to rely on minutes taken by a neutral, trained party, which are more likely to represent an accurate and complete record of meeting activity.

Practice Suggestions:

*Directors need not retain any meeting notes after reviewing and approving the formal minutes of that meeting. Avoid tape recording meetings as a means of facilitating the drafting of minutes.

The Review Process

The Board must make a bona fide effort to promptly review and approve draft minutes. This is likely to require a change in practice by many directors. Excessive editing by management should be discouraged to avoid any suggestion of a lack of integrity in the minutes.

Practice Suggestion: The CEO should join with the general counsel in explaining to the board the benefits to the corporation and to the individual directors of ascribing greater attention to the review and approval of draft minutes.

The Role of the Scrivener

Minute-taking has evolved from a ministerial practice to more of an "art form." Given the significance attributed to minutes by all of the participants in the governance process, it is important the process is overseen by an individual with strong familiarity with applicable governance practices and legal principles. This person must have the expertise to recognize nuances of the discussion, the credibility to suspend a particular discussion to ask for clarification and the authority to assure the accuracy of the final minutes and their consistency with related corporate disclosures. This suggests a much more active role for the general counsel in the minute-taking process.

Practice Suggestion: Oversight of the minute-taking process offers yet another powerful argument for always inviting the general counsel to attend board and key committee meetings.

In the post-Sarbanes environment, a thorough, accurate corporate minute-taking process provides substantial benefits to the corporation and its governing board. Corporate minutes cannot compensate for improper, inattentive or deficient board behavior; therefore, a close review and refinement of existing board processes is highly recommended.

4. Don't Let the Minutes Go By![4] (in the United States of America)

More and more, Courts (around the world) are taking hard looks at the Minutes of Director and Committee Meetings to determine whether actions taken by directors are consistent with corporate law and the fiduciary duties owed by directors to the corporation. Thus, boards of directors should take a fresh look at how their decision-making process is described in corporate minutes to ensure that the minutes will permit the directors to defend the actions taken in the boardroom, as well as to demonstrate that the directors have performed their oversight duties with appropriate care. Set out hereunder is the recent US case law and investigations focusing on the contents of board and committee minutes to evaluate the conduct of board members. These cases fall into two broad areas, namely, compensation decisions and the defense of federal securities law claims. They are followed by the lessons learned from these cases in an effort to provide guidance to board members, legal advisers and corporate secretaries on the preparation of minutes.

COMPENSATION AND EMPLOYMENT DECISIONS:

'DISNEY'

In the recent Walt Disney derivative litigation (*In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003)) plaintiffs challenged the compensation and severance paid to Disney's former president, Michael Ovitz. The Delaware Court of Chancery held that the plaintiff shareholders sufficiently stated a cause of action that Disney's Board of Directors and Compensation Committee failed to adequately investigate, oversee and become informed about the details of the original employment agreement provided to Ovitz. (See, Id. at 278.) The court also found that the directors should have, among other things, evaluated a "non-fault" termination provision that was later added to Ovitz's employment agreement, which provision resulted in a payout of more than $140 million to Ovitz after only one year of employment. (Id. at 289.)

The court reviewed the minutes of Disney's Compensation Committee and Board of Directors meetings, which had been provided to plaintiff's counsel pursuant to a books and records demand. (See, Del.Code Ann. Tit. 8 §220.) In upholding the claim, the court placed emphasis on the following: 1) that the proposal to the Compensation Committee did not Include detailed information as to the provisions of Ovitz's employment; 2) that the Committee got "sidetracked" by the issue of a fee paid to one of the members of the Board for securing Ovitz's employment; and 3) that the Committee did not retain a compensation expert to provide Industry comparisons to the Board. (*Walt Disney*, 825 A.2d at 280.) The court further stated that: "(t)he minutes of the meeting were fifteen pages long, but only a page and a half covered Ovtiz's possible employment," and the Board

[4] Saul Ewing LLP, Philadelphia

appointed Ovitz without asking "any questions about the details of (his) salary, stock options, or possible termination." (Id. at 281.)

‘COGAN’

The Pereira *v. Cogan*, 294 B.R. 449 (S.D.N.Y. 2003), case was similar to *Disney*, except that the decision followed a trial on the merits. The court upheld various claims by a Chapter 7 trustee against a former chief executive officer, officers and directors of the corporation. The court held, among other things, that the director defendants were liable for the payment of excessive compensation that was provided to the chief executive officer, Marshall Cogan, and that the approval of that compensation was a breach of the directors' fiduciary duties.

Based upon a review of the minutes of the board meeting, the court found that when the Board ratified Cogan's unilaterally increased compensation in 1992, the directors appeared to be entirely unaware of the amount of such compensation. (Id. at 475.) In particular, the court stated that there was "no evidence regarding any discussions of Cogan's compensation, nor any evidence that the Board members were aware of Cogan's compensation." (Id. at 475.) Also, when the Board later retroactively ratified Cogan's compensation for 1998 to 1994, "there (was) no agreement on what level of compensation the Compensation Committee or the Board believed they were ratifying." (Id. at 477.)

GRASSO COMPENSATION

One of the most publicized disputes regarding director compensation was addressed in a lengthy report prepared by legal counsel for the New York Stock Exchange (NYSE). The report is the result of a detailed internal investigation into the compensation of Richard Grasso during his tenure as the chairman and chief executive officer of the NYSE, which found that Grasso received up to $156.7 million in excessive compensation and benefits. (Report to the New York Stock Exchange on Investigation Relating to the Compensation of Richard A. Grasso, Dec.15, 2003, at 2.)

In addition to criticizing Grasso, the report examined and criticized the actions of the NYSE Compensation Committee. The report concluded that: "Grasso's excessive compensation and benefits were the product of multiple flaws in the compensation and benefits process employed by the NYSE." (Id. at 3.) After extensively considering the content of several compensation committee and board meetings, based upon a review of the minutes of such meetings, the report concluded that the committee: 1) failed to "examine and consider the level of Grasso's (supplemental executive retirement plan) benefits accumulating when making its compensation decisions"; 2) used an "inappropriate comparator group for benchmarking Grasso's compensation levels"; and 3) employed consultants who "did not have the appropriate level of Involvement in, or Input regarding, the compensation and benefits process." (Id. at 3-4.)

SECURITIES LITIGATION DECISIONS

'ENRON'

In the class action litigation *Newby v. Enron Corp*., 258 F. Supp.2d 576 (S.D. Tex. 2003), the class plaintiff alleged that the outside directors of Enron engaged in fraud because they failed to disclose, and recklessly approved, "the fraudulent transactions, conflicts of interest and deceptive accounting practices (that) were at the center of the fraud." (Id. at 611.) The court granted the outside director defendants' motion to dismiss with regard to these fraud claims arising under §§10(b) and 20A of the federal securities laws. (Id. at 638-39.)

The court utilized the Board and committee meeting minutes to demonstrate that the outside directors were unaware of the alleged fraudulent acts that were taking place and being approved, noting that the "references in the (board and committee meeting) minutes ... are merely brief allusions or lists of topics ... but no particular facts or details about the presentation or discussion indicate that ... their resolutions as members of the board or committees were intended to further fraud." (Id. at 627-28.) The court also used these minutes to hold that the outside directors acted "in reasonable reliance on opinions of legal and accounting experts (such as Arthur Andersen) whose opinions they had no reason to question," and that "(even a strong inference of negligence, which requires a much lower showing than severe recklessness, is negated by reliance on outside auditors' accounting." (Id. at 617-20.) Together, these conclusions helped to support the court's dismissal of the fraud claims against the outside directors.

'ARNLUND'

In contrast to the *Enron* decision, the opinion in *Arnlund v. Smith*, 210 F. Supp.2d 755 (E.D. Va. 2002), demonstrates that meeting minutes that are inconsistent with public disclosures can subject directors to potential liability. In *Arnlund*, Investors alleged that the directors of Heilig-Meyers Co. committed federal securities fraud by making certain misrepresentations and omitting certain information regarding the financial condition of the company in the May 30, 2000 annual report. (Id. at 762.) The court held that plaintiffs sufficiently pled facts supporting the allegation that the statements regarding the financial condition of the company were made by the director defendants, who knew that they were false, had no reasonable grounds for the belief that the statements were true or knew facts that undermined grounds for that belief that they were true. (Id. at 765.)

Upon a review of the allegations, the court noted that "Plaintiffs do more than rely on a change in the Company's position to infer fraud; they set out in painstaking detail when Defendants were made aware of material information, based on the Company's own meeting minutes." (Id.) Thus, the court held that the complaint

sufficiently stated a claim under §10(b) and Rule 10b-5 of the federal securities laws, and denied the defendants' motion to dismiss.

GUIDELINES: WHAT TO INCLUDE IN THE MINUTES

Minutes should by no means set forth a transcript of the statements made during board of directors or committee meetings. Indeed, by the Oxford English Dictionary's definition, minutes constitute "a summarized record of the points discussed at a meeting." However, recent litigation described in this article demonstrates the importance of minutes that clearly set forth the decisions made by a board of directors or board committee, and the basis for those decisions. While each board and board committee should have significant latitude in the amount of detail to include in the minutes of its meetings, these cases demonstrate the need to consider the following five guidelines in preparing minutes:

1. The minutes should clearly identify the decisions made by the board or board committee, either through a resolution or statement within the document;

2. The minutes should set forth the Identity of experts, such as accountants, attorneys or compensation consultants, who provided advice to the board of directors, and a summary of the advice provided to the board;

3. The minutes should refer to handouts or other materials that were distributed to directors or committee members, stating whether such documents were distributed in advance of the meeting. Copies of the documents should be filed with the minutes in the corporate records books by the corporate secretary;

4. The minutes do not need to include a recitation of all questions asked or answers given by persons attending the board meeting. Instead, it should be sufficient to note that, following discussion of the matter, the board took action; and

5. The minutes should be consistent with the company's public statements.

If these five guidelines are followed, the potential liability of directors can be reduced.

5. <u>Disclaimer</u>

What is herein set out is of a general nature and is not intended to address the needs or requirements of any particular person or body. Readers are advised not to act upon such information, opinion or comment without first obtaining professional advice directed to their specific needs and circumstances. Whilst

every effort is made to ensure that the accuracy and currency of the information, opinions and comments contained herein, we make no representation or warranty, express or implied, with respect to the correctness, accuracy or completeness of the information, opinions and comments. We will not be responsible for updating, modifying or amending the information on a regular basis or for informing any person or body if such information subsequently becomes inaccurate. Any representation or opinion is provided for information purposes only.

6. <u>Closing</u>

I am grateful to Ramani Naidoo, McDermott Will & Emery and Saul Ewing LLP for the aforegoing which I trust will prove to be of considerable benefit to all of those who receive this article. Please do not hesitate to communicate with me to discuss any aspect of the aforegoing should you so wish.

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