

COMPANY & COMMERCIAL PRACTICE

26TH JUNE 2019

MARKING SCHEME

General Guidance for the Award of Marks

1. Statement of Principle, sections of the Companies Act, 1963, case law and practice
2. Students should state the applicable legal principles clearly, cite applicable statutory basis and provide case law authority.
3. 15% marks should be awarded for the following:
 - i. *Grammar, syntax and style: choice of words, use of words and tenses, spelling, punctuation, sentence structure – 5% marks*

Presentation: clarity of thought, simplicity and clarity of expression. (i.e. Concise and precise/ logical presentation) – 10% marks

QUESTION 1

Candidate should have an understanding of what corporate governance is. That is:

- A system of administering a body corporate, adhering to the tenets of accountability, disclosure, transparency, fairness, integrity and reporting to the owners.
- A candidate must demonstrate appreciation for the fiduciary relationship between directors and the company and the other duties of directors to further the business of the company, avoid conflict of interest in contracts with the company, act in what they believe to be in the best interest of the company as a whole which includes the interest of shareholders, employees and in some cases creditors.
- directors must not make use of company property or information without the consent of the company.

- Directors are required to account to the shareholders annually at the Annual General Meeting.
- Corporate power is distributed among the directors and shareholders both acting through officers. Sections 137,138
- Section 56 of the Banks and Specialised Deposit Taking Institutions Act 2016 give the Bank of Ghana the power to prescribe rules regarding any matter of corporate governance of a bank, specialised deposit-taking institution or financial holding company .
- Bank of Ghana's corporate governance guidelines stress independent directors, audit committee and risk management committee.

Candidate should take a position in support or against the above statement and then justify whatever position they take. The discussion should raise issues such as:

-Distribution of Corporate Power section 137

- effective committees of the board, such as audit and finance committee, governance committees etc.

- corporate governance sections 137,139,200.

-Reference should be made to the Securities Exchange Commission guidelines on corporate governance and Bank of Ghana's guidelines. Both require independent directors, audit committees and avoidance of conflict of interest.

A candidate who agrees with the statement should come to the conclusion that the Companies Act provides a lot in terms of duties of directors and governance that should companies comply with them they should not fail. The Act deals with accountability, transparency, integrity, among others. This is supported by the Banks and Specialised Deposit Taking Institutions Act.

A candidate who disagrees may conclude that the existing legislation is not enough and may go ahead to state why.

QUESTION 2

- Draft the minutes for the meeting

NEHO COMPANY LIMITED

MINUTES OF THE BOARD OF DIRECTORS' MEETING HELD ON TUESDAY 12TH
JUNE 2018 AT THE AKUABA CONFERENCE ROOM, ACCRA HOTEL

PRESENT

Mr. David K. James	-	Chairperson
Mrs. Gyasi	-	Managing Director
Mrs. Ama Mensah	-	Director
Dr. JKG Gray	-	Director
Mr. John Frimpong	-	Director
Prof. James Benson	-	Director
Mr. Ampofo	-	Director
Mr. Amponsah	-	Director (From minute 5 only)

ABSENT

Mr. Lee	-	Director
Mrs. Lee	-	Director

IN ATTENDANCE

Mr. Joe Aggrey	-	Accountant
Mr. XXX	-	Company Secretary

1. OPENING

1.1 The meeting was declared open at 10:02 am.

2. APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING HELD ON 21ST JANUARY 2018

2.1 The Board having received and considered the Minutes of the previous meeting held on 21st January 2018 (the Minutes), resolved that the Minutes be entered into the Minutes book. The Chairman signed the minutes subject to the following corrections:

- a. Page 1, paragraph 2 – Replace "mangment" with "management";
- b. Page 3, paragraph 4 – Insert full stop after "report";
- c. Page 4 – Replace "Bieson" with "Benson".

3. MATTERS ARISING OUT OF THE MINUTES OF THE PREVIOUS MEETING HELD ON 21ST JANUARY 2018

3.1 The Board took note of the matters which arose out of the Minutes of the previous meeting as presented by the Managing Director on the headings stated below:

3.1.1 Operational Report

- a. The format for presenting the operational report had been changed as directed by the Board.
- b. Management ensured that the Board received the Board papers in advance.

4. SECOND QUARTER FINANCIAL REPORT

- 4.1 The Board considered and approved the 2nd Quarter Financial Report as presented by the Accountant.
- 4.2 The Board noted that the administrative expenses amounted to GH¢500,000.00 and losses for the quarter amounted to GH¢300,000.00.
- 4.3 The Board noted the need for the Company to obtain a loan of GH¢300,000.00 from BEK Commercial Bank.

5. OPERATIONAL REPORT

- 5.1 The Board noted that the Company had introduced new products onto the market and had also begun selling smaller bottles since they were more popular than bigger bottles.

6. BUDGET

- 6.1 The Board received, considered and approved the Budget for 2018 as presented by the Managing Director. The highlights were as follows:
 - a. Operating income for the year 2017 was GH¢21,130,897 as against GH¢21,570,298 2018;
 - b. Impairment charge on financial assets for the year 2017 was GH¢392,062 as against GH¢43,184.00 for the year 2018;
 - c. Profit before tax for the year 2017 was GH¢10,882 as against GH¢260,590 for 2018;
 - d. Staff cost for 2017 was GH¢160,978.85 as against GH¢287,984 for 2018;
 - e. Directors' fees for 2017 was GH¢19,957.60 as against GH¢21,000 for 2018;
 - f. Bad debt written off for 2017 was GH¢19,957.60 as against GH¢21,000 for 2018.

7. ANY OTHER BUSINESS

- 7.1 It was resolved that:

Account Opening

a. A Ghana Cedi current account be opened at BEK Commercial Bank Limited with the Managing Director and the Accountant as Joint signatories;

Bank Loan

b. A loan of GH¢300,000.00 be obtained from BEK Commercial Bank Limited to pay salaries.

8. CLOSING

8.1 The meeting came to an end at 4 p.m.

.....
CHAIRPERSON

.....
SECRETARY

NB.

The draft minutes are **only a guide**. Styles may differ but should not be substantially different.

Candidates should draft the minutes in such a way that one can use any of the following words to describe them:

- Concise
- Summary of essentials
- Precise
- A record of decisions

(18 marks)

b. Extract the relevant resolutions (7 marks)

NEHO COMPANY LIMITED

EXTRACT FROM THE MINUTES OF THE BOARD OF DIRECTORS
MEETING HELD ON.....

IT WAS RESOLVED THAT:

ACCOUNT OPENING

1. A GHANA CEDI CURRENT ACCOUNT BE OPENED AT BEK COMMERCIAL BANK WITH THE MANAGING DIRECTOR AND ACCOUNTANT AS JOINT SIGNATORIES.

LOAN

1. THAT A LOAN FACILITY OF GH¢300,000.00 BE OBTAINED FROM BEK COMMERCIAL BANK TO PAY SALARIES.

DATED IN ACCRA THIS DAY OF, 2018

.....
CHAIRMAN

.....
SECRETARY

QUESTION 3

Candidate should have an understanding of the process of registering a company's immovable property as security for a lending transaction in Ghana. That is:

1. Charges created by companies in Ghana are required to be registered at the companies' registry within 28 days after the date of its creation (Section 107)
 - An unregistered charge is void as security and all moneys secured by the charge become immediately repayable.
 - Registration of a charge constitutes actual notice of the existence of the charge.
 - Where parties fail to register a charge after 28 days, an interested party can apply to the High Court under section 115 of the Companies Act.
2. All charges related to transactions in Ghana are required to be registered at the Collateral Registry within 28 days of creation. Borrowers and Lenders Act 2008 (Act 773). Failure to register under the Act makes the security void.
 - Mortgages are required to be registered at the Land Title Registry in respect of registered land and at the Deeds Registry in respect of unregistered land. (Mortgages Act 1972(NRCD 96), Land Title Registration Act, 1986 (PNDCCL 152). Failure to register renders the security void.

Candidates may make points such as the following:
A number of concerns arise from the requirement to deal with three state institutions for the purpose of registering a security. The process may be cumbersome and discourage investors. One would have thought that for the purpose of promoting investment registration with one institution should constitute registration with other state agencies. This is a solution which could have been provided by the latest of the laws; Borrowers and Lenders Act (Act 793) but unfortunately it does not. In effect a mortgage for one loan transaction must be declared valid three times by three different institutions and three different laws. This leaves much to be desired.

A candidate may on the other hand argue in support of the state of affairs and should earn the same marks depending on the justification. **25 marks**

QUESTION 4

Answer: Candidates answer can be in support or against the Company Secretary's response.

The Candidate should discuss the following:

Section 185 – A director of a company may be removed from office in accordance with this section.

Section 135 – removal of an auditor by members at an AGM. Auditor is entitled to issue a statement and to be present at the meeting where the motion for removal will be moved.

Per sections 135 and 185, notice of the intention to remove a director/ auditor must be served on the company at least 35 days before the notice of the General Meeting is served.

Upon receipt of the notice, the company must give a copy to the director/auditor affected and also convene a general meeting by giving 21 days' notice. The director/auditor is entitled to issue a statement in response to the notice and to be heard at the general meeting where the motion is to be moved.

There is no express provision for reasons to be given. The Secretary's statement is to a limited extent correct.

The members are entitled to remove a director despite any agreement with the company or a provision in the Regulations of the company. If the sole member of a one-man company made up his mind to remove a director or auditor it would be practically unnecessary to give reasons because nobody would subsequently debate the removal at a general meeting since the decision to remove the director or auditor would have been made already before the notice and the meeting.

section 185(4)

There is an implication that the director must be given reasons for his removal so that he/she could answer in his/her statement.

HEINRICH KOCH & ANOTHER v. HORTENG LIMITED & ANOTHER [15/01/04] SUIT NO. FTC14/2001 15TH JANUARY 2004 'In all such cases, which involves the exercise of domestic jurisdiction by artificial institutions or human beings and corporate bodies, the notice must specify that a Director is going to be removed and it is necessary to state the grounds for his removal. The Director concerned must then be given a right to be heard in his defence to any charges that may be preferred against him'

Corporate governance: transparency is necessary. This allows the auditor or director to be informed of the reason in order to defend/ explain himself.

Section 153(1) – requirement of sufficient details to help member make an informed decision on whether to attend or not. Thus, notice on removal of a director/auditor could be accompanied with a circular to afford member the opportunity to decide on the director or auditor.

Section 174 prohibits removing a director or auditor by written resolution. It can only be to avoid the situation where a director or auditor will be denied the right to be heard.

(25 marks)

QUESTION 5

Candidates should raise the following:

- The statement is inaccurate.
- It is obligatory for every company registered under the Companies Act 1963, Act 179 to appoint a secretary.
- Failure to appoint a secretary is an offence.

The position of the company secretary changed several years ago with the pronouncement of Lord Denning in the case of Panorama Development(Guildford) Ltd v Fidelis Furnishing Fabric Ltd{1971} 3 All ER16.

The secretary is not the one who delivers letters.

- Has a big responsibility regarding the Board.
- Attends meetings after preparing notice and agenda.
- Keeps company's records.
- Takes & keep minutes in addition to other statutory duties.
- He is an officer of the company.

Provisions in new Companies Act 2019 regarding Company Secretary

Qualification of secretary - lawyer, accountant, tertiary education with qualification in law.

Functions

- Take minutes
- Assists the Board
- Advises the Board
- Communicates

Corresponds with auditors etc.

(25 Marks)

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QUESTION 6

- a. **Force majeure:** it means a "superior force". An event or effect that can neither be anticipated nor controlled. The term includes both acts and nature e.g. Floods and hurricanes and acts of people e.g. Riots, strikes and wars. A force majeure clause is a contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that parties could not have anticipated or controlled.
- b. **Dispute resolution:** this clause provides for how parties intend any disagreement to be solved where any arises. Parties may provide for a period within which to attempt to settle any dispute amicably, failure of which parties may opt in the clause to either resort to the court or to resort to arbitration.
- c. **Entire agreement clause:** this clause limits the scope of the agreement to what is written in the document such that what is written represents all that the parties intended to contract. The final document supersedes all oral or written agreements that the parties might have entered into. It also prevents any subsequent claims from being raised by a party to the effect that prior representations made during negotiations were intended to form a part of the agreement.
- d. **Waiver:** this clause ensures that where a party fails to enforce its contractual rights, whether intentionally or not, that party's failure will not result in a waiver of those rights or remedies for their breach. If at a point a party decided not to strictly enforce a provision of the contract, it would not mean that in the future that party cannot insist on enforcement just because it waived in the past.
- e. **Severability:** this clause keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void or unconstitutional.

Candidate can discuss other boilerplate clauses such as Governing Law and jurisdiction, notices, assignment, interpretation, amendment.

(25 marks)