



BULLETIN – 201216/53

ICMSA Bulletin – ICMSA Bulletin on Virtual Bondholder Meetings

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1. Introduction

As we adapt to the "new normal" way of living with Covid-19, we consider in this bulletin how bondholder meetings (convened under English law trust deeds) can continue to take place in light of the continued Government restrictions and how those meetings can take place "virtually". In light of the significant impact Covid-19 has had and is continuing to have on the global economy, bond issuers are needing to solicit bondholder consents during the pandemic, regardless of whether restrictions on gatherings are in place. While some bond issuers may be able to seek consents by way of written resolutions and, in more recent trust deeds, electronic consents, many bond issuers will still need to seek consents (under English law trust deeds) by way of a bondholder meeting. This is because either the bond documentation does not provide for electronic consents or written resolutions (other than those signed by all the bondholders) or because the quorum and voting requirements are lower for bondholder meetings, particularly for adjourned meetings.

English law trust deeds may confer a power on the trustee, without bondholder consent, to "prescribe regulations regarding the holding of meetings and attendance and voting at them as it in its sole discretion determines". Even without this express power, the Trustee has the discretion to agree to waive a breach of the terms of the Trust Deed (which, in this case, would arise if the issuer did not comply fully with the requirements of the trust deed regarding the conduct of bondholder meetings) if it was of the opinion that the interests of the bondholders would not be materially prejudiced by the waiver.

In this bulletin, we consider: (i) the standard bondholder meetings provisions in English law trust deeds and how they might be affected by lockdown restrictions; and (ii) how bondholder meetings can continue to take place while lockdown restrictions remain in place, the ability of the trustee to consent to such meetings taking place and the procedures that should be followed to ensure that similar rigour applies as for physical meetings.

2. Overview of standard bondholder meeting provisions

The provisions governing bondholder meetings are set out in a schedule to the trust deed. They were derived originally from shareholder meeting provisions, which are based on company law statutes and common law. Bondholder meeting provisions are, however, contractual provisions set out in the trust deed and, other than amendments agreed to facilitate electronic consents and cancellation of meetings following the global financial crisis and also to reflect the fact that bonds are generally held through the clearing systems (see ICMSA bulletin 140501/28), have not evolved as much as shareholder meeting provisions have in recent years.

For the purposes of this bulletin, the key standard meeting provisions are as follows:

- **Notice:** at least 21 clear days' notice of a meeting is required to be given to bondholders, with the notice specifying "the day, time and place of meeting", with the trustee approving the time and place of the meeting and setting out the resolutions to be considered by the bondholders at the meeting.
- **Quorum:** the resolutions can only be put to a meeting that is quorate. The quorum required will depend on whether the meeting is the first meeting at which the proposals set out in the resolutions are being considered or an adjourned meeting and the nature of the resolutions. Typically, the quorum for the first meeting to consider an extraordinary resolution (which is not a "special quorum resolution") will be a clear majority, with the quorum at any adjourned meeting being a lower threshold and can be one or two persons holding or representing bonds whatever the principal amount of the bonds held or represented.

For a "special quorum resolution", which seeks to amend a fundamental or "entrenched" right of the bondholders, the quorum requirements for the first meeting will be higher (at least 75% or 66.66% of the principal amount outstanding of the bonds) with the quorum requirement at any adjourned meeting being 25% or higher.

The trust deed will also provide the minimum quorum required for a meeting, which may be one or two bondholders in person (being the bearer of a voting certificate) or a proxy.

- **Voting:** voting can either be done by a bondholder appointing a proxy (whether by way of a block voting instruction if the bonds are in bearer form or a form of proxy if the bonds are in registered form, which must be deposited at least 48 or 24 hours before the meeting) or by the bondholder voting in person at the meeting. Bondholders typically appoint a proxy (such as the tabulation agent) to vote on their behalf at the meeting but they may want to attend in person in order to vote at the meeting (rather than deposit their proxy vote 24/48 hours before the meeting) and/or to raise questions of the issuer and its representatives at the meeting.
- **Chairperson:** A chairperson, nominated by the trustee, will be appointed to chair the meeting. This may be a party independent of the issuer (such as a representative of its legal advisers). Bondholder meetings (pre-Covid) were, therefore, typically held at the offices of one of the law firms involved.
- **Trustee's power to prescribe regulations:** trust deeds (particularly more recent ones) will provide that the trustee:

"may, without the consent of the bondholders, prescribe such further regulations regarding the holding of meetings and attendance and voting at them as it in its sole discretion determines..."

We consider this provision and the trustee's general discretion more fully below.

3. Bondholder meetings in the time of Covid-19

Since lockdown restrictions have been imposed in the UK, physical meetings inside between people not of the same household have either been prohibited or restricted, depending on the lockdown



rules in place at the time and applicable to the local area. As at the date of this bulletin, Government guidance¹ continues to encourage people to work from home, unless they cannot work from home; and employers should encourage "visits via remote connection/working where this is an option". The ability to hold physical bondholder meetings is, therefore, in practice restricted by Government guidelines and this is likely to remain the case until at least early 2021.

Since lockdown restrictions have been imposed, bondholder meetings have, therefore, been held "virtually" and this can be done in one of two ways:

- **A fully "virtual" meeting**, where the meeting is conducted solely by electronic means, with all parties participating by way of a telephone or video-conference. This is clearly stated in the notice of meeting, with the notice describing the meeting as "being held by tele/video conference". The place of the meeting is, therefore, wherever the chairperson of the meeting is situated but the notice does not have to provide his or her home address; rather it is described as being conducted through the relevant teleconference or video-conference facility; or
- **The "hybrid" bondholder meeting**: the Issuer convenes a so-called "hybrid" bondholder meeting, combining a physical meeting of limited attendance with electronic means. Such a meeting takes place at an office, with only the Chairperson and (depending on quorum requirements and subject to Government guidelines) another person, such as a representative of the tabulation agent, attending in person. The notice of the meeting, however, has to make it clear that, because of Government restrictions currently in place, bondholders and their proxies or representatives (other than the chairperson or the representative of the tabulation agent) will not be able to attend the meeting in person. "Hybrid" meetings are generally only used where there may be no express ability in the trust deed for the trustee to prescribe regulations in relation to the conduct of meetings.

In either case, bondholders are encouraged to vote by submitting voting instructions through the clearing systems and appointing a proxy to vote their bonds at the meeting. Bondholders may be entitled to "attend" the virtual or hybrid meeting virtually, by way of a telephone or video-conference call, subject to having provided satisfactory evidence of their holding to the chairperson and/or teller(s) nominated in respect of the meeting.

4. Can meetings be held virtually as a matter of law?

Long before the time of Covid-19, the English courts have accepted that meetings convened under the Companies Act could be held without the meeting being face-to-face. In *Byng v London Life Association* [1990]², it was stated that, given "*modern technological advances*", members could debate and vote on matters affecting the company: "*without all members coming face to face; without being physically present in the same room, they can be electronically in each other's presence so as to hear and be heard and to see and be seen.*". Most recently, this was followed in *Castle Trust Direct Plc, Re* [2020] 4 WLUK 63, which held, in the context of a meeting of scheme creditors:

"The word "meeting" in the Companies Act 2006 Pt 26 did not require a physical meeting in the same place. ...The essential requirement was that the members of the class had a real

¹ "Working safely during coronavirus (COVID-19): Support for businesses and self-employed people during coronavirus": Guidance published by the Department for Business, Energy & Industrial Strategy, 11 May 2020 (and, as at the date of this bulletin, updated to 14 December 2020). This guidance applies to England; the devolved public health authorities of Northern Ireland, Scotland and Wales publish their own guidance.

² *Byng v London Life Association Ltd* [1990] Ch.170



opportunity to consult together on the scheme with a view to deciding whether it was in their common interest. It did not matter that they would not be able to see and be seen by telephone so long as they could hear and participate and in that way the necessary coming together and collective consultation could be achieved."

The UK Government has clarified the position for shareholder meetings of companies in the Corporate Governance and Insolvency Act 2020 which provides, at Schedule 14, that: company shareholder meetings may be held on a "closed" basis, with meetings not needing to be held at any particular place; quorum requirements can be met without any participants being together at the same place; and a member does not have the right to attend a meeting in person, participate in a meeting other than by voting, or vote by particular means (so, appointing a chair of the meeting as proxy to vote would satisfy the right to vote). In addition, meetings may be held and votes may be cast, by electronic means or any other means. So a shareholder meeting can be held on an entirely virtual basis. These provisions, which apply irrespective of anything to the contrary in statute or a company's constitution, apply (partly retrospectively) to company meetings held between 26 March 2020 and 30 March 2021 (having been extended on 26 November 2020), with the period being able to be further extended for up to 3 months at a time (up to 5 April 2021).

Bondholder meetings are not, however, governed by statute but rather are contractual provisions set out in the trust deed, providing for how an issuer or a trustee can convene meetings of the bondholders. Such meeting provisions have, however, derived from statutory provisions governing company meetings and the common law. The UK court's interpretation of what constitutes a "meeting" is, therefore, very helpful when considering alterations to the bondholder meeting process and the statutory provisions for company meetings introduced through the Corporate Governance and Insolvency Act 2020 are supportive of measures being taken by issuers to hold bondholder meetings virtually during the Covid-19 pandemic.

5. The Trustee's power to agree to virtual bondholder meetings

As mentioned above, English law trust deeds may confer a power on the trustee, without bondholder consent, to prescribe regulations regarding the holding of meetings and attendance and voting at them, including in relation to the documentation to satisfy itself that those attending or voting may do so.

English law trust deeds will also confer on the trustee a discretion to waive, without the consent of the bondholders, any breach of the terms of the trust deed if, in its opinion, the interests of the bondholders will not be materially prejudiced thereby. If the issuer were to propose to convene a virtual meeting, depending on the wording of the trust deed, it is likely that the issuer would not be complying strictly with the meeting provisions as, for example, the notice of the meeting would not specify a "place" for the meeting and the minimum quorum may also require presence "in person".

If a "hybrid" meeting were to be held, it is arguable, depending on the precise wording of the trust deed, that the terms of trust deed would still be followed as a "physical" meeting of sorts would still take place; it is just that government guidance would restrict the ability of bondholders to attend in person – but they could still vote by voting through the clearing systems or, if permitted by the regulations, by attending the meeting "virtually".

Where an issuer has requested that the trustee consider exercising its power to "prescribe regulations" or to waive a breach of the terms of the trust deed to facilitate the convening of a virtual bondholder meeting, consideration needs to be given as to the precise manner in which the virtual bondholder meeting is to take place. In considering the regulations to be prescribed for the meeting,

the trustee would consider whether, in its opinion, the interests of the bondholders would not be materially prejudiced by holding the meeting "virtually". In this regard, the procedures to be followed in relation to the convening of the meeting and how it is conducted are key to ensure that the interests of the bondholders are not materially prejudiced by the manner in which the meeting is held. If the trustee is minded to agree to exercise its power to "prescribe regulations", as a matter of good practice, the regulations so prescribed should be set down in writing and will typically form part of the procedures for the conduct of the virtual meeting and should be agreed between the issuer and the trustee in advance of the notice being sent to bondholders.

6. Points to consider for procedures for the conduct of virtual meetings

To ensure that virtual meetings are conducted fairly, consideration should be given as to how the virtual meeting is to be conducted. The following points should, therefore, be considered:

- The notice of the meeting must make it clear that the meeting will either be conducted entirely virtually or partly virtually (i.e. in a "hybrid" form);
- The notice should explain that the bondholders will not be entitled to attend or vote in person due to Covid-19 government restrictions;
- A secure tele-conference or video-conference should be set up for the bondholder meeting; if a secure video-conference facility is used, alternative telephone dial in numbers should also be available to access the meeting in case internet connections fail. Consideration should also be given as to which tele/video-conference provider is used to ensure appropriate security and accessibility to those entitled to attend;
- Will Bondholders be able to attend "virtually"? If so, bondholders would attend "virtually" by dialling into a secure teleconference or video conference, the details of which would have been circulated by the chairperson shortly before the start of the meeting to those bondholders who have requested to participate in the meeting and have previously provided their evidence of holding and contact details to the tabulation agent/proxy;
- At the "virtual" meeting, the chairperson should check off the attendees (by way of a roll call) against those who have previously confirmed that they intend to attend virtually. On a telephone call, it will be important to identify the telephone numbers/identity of those who have dialled in, which is possible on some video conference facilities;
- The chairperson would then follow the standard procedure of confirming whether or not the meeting is quorate and allowing attendees to speak and ask questions if they wish to do so. The chairperson should also be cognisant of the risk of a virtual meeting "becoming" inquorate if attendees were to disconnect (whether voluntarily or through technical difficulties) during the course of the meeting.
- Consideration should be given as to how voting is to be conducted at the meeting. Will bondholders only be able to vote through the clearing systems or would they be able to cast their votes at the virtual meeting? If bondholders are permitting to cast their votes at the virtual meeting, this may give rise to practical difficulties which would need to be addressed in the prescribed regulations.
- At the conclusion of the virtual meeting, the chairperson would announce the results of the meeting in the usual way.



7. Conclusion

The ICMSA is mindful that a pragmatic approach should be taken to facilitate bond issuers who need to seek bondholder consents while Covid-19 lockdown restrictions remain in place and is supportive of virtual and/or hybrid bondholder meetings taking place, provided that proper procedures are implemented to ensure that the bondholders are not materially prejudiced thereby. It is the responsibility of the issuer (if convening the meeting) to ensure that meetings are conducted fairly and its resolutions are valid. Trustees will, in considering whether to exercise their discretion to prescribe regulations in relation to the conduct of the virtual meeting and to approve the notice, consider whether appropriate steps are being taken by the issuer to ensure that bondholders are not being materially prejudiced by the fact that the meeting is being conducted virtually.

Whether or not lockdown restrictions are in place, we recognise that issuers may be keen to amend meeting provisions in trust deeds to provide for virtual bondholder meetings in the future, in the same way as some companies' constitutional documents have permitted virtual attendance (at least in part) at shareholder meetings. We expect issuers to balance the utility and appropriateness of making such amendments. Even in a post-Covid world, virtual bondholder meetings may be a pragmatic solution as virtual meetings can be efficient in terms of time and cost and as remote working becomes more commonplace.