

Bondholder meetings in the time of Covid-19: virtually ok?

SPEED READ

With Covid-19 restrictions around the world affecting the holding of physical bondholder meetings, we explain our suggested approach to virtual attendance at these meetings. Our view is that a “meeting” does not require attendees to be physically present, but can include parties communicating together electronically. There will however need to be some limited additional steps to verify that the individuals joining the meeting are properly authorised to attend.

Background

As Covid-19 lockdowns and travel/gathering restrictions bite on an increasing number of people around the world, we are now seeing impacts on the (usually run-of-the-mill) physical bondholder meetings convened by issuers to solicit bondholder consents. At a time when we expect markedly increased liability management activity as a consequence of the impact of Covid-19 on the global economy (as well as in relation to LIBOR transition, which we also expect to materially drive LM over the coming months), it is critical for issuers to know that they can still solicit bondholder consents in a timely manner.

Many issuers may be able, and wish, to seek consents by way of written resolutions or electronic consent processes, but many may still need (because their documentation has no feasible alternatives) or choose (due to lower quorum/voting requirements) to follow the traditional physical bondholder meeting procedure.

It is fair to say that, despite several attempts over the last few years, the practice, documentation and infrastructure for bondholder meetings has not moved with the times. The process was originally adapted from the requirements for English company shareholder meetings and – apart from electronic voting when bonds became globalised and held through clearing systems – has remained largely unchanged in decades.

The process still requires a chairperson, the requisite number of bondholders (or their proxies/representatives), a teller (to tally the votes) and, often, a representative of the trustee (to oversee the running of the meeting) and various legal advisers to meet physically in a room and follow a set procedure to see whether the relevant resolutions have been passed.

In a time where gatherings of two or more people are outlawed and offices are closed in many places around the world, it is clear that this somewhat archaic procedure is either impossible or inadvisable to follow in many circumstances.

In this note, we examine how the longstanding procedures for bondholder meetings can be adapted to allow meetings to continue to be held under the current restrictions, and the practical steps that trustees and issuers should take in order to ensure that the meeting procedure remains robust. We have seen this issue arise in practice in the last few days as a result of the new “circuit-breaker” restrictions now applicable in Singapore, and what follows is based on our practical experience from that meeting and the legal analysis of our global team.

Convening a meeting

The first formal step towards a bondholder meeting is typically the publication of a notice to the bondholders, giving not less than 21 clear days’ notice of the date, time and place of the meeting and setting out the resolution(s) to be considered at the meeting and the procedures by which bondholders may seek to vote by proxy or attend and vote in person.

If a notice is being prepared for a new meeting, it (and any accompanying explanatory document) should at the very least contemplate the potential impact of Covid-19 restrictions, for example:

“In light of the ongoing developments in relation to Coronavirus (Covid-19), it may become impossible or inadvisable to hold the Meeting at [●]. In that event, the Issuer and the Trustee may prescribe further or alternative regulations regarding the holding of the Meeting, which may

include providing access to the Meeting by conference or video call. In such circumstances, those Holders who have indicated that they wish to attend the meeting in person will be provided with further details about access to the Meeting. Holders who have requested that their votes are included in a Block Voting Instruction will be unaffected by these alternative regulations and will not be requested to take any further action.”

Of course, if it is already known when the notice is issued that physical attendance at the meeting will not be possible, the details for how it will be held should be set out in more detail (discussed further below). It would also be prudent for the notice convening the meeting to encourage bondholders to cast their votes by proxy and avoid attending in person.

Are we allowed to hold a “virtual” meeting?

The first point to note is that the meeting might not (strictly speaking) be entirely “virtual” – it can properly be considered (for the purposes of having to specify a time and a place to comply with the requirements of the bond documentation) to be a physical meeting, being held wherever the chairperson happens to be. The “virtual” aspect would be the attendance of the other meeting participants by telephone or videoconference. If however it is not felt appropriate to specify (for example) the home address of the chairperson as the place of the meeting, we see no conceptual reason, for the reasons explained in the following paragraph, why the meeting could not simply be *“conducted through such teleconference or videoconference facility as shall be specified by the chairperson ahead of the meeting”*.

The second relevant point is that, whilst standard bond documentation does not expressly envisage virtual attendees, the latest English case law (Castle Trust Direct Plc, Re [2020] 4 WLUK 63) confirmed that *“The word “meeting” in the Companies Act 2006 Pt 26 did not require a physical meeting in the same place” and “given modern technological advances, the same result could be achieved without all the members coming face to face: without being physically in the same room they could be electronically in each other’s presence so as to hear and be heard and to see and be seen.”*

Whilst this interpretation related specifically to meetings convened under the Companies Act and not bond documentation, we do not see any particular reason why a meeting of bondholders should be considered any differently by the English courts. Accordingly, our view is that a bondholder meeting may validly have attendees by telephone or videoconference.

Suggested procedures for meetings with “virtual” attendees

Assuming that the bonds are held through the ICSDs, the tabulation agent will have received through the ICSDs ahead of the meeting the names, ID details and email addresses (as well as the principal amount of the bonds and the name of the bondholders they represent) of the individuals planning to attend and vote at the meeting.

Following collation of those details, the following procedures are suggested as a pragmatic but secure way of evidencing the identity of those wishing to join the meeting electronically:

- a video or audio conference facility should be set up for the meeting by the host;
- ahead of the meeting, the chairperson (or a delegate) should email each person who has asked to attend, notifying them that they may attend and vote virtually. They should request that each individual who wishes to attend virtually emails through a copy of their ID ahead of the meeting (with appropriately redacted personal information, if necessary), to match the details provided to the tabulation agent and shown in the tabulation spreadsheet;
- shortly before the start of the meeting (to limit the risk of unauthorised distribution), each virtual attendee should be emailed the video or audio conference details;
- attendees should then join the meeting using the audio or videoconference facility at the appointed time. The chairperson should check off the attendees (by way of a roll call) against those that have indicated that they intend to attend virtually;
- the chairperson will follow the usual procedure regarding announcing whether the meeting is quorate or not, and allowing attendees to speak and ask questions if they wish to do so;
- when it comes to voting, attendees should say (one by one) how they wish to vote (unless on a videoconference their votes on a show of hands can be physically seen), so that their votes can be manually tabulated by the teller. The teller should repeat back each vote instruction, so that everyone present can understand what is happening and voters can confirm that their votes have been received and recorded correctly; and
- the chairperson should then announce the result of voting in the usual way.

The Trustee's power to agree to these procedures

As the mechanics suggested above are not going to be expressly envisaged in the bond documentation, there is a question as to which parties must agree with the revised attendance and voting procedures.

It is arguable that no agreement is actually required, as the bond documentation will almost certainly not prohibit attendance in this manner. However, given the current novelty of this approach, we believe it is appropriate to consider them as variations to the usual procedures.

Typical trust deeds will provide that the trustee may prescribe such further or other regulations concerning attendance and voting at meetings as it may see fit. This is usually found at the end of the meetings schedule and is intended to cater for changes in market practice over time or – as here – for unforeseen events. It usually does not require issuer approval of the new regulations, although it is likely to be appropriate for trustees to at least consult with issuers in most cases concerning virtual attendance.

In our view, subject of course to the precise drafting of the trustee's power, it is entirely proper as a matter of principle for the trustee to prescribe procedures of the type mentioned above in order to allow for virtual attendees in the current circumstances. The procedures are designed to allow bondholders to continue to exercise their rights in the manner provided for in the bond documentation despite significant unforeseen legal and logistical restrictions and accordingly fit squarely within the trustee's mandate to protect the interests of the bondholders.

We do not believe a formal modification or agreement is required to evidence agreement to the proposed procedures, but they could easily be recorded on an email for the avoidance of any doubt.

Conclusion

Whilst Covid-19 is causing plenty of inconvenience and hardship for millions of people around the world, our view is that bondholder meetings at least should not be causing anyone to lose sleep. With a few simple, pragmatic tweaks in the procedure, bondholder meetings can be adapted relatively painlessly to social-distancing and lockdown restrictions.

It is of course a bigger question as to what bondholder meetings should look like post-virus. Voting procedures have been a perennial hot topic, but necessity is the mother of invention so perhaps the current crisis will trigger long-term change. From the A&O side, we will be considering how meeting procedures could be changed in new deals to address this type of problem in the future and look forward to discussing our ideas with clients and other stakeholders in due course.

If you need any help or would like to discuss any of the issues raised above in further detail, please do get in touch. With a market leading global corporate trust team, we are at the forefront of developments in relation to bondholder meetings and other Covid-19 challenges and are well-placed to assist trustees with any issues. We believe these developments may also be helpful to the challenge of legacy LIBOR remediation in the bond markets to enable more bondholder meetings to be held in a short period of time, and would welcome the opportunity to discuss that with you further.

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