

CORONAVIRUS: ENABLING THE HOLDING OF REMOTE MEETINGS OF BONDHOLDERS IN POLAND

The coronavirus epidemic has forced lawmakers to verify the legal solutions used to date and to adapt the mechanisms thereof to the currently prevailing conditions. In particular, in light of the prohibition of assemblies introduced by way of the Ordinance of the Council of Ministers of 19 April 2020 on the Introduction of Specific Restrictions, Orders and Prohibitions on Account of the Occurrence of a State of Epidemic (Journal of Laws of 2020, item 697) (the "**Ordinance on Restrictions**")¹ the holding of face-to-face meetings of various company bodies (management boards, supervisory boards, shareholders' meetings) as well as other specific bodies (bondholders' meetings) in a classical manner has turned out to be difficult, if not impossible. The above also applies to bondholders' meetings as provided for in the Act on Bonds of 15 January 2015 (Journal of Laws of 2018, item 483) (the "**Act on Bonds**").

For this reason, the bodies mentioned above have been forced to review their internal bylaws and the relevant provisions of law in order to determine the changes necessary for them to hold their meetings remotely, for example, via teleconferences enabling sound and picture transmission.² The actions taken in this respect can be observed in all jurisdictions affected by the coronavirus pandemic. In many cases the use of means of long-distance communication to hold meetings of such authorities is possible in line with the provisions of law currently in force in the given jurisdiction.³

Also in Poland, taking into consideration the necessary changes to the bylaws of the given bodies and their statutory documents the holding of remote meetings was possible according to the law prior to the outbreak of the coronavirus epidemic (including bondholders' meetings). Regardless of the above, the Polish legislator, wishing to facilitate the functioning of these

¹ The earlier restrictions resulted from the Ordinance of the Minister of Health of 20 March 2020 on the Declaration of a State of Epidemic in the Republic of Poland (Journal of Laws of 2020, item 491).

² While, in the case of a body such as a supervisory board or management board of a company amendments to their bylaws would suffice, the organisation of bondholders' meetings or shareholders' meetings of joint-stock companies using means of electronic communications requires that such means of communication be taken into account in the statutes or similarly in the terms and conditions of issue.

³ For example, English law does not require that a meeting be strictly a direct meeting of the participants ("*physical meeting*").

solutions,⁴ statutorily regulated the boundary conditions regarding the possibility of bondholders' meetings being held remotely by way of the Act of 16 April 2020 on Specific Instruments of Support in Connection with the Spreading of the SARS-CoV-2 Virus⁵ (Journal of Laws of 2020, item 695) (the "Anti-crisis Shield 2.0").

Why is ensuring the possibility of holding remote bondholders' meetings important in light of the financial crisis?

The function of a bondholders' meeting is to take decisions regarding a change of the conditions of the issuance of bonds. Therefore, in light of the financial crisis, which may affect bond issuers, it is of prime importance that the bondholders' meeting be able to actually function in reality. The financial crisis may result in, among other things, an issuer being unable to perform its obligations assumed under other finance agreements, obligations assumed based on other securities issued by the issuer or the obligation to maintain financial ratios at the level indicated in the conditions of issuance of the bonds. The above-mentioned three cases frequently constitute grounds for the exercise by the bondholders of the option of the earlier redemption of the bonds under the conditions of the issuance thereof. This means that, if such an event occurs, the bondholders may demand that the issuer convene a bondholders' meeting, during which they may decide on the earlier redemption of the bonds. A bondholders' meeting may also be used by the issuer to protect itself against the earlier redemption of the bonds, providing that the bondholders grant their consent to a given event not being treated as grounds for the exercise of the early redemption option.

For the sake of order, we wish to indicate that to the extent that a bondholders' meeting is not an assembly within the meaning of the Act on Assemblies of 24 July 2015 (Journal of Laws of 2019, item 631), the classification thereof as an assembly related to the performance of professional functions or duties may be difficult to defend in certain cases (e.g. in the case of bondholders being natural persons, who by voting only exercise the property rights attached to the securities, without conducting any business activity in this respect). In such a situation, the Ordinance on Restrictions would seem to apply, and prevent the organisation of such an assembly in a manner envisaging the direct presence of bondholders.

Description of amendments to the Act on Bonds

The Anti-crisis Shield 2.0. introduces the following amendments to the Act on Bonds:

- the possibility to hold a remote bondholders' meeting (possibility to participate in a bondholders' meeting using means of electronic communication), providing that holding such meeting has not been excluded in the conditions of issuance of the bonds; and the decision to hold a remote bondholders' meeting shall in each and every case be made by the person convening the meeting and be indicated thereby in the notification of the convening thereof;
- technical requirements applicable in the event of a remote bondholders' meeting:

⁴ The solution proposed reverses the previous rule – previously the statute or the terms and conditions of issue should indicate the possibility of organising meetings of bondholders or general meetings of joint-stock companies using means of long-distance electronic communications, whereas at the present moment it suffices that such possibility not be excluded.

⁵ The Anti-crisis Shield 2.0 came into force, as a rule, on 18 April 2020.

- (i) all of the persons participating in the bondholders' meeting must be able to communicate in real time;
 - (ii) bondholders' who are present in a place other than the place where the bondholders' meeting is being held, must be able to communicate;
 - (iii) the right to vote personally or by proxy must be ensured; and
 - (iv) the participation of bondholders in the bondholders' meeting using means of electronic communication may only be subject to the requirements and restrictions that are necessary to identify the bondholders and to ensure security of the electronic communication;
- despite the bondholders' meeting being held remotely, the obligation to prepare the following documents applies:
 - (i) minutes signed by the chairman of the bondholders' meeting and the person preparing them;
 - (ii) list of attendance signed by each bondholder participating in the bondholders' meeting; and
 - (iii) lists of the bondholders voting using means of electronic communication.

The new regulation is of a general nature, owing to the purpose thereof, said purpose being the speediest possible introduction into the legal system of a solution regulating the holding of bondholders' meeting via means of long-distance communication without the necessity to make amendments to the existing documentation of the bonds. Nevertheless, the recommended solution continues to be the implementation by issuers and bondholders or more detailed solutions by way of the modification of the conditions of issuance of the bonds or the rules and regulations of the bondholders' meeting.

Before a bondholders' meeting is convened

As of the date of entry of the Anti-crisis Shield 2.0, no amendment to the existing conditions of the issuance of bonds will be necessary in order to hold a remote bondholders' meeting. Such amendment to the conditions will be necessary only, if the issuer and the bondholders wish to exclude such possibility. This also applies in the case where new conditions of the issuance of bonds are drawn up.

Moreover, the Act does not impose the obligation on bondholders to participate in a bondholders' meeting via means of long-distance communication, but only makes this possible. This means that bondholders will not be deprived of the possibility of directly participating in a bondholders' meeting, even if in the notice convening such meeting the party doing so states that remote participation therein is possible⁶. In the notification, the party convening the bondholders' meeting is obliged to state, among other things, the date, time and place thereof. Pursuant to the law in force, a bondholders' meeting should be held in the territory of the Republic of Poland. Taking into consideration that in some cases the minutes of a bondholders' meeting must be drawn up in the form of a notarial deed and in the presence of a notary, the most practical solution would seem to be that the place of the meeting be specified as the place where the chairman of the meeting, who will

⁶ In light of the Ordinance on Restrictions, the ability of individual bondholders who are natural persons to come to the place of the bondholders' meeting is another matter entirely.

be accompanied by a notary, is present⁷. After a change of the provisions of law, if such change mentioned in the last part of this analysis occurs, the participation of a notary in the meeting may also take place via means of long-distance communication.

Pursuant to Art. 51 sec. 2 of the Act on Bonds, as amended by the Act on the Anti-crisis Shield 2.0, an announcement on the convening of a meeting should indicate that it may be held via means of long-distance communication. In practice, it is also worth stating in the announcement how a bondholder may receive access data enabling such communication from the issuer.

It should also be remembered that the obligation of a bondholder to provide a deposit certificate or the certificate mentioned in Art. 55 sec. 1a of the Act on Bonds within the statutorily set deadline has not been abolished. It seems that there are no obstacles for such certificate being provided to the issuer via e-mail in PDF format with a qualified electronic signature of the issuer thereof.

During the course of a bondholders' meeting

The amendment does not specify how a member of the issuer's management board should participate in a bondholders' meeting. There are no obstacles with respect to his/her participating in a meeting via means of long-distance communication.

Based on the amendment to the Act on Bonds a new type of annexure has been added to the minutes – a list of bondholders voting via means of electronic communication, which has not, however, replaced the list of attendance. It seems that the legislator's intention was to introduce an instrument in which the list of attendance is signed by the bondholders who are present at the meeting and the chairman thereof, who, simultaneously after verifying the bondholders participating in the meeting and voting thereat should append this second list to the list of attendance. This does not, however, result from the new Art. 68 sec. 2 of the Act on Bonds, therefore an amendment in this respect would be necessary (as described in the last part hereof).

Apart from setting out the general requirements regarding the tool enabling long-distance communication, the legislator has not specified the exact parameters thereof. It has also not specified whether a sound transmission suffices, or whether a picture transfer is also necessary⁸. Therefore it seems that organising a teleconference (if only the sound transmission is selected) or the use of one of the many platforms enabling the organisation of video conferences, providing that bondholders will be able to comply with the requirements set out in the Act to communicate their views and communicate in real time, will suffice. It must be remembered, however, that access to teleconferences or video conferences should be limited for persons who are not authorised to participate in the bondholders' meeting (e.g. by way of a login or password available only to bondholders who properly notified their participation in the meeting), and the infrastructure used should meet the basic security requirements (e.g. protection against data leakage). The organisation of a secret ballot will be a particular challenge – this is, however, possible with the use of the tools (software) available on the market.

⁷ Prior agreement of the bondholders as to who will be the chairman of the meeting may be required.

⁸ Providing that the appropriate identity verification procedures are adhered to, a bondholders' meeting can be held without a video signal transmission.

After a bondholders' meeting

Pursuant to the provisions of the Act on Bonds, an issuer is obliged to publish the minutes of the bondholders' meeting and to make them available at least until the expiry of the deadline for the challenging of the resolutions. Moreover, an issuer is obliged to keep a book of the minutes. There are no obstacles for the issuer to include the documents drawn up or presented during the meeting, in particular when they bear a qualified electronic signature, in the performance of these obligations.

Pursuant to market practice a published excerpt of the minutes does not contain sensitive data (e.g. the addresses of the participants). In the case of minutes drawn up in the form of a notarial deed, such anonymisation is made by the notary when providing the excerpt from the minutes. Unfortunately, it seems that in light of the provisions of law on notaries currently in force it is not possible for a notary to prepare an electronic official copy (excerpt) of such deed since, as a rule, the actions performed during a bondholders' meeting are not subject to entry in the National Court Register. This would, however, be possible after the amendments to these provisions of the law postulated by us below were made.

Postulates de lege ferenda

In order to improve the course of a bondholders' meeting being held with the use of means of long-distance communication, and to remove the observed doubts as to interpretation, the introduction of the following changes seems justified:

- an amendment to Art. 104 § 4 of the Act on Notaries of 14 February 1991 (Journal of Laws of 2019, item 540) by way of the introduction therein of the possibility of a notarial deed - minutes of a bondholders' meeting – being signed by the notary with an electronic signature next to the notary's handwritten signature; and
- an amendment to Art. 68 sec. 2 of the Act on Bonds, by way of elaboration that the list of attendance shall be signed only by bondholders present at the meeting, whereas the list of the bondholders voting at the meeting via means of long-distance communication also applies to the participation in the meeting, not just voting.

CONTACT

Grzegorz Namiotkiewicz
Partner

T +48 22 627 11 77
E grzegorz.namiotkiewicz
@cliffordchance.com

Andrzej Stosio
Partner

T +48 22 627 11 77
E andrzej.stosio
@cliffordchance.com

Grzegorz Abram
Counsel

T +48 22 627 11 77
E grzegorz.abram
@cliffordchance.com

Roksana Kalużna-Balazy
Advocate Trainee

T +48 22 627 11 77
E roksana.kaluzna-balazy
@cliffordchance.com

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www.cliffordchance.com

Norway House, ul. Lwowska 19, 00-660
Warsaw, Poland

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