



# ARTHUR COX

## Companies Bill 2012 Analysis

### **Companies Bill in Focus: Proposed Changes for the Law Relating to Members' Meetings**

By Tom Courtney

*(NB: this note is based on the Bill as amended in Select Committee in November 2013)*

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#### ***Private limited companies***

The law relating to general meetings of members and resolutions is set out in Chapter 6 of Part 4 of the Companies Bill 2012 ('CB 2012').

#### ***Annual general meetings ('AGM')***

There remains an obligation on an LTD to hold an AGM in each year, and at not more than 15 month intervals, (provided that where it holds its first AGM within 18 months of its incorporation, it need not hold it in the year of its incorporation, or in the following year).<sup>1</sup> That obligation is, however, now not absolute and every LTD, and not only single-member LTDs, may avail of the exemption in s 176(3) of the CB 2012 which provides they need not hold an AGM in any year where all the members entitled to attend and vote at such general meeting sign, before the latest date for the holding of that meeting, a unanimous written resolution under s 194 –

- (a) acknowledging receipt of the financial statements that would have been laid before the AGM;
- (b) resolving all such matters as would have been resolved at that meeting; and
- (c) confirming no change is proposed in the appointment of the person (if any) who, at the date of the resolution stands appointed as statutory auditor of the company.

Section 176(4) provides that without prejudice to any specific provisions providing for the contingency of an AGM being dispensed with, where a provision of CB 2012 requires that a thing is to be done at an AGM then, if it is dealt with in the foregoing resolution (whether by virtue of the matter being resolved in the resolution, the members' acknowledging receipt of a notice, report or other documentation or, as the case may require, howsoever otherwise) that requirement shall be regarded as having been complied with.

No longer must AGMs be held in the State and now all general meetings, including AGMs, may be held inside or outside the State.<sup>2</sup> Where any general meeting is held outside of the State – unless all of the members entitled to attend and vote consent in writing to its being held outside of the State – the company has a new duty to

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<sup>1</sup> Section 176(1) and (2) of the CB 2012.

<sup>2</sup> Section 177(1) of the CB 2012.

ensure that members can by technological means participate in any such meeting without leaving the State.<sup>3</sup> Moreover, a general meeting can be held in two or more venues (whether inside or outside the State) at the same time using any technology that provides members as a whole with a reasonable opportunity to participate.<sup>4</sup>

#### *Convening extraordinary general meetings ('EGM')*

Previously, the articles of association of most companies provided that the directors could convene an EGM: they were not obliged so to provide, but the vast majority did. This has been changed by section 178(2) of the CB 2012 which provides that the directors of a company may, whenever they think fit, convene an EGM, and while not expressly stated, it is implicit that this is irrespective of what the constitution provides. Moreover, where there are insufficient directors capable of acting to form a quorum for a directors' meeting, then *any* director or *any* member may convene an EGM in the same manner (as nearly as possible) as that in which meetings may be convened by the directors.

Even where there are sufficient directors capable of forming a quorum, section 179 confers both optional rights that apply unless the constitution provides otherwise ('optional default rights') and mandatory rights that cannot be taken away by the constitution ('inalienable rights') to members to convene or cause to be convened a general meeting.

The optional default right is that, one or more members holding not less than 50% (or such percentage as may be specified in the constitution) of the paid up share capital carrying the right to vote at general meetings may convene an EGM.<sup>5</sup> This is a new provision and confers the right to convene, as opposed to require to be convened, an EGM. A particular company's constitution could disapply this right entirely or could vary the 50% specification so as to require convening members to have a shareholding of as little as 1% or as great as 100%.

The inalienable right of members holding not less than 10% to require the directors to convene an EGM is broadly a restatement of existing law.<sup>6</sup>

The existing power of the court to convene a general meeting is enhanced.<sup>7</sup> Now, the court may make an order requiring a general meeting to be called, held and conducted in any manner that it thinks fit, where it is satisfied that for any reason it is impractical or otherwise undesirable for any person to call a general meeting in any manner in which meetings of that company may be called, or to conduct a general meeting of the company in any manner provided by CB 2012 or the constitution. Those with standing to apply are: a director, a member entitled to vote, the personal representative of such a member, and the assignee in bankruptcy of a bankrupt member (which member would be entitled to vote at such a meeting).

#### *Notice of general meetings*

Section 181(1) now confers a statutory right on the following persons to receive notice of every general meeting: every member (whether or not entitled to vote), the personal representative of a deceased member who has the right to vote, the assignee in bankruptcy of a bankrupt member (whether or not entitled to vote), and the directors and secretary of the company. Where a company has auditors they too shall be entitled to attend, receive notices and other communications relating to general meetings and be heard at general meetings.<sup>8</sup>

<sup>3</sup> Section 177(2) and (3) of the CB 2012.

<sup>4</sup> Section 177(4) of the CB 2012.

<sup>5</sup> Section 179(1) and (2) of the CB 2012.

<sup>6</sup> Section 179(1)(b) and (3) to (7).

<sup>7</sup> Section 180(1) of the CB 2012.

<sup>8</sup> Section 181(6) of the CB 2012.

Unless a company's constitution provides for longer notice, the statutory minimum notice of general meetings set out in section 182(1) is:

- (a) 21 days for AGMs and EGMs for the passing of a special resolution;
- (b) 7 days for EGMs.

Shorter notice can be given where all of the members entitled to attend and vote agree and, where there are auditors, the auditors also agree. Where a notice is posted, it is deemed to have been delivered 24 hours later;<sup>9</sup> and 'clear days' is given statutory recognition so in calculating notice you exclude the day it is served and the day of the meeting.<sup>10</sup>

Section 182(5) now prescribes the information that a notice of a meeting must specify: the place, date and time of the meeting, the general nature of the business to be transacted, the text or substance of any special resolution and a statement that a member entitled to attend and vote is entitled to appoint a proxy and related proxy information (see section 184, 185).

Section 182(6) provides that unless the constitution provides otherwise, the accidental omission to give notice or its non-receipt shall not invalidate proceedings. This is, therefore, a statutory default and companies can elect for a less forgiving regime where non-receipt of notice can invalidate proceedings.

#### *Quorum for general meetings*

Section 183 provides no business shall be transacted at a general meeting unless a quorum is present and, save to the extent that a constitution provides otherwise, two members of a company present in person or by proxy shall be a quorum. In a single-member company, one member present in person or by proxy is a quorum, and this implicitly provides authority for the fact that one person can constitute a meeting.

Section 183(4) provides that, unless the constitution provides otherwise, if within 15 minutes after the appointed time a quorum is not present, then where it had been convened by the members it shall be dissolved; otherwise, it will stand adjourned to the same day in the next week at the same time and place or to such other day, time and place as the directors determine and if at the adjourned meeting a quorum is not present within 30 minutes, the members present shall be a quorum.

#### *Proxies and authorised persons*

The rights of members who are entitled to attend and vote at meetings of the company to appoint a person (who need not be a member) as their proxy to attend and vote on their behalf is contained in section 184(1). This will be an inalienable right of members. A member is only entitled to appoint one person as proxy, but the constitution can provide otherwise. This section also contains provisions on the creation of a proxy, its deposit with the company and the time within which this must be done. Section 185 sets out the form which a proxy should take; it may be noted that this includes a new choice, namely, to "abstain" (i.e. it is not just confined to voting "for" or "against" as is currently the case). Bodies corporate will continue to be allowed to appoint authorised persons to represent them at meetings.

#### *The business of the AGM*

Section 187 sets out a non-exhaustive list of what the business of an AGM must include:

- (a) The consideration of the company's financial statements, directors' report and, if applicable, auditors' report;

<sup>9</sup> Section 182(3) of the CB 2012.

<sup>10</sup> Section 182(4) of the CB 1012.

- (b) The review by the members of the company's affairs;
- (c) Unless the constitution provides otherwise: the declaration of a dividend (if any) of an amount not exceeding the directors' recommendation and the authorisation of the directors to approve the auditors' remuneration (if any);
- (d) Where the constitution so provides, the election and re-election of directors;
- (e) The appointment or re-appointment of the statutory auditors (if applicable); and
- (f) Where the constitution so provides, the remuneration of the directors.

#### *Chairing of general meetings and proceedings*

Unless a company's constitution provides otherwise, all of the following provisions set out in section 188 will apply to the proceedings at general meetings as a statutory default:

- The chairperson of the board of directors will preside, or if there is none, or he or she is not there within 15 minutes, the directors will elect one of their number to chair, or if none is willing to act, the members will choose one of their number to chair.
- The chairperson may with the consent of a quorate meeting, and shall if directed, adjourn the meeting from time to time and place to place.
- Only unfinished business can be transacted at the meeting from which the adjournment took place.
- Unless a poll is demanded, voting shall be by a show of hands and a declaration by the chairperson as to whether or not a resolution has been carried, or carried by a particular majority, and an entry in the minutes to that effect, is conclusive evidence of that fact.
- Also, the default is that the chairperson shall have a casting vote on a show of hands.

#### *Votes of members*

Unless a company's constitution provides otherwise, all of the following provisions shall apply (section 189):

- Subject to the rights or restrictions attaching to any class of shares, on a show of hands every member present in person and every proxy shall have one vote, but no individual member shall have more than one vote; and on a poll every member shall have one vote for each share held, or for each €15 of stock
- In the case of joint holders, the vote of the senior holder (first named in register) who tenders a vote whether in person or by proxy shall be accepted;
- Persons of unsound mind or who have made an enduring power of attorney or in respect of whom an order has been made by a court having jurisdiction in cases of unsound mind may vote by his or her committee, donee, receiver, guardian or other court-appointed person. Such persons can also speak and vote by proxy;
- No member can vote unless all calls or other sums immediately payable in respect of his or her shares have been paid;
- No objection shall be raised to the qualification of any voter except at the meeting or adjourned meeting and every vote not disallowed at such meeting shall be valid. Any objection shall be decided upon by the chairperson whose decision is final and conclusive.

*The right to demand a poll*

Section 190 provides that a poll may be demanded at a meeting in relation to a matter, whether before or on the declaration of the result of the show of hands. This is a mandatory provision which the constitution cannot vary. Those entitled to demand a poll are specified in subs (2) as being the chairperson, at least three members present in person or by proxy, any member or members representing not less than 10% of the total voting rights of all the members of the company having the right to vote at meetings, and any member or members holding shares conferring the right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than 10% of the total sum paid up on the shares conferring that right. The right to demand a poll may be withdrawn. Section 190(4) provides that if a poll is demanded it is to be taken in such a manner as the chairperson directs (save that a poll demanded with regard to the election of a chairperson or on a question of adjournment shall be taken forthwith). Related matters are also provided for in this section.

*Voting on a poll*

On a poll taken at a meeting of a company or of any class of members, a member, whether present in person or by proxy who is entitled to more than one vote need not, if he or she votes, use all of his or her votes or cast them in the same way.

*Ordinary and special resolutions*

For the first time, “ordinary resolution” is defined. Section 192(1) provides that it means “a resolution passed by a simple majority of the votes cast by members of a company as, being entitled to do so, vote in person or by proxy at a general meeting of the company.”

Special resolution is afforded a different definition to its current one and now means a resolution—

- (a) That is referred to as such in this Act, or is required (whether by this Act or by a company’s constitution or otherwise) to be passed as a special resolution, and
- (b) That is passed by not less than 75% of the votes cast by such members of the company concerned as, being entitled to do so, vote in person or by proxy at a general meeting, and
- (c) That is passed at a meeting of which 21 days’ notice has been given and which complies with the requirements of section 182(5) (i.e. as to place, date, time, nature of business, text of the special resolution etc).

Despite the 21 days’ notice requirement, section 192(4) provides that a resolution may still be proposed and passed as a special resolution at a meeting of which lesser notice has been given where it has been so agreed by a majority in number of the members having the right to attend and vote at any such meeting, being a majority either (a) together holding not less than 90% in nominal value of the shares giving that right, or (b) together representing not less than 90% of the total voting rights at that meeting of all the members.

It is also specifically provided that “written resolution” means either an ordinary resolution or a special resolution passed in accordance with section 194 or 195.

*Resolutions passed at adjourned meetings*

A resolution passed at an adjourned general meeting shall be treated as having been passed on the date on which it was in fact passed and not at any earlier date: section 193.

*Unanimous written resolutions*

Section 194 provides that a resolution in writing signed by all of the members entitled to attend and vote on such a resolution at a general meeting is as valid and effective for all purposes as if it had been passed at a general meeting duly convened and held and if described as a special resolution will be deemed to be a special resolution. No longer will it be the case that an LTD can only rely on this where its constitution permits a unanimous written resolution; the statutory default position will be that every LTD company can pass a resolution as a unanimous written resolution.

A written resolution may consist of several documents in like form signed by one or more members (section 194(3)) and will be deemed to have been passed on the date on which it was signed by the last member to sign; and where a signature is dated, that shall be prima facie evidence that it was signed on that date (section 194(4)).

The signatories of a written resolution are required to deliver it to the company within 14 days of its passing (section 194(6)) and where a resolution is not contemporaneously signed, the company must notify the members of its passing within 21 days of the company itself having been notified (section 194(5)). The company is required to retain the resolution sent to it as if it were minutes of a meeting: section 194(7). It is important to note that the failure to comply with section 194(5) – (7) does not invalidate the resolution.

As was previously the case, a unanimous written resolution does not apply to the removal of a director or of a statutory auditor. Note, however, that it will still be possible for the sole member of a single member company to remove a director by means of a written decision (see section 197, below).

#### *Majority written resolutions*

Majority written resolutions – whether ordinary or special – are a new concept to Irish company law. Section 195(1) provides that a resolution in writing:

- (a) that is described as being an ordinary resolution;
- (b) that is signed by a member or members who alone or together, at the time of the signing, represent(s) more than 50% of the total voting rights of all the members who would have the right to attend and vote at a general meeting at that time and
- (c) the proposed text of which, and an explanation of its main purpose, has been circulated, by the directors or the other person proposing it, to all the members of the company who would be entitled to attend and vote on the resolution,

shall be as valid and effective for all purposes as if the resolution had been passed at a general meeting of the company duly convened and held.

Where such a resolution is described as being a special resolution and is signed by a member or members representing 75% of the total voting rights and (c) above is complied with, it will be as valid as a special resolution passed at a general meeting (section 195(4)).

A majority written resolution may consist of several documents in like form signed by one or more members (section 195(8)).

An important point to note is the mandatory delayed effect of majority written resolutions. So, section 195(9) provides that an ordinary resolution passed as a majority written resolution shall be deemed to have been passed at a meeting held 7 days after the date on which it was signed by the last member to sign and a special resolution passed as a majority written resolution shall be deemed to have been passed at a meeting held 21 days after the date on which it was signed by the last member to sign. This is, however, subject to section 195(10), which provides that the mandatory delayed effect shall be waived where all of the members who are entitled to attend and vote on the resolution state, in a written waiver signed by each of them, that section 195(9) is waived.

Section 196 sets out a number of conditions and restrictions on the use of the majority written resolution procedure:

- it cannot be used to remove a director or to remove a statutory auditor (section 196(1));
- the members who sign a written resolution must deliver the resolution to the company (section 196(3));
- within 3 days of the resolution being delivered to the company, the company must notify every member of the fact that the resolution was signed by the requisite majority and the date that it will be deemed to be passed (section 196(2));
- the company shall retain the resolution as if it were minutes of a meeting (section 196(4));
- a majority written resolution is of no effect unless it is delivered to the company under section 196(3), but non-compliance with section 196(2) and (4) does not affect its validity.

#### *Single-member companies*

Section 197 deals with single-member companies and is one of a number of provisions which replace the original statutory instrument, SI 275 of 1994, which implemented the 10<sup>th</sup> Company Law Directive. Section 197(2) confirms that all the powers exercisable by a company in general meeting under this Act or otherwise, shall be exercisable by the sole member without the need to hold a general meeting; this includes the power to remove a director, although this is expressed to be “*without prejudice to the application of the requirements of procedural fairness to the exercise of that power of removal by the sole member*”.

Statutory auditors may not, however, be removed by a sole member without holding the requisite meeting provided for in section 181(3) of CB 2012.

The distinction between *resolutions* and *written decisions* is preserved by section 197(4) such that any provision of CB 2012 which enables or requires any matter to be done or to be decided by a company in general meeting or requires any matter to be decided by a resolution, shall be deemed to be satisfied by a decision of the sole member drawn up in writing and notified to the company.

#### *Class meetings*

The provisions of Part 4 of CB 2012 and of companies' constitutions relating to general meetings shall as far as applicable apply to any meeting of any class of member of the company: section 198.

#### *Registration of resolutions and agreements*

Copies of every resolution or agreement to which section 199 applies must be forwarded by the company concerned to the Registrar within 15 days after the date of their passing or making. There have been a number of changes to the list of currently registrable resolutions or agreements e.g. resolutions decreasing authorised share capital, conferring authority for the allotment of shares, converting stock to shares and vice-versa.

#### *Minutes of meetings*

Section 200 provides the requirement that companies must, as soon as may be after the holding or a meeting or passing of a resolution, cause minutes and the terms of all resolutions to be entered in books. The requirement that minutes be kept of directors' meetings has not been dropped but is, rather, contained in a separate section, section 167.

#### *Designated activity companies*

The law of meetings as it applies to the DAC is that set out above as applying to the LTD, subject to three modifications.

First, a DAC may not dispense with holding an AGM.<sup>11</sup> Secondly, section 194 (unanimous written resolutions) shall apply to a DAC with the modification that its constitution may expressly disallow the use of unanimous written resolutions.<sup>12</sup> Thirdly, section 195 (majority written resolutions) shall also apply to a DAC with the modification that its constitution may expressly disallow the use of majority written resolutions.<sup>13</sup>

### *Public limited companies and SEs*

The law of meetings as it applies to the PLC and SE is that set out above, as applies to the LTD subject to certain disapplications, modifications and supplemental provisions.

- The provisions on majority written resolutions contained in sections 195 and 196 are expressly disappplied in respect of PLCs;<sup>14</sup>
- There is specific permission for a PLC that is a participating issuer to set a “record date” up to 48 hours before a meeting is held in order to determine members’ rights to attend and vote at a meeting and how many votes may be cast;<sup>15</sup>
- There is specific permission for a PLC that is a participating issuer for the purposes of serving notices of meetings, to determine that persons entitled to receive notices are those entered on the relevant register of securities at the close of business on a determined day;<sup>16</sup>
- In the case of every PLC, at least 14 days’ notice must be given of an EGM;<sup>17</sup>
- The directors of a PLC must convene a general meeting in the case of a serious capital loss – this requirement does not exist for other types of companies;<sup>18</sup>
- Notwithstanding anything in the constitution of a PLC whose shares are admitted to trading on a regulated market in any Member State (a traded PLC), the following provisions shall apply:<sup>19</sup>
  - It shall ensure equal treatment of all members who are in the same position with regard to the exercise of voting rights and participation in a general meeting of the company;<sup>20</sup>
  - Section 179(3) shall be modified in its application to a traded PLC by providing that 5% can requisition a general meeting;<sup>21</sup>

<sup>11</sup> Section 991 disapplies section 176(3) and (4) to DACs.

<sup>12</sup> Section 992 of the CB 2012.

<sup>13</sup> Section 993 of the CB 2012.

<sup>14</sup> Section 1004(4) of the CB 2012.

<sup>15</sup> Section 1095 of the CB 2012.

<sup>16</sup> Section 1096 of the CB 2012.

<sup>17</sup> Section 1098 of the CB 2012.

<sup>18</sup> Section 1111 of the CB 2012.

<sup>19</sup> Section 1099(1) and (2) of the CB 2012.

<sup>20</sup> Section 1100 of the CB 2012.

<sup>21</sup> Section 1101 of the CB 2012.

- The length of notice of general meetings by traded PLCs is different<sup>22</sup> and, in addition, certain additional provisions are applied;<sup>23</sup>
- Members have a right to put items on the agenda of the general meeting and to table draft resolutions;<sup>24</sup>
- Different rules exist in relation to the requirements for participation and voting in general meetings;<sup>25</sup>
- Participation in general meetings by electronic means is facilitated;<sup>26</sup>
- Members have a right to ask questions;<sup>27</sup>
- Additional rules exist in relation to proxies;<sup>28</sup>
- Traded PLCs can permit votes to be cast in advance of meetings by correspondence;<sup>29</sup>
- Additional rules exist for the results of voting.<sup>30</sup>

### *Guarantee Companies*

The law of meetings as it applies to the CLG is that set out above as applying to the LTD, subject to certain disapplications, modifications and supplemental provisions:

- The provisions on majority written resolutions contained in sections 195 and 196 are expressly disappplied in respect of CLGs;<sup>31</sup>
- A CLG may not dispense with holding an AGM;<sup>32</sup>
- Section 179 on the convening of EGMs is modified in its application to CLGs;<sup>33</sup>
- Section 181(2) to (4) concerning joint holders of shares are disappplied to CLGs;<sup>34</sup>
- Certain provisions concerning proxies in section 184<sup>35</sup> and the right to demand a poll in section 190<sup>36</sup> are modified;

<sup>22</sup> Section 1102 of the CB 2012.

<sup>23</sup> Section 1103 of the CB 2012.

<sup>24</sup> Section 1104 of the CB 2012.

<sup>25</sup> Section 1105 of the CB 2012.

<sup>26</sup> Section 1106 of the CB 2012.

<sup>27</sup> Section 1107 of the CB 2012.

<sup>28</sup> Section 1108 of the CB 2012.

<sup>29</sup> Section 1109 of the CB 2012.

<sup>30</sup> Section 1110 of the CB 2012.

<sup>31</sup> Section 1171(6) of the CB 2012.

<sup>32</sup> Section 1200 of the CB 2012.

<sup>33</sup> Section 1201 of the CB 2012.

<sup>34</sup> Section 1202 of the CB 2012.

<sup>35</sup> Section 1203 of the CB 2012.

- Section 189 is modified in that, unless the constitution provides otherwise, every member of a CLG shall have one vote, whether on a show of hands or a poll, and a member shall have no vote unless all monies payable to the company in respect of that member have been paid;<sup>37</sup>
- The unanimous resolution procedure can be disapplied where a CLG's constitution so provides;<sup>38</sup>
- There are minor amendments to section 199 which legislates for those resolutions and agreements that require to be registered with the CRO.<sup>39</sup>

### *Unlimited companies*

The law of meetings as it applies to the UC is that set out above as applying to the LTD, subject only to one disapplication and one minor modification:

- Section 176(3) and (4) which relate to the dispensing with the holding of an annual general meeting shall not apply to a UC;<sup>40</sup>
- Section 194 (unanimous written resolutions) shall apply to a UC with the modification that its constitution may expressly disallow the use of such unanimous written resolutions.<sup>41</sup>

Generally, it may be noted that there are no differences proposed in relation to the law of meetings as it applies to the private unlimited company (ULC), public unlimited company (PUC) or public unlimited company without a share capital (PULC).

### *Investment companies*

The law of meetings as it applies to the investment company is that set out above, as applying to the PLC, subject to the following additional disapplications, modifications and supplemental provisions:

- The additional rights of shareholders in certain PLCs in sections 1099 to 1110 are disapplied; and
- The obligation to convene an EGM in the case of a serious loss of capital is disapplied.<sup>42</sup>

***For further information on this area contact:***

***Dr Tom Courtney, Partner, [tom.courtney@arthurcox.com](mailto:tom.courtney@arthurcox.com),***

***or your usual Arthur Cox contact***

*This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.*

<sup>36</sup> Section 1205 of the CB 2012.

<sup>37</sup> Section 1204 of the CB 2012.

<sup>38</sup> Section 1206 of the CB 2012.

<sup>39</sup> Section 1207 of the CB 2012.

<sup>40</sup> Section 1257 of the CB 2012.

<sup>41</sup> Section 1258 of the CB 2012.

<sup>42</sup> Section 1380(4) of the CB 2012.