



SLAUGHTER AND MAY

The Law of Difficult Meetings

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**THE LAW OF DIFFICULT MEETINGS**

## PART 1 - INTRODUCTION

### 1. General introductory remarks

Outside the criminal law there can be few better examples of complex rules struggling to govern those who do not wish particularly to be ruled than those applying to difficult or hostile company meetings. However, unlike the situation with respect to criminal law, where rule-breakers seek to avoid the application of rules to themselves, the hostile faction at a company meeting may not be wholly or at all rule-breaking, but indeed rule-exploiting in order to frustrate, subvert or change the meeting's agenda.

It is a key principle of the UK Corporate Governance Code (the "Corporate Governance Code") that "[t]he Board should use general meetings to communicate with investors and to encourage their participation". The Institute of Chartered Secretaries and Administrators ("ICSA") interprets this to mean that the Chairman of a general meeting must be prepared to allow debate and questions - the general meeting is an opportunity for shareholders to speak, not simply a forum for the Board to deliver speeches or prepared answers to previously submitted questions.

Therefore the task of the company (assuming that it is the AGM or any similar such meeting convened by the Board) and more specifically the Chairman of the meeting and his or her advisers is broadly twofold:

- to maintain order and discipline while driving the meeting forward at a reasonable pace, and
- to anticipate and respond to lawful devices employed against the company's business.

In a difficult or hostile meeting, the test for the Chairman is how well he can achieve these aims without impinging on the legitimate interests of shareholders and the principle of the Corporate Governance Code referred to above.

### 2. The purpose of this paper

The present discussion must necessarily be selective, because there is a vast corpus of law concerning company meetings (unsurprisingly, battles fought at meetings are sometimes continued in the courts) and a critical element in the legal analysis is the articles of the company concerned. It is possible with well-drawn articles to remove much (but not all) legal uncertainty from some areas and to tip the balance of power at meetings very much in the direction of the Chairman of the meeting. However, different companies have different views and traditions and it is not particularly useful to generalise (although it is always very important for the directors to know and understand the provisions of their company's articles).

This discussion will concentrate on law and practice at the meeting itself. It assumes that the resolutions and notice of meeting have been correctly formulated and given, that any necessary explanatory circular is satisfactorily complete and accurate and that there has been no trouble with record dates, proxy cards or disputes about membership.

## **PART 1- PREPARATIONS FOR MEETING**

### **3. The time, date and location of the meeting**

The directors usually have discretion to fix the place, time and date of the meeting. As with other powers vested in the directors, this should be exercised in good faith and in the interests of the company. Consequently, the time and place of a general meeting should be arranged to be reasonably convenient to shareholders. In Cannon v Trask (1875) 20 E1.669, the directors of a company were restrained from convening an AGM on a date intentionally chosen to prevent certain shareholders from exercising their voting rights. However, Martin v Walker and Others (1918) 145 L.T.Jo. 377 suggests that the meeting need not be held in the most convenient location for shareholders.

ICSA recommends that the location, date and time of an AGM should have regard to what is likely to be convenient to shareholders generally and that companies should try to avoid holding their AGMs on the same day as others in the same sector as clashes mean that shareholders with a portfolio across the sector cannot personally attend all the AGMs of the companies in which they hold shares.

### **4. The venue**

#### **4.1 Basic principle and audio-visual links**

The basic principle is that all members who wish to attend should be able to attend the meeting, and that all members who do attend must be able to see and hear the Chairman and all speakers (and must be able to be seen and heard by others). Consequently, large rooms with balconies may not make suitable venues. If, as at Westminster Hall, the balcony overhangs the lower seating area, it may not be possible for those on the floor and on the balcony to be in visual contact.

However, Byng v London Life (1989) 2 WLR 738 gave its blessing to audio-visual links. The principle stated above can be satisfied if members are electronically in one another's presence. As a further consequence of this case, an adjournment or suspension is necessary if the audio-visual link breaks down. Provided that the audio-visual link works properly, it does not matter whether the members are in the same room, separate rooms or even, it seems, different locations. Nonetheless, ICSA advises that, as audio-visual links are expensive to establish and can be unreliable, a large room capable of being partitioned off may be preferable to separate overspill rooms.

Also note that as a matter of best practice, ICSA recommends that the venue for an AGM is accessible by attendees with disabilities, including hearing disabilities.

## 4.2 Change of venue and postponement/cancellation

If it is necessary to change the venue after the notice of meeting has been sent out, either because the venue is likely to prove too small or (as happened with bombs in the City in the 1990s) the venue is destroyed, the proper course of action is to start the meeting at the original venue before formally adjourning it and recommencing after a short interval at the new venue. In these circumstances, it is obviously sensible to inform members in advance, ideally in writing via post and/or email, by way of an advertisement in a national newspaper and by publishing the change of venue on the investor section of the company's website. It is also advisable to start the meeting at the original venue with the minimum number of people necessary to satisfy the quorum requirements.

At common law it is not possible to postpone or cancel a meeting once it has been duly called. However, it may be that it is possible for articles to provide for postponement. Where it is desired to cancel a meeting because the purpose for which it was originally called has ceased to exist, then the proper course is to open the meeting and adjourn it indefinitely without transacting any business. Of course, it would be sensible to inform shareholders by email, post or advertisement that the meeting will be a mere formality.

## 4.3 Size of venue

A meeting room which is too small gives rise to serious constitutional problems. The best way to avert a problem is to arrange a large enough venue in the first place. Therefore, either book a meeting room which is bound to be "too big", or have a stand-by option on a larger venue. The larger venue should be available at the same time as the original venue; otherwise, there may be a further constitutional problem if, for example, the alternative venue is not available until several hours later. Shareholders who had made arrangements to attend the earlier meeting may not be able to attend the later meeting nor be able to make proxy arrangements, thus invalidating the second meeting (following the rationale of the London Life case).

As touched upon above, a meeting in a very large venue or in several linked venues depends for its successful conduct (and perhaps legality) on the proper working of the audio or audio-visual equipment. This should be rigorously checked in advance and again immediately prior to the commencement of the meeting. In particular, care should be taken to ensure that the Chairman is in command of sufficient volume to enable him to be heard despite any noisy protest. Consideration might also be given to providing the Chairman with the ability to cut off other speakers if they refuse to leave a speaking-point or give up a mobile microphone. As in all cases, the Chairman must exercise this discretion judicially in accordance with the principles set out in this paper.

## 4.4 Layout

The layout of the room is important. Aisles should be frequent and wide enough so that, should it become necessary to eject anyone, security personnel can achieve that objective swiftly and efficiently. If there is a possibility that severe disruption may occur, possibly involving a concerted attempt to halt the meeting by storming the stage or dais, then not only should the latter be sufficiently high but also it is a good idea to reserve the front area

of seats for well-disposed individuals such as security staff or employees. Consideration might be given to the relative advantage of a long, narrow venue compared with a shorter, wider one. One advantage of the former is that it is easier for the Chairman to see everything that is going on and to give the appearance, when answering any question, that he is addressing the meeting rather than the individual questioner. It is also usually to the advantage of the Chairman, if it can be arranged, for ill-disposed members to be at the back, rather than the front, of the room.

#### 4.5 Security

(A) The police

Generally, the jurisdiction of the police ends at the meeting room door. If there is likely to be public disorder outside the meeting, then of course the police should be notified. Although it is possible to “hire” the police to come inside the meeting room (as at a football ground) this is not normally deemed to be the most sensitive way of ensuring order. Usually the company provides its own security staff or hires a security firm. Sometimes the venue may provide its own security officers.

(B) Identification and searches

The company may wish, or be obliged under the terms of the licence of the venue, to ask those attending to identify themselves and, in some cases, to submit to a search. Admission procedures must not in those circumstances result in someone being improperly refused entrance to the meeting. As much as possible should be arranged in advance, for example, through the despatch of colour-coded admission cards so that those attending can readily identify themselves as an individual, corporate representative, proxy or guest. Those who arrive without admission cards can then be referred to a desk where their claims to be shareholders may be verified. Note that ICSA takes the view that, even if the articles state that production of an attendance card is a condition of entry, it is unlikely to be reasonable for a company to exclude a shareholder if they can prove their identity in some other way.

Although in the absence of express provision in the articles it is not possible to refuse admission to a member who declines to submit to a search, an element of deterrence against those whose refusal is grounded in the actual possession of an offensive object rather than in principle may be for the refuser’s details to be noted down from his or her admission card and for him or her to be directed to a certain part of the room where security staff can keep a watchful eye. It is also worth noting that some companies have adopted provisions into their articles to permit greater security at annual and other general meetings, particularly where there is a past history of unruly disturbance. Some companies also refer to the security arrangements in place at the meeting venue, including whether a search will be carried out, in the notice of meeting. This may act as a deterrent for those who intend to bring offensive objects to the meeting.



Where a member has submitted to a search, and the search has turned up offensive objects (which may either be weapons, articles such as flour bags and tomatoes which are clearly intended to be used as weapons, or items of disruption such as banners or whistles), then a refusal to leave any such articles outside the meeting may be grounds for refusing admission on the general principle that the Chairman is entitled to ensure that the meeting is conducted in good order. However, since it is for the Chairman to decide this matter, any such refusal to admit someone by security staff on this ground will have to be referred to the Chairman for confirmation.

(C) Audio and visual recording equipment and mobile phones

ICSA recommends that companies should establish a policy on the admittance of audio and visual recording equipment to the meeting and the use of mobile phones by those attending the meeting. As a matter of good practice and to minimise delays prior to the meeting, this policy may also be referred to in the notice of meeting. Arguably, the Chairman may, in certain circumstances, be entitled to refuse the admission of such items to protect the good order of the meeting and to protect the identity of those attending the meeting. However, it may be difficult to justify exclusion of equipment based on grounds of security or good order unless the equipment could potentially disrupt the meeting. Moreover, if the press are also in attendance at the meeting, it may be more difficult to legitimately ask those who are entitled to attend the meeting to leave their equipment outside of the meeting.

In practice, it is increasingly difficult for companies to impose rules such as those described above, as most shareholders will attend meetings in possession of a mobile phone which is capable of taking photographs, making audio and visual recordings and uploading recorded content to the internet.

## 5. Attendance at meetings: power to exclude

In the absence of a provision in the articles, there seems to be no scope to imply a right to exclude members who refuse to comply with reasonable conditions, such as submission to a search. This is important to bear in mind when the company is agreeing the terms of any licence of non-company premises. The right of a member to attend a general meeting cannot simply be overridden by a condition imposed on a company under the licence allowing the company to use the rooms booked for the meeting.

Although the company may agree to comply with a condition that only members be admitted - thus obliging the company to require those attending to identify themselves as members - as mentioned at sub-paragraph 4.5(B) (“Identification and searches”) above, in the absence of provision in the articles it may not agree to make it a condition of attendance that members submit to a search (Bratton Seymour Service Company v Oxborough [1992] BCLC 693).

It is important to emphasise that, in cases of doubt, admission procedures should allow attendance as it is essential that the application of such procedures does not result in the exclusion from the meeting of a person entitled to attend (or the prevention from voting of

someone entitled to vote). The consequence of excluding a person who is entitled to attend could be to vitiate the meeting.

## 6. Information booths

Some companies have adopted the practice of setting up information booths at AGMs. The general feeling appears to be that the booths do help to foster good relations with shareholders. The booths are geared particularly to dealing with questions which individual shareholders might otherwise have raised with the company by way of letter, as an extension to the enquiries which the company deals with regularly. The booths might deal with questions relating to particular shareholdings (perhaps with the assistance of the registrars), provide leaflets relating to trading companies, or deal with questions, complaints or comments from shareholders about products or services. As a result, some of the more general discussion of the company's activities which might have been raised on the floor of the meeting may be siphoned off and dealt with more constructively and relevantly by the information booths. Another benefit of the information booth is that the Chairman has another valid reason for bringing generalised discussion of the company's business to an end. He can simply refer discussion or questions on, for example, consumer-type issues to the information booths.

Information booths can also be used to enable shareholders to register questions which are to be raised at the meeting. For traded companies (namely companies admitted to trading on a regulated market in an EEA State (in the UK this includes the LSE main market, the main board of ISDX (previously PLUS) and Turquoise but not AIM)), such booths can be used as a means of allowing shareholders to pre-register questions relating to the business of the meeting, which the company is required to answer under section 319A of the Companies Act 2006 ("CA 2006"). This approach may help to reduce the amount of time that questioning takes at a meeting, as duplicates can be filtered out and questions can potentially be grouped together according to their subject matter. This approach may also give some (albeit limited) extra time to prepare answers for difficult questions. Consequently, ICOSA recommends that companies invite shareholders to submit questions in advance of AGMs but notes that this must not be used as a mechanism to replace spontaneity at meetings.

Additionally, some companies set up sections on their websites prior to a meeting, setting out common questions with answers.

The company will want to give careful thought to the type of information disclosed at the information booths. Clearly, the basic considerations are the same as when the Chairman, executive directors or senior executives answer questions in informal discussions after the meeting: no inside information should be disclosed and responses should not be at odds with unannounced inside information. Further, if there is any doubt about whether it is appropriate or in the company's interests to reply to an enquiry, it would be sensible to take a note of the enquiry and to give the matter further thought before responding in writing. There may be a danger in setting up information booths if an AGM falls at a particularly sensitive time, such as around the time of a takeover bid (Rule 20.1 of the City Code on Takeovers and Mergers states that information should be made equally available to all shareholders as nearly as possible at the same time and in the same manner).

## 7. Preparations for class meetings

If various class meetings need to be held, the seating arrangements for those attending will have to be carefully planned in advance to ensure smooth running. Either the different class meetings can be held in separate rooms, with the Chairman and directors moving between the rooms, or all the meetings can be held in one room with seating plans segregating the room into different sections. Either way, it will be essential to set up a strictly controlled attendance desk.

If all the meetings are held in one room, it is open to a shareholder to argue that he does not want other people present at this class meeting. Certainly, if an objection of this kind is raised, the matter should be put to the class meeting. The validity of class meetings relating to a scheme for reduction of capital was considered by the House of Lords in the case of Carruth v ICI (1937) AC 707. The majority held that although generally a separate meeting of a class should only be attended by members of the class, the presence in this case of shareholders of another class was a matter relating to the conduct of the meeting which lay in the hands of the Chairman with the assent of those persons who were properly present and constituted the meeting. It might have been better if the Chairman had explained the position to the meeting and invited an expression of view before proceeding on the proposed basis. However, even without this, as no objection was taken at the meeting, those present must be taken to have assented to the meeting being so conducted and the resolution was validly passed.

There is sometimes doubt as to whether or not a particular class meeting is necessary on a particular item of business. If there is a concern that the class might argue in future that they should have had a separate class meeting, a practical solution is for a section of the meeting room to be roped off for that class and, on a vote on a show of hands, special note can then be taken as to how the class voted.

It is important not to have anything other than short gaps between meetings in a series, as the mood can quickly become restless, particularly if everyone has to wait for a full general meeting following the class meetings.

## PART 2 - COMMENCEMENT AND CONDUCT OF MEETING

### 8. Order of business

The order in which business is transacted at a potentially difficult meeting may be critical to its conduct. If it is, then careful thought should be given to the matter when preparing the notice of meeting.

#### 8.1 Report and accounts

Some companies expect noisy disruption when questions are taken on its activities following the Chairman's statement and the proposal of the resolution to adopt the report and accounts. If the report and accounts are likely to generate hostile discussion, and they are considered at the beginning of the meeting, the atmosphere generated may remain for the rest of the meeting even though the business is relatively non-contentious. It would be

unusual, but not impossible, to reverse the usual order of the meeting and take the adoption of the accounts and the declaration of a dividend as a last item. However, if a meeting is well run by the Chairman and the shareholders are given a fair opportunity to have their say on particular issues at the beginning of the meeting, the mood of the meeting may well settle down once the formal business of the meeting begins. This strategy is again aimed at limiting disruption to the meeting and is commonly adopted.

Another possible solution to this problem is for the Chairman to make it clear that discussion on the adoption of the accounts is to be restricted to matters directly relevant to the resolution under consideration. However, the Chairman might then explain that questions on the general business activities of the company will be allowed at the end of the meeting. This may permit the strictly formal business to be transacted with the minimum disruption and keep the heated debate and discussion on controversial issues until the end of the meeting after the transaction of the formal business. (See further paragraph 12 (“Debate and discussion”) below.) It should also be noted that there is no statutory requirement that the accounts be approved. The statutory obligation for public companies is simply to lay them before the meeting (section 437 CA 2006). However, it is a requirement of the Corporate Governance Code (Code provision E.2.1) that a resolution should be put to the AGM relating to the report and accounts. Shareholders often choose to vote against a resolution to receive or approve the report and accounts as an act of disapproval of the company’s performance or policy.

## **8.2 Taking of a poll**

Except in relation to the election of the Chairman of the meeting or a question of adjournment, when a poll must be taken immediately, it is common for articles to provide that a poll may be taken either immediately or at such time (within, for example, 30 days of the demand) or place as the Chairman directs and that the demand for a poll does not prevent a general meeting from continuing, except as regards the question on which the poll was demanded (see, for example, article 37 of the Model Articles for Public Companies (the “Public Company Model Articles”), contained in the Companies (Model Articles) Regulations 2008). If, however, a poll is duly demanded on a proposal to take the business in some other order, this means that the Chairman cannot proceed with the items of business set out in the notice of meeting, because to do so would frustrate the purpose of the poll.

Business at a meeting can, therefore, be effectively disrupted by troublesome shareholders demanding a poll on the order of business. The disruption can be particularly marked with larger companies where it may not be possible to announce the result of the poll immediately, so that the meeting may have to be adjourned. In this instance electronic poll voting would be very useful as it minimises the practical difficulties and delay in taking the poll.

## **9. Starting the meeting**

If, at the time designated for the meeting to begin, people are still waiting to be admitted to the meeting room, the question arises as to whether the Chairman should begin the meeting on time or wait until everyone who wants to attend is inside the hall. Where

appropriate, admission procedures for checking the members into a meeting should be adequate to cope with a large last minute surge. Legally, however, the general rule is that if a quorum is present, the Chairman should attempt to start the proceedings on time. This general principle needs some qualification in the light of the general duties of the Chairman requiring him, broadly speaking, to act impartially to enable a meeting to proceed in an orderly manner. Perhaps the model answer in this situation is that the meeting should start when all those who are in the queue for admittance at the start time have been admitted to the meeting.

In practice, a delay of this nature may be unattractive and it may be preferable to open the meeting promptly but to delay proceeding to formal business until the members waiting to be admitted have joined the meeting. In the case of an AGM, this approach would fit in naturally because the meeting is likely to open with the Chairman's statement before proceeding to any resolutions. In contrast, where a general meeting is convened to consider a single resolution, it may be a little less easy to open the meeting but delay discussion of the resolution until all the members wishing to attend have been admitted.

## **10. Chairman's duties and powers at the meeting and handling of the meeting**

### **10.1 Chairman's duties**

The Chairman's duties are owed to the meeting and not to the directors: he acts as Chairman of the meeting, not as Chairman of the board of directors. He must act impartially and his fundamental duties are to preserve order, to ensure that the business of the meeting is conducted in a proper and efficient manner and in accordance with law and the company's articles, to ensure that all shades of opinion are given a fair hearing as far as practicable, to accept all legitimate resolutions and amendments and to ascertain the views of the meeting on the questions under consideration.

### **10.2 Powers and casting vote**

The powers of the Chairman include the powers to regulate the course of proceedings, to make rulings on a point of order, to close the discussion and move to a vote with the consent of the meeting, to rule on the validity of and declare the results of any vote, to adjourn the meeting, to demand a poll and make arrangements for taking a poll and to receive or reject proxies and to declare the result of the voting.

Historically, the Chairman of a general meeting also tended to be given a casting vote. However, sections 281 and 282 CA 2006 require that an ordinary resolution be passed by simple majority, overriding any provision in the articles granting the Chairman a casting vote. Notwithstanding these sections, by virtue of the Companies Act 2006 (Commencement No. 5, Transitional Provisions and Savings) Order 2007, if immediately before 1 October 2007 a company's articles granted the Chairman the power to exercise a casting vote in the event of equality of votes, the Chairman retains such power (save in the case of a traded company).

Particularly in a company where there is a history of disruptions at general meetings, it may be helpful to buttress the Chairman's powers at common law with an express provision in the articles empowering the Chairman to take such action as he thinks fit to promote the orderly conduct of the business of the meeting and provide that his decision on matters of procedure shall be final.

### 10.3 Balance of powers

In Carruth v ICI, the court made clear that how a meeting is conducted is largely in the hands of the Chairman with the assent of the shareholders present at the meeting. The following comments were made as to the boundary between the Chairman's powers and the meeting's powers:

“there are many matters relating to the conduct of a meeting which lie entirely in the hands of those persons who are present and constitute the meeting. Thus it rests with the meeting to decide whether notices, resolutions, minutes, accounts, and such like shall be read to the meeting or be taken as read; whether representatives of the Press, or any other persons not qualified to be summoned to the meeting, shall be permitted to be present, or if present shall be permitted to remain; whether and when discussion shall be terminated and a vote taken; whether the meeting shall be adjourned. In all these matters, and they are only instances, the meeting decides, and if necessary a vote must be taken to ascertain the wishes of the majority. If no objection is taken by any constituent of the meeting, the meeting must be taken to be assenting to the course adopted.”

There have been cases where resolutions properly proposed to a meeting were not accepted by the Chairman, who tried to close the meeting without letting all those who wished to speak do so. In these cases it was held quite valid for the members to continue the meeting and proceed with business (see, for example, National Dwellings Society v Sykes (1894) 3 Ch 159). The normal sanction where a Chairman has invalidly refused an amendment or resolution is for a court to declare that part of the meeting invalid (see further paragraph 19 (“Amendment to ordinary resolutions”) below).

## 11. Who can speak?

Unless the articles expressly state otherwise, it seems logical to treat the right to speak as arising by implication where there is a right to vote at meetings. On this basis, in the absence of express provision to the contrary, the right to speak will be restricted if a member's voting rights are restricted. If there is any scope for argument about the rights of any class of shareholder, it may be advisable to set out in the articles the precise extent of the rights (i) to receive notice of the meeting, (ii) to attend the meeting, (iii) to speak at the meeting, and (iv) to vote at the meeting. Note also that since 2009, in respect of members of traded companies, the right to speak can arguably be implied from the ‘right’ to ask questions.

A duly appointed corporate representative has the same powers as a member and will thus be entitled to speak in all cases where the member would be so entitled. Section 324(1) CA

2006 provides that a proxy is entitled to exercise the rights of the member appointing him to attend, speak and vote at a meeting of the company.

The Chairman and any director can speak at a general meeting. The Corporate Governance Code (Code principle E.2.3) recommends that the chairman should arrange for the chairmen of the audit, remuneration and nomination committees to be available to answer questions at the AGM and for all directors to attend.

Auditors also have a right to speak on any matter which concerns them as auditors. Section 513 CA 2006 gives similar rights to an auditor removed from office in relation to the general meeting of the company at which his term would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal, including rights to receive notice of the meeting, attend and be heard at the meeting on any part of the business of the meeting which concerns him as auditor.

## **12. Debate and discussion**

### **12.1 General points**

The Chairman must allow debate and questions which are relevant to the resolution under discussion; he cannot, for example, require all questions to be in writing. While it is common practice for companies to request the submission of written questions (electronic submission being permitted), this does not affect a member's right to ask questions during the meeting. Rather, this practice is merely aimed at allowing the company to have time to consider such questions prior to the meeting.

As noted in the Introduction to this paper, the general meeting is the opportunity for shareholders to exercise their right to speak and is not simply a forum for delivering prepared answers to previously submitted questions. The Corporate Governance Code (Principle E.2) recommends that boards use general meetings to communicate with investors and, importantly, to encourage their participation. The Chairman is only obliged to permit discussion which is relevant to the resolution under consideration. It has nevertheless become the practice to allow a discussion on the business activities of the company at the AGM when the resolution to adopt the report and accounts is considered, even when the matters discussed are not strictly relevant to the resolution.

As mentioned above, a traded company must answer any question posed by a member attending the meeting which relates to the business of the meeting. However, no answer is required where to do so would interfere with the preparation of the meeting, involve disclosure of confidential information, if the answer has already been given on its website in answer to a question or it is undesirable in the interest of the company or the good order of the meeting that the question be answered.

In recent years there has been a marked increase in shareholder activism with organisations present at many FTSE 100 AGMs. Activists' questions have tended to focus on the living wage, tax reporting and more recently environmental issues. While most other questions tend to be company specific, directors' remuneration is consistently a popular subject for questions.

## 12.2 Limiting debate and discussion

Where difficulties are expected, there is a temptation to take the course, when proposing the resolution to adopt the report and accounts, for the Chairman to decline to take questions on it on the grounds that it would be difficult or even impossible to hold an orderly debate because of the inevitable uproar. But it is not open for the Chairman to rule out discussion in this manner - the members have a right to discuss the business activities of the company so far as relevant to the resolution under consideration. However, as referred to above at sub-paragraph 8.1 ("Report and Accounts") above, the Chairman does have the power to lay down an order in which questions are to be taken, specifying that questions on a particularly contentious topic are to be taken after everything else.

Other legitimate ways for the Chairman to limit debate and discussion include:

### (A) Not Replying

The Chairman is not obliged to reply to any question if he does not consider it to be in the company's interest. For example, the Chairman may legitimately refuse to reply to a question where any response would require divulging price-sensitive information. However, this right must be weighed against the practical consequences of a blank refusal to answer a question, if this is likely to alienate the sympathies of the general body of shareholders or generate further dissent.

### (B) Limiting rights of members to speak

If there are a lot of members present who wish to speak, the Chairman may allow each member only one opportunity to speak on any motion, or may limit the time allowed to any speaker. These limitations must be exercised impartially, but this does not mean that the Chairman may not waive them if he deems it necessary.

### (C) Requiring all debate on one topic at one time

It is reasonable for a Chairman to rule that all questions relating to a particular topic must be dealt with at one time, so that he can refuse to take questions on that topic at other times.

### (D) Ending discussion after sufficient debate

The Chairman has an inherent right to keep any discussion within reasonable bounds and can put a stop to further discussion of a matter once it has been sufficiently debated and a fair cross-section of views has been heard. However, the Chairman must be careful to use this power impartially and not to stifle discussion or prevent the views of a minority from being effectively expressed. Those attending the meeting must feel they have been given a fair hearing; if this is afforded to them, it will probably tend to limit the force of protest. If the general body of shareholders become bored and angry with repetitious speech making, they may make their feelings clear and volubly support the Chairman's stance in bringing the discussion to an end.



(E) Moving for closure of discussion with the assent of the meeting

It is always open for the Chairman to obtain the assent of the meeting to bring the discussion to a close. He can do this by merely pausing for approbation and then taking the views of the meeting (by a show of hands or even, as a last resort, on a poll) if there is any objection. The disadvantage in expressly asking for consent is that it could be said to undermine the authority of the Chairman and to indicate indecisiveness or weakness. On the other hand, there may be some moral force in demonstrating to the protesters that the feeling of the meeting is against them and this may solidify the “normal” shareholder support behind the Chairman.

See paragraph 12.1 for exceptions to traded companies’ obligations to cause questions relating to the business of the meeting to be answered.

### 12.3 Speaking arrangements

If the meeting room is large, it may be necessary to arrange for microphone points which speakers must use so that all members at the meeting can hear what is being said. The microphone points should be equally spaced around the body of the meeting room. If the Chairman takes questions equally from each microphone point, this will help to give an appearance of equal treatment for all shareholders. It is a good idea for the Chairman to ask shareholders before speaking to give their names and, if relevant, the names of the members whom they represent (whether as a corporate representative or as a proxy) and the class of shares held.

In the case of a large meeting, it may be appropriate to set out the speaking arrangements on a “speaking card” which is given to anyone entitled to speak upon arrival at the meeting. Speaking procedures may ask potential speakers to register at the nearest speaking point to where they enter by completing the card appropriately. A “numbers” system for calling speakers to the microphone can then be adopted. If there is more than one microphone point, a rotational sequence around the meeting room might be adopted so that the appearance of all members being given a reasonably equal opportunity to speak is maintained. If this procedure is adopted, the Chairman should make clear in his introductory remarks that if a member during the course of the meeting decides he wishes to speak at the meeting, he should register at the nearest microphone point.

## 13. Defamation

A statement made at a meeting will be defamatory if it reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or to make them shun or avoid him. The company would only be liable for defamatory statements made by a person who was shown to have acted as its servant or agent. The Chairman, the directors and anyone else answering questions on behalf of the company at the meeting should be aware of the risk that any statement they make could be defamatory. Certain defences exist to a claim of defamation, including justification, qualified privilege and fair comment on a matter of public interest:

- (A) The defence of justification exists if the maker of the statement can show that the words were true in substance and fact.
- (B) The defence of qualified privilege will cover any statements at a meeting about matters of concern to the meeting because all members present will have a corresponding interest in receiving the information. However, qualified privilege is not available where a statement is made with malice or if the statement is made to persons who do not have a corresponding interest in receiving it. Consequently if, for example, the press are present at the meeting, this may cause difficulties. There is authority to suggest that qualified privilege will not be lost if the press (or other strangers) are present at the meeting in the normal course of business. However, qualified privilege will be lost if the maker of the defamatory statement expressly invited them. If the business of the company inevitably involves discussion of an area where there is potential for defamatory statements, the company may, in an exceptional case, want to consider excluding the press and other strangers from the meeting to ensure that qualified privilege is not lost. However, it would be a serious step to decide to exclude the press and would probably generate further press interest.

Provisions in the Defamation Act 1996 provide for qualified privilege in respect of the following statements:

- a fair and accurate report of proceedings at a general meeting of a UK public company;
  - a fair and accurate copy of, or extract from, any document circulated to members of a UK public company by or with the authority of the Board, or by the auditors or by any member of the company in pursuance of a right conferred by any statutory provision; and
  - a fair and accurate copy of, or extract from, any document circulated to members of a UK public company which relates to the appointment, resignation, retirement or dismissal of directors of the company.
- (C) Finally, the defence of fair comment applies to an expression of an opinion on a matter of general public interest. It may be unlikely that this defence will apply to a meeting because a company's affairs are unlikely to be matters of public interest.

## 14. Points of order

Points of order relate to compliance with the rules governing the conduct of the meeting or the correctness of the procedure being followed. This would cover any informality or irregularity, such as non-observance of statutory requirements or of the company's articles, defects in procedure such as the absence of a quorum, the allegation that a resolution is not within the scope of the meeting and objection to the use of offensive or abusive language. Points of order must be dealt with immediately. The Chairman's ruling on a point of order is final, but others present should be given the opportunity of speaking on it.

## 15. Disruptions and demonstrations

### 15.1 Keeping order

If disruption is expected, it is important to arrange counter-measures in advance of the meeting. The Chairman will certainly find it helpful if scripted responses are to hand dealing with the possible scenarios. The Chairman should also practise responses to potential difficult questions which may arise. If overflow arrangements have been put in place or a multi-venue meeting is arranged, the company must anticipate disruption not only in the room where the directors are present physically but also in the various “satellite” rooms.

It is the Chairman’s duty to keep order at the meeting. He is the person in charge and should direct, publicly, any action required. If there are hecklers in the audience, he should answer their questions as far as possible within the scope of what it may be diplomatic to say and should always try to be reasonable and helpful towards them. The Chairman should try to avoid direct confrontation or argument with the hecklers. The interchange between the Chairman and the questioners shows the rest of the audience that the Chairman is reasonable and polite, whereas perhaps the demonstrators are shown in a different light. If so, the meeting may then tend towards supporting the Chairman.

### 15.2 Practical measures

Practical tactics to deal with disruption may include:

#### (A) Separate discussions

If there is an identified “action group” or similar ad hoc body, there may be merit in making a prior offer of an opportunity to air their grievance with company representatives who have a detailed knowledge of the particular subject. This pragmatic approach, however, should only be considered where the dissenters want to raise an issue which is not strictly relevant to the business which is before the meeting. Typically, the tactic could be employed where the business activities of the company are being discussed at the AGM in the context of the resolution to adopt the report and accounts. The separate discussions would not constitute a separate meeting in the legal sense, but might be a practical way of achieving the object of ensuring that the proper business of the AGM can be transacted without being disturbed by disruptive debate on extraneous matters. Even if the offer is not accepted - and of course many “action groups” are primarily concerned to make their points in as public a forum as possible - the approach may lower the temperature of the meeting. It might also enable the Chairman to end discussions by referring to the original prior offer and renewing it.

Where it has not been possible to make contact with the body of dissenters before the meeting, the Chairman may, at the meeting, suggest separate discussions in another room, with the participation of senior staff, while the main meeting continues. Alternatively, it may be possible to offer separate discussions with the

Chairman and other directors or staff at the conclusion of the meeting. If separate discussions are suggested, it is important to attempt to arrange them immediately.

If there is so much noise that it is not possible for the Chairman to be heard, by those making the noise at least, officials should be despatched to approach the demonstrators in the room to put the suggestion to them. The Chairman should take care to let the rest of the meeting know what is happening, on the principle that the more reasonable he appears to be to the generality of the meeting, the more the generality will lose sympathy with the demonstrators.

As to the practicalities of separate meetings with demonstrators, the number of demonstrators allowed to attend separate discussions should be kept to a minimum. If there is a considerable body of demonstrators, they should be invited to choose a deputation to meet company representatives. The company should ensure that its representatives are not significantly outnumbered and that there is rough numerical parity. This counters any psychological and, in the worst case, physical intimidation. For the latter reason, a security officer should monitor the separate meeting in an unobtrusive manner.

#### (B) Adjournment

Another option for the Chairman is to adjourn the meeting for, say, half an hour to give an opportunity for people to calm down. Assuming that the articles so provide, this should be done with the consent of the meeting. Otherwise, the Chairman may in appropriate circumstances be able to rely on his inherent power to adjourn the meeting temporarily until order is restored.

If a half-hour adjournment is favoured, security officers and staff should seek to establish with the demonstrators a basis for continuing the meeting in good order. This might involve setting up a separate meeting. If these tactics do not work, another option would be for the Chairman to adjourn the meeting for fifteen minutes to another room at the same venue - which would have to be prepared in advance - and the Chairman could direct that any identifiable troublemakers be refused admission to the new rooms so that the meeting could progress in good order. Alternatively, the Chairman could adjourn the meeting of the company for a longer period, until perhaps a week, a fortnight or three weeks ahead. Again, the Chairman could order that identifiable trouble makers be excluded so that business at the meeting can be conducted in an orderly manner.

Adjournment in general is discussed in greater detail at paragraph 27 (“Adjourning the meeting”) below.

#### (C) Expulsions

The Chairman is entitled to ask anyone who is preventing the progress of the meeting by disorderly conduct of a serious nature to leave; if the person does not leave, the Chairman is entitled to have him expelled. This is a prerogative which flows from the Chairman’s duty to preserve order and ensure that the business of

the meeting is conducted in a proper and efficient manner. However, expulsion should only be used as a last resort and should involve using the minimum force necessary (otherwise the person expelled would have a claim for assault against the persons responsible, which could potentially involve the Chairman as the person who authorised the ejection).

In sufficiently serious circumstances, the Chairman can order demonstrators to leave immediately, but he is likely to retain the support of the meeting if he builds up by stages to an order to eject, so that it is apparent to all reasonable members of the audience that expulsion is only being used as a last resort. For example, the Chairman could begin by asking the demonstrators to stop their obstructive behaviour and to go to a microphone to ask a question or make a comment, so that their grievance can be heard by the whole meeting and a constructive dialogue take place. If they do not accept this invitation, he could then ask them to sit down and allow the meeting to continue. If this request gets no response, he could then ask the demonstrators to leave voluntarily, saying that he does not wish to ask the security staff to remove them but that they may leave him no alternative.

If after several reasonable requests of this nature, the demonstrators still persist in their disorderly conduct, the Chairman may have no alternative but to ask the security officers to escort the demonstrators from the room using the minimum force necessary. Ejection should only take place under the direction of the Chairman. It may be helpful if the rest of the meeting expresses in some way that they agree with the decision to eject. Even asking for a show of hands in support of ejection may be to the Chairman's tactical advantage - when demonstrators see that they have no sympathy from anyone else, they may leave of their own accord.

ICSA is also of the view that if possible, the Chairman should seek the consent of the meeting before ordering a person to be removed. However, ICSA has acknowledged that this may not be possible and emphasises that the Chairman should rely on his innate authority to take action to preserve order at the meeting. ICSA also recommends that while it is desirable to give warnings, it is not absolutely necessary for the Chairman to do so before taking action (although this will depend very much on the nature of the disturbance).

Demonstrators can only be escorted to the doors of the building; but once outside they can be refused re-entry. The Chairman may decide to adjourn the meeting while ejection of unruly demonstrators takes place.

## **16. Reducing the length of the meeting**

Particularly if disruptions are expected, it will be sensible to keep the length of the meeting to a minimum. Thus, when the notice of meeting is being prepared, consideration might be given to the possibility of combining two or more resolutions in one to reduce the number of resolutions and so reduce the length of the meeting.

Resolutions submitted en bloc have been held not to be properly carried although there is authority to the effect that resolutions can be grouped for the purposes of a poll if the meeting agrees beforehand.

However, for listed companies combining resolutions (or bundling) is subject to the Corporate Governance Code, which requires a separate resolution to be put to the AGM on each substantially separate issue (see E.2.1). Both the National Association of Pension Funds (“NAPF”) and Pensions & Investment Research Consultants Ltd (“PIRC”) are also opposed to the practice of bundling. In PIRC’s Shareholder voting guidelines, it is stated that: “PIRC does not support ‘bundled’ proposals, unless there is a clear case for shareholders approving the combined measures. Separating authorities, but making the resolutions conditional on each other is not best practice.”

Further, it is worth noting that it is not possible to combine the appointment of more than one director in one resolution at a general meeting of a public company unless a resolution to do this has first been approved by the meeting without any vote against it.

## **PART 3 - RESOLUTIONS**

### **17. Procedural motions**

Procedural motions are often used to terminate or delay discussion, or to attempt so to do. Adjournment is discussed further at paragraph 27 (“Adjourning the meeting”) below, but other common procedural motions include:

(A) Closure

The Chairman and, it seems, any member who has not spoken on the motion can move for closure of the business. A closure motion can be used against other procedural motions and amendments as well as in relation to substantive resolutions. If passed, no further discussion on the business is permitted and the motion in debate must be put to the meeting forthwith.

(B) Objecting/consenting to strangers

Members may move that strangers be asked to leave or that the meeting consent to their presence. But if the Chairman has raised the question of the presence of strangers at the outset of the meeting and the meeting did not then object, and there has been no material change in the circumstances, then the Chairman may refuse to allow the question to be re-opened.

(C) “Move the previous question”

This is a resolution that the existing question is not now put. The “previous question” is the question of whether the matter should be put to the meeting at all and should only be moved by a member who has not spoken on the resolution in hand. Debate on this resolution and on the main resolution can also continue at the

same time. If the motion is put to the meeting and defeated, the Chairman must immediately put the main resolution to the vote.

(D) “Proceed to the next business”

This has the same effect as the previous motion, namely to shelve the matter under discussion.

(E) “Adjourn the debate”

The adjournment may be for a fixed or indefinite time. A resolution to adjourn the debate, unlike a resolution to adjourn the meeting, does not prevent the meeting from continuing to transact other business.

(F) Let the matter “lie on the table”.

This is another shelving resolution and is usually used for a subject thought to be irrelevant or unimportant.

(G) “Refer back”

This resolution effectively suspends a discussion until fresh consideration has been given to the matter by, for example, a committee. It can also be used as a polite way of rejecting the recommendation of, for example, a committee.

## 18. Amendment to special resolutions or ordinary resolutions proposed at the request of shareholders

Broadly, special resolutions may not be amended. This position is based on the wording of what is now section 283(6) CA 2006, which provides that the notice of the meeting must include the text of the “resolution” and specify the intention to propose the “resolution” as a special resolution. The “resolution” must mean the resolution actually passed, and accordingly no substantive amendment may be made (Re Moorgate Mercantile Holdings Limited (1980) 1 All ER 40) and applied in Re Peninsular and Oriental Steam Navigation Co [2006] All ER (D) 36). However, in the unreported case of Re Fenner plc (11 June 1990), a resolution to reduce the company’s share capital set out certain numbers of shares which, by the time of the meeting, were inaccurate because of the subsequent exercise of some share options. The meeting purported to amend the figures to bring them up to date and the court held that common sense should prevail and the amendment should stand. The court was influenced by the argument that, in spite of the changes in the figures, the substantive object of the resolution was to reduce the share capital by £500,000 and this object remained unaltered throughout.

Cases in this area also suggest that an amendment to a special resolution will be permitted where the amendment is to correct a typographical error. In Re Uniq plc [2011] EWHC 749 (Ch), there was a numerical error in the text of a special resolution set out in the notice circulated to shareholders. It was held that although there is no scope for amending a special resolution in light of section 283(6)(a) CA 2006, if it is clear from the text of a

resolution (when read with the text of the accompanying circular) that an error has been made, then the resolution can be read, as a matter of construction, as if the error had not been made.

In Re Uniq plc, the judge relied on Re Willaire Systems plc [1987] BCLC 67, where the text of a special resolution relating to a reduction of capital as set out in the notice of meeting contained some minor numerical errors. The resolution was passed at the meeting and its validity was subsequently challenged. The Court of Appeal held that section 137 Companies Act 1985 (“CA 1985”) provided that the court may make an order confirming a reduction of capital “on such terms and conditions as it thinks fit” and that if it later became clear to the court that a resolution contained a “latent error of such a character that no-one could be prejudiced by its correction, and it was clear how it should be corrected”, that the court had statutory power to confirm the reduction under that section or an inherent power to confirm the reduction in a form or upon terms that would correct the error. It was held that the special resolution was not incapable of confirmation and therefore, was not ineffective.

It has been suggested in the past, with reference to the CA 1985, that the same strict principles apply to ordinary resolutions to be proposed at the requisition of shareholders given certain similarities in wording between section 378(2) CA 1985 and section 376 CA 1985. However, in contrast to the previous wording of section 378(2) CA 1985, section 283(6) CA 2006 now expressly requires the text of a special resolution to be included in the notice; failure to do so will invalidate the resolution. There is no such legal requirement in the context of members’ requisitioned resolutions, and on this basis there may no longer be the same argument in favour of applying the principles in relation to special resolutions to this category of ordinary resolution. Instead, the requirements in relation to amendments of ordinary resolutions may now apply to all types of ordinary resolution.

As this question has not been directly addressed, it would be advisable for companies to continue to adopt a cautious approach in relation to members’ requisitioned resolutions, and a company should not, therefore, propose any amendment to a member’s requisitioned resolution. On the other hand, if a shareholder proposes an amendment, the company risks the possibility that the resolution actually carried may be invalid if the Chairman improperly refuses to submit a valid amendment to the meeting (see below). A cautious approach would therefore involve the Chairman allowing the amendment to be put, although if the vote goes to a poll the Chairman would have to consider carefully how he should exercise his proxy votes on the question whether the amendment which had been proposed should be adopted.

## **19. Amendments to ordinary resolutions**

The following principles apply to amendments proposed to ordinary resolutions in general:

- (A) The amendment must be within the scope of the notice of meeting

This seems to be an obvious principle, but even if the notice of meeting sets out the text of an ordinary resolution in full, the meeting is not restricted from transacting any business within the “general nature” of the business set out in the notice (Betts



v MacNaghten (1910) 1 Ch 430). Where the notice does set out an ordinary resolution, the test of the “general nature” of the business would be what a reasonable shareholder reading the resolution would consider the business to be. The court is likely to adopt a commonsense approach and to decide any ambiguity in favour of a more restrictive view, so as to protect the absent shareholder. A useful guide, endorsed by the courts, is that an amendment should not be allowed which might have affected a member’s decision to attend.

- (B) The amendment must be no more onerous on the company

A resolution cannot be amended so as to impose a greater burden on the company than the unamended resolution.

- (C) The amendment must not have the effect of negating the substantive resolution

For example, an amendment may be proposed to the resolution authorising the Board to fix the remuneration of the auditors which imposes a maximum sum. But if the amendment proposes a limit of 1p, it effectively negates the resolution to authorise the Board to fix the remuneration. While an amendment which directly negates a resolution can clearly be rejected, it is not clear (because there is no authority) whether the amendment can be rejected where the amendment negates the resolution indirectly.

- (D) Other requirements

A Chairman can reject proposed amendments on the grounds of redundancy (seeking to re-open business already settled by the meeting), inconsistency (incompatible with a previous decision of the meeting), or on the more difficult grounds that the proposed amendment is either obstructive, vexatious, dilatory or irrelevant.

Articles may attempt to minimise uncertainty or the unexpected, by providing for the company to be given time to think about proposed amendments. Where the text of ordinary resolutions are set out in full in the notice of meeting, the articles may provide that no amendment shall be considered (except at the discretion of the Chairman) unless, for example, 48 hours’ notice in writing of the proposed amendment has been given to the company.

If the Chairman improperly refuses to submit an amendment to the meeting, the resolution actually passed will be invalidated (Henderson v Bank of Australasia (1890) 45 Ch D 330). The same case is authority for the proposition that there is no obligation on the part of the mover of the amendment to contest the ruling or leave the meeting: this would not change the fact that the resolution could still be challenged or set aside. In an attempt to ward off the dangers of this decision, some articles provide that substantive resolutions are not to be invalidated by any error in good faith on the part of the Chairman in ruling an amendment out of order. It is not certain whether such a provision is effective although it can do no harm provided that the company is aware that the position is uncertain.

When an amendment is moved, it takes priority over the original motion and must be voted on before the original motion can be put. If an amendment has been put to the meeting and carried, it must be put a second time, embodied in a substantive motion which supersedes the original motion. It is therefore possible for an amendment to be approved, but for the substantive motion to be lost when it is put to the meeting.

## 20. Amending a resolution to appoint directors

### 20.1 General considerations

The question here is whether the notice concerning the election or re-election of directors is wide enough to permit shareholders to propose a new person as a director, whether in place of or in addition to a nominated director. This is a complex and difficult area, but the general considerations include:

- (A) If the articles distinguish between “ordinary” and “special” business, and the election of directors is deemed to be ordinary business, such business can be considered even if not referred to in the notice of meeting. If it is special business, then the notice must set out the general nature of the business. Some articles provide that the election of directors in place of those retiring is ordinary business while the appointment of additional directors is special business. In this case, additional directors could not be appointed unless the notice has referred to such business. If no distinction is made in the articles between ordinary and special business, the notice must set out the general nature of the business.
- (B) The wording of the notice of meeting will have to be examined to see whether the appointment of the shareholders’ nominee as a director is within the scope of the notice.
- (C) Any requirement in the articles as to the giving of notice of a proposal to appoint someone a director must be complied with.
- (D) The articles will normally set out the maximum number of directors permitted. This is relevant where there is a proposal to appoint additional directors.

In Betts v MacNaghten, the court held that the notice of meeting, which set out the names of the proposed directors, was sufficient to enable unnamed directors to be elected in place of or in addition to the named directors (within any limits on the number of directors contained in the company’s articles), since a reasonable shareholder on reading the notice would realise that those nominated might not be elected and therefore others could be put up in their place. However, the notice in that case stated that the meeting was to consider and, if thought fit, pass the resolutions “with such amendments and alterations as shall be determined upon at such meeting”.

In Choppington Collieries v Johnson (1944) 1 All ER 762, the Court of Appeal emphasised that the question of the scope of the notice of meeting will turn on the construction of the notice in any given case. It was held there that the notice was wide enough to permit the election of directors, up to the maximum allowed by the articles. The court’s decision

there was based on the general nature of the phrase in the notice “to elect directors” which could be construed as contemplating the appointment of more than one director even though the notice specifically referred to the re-election of only one director.

In neither of these cases did the articles require notice to be given of a person who was proposed to be a director.

If the wording “to re-elect Mr. X as a director of the company” is included in the notice of meeting, it is probably possible to consider the appointment of another person in substitution for a director retiring by rotation but not as an additional director. However, the view has been expressed that on such wording it is even possible to allow a separately nominated person to be proposed in addition to a director retiring by rotation. If the proxies clearly support the re-appointment of the existing director, then the narrower approach has the advantage (or disadvantage, depending upon your point of view) that this will be enough to defeat the proposal to appoint the alternatively nominated director.

## **20.2 Approach to the amendment**

It is then necessary to consider the correct approach to any amendment. The resolutions set out in the notice of meeting should not be amended to provide for another person to be elected as a director in place of the named directors. An amendment of this type would have the effect of negating the substance of the resolution to re-elect the named directors and, therefore, would prevent the meeting from considering their re-election. The Chairman should rule any such amendment out of order and instead explain to the shareholders that if they wish to take this action, the correct course of action is to propose a resolution along the following lines:

“If [named director] is not re-elected as a director of the company [proposed new director] be elected as a director of the company”.

Resolutions in this form would be considered and voted upon by the meeting and polls would be taken at the same time as the resolutions to appoint the directors named in the notice of meeting.

## **21. Amendments - some practical guidance**

Where there is any doubt as to whether an amendment to a resolution should be allowed, it is usually best to permit the amendment to go forward. Sometimes, it is necessary for the Chairman to make immediate decisions upon the validity of amendments. Where the Chairman is confident that the amendment will not be supported by the meeting, nothing very much is lost by allowing the amendment to go forward even though it may not be covered by the notice of meeting. It is never advisable to reject an amendment on the basis that it will not command support. Even though this assumption may be correct, it will risk impugning the validity of the original resolution on technical grounds.

## **22. Resolutions giving instructions to the directors**

The management of the company is usually delegated under the company's articles to the directors. However, the relevant provision in the articles commonly provides that this delegated power of management be limited by means of directions given by special resolution. If such a special resolution has not been duly proposed in advance of the meeting, it is not possible at a general meeting of the company to restrict the delegation to the directors of the management of the company by giving directions to the Board by way of special resolution. Neither is it possible to do so by way of ordinary resolution which could be rejected by the Chairman on the basis that, even if passed, it would have no validity where the articles require directions to be given by special resolution.

It would, however, be possible to put to the meeting a request that the Board take action to improve the company's performance. Any such request would not bind the company or the Board to take any particular course of action. A request of this nature could be proposed as an amendment to the resolution to receive the report and accounts and would be within the scope of the notice of resolution to adopt the report and accounts.

## **23. Votes of no confidence**

It seems that a resolution of no confidence in the Board has no effect. If a shareholder proposes a resolution of no confidence, the Chairman may wish to begin by making this point and, after commenting that the shareholder has made his point and that the Board will take note of it, request the shareholder to withdraw the motion (with the consent of the meeting). The Chairman may further wish to suggest that if the shareholders want to express their confidence or otherwise in the Board, they should vote for or against the resolution to receive the report and accounts (assuming such a resolution is being put). This will avoid wasting the time of people present in considering superfluous resolutions. Having said that, if the shareholder persists, then the resolution should formally be put.

# **PART 4 - VOTING PROCEDURE**

## **24. Polls**

### **24.1 General legal considerations**

Section 321(1) CA 2006 states that a provision of the articles is void insofar as it would have the effect of excluding the right to demand a poll at a general meeting on a question other than the election of the Chairman of the meeting or the adjournment of the meeting.

Further, section 321(2) CA 2006 provides that any provision in the company's articles is void to the extent it makes ineffective a right to demand a poll made:

- (A) by not less than five members having the right to vote at the meeting; or
- (B) by a member or members representing not less than 10% of the total voting rights of all the members having the right to vote at the meeting (excluding any voting rights attached to any shares of the company held as treasury shares); or

- (C) by a member or members holding shares in the company conferring a 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 all the shares conferring that right (excluding any shares of the company conferring a right to vote at the meeting which are held as treasury shares).

If a poll is properly demanded and the Chairman improperly refuses to take it, any resolution passed on a show of hands will be invalid and ineffective.

It is the duty of the Chairman to call for a poll if he knows that the proxies which he holds show a majority conflicting with the result of a show of hands, so as to give effect to the real sense of the meeting (*The Second Consolidated Trust Ltd v. Ceylon Amalgamated Tea Rubber Estates Ltd* [1943] 2 All E.R. 567). However, sections 320(1) and (3) CA 2006 state that, unless a poll is demanded, a declaration by the Chairman that a resolution is carried on a show of hands is conclusive evidence of the fact. Therefore, the failure of the Chairman to demand a poll would not invalidate a resolution, although a disgruntled shareholder might have a claim for damages.

Unless articles provide for a poll to be taken “immediately” or “forthwith”, as is common in connection with the election of a Chairman or the question of adjournment, it is normally within the Chairman’s discretion as to when the poll is to be taken (usually subject to a limit of, say, 30 days). However, the Chairman should exercise his discretion in what he thinks are the best interests of the meeting and should only delay holding the poll if he thinks it is reasonably necessary, for example, to give the members more time to consider a resolution or to allow them to become better informed.

As referred to at paragraph 16 (“Reducing the length of the meeting”) above, if a group of resolutions is to be put to a poll, each should be submitted to a separate vote (although, as also noted above, there is authority suggesting that resolutions may be grouped if the meeting so agrees in advance).

## **24.2 Procedure on a poll**

It is important to have polling procedures very well worked out in advance. If all shareholders are given voting cards on arrival, this helps immeasurably in the smooth running of a poll. The Chairman can simply say to the meeting that votes should be marked on the poll cards which have already been distributed and can invite voters to drop completed cards into ballot boxes as they leave the meeting. This approach avoids any interruption to the meeting. Alternatively, polls can be taken at the end of the meeting. Once other business has been concluded, the voting cards are then distributed, completed and put in the ballot boxes by voters as they leave the meeting.

## **24.3 Electronic polling**

Developments in technology mean that a number of companies now use an electronic voting system with instantly reportable results. The system has overcome the main deterrents in holding a poll: the administration of the poll and the delay this caused to the announcement of results. Where an electronic voting system is used, shareholders press a

button on a handset registered to them to indicate their vote and the results, combined with the proxies already received, are displayed on-screen shortly afterwards.

It should be noted that ICSA states in its guidance note on voting at general meetings (December 2003) that shareholders not comfortable with electronic voting devices should be given the opportunity to use a poll card. Also note that where electronic voting devices are used, it is necessary to have poll cards available to be used where technological problems arise.

#### **24.4 Scrutineers**

Even if the articles do not oblige the company to appoint scrutineers, it is advisable to do so. The auditors may be appointed as they are normally seen as having an acceptable measure of independence. Alternatively, the registrars are candidates for appointment. It is the job of the scrutineers to decide on the detailed procedure for issuing voting cards, counting them and checking them against proxy forms lodged (to ensure there is no double voting) and against the register of members. The registrars are likely to assist with the latter task. They must ensure that the register is available at the meeting, made up to the record date.

If a member or proxy claims on the voting card to be entitled to more votes than are shown on the register and all his votes are cast the same way, the number of votes cast should be reduced to conform with his entitlement. If a member or proxy who claims more votes than are shown on the register casts them in different ways, the votes for and against should be reduced pro rata.

#### **24.5 Independent assessors and independent report**

There is also a procedure for members of a quoted company (namely companies listed on the Official List of the UKLA, officially listed in an EEA State or listed on the New York Stock Exchange or Nasdaq) to require an independent report by a specially appointed “independent assessor” on the propriety of the process by which the votes were recorded and counted. Consequently, if a quoted company is concerned that there will be disruption at a meeting and that members will require an independent report to be made, it may be advisable for the company to appoint the independent assessor in advance, or at least to give prior thought to such appointment.

Section 342 CA 2006 requires directors to obtain an independent report if requested by members representing 5% of the total voting rights of all members or 100 members each holding an average of £100 of paid-up shares, in each case, who are entitled to vote on the matter to which the poll relates. These thresholds must be met for every poll investigated. The request must identify the polls to which the report should relate, must be authenticated by those making the report and must be received by the company no later than a week after the poll is taken.

Where an independent assessment of a poll is requested by a quoted company’s members under section 342 CA 2006, the directors have one week within which to appoint a person whom they consider appropriate to prepare a report for the company on the poll (section

343 CA 2006). In his report, the independent assessor must state his name and his opinion on whether (section 347 CA 2006):

- the procedures adopted in connection with the poll or polls were adequate;
- the votes cast (including proxy votes) were fairly and accurately recorded and counted;
- the validity of members' appointments of proxies was fairly assessed;
- the notice of meeting contained the required statement of rights to appoint proxies; and
- the rules regarding company-sponsored invitations to appoint proxies were complied with.

The report must also give the independent assessor's reasons for the opinions stated and, if he is unable to form an opinion on any of the matters, record that fact and state the reasons (sections 347(2) and (3) CA 2006).

Section 348 CA 2006 gives the independent assessor the right to attend the meeting at which the poll is taken (if appointed before the poll) and any subsequent proceedings in connection with the poll, as well as receive copies of any communications or notices sent to members regarding the meeting. Section 349 CA 2006 also allows the independent assessor access to the company's records relating to any poll on which he is to report or the meeting at which the poll or polls may be, or were, taken. He may also require information from employees, agents (including bankers, solicitors and auditors), officers and members of the company (section 349(2) CA 2006). However, section 349(4) CA 2006 provides that where the independent assessor requires information from such a person, a statement made by that person may not be used in evidence against him in criminal proceedings except proceedings for an offence under section 350 CA 2006 (see further below). Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings also does not need to be disclosed to the independent assessor (section 349(5) CA 2006). It is an offence under section 350 CA 2006 for a person to fail to comply with the requirement under section 349(2) CA 2006 to provide information or explanation relating to the poll on which the independent assessor is preparing a report.

Section 351 CA 2006 provides that the company must ensure that the independent assessor's name, a description of the subject matter of the poll and a copy of his report must be made available on a website "as soon as reasonably practicable" and remain available on the website for two years.

## **24.6 Closing the poll and results**

The Chairman should specify a fixed time for closing the poll. If he does not do so, he cannot close it while votes are still coming in. He will have to wait until a reasonable time after votes have stopped coming in. It is important to remember that if a member is improperly excluded, the poll may be invalidated. The Chairman should always state when

he intends to announce the result; either at the meeting or, for example, by way of newspaper advertisement or announcement, if it is not practicable for there to be a swift count. However, there is nothing to prevent the Chairman from announcing a provisional result pending final checking. As noted above, some companies now use electronic poll voting so that voting results can be displayed instantly.

Section 341 CA 2006 provides that for quoted companies, when a poll is taken at any general meeting (including an AGM), the date of the meeting, the text of the resolution or other subject matter of poll and the votes cast in favour and against must be published on a website. This information must be made available on a website as soon as reasonably practicable following the meeting and remain available on the website for two years (section 353 CA 2006). Failure to do so will not affect the validity of the poll or the subject matter voted on, but will attract other penalties. The Corporate Governance Code requires the disclosure of similar information at the meeting and on the company's website where a vote has been taken on a show of hands (para E.2.2).

ICSA's Guide to Best Practice for AGMs recommends that it is best practice when announcing the decision on a poll to disclose the total number of votes cast in favour of, and against, the resolution. The Corporate Governance Code also provides that any announcement of the results of a vote should make it clear that a 'vote withheld' is not a vote in law and is not counted in the calculation of the proportion of the votes for and against the resolution.

Traded companies must publish the information specified above and additionally information about the total number of votes cast, the proportion of the company's share capital represented by such votes and the number of abstentions (if counted) within 15 days of the meeting date or if later the day after the poll is declared.

## **24.7 Significant votes against resolutions**

Where, in the opinion of the board, a significant proportion of votes have been cast against a resolution, the Corporate Governance Code (para E.2.2) requires the company to explain in its results announcement what actions it intends to take to understand the reasons behind the result. ISS's 2016 Proxy Voting Guidelines state that 20% will be the starting point for analysis of whether there has been significant dissent, though there may be reasons why, for some companies and types of resolution, a higher or lower level might be more appropriate.

PLSA's Corporate Governance Guidelines ask issuers to treat active abstentions as votes against for this purpose.

## **PART 5 - PROXIES AND CORPORATE REPRESENTATIVES**

### **25. Proxies**

#### **25.1 Legal considerations**

As referred to at paragraph 11 ("Who can speak?") above, section 324(1) CA 2006 entitles a member who can attend and vote at a meeting to appoint a proxy to attend and vote. A



member will be able to appoint more than one proxy in respect of its registered shareholding provided that each proxy is appointed to exercise rights attached to different shares (section 324(2) CA 2006). Section 318 CA 2006 provides that a proxy counts towards a quorum (yet note that proxies of the same member will not alone comprise a quorum (section 318(2))). Moreover, section 329(1) CA 2006 states that the appointment of a proxy at a company meeting also gives authority to demand or join in demanding a poll. A proxy can vote on a deferred poll. Also, since an adjourned meeting is simply a continuation of the original meeting, proxies which are lodged in time for the original meeting can be used at an adjourned meeting.

A proxy must vote in accordance with any instructions given by the member appointing him (section 324A CA 2006). It seems that a proxy is not, however, in the absence of a contractual obligation or special fiduciary relationship, obliged to use the proxy votes he has been given. A Chairman who is appointed as a proxy must use his proxy votes to ensure that the real sense of the meeting is reflected. In *Re-Waxed Papers Limited* (1937) 2 All ER 481 “the instrument of proxy authorised the proxy to act [for the shareholder] at the meeting ... and at such meeting ... to vote [for or against] the ‘Scheme of Arrangement’, either with or without modification as ... the proxy may approve”. The Court of Appeal approved the conclusion of the first instance Judge who said:

“It seems to me that the language is such as will enable [the holder of the proxy] to vote upon any incidental matter or question that may arise and that might need to be decided in the course of the meeting before the meeting comes to consider the main purpose for which it was convened.”

A proxy should always act on the principle that he is agent for his appointor and, in the absence of express instructions, he should vote in accordance with what he can ascertain, on the basis of information available to him, to be the wishes of the appointor. It may be that the instructions on how to vote on other resolutions give some indication of how the proxy should vote. However, if the proxy is unable to decide, the wisest course may be to abstain. In some circumstances, for example where there is a particularly large holding, it may be appropriate for the proxy to seek the member’s instructions, if this is possible.

## **25.2 The instrument of proxy**

It is common for the instrument of proxy to contain express wording as to the proxy’s discretion. For listed companies, the instrument of proxy must state that if it is returned without an indication as to how the proxy shall vote on any particular matter, the proxy will exercise his discretion as to whether he votes and if so, how. Sometimes, the proxy form includes wording which goes further and makes it clear that, in the absence of specific instructions, the proxy will vote or abstain from voting at his discretion on any business - whether a matter included on the proxy form on which no indication is given, an amendment to a resolution, a resolution to adjourn or any other business - which may properly come before the meeting. Such a statement should cover broadly the following:

“Subject to any voting instructions given, your proxy will exercise his/her discretion as to how he/she votes and whether or not he/she abstains from voting on any resolution, by whomsoever proposed (including, without limitation, any resolution to amend a resolution or to adjourn the meeting).”

Is there an advantage in including some general discretionary wording of this type in the instrument of proxy? It certainly has the advantage of making the proxy's powers clear to the shareholder and to the proxy. It may also make the proxy's position slightly stronger in a case where there is no indication of the member's wishes: the proxy is expressly authorised to vote or abstain from voting at his discretion on other matters. Particularly where the Chairman of the meeting is appointed as proxy by many members, it may well be advantageous to ensure that he is clearly given the widest possible powers to vote at his discretion. It is far better, wherever possible, to incorporate specific instructions (particularly in relation to questions of amendment or adjournment) into the proxy form so as to avoid subsequent disputes between the shareholder and the proxy as to whether the proxy had a residual discretion and had exercised it properly.

Even if express general wording of the kind recommended above is included in the proxy form, a proxy should consider what the appointor, if asked, would wish to be done in deciding, for example, how to vote on a resolution to adjourn a meeting. The appointor who wanted the resolution to be passed may not want the meeting to be adjourned while the appointor who opposed the resolution may be happy for the meeting to be adjourned. Accordingly, the "yes" and discretionary proxy votes given to the Chairman should be used by the Chairman to vote against an adjournment motion, while the "no" proxy votes should be used to vote for an adjournment. Articles of association may expressly state that the instrument of proxy shall be deemed to confer authority to vote on any amendment of a resolution put to the meeting. Such a provision gives the proxy an absolute discretion to vote on an amendment in the absence of any indication of the member's wishes. In every case, however, it is important to go back to the basic agency principles, so that the proxy should vote in accordance with what he can ascertain to be the wishes of his appointor.

In April 2012, the ICSA Registrars Group published a guidance note on practical issues around voting at general meetings which noted that it is best practice for issuers with shares in CREST to allow for appointments and instructions via the CREST Proxy Voting Service and, where this facility is offered, for shareholders who hold shares in CREST to vote via that service. The note also states that it is best practice to allow shareholders to appoint and instruct via the internet. Additionally, the note highlights that a number of shareholders are using multiple media to vote on the same holding and, whilst this is permitted, goes on to urge shareholders to use the same medium for appointments and instructions during a voting period (using electronic voting channels wherever possible).

### **25.3 Multiple proxies**

It is worth noting that the rights of a shareholder under section 324 CA 2006 to appoint multiple proxies could be exercised by such shareholder to effectively "flood" a meeting with a large number of proxies who, on a vote on a show of hands, could prove decisive as to whether a given resolution is passed. However, as mentioned at sub-paragraph 24.1 ("General legal considerations"), it is the duty of the Chairman to call for a poll if he knows that the proxies that he holds show a majority conflicting with the result of a show of hands, so as to give effect to the real sense of the meeting. Therefore, for example, if a single shareholder appointed a significant number of proxies in the hope of blocking a resolution to be passed on a show of hands, yet the proxy votes held by the Chairman suggested that the vote could be passed, the Chairman would be under a duty to call a poll.

In practice, the risk of such disruption is circumvented by the move to electronic poll voting, as discussed in sub-paragraph 23.3 (“Electronic polling”).

## 26. Corporate representatives

In addition to the use of proxies, corporate/institutional shareholders may also be represented at general meetings through the appointment of corporate representatives. Section 323 CA 2006 provides that, where a corporation is a member of a company, the corporation may by resolution of its directors or other governing bodies, authorise person(s) to act as its corporate representative(s) at any meeting of the company.

Under section 323(2) CA 2006, a person authorised by a corporation is entitled to exercise the same powers on its behalf as the corporate shareholder could exercise if it were an individual member of the company, including the right to speak and to vote.

Where a member appoints multiple corporate representatives in respect of different shares they can exercise their powers and voting rights in different ways. This means that multiple corporate representatives can be appointed by corporate nominees to exercise the voting wishes of different nominees. However, if votes in respect of the same shares are cast in different ways on a poll, they are treated as not exercised (section 323(4) CA 06). It is unclear whether if the same corporate representative is appointed by several members, he has only one vote on a show of hands or as many as the number of members appointing him. The Chairman has a duty to call a poll in the case of an anomalous result based on conflicting proxy votes that he holds.

ICSA recommends that corporate representatives should pre-register with the relevant company or registrar and should arrive in good time for the meeting. Corporate representatives should take a certified copy of the authority which has granted them the right to vote on behalf of the company (i.e. the relevant signed board minutes) to the meeting, as companies’ articles often require representatives to produce evidence of authority on admission.

## PART 6 - ADJOURNMENT

### 27. Adjourning the meeting

The London Life case confirms that the Chairman has very limited inherent power to adjourn notwithstanding the provisions of the articles. The power is exercisable only when the machinery provided by the articles has broken down and in order to facilitate the presence of those entitled to debate and vote at a meeting where such debate and voting is possible.

In the absence of a contrary provision in the articles, the power of adjournment is vested in the meeting itself. Article 332 of the Public Company Model Articles permits the Chairman to adjourn a general meeting at which a quorum is present (i) with the consent of the meeting or (ii) if it appears to the Chairman that an adjournment is necessary to protect the safety of any person attending or to ensure that the business of the meeting is conducted in an orderly manner. Article 33(3) of the Public Company Model Articles

specifies that the Chairman must adjourn if directed to do so by the meeting. In Salisbury Gold Mining Co. Limited v Hathorn (1897) AC 268, where the articles provided only that the Chairman could adjourn with the consent of the meeting and did not additionally require the Chairman to adjourn if so directed by the meeting, it was held that the Chairman was not bound to adjourn even if the majority of members present wanted him to do so.

The exercise of the inherent power may arise because there is, strictly speaking, no constitutional meeting at all. This situation occurred in the London Life case because members were not able to fit into the venue. Alternatively, some emergency may require urgent action necessitating an adjournment whether the meeting wills it or not. Examples of circumstances where the Chairman's inherent power may be exercisable are:

- (A) where there is violence or the threat of violence and urgent steps must be taken to end or avoid it; or
- (B) where a poll is required and cannot be taken unless there is an adjournment; or
- (C) where it is impracticable to continue the meeting and for full and frank debate to be held on any resolution unless the meeting is moved to some other more convenient place; or
- (D) where someone at the meeting becomes ill and requires urgent medical attention.

Even where the circumstances exist for the exercise of the Chairman's power to adjourn, it is important to bear in mind the object of the inherent power referred to above i.e. to facilitate the presence of those entitled to debate and vote at a meeting where such debate and voting is possible. In London Life, the Chairman reached a decision to adjourn in good faith when it was clear that the meeting could not be conducted at all, but his decision was unreasonable because he adjourned the meeting only to the afternoon. Those whose private arrangements meant that they could not attend at the afternoon meeting would not only be unable to speak but also unable to vote, even by proxy. It was also pertinent that there was no immediate urgency to despatch the business in hand (a proposed merger) - in fact a timely meeting could have been held at any time in the next few months. Accordingly, the business conducted at the purported adjourned meeting was held to be invalid. The lesson of London Life is that the Chairman should either adjourn the meeting for a very short time in order for it to reconvene at a pre-booked, nearby location or should adjourn for a sufficiently long time to give members the opportunity to make arrangements to attend the adjourned meeting or to vote at the adjourned meeting by proxy.

Some articles now make express provision for the Chairman's inherent powers, it being further provided on such adjournment that the time and place for the adjourned meeting shall be fixed by the Board. The Chairman's power of adjournment must not be used to salvage a difficult situation for the Board. If the Chairman purports to adjourn without good reason the meeting can appoint another Chairman and proceed with the business (National Dwellings Society v Sykes).