

# Module 03 – Company Law Fundamentals

Lecture Title: Corporate Governance,  
meetings and resolutions

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# Overview

1. Basic precepts and issues in corporate governance
2. Decision making: who, how and when?



# Definition of Corporate Governance

“Corporate governance is the system by which companies are directed and controlled.”

Source: Sir Adrian Cadbury, UK Combined Code

“Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders.”

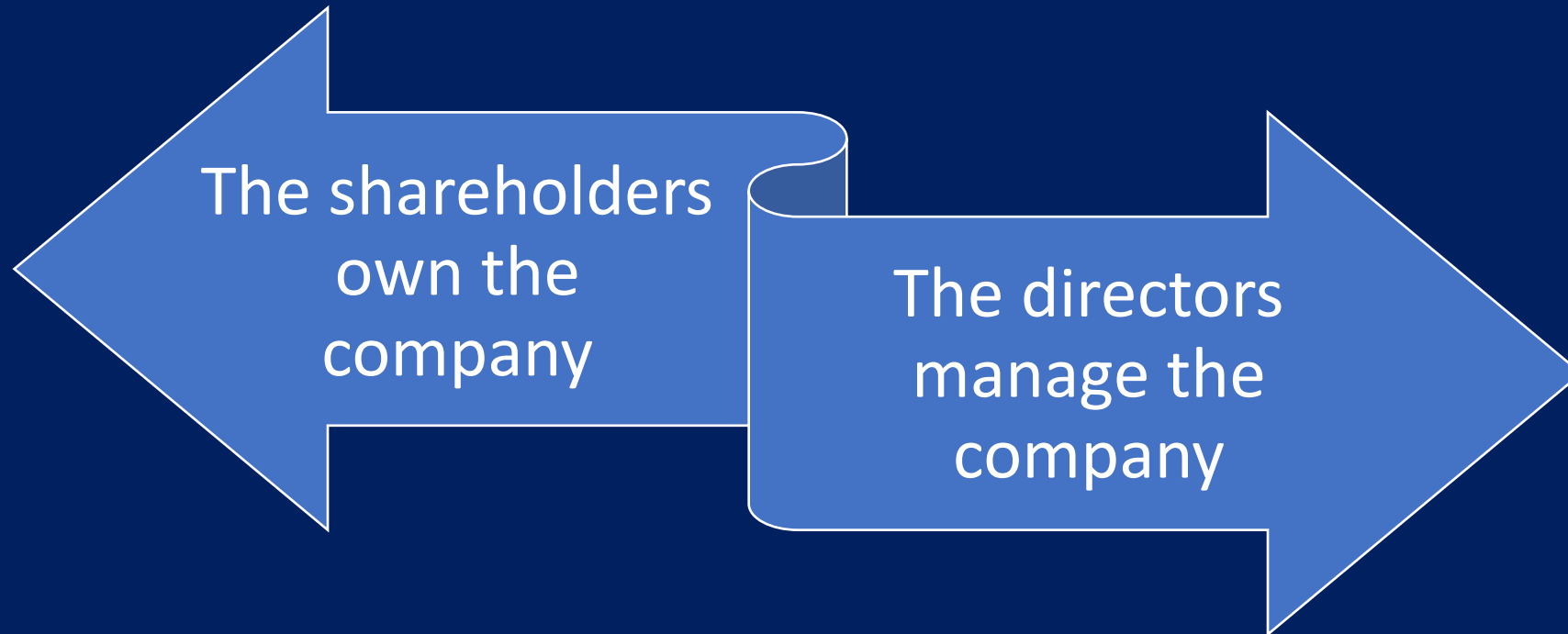
Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”

Source: OECD Corporate Governance Principles, 2004



# Separation of management and control

Shareholders and directors have two completely different roles in a company:



# The basic relationships

At this stage, we should recall the basic relationships of a company - where shareholders inject their capital; set out a number of objects that are to be attained by the use of that capital; and then entrust that capital to the directors with a view to attaining those objects.

Keeping this in mind, there can be no doubt that the directors ought to exercise their skills to achieve the objects set out in their mandate – the primacy of creating and adding shareholder value is inherent in the very underlying fabric of the company and its incorporation.



# Directors v Shareholders

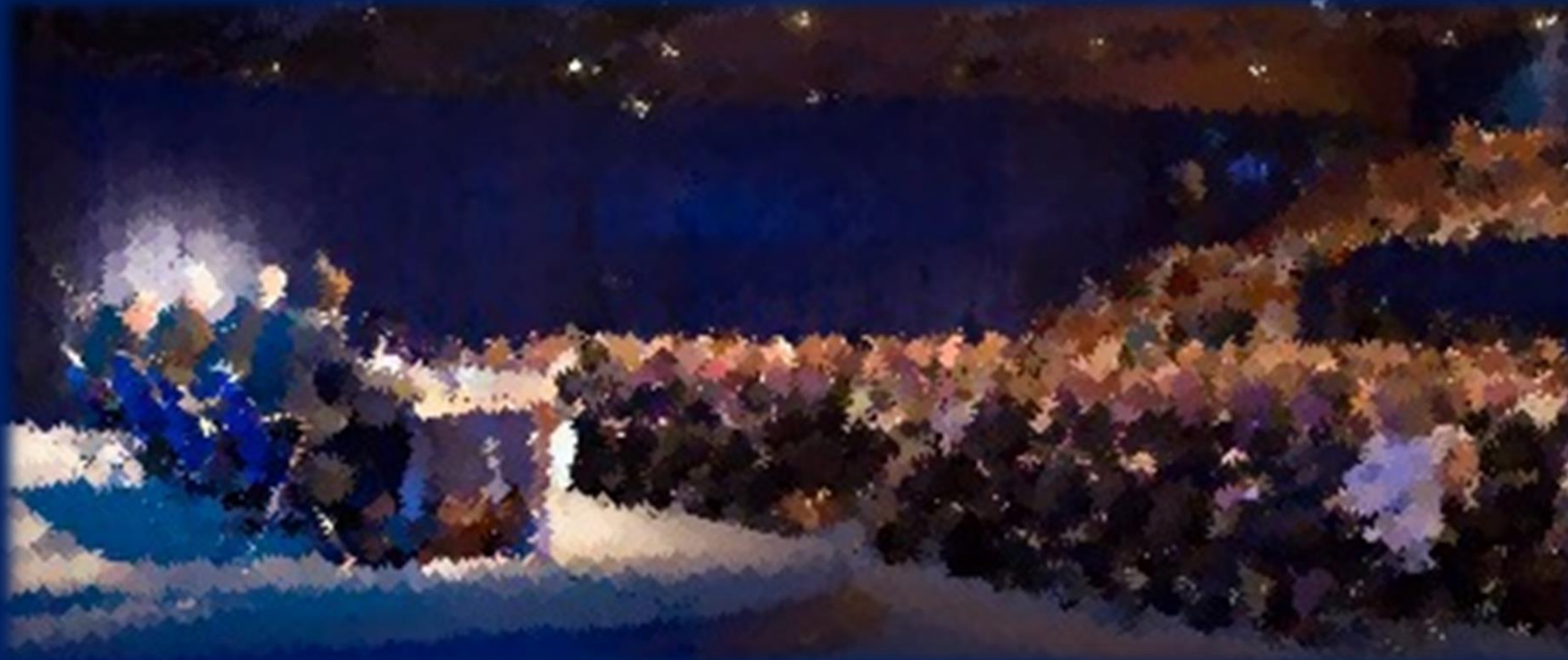
The directors may exercise all the powers of the company except those which are required by the Companies Act or by the M&A to be exercised by the general meeting.

Ultimately, control vests in the shareholders, by virtue of their power to:

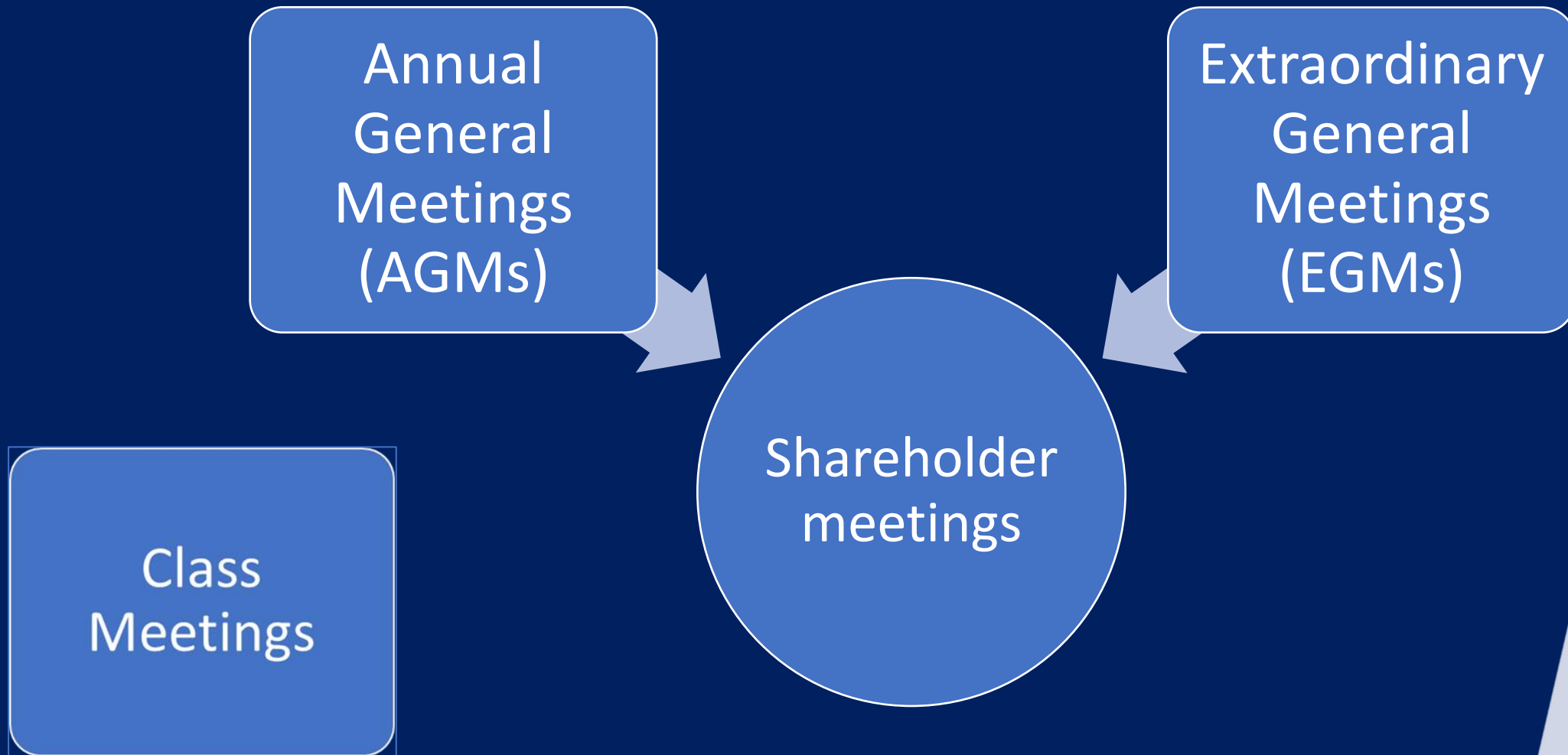
- i. Amend the M&A of the company; and
- ii. The power to remove directors.



# Decision making: Who? When? How?



# Shareholder meetings





# Annual General Meetings

When?

- Held once a year

Purpose  
?

- Accountability of directors
- Approval of accounts and reports
- Appointment of auditors
- Approval of dividends

# Annual General Meetings: Business transacted

The Companies Act does not stipulate what business is to be transacted at an AGM. The First Schedule to the Companies Act provides an indication of the ordinary business to be transacted at an AGM.

Unless the Articles of Association provide otherwise, the ordinary business conducted at an AGM is:

- i. The declaration of dividends, if any
- ii. The consideration of the audited accounts and the reports of the directors and auditors
- iii. The election of directors in place of those retiring and
- iv. The appointment and fixing of the remuneration of the auditors.



# Extraordinary General Meetings

## When?

- ✓ An EGM may be convened at any time on the demand of:
  - The Board; or
  - The Shareholders having at least 1/10th of the paid-up share capital of the company carrying voting rights
  - Others (by the Court or the Auditors)

## Purpose?

- ✓ For the matters and business specified in the notice calling the extraordinary meeting



# Class Meetings

A class meeting is called and held for the benefit of its members, holding shares of a particular class of shares, often in response to a proposal to vary class rights. Only matters relating to that class of shares may be discussed at the meeting.



# Convening of General Meetings

- ✓ Sufficient notice must be given
- ✓ Notice must be sent to: (i) every shareholder (irrespective of right to vote); the company's auditors (in the case of an AGM); and the directors
- ✓ An agenda should also be circulated, giving sufficient detail to allow shareholders, or their proxies, to decide whether or not they need attend



# Meetings generally

## Proxies

- Every member may appoint another person as his proxy to attend and vote instead of him
- The notice of the meeting must inform members of this right

## Quorum

- Unless the Articles of Association provide otherwise, a member/s present in person or by proxy holding in aggregate not less than  $1/10^{\text{th}}$  of the paid up share capital of the company carrying the right to attend and vote at general meetings of the company at the date of the holding of the meeting, shall be a quorum.



# Meetings generally

## Voting

- Voting may take place by (i) show of hands or (ii) a poll
- Show of hands: 1 member = 1 vote
- Poll: 1 share = 1 vote

## Chairman

- Chairman conducts the meeting, and is typically the chairman of the Board of Directors



# AGMs / EGMs 2.0

On 10 July 2020, the Companies Act (Public Companies – Annual General Meetings) Regulations, 2020 (S.L. 386.23) (the “Regulations”) were published. The Regulations allow all PUBLIC companies the possibility of organising general meetings in a remote or virtual manner.







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# Resolutions: Ordinary

## *Ordinary Resolutions*

Must be passed by a member(s):

- Having the right to attend and vote;
- Holding in aggregate more than 50% of the voting rights attached to the shares represented and entitled to vote at the meeting (unless the M&As require a higher %)



For		Against	

# Resolutions: Extraordinary

## *Extraordinary Resolutions*

A notice specifying the intention to propose an extraordinary resolution and:

### In the case of PUBLIC COMPANIES:

- Approved by member(s) holdings = / > 75% in nominal value of shares represented and entitled to vote at the meeting; and
- = / > 51% in nominal value of all shares entitled to vote, or such higher % prescribed in M&As

### In the case of PRIVATE COMPANIES:

- = / > 51% in nominal value of shares entitled to vote at the meeting, or such higher % prescribed by the M&As.



# Ordinary or Extraordinary Resolution?

## 1. The nature of the decision taken

It is not dependent on the type of meeting at which it is made. Rather it depends on the nature of the decision to be taken. Both types of resolutions can be passed at either kind of general meeting: extraordinary resolutions may be taken at AGMs and ordinary resolutions may be taken at EGMs, and *vice versa*.

## 2. The Companies Act or the M&A

The Companies Act reserves certain decisions to be taken by extraordinary resolution; all other decisions may be taken by way of any ordinary resolution, unless the company's M&A require an extraordinary resolution. The M&A may also require, as a rule, resolutions to be unanimously approved or to be approved by a higher % of votes than would normally otherwise be required.



# Decisions requiring Extraordinary Resolutions

include:

- ✓ Alterations to M&As
- ✓ Acquisition of own shares
- ✓ Variation of voting rights
- ✓ Voluntary winding-up or winding-up by Court
- ✓ Nomination / removal of liquidator
- ✓ Conversions to commercial partnerships
- ✓ Merger / amalgamation and division of companies



# Resolutions in writing

The M&As of a PRIVATE company typically provide that:

“A resolution in writing is as valid and effective as if the same had been passed at a general meeting of the company duly convened and held”

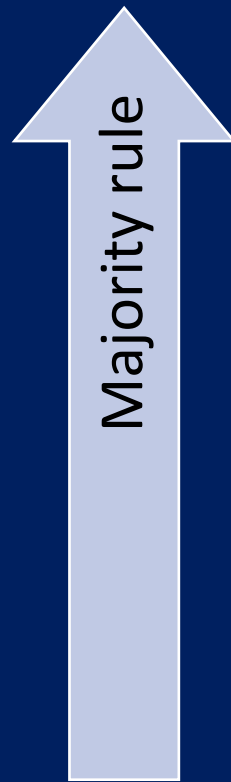
*...but can any resolution be made in writing?*

YES...except for any decision purporting to:

- Remove a director or an auditor before the expiration of his term of office; or
- Deprive the company’s auditors of their right to receive notice of, and to attend and to be heard at, general meetings of the company.

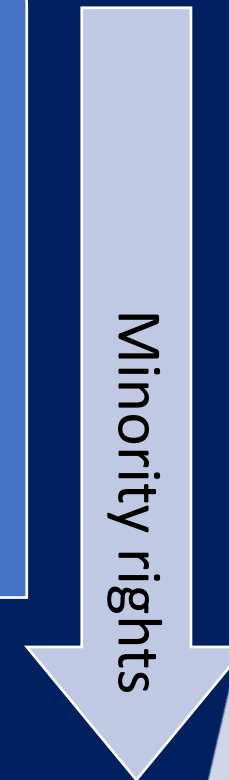


# Majority rule and minority rights



The majority of the shareholders hold the decision making power of the company

The Companies Act provides for the protection of minority rights and the claims which may be raised by a minority shareholder in order to protect his rights





# General rule: *Foss v Harbottle*

- The position in Malta reflects that in the UK, which is enshrined in the judgment of *Foss v Harbottle (1843)*
- The general rule is composed of two limbs:
  - 1) Where a wrong is done to the company, the proper plaintiff is, *prima facie*, the company itself
  - 2) Where the wrong or irregularity could be made binding on the company by a simple majority of the votes of its members, no individual member may maintain an action in respect of the wrong or irregularity.



# The derivative action: one exception to the general rule

- The derivative action is an action brought by a shareholder in connection with a wrong done to the company, where the wrongdoers are in control and prevent the company itself from bring a claim.
- Minority shareholder must prove:
  - ✓ Fraud on the minority and
  - ✓ Wrongdoer control which prevents the company from instituting the action in its own name
- Statutory form of derivative action: Article 402(3)(e)



# Statutory remedies under Maltese law

- There are two principal remedies under Maltese law:
  - 1) Unfair prejudice action (Article 402 of the Companies Act)
  - 2) Winding up of the company



# Unfair prejudice action

“Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.”



# Unfair prejudice action

If the Court considers it just and equitable to do so, the Court may issue seven different types of orders, on terms it considers fit, including orders to:

- ✓ Regulate the conduct of the company's affairs in the future
- ✓ Restricting or forbidding the carrying out of any proposed act
- ✓ Derivative action
- ✓ Dissolving the company and providing for its consequential winding up





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# Board meetings

The powers of directors are exercised through board meetings

There are less stringent rules regulating the convening of board meetings...why?

- Directors, unlike shareholders, are deemed to be aware of the financial position of the company;
- Urgent board meetings may need to be held; and
- Meetings need not be formal



# Board meetings

## Convening a Board meeting

- No rule in the Companies Act, but the Model Articles provide that the directors may summon a meeting at any time
- The company secretary may also summon a Board meeting
- Board meetings may take place by audio / visual conference

## Addressee of notice

- Notice must be given to all directors.





# Board meetings

## Length of notice

- No rule in the Companies Act – the M&A may provide for a notice period BUT this may be impractical if urgent matters arise
- In the absence of any notice period in the M&A, reasonable notice should be given

## Form of notice

- No rule in the Company Act – the M&A may prescribe the form of notice
- In the absence, notice through email / telephone should suffice
- Typically, an agenda is circulated with the notice



# Board meetings

## Documents to be circulated

- All documents pertaining to the business to be transacted at the meeting should be circulated within a reasonable time prior to the meeting

## Quorum

- A quorum of directors may be present
- This is determined by the M&A; the Model Articles provide that the quorum is 2 directors



# Board meetings

## Voting

- No rule in the Companies Act; the M&A would typically state that voting is by simple majority
- Chairman may have a casting vote

## Minutes

- Minutes must be taken for each Board meeting
- Signature of the Chairman is evidence that the proceedings took place in accordance with the minutes



# Resolutions in Writing

- These are permitted if the *M&A* provide for this
- Resolutions in writing must be signed by all directors entitled to receive notice of a board meeting
- Resolution in writing would be valid and effective as if the same had been passed at a Board meeting duly convened and held



# Reserved matters



Shareholder  
reserved  
matters



Director  
reserved  
matters



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