Module 03 – Company Law Fundamentals

Lecture Title: Corporate Governance, meetings and resolutions

Diploma in Law (Malta)

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Agenda

1. Basic principles and issues in corporate governance
2. Decision making: Shareholder meetings & resolutions
3. Principle of majority rule and minority rights
4. Decision making: Board meetings & resolutions

Basic principles and issues in corporate governance

Background

1992
Sir Adrian Cadbury – Code of Best Practices (Cadbury Code)

1994
American Law Institute's Principles of Corporate Governance

1990s-2000s
Corporate failures and scandals: WorldCom, Enron, Parmalat, Guinness etc.

2007-2009
Aftermath of global financial crisis

Background


LEHMAN
BROTHERS


BEAR
STEARNS


AIG


Fannie Mae


RBS
The Royal Bank of Scotland


northern
rock


Lloyds TSB


DEXIA
Banque

Background

The financial crisis led to re-thinking of the causes of corporate failures.

- Corporate culture?
- The role of various parties?

Development of new principles, practices and policies.

Background

- The key to improving governance was action taken by the board itself

- Each company is different and needs to develop its own structures, processes and practices

- Crisis also triggered regulatory authorities taking action – reform in certain aspects of company law:
    - Enhanced reporting and disclosure requirements
    - Board's responsibility emphasized
    - Level of director remuneration questioned
    - Corporate social responsibility
    - Business ethics

Interplay between company law and corporate governance

*"If company law is the **hardware** and the operating system, corporate governance can be described as the **APPS** running on the hardware."*

Interplay between Company Law and Corporate Governance

Hard law

Prevails in conflict

Company law	Corporate Governance
Legal structure	Policies and practices
Regulation & Compliance	Accountability & Transparency
Enforcement	Adaptability

Soft law

Interplay between Company Law and Corporate Governance

Corporate governance without company law

without a solid legal framework, governance may be ineffective

Company law without corporate governance

without strong governance, companies may fail to meet legal standards and stakeholder expectations

What is “corporate governance”?

Board of directors

Senior management

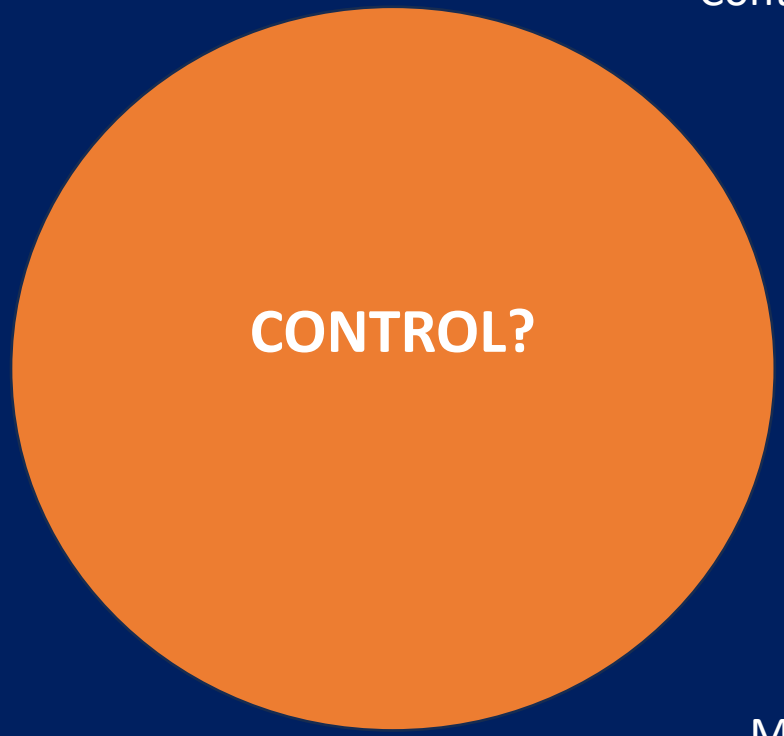
CORE ISSUE
=
CONTROL

How is power allocated to the parties involved?

Shareholders

Other stakeholders

What is “corporate governance”?



Control through almost complete ownership

Majority control

Control through legal devices without majority control

Minority control

Management control

What is “corporate governance”?

The focus is on addressing “control issues” through:

Essentially, it is about:

- which governing body/ies within the company have the power to make decisions?
- how are members of this body chosen and how do they take decisions?
- what values should guide their decision-making?

What is “corporate governance”?

“Corporate governance is **the system by which companies are directed and controlled, and to what purpose**.”

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.**

Source: OECD Corporate Governance Principles, 2004

The basic relationships of a company

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, acting in the **best interest of the company's members as a whole**.

Shareholders vs. Directors

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

Allocation of power

The directors are vested with the “residual powers” of the company: 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 shareholders.

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.

Who is corporate governance relevant to?

- All forms of organizations need to be governed.
- In the case of a company, it is the board of directors.
- Many issues of corporate governance affect all companies, regardless of their size or nature.

Who is corporate governance relevant to?

Smallest, family-owned companies	• Shareholders double up as directors. No distinction between decisions by the board and by the shareholders.
In between	• Delegation of management to board takes place, but some control still resides with the shareholders.
Large companies, including listed companies	• Total delegation of management of business to the board. Shareholders lose effective control.

Who is corporate governance relevant to?

- Special treatment afforded to **listed companies**.
- **Widely dispersed shareholding** results in lack of effective control which increases the risks of abuse by managers.
- A shareholder-oriented approach is prevalent.
- Code of Principles of Good Corporate Governance set out in the Capital Markets Rules issued by the MFSA.

Who is corporate governance relevant to?

- Good corporate governance should be adhered to irrespective of the size and type of company.
- Corporate governance code serves as a useful tool to the improvement of corporate governance in non-listed companies.
- No one universal formula for good corporate governance – the solution must reflect **cultural**, **social** and **economic** background in which the company is to operate.

Corporate Governance Issues

- Corporate governance is principally concerned with the consequences of the separation of ownership and control – the “Agency Problem”.

- The "agency problem" refers to a conflict of interest that arises when one party (the agent) is tasked with making decisions on behalf of another party (the principal), but their interests do not align.

Main approaches to corporate governance

ANGLO-AMERERICAN MARKET-ORIENTED

(UK, US)

Large number of listed companies

Widely dispersed ownership structure

Ownership and control are separated

CONTINENTAL STAKEHOLDER-ORIENTED

(Europe, incl. Malta)

Smaller number of listed companies.

Tendency to have concentrated ownership structure

Ownership and control are united

Anglo-American market-oriented system

- Banks do not play key role in corporate finance. Companies raise funds through the capital markets. As a result, fluid stock markets and widely dispersed shareholder base are a key feature of this system.

- The fragmentation of ownership has diluted the power of shareholders. These features have led to a separation of ownership and control.

- Agency problem between management and shareholders – in the form of expropriation by insiders.

- As a result, corporate governance focuses on protecting the interests of shareholders.

Continental stakeholder-oriented system

- Smaller number of listed companies, and it is the banks that provide much of the financing.
- Concentrated ownership structure allows for greater measure of shareholding control over management. Risk of abuse by management is reduced.
- Agency problem between shareholders, in the form of expropriation by the majority of interests of the minority.
- This has led to a different approach – stakeholder-oriented system, which seeks to reduce the power of the majority for the benefit of the minority and non-shareholder interests.

Market vs. oriented model

Both approaches addresses the conflict between shareholders and management.

However,while the market oriented-approach focuses on the ***protection of the interests of shareholders,***

the stakeholder-oriented approach seeks to ***reduce the power of the majority for the benefit of the minority or non- shareholder interests.***

Corporate Governance in Malta

- What is the prevalent ownership structure of companies in Malta?
- What is the major corporate governance issue in Malta?
- What system/approach is appropriate to Malta?

Corporate Governance in Malta

- What is the prevalent ownership structure of companies in Malta? **Small private family-owned businesses with a concentrated ownership structure.**

- What is the major corporate governance issue in Malta? **As a result of concentrated ownership, minority oppression is an issue.**

- What system/approach is appropriate to Malta? **Malta is considered a hybrid case – it is a jurisdiction whose financial system is dominated by banks (rather than financing through the capital markets, therefore less listed companies), and a corporate law system and culture that views directors' responsibilities as being owed to the company and its shareholders**.

Corporate Governance in Malta – the Code

- Adoption of the Code of Principles of Good Corporate Governance in 2001.
- Appendix 5.1 of the Capital Markets Rules issued by the Malta Financial Services Authority) applicable to listed companies.
- The market-oriented model was adopted. Rationale: The fundamental focus of corporate law and practice should be the regulation of the relation between the **directors and the shareholders**.
- In Malta, corporate governance is “principle-based” – based on a code of corporate governance principles of good practice, resulting in a “comply or explain” regime.
- Despite non-mandatory regime, listed companies are obliged to report on compliance (or otherwise) with the Code annually, in is annual report.
- Setting the example for non-listed companies.

Corporate Governance in Malta – NOT just the Code

The Code does not embody all progress in corporate governance – several corporate governance measures are located elsewhere:

- The reforms introduced by EU directives (e.g. Transparency Directive, Shareholder Rights Directive, Non-Financial Reporting Directive);
- Rules in the Companies Act itself (e.g. division of power between shareholders and directors);
- Employee interests regulated by industrial legislation;
- Creditor interests regulated by insolvency.

Key features of corporate governance in Malta

Board composition

- ✓ The board should not be so large as to be unwieldy.
- ✓ The board should be composed of executive and non-executive directors, including independent non-executives, placing the board in a position to exercise both a supervisory and management function.
- ✓ Code sets out the criteria to determine independence.

Board Meetings

- ✓ The board should meet regularly to discharge its duties effectively
- ✓ Urges the board to set procedures to determine the frequency, purpose, conduct and duration of meetings
- ✓ Sufficient advance notice should be given

Committees

- ✓ Remuneration committee
- ✓ Nomination committee

Key principles of corporate governance

Division of responsibility between the CEO and Chairman

- ✓ Separation of roles of Chairman and CEO is a means of avoiding concentration of authority
- ✓ Differentiates leading of the board from the running of the business
- ✓ A person occupying both roles could potentially be internally conflicted
- ✓ If they are the same individual, the company must explain to the market the reason for the decision to combine the roles.

Corporate Social Responsibility

- ✓ Directors to adhere to accepted principles of CSR in the stakeholder-oriented management of the company
- ✓ Notion of CSR gravitates towards the stakeholder-oriented system – going beyond fulfilling legal expectations and investing more in human capital, the environment, relations with stakeholders.

Why give importance to corporate governance?

The role of corporate governance is not merely to preserve the INTEGRITY and HONESTY of the market

But to bring EFFICIENCY and DEVELOPMENT to the company and therefore lead to PROFITABILITY.

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Decision making: Who? When? How?

Decision making:

Who?

When?

How?

Decision making:

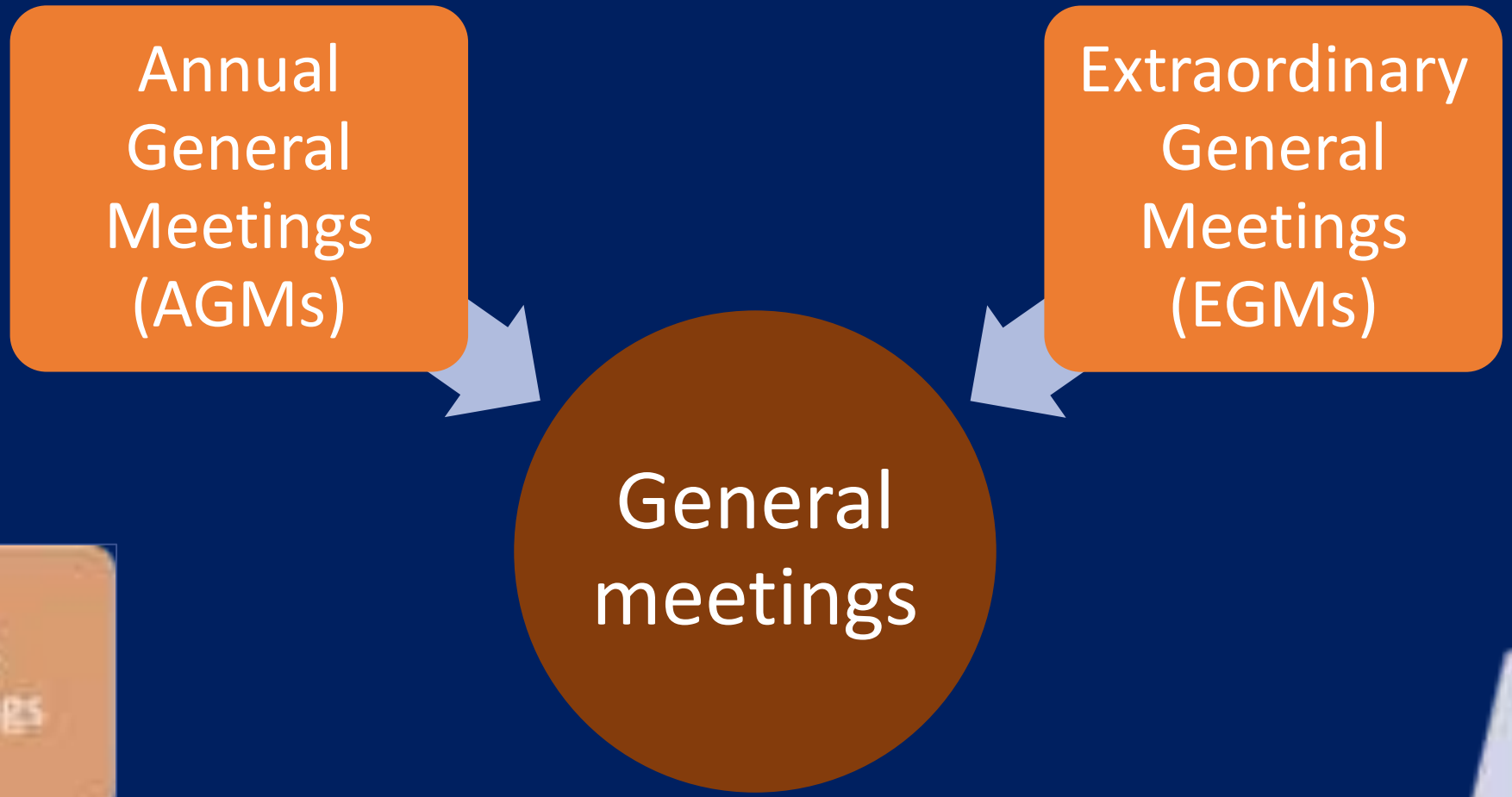
A company acts through two principal organs, at their respective meetings:

1. the body of shareholders – acts through the general meeting

2. the board of directors – acts through board meetings

Shareholder decision-making

Shareholder meetings



Class 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.

Annual General Meetings: Circulation of accounts

The company, usually through its company secretary, is required by the Companies Act to ensure that not less than 14 days before the date of the AGM at which the annual accounts are laid, a copy of the accounts is to be sent to:

(i) every shareholder;

(ii) every debenture holder; and

(ii) all other persons who are entitled to receive notice of general meetings.

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.

EGM or AGM

Two particular matters that shall be considered at an EGM:

1. Decision to be taken in the course of a company recovery procedure (CRP);
2. Where a resigning auditor requisitions an EGM for the purpose of explaining the reason for this resignation.

There are of course several other matters which require consideration and decision at an EGM or an AGM, including:

- Alterations to M&As,
- conversion, amalgamation or division of a company;
- dissolution of a company and filing for winding up;
- filing for CRP;
- review of financial position when company is unable to pay debts;
- AND other matters which the **board may, in terms of law or the M&As, lawfully refer to the general 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.

- Resolutions that are passed will only bind the members of that class, and only those members may attend, speak and vote at such meetings.

Class Meetings

Class meetings may be held:

- To approve of alterations to the rights of the particular class under the M&As;
- To approve a reduction in share capital;
- To approve an increase in the issued share capital;
- To appoint directors (where the holders of a class have that right);
- To approve of compromises or arrangements which affect the particular class;
- To approve the amalgamation of the company;
- The approve the division of the company.

Convening of General Meetings

- ✓Sufficient notice must be given in writing specifying the date, time and location.
- ✓Waiver of notice period is possible.
- ✓Notice must be sent to: (i) every shareholder (irrespective of right to vote); (ii) the company's auditors (in the case of an AGM); and (iii) the directors.
- ✓Supporting documentation to be circulated together with the notice.

Typically, 14 day period

21 day for listed companies

Meetings generally

Agenda

- An agenda should also be circulated, giving sufficient detail to allow shareholders, or their proxies, to decide whether or not they need attend

Quorum

- Unless the M&As provide otherwise, members present in person or by proxy holding in aggregate not less than 1/10th 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

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

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

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Shareholders' Resolutions: Extraordinary and Ordinary

Resolutions: Extraordinary

Extraordinary Resolutions

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

2. Quantum of votes:

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.

Resolutions: Extraordinary

Extraordinary Resolutions

In the case of PUBLIC COMPANIES:

- Approval by member(s) **holding not less than 75% in nominal value of the shares represented and entitled to vote at the meeting**

[e.g. if a company has 10 shareholders, and 7 are present at the meeting, you require 75% of the 7 shareholders present, voting in favour of the resolution]

- Approval by member(s) **holding at least 51% of all shares (or such higher % prescribed in M&As) in nominval value of all shares entitled to vote**

[e.g. if a company has 10 shareholders, and 7 are present at the meeting, you require 51% of all 10 shareholders, voting in favour of the resolution]

If the original targets are not achieved at the meeting that is originally convened, a second meeting is held, within 30 days, at which a lower threshold will be required for the approval of the resolution.

- Approval by member(s) **holding not less than 75% in nominal value of the shares represented and entitled to vote at the meeting**
- Approval by member(s) **holding more than 50% of all shares (or such higher % prescribed in M&As) in nominal value of all shares entitled to**

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 %).

Ordinary or Extraordinary Resolution?

The nature of the decision taken

It is not dependent on the **type of meeting (AGM/EGM)** 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.*

Ordinary or Extraordinary Resolution?

The Companies Act reserves certain decisions to be taken by extraordinary resolution

- ✓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

All other decisions may be taken by way of any ordinary resolution, unless the company's M&A require an extraordinary resolution.

Shareholder reserved matters

Shareholder reserved matters in shareholders' agreements and/or M&As:

Resolutions to be unanimously approved or to be approved by a higher % of votes than would normally otherwise be required.

Shareholders' Resolutions in writing

Insofar as **PRIVATE** companies are concerned, the Companies Act provides 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.

Resolutions in writing would need to be signed by all shareholders having the right to receive notice of and attend and vote at general meetings

Shareholders' Resolutions in writing

The M&As of a **PUBLIC** 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**

If not specified in the M&As, the resolutions would need to be passed through general meeting.

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The Principle of Majority Rule and the Protection of Minority Rights

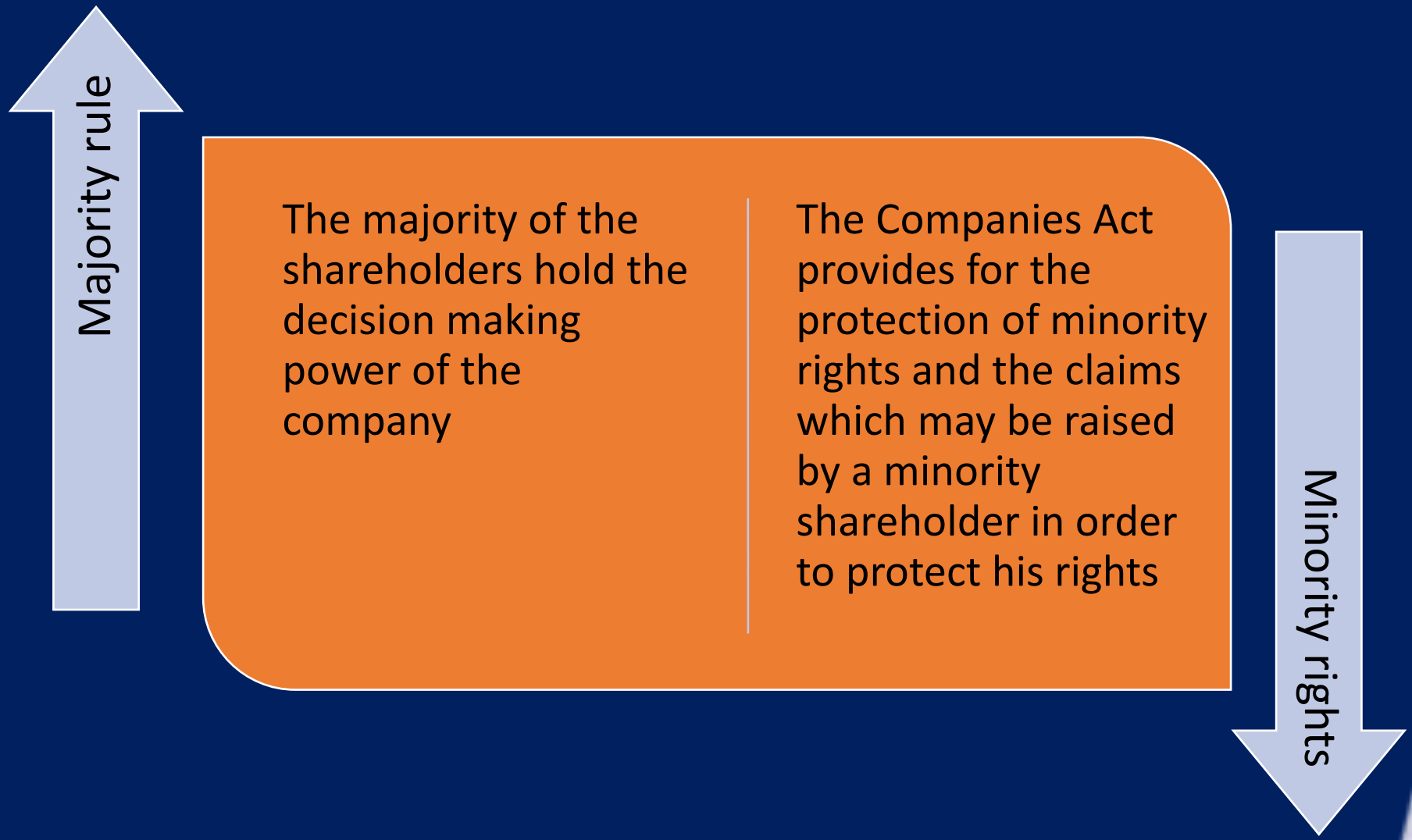
Majority rule and minority rights

- Majority rule means that power resides, principally, in the hands of those who own more than half the shares with voting rights.

  Without the majority rule principle, companies wouldn't prosper.

  The minority shareholders would have to accept the decision of the majority as a matter of business necessity, or may otherwise seek to reverse the decision through normal democratic processes (of persuasion, lobbying, publicity etc) or sell out.

Majority rule and minority rights



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:*

  *(i) that the **affairs of the company** have been or are being or are likely to be conducted in a manner that is, or*

  *(ii)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:

- ✓Regulate the conduct of the company's affairs in the future
- ✓Restricting or forbidding the carrying out of any proposed act
- ✓Requiring the company to do an act which the applicant has complained it has omitted to do
- ✓Provide for the purchase of the shares of any member by other members or by the company itself

Unfair prejudice action

- ✓Derivative action: directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company

- ✓Provide for the payment of compensation for loss and damage as a result of act or omission complained of

- ✓Dissolving the company and providing for its consequential winding up

Winding up of the company

A shareholder may file a request for the dissolution and winding up of the company (winding up application) for an order that there are **grounds of sufficient gravity to warrant the dissolution and consequential winding up of the company.**

Article 214(2)(b)(iii): "grounds of sufficient gravity" situations:

- Disappearance of the substratum (purpose)
- Deadlock
- Justifiable loss of confidence in management
- Exclusion from management
- Oppression, unfair prejudice, unfair discrimination

Unfair prejudice v Winding up remedy

Interrelationship between the winding up remedy under the unfair prejudice provision and the "grounds of sufficient gravity" basis for winding up:

Unfair prejudice remedy

☹ An article 402 winding up order can only be made in the case of conduct, act, omissions which have been or are likely to be oppressive, unfairly discriminatory or unfairly prejudicial to a member(s). And only if the court considers it "just and equitable" that the company be dissolved and wound up.

☺ Variety of potential remedies if the court considers dissolution to be too draconian.

"Grounds of sufficient gravity" winding up

☺ Grounds on which a winding up order can be made under Article 214(b)(iii) are wider. The court is not limited by the "unfair prejudice" requirements.

☹ Dissolution and winding up is the only remedy.

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Board decision making

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

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 Companies 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

- This is determined by the M&A;
- The Model Articles provide that the quorum is may be fixed by the directors, and unless so fixed shall be 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

Board Resolutions in Writing

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

Reserved matters

Shareholder reserved matters

Director reserved matters

Board reserved matters

External financing

Change in scope of business

Litigation

Amendments to budget or business plan

Dividend distributions

Shareholder reserved matters

Liquidation

Increase/ decrease share capital

Disposing significant part of business

Merger or Division

Improving Cap Ex over min threshold

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Thank you

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