

	(3)The company must do so— (a)by sending copies at the same time (so far as reasonably practicable) to all eligible members in hard copy form, in electronic form or by means of a website, or (b)if it is possible to do so without undue delay, by submitting the same copy to each eligible member in turn (or different copies to each of a number of eligible members in turn), or by sending copies to some members in accordance with paragraph (a) and submitting a copy or copies to other members in accordance with paragraph (b). (4)The copy of the resolution must be accompanied by a statement informing the member— (a)how to signify agreement to the resolution (see section 296), and (b)as to the date by which the resolution must be passed if it is not to lapse (see section 297).
296	Procedure for signifying agreement to written resolution (1)A member signifies his agreement to a proposed written resolution when the company receives from him (or from someone acting on his behalf) an authenticated document— (a)identifying the resolution to which it relates, and (b)indicating his agreement to the resolution. (2)The document must be sent to the company in hard copy form or in electronic form. (3)A member's agreement to a written resolution, once signified, may not be revoked. (4)A written resolution is passed when the required majority of eligible members have signified their agreement to it.
297	Period for agreeing to written resolution (1)A proposed written resolution lapses if it is not passed before the end of— (a)the period specified for this purpose in the company's articles, or (b)if none is specified, the period of 28 days beginning with the circulation date. (2)The agreement of a member to a written resolution is ineffective if signified after the expiry of that period.
284	Votes: general rules (1)On a vote on a written resolution— (a)in the case of a company having a share capital, every member has one vote in respect of each share or each £10 of stock held by him, and (b)in any other case, every member has one vote. (2)On a vote on a resolution on a show of hands at a meeting, each member present in person has one vote. (3)On a vote on a resolution on a poll taken at a meeting— (a)in the case of a company having a share capital, every member has one vote in respect of each share or each £10 of stock held by him, and (b)in any other case, every member has one vote. (4)The provisions of this section have effect subject to any provision of the company's articles.
Records of shareholder	
355	1)Every company must keep records comprising— (a)copies of all resolutions of members passed otherwise than at general meetings, (b)minutes of all proceedings of general meetings, and (c)details provided to the company in accordance with section 317 (decisions of sole member). (2)The records must be kept for at least ten years from the date of the resolution, meeting or decision (as appropriate).
Model Articles	
3	Directors to Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.
7	Directors to take decisions collectively (1) The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8. (2) If— (a)the company only has one director, and (b)no provision of the articles requires it to have more than one director, the general rule does not apply, and the director may take decisions without regard to any of the provisions of the articles relating to directors' decision-making.
8	Unanimous decisions (1) A decision of the directors is taken in accordance with this article when all eligible directors indicate to each other by any means that they share a common view on a matter. (2) Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible director or to which each eligible director has otherwise indicated agreement in writing. (3) References in this article to eligible directors are to directors who would have been entitled to vote on the matter had it been proposed as a resolution at a directors' meeting. (4) A decision may not be taken in accordance with this article if the eligible directors would not have formed a quorum at such a meeting.
9	Calling a directors' meeting

Before outlining the diagram on appointing a director + executive director + removal of director these notes will first provide some basic information on this topic.

(1) What is the difference between an executive director and a non-executive director?

Executive director is an employee of the company and will have a service contract and is in charge of the day to day running of the business.

A non-executive director does not participate in day to day running of the business. Their main role is to attend and vote at board meetings. These are typically found in public companies rather than private ones.

(2) How is a person appointed to the board of directors?

The first directors of a company will be those persons named as directors in the statement of proposed officers – they automatically become directors.

Subsequent directors being appointed depends on the articles of the company but typically it is either through ordinary resolution of shareholders or board resolution by existing directors.

(3) How does a company give a director an executive role and award him a service agreement/contract?

The company will be powered by its own articles to enter into service agreements and art 3, art 5 and art 19 of model articles provide for this power. The board will decide the terms of each service contract, which include the directors responsibilities, authority of director and salary etc.

(4) In what ways may a director lose his position as an officer of the company?

This is how it's normal:

- a) Resignation-by giving notice. Look at 18 (f) model Articles
- b) Removal by board of directors sometimes, power is given to the board of directors through articles to dismiss a fellow director through a majority vote at a board meeting. This must be done bona fide in the best interests of the company. This essentially means that the reasons for this must be serious, such as gross negligence by a director or failure to perform duties over time.
- c) Removal by shareholders under CA 2006- may remove director by ordinary resolution -s 168. A shareholder wanting to propose a resolution to remove a director must give special notice (s 168 (2). Section dealing with special notices is s 312 (formal notice at least 28 days before GM)

Model Article 18

Termination of director's appointment

A person ceases to be director as soon as-

- (a) They cease by virtue of CA 2006 or prohibited by law from being director
- (b) Bankruptcy order made against them
- (c) Composition made with that person's creditor in satisfaction of their debts
- (d) A registered medical professional treating them gives a written opinion that they are physically or mentally incapable of acting as director and may remain like this for a further 3 months
- (e) ..
- (f) Notification is received by company from director that they are resigning from office, and this resignation took effect according to the terms

(5) How (if at all) does an executive director's loss of office affect his executive (employment) position?

If a director is removed from the board then he automatically loses any executive role that he might occupy within the company because the executive role is dependent on his being a director. However the ex-director/executive still retains other employment rights which are found in the service agreement. Therefore, the company will effectively be in breach of its obligations and so the director potentially has a claim under wrongful dismissal as well as unfair dismissal.

(6) How can a company dismiss an executive director from his executive role (i.e. terminate his employment) and what financial implications may this have for the company (see Preparation item 5 above)?

Can terminate for numerous reasons e.g. notice period outlined in service contract, gross misconduct, criminal offence, breaching terms of service agreement, bankruptcy.

Financial implications – payments for loss of office via S.215 which needs to be approved by member approval via S.217 or termination payment which calculated based on length of notice period.

(7) How (if at all) does the loss of a director's executive position affect his position as an officer of the company?

No, as service agreement does not include a provision stating his directorship would end. Stays director until he resigns (as stated in the contract) but he would no longer be an employee.

(8) Alternatively, if the shareholders were to pass a resolution under s168 Companies Act 2006 removing David from the office of director, what effect would this have on his employment contract? What would be the consequences for Diggers?

That now ex-director would no longer be able to satisfy his part of the service contract because of the loss of office which means the company would be breaching the service contract – the company would be sued for damages.

For clarity...

Payments for loss of office – S.215 (3) This is payable to director (a) by way of compensation for loss of office as director (b) by way of compensation for loss, while director of company or in connection to ceasing to be a director, of any other office or employment in connection with the management of the affairs of company/ holding company, (c) as consideration for his retirement from office as director, (d) in connection with his retirement while director or while ceasing to be director, from any office in connection to management of affairs (4) References for compensation and consideration include benefits other than cash
Payment by company: requirement of members’ approval – S.217 (4) Company may not make payment for loss of office unless approved by resolution of members (5) Same for loss of office of holding company (6) A resolution can only be passed if a memorandum setting out the particulars of payment was made available to members : (a) for written resolution by being sent and submitted to every member (b) in case of resolution at meeting, by being made available for inspection at the registered office for at least 15 days prior to meeting, and at the meeting itself.
Exceptions for payments in discharge of legal obligations – S.220 (3) Approval not required for a payment made in good-faith in discharge of an existing legal obligation, by way of damages for breach of obligation, by settlement or compromise of any claim arising in connection with termination, by way of pension (4) In relation to s 217, an existing legal obligation means the obligation of a company that is not connected to the event giving rise to the payment for loss of office
Exception for small payments – S.221 (2) Approval not required under 217, 218, 219 if (a) the payment is made by company/subsidiaries and (b) the amount or value does not exceed £200

Diagram on appointing director/executive director/removal of director (this will include steps regarding meetings/resolutions/filing requirements)

NB – appointing a new director to office

and granting them a service contract (so they can be an executive director) is a two-step process.

Model Article 17 – Appointing a Director Any person who is permitted by law and is willing to do so may be appointed by a director (a) By ordinary resolution of shareholders or (b) Decision by the directors (board resolution)

If going down the shareholder resolution route... Section 302 – Director may call a general meeting of the company

Need to get a letter of waiver signed by current shareholders to dispense with their first refusal rights.



S.696 (2) (a) if a written resolution is used to validate the terms of the contract then the details of that contract need to be disclosed to every member.

(2) (b) if the resolution is at a meeting then then at the office for no less than 15 days and at the meeting itself.

Had a board resolution effecting the purchase in accordance with Model Article 3.

Insolvency

You are asked to look at a balance sheet and identify the implications of s 123 Insolvency Act. (BASICALLY HOW TO DETERMINE A CO IS INSOLVENT)

Look at the statute: (for context 123, is relevant because by 122(f), a company may be wound up by the court is it concludes that a company is unable to pay its debts,

123 (1) A company is deemed unable to pay its debts :

a. If the sum exceeds £750 and the creditor has served a written demand to pay the sum and for the 3 weeks the company did not pay then the company is therefore seen as being unable to pay debts

...(e) if it is proved to the satisfaction of the court that the company **cannot paid its debts as they fall due**

(2) a company is also deemed unable to pay its debts of it is proved to the satisfaction of the court that **the value of the companys assets is less than the amount of its liabilities** taking into account contingent and prospective liabilities

If on balance sheet the assets are greater than liabilities, you can state that the it is not balance sheet insolvent but as the act suggests it may be insolvent in other ways e.g. cash flow insolvent, which will still mean the company may need winding up. You should also point out where you see worrying patterns from a year to another, e.g. there are now less creditors or more liabilities, or if the property has gone down in value. Similarly, if it is not too recent (e.g. half a year old, you should state that there would need to be a more recent account for an accurate evaluation)

1. Advise directors on their duties on winding up

Directors have fiduciary duties to companies. S 170 and 171 f Companies Act

170 (1)The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

171 A director of a company must—

- (a)act in accordance with the company's constitution, and
- (b)only exercise powers for the purposes for which they are conferred.

Most importantly, however: **172 (1)** - A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a)the likely consequences of any decision in the long term,
- (b)the interests of the company's employees,
- (c)the need to foster the company's business relationships with suppliers, customers and others,
- (d)the impact of the company's operations on the community and the environment,
- (e)the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f)the need to act fairly as between members of the company.

But: **172 (3)**The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company=> SO THESE DUTIES SHIFT FROM PROTECTING THE COMPANY TO THE CREDITORS NOW

2. Consider the effect of 214 on directors:

214- deals with wrongful trading. It may hold directors accountable for things they shouldn't have done which led to insolvency (the equivalent for administration of this section is 246 ZB)

214(1)-if this section applies, directors may be personally liable to the company's assets

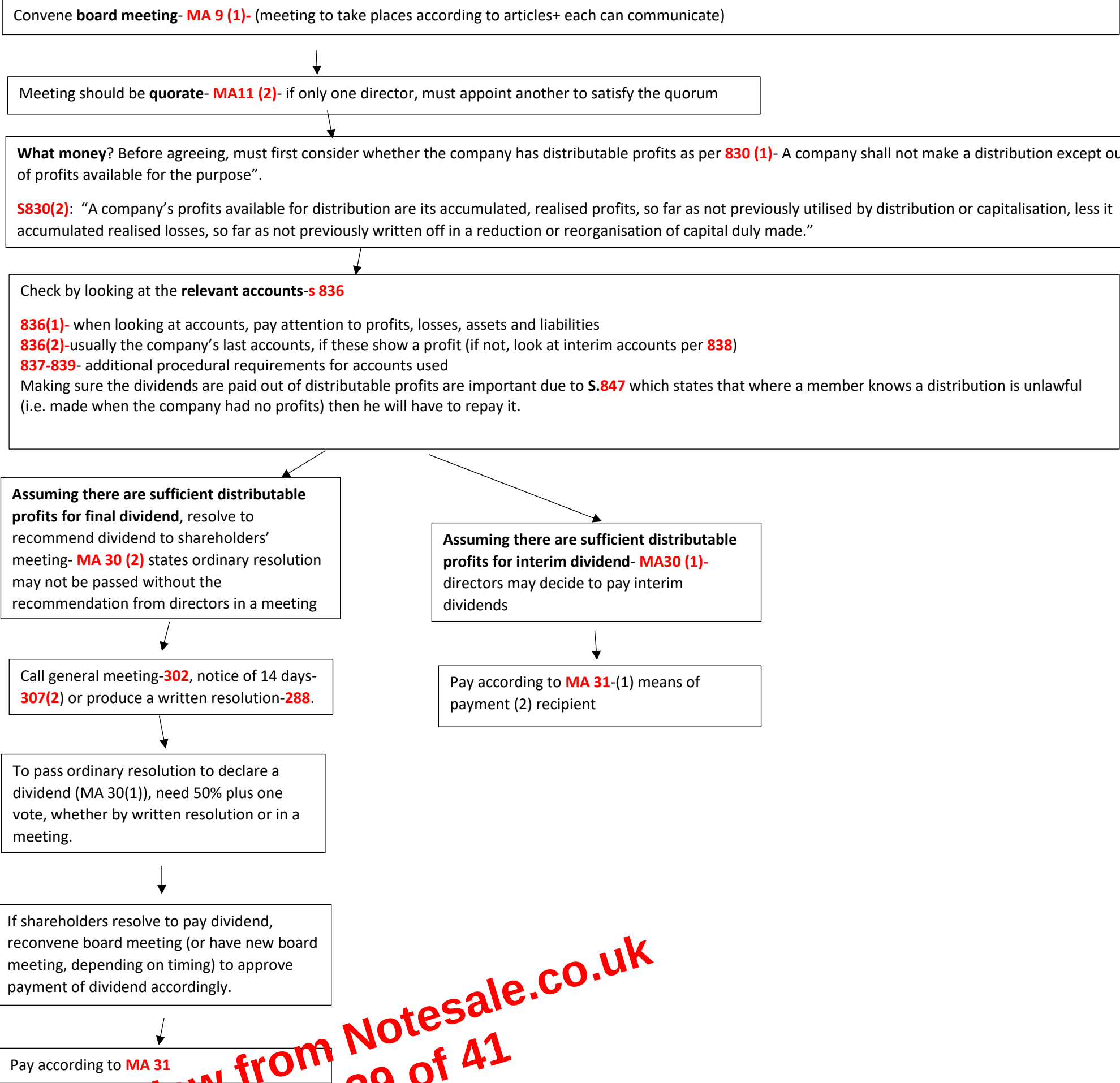
214(2)- (a) applies where company has gone into insolvent liquidation- as defined by **214 (6)**= unable to pay its debts

214 (2) (b)- at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation=> to see how this applies look at BUT as per **214 (3)** this will not be done if the court is satisfied that' person took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken.'

245 is preferable to 239 as 239 requires a court order which may be expensive and time consuming, while 245 applies automatically

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Procedure as to paying an interim dividend:



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!!!NB!!!

In a problem question:

- if someone with ordinary shares complains about not having been paid dividends-they have no automatic right to a dividend- Model Article 30 says 'may pay' not 'must'
- if it's a preference share etc look at the amended articles you were provided: if there is an obligation to pay. IF there is a provision stating that any sum payable becomes due and immediately payable, can only force them to pay if there are distributable profits as per 830. If not, money owed will roll over.
- If one year made the loss and the following year made a profit, before distributing take away the loss
- Always pay preference share before deciding how much is left to divide between ordinary share
- Any interest on a loan is a debt so should be paid regardless whether there is a profit /loss