LEGAL SYSTEMS IN ASEAN – SINGAPORE
CHAPTER 5 – BUSINESS LAW (PART 1): BUSINESS ORGANISATIONS AND STRUCTURES, COMPANY LAW, AND THE LAW OF INSOLVENCY

FONG Wei Li
Director, KEL LLC

Dr Jack Tsen-Ta **LEE**
Deputy Research Director, Singapore Academy of Law;
with the assistance of **SHU** Kit, third-year LLB student, School of Law, Singapore Management University

TABLE OF CONTENTS

A. BUSINESS ORGANISATIONS AND STRUCTURES 3
Sole Proprietorship 3
Formation Requirements 3
Registration Requirements 4
How Does a Sole Proprietorship Cease to Exist? 4
Partnership (General Partnership) 4
Formation Requirements 4
Registration Requirements 5
Rights and Powers of the Partners 5
Liabilities and Duties of the Partners 5
Relationship between the Partners 6
Liability of Non-partners for the Partnership's Debts 6
Relationship between the Partnership and Third Parties 6
How does the Partnership Cease to Exist? 7
Limited Partnership 7
Formation Requirements 7
Registration Requirements 8
Relationship between the Partners 8
Limited Partners 8
General Partners 9
Relationship between the Limited Partnership and Third Parties 10
How does the Limited Partnership Cease to Exist? 10
Limited Liability Partnership 10
Formation Requirements 10
Registration Requirements 11

Relationship between the Partners in the LLP ... 11
Partners in the LLP ... 11
Manager of the LLP ... 11
Relationship between the LLP and Third Parties ... 12
How does the LLP Cease to Exist? ... 12
Company ... 13
Types of Companies ... 13
Formation of a Company ... 15
Registration Requirements for Companies in General ... 16
Members of a Company ... 16
Directors ... 17
Company Secretary ... 17
How does the Company Cease to Exist? ... 18
Business Trust ... 18
Formation of a Business Trust ... 18
Registration of a Business Trust ... 19
Trustee-manager ... 19
Unitholders ... 19
How does the Business Trust Cease to Exist? ... 20
Singapore Variable Capital Company ... 20
B. COMPANY LAW ... 21
Introduction ... 21
Incorporation and Its Consequences ... 21
Incorporation ... 21
Lifting the Corporate Veil ... 22
Corporate Governance ... 26
Division of Powers ... 26
Statutory Limitations on the Board of Directors ... 27
Duties Owed under Common Law ... 28
Enforcement of Corporate Rights ... 34
Proper Plaintiff Rule ... 34
Derivative Actions ... 34
Shareholder Remedies ... 37
Oppression Remedy ... 37
Just and Equitable Winding Up ... 38
Shares ... 41
Definition ... 41
Types of Shares ... 41
Class Rights ... 41
Capital Maintenance ... 42

General ... 42
Dividends are only Payable from Profits ... 42
Share Repurchases are Allowed in Limited Circumstances ... 43
Capital Reduction ... 44
Debenture and Charges ... 44
Debentures ... 44
Charges ... 45
Winding Up ... 47
Winding Up by the Court ... 47
Voluntary Winding Up ... 50
C. THE LAW OF INSOLVENCY ... 51
Introduction ... 51
When is a Company Insolvent? ... 52
Consequences of Corporate Insolvency – a Company's Options ... 52
Winding up ... 52
Corporate Rescue – Restructuring ... 52
Impact on Creditors ... 54
Winding-up Situation ... 54
Corporate Rescue Situation ... 54

A. BUSINESS ORGANISATIONS AND STRUCTURES

The various business organisations and structures for doing business in Singapore are as follows:

- Sole proprietorship.
- Partnership (general partnership).
- Limited partnership.
- Limited liability partnership.
- Company.
- Business trust.
- Singapore variable capital company (hereafter S-VACC; a proposed vehicle mainly for funds that is not in effect).

Sole Proprietorship

A sole proprietorship is a business carried on by a proprietor on his or her own without the use of a separate and distinct business form. A sole proprietorship does not have a separate legal personality.

Formation Requirements

The proprietor can be an individual or a legal entity.

Where the proprietor of the business does not reside in Singapore, at least one authorised representative who is at least 18 years of age, of full legal capacity and is ordinarily resident in Singapore must be appointed.

Registration Requirements

There are no registration requirements when the proprietor carries out business in Singapore under his or her own name as an individual, or when the proprietor is a company that carries out business under its corporate name.

If the proprietor carries out business using a business name, he or she must apply to register the business name and comply with the requirements of the Business Names Registration Act 2014 (hereafter BNRA).[1]

How Does a Sole Proprietorship Cease to Exist?

The sole proprietorship ceases to exist when its proprietor dies or ceases to carry on business.

The BNRA requires any person registered under it who has ceased to carry on business to notify the Registrar of Business Names of this. Failing to do so is an offence and may result in the imposition of a fine.

Partnership (General Partnership)

A partnership is the relation which subsists between two or more persons carrying on a business in common with a view to making profit.[2] A partnership does not have a separate legal personality – it is not a separate legal entity from its partners.

The relevant statute governing partnerships is the Partnership Act.[3]

Formation Requirements

There is no formality required in creating a partnership. As long as the definition of a partnership referred to above is satisfied, the law recognises the existence of a partnership.

Partnerships are usually created through a partnership agreement entered into by the partners in the business. The partnership agreement may be made orally or in writing.

A partnership can only have a maximum of 20 partners. This restriction does not apply to partnerships formed solely or mainly for the purpose of carrying on any

1 No 29 of 2014.
2 Partnership Act (Chapter 391, 1994 Revised Edition) s 1(1).
3 ibid.

profession that is regulated by other legislation, such as accounting firms, law firms and medical practices.

The partners can be individuals or corporate entities.

If the partners are not resident in Singapore, they must appoint an authorised representative who is resident in Singapore.

A partnership can convert itself into a limited partnership where one or more (but not all) of its partners register themselves as limited partners.

Registration Requirements

The partnership does not need to be registered if it has two or more individuals carrying on business under the full names of all the individuals. Even if this requirement is satisfied, the partners may nevertheless choose to register the partnership under the BNRA.

If the partners intend to carry on partnership's business under a business name, the partnership has to be registered with the Accounting and Corporate Regulatory Authority (hereafter ACRA).

Rights and Powers of the Partners

The partners collectively own the assets of the partnership. Each partner has equal managerial right and authority to act for the partnership.

Liabilities and Duties of the Partners

Each partner is liable for all debts and obligations of the partnership that have been incurred while he or she is a partner of the partnership.

The partnership and all its partners may also be sued for any wrongful act committed by any partner in the course of the business of the partnership or with the authority of his or her co-partners.

A person who is admitted as a partner into an existing partnership is not liable to the creditors of the partnership for anything done before he or she became a partner.

A partner who retires from a partnership does not cease to be liable for partnership debts or obligations incurred before his retirement.

Partners are taxed individually on their share of the partnership's profits.

There are statutory fiduciary duties in the Partnership Act which the partners have to comply with:

(a) **Duty of Honesty and Full Disclosure**. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.[4]

(b) **Duty to Avoid Conflict of Interest and Duty**. Every partner must account to the partnership for any benefit derived by him or her without the consent of the other partners from any transaction concerning the partnership, or from any use by him or her of the partnership property, name or business connection.[5]

(c) **Duty not to Compete**. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the partnership, he or she must account for and pay over to the partnership all profits made by him or her in that business.[6]

The duties of the partners can also be specified in the partnership agreement and this may be varied by the consent of all the partners. Such consent may be either express or inferred from a course of dealing.

Relationship between the Partners

The relationship between the partners is governed by the partnership agreement. There is flexibility to vary terms of the partnership agreement by consent. Such consent can be express or inferred from a course of dealing.

Where there is no partnership agreement or areas which the agreement does not comprehensively provide for are involved, the relationship between partners is governed by the relevant provisions of the Partnership Act.

Liability of Non-partners for the Partnership's Debts

A retired partner who continues to appear to be a partner of the partnership may, in certain circumstances, be treated as still being a partner by parties dealing with the partnership. Such a person may be made liable for the debts of the partnership until he notifies third parties of his retirement from the partnership.

If any person by words or conduct represents himself or herself or allows himself or herself to be represented as a partner of a partnership, he or she will be liable to any person who has given credit to the partnership on the strength of the representation.

Relationship between the Partnership and Third Parties

Partners are agents of each other and of the partnership. A partner's acts in relation to the normal business operations of the partnership will be treated as the actions of the partnership and all its partners. While the authority of a partner

[4] ibid s 28.
[5] ibid s 29.
[6] ibid s 30.

may be restricted by agreement, such a restriction will not affect a third party dealing with the partner unless the restriction is known by the third party.

The acts of the partner will not bind the partnership with respect to the third party if the partner has in fact no authority to act for the partnership in a particular matter and the third party dealing with the partner does not know or believe that the person he or she is dealing with is a partner of the partnership.

How does the Partnership Cease to Exist?

A partnership will automatically be dissolved if any partner dies or leaves the partnership. The partnership agreement may also provide for other situations in which the partnership is to be dissolved. This may include situations where any one of the partners becomes bankrupt or becomes of unsound mind. It is also possible for an application to be made to court to have the partnership dissolved under circumstances specified in section 35 of the Partnership Act.

The business of the partnership can be closed by the partner or an authorised representative filing a 'notice of cessation of business registration', or by the Registrar of Business Names if registration has expired and has not been renewed.

Limited Partnership

A limited partnership is a business organisation that consists of one or more general partners and one or more limited partners.

A limited partner enjoys limited liability and is not liable for the debts or obligations of the firm beyond the amount of his or her agreed contribution. A general partner has unlimited liability.

A limited partnership does not have a legal personality that is separate from their constituent partners.

The relevant statutes governing limited partnerships are the Partnership Act and the Limited Partnerships Act.[7]

Formation Requirements

Limited partnerships are created pursuant to a limited partnership agreement among the partners. The agreement may be oral or in writing.

The name of the limited partnership has to contain the words 'limited partnership' or 'LP'.

There is no maximum limit on the number of partners there can be in a limited partnership.

---

7 Cap 163B, 2010 Rev Ed.

Registration Requirements

A limited partnership needs to have one or more persons registered as limited partners of the limited partnership under the Limited Partnerships Act, otherwise it will be deemed a general partnership. The registration of the limited partnership is done through the lodging of prescribed documents by one of its general partners.

After registration, the limited partnership must comply with all the requirements set out under the Limited Partnerships Act such as the filing of changes in particulars of the limited partnership, publication of its name and registration number on invoices and official documents and the keeping of proper accounts.

Limited partnerships registered under the Limited Partnerships Act are not subject to the provisions of the BNRA. If the limited partnership ceases to have any person named as its limited partner, its registration under the Limited Partnerships Act will be suspended and the provisions of the BNRA will apply. Once a new limited partner is appointed, the registration of the limited partnership will be restored and the application of the BNRA will cease.

Relationship between the Partners

Like the case of the partnership, the relationship between partners is governed by the limited partnership agreement. There is flexibility to vary the terms of the limited partnership agreement by consent, which can be express or inferred from a course of dealing.

Subject to the limited partnership agreement, a person may become a partner without the consent of the existing limited partners.

Where there is no partnership agreement or where the agreement is not comprehensive, the relationship between partners is governed by the relevant provisions of the Partnership Act.

Partners in a limited partnership also have to abide by the statutory fiduciary duties laid out in the Partnership Act.[8]

Limited Partners

The agreed contribution of the limited partner to the limited partnership can be in the form of services.

Subject to the limited partnership agreement, limited partners may increase, reduce or draw out their contributions with the approval of the general partners. The Limited Partnerships Act also specifies when the limited partner is liable to refund distributions made to it[9] and when an agreement to reduce the amount of the agreed contribution of the limited partner would be of no effect.[10]

8 Partnership Act (n 2) ss 28–30.
9 Limited Partnerships Act (n 7) s 7(2)
10 ibid s 7(3).

Parties who wish to be limited partners in a limited partnership have to register themselves as such under the Limited Partnerships Act. Failing to do so will result in them being treated as if they were general partners of the limited partnership, causing them to lose their limited liability status.

Where a person deals with a limited partnership after a partner becomes a limited partner, that person is entitled to treat that partner as a general partner of the limited partnership until he or she has notice of the registration of that partner as a limited partner.

Limited partners should not take part in the management of the limited partnership and should not have the power to bind the limited partnership. Limited partners who take part in the management of the limited partnership are liable for all debts and obligations of the limited partnership incurred while they so take part in the management as though they were general partners.

However, there is a safe harbour list of activities in the First Schedule of the Limited Partnerships Act that the limited partner can engage in without being regarded as taking part in management of the limited partnership. Some of the activities in the safe harbour list include the following:

(a) Consulting with and advising the limited partnership or any partners of the limited partnership with respect to the business, affairs or transactions of the limited partnership.

(b) Acting as an agent or employee of the limited partnership within the scope of the authority conferred by the partners.

The safe harbour list of activities is not exhaustive. The limited partnership agreement can increase the scope of activities which the limited partner can engage in without being held liable as a general partner.

General Partners

Anyone who is not a limited partner is a general partner. General partners are treated the same as partners in a partnership and are liable for all the debts and obligations of the limited partnership incurred while they are general partners. A general partner can be an individual or a corporation.

The general partner can only carry on the business of the limited partnership under a name that is registered under the Limited Partnerships Act.

Where every general partner of a limited partnership is ordinarily resident outside Singapore, the Registrar of Limited Partnerships may require a local manager to be appointed to be responsible for the discharge of all obligations attaching to the limited partnership as prescribed by the Limited Partnerships Act.

Relationship between the Limited Partnership and Third Parties

Where a person deals with a firm after it becomes a limited partnership, that person is entitled to treat the firm as a general partnership until he or she has notice of the registration of that firm as a limited partnership. He or she is also entitled to treat any person who was a partner of the firm as a general partner of the limited partnership until he or she has notice of the registration of that person as a limited partner.

Partners are agents of each other and of the limited partnership. A partner's acts in relation to the normal business operations of the limited partnership are treated as being the actions of the limited partnership and all its partners. While the authority of any individual partner may be restricted by agreement, such a restriction will not affect a third party dealing with the partner unless the restriction is known by that party or that party either does not know or believe that the person he or she is dealing with is a partner of the limited partnership.

How does the Limited Partnership Cease to Exist?

The dissolution of limited partnerships is similar to that of partnerships.

However, limited partners are not entitled to dissolve the limited partnership by notice. A limited partnership is also not dissolved on the death, dissolution, bankruptcy or liquidation of a limited partner. The limited partnership agreement can provide otherwise.

In the event of the dissolution of a limited partnership, its affairs are to be wound up by the general partners unless there is a court order to the contrary.

Limited Liability Partnership

A limited liability partnership (hereafter LLP) is a business organisation comprising two or more persons associated for carrying on a lawful business with a view to profit that is registered as such under the Limited Liability Partnership Act (hereafter LLPA).[11]

An LLP has a separate legal personality. It can sue, be sued and own property in its own name. The partners of an LLP are not liable for the debts of the LLP. Each partner is assessed and taxed individually on his or her respective share of the profits in the LLP.

An LLP is not the same as a partnership. The relevant statute governing the LLP is the LLPA, and the Partnership Act does not apply to LLPs.

Formation Requirements

The word 'LLP' has to be included as part of the name of an LLP.

[11] Cap 163A, 2006 Rev Ed.

An LLP must have a minimum of two partners, but otherwise there is no limit on the number of partners that an LLP may have. A partner can be an individual or a corporation.

All LLPs must have at least one manager who is a natural person and who is of full age and capacity. Such a manager must also be ordinarily resident in Singapore. Managers are persons who are concerned in or who take part in the management of the LLP. They need not be a partner of the LLP.

An LLP needs to have a registered office in Singapore to which all notices and correspondence may be sent.

An LLP has to disclose and maintain a register of registrable controllers. LLPs that are exempted from this requirement are those in the Sixth Schedule of the LLPA. These include companies wholly owned by the Government and Singapore financial institutions.

Registration Requirements

If the LLP is carrying on business under its registered name, it is exempted from the registration requirements under the BNRA. Otherwise, it must comply with the provisions of the BNRA.

Relationship between the Partners in the LLP

Except as otherwise provided by the LLPA, the mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, are governed by the LLP agreement. There is flexibility in varying the terms of partnership in the LLP agreement.

Matters not covered by the LLP agreement are governed by the provisions of the First Schedule of the LLPA.

Partners in the LLP

A partner in the LLP can cease to be a partner of the LLP in accordance with the LLP agreement or, where there is no agreement on the matter, by giving 30 days' notice to the other partners of his or her intention to leave the LLP. A partner will also cease to be a partner in the LLP upon death or dissolution.

Partners enjoy limited liability to the extent of their agreed contribution to the LLP.

Manager of the LLP

The manager will be held responsible should the LLP fail to comply with the requirements of the LLPA pertaining to the following:

(a) The filing of a declaration of solvency under section 24 of the LLPA.

(b) The publication of the LLP's name, registration number and limited liability status on its invoices and correspondence.

(c) The registration of any change in particulars of the LLP.

The following persons are disqualified from acting as a manager of an LLP:

(a) Undischarged bankrupts (unless they get permission from the High Court or the Official Assignee).

(b) Persons who are under disqualification from so acting pursuant to an order by the High Court because of their previous role in managing LLPs which have become insolvent or which were wound up on grounds of national security.

(c) Persons who have been convicted of specified offences.

(d) Persons who are disqualified from acting as directors or from being involved in the management of companies under the Companies Act.[12]

Relationship between the LLP and Third Parties

Every partner of the LLP is regarded as an agent of the LLP. However, the LLP is not bound by the acts of a partner which are not authorised where either this fact is known to the person dealing with the partner or the person does not know or believe the partner to be a partner in the LLP.

If the partner of an LLP ceases to be a partner, the LLP is required to pay to the former partner (or his legal representative or its liquidator) an amount equal to the former partner's capital contribution to the LLP and the former partner's share in the accumulated profits of the LLP. The amount is determined at the date the former partner ceased to be a partner.

How does the LLP Cease to Exist?

Dissolution often takes place after a winding-up process has been completed. The winding up may be effected voluntarily upon the resolution of its partners. Alternatively, it may be effected following a court order being made upon the successful application of the LLP itself, any of its partners (or persons representing their estates), any creditor, the liquidator or the Minister for Finance. The grounds on which an application for an order for the winding up of an LLP and the procedures relating to both voluntary and court-ordered winding up of LLPs may be found in the Fifth Schedule of the LLPA.

During the winding up, the assets of the LLP will be called in by the liquidator and realised. The money collected will first be used to pay off all the debts of the

[12] Cap 50, 2006 Rev Ed.

LLP. Any amounts remaining will be distributed to the partners of the LLP in accordance with the LLP agreement.

Company

A company is an entity that is registered under and governed by the Companies Act (hereafter CA).[13] It has a separate legal personality from its members and the persons who manage the company. Companies can therefore own property and sue or be sued in their own names. Members of a company generally enjoy limited liability. Companies are recognised as taxable entities in their own right.

Types of Companies

Singapore law draws a distinction between private companies and public companies. A *private company* can only have a maximum of 50 members, and its constitution has to restrict the right of the members to transfer their shares in the company. A *public company* is any company that is not a private company. In other words, it can have more than 50 members and is not required to have restrictions on the transfer of its shares. There are a number of different types of companies:

(a) **Unlimited Company**. Unlimited companies can be private or public companies. There is no limit on the liability of the company's members for the debts of the company.

(b) **Public Company Limited by Guarantee**. A public company limited by guarantee is a company where its members contribute or undertake to contribute a fixed sum to the liabilities of the company by way of guarantee. It is commonly formed for carrying out non-profit-making activities, for example, for promoting art or charity.

The liability of the members is limited to the respective amounts that the members guarantee to contribute to the property of the company if it is wound up.

(c) **Companies Limited by Shares**. Where a company is limited by shares, the liabilities of the company's members are limited to the amount, if any, unpaid on the shares that the members respectively hold. Different types of companies can be limited by shares, namely, private companies, exempt private companies, small companies (and small groups), and public companies. These are examined below.

(i) ***Private Companies***. Instead of being limited by guarantee, a private company can be limited by shares. The restriction on the right to transfer shares usually takes the form of a requirement that the transfer be first approved by

[13] ibid.

the company's board of directors, or a requirement that the shares be first offered to be transferred to existing shareholders.

(ii) ***Exempt Private Companies***. An exempt private company (hereafter EPC) is a private company the beneficial interest in the shares of which is not held directly or indirectly by any corporation, and which consists of not more than 20 members.

An EPC can also be a company declared by the Minister for Finance as an EPC.

An EPC is exempted from some of the provisions in the CA. For example, an EPC is exempted from prohibitions against loans to its directors or to companies related to its directors under sections 162 and 163 of the Act. If an EPC is solvent, it need not attach its accounts to its annual returns when filing these with ACRA but can simply complete an online declaration of solvency instead.

(iii) ***Small Companies and Small Groups***. Small companies are exempt from audit requirements. Small companies which are either holding companies or subsidiaries will only qualify for such an exemption if the corporate group to which they belong is regarded as a 'small group'.

A company is a small company from a certain financial year if:

- it is a private company throughout the financial year; and
- it satisfies any two of the following criteria for each of the two financial years immediately preceding the financial year:
    - The revenue of the company for each financial year does not exceed S$10 million.
    - The value of the company's total assets at the end of each financial year does not exceed S$10 million.
    - It has at the end of each financial year not more than 50 employees.

A company ceases to be a small company if it ceases to be a private company during the financial year in question or if it does not satisfy any two of the three criteria listed above for two consecutive financial years immediately preceding the financial year in question.

(iv) ***Public Companies***. Public companies may or may not be listed on a stock exchange. If they are listed, they will usually be referred to as 'listed companies' and have to comply with the rules and regulations of the stock exchange on which they are listed.

Formation of a Company

A company comes into existence upon registration under the CA. It can have a minimum of one member. There is no limit to the number of members that a company can have, except for a private company. The members of a company can be individuals or corporations.

The members and managers of a company are governed by the company's constitution and by the provisions of the CA. Model constitutions for a private company limited by shares and a company limited by guarantee can be found on the ACRA's website.[14] Shareholders' agreements also govern the key rights and obligations among members of the company.

Companies must comply with various requirements, including the following:

(a) A company must appoint an auditor within three months from the date of its incorporation, unless it is exempted from audit requirements under sections 205B or 205C of the CA.

(b) A company must appoint a competent company secretary within six months from the date of its incorporation.

(c) All companies must have at least one director who is ordinarily resident in Singapore. Being ordinarily resident in Singapore means the director's usual place of residence is in Singapore. A Singapore citizen, Singapore permanent resident or an EntrePass holder can be accepted as a person who is ordinarily resident here.

(d) A company must have a registered office to which all notices and official documents may be sent, and at which the company is to keep the various registers that it is required to maintain under the law.

(e) A company has to file an annual return, which is a yearly statement that reflects the current financial status, the composition, and activities of the company, including its consolidated financial statements and balance sheet.

---

14 See 'Setting Up a Local Company' (Accounting and Corporate Regulatory Authority website, 10 November 2016) <https://www.acra.gov.sg/How_To_Guides/Setting_up_a_local_company/Downloads/> accessed 31 May 2018.

Registration Requirements for Companies in General

Companies have to be registered under the CA. Upon registration, companies must comply with the regulatory provisions of the CA and any rules made under the Act. If the company is not carrying on business under its registered name, it must also comply with the provisions of the BNRA.

Companies have to disclose and maintain a register of registrable controllers, a register of members and a register of nominee directors.

Members of a Company

1. *How to Become a Member of a Company*

A person can become a member by subscribing for shares in the company or by purchasing the company's shares from another person. Members of a company are also referred to as shareholders.

2. *Rights of the Members*

The main rights and obligations of the members in relation to each other and to the company may be found in the CA, in the company's constitution and under the terms of issue relating to the shares which the members hold.

Members are not liable for the debts of the company.

The main rights that members have are as follows:

(a) The right to be given notice of and to attend and participate in general meetings of members.

(b) The right to be treated fairly and to have the provisions of the company's constitution complied with.

(c) The right to make some key decisions in relation to the company through the general meeting. These include matters such as the appointment and removal of directors and auditors of the company, and the issue of shares and the amendment of the company's constitution.

(d) The right to a share of declared dividends, which can only be declared out of available profits.

(e) The right to have the company wound up in specified circumstances and to share in the residual assets of the company.

Directors

1. *Who Can be a Director*

Only individuals who have attained the age of 18 years and who are otherwise of full legal capacity may be appointed as a company's director. There is no maximum age limit for a director.

If a foreigner wishes to act as a local director of the company, he or she can apply for an EntrePass from the Ministry of Manpower.

The following persons are disqualified from acting as company directors:

(a) Undischarged bankrupts (unless they get permission from the High Court or the Official Assignee).

(b) Persons who are under disqualification orders made by the Court.

(c) Persons convicted of specified offences or offences involving fraud or dishonesty punishable with imprisonment for three months or more. The disqualification is for five years from the date of conviction of the relevant offence, or, where the person has been sent to prison, from the date of release.

(d) Persons convicted of certain offences or subject to the imposition of civil penalties under the Securities and Futures Act.[15]

(e) Persons who have been a director of not less than three companies which have been struck off the Register of Companies within a period of five years.

(f) Persons against whom debarment orders have been made by the Registrar of Companies.

(g) Persons who are disqualified from acting as managers of limited liability partnerships under the LLPA.

Company Secretary

The main role of the company secretary is to ensure administrative and regulatory compliance.

The secretary must be a natural person who has his oer her principal or only place of residence in Singapore. He must not be debarred under section 155B of the CA from acting as secretary of the company.

[15] Cap 289, 2006 Rev Ed.

The secretary of a public company has to satisfy prescribed requirements relating to experience, professional and academic requirements and membership of professional associations.

How does the Company Cease to Exist?

A company ceases to exist when it undergoes dissolution. Dissolution often takes place after a winding-up process. Winding up can occur by an order of court or voluntarily upon an appropriate resolution being passed by the company's members.

During the winding up, a liquidator will be appointed to collect and realise the assets of the company. The money collected will be used to pay off all the debts of the company, with the remaining amount distributed to the shareholders.

Business Trust

A business trust is a trust that operates and runs a business enterprise. A trustee holds the property of the business trust for the benefit of the beneficiaries of the trust. The beneficiaries are also known as the unitholders in a business trust.

A business trust is not a separate legal entity in that the trustee of the business trust is regarded as the legal owner of the assets in the trust. Thus, a business trust has no separate legal personality.

The relevant laws governing business trusts are the general law of trusts, the Business Trusts Act[16] (hereafter BTA) and the Trustees Act.[17] However, the Trustees Act does not apply to registered business trusts.

Formation of a Business Trust

Business trusts are usually created under a trust deed. A trust deed defines the property and the purpose of the trust and the business to be carried out under the trust. The trust deed will also set out the trustee's duties and the entitlements of the trust's beneficiaries.

A business trust has to satisfy the following requirements:[18]

(a) It needs to have the purpose of enabling unitholders to participate and receive returns from the management of the property under the business trust.

(b) Unitholders do not have day to day control of the management of the property.

(c) The property is managed by the trustee or another person on behalf of the trustee.

---

[16] Cap 31A, 2005 Rev Ed.
[17] Cap 337, 2005 Rev Ed.
[18] Business Trusts Act (n 16) s 2.

(d) Contributions of the unitholders and the profits from which payments are made to unitholders are pooled.

(e) The units in the trust that are issued are exclusively or primarily non-redeemable.

Registration of a Business Trust

A business trust can be registered under the BTA if the business trust fulfils certain criteria. The purpose of the BTA is to put in place a framework to regulate business trusts that wish to raise funds from the general public.

Business trusts offered to retail investors have to be registered under the BTA, whereas those offered to accredited investors and institutional investors will not require registration. Even so, business trusts that do not require registration may be voluntarily registered if it is considered that the investors targeted prefer to have the assurance that the business trust is one which is registered under the BTA.

Business trusts which are not registered under the BTA will continue to be subject to the Trustees Act, which sets out the general obligations of trustees.

Trustee-manager

Registered business trusts must have a trustee-manager. The trustee-manager must be a Singapore registered company which is not an exempt private company, the sole business of which is the management and operation of the trust. The trustee-manager's role is to safeguard the interests of the unitholders of the trust and to manage the business of the trust.

The trustee-manager, as a company, would be owned by shareholders. It would typically be controlled by the sponsoring entity which had divested its business by setting up the business trust.

The trustee-manager and its board of directors have a fiduciary duty to manage the trustee-management company in the best interests of the company and its shareholders. At the same time, as a trustee, the trustee-manager has to safeguard the interests of the unitholders of the business trust.

The duties and responsibilities of the trustee-manager are set out under the BTA. A trustee-manager can be removed by a resolution approved by not less than three-quarters of all unitholders.

Unitholders

There is no maximum number of unitholders in a business trust.

Unitholders in registered business trusts are given certain rights, some of which may not be available under general trust law. These rights include the following:

(a) A unitholder of a business trust registered under the Business Trust Act has no personal liability for the debts and liabilities of the business and its liability is limited to the amount of money that the unitholder expressly agreed to contribute to the venture.

(b) The right to remove and replace the trustee-manager.

(c) The right to fair treatment.

(d) The right to bring a representative or derivative action on behalf of the trust.

(e) The right to resort to the oppression remedy. In other words, the unitholder who feels that the affairs of the company are being conducted in an oppressive manner in disregard of his or her interests, or that the actions of the other unitholders unfairly discriminate or are prejudicial against him or her, can apply to the court to remedy the matter.

Although a registered business trust is not a separate entity, it is taxed as such. Unitholders are not taxed on the sums received as distributions from the registered business trust.

Business trusts can make distributions to investors out of operating cash flows and are not restricted to making distributions out of accounting profits only, which is the case for companies.

How does the Business Trust Cease to Exist?

A registered business trust may be terminated pursuant to the provisions in its trust deed. Notwithstanding the provisions of the trust deed, the unitholders of a registered business trust can direct the trustee-manager to wind up the trust by passing a special resolution to that effect.

In addition, a registered business trust can be wound up by the court on the petition of the trustee-manager, a director of the trustee-manager, a unitholder or a creditor of the business trust. Upon winding up, the assets in the business trust are to be applied in accordance with the trust deed.

Singapore Variable Capital Company

A Singapore variable capital company (S-VACC) is a new business vehicle that was just proposed in 2017.[19] However, as at the time of writing, the proposed

[19] For more details on the consultation paper for S-VACCs and the proposed S-VACC Act, see 'Consultation Paper on the Proposed Framework for Singapore Variable Capital Companies' (Monetary Authority of Singapore website, 23 March 2017) <http://www.mas.gov.sg/ News-and-Publications/Consultation-Paper/2017/Consultation-Paper-on-the-Proposed-Framework-for-Singapore-Variable-Capital-Companies.aspx> accessed 31 May 2018.

statute governing this business vehicle (the 'S-VACC Act') was still in its draft form.

The S-VACC is meant to be used in the funds industry as a vehicle for collective investment schemes only. Some aspects of the proposed S-VACC are:

(a) Sub-funds with segregated assets and liabilities can be created by registration with the ACRA.

(b) At least one director must be a director of the S-VACC's fund manager.

(c) Redemption of shares and capital reduction will be allowed under certain conditions where the shares are issued and redeemed at their net asset value.

(d) A S-VACC will not be required to disclose its register of shareholders to the public.

B. COMPANY LAW

Introduction

Companies in Singapore are predominantly governed by the Companies Act,[20] which is supplemented by common law rules and principles.

Incorporation and Its Consequences

Incorporation

1. *Obligation to Incorporate*

A business organisation with more than 20 members must be incorporated as a company.[21] However, this requirement does not apply to an association or a partnership formed solely or mainly for carrying on any profession or calling which, under the provisions of any written law, may be exercised only by persons who possess the qualifications laid down in such written law for the purpose of carrying on that profession or calling.[22] An example of such a partnership is a law firm.

2. *Registration of a Company*

Generally, any person may register a company upon payment of the prescribed fee and lodgement of the proposed company's constitution with other necessary

[20] Companies Act (n 12).
[21] ibid s 17(3).
[22] ibid s 17(4).

documents.[23] The Registrar of Companies would then register the company by registering its constitution.

On the registration of the company's constitution, the Registrar will issue in the prescribed manner a notice of incorporation, stating that the company is, from the date specified in the notice, incorporated and the type of company it is – that is, whether it is company limited by shares or guarantee or an unlimited company and where applicable that it is a private company.[24]

3. *Effects of Incorporation*

After incorporation, the company becomes a body corporate with all such powers as flow from being such an entity. The company may sue and be sued in its own name, and has perpetual succession until it is wound up; it may hold land; and its members shall have such liability to contribute to its assets in the event of its winding up as is provided under the Act.[25]

The company also becomes a separate legal entity.[26] It has its own rights and liabilities, which are not extended to its members, and owns its own property. Therefore, members of the company will not be liable for any debts incurred by the company. They have limited liability, in other words, liability limited to the amount they have to pay. In the event that the company becomes insolvent, liability for the members is capped and they will not be subject to the company's creditors.

Lifting the Corporate Veil

Although in most cases a company is a separate legal entity distinct from its directors or members, in certain circumstances the courts are prepared to 'pierce the corporate veil' of the company to find its members liable for the company's debts.

Locally, in the case of *Tjong Very Sumito v Chan Sing En*,[27] it was recognised that there is not yet a single legal test to determine when the courts should pierce the veil. It was also held that there are only two justifications for doing so. This is when either of the following is satisfied:

(a) The evidence shows that the company is in fact a separate legal entity, but has been used by the controller as an extension of himself or herself with no distinction between the company's business and his or her own personal business, with him or her having been the controlling mind and spirit of the company.

[23] ibid s 19(1).
[24] ibid s 19(4).
[25] ibid s 19(5).
[26] *Salomon v Salomon & Co Ltd* [1897] AC 22 (House of Lords, United Kingdom).
[27] [2012] 3 SLR 953 (High Court, Singapore).

(b) The corporate form has been abused to further an improper purpose, such as to escape personal liability for wrongs personally committed.

1. *Statutory Veil Piercing*

Certain provisions of the Companies Act provide for express statutory veil piercing in the following situations:

(a) Responsibility for fraudulent trading.[28]

(b) The payment of dividends from sources other than profits only.[29] If a company pays dividends out of, for example, gains derived from the sale of treasury shares instead of the company's profits, the directors or chief executive officers of the company will be found liable.

(c) Fraud committed by officers of the company.[30]

2. *Judicial Veil Piercing*

The courts may pierce the corporate veil and hold a person liable instead of the company if the facts of the case fall under certain established categories.

(1) *Statutory Provisions*

The corporate veil can be statutorily pierced when a provision of the law permits it, or, if clear and express words are absent from the statute, a purposive construction of the provision means that allowing a piercing of the veil would be consistent with parliamentary intention.

In *Re Bugle Press Ltd*,[31] the High Court of England and Wales held that two shareholders of a company ('A') who set up another company ('B') to compulsorily acquire the shares owned by a minority shareholder could not rely on a certain statutory provision even though company B had complied with the provision's requirements, because company B's use of the provision would not be for 'the purposes of any scheme contemplated by the section, but for the purpose of enabling majority shareholders to expropriate or evict the minority'. Thus, the Court took a purposive interpretation of the provision to pierce the corporate veil of company B.

(2) *Facade or Sham that Conceals the True State of Affairs*

The general rule is that where the company is a sham or mere facade designed to conceal the true state of affairs, the court may disregard its notional separateness and treat it as the same as its members.

---

[28] Companies Act (n 12) s 340.
[29] ibid s 403.
[30] ibid s 406.
[31] [1961] Ch 270 (High Court, England and Wales).

In *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd*,[32] the High Court defined shams and facades as 'acts done or documents executed by the parties to the "sham" which are intended by them to give third parties or to the court the appearance of creating between parties legal rights and obligations different from the actual legal rights and obligations (if any) the parties intended to create.'

Courts often conclude that a company is a sham or facade where the privilege of incorporation has been abused because the company has been used to evade legal obligations or to commit fraud. Although every person has a right to incorporate a company for his own purposes, incorporation should not be used as a device to circumvent the law or to hide the true state of affairs from the court.

It has been suggested that the test is whether the corporators have in fact treated the company as separate from themselves. If they have been using the company as an extension of themselves, it should not be open to them to hide behind its separate legal personality when that is convenient for them.[33]

(3) *Fraud and/or Evasion of Legal Obligations*

No court will lend its aid to a fraudulent scheme. Where a company is used as a cloak for fraud or crime, such as evading an existing contractual or statutory duty,[34] or where the director's behavior is akin to fraud,[35] it is unlikely that the court will refuse to hold the true wrongdoers liable just because the company is a notionally separately identity.

It is not enough to show that there was wrongdoing. The wrongdoing must have the nature of an independent wrong that involves the fraudulent or dishonest misuse of the company's corporate personality for the purpose of concealing true facts.[36]

(4) *'Single Economic Units'*

Generally, the mere fact that several companies are organised as a single economic unit will not negate the separate legal personality of each company, and the veil will not be pierced. It is perfectly legitimate to operate a group of incorporated subsidiaries to reduce the exposure of the main company to any liabilities. However, in the United Kingdom, it has been held that in certain situations a group of companies may have been treated as a single *corporate*

---

32 *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd*[1999] 2 SLR(R) 24 (High Court, Singapore).

33 *Asteroid Maritime Co Ltd v The Proceeds of the Sale of the Ship or Vessel 'Saudi Al Jubail'* [1998] SGHC 192 (High Court, Singapore); *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 (Supreme Court, United Kingdom).

34 *Gilford Motor Co v Horne* [1933] Ch 935 (Court of Appeal, England and Wales).

35 As it was in *Nagase Singapore Pte Ltd v Ching Kai Huat and Others* [2008] 1 SLR 80 (High Court, Singapore).

36 *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 (Supreme Court, United Kingdom).

entity,[37] which, in contrast with single *economic* entities, would allow piercing of the veil.

In Singapore, the 'single economic entity' justification for piercing the corporate veil between a parent company and its subsidiaries within the same group has not been well received.[38] According to *New Line Productions Inc v Aglow Video Pte Ltd*,[39] the separate legal personalities of group companies will only be ignored and the veil pierced when the following elements are present:

(a) There is functional unity within the group, with unity of ownership and unity of control. Where there are no common shareholders or directors, the group companies will not be treated as one legal entity.

(b) Where there was an abuse of the corporate form by treating the group companies a single economic unity, that is, an extension of oneself. Examples include there being no separate financial accounts, and/or no independent decision-making. The ultimate goal must have been to create a network of seemingly independent companies to allow the group to circumvent any injunctions served on a single company.

(5) *Interests of Justice*

In the United Kingdom, it has been held that the courts may exercise an equitable discretion to ignore the separate personality of a company if it is just in the circumstances to do so.[40] However, in *Adams v Cape Industries plc*[41] the Court of Appeal of England and Wales took a restrictive approach to the lifting of the corporate veil. The Singapore courts' stance on this is still unclear.

(6) *The Way Forward?*

The United Kingdom Supreme Court case *Prest v Petrodel Resources Ltd*[42] contains a principled analysis for when to pierce the corporate veil. Specifically, Lord Sumption laid down the concealment principle and the evasion principle.

In Lord Sumption's view, the concealment principle does not really involve veil piercing; the court is not disregarding the company's personality but looking behind it to discover the facts that the corporate structure is being used to conceal.

While the successful invocation of the concealment principle may not involve a piercing of the corporate veil, Lord Sumption stated that the evasion principle

37 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] All ER 462 (Court of Appeal, England and Wales).
38 See *Win Line (UK) Ltd* (n 32); *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210 (High Court, Singapore); *Simgood Pte Ltd v MLC Barging Pte Ltd* [2016] SGCA 46 (Court of Appeal, Singapore).
39 [2005] 3 SLR 660 (High Court, Singapore).
40 *Re A Company* [1985] BCLC 333 (High Court, England and Wales).
41 [1990] 1 Ch 433 (Court of Appeal, England and Wales).
42 *Prest* (n 33).

allowed the court to disregard the corporate veil. This arose if there was a legal right against the person in control of the company, which existed independently of the company's involvement, and a company was interposed so that the separate legal personality of the company would defeat the right or frustrate its enforcement. However, Lord Sumption also cautioned that this principle was a limited one, because the corporate veil should not be pierced unless it was necessary to do so. If some other basis existed which would allow the same result without veil piercing, it would not be appropriate to lift the corporate veil because in such a case there would be no public policy justifications for doing so.
Lord Neuberger agreed with Lord Sumption. He held that such abuse was in fact the only ground for piercing the veil 'in the absence of specific statutory authority to do so'.

At two extremes were Lord Walker of Gestingthorpe, who doubted the existence of a unifying corporate veil piercing principle, and Lord Mance and Lord Clarke of Stony-cum-Ebony, who thought the categories were not closed. Lady Hale of Richmond (with whom Lord Wilson of Culworth agreed) thought that the cases could 'simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business'.

As of current, the Singapore courts have yet to make a definitive pronouncement on whether the holding in *Prest* will be endorsed locally. Nonetheless, academics have argued that this approach 'will increase certainty for all concerned using the corporate form'[43] and is to be 'warmly welcomed' since it 'represents a significant attempt to formulate a principled approach to veil piercing'.[44]

Corporate Governance

Division of Powers

Under Singapore law, the power to manage the company is delegated from the shareholders (as owners) to the board of directors, as seen from section 157A of the Companies Act. What section 157A does is twofold:

(a) Section 157A(1) creates a mandatory rule by which the power to manage the business of the company, that is, decision-making, must be vested in the board or undertaken at the board's discretion.

(b) Section 157A(2) creates a default rule by which the company's powers are presumptively vested in the board. It also limits the derogation from that presumption to powers vested by the company's constitution in the general meeting.

The primary goal of directors' duties is to establish a body of rules and standards that allow shareholders (and, ultimately, other corporate stakeholders) to reap

43 Hans Tjio, 'Lifting the Veil on Piercing the Veil' [2014] *Lloyd's Maritime and Commercial Law Quarterly* 19.
44 Tan Cheng Han, 'Veil Piercing: A Fresh Start' [2015] *Journal of Business Law* 20.

the benefits of delegating management authority to the board while minimising the costs of doing so.

Statutory Limitations on the Board of Directors

Certain provisions set out in the Companies Act limit the powers of the board of directors. Examples include:

(a) Section 157(1), which governs the duty and liability of officers, and which stipulates that a director 'shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office'.

(b) Section 160(1), which attempts to restrict the power of directors to manage the company by increasing shareholder rights. This is done by requiring shareholder approval to effectuate a disposal of the whole or substantially the whole of the company's undertaking of property.

(c) Section 161(1), which places shareholders in the company. This section also institutes a requirement for shareholder approval before the directors can exercise their power to issue shares.

The statutory duty under section 157(1) of the Companies Act largely mirrors the common law directors' duties, with the duty to act honestly overlapping with the fiduciary duty to act *bona fide* in the company's interest, to act for proper purposes and avoid conflicts of interest, and to act with reasonable diligence encompassing the common law duties to act with care, skill and diligence.[45] However, it should be noted that a breach of common law duty does not necessarily mean that there has been a breach of statutory duty, and *vice versa*.[46]

Thus, section 157 of the Companies Act does not purport to replace the duties imposed at general law. This has a number of implications:

(a) A director who escapes liability under section 157 of the Companies Act may nevertheless find himself in breach of his or her duties at general law. The consequences of a breach of statutory duties prescribed under section 157 are, however, more severe as criminal liability[47] and disqualification from office[48] may be imposed on the errant director.

(b) Section 157 extends certain duties to 'officers', thereby imposing fiduciary-like obligations on certain employees who may not necessarily be classified as fiduciaries under general law.

[45] *Cheam Tat Pang v Public Prosecutor* [1996] 1 SLR(R) 161 (High Court, Singapore).
[46] *Falmac Limited v Cheng Ji Lai Charlie* [2013] SGHC 113 (High Court, Singapore).
[47] Companies Act (n 12) s 157(3)(b).
[48] ibid s 154.

Duties Owed under Common Law

1. *Non-fiduciary Duties*

Directors must meet a minimum objective standard of care, skill and diligence. This is the standard expected of a reasonable director in the position of the actual director, regardless of his actual capabilities. However, if the director holds himself or herself out as having or purporting to have special expertise, or is in a special position in the company, then a higher standard will be imposed. These negligence duties are imposed to reduce the potential for liability as a result of a director's incompetence or irresponsibility.

2. *Duty of Care and Skill*

The duty of care and skill aims to prevent directors shirking of their responsibilities and to penalize incompetence. In a broad sense, this duty achieves this by establishing an appropriate conduct that directors must exercise to avoid potential liability in the course of carrying out their directorial responsibilities.

The standard of conduct required for the duties of care, skill, and diligence is based on a minimum objective standard. Directors are required to act with the level of care, skill, and diligence that could be expected of a reasonable director in the position of the actual director himself, irrespective of what the latter director is actually capable of achieving. The defence of lack of knowledge needed to exercise the requisite degree of care cannot be used: if one 'feels that he has not had sufficient business experience to qualify him to perform the duties of a director, he should either acquire the knowledge by inquiry, or refuse to act'.[49]

The objective standard is the minimum that is required of a director and more will be required if he or she has, or is purported to have, particular expertise, or if he or she holds a special position in the company. This standard will not be lowered to accommodate any inadequacies in the director's knowledge or experience, but can be raised if he or she had held himself or herself out to possess or had in fact possessed some special knowledge or experience.[50]

Pursuant to section 391 of the Companies Act, the court may reserve discretionary power to wholly or partly relieve a director from liability for breaches of duty, including negligence, if the court considers that he acted honestly and reasonably and ought fairly to be excused.

3. *Fiduciary Duties*

Directors are required to be loyal to the company by virtue of the fiduciary duties they owe to it. Thus, directors must exercise their management powers in the interests of the company, and not for their own self-benefit at the company's expense.

---

49 *Daniels v Anderson* (1995) 16 ACSR 607 (Court of Appeal, New South Wales, Australia).
50 *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 (High Court, Singapore).

There are three types of fiduciary duties:

(a) The duty to act *bona fide* in the interests of the company.

(b) The duty to avoid conflicts of interest.

(c) The duty to act for a proper purpose.

(1) *Duty to Act in the Company's Interests*

A director stands in a fiduciary position *vis-à-vis* the company, and it is a fundamental obligation imposed upon all fiduciaries to act in the best interests of their beneficiaries. Directors 'must exercise their discretion bona fide in what they consider – not what the court may consider – is in the interests of the company'.[51]

The duty to act in the company's interests obliges directors to exercise their discretion in a manner that they, in their own minds, think best advances the company's interests. A director's conduct is therefore tested by reference to an essentially subjective barometer, determined by inferences drawn from the context and the parties' conduct. Ultimately, the courts will not substitute its own decisions for those made by the directors 'in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out to be money losing ones'.[52] This is supported by policy considerations that the market, instead of the courts, should punish directors for bad commercial decisions. An interventionist approach by the courts would stifle commercial growth, with an increase in defensive practices born of fear of legal consequences.[53]

The relevance of the objective yardstick lies in the assessment of the director's credibility. If a comparison with what reasonable directors would do in similar circumstances is unfavourable, the director is likely to find it harder to convince the court of his or her subjectively honest state of mind. While the courts will be slow to interfere with honest commercial decisions that turn out to be financially detrimental on hindsight, 'this does not mean that the courts should refrain from exercising any supervision over directors as long as they claim to be genuinely acting to promote the company's interests'.[54]

---

51 *Re Smith and Fawcett Ltd* [1942] Ch 304 (Court of Appeal, England and Wales).

52 *ECRC Land Pte Ltd (in liquidation) v Ho Wing On Christopher* [2004] 1 SLR(R) 105 (High Court, Singapore).

53 *Vita Health Laboratories Pte Ltd and Others v Pang Meng Seng* [2004] 4 SLR(R) 162 (High Court, Singapore).

54 *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd*) [2014] 3 SLR 329 (Court of Appeal, Singapore).

(2) *Duty to Avoid Conflicts of Interest*

A director cannot place himself in a position where his duty to advance the company's interests conflict or may conflict with his personal interests or some external loyalty.

(a) *Improper Profit Rule*

A director, even though he or she may have been acting outside the scope of his or her directorship, cannot retain any profit he or she made through actual misuse of his or her representative position. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he or she has or can have a personal interest conflicting with the interests of those he or she is bound to protect. Liability thus arises from the mere fact of a profit having been made in the stated circumstances. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[55] Thus, a director, if acting in a fiduciary capacity, is liable to account for the profits made by him or her from knowledge acquired when so acting.[56]

However, whether a 'mere possibility of conflict' would suffice, or if a 'real sensible possibility of conflict' is necessary, is unsettled in Singapore.

(a) According to the 'mere possibility of conflict' test, it is irrelevant that the possibility of conflict materialising may have been remote. As long as a possibility of a conflict was present, the test is satisfied. The Court of Appeal in *Ng Eng Ghee v Mamata Kapildev Dave (Horizon Partners Pte Ltd, intervener*)[57] opined that this is the preferable approach due to, firstly, the need to extinguish all possibility of temptation and to deter fiduciaries who may be tempted to abuse their positions; secondly, the difficulty of inquiring into a person's state of mind or motives, and therefore of ascertaining whether an actual conflict of interest has occurred; and thirdly, the difficulty of detecting actual conflicts of interest given the ease with which fiduciaries may conceal them.

(b) According to the 'real sensible possibility of conflict' test, whether there was a conflict is tested by reference to whether a reasonable person, looking at the relevant facts of the case, would think that there was a 'real sensible possibility of conflict'. This has been adopted by the Court of Appeal in *Guy Neale v Nine Squares Pty Ltd*.[58] However, it should be noted that that case involved trustees instead of directors.

---

55 *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134 (House of Lords, United Kingdom).
56 *Boardman v Phipps* [1967] 2 AC 67 (House of Lords, United Kingdom).
57 [2009] 3 SLR(R) 109 (Court of Appeal, Singapore).
58 [2015] 1 SLR 1097 (Court of Appeal, Singapore).

(b) *Conflict between Duty and Personal Interests*

Directors cannot, on their own account, derive any benefit that their directorships require or authorise them to pursue in their representative capacity.

Director are not allowed to engage in self-dealing. The conflict here is between the director's duty to his or her company and some extraneous personal interest. Directors will be found to have breached their duty if they profit from standing on both sides of the transaction.[59] However, the company's constitution may provide provisions that can mitigate the strictness of the no-conflict rule.

In some situations, a director may act for more than one principal. According to *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)*,[60] besides disclosing this conflict of interest to the rest of the Board as required under section 156(1) of the Act (or under section 156(5) if he or she is a nominee director), the director must also:

(a) obtain informed consent before acting for two principals;

(b) serve both principals as faithfully as though they were the only principal; and

(c) cease acting for one or both where there is actual conflict, which means that if the conflict of interests between his or her duties cannot be resolved, he or she should resign.

Except with the company's fully informed consent, a director of a company is not allowed to retain any profits he or she made out of his or her position. It is irrelevant that the director had acted honestly throughout or that the company had not suffered any damage, or even that the company itself would not have qualified for the benefit or made the profit.

The 'no secret profit' rule is often expressed using the language of corporate opportunities. Many breach of duties cases involve the director stealing a march on the company to exploit some lucrative opportunity. A business opportunity may be one that the company is actively pursuing, such that it was 'properly belonging to the company'[61] or was a 'maturing business opportunity'.[62] In either case, the director is proscribed from usurping or diverting the opportunity to himself or herself or some other, since this is akin to improperly using the company's property.

Where a company is unable to perform a contractual obligation, a director is in breach of his or her fiduciary duty to the company if he or she unilaterally passes on the contract to a third party without informing his or her fellow directors.[63]

---

59 *Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin* [1999] 3 SLR(R) 1049 (High Court, Singapore).
60 [2007] 2 SLR(R) 597 (Court of Appeal, Singapore).
61 *Cook v Deeks* [1916] AC 554 (PC on appeal from Ontario, Canada).
62 *Canadian Aero Services v O'Malley* (1973) 40 DLR (3d) 371 (Supreme Court, Canada).
63 *Viking Airtech v Foo Teow Kong* [2008] 1 SLR(R) 225 (High Court, Singapore).

(c) *Statutory Duty of Disclosure*

Section 157 of the Companies Act supplements the general law requirement of disclosure by requiring the director to declare the nature of any potential conflicts of interest to the board of directors. The obligation to inform the board arises when the director 'is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with the company'.[64] A director is required to comply with this section only if his interest may properly be regarded as a 'material interest'.[65]

Although what constitutes 'material interest' is not defined in the Companies Act, the High Court in *Yeo Geok Seng v Public Prosecutor*[66] held that whether or not the director has a material interest is a fact-specific inquiry dependent on the context of each case. A controlling interest in the other company, or a substantial shareholding in the present company such that he or she can influence board decisions would be a 'material interest'.

Notably, the potential width of section 156(1) is reduced as section 156(3) excludes certain situations. Specifically, a director is not deemed to be interested in any loan to the company merely because he or she has guaranteed the repayment of the loan or any part thereof.[67] There is also an exception *vis-à-vis* any transaction between related companies where the director sits on the board of both companies.[68]

To avoid a breach of the section, the director would have to either declare the nature of his or her interest at a meeting of the directors of the company or disclose the same to the company by written notice as soon as practicable after he becomes aware of the relevant facts.[69] The company secretary must record every such declaration in the meeting minutes.[70]

For a director with stakes in entitles which might be expected to transact with the company, section 156(4) of the Companies Act provides that it will be a sufficient declaration of interest if a general notice is given to the directors of the company to the effect that he or she is an officer or member of a specified corporation or a member of a specified firm or a partner of a specified limited liability partnership and is to be regarded as interested in any transaction which may, after the date of the notice, be made with that corporation, firm, or limited partnership. This notice must be given at a meeting of the directors. If not, the director must take reasonable steps to ensure that it is brought up and read at the next meeting of the directors after it is given.[71]

A director is also obliged to inform the board if he or she 'holds any office or possess any property whereby whether directly or indirectly duties or interests

64 Companies Act (n 12) s 156(1).
65 ibid s 156(2).
66 [1999] 3 SLR(R) 896 (High Court, Singapore).
67 Companies Act (n 12) s 156(3)(a).
68 ibid s 156(3)(b).
69 ibid s 156(1).
70 ibid s 156(7).
71 ibid s 156(4)(c).

might be created in conflict with his duties or interests as director'.[72] This clearly contemplates a conflict between duties owed by directors engaged in conflicting positions.

A failure to comply with the disclosure requirements under section 156 will expose the director to criminal liability. It is worth noting that the statutory obligation is in addition to the general law obligation. Thus, although directors who have declared their conflicting interests to the board in satisfaction of section 156 will avoid criminal sanctions, they may nevertheless still be in breach of their fiduciary duties at common law if they did not disclose their interests to the general meeting and obtain the company's approval of the conflicting situation.

(3) *Duty to Act for a Proper Purpose*

Directors have a duty to use the broad management powers granted to them for the purpose they were intended for. The courts determine whether the director has applied his powers to an improper purpose using a two-part objective test:[73]

(a) The first stage requires a proper consideration of the power whose exercise in question. The objective of this stage is to ascertain, as fairly as possible, the nature of the power and the limits or conditions to which its exercise is subject.

(b) The second stage involves an examination of the actual substantial purpose for which the power was exercised. The objective here is to reach a conclusion as to whether that actual purpose was proper, and is thus concerned with the state of mind of the director or of the board of directors when they exercised the power.

(4) *Effect of Breach of Fiduciary Duties*

If a director places his or her own interests before those of the company, he or she will be liable for the losses caused to the company. If the director has profited from his or her position, he or she may have to account for the profits to the company.

Where the director has contracted with the company – for example, the director has sold an asset to the company – the company may be able to avoid the contract if the contract with the company was entered into in breach of the director's fiduciary obligations to the company. Where a third party has entered into a contract with the company knowing that the directors of the company have acted improperly, the company may also be able to avoid the contract *vis-à-vis* the third party.

---

72 ibid s 156(5).
73 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC on appeal from Australia).

Enforcement of Corporate Rights

Proper Plaintiff Rule

The 'proper plaintiff' in a legal action for a wrong alleged to have been done to the company is the company itself,[74] since the company has a separate legal personality. In allowing only the company to sue, the possibility of multiplicity of suits on the same subject matter may be avoided.[75]

Practically, the proper plaintiff rule restricts minority shareholders from bringing an action with respect to wrongs done to the company, because the majority shareholders have *de facto* power to decide when the company will pursue an action. This is justifiable, since the majority has made the greater investment in the corporate enterprise, and should thus be afforded greater protection.

However, the proper plaintiff rule can be circumvented to uphold justice, fairness, reasonableness, and equity. In such cases, exceptions can be made, and the minority shareholder can complain about the actions of the company either on behalf of the company or in his individual capacity.

Derivative Actions

1. *Common Law Derivative Action*

The expression *common law derivative action* is used to denote a derivative action that is not launched pursuant to section 216A of the Companies Act.

The common law derivative action is a procedural device based in equity where a member sues to enforce the rights of the company and not to enforce personal rights. At its core, the derivative action is most commonly used to address injustice arising from directors' breach of duties where the wrongdoing directors can prevent themselves from being impugned using their directorial powers.

To bring a common law derivative action, the plaintiff must establish at the outset that the company has a reasonable basis for the relief claimed, and that the action sought is legitimate; he or she does not, however, need to prove the claim on a balance of probabilities.[76]

In Singapore, the leading authorities suggest that three elements have to be established:[77]

(a) The wrongdoer obtained some sort of benefit.

---

[74] *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 (High Court, England and Wales).
[75] *Gray v Lewis* (1873) LR 8 Ch App 1035 (Court of Appeal, England and Wales).
[76] *Sinwa SS (HK) Co Ltd v Morten Innhang* [2010] 4 SLR 1 (High Court, Singapore).
[77] *Ting Sing Ning v Ting Chek Swee* [2008] 1 SLR(R) 197 (Court of Appeal, Singapore); *Sinwa SS (HK) Co Ltd*, ibid.

(b) The benefit was obtained at the expense of the company or that some loss or detriment was caused to the company.

(c) The wrongdoer used their controlling power to prevent an action from being brought against them by the company.

(1) *Procedure and Practicalities*

Generally, the person who applies for leave to pursue a common law derivative action has to be a member of the company. The action should be commenced as an action on behalf of all the shareholders except the defendants, and the company should be named as a co-defendant to ensure that it is bound by the judgment. The applicant should be able to show that he or she attempted to persuade the company to commence the action before bringing the application. The issue of standing should also be decided as a preliminary issue before trial.

The costs of bringing a common law derivative action will be borne by the plaintiff, but any proceeds recovered are awarded to the corporation. However, the court has the discretion to order the plaintiff-member's costs in pursuing a common law derivative action to be paid by the company, even if the action proves to be unsuccessful.

The uncertainty of the procedure for determining standing and receiving indemnification for costs, plus the difficulty in establishing the 'fraud on the minority' required, makes the common law derivative action unappealing for most minority shareholders.

(2) *Continuing Utility?*

The usefulness of the common law derivative action is limited, especially after the implementation of the more efficient statutory derivative action under section 216A of the Companies Act. The wide and flexible remedies of the oppression remedy under section 216 of the Companies Act plus that of the just and equitable winding up under section 254(1)(i) has also made other common law personal shareholder rights less important. Section 392 of the Companies Act has also rendered the common law jurisprudence on irregularities moot.

However, the common law derivative action cannot be forgotten. Cases like *Ting Sing Ning v Ting Chek Swee* and *Sinwa SS (HK) Co Ltd v Morten Innhaug*[78] illustrate that the common law derivative action is still alive in Singapore. The common law derivative action is the only avenue for shareholders of foreign-incorporated companies to pursue a derivative action in Singapore, since section 216A of the Act does not extend to foreign-incorporated companies. Moreover, the section 216 oppression remedy and section 254(1)(i) just and equitable winding up are meant to mainly address personal and not purely corporate wrongs; thus, in situations where there is purely a corporate wrong not amounting to oppression which would justify a just and equitable winding up

[78] ibid.

(such as a one-off breach of directors' duties in a company), a derivative action may be the most appropriate way for a minority shareholder to seek redress.

In addition, the derivative action may be used as a tactic to force a settlement, since once leave is granted to pursue a derivative action, the company will often be required to indemnify the plaintiff. This means that the defendant must pay for the plaintiff's lawyer fees while the plaintiff-shareholder can proceed to trial using the company's funds.

2. *Statutory Derivative Action*

In addition to the common law derivative action, section 216A and section 216B of the Companies Act make provision for a statutory derivative action.

As mentioned above, the company must be incorporated in Singapore. The complainant must be a member of the company, the Minister of Finance, or any other person the court deems 'proper'.[79] The loss suffered must be to the company, not the shareholder. Generally, a statutory derivative action cannot be based on reflective loss, subject to exceptions.[80] Reflective loss is a loss that is actually suffered by the company and which is merely reflected by a shareholder's loss.

When the company concerned has gone into liquidation in the course of section 216A proceedings, section 216A is not applicable.[81] However, academics have opined that this raises the possibility that after the majority shareholder-directors are served with notice under section 216A(3)(a) they may strategically pass a special resolution to place the company into member's voluntary liquidation to thwart an otherwise valid derivative action.

Under section 216A, there are three requirements that a complainant has to satisfy before leave will be granted to pursue a statutory derivative action:

(a) The complainant must give 14 days' notice to the company's directors of his or her intention to bring the derivative action before commencing the application for leave,[82] unless it is not practical or expedient.[83]

(b) The complainant pursuing the derivative action must be acting in good faith.[84]

(c) It must appear to be *prima facie* in the interests of the company that the derivative action be brought.[85]

---

79 Companies Act (n 12) s 216A(1).
80 *Hengwell Development Pte v Thing Chaing Chin* [2002] 2 SLR(R) 454 (High Court, Singapore).
81 *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] 2 SLR 1022 (Court of Appeal, Singapore).
82 Companies Act (n 12) s 216A(3)(a).
83 ibid s 216A(4).
84 ibid s 216A(3)(b).
85 ibid s 216A(3)(c).

Under section 216B of the Companies Act, the defendant has the onus of demonstrating that any ratification by the majority was independent before the court will consider whether such ratification demonstrates that bringing an action is not in the company's interests. This appears to reverse the burden of proof, placing the onus on the allegedly wrongdoing directors to convince the courts that any shareholders' resolutions absolving them of breaches of duty was a result of independent voting.

Shareholder Remedies

Oppression Remedy

The oppression remedy under section 216 is an exception to the proper plaintiff rule. It is a claim for personal wrongs done to the member, in his or her capacity as a member. As it is a personal action, the applicant is *prima facie* responsible for his or her own costs, but also eligible to receive direct benefits from a remedy, unlike derivative actions.

On the face, there appear to be four separate grounds in section 216(1) upon which a member can claim oppression. However, these have been interpreted as alternative expressions of a single test of whether the conduct of the company has 'offended the standards of commercial fairness and deserves intervention by the courts'. The whole of the circumstances will thus be considered holistically based on the 'touchstone of fairness'.[86]

Courts have made clear that they will not create watertight compartments in ascertaining what constitutes 'commercial unfairness'. Context is key, and what may be oppression in one case will not necessarily be so in another. Examples of commercial unfairness include the following:

(a) Dominant members advancing their interests at the expense of the company and/or minority shareholders.[87]

(b) Exclusion from management in breach of legitimate expectations that the plaintiff would remain a director from an agreement or informal understanding.[88]

(c) Serious mismanagement.[89]

The plaintiff must seek an appropriate remedy to succeed in his or her action, even if he or she does have a valid claim for oppression. The courts will not grant a remedy which is incongruent with their primary objective in exercising its

86 *Over & Over Ltd v Bonvest Holdings Ltd* [2010] 2 SLR 776 (Court of Appeal, Singapore).
87 *Low Peng Boon v Low Janie* [1999] 1 SLR(R) 337 (Court of Appeal, Singapore); *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 (Court of Appeal, Singapore).
88 *Kitnasamy v Nagatheran* [2000] 1 SLR(R) 542 (Court of Appeal, Singapore); *Tan Choon Yong v Goh Jon Keat* [2009] 3 SLR(R) 840 (High Court, Singapore).
89 *Lim Swee Khiang* (n 87).

broad discretion under section 216(2), which is to bring an end to disputes between parties by making the appropriate orders.[90]

The court's wide discretion under section 216(2) of the Companies Act is the reason why many plaintiffs seek the oppression remedy, as the courts can prescribe any remedy they think fit. This includes compensating the company (and not just the oppressive member) for damages suffered. This can be done as in cases involving breach of directors' duties.

Courts tend to order buy-outs under section 216(2)(d) as it is usually the most reasonable remedy, since it allows the minority shareholders to realise the value of their interest in the company and exit the company while still putting an end to the oppression without destroying the company.[91] Normally, the court will order that the majority shareholder buy out the oppressed minority shareholder's shares. However, with the court's broad remedial discretion under section 216, it is possible for the court to order a minority buy-out in exceptional circumstances.[92]

Courts are reluctant to order a winding up of the company and it is usually a last resort, because of its harsh and drastic nature.[93] A winding up must be the best solution available because it is uneconomical to order a winding up when the oppression can be remedied in other ways that still leave the company intact. Since the remedy asked for must be appropriate, courts have sometimes been slow to allow an oppression action where the only remedy sought is winding up,[94] since winding up is reserved for extreme situations such as when a company has been severely mismanaged.

Just and Equitable Winding Up

Section 254 deals generally with circumstances under which a company may be wound-up by the court. Typically, minority shareholders do not have the voting power to secure a special resolution to effect a winding up.[95] However, they can seek a winding up on 'just and equitable grounds'.[96]

With the implementation of section 254(2A) in 2015, the remedial options under section 254(1)(i) have been expanded to now allow for a winding up or a buy-out remedy to be ordered if it is 'just and equitable' to do so. Unfairness is the foundation of the jurisdiction under section 254(1)(i), and the introduction of section 254(2A) did not change this. Rather, section 254(2A) grants the court the additional option of ordering a buy-out if the company is still a viable proportion, since it is not sensible to liquidate a profitable business simply because the shareholders are deadlocked.

---

90 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 (Court of Appeal, Singapore).
91 *Over & Over Ltd* (n 86).
92 *Koh Keng Chew v Liew Kit Fah* [2016] 4 SLR 1208 (High Court, Singapore).
93 *Lim Swee Khiang* (n 87).
94 *Sembcorp Marine Ltd* (n 90).
95 Companies Act (n 12) ss 254(1)(a) and 290(1)(b).
96 ibid s 254(1)(i).

The Court of Appeal decision of *Ting Shwu Ping v Scanone Pte Ltd*[97] suggests that section 254(1)(i) is the most effective shareholders' remedy for the following:

(a) Shareholders who seek a winding up based on the claim that they have suffered unfairness, regardless of whether the unfairness was 'fault-based' or 'fault-neutral'.

(b) Shareholders who seek a buy-out based on the claim that they have suffered 'fault-neutral' unfairness, for example, in cases involving a deadlock, irretrievable breakdown, loss of mutual trust and confidence, or loss of substratum. However, it is not the most effective shareholders' remedy where they seek a buy-out based on 'fault-based' unfairness, since section 216 oppression would then be available and would be preferable instead.

The flexibility of a section 216 winding up (as opposed to a section 254(1)(i) winding up) may make it easier for an aggrieved minority to receive some remedy, especially in cases involving a successful company or where 'non-complaining' minority shareholders may suffer losses from a winding up. In such cases, the court may reject a section 254(1)(i) petition if it is seen as an attempt to bypass the more appropriate and moderate remedies under section 216 or to use the threat of a winding-up application for strategic purposes.

Where there is the possibility of both actions succeeding, an aggrieved minority may choose to pursue applications under section 216(2)(f) and section 254(1)(i) of the Companies Act concurrently. However, an important consideration when deciding to commence a section 254(1)(i) application is that, unlike a section 216(2)(f) application, it has potentially crippling effects on the company. The courts will not look kindly on a minority shareholder who maliciously uses this power to improve their bargaining position.

Notably, section 254(1)(f) allows a winding up application to be commenced on the basis that the directors have acted in a manner that is unfair or unjust to the other members. However, this subsection has not been developed in Singapore as almost all claims of unfairness brought under section 254 have traditionally been funnelled through section 254(1)(i). If this continues, section 254(1)(f) will remain of little practical utility.

1. *Consequences of Commencing a Section 254(1)(i) Application*

An application for winding up must be advertised. The presentation and advertisement of a winding up petition may result in the company's credit drying up. Banks may freeze the company's accounts and creditors may deal only on cash terms. In addition, the presentation of a winding up petition against the company is often an event of default in loan agreements and guarantees.

However, since an application under section 216(2)(f) is not a winding up petition, it does not have to be advertised and thus does not normally have the

[97] [2017] 1 SLR 95 (Court of Appeal, Singapore).

potential negative effects of commencing an application for a section 254(1)(i) winding up. This is even though it may still result in the company winding up.

To alleviate the harshness of a winding-up order and to facilitate contractual freedom between the parties, the courts, using their discretion under section 257(1), can defer the winding up order to provide parties with an opportunity to reach a compromise.[98]
It is pertinent to note that particular care should be taken before commencing an action under section 254(1)(i). Abuse can motivate the court to order severe cost penalties to discourage such behaviour.[99]

2. *Determining when a Winding Up is 'Just and Equitable'*

'Fairness' is the primary litmus test that the court will use to decide whether to grant a just and equitable wind-up under section 254(1)(i). Equitable principles are applied to determine if a winding up order should be made.[100] Two main principles will be applied:

(a) Whether there is sufficient cause to order a just and equitable winding up.

(b) Whether the winding up order resulting in the company's destruction is just and equitable, that is, whether 'the cure is worse than the illness' since a winding up would likely cause loss to all parties.

The court has extremely wide discretion under section 254(1)(i). Some examples of the types of cases in which section 254(1)(i) winding ups have been successful are indicated below:

(a) Irretrievable breakdown or deadlock in management.[101]

(b) Loss of the company's substratum (*Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR 56; *Summit Co (S) Pte Ltd v Pacific Biosciences Pte Ltd* [2007] 1 SLR 46).

(c) Loss of mutual trust and confidence (*Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95).

The presence of an exit mechanism in the company's constitution may prevent the court from granting relief under section 254(1)(i). If an exit mechanism exists, and invoking that exit mechanism would resolve the unfairness, that mechanism should generally be invoked to resolve the fairness unless:

---

98 *Sim Yong Kim v Evanstar Investments Pte Ltd* [2006] 3 SLR(R) 827 (Court of Appeal, Singapore).
99 *Ting Shwu Ping* (n 97).
100 *Sim Yong Kim* (n 98).
101 *Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 (High Court, Singapore); *Chow Kwow Chuen v Chow Kwow Chi* [2008] 4 SLR(R) 362 (Court of Appeal, Singapore).

(a) the disaffected shareholder has a legitimate expectation that he or she is entitled to have his or her shares valued in some other way than that provided in the company's constitution;

(b) There is bad faith or impropriety in the respondent's wrong conduct (such as conduct which negatively affects the value of the shares); or

(c) The constitution provides for an arbitrary or artificial method of valuation.

Shares

Definition

A share is the shareholder's moveable and intangible interest in the company, measured by a sum of money, which confers on the shareholder a bundle of rights against the company including a chose in action. A chose in action refers to a bundle of personal rights of property that can only be claimed or enforced by legal action and not physical possession.[102] The share certificate evidences possession of the share.

Section 4 of the Companies Act stated that a *share* means a share in the share capital of a corporation and includes stock except where a distinction between stocks and shares is expressed or implied.

Types of Shares

The type of shares issuable by a company are not generally restricted by the Companies Act. They may be divided into different classes, for example, preference and ordinary shares, 'A' and 'B' types of ordinary shares, and ordinary and deferred shares.

Following the Companies (Amendment) Act 2014[103] which took effect in 2016, public companies may now issue shares with enhanced or weighted votes, or shares with limited or no voting rights.[104] Private companies continue to have the right to issue shares of different classes including shares conferring special, limited, or conditional voting rights, or no voting rights at all.[105]

Class Rights

Class rights are the rights attached to a particular class of shares, such as the right to vote when the shareholders' rights are being varied.

[102] *Torkington v Magee* [1902] 2 KB 427, 430 (Divisional Court, England and Wales).
[103] No 36 of 2014.
[104] Companies Act (n 12), ss 64(1) and (3).
[105] ibid s 64A(6).

Class rights can only be varied in accordance to the constitution and section 74 of the Companies Act. If there is no provision stipulating the boundaries of variation in the constitution, when his or her class rights are varied an aggrieved shareholder may seek an oppression remedy under section 216 of the Companies Act.

Capital Maintenance

General

Generally, a company may not return money or assets to its members and shareholders except in accordance with the Companies Act. To do otherwise would impair the legal share capital that a creditor relies on when deciding whether to extend credit and how much credit to extend to the company. Ultimately, the underlying rationale behind capital maintenance is to maintain a capital cushion to protect creditors, especially since not all groups of creditors may be in a position to negotiate for self-help.

Arising from this general principle, the following five propositions may be made:

(a) A company may not buy back its own, or its parent company's shares.[106]

(b) A company may not lend money on the security of its own shares or those of its parent company.[107]

(c) A public company cannot give financial assistance to a third party to purchase its shares, or the shares of its parent company.[108]

(d) A company can only pay dividends out of available profits.[109]

(e) A company cannot reduce its capital or otherwise return assets to its members, except to the extent permitted by the Companies Act.[110]

Dividends are only Payable from Profits

The most common way in which a member of a company gets a return on his investment is in the form of dividends paid by the company on the share held by that member. No dividend shall be paid to shareholders except out of profits.[111] Dividends are hence not objectionable from the creditors' standpoint since they do not affect the capital yardstick.

---

[106] ibid s 76(1A)(a).
[107] ibid s 76(1A)(b).
[108] ibid s 76(1).
[109] ibid s 403.
[110] ibid s 78A.
[111] ibid s 403(1).

Specifically, a company may pay dividends to shareholders as long as a profit has been made on its revenue account in the relevant accounting period, that is, its income exceeds its outgoings even if the capital of the company does not remain intact.[112] Revenue profits do not have to be paid out as dividends in the same year they are earned and can be used to pay dividends in the future, as long as they have not been capitalised.[113]

Dividends may also be paid out of capital profits, which are realised profits made from selling current fixed assets, that is, when assets are sold with a surplus to the book entry value, or the book entry is written up. In this case, the subscribed capital must be intact; there can be no capital profits unless there is an accretion to paid-up capital.

Any director or chief executive officer who breaches the rule will be criminally liable and also civilly liable to the creditors of the company (or the liquidator suing on behalf of the creditors) for the amount of debts due to them to the extent by which the dividends wrongfully paid exceeded the profits.[114]

Share Repurchases are Allowed in Limited Circumstances

Generally, a company is disallowed from directly or indirectly acquiring shares in the company or purporting to acquire shares in a holding company or ultimate holding company.[115] This is subject to a number of exceptions;[116] for instance, there are four means of repurchasing the company's shares permitted under the Companies Act:

(a) Off-market acquisition on an equal access basis.[117]

(b) Selective off-market acquisition.[118]

(c) On-market acquisition of shares listed on a securities market.[119]

(d) Acquisition of shares by the company pursuant to contingent purchase contracts.[120]

To protect members and creditors, share buybacks are subject to limitations. For instance, the amount of shares that can be purchased during the relevant period is capped at 20%, except for redeemable shares.[121] The company also has to satisfy a solvency test.[122] The level of shareholder approval required to authorise

---

112 *Lee v Neuchatel Asphalte Co* (1889) 41 Ch D 1 (Court of Appeal, England and Wales).
113 *Re Hume Industries (FE) Ltd* [1974–1976] SLR(R) 37 (High Court, Singapore).
114 Companies Act (n 12) s 403(2).
115 ibid s 76(1A)(a).
116 ibid ss 76B–G.
117 ibid s 76C.
118 ibid s 76D.
119 ibid s 76E.
120 ibid s 76DA.
121 ibid s 76B(3D).
122 ibid s 76(4).

a buyback will also differ for different methods of buybacks – a special resolution is required for buyback schemes that are more vulnerable to abuse.

Capital Reduction

Capital reduction is returning the company's assets received in payment for its shares. Section 78(1) of the Companies Act names the three most common motivations for a reduction of the company's legal capital:

(a) To extinguish or reduce the liability on any of its shares in respect of share capital not paid up.

(b) To cancel any paid-up capital share capital which is lost or unrepresented by available assets.

(c) To return to shareholders any paid-up share capital that the company does not need.

Court-approved capital reductions under the traditional model of section 78G require special resolutions approved by an order of the court, either conditionally or on such terms and conditions as the court thinks fit.[123] This is made by a directors' resolution, followed by a shareholders' resolution, and lastly, approval by the court. The capital reduction takes only effect when the requirements under section 78I are satisfied.

Creditor protection mechanisms are provided in section 78H of the Companies Act and are applicable to transactions that are effectively capital reductions.[124] The main protection mechanisms are the ascertainment of all liabilities of the company, including those not yet due owed to qualifying creditors,[125] and the payment or security of these liabilities to the court's satisfaction.[126]

Notably, in 2002, the Company Legislation and Regulatory Framework Committee (CLRFC) recommended a simplified alternative procedure, which does not require court sanction but only a shareholders' special resolution accompanied by a solvency statement. Section 78B governs the reduction of share capital by private companies, whereas section 78C governs the reduction of share capital by public companies. The requirements of these new models of capital reduction are set out in sections 78B(1)(b)–(c) and 78C(1)(b)–(c) of the Companies Act.

Debenture and Charges

Debentures

A debenture is a type of debt instrument which is not secured by physical assets or collateral; it is backed only by the general creditworthiness and reputation of

---

[123] ibid s 78I(1).
[124] ibid s 78H(1).
[125] ibid s 78H(4)(a) read with s 78H(6).
[126] ibid s 78I(2).

the issuer. It is a common form of long-term loan taken out by companies, repayable on a fixed date in the future and with a fixed rate of interest. These interest payments are made prior to paying shareholder dividends. A list of instruments that constitute debentures is provided in section 4 of the Companies Act, followed by a list of instruments which do not. This list is non-exhaustive, and the full scope of what constitutes a debenture has yet to be judicially determined.

The meaning of *debenture* is not limited to instruments or a series of instruments. It is possible for there to be a single debenture payable to one individual.[127] However, section 131(3)(a), which deals with the registration of charges, refers to a debenture series as opposed to a single debt obligation.

Like shares, debentures may be listed on the stock exchange. However, they can be transferred merely by delivery (that is, issued in bearer form) unlike shares, which require registration. If debentures are issued in registered form, they will be transferred in the same manner as shares.[128]

Unlike shares, debentures are generally redeemable. This is unless they are perpetual debentures, redemption of which is subject to specific conditions.[129] The security for such perpetual debentures may, however, be enforceable by an order of court on the application of the holder if the court is satisfied that certain conditions exist.[130]

A debenture holder's rights are found in the contract constituting the debenture, and the security documents (if any). If the debentures are secured, the company may appoint a receiver in lieu of default, or a receiver and manager if the security covers all or substantially all of the company's assets.

Charges

A charge is a security interest created in or over an asset by the debtor in favour of the creditor, for appropriation to the satisfaction of the debt. It is proprietary in nature but created by contract, and is a mere encumbrance on the asset since there is no transfer of title or taking for possession by the creditor. According to section 4 of the Companies Act, a charge includes a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise.

1. *Creation of a Charge*

Although a legal charge is one created by statute or the operation of law, charges in the commercial context are merely equitable charges. They are consensual and the result of a contractual bargain, since both parties have evinced an intention for the property to be availed as security for the payment of a debt and for the creditor to have a present right to have it made available.

---

[127] *Fons HF v Corporal Ltd* [2014] EWCA Civ 304 (Court of Appeal, England and Wales).
[128] Companies Act (n 12) s 93(1).
[129] ibid s 95.
[130] ibid s 100(1).

As a consensual security, there must be an agreement to create a charge for security. Formalities are not required, but proper wording should be used to avoid confusion.[131]

2. *Registration of a Charge*

A floating charge and/or a fixed charge over a book debt – these terms are explained below – must be registered under section 131,[132] because registration is meant to give constructive notice to the persons dealing with a company of the existence of floating or fixed charges over that company's property. However, it does not give notice of the charge's precise terms, because these precise terms are not required by registration. It would thus be improper to attribute notice of them to persons dealing with the company.

The modern practice is to register the particulars of the important clauses in the charges specifically. Under section 131(1) of the Companies Act, certain charges created by companies must be registered with the relevant authority within 30 days after the creation of the charge. Failure to do so will render the charge void against the liquidator or secured creditors of the company. Where a charge has not been registered within the 30-day period, it may be possible to obtain an extension of time if the omission to register was accidental or does not prejudice the position of creditors or members of the company.[133]

All floating charges must be registered,[134] while only those fixed charges that fall within those described in section 131(3) of the Act must be registered.

3. *Fixed and Floating Charges*

Charges may be fixed (in which case they attach to specific property wherever that property goes) or floating (in which case they only 'crystallise' over the charged assets when an 'event of crystallisation' occurs). Floating charges are thus more useful as security when the specific property in the charged class of property continuously changes. The type of charge affects the ranking of claims in liquidation.[135]

The characteristics of a floating charge are as follows:[136]

(a) It is a charge on a class of assets of a company present and future.

(b) That class is one that, in the ordinary course of nature of the business of the company, would change from time to time.

---

131 *Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 (Court of Appeal, Singapore).
132 Companies Act (n 12) s 131(3)(f).
133 ibid s 137.
134 ibid s 131(3)(g).
135 ibid s 382(5).
136 *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 (High Court, England and Wales).

(c) It is contemplated by the chargee (the person benefiting from the charge) that, until some future step is taken by or on behalf of the chargee, the chargor (person creating the charge) may carry on its business in the ordinary way so far as it concerns the particular class of assets charged. According to *Re Brumark Investments Ltd*,[137] this third characteristic is the critical distinction between a fixed and a floating charge. If a chargor can control and manage the charged assets and withdraw them from the security freely and without the chargee's consent, it is a floating charge.

(d) The chargor can use the assets over which a floating charge was created at his or her discretion, in the ordinary course of business, until the floating charge crystallises into a fixed charge. However, despite this crystallisation, the initial nature of the security as a floating charge is not retrospectively changed. Hence, non-registered floating charges remain void even after crystallisation, and do not become registrable fixed charges.[138]

The events of default upon which the creditor or chargor may crystallise the charge are usually stipulated in the charge documents, but in the absence of such stipulations, the charge may crystallise when the creditor or chargor takes steps to take possession of the security. Notwithstanding these events of default, the charge will generally crystallise upon the winding up of a company or the business.

Winding Up

'Winding up' is the process of the company's dissolution, where the company's business is closed down, its assets are sold off, the creditors are paid, the balance of the assets are distributed to the members and, at the end of the whole process, the company ceases to exist. A company can either be wound up voluntarily or by a court order.[139]

Winding Up by the Court

A company may be compulsorily wound up by a court order. The following persons may petition for the winding up of a company:[140]

(a) The company itself.

(b) A creditor.

(c) A contributory to the company.

(d) The personal representative of a deceased contributory.

---

137 [2001] 2 AC 710 (PC on appeal from New Zealand).

138 *Dresdner Bank AG v Ho Mun-Tuke Don* [1992] 3 SLR(R) 307 (Court of Appeal, Singapore).

139 Companies Act (n 12) s 247(b). The winding-up procedure is set out in the Companies Act, Part X, Division 3.

140 ibid s 253(1).

(e) The trustee in bankruptcy or the official assignee of the estate or a bankrupt contributory.

(f) The liquidator of the company.

(g) A judicial manager appointed under Part VIIIA of the Companies Act.

(h) Various Ministers on specified grounds, for example, where the company is being used for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore.[141]

A petition to wind up the company must state on what grounds it is sought to wind the company up. A company may be wound up by the court on any of the following grounds:[142]

(a) The company has by special resolution resolved that it be wound up by the court.

(b) The company in lodging the statutory report or in holding the statutory meeting makes default.

(c) The company does not commence business within a year from its incorporation or suspends its business for a whole year. However, this ground seems to be of little utility nowadays; it is easier (and cheaper) to just let the company slip into dormancy. After several years of suspended animation, the Registrar of Companies may be induced to strike the company off as a defunct company.[143]

(d) The company has no members.

(e) The company is unable to pay its debts. There is no single test for insolvency – the question is to be answered by 'focusing on the company's financial position taken as a whole by reference to whether a person would except that at some point the company would be unable to meet a liability. The various tests such as quick assets test, balance sheet test or cash flow test are all different measures of solvency and depending on the facts of the case, one test or a combinations of tests may or may not be found to be appropriate'.[144] If a creditor of the company wishes to rely on this ground of insolvency, it has to apply to the High Court to do so.[145]

(f) The directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or

---

141 ibid s 254(1)(m).
142 ibid ss 254(1)(a)–(m).
143 ibid s 344.
144 *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Moi* [2004] 1 SLR(R) 434 (High Court, Singapore).
145 Companies Act (n 12) s 254(1)(e).

in any other manner whatever which appears to be unfair or unjust to other members. However, this ground is largely redundant in view of section 216(2)(f), which specifically empowers a court to wind up a company if, among other things, the powers of the directors have been exercised in a manner oppressive to the members or in disregard to their interests.

(g) An inspector appointed under Part IX of the Companies Act has recommended the winding up of the company. This provision should be read together with section 24(1) which allows the Minister to apply to court for the winding up of a company after an inspector has made his or her report.

(h) The time fixed for the company's existence has expired or some other event happens on the occurrence of which the memorandum or articles of association provide that the company should be dissolved.

(i) The court is of the opinion that it is just and equitable that the company be wound up.

(j) A banking company has had its licence revoked or has carried on business in contravention of any written law related to banking. Under section 253(1)(g), the Minister for Finance may petition on this ground.

(k) The company has carried on unlawful multi-level marketing or pyramid selling.

(l) The company is being used for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore, or against national security or the national interest.

If the Court orders the company to be wound up, the winding up is deemed to have commenced at the time of presentation of the creditor's application.[146]

In a successful compulsory winding up, the Court must appoint a liquidator to carry out actions necessary for winding up the company and distributing its assets, including carrying on the business of the company so far as is necessary and adjudicating creditors' claims.[147] The Court can either appoint a liquidator from the private sector, or if there is no private liquidator, the Official Receiver is appointed.[148]. The Official Receiver is a public officer appointed by the Court to act as a liquidator.[149] If the Court appoints a private liquidator, the Official Receiver acts as a regulator to ensure that the private liquidator duly observes all

146 ibid s 255(2).
147 ibid s 272.
148 ibid s 263(c).
149 'About the Official Receiver' (website of the Insolvency Office, Ministry of Law, 31 January 2018) <https://www.mlaw.gov.sg/content/io/en/corporate-insolvency.html> accessed 31 May 2018.

requirements under the law. In a creditors' voluntary winding-up, the creditors have the ultimate right to appoint the liquidator.[150]

Thereafter, all modes of liquidation follow broadly the same path:[151]

(a) The collection and realisation of the company's assets;

(b) the quantification and discharge of the company's liabilities.;

(c) the distribution of any surplus assets to the entitled shareholders; and

(d) the dissolution of the company.

Voluntary Winding Up

A voluntary winding up may result where the company cannot carry on its business by reason of its liability, or on other grounds.

In the case where the company cannot carry on its business because of its liabilities, if the company cannot carry on its business by reason of its liabilities, the directors may make a statutory declaration to that effect and must appoint a provisional liquidator.[152] Meetings of the company and of its creditors must have been summoned for a date within one month of the making of the declaration.[153] At the meeting of the company, the resolution for voluntary winding up must be passed, and a qualified person nominated to be the liquidator. The creditors' meeting must be held on the same day as the members' meeting or on the following day.[154] At this meeting, the creditors may choose a liquidator, and if their choice is different from that of the company, the creditors' choice will prevail.[155] The winding up is deemed to have commenced on the date that the statutory declaration that the company cannot continue its business is lodged with the Registrar.[156]

Other voluntary winding ups are a members' voluntary winding up and a creditors' voluntary winding up. However, where the company is insolvent, a members' voluntary winding up must continue as a creditors' voluntary winding up.[157] The relevant procedure are as follows:

(a) When a meeting of the company is called to pass a resolution for winding up.[158] This resolution must be a special resolution, unless

150 Companies Act (n 12) s 297.
151 Tan Chuan Thye, Yvonne Quek, Ong Yew Huat, Justin Yip and Seshadri Rajagopalan, 'Winding Up' in *Law and Practice of Corporate Insolvency* (Andrew Chan Chee Yin gen ed, LexisNexis 2005) 420.
152 Companies Act (n 12) s 291(1).
153 ibid s 291(1)(b).
154 ibid s 296(1).
155 ibid s 297(1).
156 ibid s 291(6)(a).
157 ibid s 295.
158 ibid s 290(1).

the time fixed for the duration of the company has expired, in which case an ordinary resolution will suffice. A company may not resolve to wind up voluntarily if a petition has been presented for its winding up by the court on the ground of its inability to pay its debts, unless the court gives leave.[159]

(b) Before the notices of the meeting are sent out, the majority of the directors may make a declaration of solvency.[160]

(c) If the declaration of solvency is made, the winding up proceeds as a members' voluntary winding up, and the members get to appoint the liquidator.[161]

(d) If the declaration of solvency is not made, the winding up proceeds as a creditors' voluntary winding up.[162] A meeting of the creditors must be summoned for the same day as the company's meeting, or for the day following. The creditors will then choose the liquidator.[163]

(e) In either case, the winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up.[164]

C. THE LAW OF INSOLVENCY

Introduction

This part of the chapter briefly examines corporate insolvency and the steps that various affected parties may adopt. It should be noted that in a move to transform Singapore into an insolvency and debt restructuring hub,[165] the Companies (Amendment) Act 2017[166] was enacted, and in 2018 there will be an upcoming bill to streamline the insolvency framework in Singapore.[167] The discussion therefore takes place against the backdrop of these changes.

[159] ibid s 312.
[160] ibid s 257(1). The declaration of insolvency must be in accordance with s 293(1).
[161] ibid s 294(1).
[162] ibid s 296(1).
[163] ibid s 297(1).
[164] ibid s 291(6)(b).
[165] Indaranee Rajah SC (Senior Minister of State for Law and Finance), 'Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond' (Ministry of Law website, 20 June 2017). <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Note%20on%20Debt%20Restructuring.pdf> accessed 31 May 2018.
[166] No 15 of 2017.
[167] Ng Huiwen, 'Bill to streamline insolvency framework to be introduced in 2018' *The Straits Times* (Singapore, 24 August 2017) <https://www.straitstimes.com/singapore/bill-to-streamline-insolvency-framework-to-be-introduced-in-2018-k-shanmugam> accessed 31 May 2018.

When is a Company Insolvent?

Insolvency is established by proving to the court that a company is unable to pay its debts.[168] There are two main tests used in Singapore: the inability to pay debts as they fall due, and/or an excess of total liabilities over total assets.[169]

Since it might be difficult in reality for creditors to prove that a company is unable to pay its debts, the law creates two presumptions of insolvency. The first is when a judgment debt is not paid;[170] and the second is when the company is unable to pay within three weeks when one of its creditors who is owed more than S$10,000 serves a demand of payment on the company.[171] The company can rebut such presumptions by showing that it had reasonable cause for neglecting to pay the sum demanded, or prove that it is in fact able to pay its debts.

Consequences of Corporate Insolvency – a Company's Options

By itself, insolvency has no legal consequences. The consequences arise only after winding-up proceedings are brought against the company, or when insolvency is, for example, a trigger event of default in contracts that the company is party to.

Winding up

Insolvency is a ground for winding up as elaborated above.

Corporate Rescue – Restructuring

1. *Private Workout*

Remedial actions may be taken to prevent a company from being wound up. 'Private workout' is an informal step usually instituted by the company's own directors or its creditors without resorting to the statutory insolvency procedures. Common actions that are taken include a change in management, corporate reorganisation, or refinancing the company. At times, external help is sought such as hiring a firm of accountants to investigate the company's affairs and make recommendations as to how it can improve its financial position.[172]

Informal rescue minimises publicity about the company's financial troubles, helping to preserve the goodwill and reputation of the company. However, due to a lack of legal safeguards, larger and more powerful creditors of the company may seek to control the proceedings in a way that gives them greater benefits, to the disadvantage of less-well-placed creditors.

---

[168] Companies Act (n 12) s 254(2)(c).
[169] *Re Great Eastern Hotel (Pte) Ltd* [1988] *Singapore Law Reports (Reissue)* 276 (High Court, Singapore).
[170] Companies Act (n 12) s 254(2)(b).
[171] ibid s 254(2)(a).
[172] Vanessa Finch, 'Rescue' in *Corporate Insolvency Law* (Cambridge University Press 2002) 251.

2. *Scheme of Arrangement*

Instead of winding up, a company can negotiate with its creditors to rearrange or extinguish a percentage of the debts owed to them.[173] This is called a scheme of arrangement. With the introduction of so-called ‘pre-packs’, the Court, subject to certain safeguards, can now approve a pre-packaged scheme without a court-ordered scheme meeting.[174] This increases the efficiency of the scheme of arrangement process.

The overarching objective is to ensure that the scheme is fair and reasonable to all creditors.[175] Thus, a ‘class meeting’ is usually held to resolve conflicts between the different classes of creditors who are treated differently. Creditors are classified according to commonality in interests. For example, secured creditors will form a different class from unsecured creditors as secured creditors have the common interest of realising their respective security. Another important consideration before implementing a scheme is whether the company will be sustainable in the future if the scheme is approved. This involves determining the reason for the company’s financial crisis. If the company is insolvent due to poor management then it can be remedied and the company will be sustainable in future, but if the reason for the insolvency is due to a fundamental change in the business environment then it is unlikely the company will be salvaged even if the scheme is implemented.[176]

3. *Judicial Management*

Another alternative to liquidation is for the company or its directors to petition to the High Court for judicial management.[177] For a judicial management order to be made, a company now only needs to be ‘likely to become unable to pay its debt’,[178] rather than the previous higher threshold of ‘will be unable to’.

The main aim of judicial management is to try and achieve recovery of the company, or a more economic distribution of the company in insolvency, through a more advantageous realisation of the company’s assets. The judicial manager appointed by the Court is a public accountant who is not an auditor of the company.[179] He or she exercises the general powers of the company’s board of directors to carry on the business, collect and sell property, borrow and give security, and even conduct litigation.[180] Importantly, the judicial manager has 60 days to propose a plan to the creditors in a meeting.[181]

173 Mohammed Reza, Low Poh Ling and Tim Reid, “Schemes of Arrangement and Compromise” in *Law and Practice of Corporate Insolvency* (n 175) 55.
174 Companies Act (n 12) s 211I.
175 *Re Halley’s Departmental Stores Pte Ltd* [1996] 1 SLR(R) 81 (High Court, Singapore).
176 Mohammed Reza, Low Poh Ling and Tim Reid, ‘Schemes of Arrangement and Compromise’ in *Law and Practice of Corporate Insolvency* (n **Error! Bookmark not defined.**) 74–75.
177 Companies Act (n 12) s 227B(1).
178 ibid s 227B(1)(a), as amended by the Companies (Amendment) Act 2017 (n 166).
179 ibid s 227B(3)(b).
180 ibid s 227G.
181 ibid s 227M.

It is important to note that, besides insolvency, one or more of the statutory purposes have to be fulfilled before the judicial management order can be made.[182] These include the ensuring the survival of the company as a going concern and achieving a more advantageous realisation of the company's assets compared to a winding up.

Impact on Creditors

As a preliminary point, once a company has been ordered to wind up,[183] has applied for a scheme of arrangement,[184] or is under judicial management,[185] creditors are no longer allowed to proceed with or commence any legal proceedings against the company.

Winding-up Situation

Creditors are entitled to be repaid their debts after the liquidator's fees and expenses are settled.[186] In order to receive payment, creditors have to submit proofs of their debts within three months of the winding-up order. This includes present debts, future debts and contingent debts.[187]

However, the Companies Act lays down a hierarchy that determines the order of repayment for the various types of creditors.[188] The creditors with the highest priority to be repaid are secured creditors holding fixed charges over the company's assets, followed by preferential creditors such as employees and the liquidator [189] then secured creditors with floating charges, and lastly unsecured creditors.

Evidently, unsecured creditors will be put in a risky position if a company is wound up, as the company may not have enough assets to satisfy their debts after the higher-priority creditors have been paid. Hence, they generally try to prevent a winding up and instead petition for a scheme of arrangement or judicial management.

Corporate Rescue Situation

Where a scheme of arrangement has been proposed, unsecured creditors will be placed in a different class from secured creditors. Since different classes of

---

[182] ibid s 227B(1)(b).
[183] ibid s 262(3).
[184] ibid s 211B.
[185] ibid s 227D(4).
[186] ibid s 328.
[187] ibid s 327.
[188] ibid s 328.
[189] They are a special category of unsecured creditors who are given statutory priority under the Companies Act, ibid s 328, meaning they are to be paid first before the company pays its debts to the other creditors (secured and unsecured). The first category of debt will be the cost and expenses for winding up which will include the liquidator's remuneration. Thereafter, employees will be paid. Their payments are also ranked with wages or salary being paid first, followed by amounts due to employees as a retrenchment benefit or *ex gratia* payment, then compensation under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed), and thereafter superannuation or provident funds.

creditors will be treated differently, it is especially important for unsecured creditors to turn up for the meetings[190] and engage in negotiations to ensure that the scheme is favourable to them as well. Unhappy classes of creditors can also choose to vote against the scheme, such that it does not meet the majority requirement to pass.[191]

Where there is a judicial management order in place, the creditors can voice their opinions when the judicial manager presents his or her proposal. Should there be a case of unfair prejudice by the judicial manager, creditors can seek a remedy against the judicial manager.[192] Remedies include regulating the future management by the judicial manager, or discharging the judicial management order. Compared to a winding up which tends to favour secured creditors, judicial management is usually more preferable for unsecured creditors as their interests are looked after better, whereas the secured creditors risk not having their debts fully settled if there is a shortfall of funds.

The views expressed in this article are that of the authors alone. They do not necessarily reflect the views or opinions of the ASEAN Law Association or the organisation which the authors are currently associated with.

The sections on *Business Organisations and Structures* and *Company Law* were prepared by Fong Wei Li, and the section on *The Law of Insolvency* by Dr Jack Tsen-Ta Lee with the assistance of Shu Kit.

[190] Companies Act (n 12) s 210(1).
[191] ibid s 210(3AB)(a).
[192] ibid s 227R.