

Topic 1: Introduction to Company Law and the Legal Nature of Companies

Companies have Perpetual Succession (The company's existence continues indefinitely until it is brought to an end through winding up and deregistration)

Companies are a Separate Legal Person (Separate person from its members and those who manage its operations. Can incur/receive obligations in its name. Sue and be sued)

<u>Private Company (Pte Ltd)</u> S18 CA: (a) Restriction on right to transfer shares of the company; and (b) Company maximum 50 members Corporations can be shareholders	<u>Public Company (Ltd)</u> Any company other than a private company. More regulated than private company, statutory meetings and AGM required. Liability limited to OG capital.
<u>Exempt Private Company (Pte Ltd)</u> S4 CA: No corporate beneficial interest in company, < 20 members. No shareholder is a corporation (natural person) Exempted from prohibitions relating to the making of loans to directors/director-related companies. Also exempted from filing Financial Statements with its annual returns.	<u>Listed Company (Ltd)</u> Company admitted to official list of securities exchange in Singapore, regulated by Securities & Futures Act. <u>Foreign Companies</u> Company incorporated outside of SG.
<u>Small Company</u> Private Company for the financial year in question and satisfies 2 of the following criteria in each of the last 2 preceding year: revenue <= \$10m, company total assets <= \$10m at end of financial year, no. of employees <= 50 Exempt from audit. <u>Small Group</u> Add. Condition: All companies must be private.	<u>Limited Company (Ltd, can be pvt/public)</u> Liability of members to contribute to asset of company on winding up is limited (by shares or guarantee (no share capital)) <u>Unlimited Company (Unlimited, Very rare)</u> Liability of members to contribute to assets of company is unlimited.
<u>Holding/Subsidiary Company</u> If A controls composition of board of directors of B; Or If A controls more than half of voting power of B; Or If B is a subsidiary of C which is a subsidiary of A, then B would be A's subsidiary and A would be B's holding company. Control composition = A can appoint/remove majority of B's board without anyone's consent where B's director cannot be appointed without exercising A's power	<u>Related Companies</u> As long as in a relationship of holding/subsidiary family tree somehow. <u>Associated Companies</u> A company in which at least 20% but not more than 50% of its shares held by a listed company/group.

Grounds for "lifting corporate veil"

- 1) Where company used to evade existing legal duty/obligations
 - a. Gilford Motor v Horne: Contract between GM & H contained a non-compete clause, and then H set up a company with the sole purpose of evading the non-compete.
- 2) Where company is used to perpetrate a fraud/illegality or enter into a sham transaction or if company is a sham/façade designed to conceal true state of affairs
 - a. Re Darby (1911) where corporate veil pierced to ensure Darby does not get away with a fraud that he had schemed.
- 3) Where the company is an agent/alter ego of its controllers

CA requires the following register to be kept: Register of Members/Shareholders/Debenture Holders/Directors/Director Shareholdings/Charges

Topic 02: Introduction to Corporate Capacity

S23: A company has full capacity/power/rights to carry on or undertake any business/activity or enter into any transactions. Subjected to any other written law and its constitutions.

Ultra Vires Transactions

S25(1) No act of a company (*Entering into an agreement, any act done on behalf of a company by an officer/agent of the company under any purported authority, be it express/implied*) and no conveyance or transfer of property, whether real or personal, to or by a company is invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer. *TLDR; No act of a company is invalid even if beyond capacity (Except in s25(2)(a): where member/debenture holders can prevent the companies from an ultra vires transaction, s25(2)(c) where Minister applies to wind up the company*

S25(3): Exception above Only if the court considers it to be just and equitable, then can the performance of obligations of the contract be restrained.

Topic 03: The Company Constitution

S39: The Constitution is regarded as having a similar effect as if there was:

- (a) a contract between the company and its members as well as
- (b) a contract between the members amongst themselves.
- (c) Non-members do not have the right to enforce the provisions of the company's constitution under s 39
- (d) Only members can enforce provisions in the constitution and that only provisions relating to members' rights are enforceable.
- (e) *Malayan Banking Ltd v Raffles Hotel Ltd (1965-1968): Malayan Bank should have been a member if they wanted to enforce the constitution*
- (f) *Eley vs Positive Government Security Life Assurance Co. Ltd.: Eley unable to sue for non-member rights despite being a member.*
- (g) Constitution of a company can be incorporated by a contract in either (1) by express reference – stated in employment contract that employment are under constitution terms or (2) by implication – appointment without a written contract but salary/terms of employment follows constitution terms.

Model constitution is not adopted by default (s37). Companies must adopt it themselves.

	Constitution	Ordinary Contract
Nature & Purpose	Framework of organization's structure, power, rights & obligations.	Legally binding agreement between 2 or more parties, outlining specific power, rights & obligations.
Parties Involved	Whole organization	Specific individuals that are parties to the agreement
Duration & Scope	Wide range of topic, long period of time	Limited in scope, specific duration
Amendment & Modification	S26(1) Requires Special Resolution (Min. 75% of those that are present at GM). Effective prospectively.	As long as all parties agree

Limitations to amendment to constitution:

- Unfair under S216
- Modifications of class rights (Only authorised if specified class of rights consents)
- Power to alter must be bona fide in the company's interests
- Amendment subjected to entrenching provisions
- Compulsory Share Transfers (S39(3): Applicable only for alterations)

An entrenching provision = a provision of the constitution of a company to the effect that other specified provisions of the constitution —

- a) may not be altered in the manner provided by this Act; or
- b) may not be so altered except —
 - i) by a resolution passed by a specified majority greater than 75% (the minimum majority required by this Act for a special resolution); or
 - ii) where other specified conditions are met.

Can be created and included in constitution at the start of the company, or inserted into the constitution **ONLY IF ALL** members agree. Can be removed/altered **ONLY IF ALL** members agree.

Topic 04: Membership, Shares and Interests in Shares

Issuing Shares: s161(1) Despite anything in a company's constitution, the directors must not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.

Issuing shares with different voting rights: S64A: Different classes of shares in a public company maybe issued only if (a) issue of the class of shares is provided for in the constitution and; (b) the constitution sets out in respect of each class of shares, the rights attached to them. Despite the above, must be approved via special resolution by members of the public company.

Definition of member: (1) initial subscriber to the company's constitution or (2) every other person who agrees to become a member of the company and whose name is entered in the register of members. Interchangeable with shareholder, but shareholder may not be member (if not under register). Members may not be shareholder (register, but no shares).

Rights of a member:

- Rights to receive certain information: (*Right to be given notice for meetings, to receive audited financial statements annually, to access all registers required owned by company*)
- Right to participate and vote at meetings: (*Depends on the type of share that the members hold. Constitution may restrict voting entitlement, especially if shares held not paid*)
- Right to have company's constitution observed
- Right to have fair treatment
- Right to apply to have company wound up
- Right to have "share" of the company

Modification of Rights Clause: E.g. Reg 8(1) of Model Constitution Regulation 8(1), class rights alteration can be done as long as it fulfils one of the following criteria: (a) the consent in writing of the holders of 75% of the issued shares of that class; or (b) the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class

Variation of Class Rights: S74(6) of the Companies Act states that the issue by a company of preference shares ranking *pari passu* ('equal footing' in Latin) with existing preference shares issued by the company is deemed to be a variation of the rights attached to those existing preference shares unless the issue of the first mentioned shares was authorised by the terms of issue of the existing preference shares or by the constitution of the company in force at the time the existing preference shares were issued.

When there is variation of class rights, company must first comply with any Modifications of Rights (MOR) clause before amending the variation clause. S74(7) Further states that any alteration of provision relating to the variation of rights, shall be deemed a variation or abrogation of rights itself. Under 74(1), the holders of not less in the aggregate than 5% of the total number of issued shares of that class may apply to the Court to have the variation or abrogation cancelled, and, if any such application is made, the variation or abrogation does not have effect until confirmed by the Court.

Interest in Shares: S7(1A) – A person has interest in shares if the person has authority to dispose/exercise control over the disposal of those shares.

Deemed Interest in Shares: S7(2) Where any property held in trust consisting/including shares, and that person has an interest in the trust, is deemed to have interest in those shares.

S7(4) – Where a body corporate have interest in a share, and a person has controlling interest over this body corporate, this person is deemed to have an interest in a share.

S7(4A) – Where body corporate has DEEMED interest in a share, if person and its associates is entitled to exercise/control > 20% voting power in the body corporate, deemed to have interest in those shares that the body corporate has interest in. Person does not mean individual human btw, associates can be subsidiary/under obligation to act/under control of that person.

S7(6) – Where a person has entered into contract to purchase a share or has rights of the share or to acquire share under an option, or entitled to vote/right to a share (deemed to have interest).

Topic 05: Division of Powers between Corporate Organs

Decision Making in companies by directors/members. Operational decisions mostly made by directors.

Directors/Board of Directors	Members (Shareholders)
S157A (1): The business of a company shall be managed by, or under the direction or supervision of, the directors. S157A (2): The directors may exercise all the powers of a company except any power that this Act or constitution of the company requires the company to exercise in GM.	Specifically reserved for GM – all these provisions are mandatory: - Removal of director (public company) (s 152(1) CA) - Structural Decisions: Issue of shares (s 161 CA) - Approval of loans to director-related companies (s 163 CA) - Payments made to director upon retirement or resignation (s 168 CA) - Provision or improvement of director's emoluments (s 169 CA) - Appointment of auditors - Winding up - Schemes of Arrangement

Topic 06: Corporate Decision-Making (the Law of Meetings)

	Annual GM	Extraordinary GM
Frequency	Held annually and is mandatory (unless pvt company all members agree not to do it). Within 4 months after end of FYE for public listed company, and within 6 for other companies.	Called upon when necessary for specific purposes. Can be held at any time when requested (ASAP/within 2 months of requisition)
Rationale	Present financial statements and approve other company transactions (director fee, appt of new director/auditor)	Urgent business matter (to change constitution, solve legal dispute, approving merger & acquisition)
Who raises meeting?	Directors	Board of directors, members and shareholders (with > 10% shares) or lower threshold specified in constitution.
Min. days notice	14 days	14 Days – Special Resolution (Pvt) 21 Days – Special Resolution (Public)

Majority Vote: Regulation 84(1) of the Model Constitution provides that decisions taken at a meeting of directors are decided by a majority of votes and a determination by majority of directors is treated as a determination of the directors.

Casting Vote: Regulation 84(2) of the Model Constitution confers on the chairperson of the board a second or casting vote in the event there is an equality of votes.

No Conflict of Interest Vote: Regulation 85(1) of the Model Constitution says that a director must not vote in respect of any transaction or proposed transaction with the company in which the director is interested. And if the director does vote, the director's vote must not be counted.

Meetings S173J may be held at a (a)physical place/(c)using virtual meeting technology/(b) both.

Unless excluded under subsection (5) By the constitution or (7) by the minister.

Notices must be served on every member having a right to attend. Notice must state the business objects that the company may discuss, and rights of members to appoint a proxy, and specify requirement of special resolution (if any). Furthermore, SGX Listing Manual states that notice must specify date/time of commencement of meeting, resolutions to be proposed, details of physical place, and instructions to shareholders.

Notice Period S177= Same as the EGM one in the table.

Quorum: Minimum number of members needed to be present at meeting before begin & be valid. Typically stated in company's constitution, if not, rely on S179(1)(a) where 2 members of the company personally present is sufficient.

Proxy: S181(1A) unless constitution provides otherwise, proxy not entitled to vote except on a poll, not entitled to have more than 2 proxies, if 2 proxies, invalid unless proportion of member's holdings specified by the member. Can appoint more than 2 proxies if (1C) each proxy have rights to different shares, and (1D) these proxies under 1C can have right to vote on a show of hands.

Chairperson: S179(1b) states that any member elected by members present at the meeting can be the chairperson.

Ordinary Resolution (>50) Simple majority by those present	Special Resolution (>=75) Majority of not less than 75% by those present	Written Resolution Can pass resolutions without meetings, but not for removal of director/auditor. (% Depends on ordinary/special)	Doctrine of Unanimous Resolution 100%. But need to ensure sufficient basis.
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Topic 07: Corporate Contracting

Express Actual Authority: (1) From a provision in the company's constitution granting authority to exercise powers. (2) By board of directors (or other agent having actual authority) delegating its powers and expressly authorizing the exercise of power. (3) From a provision in the agent's employment contract or contract of appointment.

Implied Actual Authority: (1) Appointing someone to a certain position (from which is implied by the position). (2) Otherwise acting to give the person authority, including through "acquiescence" – Someone with no express authority but has been purporting to enter several transaction and the rest of the directors know but does nothing to stop him. Effectively, the board treats that as "Ratified" and thus the company is a valid party in transactions occurred so far. Implied authority flows from conduct (or lack of conduct) by BODs when it acquiesced in earlier actions.

Ostensible/Apparent Authority: For apparent authority to exist, three requirements must exist

- Representation made by the company (the principal) to third party that agent has authority to act on principal's behalf. Representation may consist of words/conduct.
- Person acting for company in making representation should have actual authority to make that representation.
- Third party relied on the representation. But third party has to prove that reliance was reasonable.

Indoor Management Rule (IMR): A person dealing with a company is entitled to assume that all matters of internal management and procedures have been complied with. Protects third party who rely on apparent authority of company's agent, holding the company liable for the agent's actions.

Exception: If third party is aware of irregularities but still enters contract despite knowledge -> Unable to fall back on IMR. Or if third party is insider who know/ought to know whether internal

procedures have been observed. Or if 3rd party is aware that contracting agent is behaving suspiciously but fails to make inquiries. Or if 3rd party enters contract with forged documents.

No Constructive Notice: S25A - Despite anything in the constitution of a company, a person is not affected by, or deemed to have notice or knowledge of the contents of, the constitution of, or any other document relating to, the company merely because constitution is in registrar. Complementary with IMR. Further enhance/extends it. Good to write both.

S25B(1) – As long as 3P deals in “good faith”, directors assumed to be free from any limitations.

S25B(2) – 3P not bound to enquire any limitations on director’s powers and presumed to have acted in good faith unless contrary is proved by company. In that case, transaction can be voided.

Transactions with directors/associates – s25(c) Such transactions can be voidable under S25C(3) if parties to the transaction include director of the company/person connected with director. S25c(5) makes transaction cease to be voidable if restitution of money/asset is no longer possible, or if company is indemnified for any losses/damage from transaction, or rights acquired bona fide for value, or if transaction is affirmed by company.

Person Connected with director – s25(d) A member of director’s family, body corporate in which director is connected (interested in 20% share, or 20% control), a person acting in the person’s capacity as trustee of a trust, or as capacity as partner, firm partner connected.

Topic 08 – Office of Director

Officer: Person employed in an executive capacity, including people employed in senior positions like CEO/CFO/COO. Includes receiver & manager.

Director: Person appointed to the company’s board of directors. Typically higher level of authority.

Executive Director: Both a director and full-time employee, including directors who hold the role of CEO/CFO

Non-executive Director: Director but not full-time employees.

Independent Director: Directors who have no other relationship with the company or its related corporation management, key shareholders or officers that could interfere or be perceived to interfere with the exercise of the director’s independent business judgement. All independent directors are non-executive, but converse might not be true.

De-facto Director: Not directors in name, but act in a manner consistent of a company’s director. To establish if a person is a de-facto director, principles laid out in Gemma Ltd vs Davie established: (1) Undertook functions in relation to the company which only could be discharged by a director, (2) Participated in directing the affairs of the company with equal footing as other directors, not as a subordinate role. (3) Assumed status/function of company director and exercised real influence.

Shadow Director: Persons that the board of directors are accustomed to taking directions/instructions from. Something like the super big boss.

Qualifications for appointment as director: S145(2) Be an individual, not a company, at least 18 years old, and have full legal capacity. S146(1A) File a declaration of his/her consent to the appointment together with a statement that he/she is not disqualified or debarred from acting as a director. S147 If the person is taking up shares, must also do so within 2 months of appointment and file necessary documents indicating intention to take up shares/or has taken up shares.

Grounds of Disqualification: Being bankrupt, convicted of offenses involving fraud/dishonesty, being in persistent default of complying with administrative requirements of CA with persists 3 months or more, By court order where (1) convicted for offences in connection with formation/management of a corporation or specified offences under the CA, (2) because of past management of failed companies, (3) Director of a company that has been wound up because it was used for purposes against national security/interest, (4) Where person has been director of not less than 3 companies which have been struck off companies register within a period of 5 years.

Statutory Requirement for Directors: All SG Companies must have at least 1 director who is ordinarily resident. Listed companies must have at least 3 directors since there must be audit committee comprising at least 3 directors.

Appointment of Directors: For incorporation of new company, directors to be named in documents filed with ACRA. For existing companies, under S149B, unless constitution states otherwise, ordinary resolution passed at general meeting is sufficient. For public companies, individual resolutions needed for appointment of each director.

End of Directorship: Upon end of tenure of his office. Upon resignation (only can resign if still have 1 remaining director ordinarily resident). Upon director being removed from office by circumstances stated in constitution. Upon death. Upon disqualification.

Removal of Director (Public Company): S152(1): A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its constitution or in any agreement between it and him, therefore members have the power to remove a director even if he/she has a contract with the company which specifies that the director will remain in office for a certain number of years. S152(2): Special notice is required of any resolution to remove a director of a public company under subsection (1) or to appoint some person in place of a director so removed at the meeting at which the director is removed, and on receipt of notice of an intended resolution to remove a director under subsection (1) the company must immediately send a copy thereof to the director concerned, and the director, whether or not he or she is a member of the company, is entitled to be heard on the resolution at the meeting. S152(8): A director of a public company must not be removed by, or be required to vacate his or her office by reason of, any resolution, request or notice of the directors or any of them despite anything in the constitution or any agreement.

Removal of Director (Private Company): S152(9): Subject to any provision to the contrary in the Constitution, a private company may by ordinary resolution remove a director before the expiration of his period of office notwithstanding anything in any agreement between the company and director

Director's Emoluments/Fees: S169(2) Defined as the fees/percentages/sums paid by way of expense allowance/contributions paid in respect of a director under any pension scheme and any benefits received by them otherwise than in cash. Under S169(1), all provision/improvement of emoluments for a director must be approved by ordinary resolution passed at a general meeting. This resolution has to be standalone and can't be tied to other affairs so as to prevent director from coercing members.

Director's Emolument (in capacity of executives): Basically employment salary etc., do not require shareholder approval, S164A unless served a notice by (a) at least 10% of total no. of members, or (b) members with at least 5% of total issued shares. In that case, audited statement of emoluments received must be disclosed.

Payment for Loss of Office: S168(1) not lawful to pay for loss of office, unless proposed payment has been disclosed and approved by way of ordinary resolution in general meeting. Exception: Contract.

Exceptions to payment for loss of office in s168(5): (c) any bona fide payment by way of damages for breach of contract, (b) any payment under agreement of which have been disclosed and approved by special resolution of company, (d) any bona fide payment by way of pension/lump sum in respect of past services, where the value of payment does not exceed total emolument of the director in 3 years preceding retirement/death, (e) any payment pursuant to an agreement made between company and director before he became a director as consideration/part of consideration for agreeing to serve as director.

Shirlaw v Southern Foundries: Case where Shirlaw was appointed as managing director of SF for fixed term of 10 years, but SF taken over by another company and sacked Shirlaw. Ruled that Shirlaw

recover damages for breach of contract. Implied term under employment contract that he would not be removed from his role as director during the fixed term.

Topic 09 – Directors’ Duties I

<u>General/Common Law</u> Directors owe a duty of care, skill and diligence to their companies. Re City Equitable Fire Insurance Co Ltd (1925) opined that a director must exercise the same degree of skill and diligence which an ordinary man acting with reasonable care would, as if he were acting on his own behalf having no regard to circumstances of the case. Court can only order for payment of compensation/damages to the company.	<u>Statutory Duties</u> S157(1) – A director must shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. Enforced by ACRA, criminal provision. May be fined \$5,000 or imprisoned up to 1 year. Additionally, may be made to pay over any profit made by him, and compensate for any losses suffered as a result of breach. Also possible for court to order director to not be involved in managing companies for specified period. Courts have held that there is no significant difference between the statutory duty of care and the general law duty of care.
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Duty of care under contract: can also arise from contract between director and other officers or the company under the terms of contract, specifying that officer must exercise care/diligence/skill expected of a person who occupies the position in question.

Duty of care under general law: A director is in a fiduciary relationship with the company director and the director has a legal and ethical duty to act in the best interests of the company and its shareholders. A duty of care and diligence which arises from such a fiduciary relationship is similar to the duty of care imposed by equity on a trustee in relation to a beneficiary. A director may also owe a duty of care to the company at common law, which overlaps with the equitable duty of care mentioned earlier.

Objective Test: Compare director’s conduct with that expected of a reasonably diligent person having carrying out the same functions as the director in his position.

Subjective Test: Compare director’s conduct with that expected of a reasonably diligent person having any additional knowledge/skill/experience that the particular director has.

Basically objective = compare to average person, subjective = compare against that director himself

Based on case law, Lim Weng Kee v PP, a director of a company must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both -

(a) the knowledge, skill and experience which may reasonably be expected of a director in his position; (objective test) and

(b) any additional knowledge, skill and experience which he has (subjective test).

Minimum standards of care, skill and diligence expected of directors:

- Director must acquire a basic understanding of the business of the company and must be familiar with the fundamentals of the company’s business.
- Directors are under a continuing obligation to keep informed about the activities of the company.
- Detailed inspection of day-to-day activities is not required but what is required is a general monitoring of the company’s business affairs. A director should attend board meetings regularly.
- While directors are not required to audit the company’s books, they should maintain familiarity with the financial status of the company by a regular review of financial statements.

Circumstances where the directors can “delegate” their functions: As long as director reasonably believes that the delegated person is capable of fulfilling in the best interests of the company.

However, director is still required to do due diligence to supervise his delegated tasks in a consistent and reasonable manner. Failure to do so = breach of duty and care and diligence.

Reliance on other information/advice: S157C A director is allowed to rely on reports/data/info/expert advice given by the following persons: (a) Employee of the company that director reasonably believes is reliable/competent in relation to matters concerned, (b) Professional adviser/expert reasonable grounds to be within professional or expert competence, (c) Any other director or committee of directors upon which the director did not serve in relation to matters within that other director's authority.

Director required to prove that he acted in good faith and made inquiries where the need for inquiry was indicated by the circumstances and had no knowledge that such reliance was unwarranted.

Business Judgement Rule: A rule that protects directors/board from any personal liability resulting from any bad commercial decision, so long as the directors/board can prove that their actions and decisions were made in the best interests of the company and not a negligent one, operating on the assumption that directors may not always make the best business decisions.

Common Law Duty: Act bona fide in the interests of the company: Has the director exercised their discretion bona fide in what they consider is in the interests of the company, not what the court may consider to be best, but the director instead in the proper commercial context.

Acting dishonestly: Bona fide is not satisfied even if purported aim is to maximise profits. Vita Health Laboratories Pte Ltd v Pang Seng Meng, where Pang made fake transactions claiming to be in the interests of the company, but was held that he did something illegal and was dishonest.

Company's Interests: Members, The Company itself as a commercial entity separate from members, Creditors, Other companies within a group of companies, Employees/Customers/Community

Topic 10: Directors' Duties II

No Conflict Rule: A director/senior executive must not place themselves in a position where there is an actual or substantial possibility of conflict between a personal interest and their duty to act in the best interests of the company unless permission of the company (shareholder approval) is obtained.

How to determine conflict of interest?: Objective test: Whether a reasonable man, looking at case facts and circumstances would think there is a mere possibility or real sensible possibility of conflict. No-conflict can be breached even if the director acted bona fide and did not cause loss/gain profit.

No-Profit Rule: A director must not misuse his position to advantage himself or a third party, and will have to account to the company any gains derived in connection with their office, unless company has given fully informed consent. The fact that the opportunity was introduced to the company in the first place by the director concerned was also an irrelevant consideration.

Disclosure: S156 CA allows a director to have a conflict in relation to a matter affecting the company provided the interest is disclosed. Under S156(1)(a) & (b), when there is a conflict of interest, the director or CEO must, upon knowledge of the relevant facts,

- a) declare the nature of his or her interest at a meeting of the directors of the company; or
- b) send a written notice to the company containing details on the nature, character and extent of his or her interest in the transaction or proposed transaction with the company.

Breach of Duty conflict interest: No disclosure of interest // Informal disclosure or informally acquired knowledge.

Breach of Duty non-profit: There is still a breach even if company is unable to take up the opportunity, on the basis that directors may be tempted to refrain from exerting best effort on behalf of the company. There is still breach even after the director resigns and takes up opportunity without permission of the company where the resignation was prompted/influenced by desire to acquire the opportunity. To take up opportunity: Director has to obtain approval of shareholders even if the company already rejected the opportunity in good faith.

Director's disclosure to take up opportunity: If a director chances upon an opportunity prior to the company, director has a duty to disclose information about the opportunity to the company.

Secret Profit: The director's duty to avoid conflicts of interest also encompasses the duty not to make secret profit from one's position as director without the company's approval. Directors who stand to profit in any manner from their position as directors must disclose the profit that they are to make and get the company's approval before they will be allowed to keep the profit. Failure to obtain such approval will result in the directors having to account to the company for any profit that they make. S157(2) **applies to any officer or agent of a company.** They must **not make improper use of his or her position** as an officer or agent of the company or any information acquired by virtue of his or her position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the company. Breach of 157(2) may result in prosecution for criminal offense and fined up to maximum of \$5,000 or imprisonment up to 1 year. **Nominee director** is to act on behalf of and in the interests of the **nominating party** (Can be shareholder, other company, other entity). Nominee directors clearly owe fiduciary duties to the company to which they are appointed.

Disclosure of company information by certain directors: S158(1) A director of a company may disclose information which the director has in his or her capacity as a director or an employee of a company, being information that would not otherwise be available to him or her, to the persons specified in subsection (2) if such disclosure is **not likely to prejudice** the company and is **made with the authorisation** of the board of directors. S158(2) – Person whose interests director represents/A person in accordance with whose directions the director may be required to act.

Restricted Transactions: S162(1) A company makes a restricted transaction if it makes a loan/quasi loan to a director of the company or to a director of a company deemed related, or to a director's family. Exceptions: Exempt Private Company

Acceptable loans: S162(3) Loan that are advances to relevant director to provide them with funds to meet expenditures incurred/to-be incurred as a director. Loan to director who is a full-time employee for the purpose of purchasing a home. Loan to director who is a full-time employee pursuant to GM-approved employee benefit scheme. Loan to director in ordinary course of business by bank/financial institute/insurance company. However, 163(4) still requires prior approval and disclosure of purpose/amount, on the condition that if approval not given, amount must be repaid within 6 months of the meeting.

Restricted Transactions extended to persons connected with directors: S163 same as 162, but extended to if the director is interested in 20% or more of the total voting power, or exercise control over the company. Breach = fine \$20,000 or imprisonment 2 years (S163(7))

Topic 11 Protection of Members and Members' Actions

216 more for personal unjust? 216A for the company unjust? 125 IRDA

Who can sue for oppression or injustice: S216(1) Any member or holder of a debenture of a company may apply to the court on the grounds that

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including the applicant or in disregard of his, her or their interests as members, shareholders or holders of debentures of the company; **or**

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including the applicant).

Remedies for S216: Court order granted at the end of a successful oppression suit may include:

- Direct or prohibit any act or cancel/vary any transaction or resolution
- Regulate conduct of affairs of the company in the future
- Authorise civil proceedings to be brought in the name of/on behalf of the company.
- Provide for the purchase of shares/debenture of the company by other members
- In the case of purchase of shares by the company, provide for reduction accordingly.
- Provide that the company be wound up.

Derivative or Representative Actions: S216A (1)(a) any member of a company, (1)(b) Minister, (1)(c) any other person who, in the discretion of the court is a proper person to make an application, can (2) apply to the court for permission to bring an action or arbitration in the name on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting /defending /discontinuing the action on behalf of the company.

Subjected to 216A(3) that the court is satisfied that (a) Complainant given 14 days notice to directors of the company of intention to apply 216A if the directors do not diligently defend/discontinue. (b) complainant is acting in good faith, (c) appears to be prima facie in the interests of the company that the action be prosecuted/defended/discontinued. (4) If not expedient to give notice, establish satisfaction on the court and the court may make interim order as it thinks fit.

S125(1) IRDA allows a member to apply for the winding up of a company on “just and equitable grounds” without requiring the company to be insolvent. Question to ask is, “would winding up be in the best interests of the company?”. Court is unlikely to wind up profitable, functional companies, and unlikely to wind up companies in circumstances where employees are dependent upon company for livelihood.

Alternative to winding up: S125(3) provides that the court may order a share buyback or order other members to buy another member’s share, decreasing number of members in the company and helping the company turn around if all members have a congruent goal. S90 IRDA also allows for company to apply to be placed under judicial management to achieve survival as a going concern.

Topic 12 Corporate Disclosure Requirements

General duty to disclosure: S165(1) Every director/CEO of a company must give written notice to the company (a) of such particulars relating to shares/debentures/participatory rights/options/contracts for the purposes of compliance that are applicable in relation to him, (b) particulars of any change in (a) including any consideration (if any) received as a result of event giving rise to the change, (c) of events/matters affecting or relating to himself as are necessary for the purposes of compliance by company with section 173A

Notice to be given: within 2 business days after date of becoming director/CEO, or date on which director/CEO became registered holder of the shares/debentures/etc., or within 2 days after the change in S165(1)(b).

Substantial Shareholder: Securities and Futures Act (SFA) ss2(4), is someone who has substantial shareholding in a corporation if the person has interest in one or more voting shares and total votes is not less than 5% of the total votes attached to all voting shares in the corporation. Same applies for class shares. Just need 5% of that specific class to be considered substantial shareholder.

Disclosure relating to substantial shareholding: Under SFA ss135, substantial shareholder must give notice in writing within 2 business days after they are aware that they have become a substantial shareholder. Any changes in percentage level of interest must also be given a written notice within 2 business days. Also give notice upon knowing that substantial shareholding ceased.

Disclose upon Interested Party Transaction (ITP): Listed companies need to make disclosure when there is ITP. Interested Person = director/CEO of issuer, entity at risk = Issuer. Every director/CEO who is interested in a transaction with the company shall declare the nature of his interest at a meeting of the directors or send written notice to the company. Transactions include provision/receipt of financial assistance, acquisition/disposal asset, securities, options, services.

Circumstances whereby a listed company would have to comply with disclosure and approval requirements when it acquires or disposes of assets.

Category	Situation	Disclosure/Approval
Non-disclosable transactions	$\leq 5\%$	Company may announce transaction if it wants to.
Disclosable transactions	$> 5\%$ but $\leq 20\%$	Immediate announcement after terms have been agreed
Major transactions	$> 20\%$	Immediate announcement after terms have been agreed Transaction conditional on shareholder approval
Very substantial acquisitions or reverse takeovers	100% / which result in change in control of company	Immediate announcement after terms have been agreed Transaction conditional on shareholder approval and approval of SGX

Topic 14 Legal Aspects of Equity Finance

<u>Share capital</u> (Not applicable for limited by guarantee)		<u>Debt finance</u>
Returns	Depends on the dividends declared	Fixed repayment of principal + interest
Priority if company winds up	Lower priority, shareholders can only claim after all debts have been paid	Higher priority
Holding term with company	Held for the long-term, until all shares held are sold	Usually a short or finite term stated in the contract and is expected to be repaid before winding up
Membership	Shareholders can be members upon registering	Creditors are not members

Other sources of financing: Trade Finance, Retained Earnings

Ways to alter share capital (Authorized by company's constitution): 1) Consolidate and divide share capital, 2) Convert paid-up shares into stock and reconvert stock into paid-up shares, 3) Sub-divide its shares, 4) Cancel shares that have been forfeited/not taken up. Takes effect upon passing of the requisite resolution.

Maintenance of Capital Principle: Company maintains an adequate level of capital to meet its obligations to creditors and to prevent the unfair distribution of assets to shareholders.

Solvency Statement: Under s7A, statement by the directors of the company that they have formed the opinion: As regards the company's situation at the date of the statement, there is no grounds on which the company could then be found to be unable to pay its debts, where it is able to pay off debts in full if winding up within 12 months, or pay off debts as they fall due during the period of next 12 months, and that the value of company's assets is greater than the value of its liabilities and will not become less than value of liabilities. Solvency statement must take the form of a declaration in writing signed by every director, accompanied by a report from company's auditor and is of the opinion that the statement is not unreasonable (if company not exempt from audit requirements).

Dividends paid: s403(1) No dividend is payable to shareholders except out of profits that a company makes. Profits can be either revenue/retained earnings/unrealised profit/capital gains/need not necessarily be available cash. Profits need to be available at time declared, not time paid.

S403(2): Every director that wilfully pays or permits to be paid dividend in contravention to the above shall be fined up to \$5,000 or imprisonment not exceeding 12 months. Also liable to creditors for amounts debt due to the extent by which dividends paid exceed profits.

Reduction of Capital: Slightly different from share buy-back.

- In a buy-back, the member has the option of refusing to sell, while in an authorized reduction of capital exercise, some members' shares may be canceled against their will, and
- A reduction of capital may not necessarily involve a payment to members when the shares are canceled. This is because a reduction of capital exercise may be undertaken to achieve goals other than the return on funds to shareholders.

s78A (1) of CA states: A company may reduce its share capital under the provisions of this Division in any way and, in particular, do all or any of the following:

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;
- (b) cancel any paid-up share capital which is lost or unrepresented by available assets;
- (c) return to shareholders any paid-up share capital which is more than it needs.

Reduction by private company: S78B – Reduce by special resolution if meet solvency requirements (All directors make solvency statement, within 20 days of special resolution)

Reduction by public company: S78C – Reduce by special resolution if meet solvency requirements (All directors make solvency statement, within 30 days of special resolution)

For both pvt and public, subsection 2 -> Does not need solvency requirement if reduction of share capital does not involve (a) reduction or distribution of cash/asset, (b) release of liability owed.

Redemption of "redeemable preference shares" is not regarded as a "reduction of capital". As stated in s70(5), redemption through "fresh issue of shares issued for purpose of redemption" will not be treated as redemption out of capital.

S70(3): The shares shall not be redeemed unless they are fully paid up.

S70(4): The shares shall not be redeemed out of the capital of the company unless

- (a) All the directors have made a solvency statement in relation to such redemption; and
- (b) The company has lodged a copy of the statement with the Registrar

Share Buy-back: S76(1A): Company cannot acquire its own shares/shares in holding company.

General Rule: The company may buy back ordinary shares, stocks and preference shares. The total number of ordinary shares, stocks and non-redeemable preference shares in any class that may be purchased or acquired by a company during the relevant period must not exceed 20% of the total number of ordinary shares, stocks and non-redeemable preference shares of the company, unless:

- (a) The company has reduced its share capital by special resolution during the relevant period; or
- (b) The court has made an order under s78I approving the reduction of share capital of the company during the relevant period.

Treasury Shares: Maximum holding of 10% treasury shares in the company (no voting rights)

Profits from share repurchase: Cannot be distributed as dividends (s403(1A)), but proceeds from treasury shares can. S403(1b).

Topic 15 Legal Aspects of Debt Finance

A charge is a security arrangement where the borrower grants the lender the right to receive payment out of the sale proceeds of specified assets or to be paid from specified funds should the borrower default on the loan

Fixed charge: A fixed charge is one that the charge attaches to specific property (equipment / machinery / securities / real property) when created, whether in existence or acquired in the future. Until the charge is lifted, the property is encumbered with the charge. The chargor (borrower) cannot dispose of the property or enter into transactions relating to ownership interests in the property without this encumbrance unless the charge (lender) consents

In the event that the property is transferred without such consent, the new owner will generally have to take the property subject to the charge unless the new owner purchased the property in good faith, for value and had no notice of the charge.

Floating charge

A floating charge generally has 3 key characteristics :

1. It is a charge over the present and future items of a class of assets
2. The specific items in the class of assets change from time to time in the ordinary course of the business; and
3. It is contemplated that until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the usual way as far as concerns the particular class of assets in question.

A floating charge is one where the charge, although affecting all the assets of the company expressed to be included in it, does not specifically affect any item comprised in the security until some event occurs or some act is done on the part of the chargee which causes it to crystallize into a fixed security.

Key Differences between fixed/floating charge:

1. For a fixed charge there are restrictions on the chargor to deal with the assets in the ordinary business of the chargor's business, but for floating charge there is no restriction placed on the chargor.
2. Floating charge allows the chargor the liberty to substitute the existing assets of the class of charged assets with new assets of the same class, but fixed charge does not allow this liberty. (i.e. fixed charge is attached to a specific property when created, whereas floating charge does not specifically affect any item comprised in the security until some event occurs or some act is done on the part of the chargee which causes it to crystallize into a fixed security)
3. Fixed charge has a priority to the security compared to floating charge

Creditors would prefer a fixed charge as they have more control over when an asset is disposed of and they have more priority to the security.

Important to register a charge as it protects the chargee and gives him priority over the asset. Failure to register charge would lead to all officer of the company being guilty of an offence and liable to conviction of fine not exceeding \$1,000 and also to a default penalty.

A receiver

- ___ takes control over some or all of the company's assets (usually the assets subject to the security).

A receiver and manager is a subset of a receiver and

- Takes control over part or whole of the company's undertaking (business).
- Can manage the company until it is sold as a going concern.
- Is an 'officer' of the company if appointed under a power contained in any instrument:

Not qualified to be receivers under S74 IRDA: Company/corporation, undischarged bankrupt, chargee of any property of the relevant company, auditor of the relevant company, director/employee of the relevant company, any individual who is not a licensed insolvency practitioner.

Appointment of receiver: May be appointed by court upon application by debenture holder under s4(10) of Civil Law Act. OR appointed by mortgages under ss24(1)(c) Conveyancing & Law of Property Act. OR appointed by secured creditor if the debenture grants the creditor power to do so (usually in the event of default, it grants the creditor power to appoint receiver). Receiver can be agent of either company or appointor (by default). But If appointed by court, then officer of the court.

Effects of Receivership: (1) Secured creditor recovers his debts. (2) Contracts of employment terminated and fresh employment contracts to be entered into with receiver. (3) Floating Charge crystallizes. (4) Powers of the company and directors to deal with assets are suspended.

Key Powers of Receiver: Take over control of the company's bank accounts and insurance arrangements

- Work out and value the properties owned by the company
- Review all uncompleted contracts
- Arrange for the continued supply of essential goods and services
- Terminate employee contracts that are not required during the receivership
- Review the company's systems of internal control, and
- Sell assets where necessary.

Key duties & responsibilities of a receiver

If appointed by a creditor, the receiver owes its primary duties to the secured creditor who appointed him, regardless of whether the receiver is an agent of the company or the appointor.

The receiver also has

- Duty to the company to avoid conflict of interest
- Duty to lodge accounts with ACRA every 6 months and at end of receivership: S85 IRDA
- Duty to not make improper use of his or her position as an officer or agent of the company or any information acquired by virtue of his or her position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the company: S157(2) CA

Although the receiver has no duty to act in the interests of the company, the receiver is subjected to exercise due care and diligence when performing his duties. Thus the receiver has:

- Duty of good faith when deciding whether to sell assets; and
- Duty of care to obtain fair value if a decision is made to sell the assets.

Key liabilities of a receiver: Under S75(2)(a) IRDA: A receiver may be personally liable on any contract entered into by that person in the performance of that person's functions (except insofar as the contract otherwise provides) and, to the extent of any qualifying liability, on any contract of employment adopted by that person in the performance of those functions; and (b) entitled in respect of each liability mentioned in paragraph (a) to an indemnity out of the property of the company or corporation.

Default in lodging accounts: Under S85(6) IRDA, every receiver or manager who defaults in complying with S85 IRDA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000 and also to a default penalty.

Topic 16: Corporate Rescue

Private/informal workout: Private arrangements with every creditor, single or group, and discuss when and how each debt should be repaid. No need to be disclosed. Difficult to propose/enforce since requires negotiation with all creditors. *Flexible & Private, cheap.*

Scheme of Arrangement: A plan which, by law, binds a company creditor or members or both to some form of rearrange of their rights and obligations. s210 CA sets out a statutory procedure by which a scheme of compromise or arrangement may be effected. s210(1) provides that: “Where a compromise or an arrangement is proposed between (a) A company and its creditors or any class of them; (b) A company and its members or any class of them; or (c) A company and holders of units of shares of the company or any class of them. Complex, costly

Application of Scheme of Arrangement: s210(2): Can be done by liquidator, company, creditor (usually unsecured).

Procedure: 1. Application for moratorium. 2. Application for leave to convene creditors meeting. 3. Sending of notices, explanatory statements to creditors; s211(1), holding of meeting; obtaining creditors sanction/approval (requires >50% majority in present and voting approval, and that the majority in number must represent >=75% in value of creditors present and voting.). 4. Application for court sanction of scheme.

<i>s210 CA Power to compromise with creditors, members and holders of units of shares</i>	<i>s 64 IRDA Power of Court to restrain proceedings, etc., against company</i>
Scheme proposed	Scheme proposed or intended to be proposed
Applied by company, member or holder of units of shares (or liquidator if company being liquidated)	Applied by company
Moratorium must be applied for under s210(10) CA	Moratorium granted when s 64(1) IRDA application made
Moratorium on “further proceedings in any action or proceeding against the company:	Moratorium extends to resolutions, appointment of receivers, restraining proceedings and executions against the company, enforcement of security and/or enforcement of rights of lessors
Court’s discretion	Conditions: Company not being winded up // Company has applied meeting of creditors under s210(1) CA or approval of scheme under s 71(1) IRDA // No s210(10) CA application has been made

Classification of creditors: To ensure that no particular class of creditors will be prejudiced by any proposed scheme, the law requires that creditors be separated into different classes based on their rights and claims (e.g. secured, preferential, and unsecured creditors).

“**Dissimilarity principle**” is a test used in classifying creditors for the purpose of voting on a scheme of arrangements.

- Persons whose **rights** are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings
- Persons whose **rights** are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting
- The test is based on **similarity/dissimilarity of legal rights** against the company (not interests not derived from such legal rights)

Failure to properly classify creditors may prejudice the minority creditors where their rights might be crammed down if they are outvoted.

Statutory majority required for a scheme to be approved: S210(3AB) CA: (a) A majority (>50%) in number of creditors present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to the compromise / arrangement (unless court orders otherwise); (b) under para (a), the majority in number must represent >=75% in value of creditors present and voting either in person or by proxy at the meeting or the adjourned meeting

Power of Court to cram down: s70(1) applies to compromise/arrangement between creditors and company, where there are 2 or more classes of creditors, and conditions for statutory majority is satisfied for at least one class, and not satisfied for at least one class.

(2) Despite section 210(3AA) and (3AB)(a) and (b) of the Companies Act, the Court may, subject to this section and on the application of the company, or of a creditor of the company who has obtained the leave of the Court to make an application under this subsection, approve the compromise or arrangement, and order that the compromise or arrangement be binding on the company and all classes of creditors meant to be bound by the compromise or arrangement.

(3) Conditions (50/75 together): (a) Majority of creditors meant to be bound by arrangement who were present in voting has agreed. (b) Majority mentioned in (a) represents three-fourths in value of creditors meant to be bound by arrangement and (c), Court is satisfied that the compromise does not unfairly discriminate between 2 or more classes of creditors and is fair & equitable.

Not fair & equitable if creditors receive less in the scheme of arrangement than what is estimated by the court in most likely scenario.

S67 IRDA: Super priority for rescue financing: S67(9) “rescue financing” means any financing that satisfies either or both of the following conditions:

- (a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;
- (b) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company

S67(1) - To encourage parties to provide additional financing to the company, the Court may, on an application by the company under this subsection, make one or more of the following orders:

- (a) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to be treated as if it were part of the costs and expenses of the winding up mentioned in section 203(1)(b);
- (b) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to have priority over all the preferential debts specified in section 203(1)(a) to (i) and all other unsecured debts, if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in this paragraph;
- (c) an order that the debt arising from any rescue financing to be obtained by the company is to be secured by -
 - (i) a security interest on property of the company that is not otherwise subject to any security interest; or
 - (ii) a subordinate security interest on property of the company that is subject to an existing security interest,

if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this paragraph;

- (d) an order that the debt arising from any rescue financing to be obtained by the company is to be secured by a security interest, on property of the company that is subject to an existing security interest, of the same priority as or a higher priority than that existing security interest, if
 - (i) the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this paragraph; and
 - (ii) there is adequate protection for the interests of the holder of that existing security interest.

S71 IRDA: Power of Court to approve compromise or arrangement without meeting of creditors:

S71(1) - Despite section 210 of the Companies Act but subject to this section, where a compromise or an arrangement is proposed between a company and its creditors or any class of those creditors, the Court may, on an application made by the company, make an order approving the compromise or arrangement, even though no meeting of the creditors or class of creditors has been ordered under section 210(1) of that Act or held. Statute Majority assumed to be satisfied, no need for creditor

meeting assuming conditions are satisfied

Moratorium is to stop creditors from applying for winding up?

64 is better since it applies moratorium automatically whereas 210 you have to do 210(10) and 210(10) only for existing proceedings whereas 64 stops ALL proceedings including future ones/

Topic 17: Winding-up

Application by whom? S124(1) IRDA A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the application of one or more of the following: (a) Company, (b) Director of the company, (c) Creditor of the company, (d), Contributory, (e) Liquidator of the company

WHY? Circumstances of winding up: S125(1) The Court may order the winding up of a company if —

- (a) the company has by special resolution resolved that it be wound up by the Court;
- (b) default is made by the company in lodging statutory report or in holding statutory meeting;
- (c) the company does not commence business within a year after its incorporation, or suspends its business for a whole year;
- (d) the company has no member;
- (e) the company is unable to pay its debts;
- (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 in any other manner which appears to be unfair or unjust to other members;
- (i) the Court is of the opinion that it is just and equitable that the company be wound up;
- (n) 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 interest.

Voluntary winding up circumstances: IRDA s160(1) A company may be wound up voluntarily —

- (a) when the period fixed for the duration of the company by the constitution of the company expires or, where constitution of the company provides that company is to be dissolved on the occurrence of an event, when event happens, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; or
- (b) if the company so resolves by special resolution.

Court-ordered winding up (Compulsory Winding Up) initiated by the court or a creditor when the company can't meet its financial obligations; or

Voluntary winding up initiated by either members (Members' Voluntary Winding Up) when a solvent company decides to cease operations, pay debts and distribute surplus to shareholders, or by directors/shareholders (Creditors' Voluntary Winding Up) when an opinion is formed that the company will not be able to pay its debts in full within a period not exceeding 12 months after the commencement of winding up.

Liquidator Appointment: Compulsory Winding Up: The court appoints a liquidator to oversee the process. Members' Voluntary Winding Up: Shareholders pass a resolution to wind up the company and appoint a liquidator. Creditors' Voluntary Winding Up: Similar to members' voluntary, but creditors may also have a say in the choice of the liquidator.

Consequences of Compulsory Winding Up:

IRDA s133(1) When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except —

- (a) by the leave of the Court; and
 - (b) in accordance with such terms as the Court may impose.
- (2) Subject to section 198, an order for winding up a company operates in favour of all the creditors and contributories of the company as if made on the joint application of a creditor

and of a contributory.

Consequences of Voluntary Winding Up:

IRDA s162 (1) The company must, starting on the commencement of the winding up, cease to carry on its business, except so far as is in the opinion of the liquidator required for the beneficial winding up of the company.

(2) Despite anything to the contrary in the constitution of the company, the corporate state and corporate powers of the company continue until the company is dissolved.

(3) Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members made after the commencement of the winding up, are void.

IRDA S125(2) - A company is deemed to be unable to pay its debts if —

(a)	a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding \$15,000 then due has served on the company, by leaving at the registered office of the company, a written demand by the creditor or the creditor's lawfully authorised agent requiring the company to pay the sum so due, and the company has for 3 weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
(b)	execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c)	it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court must take into account the contingent and prospective liabilities of the company.

Cash Flow Test: The only determinative test to see if a company is able to pay its debts. Under the cash flow test, the application consideration is "whether a company's current assets exceed its current liabilities such that it is able to meet all its debts as and when they fall due". So if creditors can satisfy the cash flow test then s125(2)(c) IRDA will be satisfied.

Process of winding up:

1. company's directors declare in writing that, having inquired into the company's affairs, they believe the company will be able to pay its debts in full within 12 months
2. company's members in general meeting pass a special resolution that the company be wound up voluntarily
3. members in general meeting appoint a liquidator
4. commencement of winding up is deemed to have commenced when the resolution for voluntary winding up is passed/ even if the company is subsequently wound up by the court.
 - (i) every invoice, order for goods or business letter issued by the company must have the words "in liquidation" added after the name of the company
 - (ii) the company stops carrying on its business, except to the extent the liquidator believes is necessary for the beneficial disposal or winding up of the business
 - (iii) transfers of the company's shares are void unless the liquidator approves the transfer (s 292(2)), and
 - (iv) if a judgement creditor has not completed execution or attachment against the company before commencement of winding up, he/she may not have the benefit of his/her execution as against the liquidator. In instances where the creditor had notice of the resolution to wind up the company, he/she cannot retain the benefit of any execution that was not completed before he/she received such notice
5. time of the liquidator's appointment in step (3), the directors lose their powers, except to the extent allowed by the liquidator or by the members with the consent of the liquidator
6. liquidator carries out his/her functions,
7. at any time the liquidator forms the opinion that the company will not be able to pay its debts in

full within the 12-month period, the liquidator must call a meeting of the company's creditors, after which the winding up proceeds as if it were a creditors' voluntary winding up

8. When the winding up is completed, the company is normally dissolved

Voidable transactions are transactions entered into by a company in the period leading up to its winding up. A liquidator can apply to court to try to prove that the transaction is voidable. If the liquidator is successful, the court has the power to: make an order to undo the transaction, or make an order that money be paid to the company equal to the amount of the voidable transaction

"transactions at an undervalue" Under s224(3) IRDA, transactions are at an undervalue if:

- (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
- (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

The court should not make an order under s224 if (s224(4)):

- (a) the company entered into the transaction in good faith and for the purpose of carrying on its business; and
- (b) at the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

The undervalue transaction must be entered into within the period of 3 years ending with the date of making the application for winding up (winding up by court) or with the date of passing of the resolution to wind up the company (voluntary winding up).

The company must be insolvent at the time the transaction was entered into or become insolvent in consequence of the transaction.

- In the case where the company has entered into an undervalued transaction with its associate → presumed that company was insolvent at the time of the transaction or become insolvent as a result of transaction.

"Unfair preferences": A company gives an unfair preference to a person if (s225(3)):

- (a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and
- (b) the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company's winding up, will be better than the position that person would have been in if that thing had not been done.

To make an order under unfair preferences, the liquidator must prove that the Co had a desire to prefer: meaning the Co that gave the unfair preference was influenced in deciding to give the preference by a desire to prefer to produce in relation to that person the effect mentioned in subsection (3)(b). s225(4) This desire depends on the evidence of the directors who authorised the giving of the preference. s225(5) It is automatically assumed that there was a desire to prefer if the person receiving the unfair preference is connected with the Co, unless proven otherwise.

s225(2) The Court may, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that unfair preference.

For unfair preference which is not a transaction at an undervalue and which is given to a person who is connected with the company — within the period starting 2 years before the commencement winding up. For any other case of an unfair preference — within the period starting one year before the commencement of winding up.

Distribution of assets pursuant to winding up

- 1) Secured creditors have priority over unsecured creditors and are paid first
- 2) Remaining assets are then distributed to unsecured creditors

S203 (1) IRDA (In order):

- (a) First, the costs and expenses of the winding up incurred by the Official Receiver as the liquidator of the company.
- (b) Second, any other costs and expenses of the winding up, including the remuneration of the liquidator
- (c) Third, the costs of the applicant for the winding up order
- (d) fourth, subject to subsection (2), wages or salary
- (e) fifth, subject to subsection (2), the amount due to an employee as a retrenchment benefit
- (f) sixth, all amounts due in respect of work injury compensation under the Work Injury Compensation Act (Cap. 354)
- (g) seventh, all amounts due in respect of CPF contributions payable
- (h) eighth, subject to subsection (2), all remuneration payable to any employee in respect of vacation leave
- (i) ninth, the amount of all tax assessed

S67(4) IRDA: Where a company that **has any super priority debt or debts is wound up**, the super priority debt or debts constitute one class of debts and, **despite section 203** —

- (a) the super priority debt or debts are to be paid in priority to all the preferential debts specified in section 203(1)(a) to (i) and all other unsecured debts; and
- (b) if the property of the company available for the payment of the super priority debt or debts is insufficient to meet the super priority debt or debts, the super priority debt or debts —
 - (i) have priority over the claims of the holders of any debentures of the company secured by a floating charge (which, as created, was a floating charge); and
 - (ii) are to be paid out of any property comprised in or subject to that floating charge.

s67(3) states if a company has two or more super priority debts wound up, the super priority debts rank equally in priority and are to be paid in full. If the company has insufficient property to pay in full, they are to abate in equal proportions between themselves.