SECTION 1 INTRODUCTION

16.1.1 In Singapore, companies are principally governed by the Companies Act (Cap 50, 2006 Rev Ed) (hereinafter "the Act"). It should be noted though that specific types of companies may, in addition to the Companies Act, be regulated by other statutes. For example, insurance companies and banks are also regulated by the Insurance Act (Cap 142, 2002 Rev Ed) and the Banking Act (Cap 19, 2008 Rev Ed) respectively. Limited liability partnerships, which despite their name are body corporates, are governed by the Limited Liability Partnership Act (Cap 163A, 2006 Ed Rev). Certain provisions in other statutes such as the Securities and Futures Act (Cap 289, 2006 Rev Ed) are also relevant to companies.

16.1.2 It should also be noted that the statutory provisions governing companies are supplemented by the common law.

SECTION 2 INCORPORATION AND ITS CONSEQUENCES

A. Obligation to Incorporate

16.2.1 Under section 17(3) of the Act, a business organization that has more than 20 members must be incorporated as a company. However, this requirement does not apply to an association or a partnership formed solely or mainly for the purpose of 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 (section 17(4) of the Act). Thus members of the legal profession who are governed by the Legal Profession Act (Cap 161, 1994 Rev Ed) may establish partnerships of more than 20 partners.

B. Registration of a Company

1. Mandatory submission of the proposed company's constitution

16.2.2 As a general rule, any person may register a company upon payment of the prescribed fee and lodgment of the constitution of the proposed company together with such other documents and information as the Registrar may require. Under section 22(1) of the Act, the corporate constitution must *inter alia* prescribe the name of the company and whether the liability of the members of the company is limited or unlimited. A company's constitution shall also contain the regulations of the company (section 35(1) of the Act). The Minister may prescribe model constitutions for private companies and companies limited by guarantee which may be adopted by such companies either in whole or in part (sections 36 and 37 of the Act).

2. Registrar to issue notice of incorporation once constitutution is registered

16.2.3 Once the constitution of the company is registered, the Registrar will issue a notice of incorporation stating that the company is, from the date specified in the notice, incorporated and the type of company it is, i.e. whether it is company limited by shares or guarantee or an unlimited company and where applicable that it is a private company - see section 19(4) of the Act.

C. Effects of Incorporation

1. Powers of a company after incorporation

16.2.4 Section 19(5) of the Act sets out the general effect of incorporation which is that the company is a body corporate with all such powers as flow from such an entity. The company may sue and be sued in its own name, it has perpetual succession in that it can survive indefinitely 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.

2. The company has a separate identity from that of its members

16.2.5 Cases have established that as a body corporate a company has a distinct personality that is recognized by law. In other words, a company has an existence and identity separate from that of its members - see Salomon v A Salomon & Co Ltd [1897] AC 22; Lee v Lee´s Air Farming Ltd [1961] AC 12; Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd [2015] SGHC 303. The most important consequence of this is that the debts and obligations incurred by the company are its own and its members generally do not share the company´s liabilities (unless the company is an unlimited company). Creditors of the company may only look to the company for payment of debts owed to them by the company. If the company is insolvent and cannot pay its debts, the creditors will have to bear the loss however solvent the company´s individual members may be. All that the members of a company are obliged to do is to contribute the amount that remains unpaid on the shares that the members have subscribed, or the amount that they have agreed to contribute in the case of a company limited by guarantee. This obligation is owed to the company, not the creditors of the company. As such, if the shares were issued on a fully paid basis, or have already been fully paid, the members of a company limited by shares have no further liability to the company. Thus, when speaking of limited liability it is important to note that what is meant is not that the company´s liability is limited but that the members´ liability to contribute to the company is limited to what the members have agreed to contribute.

D. 'Lifting the Veil' of Incorporation

16.2.6 While an incorporated company has a personality separate from that of its members, there are circumstances when the courts will ignore such separate personality and treat the company and its members (or officers) as one for limited purposes. Thus, for example, there may be circumstances when the courts will hold the members of a company liable for debts incurred by the company. When the courts do so, it is said that the veil of incorporation is "lifted" or "pierced". Generally, the cases of veil lifting fall into two categories: by statute and at common law.

E. Examples of Statutory Exceptions to the Separate Personality Doctrine

1. Where debts are incurred without any reasonable or probable expectation that the company would be able to pay

16.2.7 It is open to Parliament to limit the effects of incorporation by a suitably worded statutory provision. One of the more important statutory limitations on the separate personality doctrine arises under sections 339(3) and 340(2) of the Act. The combined effect of those provisions is that, where debts are contracted without any reasonable or probable expectation that the company would be able to pay the debts, any officer of the company who was a party to the contracting of such debts is guilty of an offence and may, after conviction, be made personally liable by the court for the payment of the whole or any part of such debts.

2. Where debts are incurred when businesses are carried on with the intent to defraud creditors

16.2.8 Another important exception is found in section 340(1) of the Act. Where it appears in the course of the winding up of a company that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may declare that any person who was knowingly a party to the carrying on of the business in such a manner shall be personally liable for all or any of the debts or liabilities of the company as the court may direct.

3. Where debts are incurred because dividends paid exceed available profits

16.2.9 A third important exception arises where dividends are paid even though there are no available profits out of which to pay such dividends - see section 403(2)(b) of the Act. Since dividends may only be paid where there are profits so as not to unduly prejudice creditors of the company, a director or Chief Executive Officer of a company who wilfully pays or permits the payment of a dividend in the absence of profits will be liable to the creditors of the company for the amount of the debts due to them to the extent by which the dividends exceed the available profits.

F. Common Law Exceptions to the Separate Personality Doctrine

1. Abuse of the corporate vehicle

16.2.10 Persons incorporate companies for various reasons but, undoubtedly, one of the reasons is to insulate themselves from personal liability should the business fail. Accordingly, the mere fact that members or officers of a company utilize the corporate vehicle to shield themselves from personal liability is no -reason to disregard the company´s separate personality - see Adams v Cape Industries plc [1990] 1 Ch 433. However, the position is different where the members or officers of a company abuse the corporate form for improper means – see Prest v Petrodel Resources Ltd [2013] 2 AC 415; Simgood Pte Ltd v MLC Shipbuilding Sdn Bhd [2015] SGHC 303.

16.2.11 Thus, if an individual already has existing legal obligations, but attempts to use the corporate vehicle to evade such obligations, the courts will ignore the company´s separate personality. For example, it has been held that a person who has agreed to sell a house cannot avoid his contractual obligations by transferring the house to a company. Both he and the company were ordered to specifically perform the contract even though the company was not a party to the contract - see Jones v Lipman [1962] 1 WLR 832.

16.2.12 Similarly, if a company is used to perpetrate a fraudulent act, the courts will treat the company and those behind it as one and the same. Thus, if a company has been incorporated to defraud innocent investors, the court may hold the promoter of the company liable even though the promoter and company are separate persons - see Re Darby [1911] 1 KB 95.

SECTION 3 CORPORATE GOVERNANCE

A. Separation of Ownership and Management

16.3.1 Section 157A of the Act states that the business of the company shall be managed by or under the direction of the directors. The directors may exercise all the powers of a company except any power that the Act or the company's constitution of the company requires the company to exercise in general meeting. This reflects one of the features of company law, namely, that it can facilitate a separation of ownership and management. The members or shareholders who own the company need not necessarily be involved in its management as directors. While in some companies, particularly small ones, the members of the company may also be involved in its management - either as directors or in some other executive capacity - in other companies, the members are not involved in management. Instead, such companies are managed by boards of directors in which many of the directors are not members of the company. Even when the directors are members of the company, their shareholdings in the company may be relatively small. It should also be noted that, in such companies, even this management by the board may often be notional as the majority of the members of the board may not be full-time directors but are non-executive directors. In such companies, the day-to-day management of the company will be in the hands of the senior executive officers of the company, who may or may not may be board members. The role of boards in such companies is then to exercise a general oversight but not to be involved in executive matters.

B. Statutory Duties

1. Directors owe fiduciary duties to their companies at common law, subject to Section 157 of the Act

16.3.2 Under common law, directors are regarded as fiduciaries and therefore owe fiduciary duties to their companies. At the same time, the Act also prescribes certain duties on directors which mirror their general duties under the common law. One important provision is section 157(1) of the Act which prescribes that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. Section 157(2) of the Act goes on to state that an officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person, or to cause detriment to the company.

2. Section 157 makes certain duties mandatory and does not derogate from existing rules

16.3.3 Section 157 of the Act does not purport to be an exhaustive statement of the law relating to the duties that directors owe to their companies. In this regard, section 157(4) provides that the section is in addition to and not in derogation, of any other rule of law relating to the duty or liability of directors or officers of a company. The effect of section 157 is to render the statutory duties mandatory while the duties at common law are capable of exclusion by agreement between the company and its directors, assuming that the company has made such a decision independently of the interested directors. Under section 157(3) of the Act, a breach of sections 157(1) and 157(2) renders the officer or agent liable to the company for any profit made or any damage suffered by the company as a result of the breach. At the same time, a breach of these sections is an offence, and the officer or agent shall be liable upon conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding one year.

C. Duty at Common Law to Act in the Best Interests of the Company

1. Courts will not substitute own judgment for that of directors

16.3.4 In the exercise of their duties, directors (and the company's senior managers) must act bona fide in what they consider is in the best interests of the company. When the acts of directors are challenged, the courts do not substitute their own judgment for that of the directors - see ECRC Land Pte Ltd v Wing On Ho Christopher [2004] 1 SLR 105; Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] 4 SLR 162. All that the courts are concerned about is whether the directors have acted honestly in what they (and not the courts) considered to be in the company´s best interests. Of course, if the decision is one that no reasonable board would have arrived at, this casts serious doubt on the bona fides of the directors.

2. Directors are entitled to have regard to interests of members and employees notwithstanding the company's separate personality

16.3.5 It should be noted though that, while the directors´ overriding duty is to the company, section 159 of the Act provides that in exercising their powers, directors are entitled to have regard to the interests of the company´s employees generally, as well as the interests of its members. That directors may have regard to the interests of its members is also the position at common law since the members collectively do in a sense comprise the company notwithstanding the company ´s separate personality - see Peters American Delicacy Co Ltd v Heath (1939) 61 CLR 457; Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286. The entitlement to have regard to the interests of employees is also a sensible one since advancing the interests of employees will often be in the best interests of the company.

3. Directors are entitled to have regard to interests of creditors especially in cases of insolvency

16.3.6 There are also circumstances where directors must have regard to the interests of creditors. Generally speaking, creditors have no interest in the company´s assets. A creditor who wishes to enforce the debt owing to him from the company must bring a claim against the company. In the absence of an interest in the company´s assets, the directors of a company do not have to take the interests of creditors into account when making corporate decisions. However, when a company is unable to pay its debts, and is thereby effectively insolvent, the interests of its creditors must be taken into account. This is because creditors of an insolvent company are entitled to appoint a liquidator to get in the assets of the company to which the creditors have a prior claim before the members of the company. Accordingly, in such circumstances, directors must ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited to the prejudice of the creditors - see Winkworth v Edward Baron Development Co Ltd [1987] 1 All ER 114.

D. Duty at Common Law to Avoid Conflicts of Interest

16.3.7 As a fiduciary, a duty of loyalty is imposed on a director vis-à-vis the company. As a result, a director is obliged not to place himself in a position where his duty to the company may conflict with his own interests - see Chew Kong Huat v Ricwil (Singapore) Pte Ltd [2000] 1 SLR 385; Kumagai-Zenecon Construction Pte Ltd v Low Hua Kin [2000] 2 SLR 501. One particular application of this duty is that a director is not permitted, without the fully informed consent of the company, to make a profit in connection with the director´s position. Thus, if a director comes across a business opportunity while discharging his role as a director, he cannot personally take advantage of such an opportunity unless the company has, with full knowledge of the facts, permitted him to do so. This permission may be given by the rest of the board (assuming the other board members giving approval are independent and do not stand in any way to benefit personally) or by the members in general meeting – see Dayco Products Singapore Pte Ltd v Ong Cheng Aik [2004] 4 SLR(R) 318.

E. Duty at Common Law to Act for Proper Purposes

16.3.8 The management of a company is generally vested in the board of directors and the board will often have other more specific powers such as the power to issue shares under section 161 of the Act, provided that the directors have obtained a specific or general mandate to do so. Such powers must be exercised for proper purposes. Even if directors have acted in good faith in what they believe is in the best interests of the company, they may have exercised certain powers in an improper manner. For example, it has been held that, where the power to issue shares was used to facilitate a takeover bid for a company, that was not a proper exercise of such a power even though the directors felt that they were acting in the company´s best interests - see Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821.

F. Effect of Breach of Fiduciary Duties

16.3.9 If a director places his own interests above those of the company, the director will be liable for any loss caused to the company. If the director has profited from his position without the informed consent of the company, the director may have to account for the profits to the company. Where the director has contracted with the company, e.g. 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.

SECTION 4 ENFORCEMENT OF CORPORATE RIGHTS

A. The `Proper Plaintiff´ Rule

16.4.1 As a company has a personality separate from that of its members, a member of the company cannot sue to enforce rights that belong to the company. This is known as the `proper plaintiff´ rule, namely, that the company is the proper plaintiff in respect of any rights that it has - see Foss v Harbottle (1843) 2 Hare 461; Ng Heng Liat v Kiyue Co Ltd [2003] 4 SLR 218. Where a company has rights to be enforced, or is being sued, the usual body that is empowered to decide whether the company should either bring an action or defend the claim is the board of directors in whom the power of management is usually vested.

B. Derivative Actions

16.4.2 Notwithstanding the proper plaintiff rule, there may be occasions where a member of the company is entitled to bring an action on behalf of the company. Where a member does this, the action is referred to as a derivative action as the right is derived from the company. The member is not suing to enforce any rights that belong to him personally. In such actions, the company is included as a nominal defendant so that any decision of the court will bind the company as well.

1. The need for derivative actions to counter illegitimate abuse of power

16.4.3 A member may bring a derivative action at common law in respect of a wrong done to the company where the wrongdoer is the person who has control of the company and is in a position, or has used such control, to prevent a proper action from being brought against him. The wrong done may have arisen because the person in control of the company has appropriated the company´s assets for himself, or it may consist of an abuse of the powers vested in the wrongdoers, e.g. where the majority shareholders attempt to use their voting power in an illegitimate manner. In such a situation, the wrongdoers would use their control of the company to prevent a claim from being brought against themselves. Accordingly, a member will be allowed to institute a derivative action against the wrongdoers if the member is bringing the claim bona fide for the benefit of the company in circumstances where there is no other remedy available. If the action is being brought for an ulterior motive or in bad faith, the court is entitled to take that into account in determining if it is in the best interests of the company that the action should proceed – see Sinwa SS (HK) Co Ltd v Morten Innhaug [2010] 4 SLR 1.

Statutory Derivative Action

1. Statute empowers certain individuals to institute derivative actions

16.4.4 In addition to the common law derivative action discussed above, sections 216A and 216B of the Act make provision for a statutory derivative action. This action is potentially available to any member of a company, the Minister of Finance (in certain cases), or any other person who in the discretion of the court is a proper person to make an application under the section. Such persons are potential complainants under sections 216A and 216B.

2. Statutory derivative actions require the company to pay reasonable legal fees incurred by the complainant

16.4.5 Section 216A(2) of the Act provides that a complainant may apply to the court for leave to bring an action or arbitration in the name and on behalf of the company or intervene in an action or arbitration to which the company is a party for the purpose of prosecuting, defending or discontinuing the action or arbitration on behalf of the company. The court will only grant leave if the court is satisfied under section 216A(3) of the Act that the complainant has given 14 days´ notice to the directors of the company of the complainant´s intention to apply for leave; the complainant is acting in good faith; and it appears to be prima facie in the interests of the company that the action or arbitration be brought, prosecuted, defended or discontinued. One advantage of the statutory derivative action is that if the court authorizes the bringing of the action or arbitration, it can order the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action. Under the common law derivative action, the risk of legal costs falls on the person bringing the action.

16.4.6 Section 216B(1) states that an application under section 216A shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the members of the company However, evidence of approval by the members may be taken into account by the court in making an order under section 216A.

SECTION 5 SHAREHOLDER REMEDIES

A. The Oppression Remedy

1. Section 216 allows certain individuals to seek recourse if they are being oppressed

16.5.1 In addition to the ability to bring a common law or statutory derivative action to protect the legitimate interests of the company, there are two other important remedies open to shareholders who feel that their interests are being prejudiced. The first arises under section 216 of the Act. Section 216(1) provides that any member or holder of a debenture of the company, or the Minister of Finance in certain cases, may apply to the court for an order that the affairs of the company are being conducted in a manner oppressive to one or more of the members or holders of debentures, or in disregard of their interests as members, shareholders or holders of debentures of the company. A similar application may be made if an act of the company has been done or is threatened which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures. Section 216 is commonly referred to as the `oppression remedy´.

2. The Court will make orders as it thinks fit to remedy the matters complained of

16.5.2 Where such an application is made, and the court after hearing the evidence is satisfied that the complaint is a valid one, the court may, with a view to bringing an end or remedying the matters complained of, make such order as it thinks fit. Such orders may include directing or prohibiting any act or canceling or varying any transaction or resolution; regulating the conduct of the affairs of the company in future; authorizing civil proceedings to be brought in the name of the company; providing for the purchase of the shares and debentures of the company by other members or holders of debentures or the company itself; or even winding up the company.

3. Courts are only concerned that there should be standards of fair dealing in place, not whether the company is well-managed

16.5.3 Section 216 of the Act is intended to provide relief to members or holders of debentures where those in control of the company exhibit conduct that is equivalent to abuse or wrongdoing *vis-à-vis* such members and holders of debentures. The courts are not concerned whether a company is well managed. Business decisions are for the board to make and the courts will not generally second guess business decisions. Nor are the courts concerned that a member or some members are frequently outvoted. It is part and parcel of corporate administration that decisions are taken by the majority. What the courts are concerned with is whether the affairs of the company are being run by those in control in such a way that there is a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder (or debenture holder) is entitled to expect - see Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227. This may arise where key shareholders are excluded from management; where shareholders are deprived of information about the company; where the dominant members are clearly preferring their own interests; and where the patriarch of a family company behaves in an autocratic manner, just to give some common examples.

16.5.4 Similarly, section 216 of the Act should not be invoked where the essence of the complaint is that a wrong has been done to the company. In such instances, the more appropriate route is for the plaintiff to apply for leave to commence a derivative action against the wrongdoers. Having said this, Singapore courts recognize that the distinction between a personal wrong to which section 216 applies, and a corporate wrong to which the proper remedy should be a derivative action, is not always clear. Wrongful acts committed against a company may amount to a personal wrong against minority shareholders insofar as such acts can have an adverse effect on the company's assets and the value of the shares in the company. As such, it is suggested that one key question is whether the plaintiff seeks relief from misconduct (in which case a derivative action should be commenced) or the misconduct is evidence on which the plaintiff asserts that he has been oppressed as a member or debenture holder – see Ng Kek Wee v Sim City Technology Ltd [2014] 4 SLR 723.

B. Winding Up on the Just and Equitable Ground

16.5.5 Under section 254(1)(i) of the Act, the court may wind up a company where it is just and equitable to do so. This is also an important remedy for shareholders as it provides a means for disgruntled shareholders to use the winding up process to disengage from a company.

16.5.6 The just and equitable ground for winding up has been used in a number of different circumstances. For example, where the main object of the company cannot be achieved or has been departed from, aggrieved members of the company may petition for the company to be wound up. Similarly, a company may be wound up if it engages in acts that are entirely outside of what can fairly be regarded as having been within the general contemplation and understanding of the members when they became members of the company. Another situation where the just and equitable ground has been used is where the company´s business has been carried on in a fraudulent manner. In addition, where the company is a quasi-partnership, in that the way the business is run resembles how a partnership is managed despite the use of the corporate form, and further, trust and confidence among the members has been irretrievably damaged, the court may order the winding up of the company since the members can no longer work with one another.

16.5.7 Section 254(2A) states that instead of making a winding up order, the Court has the discretion, if it is of the opinion that it is just and equitable to do so, to make an order for the shares of one or more members to be purchased by the company or other members on terms to the satisfaction of the Court.

SECTION 6 SHARES

1. Definition of a share

16.6.1 A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders between themselves in accordance with section 39(1) of the Act - see Borland´s Trustee v Steel Brothers & Co Ltd [1901] 1 Ch 279.

2. Rights and liabilities of shareholders

16.6.2 As mentioned earlier, the liability of a member/shareholder is to contribute to the company only that amount unpaid on the shares taken up by the member/shareholder. This is what is meant by limited liability. A shareholder is entitled to participate in the life of the company on the terms set out in the company´s constitution and to the extent allowed by the Act. These will often determine the exact rights of the shareholder. Some of the usual rights of shareholders include being entitled to a pro-rata share of any dividends that are declared and paid; having a pro-rata share of any assets

remaining upon a winding up after the creditors of the company have been paid; and having the power to appoint and remove the directors of the company.

3. Types of shares

16.6.3 Generally speaking, there are two broad classes of shares - ordinary shares and preference shares. Preference shares, as the name suggests, are shares that confer some preference on the holders of those shares. That preference may be in the form of dividends or return of capital. For example, the terms of a preferential share may provide that the holders of those shares are entitled to a particular rate of dividend before any dividends may be paid to holders of ordinary shares.

A. Maintenance of Capital

1. Capital must be maintained and not returned to company members

16.6.4 As a general rule, though this is now subject to many exceptions, a company under Singapore law is required to maintain its capital in the sense that it cannot return capital to its members. This general rule is intended to protect creditors. Creditors of a company are said to give credit to the company on the faith that the capital of the company will be applied only for the purposes of the business and therefore have a right to insist that such capital be kept and not returned to the shareholders - see Re Exchange Banking Co (1882) 21 Ch D 519.

2. Rules that the company must adhere to

16.6.5 Arising from this general principle, the following 5 propositions may be made:

i. a company may not purchase its own shares or those of its parent company – see section 76(1A)(a) of the Act;
ii. a company may not lend money on the security of its own shares or those of its parent company - see section 76(1A)(b) of the Act;
iii. a public company cannot give financial assistance to a third party to purchase the company's shares or those of its parent company – see section 76(1) of the Act;
iv. a company cannot pay dividends except out of available profits – section 403 of the Act;
v. a company cannot reduce its capital or otherwise return assets to its members, except to the extent the Act permits this – see section 78A of the Act.

3. Only profits can be returned to company members

16.6.6 This is not to say that members of a company cannot obtain any return on their investment. Indeed, if a company makes profits in a particular year, the company may pay dividends to its shareholders out of the profits made. The rules relating to capital maintenance also do not mean that members of the company must contribute to the company when trading losses have occurred which have depleted the company´s capital. A member´s liability to the company is limited only to the amount he has agreed to contribute to the company when the shares are issued to him. The rules relating to capital maintenance simply mean that, absent profits, a company must not take any steps that in effect return capital to its shareholders.

4. A company may purchase its own shares under certain circumstances

16.6.7 One of the exceptions now permitted by the Act is that a company may, in certain circumstances purchase or otherwise acquire its own shares if it is expressly permitted to do so by its constitution – see section 76B(1) of the Act. Generally, it will be necessary to convene a general meeting of shareholders to pass a resolution – in some instances a

special resolution – allowing the company to buy back its shares. Pursuant to section 76B(3) of the Act, the total amount of shares that can be bought during the relevant period shall not exceed 20% (or such other percentage as the Minister may prescribe) of the total number of shares of the type of shares being purchased. This limitation does not apply to redeemable preference shares – see section 76B(3D) of the Act. The relevant period is defined in section 76B(4) as the period commencing from the shareholders' resolution authorizing the purchase and expiring on the date when the company next has to hold its Annual General Meeting or the date of the next Annual General Meeting whichever is the earlier. Payment for share buy-backs may be made out of the company's capital or profits so long as the company is solvent – see section 76F(1) of the Act. This ensures that creditors are not prejudiced. In addition, directors and the Chief Executive Officer of a company should not authorize any buy-backs if they know that the company is not solvent – see section 76F(3) of the Act. Where a company purchases its ordinary shares, it may keep them as Treasury shares provided the amount held by the company does not exceed 10% of the class of shares in question – see sections 76H and 76I of the Act.

B. Reduction of Capital

16.6.8 Notwithstanding the capital maintenance rules, the Act permits a reduction of capital in certain circumstances. Sections 78A(1) and (3) of the Act provide that a company may, unless its constitution excludes or restricts it, reduce its share capital in any way and, in particular, do all or any of the following:

1. extinguish or reduce the liability on any of its shares in respect of share capital not paid up;
2. cancel any paid-up capital which is lost or unrepresented by available assets;
3. pay off any paid-up share capital which is in excess of the needs of the company.

16.6.9 Any reduction of capital must be authorized by a special resolution and the company must in general meet solvency requirements – see sections 78B and 78C of the Act. Creditors may pursuant to section 78D of the Act object to the reduction and if there are any such objections the court will cancel the reduction if the court is satisfied that the creditors' claims have not been secured or they are insufficient safeguards for such claims, and it is not the case that such security or safeguards are unnecessary – see section 78F of the Act. If there are no objections from creditors the share reduction will take effect upon certain formalities being complied with and no order of court is required – see section 78E(1) and (2) of the Act.

16.6.10 A reduction of capital is also possible by way of special resolution subject to court approval. In such cases the capital reduction does not take effect until it receives approval by an order of court – see section 78G of the Act.

SECTION 7 DEBENTURES AND CHARGES

A. Definition of a Debenture and its Terms

16.7.1 A company will frequently have to borrow money for its business operations. Often when it does so, a document known as a debenture will be created. Simply put, a debenture is a document that either creates a debt or acknowledges it - see Levy v Abercorris Slate and Slab Co (1887) 37 Ch D 260.

16.7.2 When a company borrows money, it will often give security to its creditor for the loan. Where a debtor gives security to a creditor, the creditor obtains a proprietary interest in the property of the debtor over which security has been granted. This proprietary interest in those assets allows the creditor to have priority to those assets ahead of ordinary creditors of the debtor should the debtor not be able to pay its debts. One common form of security that companies provide

to its creditors is a charge over its assets. The debenture that creates or acknowledges the debt will frequently also contain the terms of the charge that is created.

B. Definition of a Charge and its Terms

16.7.3 A charge is a non-possessory form of security, i.e. the validity and efficacy of the security is not dependent on the secured creditor having possession of the security given. For example, a company that needs to use the machinery in its factory can still grant security by way of a charge over such machinery to the bank that has provided the financing to purchase the machinery. The bank need not take possession of the machinery for the charge to be effective. Being non-possessory in nature, the charge can also be taken over intangible assets such as shares and book debts.

16.7.4 A charge arises where, in a transaction for value, the company and its creditor show an intention that property, existing or future, will be made available as security for the payment of a debt, and that the creditor shall have a present right to have such property made available as security even though the present legal right can only be enforced at a future time, usually when there is a default - see National Provincial and Union Bank of England v Charnley [1924] 1 KB 431 at pp 449-450.

1. Fixed and floating charges

16.7.5 Company charges may be fixed or floating. A fixed charge is one that attaches to specified assets that are presently owned by the chargor or that may be acquired in the future, e.g. a company may grant a fixed charge over all the machinery presently in its factory and any machinery subsequently acquired for the factory. As the fixed charge immediately attaches to the specified assets, either at the creation of the charge or upon later acquisition, the company cannot dispose of the charged assets to a third party. If the company does so, this is a breach of the terms of the charge and the third party will not obtain good title to the assets, unless the third party has provided value for the purchase and did not know of the existence of the fixed charge.

16.7.6 A floating charge on the other hand is a security interest that does not, at its inception, specifically attach to any assets of the chargor company. The charge is said to `float´ over the assets in question until some act occurs which causes the charge to attach to the assets. From that time, the charge effectively becomes a fixed charge. The acts which cause the floating charge to crystallize, i.e. to attach to the assets, may be contractually provided for in the debenture. Thus, the parties may provide that in certain circumstances the floating charge will automatically crystallize without the parties having to do anything else, or that in certain circumstances the chargee may give notice of crystallization to the company thereby causing the charge to crystallize. Floating charges may also crystallize in other ways, e.g. if the company goes into liquidation or if it ceases to be a going concern.

16.7.7 The advantage of floating charges is that they can be taken over assets which, as a class, are constantly changing. For example, where the assets of a company largely comprise perishable goods or raw materials, it is impractical to obtain a fixed charge because the goods have to be sold within a relatively short period or are intended to be used in the manufacturing process. If a fixed charge over such assets is created, it will be extremely inconvenient for the company to have to obtain the permission of the chargee each time the company wishes to sell its goods or consume its raw materials. A floating charge will enable the chargor company to sell or otherwise use such assets, and it is only when the charge crystallizes that the power to deal with the assets comes to an end. On the other hand, when the assets are not intended to be dealt with in the ordinary course of business, such as in the case of machinery or a parent company´s shares in its subsidiary, a fixed charge would be more appropriate.

2. Registration of charges

16.7.8 Under section 131 of the Act, certain charges created by companies have to be registered with the public authority responsible for corporations. Failure to do so will render the charge void against the liquidator or other secured creditors of the company. As a chargee will often wish to enforce a charge when the company is insolvent, this provides an incentive to chargees to ensure that any charge created in their favour is registered within the 30 day period after the creation of the charge as required by section 131(1) of the Act. Where a charge has not been registered within the 30 day period, it may be possible to obtain an extension of time under section 137 of the Act, e.g. if the omission to register was accidental or does not prejudice the position of creditors or members of the company.

16.7.9 Under section 131(3)(g) of the Act, all floating charges must be registered. As for fixed charges, only those that fall within those charges described in section 131(3) of the Act require registration.

SECTION 8 COMPANIES IN DISTRESS

A. Schemes of Arrangement

16.8.1 There may be occasions where it is desirable to rearrange the rights of the company, its creditors, and shareholders, particularly where the company is in a financially perilous position. On such occasions, it may be difficult to obtain the unanimous consent of all creditors and shareholders. Accordingly, section 210 of the Act provides for schemes of arrangement to be binding on the company, its creditors, and shareholders (as the case may be) where the requisite majority is obtained, subject to approval by the court. Schemes of arrangement are most often used where it is desirable to compromise creditors´ claims against an insolvent company.

1. Application for a scheme of arrangement and the requisite documents

16.8.2 For a scheme of arrangement to take effect, it will be necessary first of all to make an application to court under section 210(1) of the Act for an order summoning one or more meetings of the creditors, members of the company, or holders of units of shares of the company. If the court is minded to make such an order, a proposal must then be tabled before the relevant meetings and approved by the requisite majority (unless the court orders otherwise) of the creditors or class of creditors, members or class of members, or the holders of units of shares or class of holders of units of shares. The default majority required is such numbers as amounts to three-fourths in value of the class in question present and voting either in person or by proxy – see section 210(3AB) of the Act. To allow the relevant parties to exercise their votes in an informed manner, section 211(1) of the Act states that every notice summoning the meeting must contain a statement explaining the effect of the compromise or arrangement and, in particular, stating any material interests of the directors and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons. If this is not done and the creditors and members do not have sufficient information on which to make an informed decision, the court may later decline to approve the scheme even though it may have been approved by the requisite majority - see Re Dorman, Long & Co [1934] Ch 635; Wah Yuen Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd [2003] 3 SLR 629.

2. The Court may make such alterations as it thinks are just

16.8.3 Any scheme will be binding only if the court approves it and such approval may be subject to such alterations or conditions as the court thinks just - see section 210(4). The requirement of the court's approval serves as an additional crucial check to ensure the integrity of voting outcome(s) at the scheme creditors' meeting(s) and the objective fairness of the proposed scheme – see The Royal Bank of Scotland NV v TT International Ltd [2012] 2 SLR 213; Re Dorman, Long & Co [1934] Ch 635.

B. Judicial Management

16.8.4 Where a company is in financial difficulty but there is a reasonable prospect of rehabilitating the company or of preserving all or part of the business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding up, the company or its creditors may apply to court for an order that the company be placed under the judicial management of a person known as a judicial manager - see section 227A of the Act.

1. The order must satisfy several conditions

16.8.5 Upon such an application by the company, its directors or creditors, section 227B(1) of the Act provides that the court may make a judicial management order if the court is satisfied that the company is or will be unable to pay its debts. Additionally, the court must be satisfied that the order if made would be likely to achieve one or more of the following purposes, namely:

i. the survival of the company, or the whole or part of its undertaking as a going concern;
ii. the approval under section 210 of the Act of a compromise or arrangement between the company and any such persons as are mentioned in that section;
iii. the more advantageous realization of the company´s assets than would occur in a winding up.

2. Motives for the application must be honourable and without ill-intent

16.8.6 The court must be vigilant to ensure that the judicial management procedure is not directly or indirectly used by the directors and shareholders of the company to the detriment of creditors. The motives of the application should therefore be clearly honourable. The court must also show great heed to the wishes and views of creditors since the assets of an insolvent company in effect belong to creditors - see Re Genesis Technologies International Pte Ltd [1994] 3 SLR 390 at p 392. The court is obliged to dismiss an application for a judicial management order, however, if the making of such an order is opposed by a debenture holder of debentures secured by a floating charge - see sections 227B(4) and (5) of the Act.

3. Role of the judicial manager

16.8.7 If the court makes an order for judicial management, the business and property of the company will be managed by a judicial manager - see section 227B(2). As the role of the judicial manager is to rehabilitate the company or to preserve part or all of its business as a going concern, section 227G(1) of the Act provides that, on the making of a judicial management order, the judicial manager shall take into his custody or control all the property to which the company is or appears to be entitled. Section 227G(2) goes on to state that, during the period for which the order is in force, all the powers and duties of the directors shall be exercised and performed by the judicial manager and not by the directors. The judicial manager may do all such things as are necessary for the management of the affairs of the company and shall do all such things as the court may sanction - see section 227G(3) of the Act.

4. Benefits of judicial management vis-à-vis premature liquidation

16.8.8 The benefit of judicial management is that it allows a company that is not hopelessly insolvent some breathing space to reorganize its affairs. If this can be done successfully, this will benefit all creditors and members of the company. The alternative may be a forced and premature liquidation that is not in the interests of most creditors and members. Accordingly, when a judicial management order is made, section 227D(1) provides that any receiver or receiver and manager shall vacate office and any petition for the winding up of the company shall be dismissed. Section 227D(4) goes

on to state *inter alia* that no other proceedings and no execution or other legal process shall be commenced against the company or its property, except with the consent of the judicial manager or with leave of the court and no steps shall be taken to enforce security over the company´s property or to repossess any goods except with the consent of the judicial manager or with leave of the court.

5. Duration of a judicial management order

16.8.9 Under section 227B(8) of the Act, a judicial management order will be discharged after 180 days unless extended by the court. The judicial management order may also be discharged under section 227N(4) of the Act if the creditors decline to approve the judicial manager´s proposals; if under section 227Q(1) of the Act it appears on the application of the judicial manager that the purposes specified in the judicial management order cannot be achieved; or if under section 227R of the Act the judicial manager has acted or will act in a manner that would be unfairly prejudicial to the interests of creditors or members of the company.

6. Removal of a judicial manage

16.8.10 Just as the judicial manager is appointed by an order of court, so too the judicial manager may at any time be removed from office by the court, and may also with the leave of the court resign by giving notice of resignation to the court - see section 227J(1) of the Act.

SECTION 9 WINDING UP

16.9.1 Despite the best of efforts, an insolvent company may not be able to overcome its difficulties. In such circumstances, the company may be dissolved to enable its assets to be liquidated so that its creditors may be repaid part of what is owing to them. This process by which a company is dissolved is known as winding up or liquidation. A healthy company may also be wound up if its members no longer wish the business to continue. When a company is wound up, its assets or the proceeds thereto will be used to pay off creditors after which the balance, if any, is distributed pro rata amongst shareholders.

A. Voluntary Winding Up

16.9.2 There are two forms of liquidation, namely voluntary winding up and compulsory winding up by the court. A voluntary winding up usually occurs where the company resolves to do so by a special resolution - see section 290(1)(b) of the Act. In a voluntary winding up, the directors of the company may make a statement pursuant to section 293(1) of the Act that the directors of the company are of the view that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up. If the directors do so, the winding up will proceed as a members´ voluntary winding up. In such circumstances, the shareholders will appoint the liquidator - see section 294(1) of the Act. If the directors do not make such a statement, it will be a creditors´ voluntary winding up, in which case the directors must call a meeting of creditors in order to appoint the liquidator - see Re Sin Teck Hong Oil Mills Ltd [1950] MLJ 232.

16.9.3 A members´ voluntary winding up may be converted into a creditors´ voluntary winding up if the liquidator appointed by the members forms the opinion that the company will not be able to pay its debts in full within the period stated in the declaration made under section 293(1) of the Act. The liquidator will then have to summon a meeting of creditors and lay before them a statement of the assets and liabilities of the company - see section 295(1) of the Act. The creditors may then, pursuant to section 295(2) of the Act, appoint some other person to be the liquidator for the purpose of the winding up of the company.

B. Winding Up by the Court

16.9.4 A company may also be compulsorily wound up by an order of court. Under section 253(1) of the Act, an application to the court to wind up the company may be presented by

i. the company itself;
ii. a creditor;
iii. a contributory, the personal representative of a deceased contributory or the Official Assignee of the estate of a bankrupt contributory; the liquidator of the company;
iv. a judicial manager;
v. the Minister on specified grounds;
vi. the Monetary Authority of Singapore in relation to a company engaged in the business of banking.

16.9.5 When such an application is made, the court pursuant to section 254(1) of the Act may order the winding up of the company in certain circumstances, the more important of which are the following:

i. the company has by special resolution resolved that it be wound up by the court;
ii. the company does not commence business within a year from its incorporation or suspends its business for a whole year;
iii. the company is unable to pay its debts;
iv. 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;
v. the court is of opinion that it is just and equitable that the company be wound up;
vi. the company has carried on multi-level marketing or pyramid selling in contravention of any written law that prohibits such activities;
vii. 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.

16.9.6 Of the above circumstances, by far the ground most relied upon is that the company is unable to pay its debts. Section 254(2)(a) of the Act provides that a company shall be deemed unable to pay its debts if a creditor has served on the company a statutory demand for a sum exceeding S$10,000 and the company has, for 3 weeks thereafter, neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor. A company shall also be presumed unable to pay its debts if execution or other process issued on a judgment or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part - see section 254(2)(b) of the Act. It is also open to creditors of a company to substantively prove to the satisfaction of the court that the company is unable to pay its debts and, in such cases, the court can take into account the contingent and prospective liabilities of the company - see section 254(2)(c) of the Act.

C. Effect of Commencement of Winding Up

16.9.7 When winding up commences, the company moves into a different phase, one that is not concerned with the business as a going concern but with the winding down of the enterprise. At the same time, the interests of creditors become more important as creditors have priority over members to the residual assets of the company. As such, a number of consequences arise, some of which will be summarized here. First, though, it is necessary to determine when winding up commences as many of the consequences begin from the date of the commencement of winding up. In the case of a voluntary winding up, the winding up is generally deemed to have commenced at the time of the passing of the resolution for voluntary winding up. However, where a provisional liquidator has been appointed before any such resolution was passed, a voluntary winding up commences at the time when the directors of the company filed the declaration under

section 291(1) of the Act of the company´s inability to continue its business by reason of its liabilities - see section 291(6) of the Act.

1. The effective date of winding up when the court winds up a company

16.9.8 Under section 255(1) of the Act, where a resolution for voluntary winding up has been passed, but the company is subsequently wound up by the court, the winding up is still regarded as having commenced from the time of the passing of the resolution. Section 255(2) of the Act provides that in all other cases where the company is wound up by the court, the winding up is deemed to have commenced at the time of the making of the application for the winding up.

16.9.9 In a voluntary winding up (whether members´ or creditors´), section 292(1) of the Act provides that the company shall, from the commencement of the winding up cease to carry on its business, except so far as in the opinion of the liquidator is required for the beneficial winding up thereof. Where the company is wound up by the court, the liquidator may under section 272(1) of the Act carry on the business of the company for 4 weeks after the date of the winding up order. Thereafter, the liquidator must obtain the consent of the court or the committee of inspection to continue with the business of the company. On the appointment of a liquidator in a voluntary winding up, the powers of the directors generally cease - see sections 294(2) and 297(4) of the Act. This is also the case with a winding up by the court.

2. Disposition of property, transfer of shares, and alteration in members' status are invalid after winding up date

16.9.10 Pursuant to section 259 of the Act, any disposition of the property of the company, any transfer of shares or alteration in the status of members made after the commencement of winding up by the court shall be void unless the court otherwise orders. There is no equivalent provision in the case of a voluntary winding up. Where judgment creditors have not completed execution against the company before the commencement of winding up (whether the winding up is by the court or voluntary), they may not retain the benefit of their execution as against the liquidator - see section 334(1) of the Act. This is because in a liquidation the assets of the company should be distributed pro rata to all creditors of the company in the first instance. Similarly, after the commencement of winding up by the court or a creditors´ voluntary winding up, any attachment, sequestration, distress or execution put in force shall be void - see sections 260 and 299(1) of the Act.

3. Application to stay proceedings between the petition and a winding up order

16.9.11 In the case of winding up by the court, at any time after making of the winding up application and before a winding up order has been made, the company or any creditor or contributory may apply to the court to stay any proceedings pending against the company - see section 258 of the Act. When a winding up order has been made or a provisional liquidator has been appointed, no action may be started against the company or proceeded with except with the leave of the court - see section 262(3) of the Act. Similarly, in the case of voluntary winding up, section 299(2) of the Act states that, after the commencement of winding up, no action shall be commenced or proceeded with against the company except by leave of the court.

D. Recovery of Company´s Property

1. Difficulties of the liquidator when property has been improperly transferred to third parties

16.9.12 In a winding up, one of the principal roles of the liquidator is to get in the company´s property so that it can be realized and the proceeds distributed to creditors with any balance going to the members. In most cases, this is a straightforward process. However, there may be circumstances where the company´s property has been improperly transferred to third parties and the liquidator must attempt to recover such property. Two common instances involve undue preferences and transactions that have taken place at an undervalue.

2. The Court may avoid the transaction in situations of undue preferences and transactions at an undervalue

16.9.13 Section 329 of the Act prohibits undue preferences and transactions at an undervalue by reference to various provisions in the Bankruptcy Act (Cap. 20, 2009 Rev Ed). Generally speaking, a transfer of property in the context of a company amounts to an undue preference under section 99(3) of the Bankruptcy Act if it was made to a creditor of the company and puts the creditor in a better position than he would otherwise have been in the winding up of the company. In addition, the company must have been influenced, in deciding to give the preference, by a desire to produce the effect of placing that person in such a better position - see section 99(4) of the Bankruptcy Act - and the transfer took place at the relevant time. The relevant time in the case of winding up by the court where the person said to have been preferred is an associate of the company (e.g. a person in control of a company is an associate of the company), is that the transaction must have taken place within two years of the date of the making of the winding up application, or where before the making of the winding up application a resolution has been passed by the company for voluntary winding up, the date upon which the resolution to wind up the company voluntarily was passed, whichever is the earlier. In the case of a voluntary winding up the transaction must have taken place within two years of the date upon which the winding up is deemed by the Act to have commenced. In cases that do not involve associates, the relevant period is six months - see section 100 of the Bankruptcy Act read with section 329(2) of the Act. Where the liquidator has established that an act constitutes an undue preference, the court may avoid the transaction and allow the liquidator to recover the property transferred.

16.9.14 A transaction entered into by a company with a third party at an undervalue may also be set aside by the court. Such a transaction arises where:

(i) 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
(ii) 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 – see section 98(3) of the Bankruptcy Act.

16.9.15 The relevant period for transactions at an undervalue is five years - see section 100(1) of the Bankruptcy Act. In addition, it must also be shown – and this is also the case for undue preferences – that, at the time the transaction took place, the company was insolvent or became insolvent as a consequence of the transaction or preference - see section 100(2) of the Bankruptcy Act.