

### Business Models

Sole Trader	Exclusive owner of business  Not separate legal entity	Can start trading immediately	Unlimited personal liability
		No setup costs/formalities	Contracts formed between sole trader and third parties
		Can keep all profits	
		Full control over decision making	
		Complete privacy; no disclosure requirements	
Partnership	2 or more persons own business and share profits  Not separate legal entity	Can start trading immediately	Unlimited personal liability
		No setup costs/formalities	Contracts formed between partners and third parties
		Full control over decision making	A partnership agreement will be required otherwise the Partnership Act 1890 will apply in default
		Complete privacy; no disclosure requirements	
LLP	2 or more persons carrying on a business  Separate legal entity	All partners have limited liability	Set-up costs and formalities: LLP must be registered at CH
		Partnership enters contracts with third parties	Must file annual accounts  Disclosure obligations
		Flexible management procedures	A members' agreement will be required otherwise the provisions of the Limited Liability Partnership Regulations 2001 will apply in default
Private Limited Company	Separate legal entity distinct from its owners	Limited liability: shareholders only liable to pay any amount unpaid on their shares	Set-up costs and formalities: Company must be registered at CH
		Min. of 1 person required to incorporate a company	Extensive disclosure obligations  CA 2006 imposes strict requirements on how companies are run
		Easier to raise finance	



### Partnerships

Persons carrying on a business in common with view to profit

Governed by PA 1980 if no partnership agreement

PA 1980:

Partners will share equally in profits & losses even where unequal contributions to capital;

Not entitled to salary;

Decisions decided by majority;

Partner cannot be expelled by majority vote

### Limited Partnerships

Limited partners	'Sleeping partners' Not involved in management
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General partners	Run business Unlimited liability
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Must be at least 1 limited & 1 general partner

Must register at CH but do not need to file accounts

### Who's Who

Shareholders	Owners who invest money Not involved in management Voting rights Control key decisions Membership begins when name entered into company's register of members Need not be a human being
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Subscribers	1st shareholders
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Directors	Officers/managers The Board Owes duty to company Agent of company Every company must have at least 1 director who is natural person Must be at least 16 years old
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PSCs	Shareholders with over 25% of shares Details to be provided to CH
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Other stakeholders	E.g. employees, creditors
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### Incorporation of a Company

How?	From scratch	Purchase shelf company
Requirements	Memorandum; articles; fee; form IN01	Change name, articles, registered office, members, directors and secretary details
Post-approval	Certificate of incorporation with name, registered company number and date of incorporation	Already approved as shelf
Legal Entity	From date of incorporation	Already legal entity from existing date of incorporation

### Pre-Incorporation Contracts

Pre-incorporation contract enforceable as personal contracts against persons purporting to act on company's behalf ('promoters')

Promoters bear personal liability, unless there was express agreement that signatory would not be personally bound by contract

Company cannot ratify contract before it came into existence

Company can obtain benefit of contract made on its behalf pre-incorporation by novating it (replacing with new contract)

### Shares - Terminology

Share 'bundle of rights' and 'personal property' carrying legal and beneficial interests

Nominal/par value Minimum subscription price for that share

Represents a unit of ownership rather than actual value of the share

Share cannot be allotted/issued at discount to nominal

May be issued for more than nominal (the excess over nominal = the 'premium')

Market value of share often higher than nominal value

Issued share capital Total amount in value (nominal & premium) of all shares in issue at any time  
Amount of share capital shown in company accounts

Paid-up share capital Amount paid by shareholders out of the full amount due on their shares

Called-up share capital Amount of outstanding value due on shares which has been demanded by the company



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### Shares - Terminology (cont)

Share capital	Made up of subscriber shares and further shares issues after incorporation to new/existing shareholders
Allotted Shares	Shares are allotted when person acquires unconditional right to be included in register of members in respect of those shares Confers equitable title only; does not entitle any rights attached
Limited liability	Total nominal value of shares held by shareholder is equal to total amount of shareholder's liability to contribute to assets of company if it becomes insolvent  If shareholder's shares are fully paid, will not have to contribute any further amount on insolvency
Capital	Funds available to run business of a company
Share transfer	Person acquires shares by way of transfer from existing shareholder
Transmission	Where titles to shares devolved other than by transfer (e.g. death, bankruptcy or marriage)
Issued Shares	Shares issued when shareholder has been registered in register of members and title has become complete

### Shareholder Resolutions

Some decisions require shareholder authorisation	E.g. making changes to constitution; approval of certain transactions; formal declaration of dividends
2 types of resolution	Ordinary: more than 50% Special: 75% or more
Voting by show of hands:	1 vote per person present at GM
Voting by poll:	1 vote per share held by that person present at GM
Voting by written resolution:	Votes counted out of all shareholders entitled to a vote  Must be sent to all eligible members  Time limit of 28 days to respond  Removal of director/auditor cannot be passed by written resolution



### Shareholder Resolutions (cont)

The "Duomatic" principle	Informal resolutions agreed by all shareholders outside of formal meeting, whether express/implied, by verbal/conduct, will be valid and binding
Right to demand a poll	Can be demanded any time before the vote is held  Can be demanded by: chairman; directors; 2 or more persons with right to vote; person(s) with no less than 10% of total voting rights
Right to demand a proxy	Every member entitled to appoint another to exercise all/any of their rights to attend, speak and vote at GM in their place
Quorum	2 qualifying persons (unless it is single member company)

### Authority

Express actual authority	Authority has actually been conferred on that person by the principle
Implied actual authority	Arises from appointment to specific role or from course of dealing where board have previously agreed or agreed without protest
Statutory deemed authority	Third parties dealing in good faith entitled to assume directors' powers are free of constitutional limitations  Threshold to prove bad faith = high (good faith is presumed)  Protects third parties, not directors Company can sue director and recover compensation in CEL caused Director may be disqualified
Ostensible/apparent authority	Authority of agent as it appears to third party  Representation must have been made by someone with actual authority and third party must have reasonably relied upon this representation



### Authority (cont)

Deemed authority under 'indoor management' rule      Outsiders are entitled to assume company's internal procedures have been complied with

Of lesser significance now, but still applies when:

- i) Third party has not dealt with Board; or
- ii) When Q of whether agent was authorised by board applies.

Does not apply when:

- i) Third party has actual notice of the irregularity or is acting in bad faith
- ii) Third party is an insider (e.g. director contracting with company)

Ratification:

Company can ratify acts beyond the actual authority of its agents provided act is within authority of the relevant organ of the company

Involves passing resolution to approve act and agree company will be bound by it

### Capacity/Authority - Summary

**Summary**

**Capacity:**  
Does the company have actual or deemed capacity?  
For CA 2006 companies the answer will be yes (s 31)  
For pre-CA 2006 companies, check the memorandum and articles to see whether the objects clause restricts the company's capacity to enter into the contract.

**Authority:**

1. Does the agent have actual authority (express or implied)?  
If yes, the contract is binding. If no:
2. Does s 40 CA 2006 remedy the defect and make the contract binding?  
If yes, the contract is binding. If no:
3. Does the agent have ostensible authority? (ie has there been a representation by someone with actual authority reasonably relied on by the third party?)  
If yes, the contract is binding. If no:
4. Does the rule in *Tzogianis's case* assist? Is reliance reasonable?  
If yes, the contract is binding. If no:
5. Has the company ratified the act?  
If yes, the contract is binding. If no, the contract is NOT binding.

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### Company Liability in Tort

Primary Liability

Vicarious Liability

### Company Liability in Crime

Company may be held liable for corporate manslaughter

Company commits offence if manner in which its activities are managed/organised by senior management causes death of person and amounts to gross breach of relevant duty of care owed to person

If guilty, company may be liable to pay fine

### Termination of Director

Resignation

May resign at any time by giving notice

Will normally be effective and doesn't need to be specifically accepted by board



### Termination of Director (cont)

Vacation	<p>Director automatically vacates office where:</p> <ul style="list-style-type: none"> <li>- prohibited from being a director;</li> <li>- bankrupt, subject to a composition order made with creditors; or</li> <li>- physically or mentally incapable for more than 3 months</li> </ul>
Removal - ordinary resolution	<p>Removed by ordinary resolution at GM</p> <p>28 clear days notice needed before GM can be held</p> <p>Director allowed to vote in capacity as shareholder on resolution to remove them</p> <p>'Bushell v Faith' clause in articles gives weighed voting rights to directors who are also shareholders to effectively block ordinary resolution to remove them</p>
Removal - disqualification	<p>Mandatory: can last between 2 to 15 years (Director abused privilege of limited liability, by gross negligence or deliberate disregard of creditors' interests)</p> <p>Discretionary: can last for up to 10/15 years depending on grounds for disqualification (Convicted of indictable offence in connection with company management/property; persistent breaches; fraud; post-investigation)</p>

### Penalties for Breach of Disqualification

Criminal offence to act in breach of disqualification order (fine/imprisonment/both) & personally liable for company debts incurred during breach of disqualification
SoS may apply to court for compensation order against disqualified director where creditors suffered loss due to director's misconduct
SoS may accept disqualification undertaking by any person that for a specified period, that person will not be a director or be involved with promotion/formation/management of a company without leave of court

### Directors' Duties

Duty to act within powers	<p>Must act within company's constitution</p> <p>Must exercise powers for proper purposes for which they are conferred</p>
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### Directors' Duties (cont)

Duty to promote success of company    Must act subjectively in good faith to promote company for benefit of its members, having regard to:

- consequences;
- employee interests;
- need to foster business relationships;
- impact on community/environment;
- reputation for high standards of business conduct;
- need to act fairly

Can exemplify these in meeting minutes

Duty to exercise independent judgement    Must make decisions of own accord and not be influenced by others

Duty not infringed by acting:

- in accordance with agreement entered into by company that restricts future exercise of discretion by directors;
- in a way authorised by company's constitution

Duty to exercise reasonable care, skill and diligence    Must be exercised according with:

- reasonably diligent person with general knowledge, skill and experience reasonably expected of person carrying out those functions; and
- general knowledge, skill and experience of the relevant director

Breach of this can claim damages only





### Directors' Duties (cont)

Duty to avoid conflicts of interest	<p>Must avoid direct/indirect interests that conflict or may conflict with company's interests</p> <p>Applies to exploitation of property, information or opportunity</p> <p>Does not apply to conflict in relation to transaction/arrangement with company</p> <p>Not infringed if situation cannot reasonably be regarded as likely to give rise to conflict, or if matter has been authorised by independent directors</p> <p>Resigned director continues to be subject to this duty</p>
Duty not to accept benefits from third parties	<p>Must not accept benefit conferred by reason of being a director or doing/not doing anything as a director</p> <p>Cannot accept bribes or benefit through dividends in another company</p>
Duty to declare interest in proposed transaction	<p>If director directly/indirectly interested in proposed transaction/arrangement with company, must declare nature/extent of interest to other directors prior to company contracting</p> <p>Disclosure need not be in writing</p>

Duties are cumulative: director cannot comply with one duty at expense of another

### Piercing the Corporate Veil

Definition	When courts go behind corporate framework and company's separate legal personality to make shareholders liable
Not piercing the veil:	<p>Statutes allow members of company to become liable in certain circumstances but this is not piercing the veil</p> <p>The single economic entity argument is not a basis for piercing the veil</p> <p>Parent companies may be liable to those dealing with their subsidiaries in tort but this is not piercing the veil</p>



### Piercing the Corporate Veil (cont)

Piercing the veil: Where company was set up as a façade/sham

Concealment principle: doesn't involve piercing the veil. Corporate structure conceals real actors; court looks behind corporate structure to discover real facts

Evasion principle: court may pierce the veil if a person deliberately attempts to evade an existing legal obligation by interposing a company which he controls

Even if there has been evasion, the court will try to find another legal remedy at all costs

Extremely rare that piercing the veil will be invoked

### Remedies for Breach of Directors' Duties

Shareholders may bring a derivative claim on behalf of company where directors have breached their duties

Any relief will be granted to company, not shareholder who brought claim

Remedial options:

- Account for profits
- Damages
- Rescission
- Injunction (to prevent directors from breaching their duties)

Relief from liability:

- Prior approval by directors
- Prior approval by shareholders
- Ratification
- Relief granted by court (where director has acted honestly, reasonable and ought fairly to be excused)

### Classes of Shares

Ordinary Most common & default

Carry right to vote, receive dividend and share of capital on winding up

Preference Entitled to have dividends paid at predetermined rate in priority to dividend paid on ordinary shares

Right to priority over ordinary shareholders when capital returned on winding up

Don't always have voting rights

Cumulative preference Arrears of preference dividends not declared in earlier years + those for current year payable before any dividend paid to ordinary shareholders



### Classes of Shares (cont)

Non-cumulative preference	Only current year's right to dividend is payable before any dividend paid to ordinary shareholders
Participating preference	Receive both fixed preferential dividend or fraction of capital on winding up + fraction of general dividend or capital in accordance with their shareholding
Non-participating preference	Receive only fixed preferential dividend or fraction of capital
Deferred	Only have right to dividend and/or return of capital after claims of preference and ordinary  Not common
Redeemable	Temporary shares which may be bought back by company at future date  Purchased and issues for short-term investments
Non-voting	Issued where company seeks to restrict control of company
Convertible	May be converted to a different type of share in issuing company according to pre-arranged formula in articles
Employees'	Issued to employees under employee's share scheme which has tax advantages  Usually issued as ordinary but with restrictions

### Class Rights & Variations

Presumption that all shares have equal rights unless express provision in articles says otherwise

Class rights can only be varied:

- in accordance with relevant provisions in articles; or
- if no provision exists, where 75% of shares of the affected class consent in writing, or a special resolution is passed at meeting of holder of the affected class

Companies may entrench class rights in articles

This protection cannot be circumvented

Variations which affect the exercise of rights rather than rights themselves are not subject to these provisions (e.g. if company issues more of that same class, even though it may dilute)

Dissenting members of class of shares have right to challenge variation

Only shareholder holding 15% or more of issued shares of that class may challenge; and

Variation must be challenged in court within 21 days of date which consent was given or resolution was passed to vary class rights



### Shareholders Reserve Powers

Shareholder may direct directors to take, or refrain from taking, specified action by special resolution

No such special resolution invalidates anything which directors have done before passing of resolution

Shareholders may act where board is unable to do so

### Protection for Shareholders

Limit on company's authorised share capital	Articles may limit amount of share capital company may issue, though relatively rare, to protect shareholders from dilution
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Limit on power of directors to issue new shares	Directors require authorisation of shareholders to issue shares in most cases
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Pre-emption rights	<p>Rights of first refusal when company issues new shares</p> <p>Rights apply where shares to be issued are 'ordinary shares'</p> <p>May be disapplied by special resolution, but uncommon</p> <p>Generally no right on transfer of shares</p>
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Class rights	Shares issued with various different rights
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### Minority Shareholders: Unfair Prejudice

Member may apply to court by petition for an order on ground that:	<p>a) Company's affairs are being or have been conducted in a manner which is unfairly prejudicial to interests of its members generally or of some part of members (incl. himself), or</p> <p>b) any actual/proposed act/omission of company is or would be so prejudicial</p>
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Complaint must:	Relate to how the affairs of the company have been managed
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### Minority Shareholders: Unfair Prejudice (cont)

Petitioner must prove:	<ul style="list-style-type: none"><li>- Their interests in their capacity as a member have been unfairly prejudiced as a result of conduct on the part of company</li><li>- E.g. members have interest in value of shares so could bring a claim if they can show value of shareholding has been seriously jeopardised by conduct of persons with de facto control</li><li>- Breach of contract (articles or shareholders' agreement) or breach of some fundamental understanding</li></ul>
Examples of unfairly prejudicial conduct:	<ul style="list-style-type: none"><li>- Exclusion from management</li><li>- Mismanagement (but not poor management)</li><li>- Breach of directors' fiduciary duties</li><li>- Excessive remuneration and refusal to pay dividends</li></ul>
Who may bring a claim?	Any member of the company
Remedies:	<ul style="list-style-type: none"><li>- Court may make such order as it thinks fit for giving relief</li><li>- Presumption that court will grant order for purchase of petitioner's shares by company or another shareholder (most common remedy)</li></ul>

### Minority Shareholders: Personal Claims

Individual shareholder may bring claim to recover loss suffered under general principles of contract or tort law

Shareholder cannot bring personal claim where only loss alleged to have been suffered by shareholder is a reflection of loss sustained by company (e.g. shares decreasing in value due to wrong suffered by company)

Shareholder can bring personal claim where D's conduct constituted a breach of legal duty to them personally and that breach caused them personal loss, separate and distinct from loss sustained by company

### Financial Assistance

Company may provide financial assistance for purchase of its own shares



### Financial Assistance (cont)

Prohibitions apply to PUBLIC companies:	<p>1. <b>Public</b> companies and their <b>private</b> subsidiaries prohibited from providing financial assistance for purchase of shares in the <b>public</b> company</p> <p>2. <b>Public</b> companies prohibited from providing financial assistance for the purchase of shares in their <b>private</b> holding companies</p>
Consequences of unlawful assistance:	<ul style="list-style-type: none"> <li>- Transaction will be void</li> <li>- Company and any officer in default will be liable to a fine and/or up to 2 years in prison</li> </ul>
Exceptions (difficult to rely on):	<ul style="list-style-type: none"> <li>- Financial assistance offered for procedures authorised in other parts of CA 2006 (e.g. redemption of shares/reduction of capital)</li> <li>- Will not be unlawful if company has net assets and (a) those assets are not reduced by giving of financial assistance, or (b) where assets are reduced, the assistance is provided out of distributable profits</li> <li>- Assistance not prohibited if purpose of assistance is not for acquisition or shares, or is incidental to some larger purpose, or is given in good faith in interest of company</li> </ul>
Example of exception:	Financial assistance by company for purposes of employee share scheme made in good faith in interest of company or holding company

### Private v Public Company - the basics

Name	Limited/Ltd	Plc
Share capital	No requirement	Must have share capital with nominal value of at least £50,000, of which 1/4 must be paid up
Directors	Min. 1	Min. 2
Secretary	Optional	Mandatory - person appointed must have requisite knowledge & experience and hold qualification
AGM	Not required	1 per year
Regulations	CA 2006	Higher level of regulation: CA 2006 + further legislation



### Memorandum

Under CA 1985:	Forms part of constitution with objects clause
Under CA 2006:	Required to register at CH Unrestricted objects

### Articles

Types/- choices	Model Articles (MA) Amended MA Tailor Made Articles
Amendments	Special Resolution Must be made bona fide in the interests of the company as a whole Right to demand poll vote cannot be removed in Articles
Legal effect	Binding on the company and its members Articles = contract between company and members in their capacity as members, regarding their rights and obligations as members

Court has no jurisdiction to rectify articles

Court will not interfere to rewrite article even while outcome is improbable if article is clear, unambiguous and not commercially absurd

Any member has right to enforce terms of articles against the company

Company is entitled to enforce and restrain breaches of articles against its members

### Board Meetings (BM)

Taken by majority vote on a show of hands

In the event of deadlock, chairman has casting vote

Quorum must never be less than 2

Unless otherwise decided, quorum is 2

Directors may instead make decisions by unanimous agreement without holding BM - can indicate this by any means (in practice, rare)

In companies with 1 director, that director can take decisions on their own

Reasonable notice of BM is necessary

### Calling a GM

1. BM held at reasonable notice to convene GM
2. Board to give 14 clear days' notice of GM (for Ltd companies)
3. GM - members vote on resolution set out in notice
4. Further BM held at reasonable notice to authorise relevant action and instruct post-meeting matters (PMM)



### Calling a GM (cont)

5. PMM - carried out by secretary (or director if no secretary) - copies of relevant documents filed at CH within 15 days of being passed and internal records updated

All special resolutions must be filed and some ordinary.

If procedure is not followed, resolution may be invalid. May also be criminal sanctions.

### Short-notice GMs

1. Must be agreed to by majority in number of members who together hold shares of 90% or more of total shares giving rights to attend & vote at GM (% may be increased up to 95% in Articles)

2. BM held at reasonable notice to approve notice of GM and consent to short notice

3. GM - Shareholders vote on resolution set out in notice

4. Reconvene BM - Directors authorise relevant action and PMM

5. PMM carried out and copies of relevant documents filed at CH within 15 days of being passed and internal records updated

All special resolutions must be filed and some ordinary.

If procedure is not followed, resolution may be invalid. May also be criminal sanctions.

### GM Called by Shareholders

Shareholders holding no less than 5% of paid-up share capital can serve S 303 request on Board to call GM

Upon receipt of S 303, directors must call GM within 21 days

GM must be held on a date within 28 days after date of notice convening GM

If directors fail to call GM, all shareholders who submitted S 303 (or any of them representing more than 1/2 of voting rights) can call the GM themselves

If shareholders call GM themselves, must be held within 3 months of date directors received initial S 303

If shareholders call GM themselves, they can recover reasonable expenses for doing so from company; company can then recover monies back from directors

### Annual General Meeting

Public companies must hold AGM

AGM must be called by directors

AGM must be held on 21 clear days' notice\*\* within 6 months of financial year end

At AGM:

- Directors present annual report

- Shareholder with voting rights vote on current issues

\*\*Note: day notice is given & day of meeting are discounted in calculating clear days





### Types of Director

Executive	Appointed to Exec office Officer & employee Works on business
Non-executive	Officer but not employee Not involved in daily running Provide independent guidance & advice to board Protect shareholder interests
Alternate	Attends board meetings and acts in director's place if actual director is incapacitated, otherwise engaged or out of the country Usually a fellow director or someone approved by board Quite rare now
Shadow	Does not claim or purport to act as a director Not held out as director by company A person in accordance with whose directions/instructions directors are accustomed to act Exerts influence over board
De facto	Assumes to act as director but has not been validly appointed Not a de jure (legal) director Held out as director Performs acts which are directorial in nature Part of corporate governance of company
De jure	Director validly appointed at law
Nominee	Director appointed by shareholder

### Appointment of Directors

Governed by Articles

MA: ordinary resolution of shareholders; or decision of directors

All persons appointed as directors must consent to act as such

Consent required on form AP01 which must be sent to CH

Register of directors must be kept at company's registered office

### Director Service Contracts

Service contracts	For executive directors who are employees Contain T&Cs of employment Terms included are for the board to decide Requires approval by board resolution
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### Director Service Contracts (cont)

Long-term service contracts      Where employment has 'guaranteed term' which is, or may be, over 2 years  
 Requires ordinary shareholder approval  
 If shareholder approval not given, term is void and contract can be terminated at any time by giving reasonable notice

No automatic entitlement for directors to be paid for their services

Company must keep copy of all directors' service contracts or memoranda of the terms of these contracts

Shareholders have right to inspect copies of service contracts/memoranda, must be provided within 7 days of request

### Substantial Property Transactions

Acquisition or disposal by director/connected person of a substantial non-cash asset requires ordinary shareholder approval

Substantial asset =

- exceeds 10% of company's asset value and is more than £5,000; or
- exceeds £100,000

Connected persons =

- members of directors family (spouse/civil partner, parents, children/step-children);
- companies in which directors or others connected hold over 20% shares;
- business partner or director or persons connected;
- trustees of a trust the beneficiaries of which include director or persons connected

Shareholder may approve transaction after the event but this does not absolve directors of potential liability

No shareholder approval?

- Transaction may be voidable;
- Directors involved liable to account for profits and indemnify for loss

### Loans to Directors

Loans to directors may be subject to requirement of ordinary shareholder approval

Shareholders must be provided with information as to:

- the nature of the transaction;
- the amount & purpose of loan
- the company's liability in form of memorandum

Shareholders may approve transaction after the event but this does not absolve directors of potential liability

Shareholder approval not needed for:

- expenditure on company business up to £50,000;
- loans for defending proceedings brought against director;
- loans for defending regulatory actions/investigations;
- loans up to £10,000
- intra-group transactions;
- money lending companies (where loan made in ordinary course of company business)

If shareholder approval not obtained and no exceptions apply:

- transaction may be voidable
- directors involved liable to account for any profits made and indemnify company for any losses



### Payment for Loss of Office

Payment for loss of office to director must be approved by ordinary shareholder resolution

Exceptions:

- If payment is less than £200;
- Where payment made in good faith (a) in discharge of existing legal obligation, (b) by way of damages for breach of such obligation, (c) by way of settlement/compromise of any claim arising out of termination, or (d) by way of pension for past services

If shareholder approval not obtained, director holds payment on trust for company and any director who authorised payment is jointly & severally liable to company for any resulting loss

### Shareholders Agreements

A contract entered into between shareholders which supplements the articles

Can be entered into at any time

Can be between certain classes of shareholders only, but usually entered into by all shareholders

Can only be altered if all shareholders agree

Provisions may also be enforceable by injunction

Company may also be a party but not to any provisions which would fetter statutory powers of company

An effective way of limiting the possibility of major changes within company and protecting interests of minority shareholders

Generally provide for how shareholders will vote on particularly important decisions

New shareholders may be required to join an existing agreement by executing a Deed of Adherence

### Minority Shareholders: Derivative Claims

A claim brought by a member in respect of a cause of action vested in the company seeking relief on behalf of the company

Who may bring a claim? Any shareholder

Who may a claim be brought against? Any director and/or another person, including former directors

Grounds for bringing a claim: Any act or omission, actual or proposed, involving negligence, default, breach of duty or breach of trust by director

It is immaterial whether cause of action arose before or after C became a shareholder

Advantages: Allow individual members to 'right a wrong' on behalf of the company

Disadvantages: Relief gained is only awarded to company, not individual member bringing proceedings



### Minority Shareholders: Derivative Claims (cont)

Two-stage application process:	<ol style="list-style-type: none"> <li>1. Court will consider whether applicant has prima facie case for permission to continue derivative claim (i.e. good cause of action);</li> <li>2. If 1 is satisfied, full permission hearing proceeds - court may order company and applicant to provide evidence</li> </ol>
Stage 2 - Absolute bars:	<p>Permission must be refused if court is satisfied that:</p> <ul style="list-style-type: none"> <li>- person acting to promote success of company would not seek to continue claim, or</li> <li>- the relevant act/omission is yet to occur and has been authorised by company, or</li> <li>- the relevant act/omission has already occurred and was authorised before/has been ratified since</li> </ul>
Stage 2 - Discretionary bars:	<p>To continue derivative claim, courts must consider:</p> <ul style="list-style-type: none"> <li>- Whether member is acting in good faith in seeking to continue claim;</li> <li>- importance that a person acting to promote success of company would attach to continuing claim;</li> <li>- whether act/omission yet to occur could be authorised before it occurs or ratified after;</li> <li>- whether act/omission that has already occurred could be ratified;</li> <li>- whether act/omission gives rise to another cause for action that member could pursue in own right rather than on behalf of company</li> </ul>
Court will dismiss derivative claim unless:	<ul style="list-style-type: none"> <li>Act is ultra vires or illegal</li> <li>Personal and individual rights of member have been infringed</li> <li>There has been fraud on the minority</li> <li>There has been non-compliance with special procedure</li> </ul>



### Minority Shareholders: Derivative Claims (cont)

Costs: Member brings the claim but company benefits from remedies  
 Court may order company to indemnify C against liability in respect of costs incurred in claim/permission application/both  
 C may apply for costs at same time as permission application - pre-emptive costs order

Court will be reluctant to grant permission to continue derivative claim if unfair prejudice claim available

### Statutory Minority Shareholder Rights

Principal statutory remedies:	Unfair prejudice & just and equitable winding up
Protection against alteration to company's constitution	Special resolution of 75% or more required to make changes to articles
Right to requisition GM	Shareholders holding not less than 5% of voting paid-up capital can request directors to call GM
Right to demand poll vote	Members holding no less than 10% of voting rights; OR not less than 5 members with right to vote; OR members holding cumulative shares with right to vote equalling 10% may demand a poll vote

### Maintenance of Share Capital

Company must not reduce its share capital except in certain limited circumstances

Impact on granting of dividends/distributions: Company may only pay dividends out of distributable profits

Share premium account cannot be used to fund distribution

Most recent annual accounts, or in some cases specially prepared interim accounts, must be referred to to justify dividend payment

Any transaction in which a shareholder receives value will be a distribution; disguising distributions is in breach of capital maintenance

Directors who authorise unlawful distribution and shareholders who receive it may be liable

Board must take steps before issuing dividend/distribution



### Maintenance of Share Capital (cont)

Impact on reduction of share capital: Public and private companies may reduce capital by using court procedure  
Requires special shareholder resolution, then order of court

Creditors have right to object before court order

If successful, reduction will take effect on registration of court order and statement of capital at CH

Private companies may instead use solvency statement of directors and special shareholder resolution to reduce share capital  
Solvency statement must be made not more than 15 days before date on which special resolution passed, must be signed by all directors and must confirm there are no ground on which company could be unable to pay debts, and company will be able to pay debts for 1 year from date of solvency statement

Requirements for private companies purchasing own shares using capital

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### Maintenance of Share Capital (cont)

Impact on purchase and redemption of own shares: Companies are able to issue shares that are redeemable at option of either company/shareholder  
Public company needs express authorisation in articles to issue redeemable shares; Private needs statutory authorisation to issue

Companies are able to purchase their own shares (subject to articles)

For redeemable shares to be issued, must be at least 1 other class of shares in issue

Shares may not be redeemed unless fully paid

Redemption will usually be out of distributable profits

Any company may purchase its own shares subject to articles

Must contract with shareholder selling shares; must be approved by ordinary shareholder resolution

Requirements for private companies purchasing own shares using capital

### Debt Finance - Loan Facilities

An agreement between a borrower and lender giving borrower the right to borrow money on terms set out in agreement

Overdraft: - On-demand facility  
- Bank can call for all of money owed at any point and demand it is repaid immediately  
- Unsuitable as long-term borrowing facility

Term loan: - Loan of money for fixed period, repayable on certain date  
- Lender cannot demand early repayment unless borrower is in breach  
- Lender will receive interest on loan throughout the period



### Debt Finance - Loan Facilities (cont)

Revolving credit facility (RCF):

- Borrower has flexibility to borrow and repay
- Allows company to draw down money, repay it, then re-draw it down again, then repay it
- Borrower has flexibility to choose when it borrows and repays as against a maximum aggregate amount of capital provided by lender

### Insolvency - Informal - Pre-Insolvency Moratorium

A moratorium is a period during which:

- Creditors are unable to take action to enforce their debts;
- Any existing court proceedings are stayed; and
- Company may not be wound up

Gives company breathing space:

Lasts for 20 business days but can be extended by directors for further 20 business days

Further extensions are possible up to 1 year

Moratorium automatically comes to an end when company enters formal insolvency procedure

Procedure to obtain:

1. Directors must apply to court
2. Application must be accompanied by:
  - Statement that company is, or is likely to become, unable to pay debts as they fall due; and
  - Statement from licensed insolvency practitioner (Monitor) stating that company is eligible and moratorium will likely result in rescue
3. Comes into force at time documents are filed at court
4. Monitor has responsibility to notify registrar of companies and all creditors of company that moratorium is in force
5. Monitor has supervisory function during moratorium

### Company Facing Financial Difficulties

The directors must review the financial performance of company and recognise when it is facing financial difficulties

Faced with financial difficulty directors can...

Do nothing: Directors risk personal liability and risk breaching directors' duties





### Company Facing Financial Difficulties (cont)

Apply for pre-insolvency moratorium:	Gives company some 'breathing space'
Do a deal:	Reach informal/formal agreement with creditors with view to rescheduling debts
Appoint administrator:	Collective formal insolvency procedure considering interests of all creditors aiming to rescue company
Put company into liquidation:	Collective insolvency procedure under which business is wound up and assets transferred to creditors and, where surplus, to members

### Registration of Charges

Must be registered at CH within 21 days beginning with the day after the date of creation of the charge

Any person interested in charge may complete registration formalities

Usually done by lender, since lender is most at risk if charge not registered

If charge not registered within 21 days, charge is void against liquidator, administrator or creditor and debt becomes immediately payable

Any holder of the charge reduced to unsecured creditor

Court has power to extend period of registration where:

- failure to deliver documents was accidental or due to inadvertence or to some other sufficient cause, or
- failure to deliver is not of a nature to prejudice the position of creditors or shareholders of company, or
- on other grounds, it is just and equitable to grant relief

Certified copies of all charges must be kept at company's registered office

### Order of Priority on Winding Up

1:	<b>Liquidator's costs and expenses of preserving and realising fixed charge assets;</b> then any remaining funds go to:
2:	<b>Fixed charge creditors</b> – but <b>only to the extent of their security</b> (i.e. the money realised from sale of the fixed asset(s) – any remainder that the creditor is owed but which is not realised from the sale of the asset must be claimed as an <b>unsecured creditor</b> – e.g. if £105,000 is realised from the sale of an asset which was originally given as a fixed charge security for a £200,000 loan from the bank: £5,000 goes to the liquidator at step (1), £100,000 goes to the bank at step (2) here, and the remaining outstanding £100,000 is included as a liability due to unsecured creditors at step (7);
3:	<b>Liquidator's general costs and expenses of the liquidation;</b>
4:	<b>Preferential creditors</b> – e.g. employees are entitled to arrears of wages of <b>up to £800</b> and holiday pay, and where pension contributions have been deducted but not paid into the pension fund then monies due for the <b>previous four months</b> are a preferential debt. (From 1 December 2020 <b>HMRC</b> will have its preferential creditor status reinstated in respect of VAT, PAYE and NI, which will be paid out after existing preferential creditors).
5:	The <b>"Prescribed Part"</b> or <b>"ring-fenced fund"</b> for unsecured creditors – paid in full if <b>under £10,000</b> ; if more than £10,000 is left for the floating charge creditors at (6) below, then 50% of the first £10,000 and 20% thereafter up to £600,000 is set aside for the unsecured creditors at (7) below rather than going to the floating charge holders;
6:	<b>Floating charge creditors</b> – money goes to creditors who hold any floating charge over a <b>class of assets</b> ;
7:	<b>Unsecured creditors</b> – this includes <b>general trade creditors</b> . Any money remaining after funds have been paid to those in (1) to (6) above will be paid to the unsecured creditors, plus any ring-fenced fund which will also be shared among the unsecured creditors. Creditors will be paid back <b>capital</b> only – any interest which has accrued and which they are owed is dealt with at (8) below;
8:	<b>Interest on unsecured and preferential debts</b> ; then finally
9:	<b>Shareholders</b> – members of the wound-up company will share any amount left over. Note that the proportional distribution among them will be governed by the rights attributable to the class of their shares <b>as written into the Articles</b> .



### Guarantees

Guarantees are not a security as they do not give rights in assets

An agreement that the guarantor will pay borrower's debt if borrower fails to do so

Can come from companies or individuals (such as directors)

### Fixed and Floating Charges

**Fixed charge** Prevents borrower from dealing with assets subject to charge

Lender will control borrower's use of charged asset

Strongest form of security

**Floating charge** Does not prevent borrower from dealing with assets unless and until crystallisation  
Charge floats over class of asset which fluctuates

**Fixed or floating?** Book debts are a fluctuating asset and will be treated as a floating charge, unless they are paid into a blocked account which gives the lender the degree of control required for a fixed charge

**Crystallisation:** When a floating charge crystallises, it ceases to float over all of the assets in a class and fixes onto the assets in the class charged at the time of crystallisation.

### Debt Finance - Security

Temporary ownership, possession or other proprietary interest in an asset to ensure that debt owed is repaid (i.e. collateral for debt)

Protects creditor in event that borrower enters formal insolvency procedure

**Pledge** Security provider gives possession of asset to creditor until debt is paid back

**Lien** Creditor retains possession of asset until debt is paid back

**Mortgage** Security provider retains possession of asset but transfers ownership to creditor

Subject to security provider's right to require creditor to transfer asset back when debt is repaid

This right is known as the 'equity of redemption'

**Charge** Security provider retains possession of asset and equitable proprietary interest is created in favour of creditor

As well as interest, charging document will give lender certain contractual rights over asset if debt not paid back when it should be

Two type of charge: fixed & floating



### Debt Finance - Key Terms

Debenture	<p>1. Covers any form of debt security issued over company, including debenture stock, bonds or others, whether or not constituting charge on assets of company</p> <p>2. Name of particular document which creates a security by setting out details of security</p>
Representations	<p>Statements of fact as to legal and commercial matters</p> <p>Made on signing of loan agreement and repeated periodically during life of loan</p>
Undertakings	<p>Promises to do/not do something, or to procure that something is done/not done</p> <p>Known as covenants</p>
Event of default	<p>Breach of representations or undertakings gives bank contractual remedies where breach constitutes event of default</p> <p>Events of default clause vital in giving bank power to call in its money early if borrower shows signs of becoming enhanced credit risk</p>

### Debt Finance Documents

Term sheet	<p>Statement of key terms of transaction agreed by lender and borrower</p> <p>Not intended to be legally binding, but statement of understanding</p>
Loan agreement	<p>Sets out main commercial terms of loan</p> <p>Includes information from term sheet in much more detail</p>
Security document	<p>If loan is secured, separate security document will be negotiated and entered into</p>

### Debt Finance - Debt Securities

In return for finance provided by investor, company issues security acknowledging investor's rights

Security = piece of paper acknowledging the debt, which can be kept or sold onto another investor

At maturity date of security, company pays value of security back to holder

Example: a bond

- Issuer (company) promises to pay value of bond to holder of that bond at maturity
- Company also pays interest at particular periods, usually biannually
- Bonds are issued with view to being traded
- Market on which bonds may be traded known as capital market
- Whoever holds bond at maturity will receive value of bond back from issuer
- Private companies can only issue bonds to targeted investors and not public indiscriminately



### Company Voluntary Arrangement (CVA)

A compromise between company and creditors

Creditors agree to part payment of debts or to new timetable for repayment

Agreement must be reported to court, but no requirement for court to approve agreement

CVA supervised and implemented by Insolvency Practitioner

Company's directors remain in post, involved in implementation of CVA

Can be used together with administration/liquidation

Setting up 1. Directors draft written proposals and appoint nominee

CVA: If company in liquidation/administration, administrator/liquidator drafts

2. Directors submit proposals and statement of company's affairs to nominee

3. Nominee considers proposals and must report to court within 28 days on whether to call a meeting of company and creditors

4. Nominee gives 14 days' notice of meeting to creditors

Meeting of members must take place within 5 days of creditors' decision

5. Proposals must be approved by 75% in value of creditors (excl. secured creditors) **and** simple majority of members

6. Nominee reports to court on approval

7. Nominee becomes supervisor and implements proposals

Effect of CVA: Binding on all unsecured creditors, including those who did not vote or voted against it

Secured/preferential creditors not bound unless they unanimously consent

CVAs relatively rarely used

### Restructuring Plan

Compromise company's creditors and shareholders and restructure liabilities so company can return to solvency

Can bind secured creditors

Can only be used by companies which have/are likely to encounter financial difficulties

Creditors and members must be divided into classes; each class which votes on Plan must be asked to approve it

Must be approved by at least 75% in value of each class voting

Court must sanction Plan and it will then bind **all** creditors



### Restructuring Plan (cont)

Who can apply to court for Plan?

- Company
- Any creditor
- Any member
- Liquidator (if in liquidation)
- Administrator (if in administration)

Court can sanction Plan if just and equitable even if:

- One or more classes do not vote to approve it
- It brings about cross class cramdown
- It brings about a cramdown of shareholders

Plan is likely to be used by directors following pre-insolvency moratorium

### Wrongful Trading

Establishes liability for directors who carry on business negligently rather than fraudulently

Who may bring a claim?

- Liquidator;
- Administrator; or
- Third Party (assigned by either above)

Against whom?

- Any person who was director at relevant time (including shadow, de facto & non-executive)

No criminal provisions

When directors become aware, or ought to become aware that insolvent liquidation/administration is inevitable, they are under duty to take **every step** possible to minimise potential losses to creditors

If director fails this duty, court can order director to contribute to insolvent estate by compensation for losses that body of creditors have suffered from wrongful conduct

Liability imposes personal liability on directors

No requirement to show intent or dishonesty

If company has not reached point of no return, wrongful trading liability can not arise; no need to consider 'every step' defence

Examples of 'every step':

- Voicing concerns at regular BMs;
- Seeking independent financial & legal advice;
- Ensuring adequate, current financial info available;
- Suggesting reductions in overheads/liabilities;
- Not incurring further credit

Burden of proof?

- On director to establish they took every step



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### Wrongful Trading (cont)

Reasonably diligent person: - Facts which director ought to have known/ascertained, conclusions they ought to have reached and steps ought to have taken are those which would have been known/ascertained/reached/taken by reasonably diligent person with general knowledge, skill and experience expected (objective) and actual knowledge, skill and experience of the relevant director (subjective)

Relief? Not available

'Insolvency' restricted to balance sheet test

### Fraudulent Trading

Exceptionally high bar for fraudulent trading

Who may bring a claim? - Liquidator; or  
- Administrator

Against whom? - Any person knowingly party to carrying on of any business of company with intent to defraud creditors or for any fraudulent purpose

Actual dishonesty: - Must be proven for claim to succeed  
- Assessed on subjective not objective basis  
- Knowledge includes suspicion of relevant facts together with deliberate decision to avoid confirming they did exist  
- Not necessary to show **all** creditors have been defrauded

Remedies: - Civil liability to contribute to funds available to body of unsecured creditors suffering loss caused by the fraudulent trading;  
- Also corresponding criminal claim for fraudulent trading (may be brought by same people but court approval required);  
- Contribute to company's assets as court thinks proper  
- Court likely to make disqualification order against person if director

### Misfeasance

On a winding up, action may be brought against directors for any breaches of duty committed by them

Who can bring claim? - Liquidator (but not administrator);  
- Official Receiver; or  
- Any creditor/contributory



### Misfeasance (cont)

Burden of proof?	On C to establish misfeasance on part of director or other D Not for D to justify their conduct
Against whom?	- Any person who is/was officer of company (incl present/former directors, managers or secretaries); - Any others who acted in promotion, formation of management of company; and - A liquidator or administrative receiver (or administrator under Schedule B1)
What amounts to misfeasance?	1. Misapplication of money/assets of company; 2. Breach of statutory provision/duty (E.g. unlawful loans to director; director acting ultra vires; failing to seek approval for substantial property transaction); 3. Directors responsible for transactions at an undervalue, or preferences, may thereby commit a misfeasance; and 4. Breach of duty to exercise reasonable care, skill and diligence (negligence)
Remedies:	Repayment, restoration or contribution to company's assets as it thinks just Director may claim relief where they acted honestly and reasonable and ought fairly to be excused Finding of misfeasance may lead to disqualification order
Ratification:	Not possible for shareholders to ratify what amounts to breach of directors duties at a time when there is a reasonable prospect that company will go into insolvent liquidation or administration

### Role/Power of Liquidator

Management and fiduciary powers of directors are transferred to liquidator
Liquidator must act in good faith, avoid conflicts of interest and not make secret profit
Must be qualified insolvency practitioner or Official Receiver (appointed by court in short term)
Acts as officer of court
Principle functions:
- To secure and realise assets of company then distribute to creditors; and
- Take into their custody/control all company's property



### Role/Power of Liquidator (cont)

Liquidator may:

- Sell any property;
- Execute deeds and other documents in name of company
- Raise money on security of assets;
- Make/draw bill of exchange or promissory note in name of company
- Appoint agent to do any business for them;
- Commence/defend court proceedings in name of company;
- Pay debts and compromise claims

Have duty to preserve company's property and maximise value of assets available for distribution

Can avoid certain antecedent transactions to maximise amount of assets available (many of these powers also apply to administrators)

### Creditors' Voluntary Winding Up (CVL)

Commenced by special resolution of shareholders but under effective control of creditors who can choose liquidator

Where directors' declaration of solvency not made, liquidation will be CVL

Shareholders may nominate person to be liquidator

Within 14 days of special resolution being passed, directors must ask creditors to either approve nominated liquidator/put forward their own choice

Creditors' liquidator nomination takes precedence

Directors must draw up statement of company's affairs (assets and liabilities) and send to creditors

### Conversion of MVL to CVL

If liquidator on MVL consider company unable to pay debts and interest within period stated in directors' declaration, they must change MVL to CVL

Must prepare and send statement of company's affairs to creditors

Creditors may nominate person to be liquidator (often insolvency practitioner who was appointed to deal with MVL)

CVL takes effect from date of nomination of liquidator

### Members' Voluntary Winding Up (MVL)

Members must pass special resolution to place company into MVL

Members must pass ordinary resolution to appoint liquidator

Company must be solvent

Directors required to swear declaration of solvency stating:

- They have made full enquiry into company's affairs
- They have formed opinion that company will be able to pay creditors in full, with interest at official rate, within period of no more than 1 year from commencement of winding up
- Company's assets and liabilities as at latest practicable date before making declaration





### Members' Voluntary Winding Up (MVL) (cont)

Any director making declaration of solvency who does not have reasonable grounds for the opinion liable to fine/imprisonment

If debts are not actually paid in full within specified period, presumed that director did not have reasonable grounds for opinion

Winding up commences when special resolution passed

### Common Ground for Compulsory Liquidation

Most common ground for winding up petition is company's inability to pay debts

Can be evidenced by:

1. Failure to comply with creditor's statutory demand
  - Written demand in prescribed form requiring company to pay specific debt
  - Demand can only be used if debt exceeds £750 and is not disputed on substantial grounds
  - Company has 21 days to pay debt, failing which creditor has right to petition court to wind up company
2. Creditor sues company, obtains judgment and fails in attempt to execute judgment debt
3. Proof to satisfaction of court that company is unable to pay debts as they fall due
  - Cash-flow test (usually satisfied by going through process 1, but not essential)
  - Consideration of debts falling due in reasonably near future
4. Proof to satisfaction of court that value of company's assets is less than amount of its liabilities
  - Must consider contingent and prospective liabilities ('balance sheet test')
  - Burden of proof on party asserting balance-sheet insolvency

### Compulsory Liquidation

Court-based process

Applicant presents winding up petition to court to request winding up order against company

Granted petition by court operates in favour of all creditors and contributories (members and some former members)

Official Receiver will become liquidator and continue in office until another person is appointed

Official Receiver will notify CH and all known creditors of liquidation

Official Receiver has power to summon separate meetings of creditors and contributories to choose person to become liquidator in their place



### Compulsory Liquidation (cont)

Who can apply?	<ul style="list-style-type: none"><li>- Creditor</li><li>- Company (by shareholders where insufficient assets to fund voluntary liquidation)</li><li>- Directors (by board resolution where insufficient funds)</li><li>- Administrator</li><li>- Administrative receiver</li><li>- Supervisor of CVA</li><li>- SoS for Business, Energy &amp; Industrial Strategy (on public policy grounds)</li></ul>
Grounds for petition:	<ul style="list-style-type: none"><li>- Unable to pay debts</li><li>- Just and equitable</li><li>- Special resolution passed to be wound up</li><li>- Public company that has not issued requisite share capital and over 1 year has passed since registration as plc</li><li>- Old public company with meaning of Consequential Provisions Act</li><li>- Company does not commence business within year of incorporation or suspends business for whole year</li></ul>
Consequences:	<ul style="list-style-type: none"><li>- Certain dispositions of company's property, transfer of shares and changes to members will be void if made after commencement of winding up</li></ul>

### Liquidation/Winding Up

Most common type of insolvency procedure

Process by which company's business is wound up and assets transferred to creditors and (where surplus) to members

Both solvent and insolvent companies may be wound up

Liquidators function is to:

1. Realise company's assets for cash
2. Determine identity of company's creditors and amount owed to each, then
3. Pay dividend to creditors on proportionate basis relative to size of their determined claims

Creditors of same rank are said to rank 'pari passu'

Liquidation not a rescue mechanism; Liquidator has very limited powers to carry on business of company

Usually close business and dismiss employees soon after appointment, and sell assets on piecemeal basis rather than selling anything as a going concern

Common for companies to enter liquidation after having been through different insolvency procedure first



### Receivership

Individual enforcement procedure which benefits only the appointing creditor

Most common type is fixed charge receivers

Fixed charge receivers appointed by holders of fixed charge pursuant to terms of security documentation

Appointed to enforce security and recover debt owing to their appointor (often a bank)

Owe duties primarily and exclusively to appointer to act in good faith in course of appointment

Usually have extensive powers set out in security documents and some limited powers under Law of Property Act 1925 (e.g. ability to sell, mortgage and collect rents from property)

### Pre-Packaged Sales in Administration

Where business of insolvent company is prepared for sale to selected buyer prior to company's entry into administration

Agreed sale carried out by insolvency practitioner shortly after their appointment

Pre-pack purchaser will often be one or more of existing owners/directors of insolvent company

Controversial

Requires clear, comprehensive and timely explanations to creditors following pre-packaged sales

### Administration

Aims to rescue company which is insolvent if at all possible, or achieve better result for creditors if not

Administrator acts in interests of creditors as a whole

Administrators may be able to rescue company which will continue trading; other companies may proceed into liquidation

Administrators required to perform functions in interests of creditors as a whole and owe duties to court and creditors collectively

Appointment - Court procedure: Court may appoint administrator where company is or is likely to become unable to pay its debts on application of company, directors, or one or more creditors

Appointment may only be made where order is reasonably likely to achieve purpose of administration

Appointment - Out of court procedure: The company, directors, or qualifying floating charge holder (often bank) may appoint administrator

Directors cannot use this procedure where creditor has presented petition for winding up of company; here, director can apply to court or QFCH can use out of court procedure

Directors unable to exercise any management powers without consent of administrator



### Administration (cont)

Once appointed, administrator has up to 8 weeks to produce report setting out proposals for company's future

Report must be put to all creditors for approval

If reject, company usually put into liquidation

If accepted, administrator has options for company to exit administration

12-month fixed time limit for completion of administrations, though possible to obtain extensions

Administrator must report outcome to court

Company can benefit from moratorium during administration

During administration, all documents & website must state company is in administration

During administration moratorium, administrators may sell property subject to floating charge

### Preferences

Prevents creditor from obtaining improper advantage over other creditors at time when company is insolvent

Who may bring a claim? - Liquidator; or  
- Administrator

Company gives preference if:

1. Person is a creditor (or surety/guarantor of any of debts/liabilities); and
2. Company does anything/allows anything to be done which has effect of putting that person in better position in event of company going into insolvent liquidation than they would otherwise have been in

Preference will be voidable if:

1. It was given within relevant time (in 6 months preceding onset of insolvency)(relevant time extended to 2 years for connected persons)
2. It was proved company was insolvent on cash flow/balance sheet basis at time of transaction or became so as a result of it
3. It is proved that company was influenced by desire to prefer creditor (subjective test)

If preference given to connected person/associate, there is rebuttable presumption that company was influenced by desire to prefer creditor (shifts burden to preferred person to rebut)

Defences: Absence of desire to prefer (e.g. action was result of genuine commercial pressure to continue trading and avoid defaults)

Sanctions: Court has discretion to make order to restore position as if company had not given preference



### Transactions Defrauding Creditors (TDC)

Claims may be brought by victim of transaction in question where company is insolvent/solvent

Must have been: - A TUV; and  
- Intention/purpose of transaction putting assets beyond reach of creditors or otherwise prejudice their interests, including future creditors unknown at time of transaction.

Insolvency practitioners may prefer to bring TUV claim over TDC claim as no burden of proof that purpose was to put assets beyond reach of creditors/prejudice them

Who may claim? - Liquidator/administrator;  
- Supervisor of voluntary arrangement; or  
- Victim of relevant transaction

Sanctions: Court may make such order as it thinks fit to restore position to what it would have been but for transaction

Advantage: TDC does not face risk of becoming time-barred in same way as TUV

### Avoidance of Certain Floating Charges

Prevents unsecured creditor obtaining floating charge to secure existing loan for no new consideration at expense of other unsecured creditors

Only applies in liquidation/administration

Automatic procedure; no need for office-holder to challenge floating charge by bringing legal proceedings

Legal proceedings may only be brought where there is a dispute between floating charge holder and office holder over application of avoiding the charge

For floating charge to be invalid:

1. Must have been created within relevant time (12 months preceding onset of insolvency, extended to 2 years for charge granted to connected person)
2. Unless granted to connected person/associate, must be proved that company was insolvent on either cash-flow/balance sheet basis at time of floating charge's creation, or became insolvent because of charge creation

When are floating charges valid? Even if above holds, charge will be valid to extent that 'new money' or fresh consideration is provided to the company (or existing debts are extinguished) in return for grant of charge on/after its creation

Where floating charge is void here, only security (and its advantage to creditor in order of priority) is void, not the debt itself



### Avoidance of Certain Floating Charges (cont)

Floating charge is also void against liquidator, administrator and other creditors if not duly registered with CH

Floating charge to creditor may also be voidable as TUV or preference

### Transactions at an Undervalue (TUV)

TUV =

- A gift; or
- A transaction for consideration the value of which, in money/money's worth, is significantly less in value than consideration provided by the company

Granting of security/payment of dividend may be held to amount to TUV

Court may set aside transaction as a TUV if:

1. Company made a gift/entered into transaction for consideration which was significantly less value than consideration provided by company
2. It took place within relevant time (2 years preceding onset of insolvency)
3. It is proved by applicant that company was insolvent at time of transaction or became so as a result of it

Where TUV entered into with person connected, insolvency is presumed unless connected person proves otherwise

No order will be made to set aside transaction if:

1. Company entered into transaction in good faith for purpose of carrying on business; and
2. At the time, there were reasonable grounds for believing transaction would benefit company

Sanctions:

- Court has discretion to make such order as it thinks fit to restore position as if company had not entered transaction

