Section 1: Introduction

24.1.1 While there is no trite definition of an insurance policy, the concept underlying an insurance policy is that of risk transfer, whereby an insurer takes on the risk of a contingency eventuating in exchange for a monetary sum payable by the insured. This risk management function of insurance policies bears crucial socio-economic significance insofar as it enables individuals and corporate entities to hedge against risks and uncertain losses that they might be unable or unwilling to bear.

Sources of Law

24.1.2 Besides the common law, other sources of insurance law include statutes such as the Insurance Act (Cap.142), the Policies of Assurance Act (Cap. 392), the Marine Insurance Act (Cap. 387) and the Motor Vehicles (Third Party Risks and Compensation) Act (Cap.189).

Types of policies

24.1.3 Insurance policies can cover a wide range of risks and can accordingly be classified in several ways – e.g. first party and third party insurance, life and non-life policies, as well as marine and non-marine insurance. The differences within each category and inter se are borne out in different legal requirements to which each type of policy is subject. For instance, marine insurance policies are governed by the Marine Insurance Act, with only certain principles therein applying to non-marine insurance.

Definition

24.1.4 It has been deemed undesirable to attempt a legal definition of an insurance policy (*Medical Defence Union v Department of Trade* [1980] 1 Ch 82), but an insurance policy must nevertheless possess several key features before it will be deemed valid. "A contract of insurance ... must be a *contract for the payment of a sum of money, or for some corresponding benefit...* to become due on the *happening of an event*, which event must have *some amount of uncertainty* about it, and must be of a *character more or less adverse to the interest of the person effecting the insurance"*. (*Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658). These requirements find justification in various policy considerations such as the unequivocal policy stance against wagering contracts [section 5 Civil Law Act (Cap 43)].

24.1.5 Notably, as per the definition of *"policy"* in the First Schedule to the Insurance Act, there is no requirement for an insurance contract to be *"embodied in or evidenced by an instrument in the form of a policy"* subject to certain exceptions found in other relevant legislation (e.g. section 22 Marine Insurance Act).

Section 2: Insurable Interest Requirement

24.2.1 A party who wishes to take out insurance coverage needs to have an interest in the contingency that he is insuring against. This is premised on the public interest in preventing wagering; a wager and an insurance policy bear striking similarity insofar as they both hinge on the eventuation of an uncertain event, and the distinguishing feature hence lies in the existence of an interest beyond the sum insured. An insurance policy where the policyholder lacks an insurable interest will be rendered void.

Life Insurance Policies

24.2.2 The insurable interest requirement in respect of life insurance policies is statutorily codified under section 57 of the Insurance Act, and is bifurcated into the categories of presumed and proven interests.

24.2.3 Under section 57(1)(b) of the Insurance Act, certain classes of persons are presumed to have an insurable interest in the life insured. This includes the individual himself, his spouse, his child or ward under 18 years of age, and any other person on whom the policyholder is wholly or partly dependant. Persons who fall within this class of persons are not subject to a limit to their recovery under the policy.

24.2.4 Persons who fall outside this class of persons may still prove their interests in a person's life, but will only be permitted to recover to the extent of the interest proven (see: sections 57(1)(a) and 57(2) of the Insurance Act).

24.2.5 With regard the relevant time to determine the presence of an insurable interest, the Insurance Act makes clear that regardless of whether the person possesses a presumed or proven interest in the life insured, the insurable interest requirement will be measured at the time of the application for the policy.

24.2.6 Further, by virtue of section 62 of the Insurance Act, life insurance policies are subject to two additional checks, where the beneficiaries of the policy are required to first, have an interest in the life insured despite not being the policyholder, and second, be named in the policy.

Non-Life Insurance Policies

24.2.7 The insurable interest requirement in non-life insurance policies is non-statutory by virtue of the wording in section 62(4) of the Insurance Act which excludes from its ambit any insurance *"on ships or goods, or to contracts of indemnity against loss by fire or loss by other events whatsoever"*. While any analysis on the source of the insurable interest requirement is largely moot in respect of liability insurance insofar as one is bound to have interest in their potential legal liability, it is nevertheless agreed that there is no defensible reason for exempting non-life policies from the insurable interest requirement. Moreover, section 5 of the Civil Law Act would apply to nullify any wagering contracts where the policyholder has no interest in the risk insured.

24.2.8 While there has been some disagreement as to the interpretation of what constitutes insurable interest in property insurance, the prevailing view is that a strict test of legal or equitable interest in the property applies at the timing of the loss before the requirement would be fulfilled. A moral certainty of loss or physical possession of property short of a legal or equitable interest is thus unlikely to be sufficient to constitute an insurable interest.

Third Party Interests

24.2.9 There are however exceptions to the rule on insurable interest insofar as commercial convenience has allowed for bailees and carriers to take out insurance coverage for goods on behalf of their actual owners. By extension of this reasoning, contractors have also been permitted to take out one main policy to cover all sub-contractors, for instance, under Contractors' All Risk policies.

Section 3: Formation of an Insurance Contract

24.3.1 An insurance policy remains a contractual arrangement between parties, and the general body of contract law is thus applicable. In this regard, the four requirements of a binding contract—offer and acceptance, agreement (consensus *ad idem*), consideration, and an intention to create legal relations—apply with equal force in determining the formation of a binding insurance contract.

24.3.2 However, the analysis is made slightly more nuanced owing to the particularities of the insurance industry where the usage of proposal forms and cover notes is part of industry practice.

24.3.3 An offer to enter into an insurance contract can be made by either the applicant or the insurer, but typically occurs by way of an applicant completing and submitting a proposal form. The insurer may thereafter accept it with or without qualification, but a qualified acceptance will amount to a counter-offer.

24.3.4 On the insurer's end, insurers may issue cover notes to provide temporary insurance coverage prior to the existence of a binding insurance contract, but any unilateral undertakings to be bound will not amount to a binding contract without the applicant's acceptance.

24.3.5 As above, there is generally no legal requirement for an insurance contract to be evidenced by an instrument in the form of a policy. Thus, the failure to issue a policy will not be a bar to the finding of a concluded insurance contract unless contractually required (*Borhanuddin bin Haji Jantara & Anor v American International Assurance Co Ltd* [1987] 1 MLJ 22; *American International Assurance Co Ltd v Koay Fong Eng* [1996] 5 MLJ 268).

Section 4: The Duty of Utmost Good Faith

24.4.1 Deviating from general contract law in respect of 'caveat emptor' (i.e. buyer beware), insurance contracts fall within a special class of contracts which are deemed *uberrima fides* (utmost good faith). Consequently, while a failure to disclose would not typically attract legal ramifications under general contract law, an insurer would be entitled to avoid an insurance policy ab initio on discovery of any material non-disclosure. Short of finding fraudulent conduct on the part of the insured, premiums paid will be disgorged on the basis of total failure of consideration. As the courts and academics have acknowledged, this is an extremely draconian remedy which leaves an insured no further than he had begun.

24.4.2 The rationale underlying the duty of disclosure can be found in Lord Mansfield's seminal judgment in *Carter v Boehm* (1766) 3 Burr 1905:
"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, *lie most commonly in the knowledge of the insured only:* the underwriter trusts to his representation, and proceeds upon the *confidence that he does not keep back any circumstance* in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to *induce him to estimate the risk as if it did not exist"* .

24.4.3 It must thus be recognized that the business of underwriting and risk assessment could be made wholly impossible should insureds not be subject to a duty of voluntary disclosure. Insurers are only able to make decisions to accept a policy application or calculate appropriate premium levels based on the information available to them in assessing the risk to be underwritten. Accordingly, the overarching duty of utmost good faith has since been statutorily codified in section 17 of the Marine Insurance Act, while the corresponding duty of disclosure and duty not to misrepresent are found in sections 18 and 20 of the Marine Insurance Act.

Non-Disclosure

24.4.4 Section 18(1) of the Marine Insurance Act provides that *"the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him"* .

24.4.5 A material circumstance is then defined in section 18(2) of the Marine Insurance Act, which states that *"every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

In interpreting the test for materiality, the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 has laid down a two-step test whereby the non-disclosure in question must first be of circumstances that a prudent insurer would objectively have wished to know, and second, have subjectively induced the particular insurer to enter into the contract.

24.4.6 Facts that are typically considered material to the insurer's decision often relate to either the physical hazard of the insured subject-matter or the moral hazard of the proposer. On the other hand, circumstances that are not required to be disclosed can be found in section 18(3) of the Marine Insurance Act and includes circumstances which diminish the risk, are already known or presumed to be known to the insurer, are waived by the insurer, or are superfluous to disclose by reason of a warranty.

24.4.7 As the courts and academics have rightfully recognized, the common law position is largely in favour of insurers insofar as vulnerable insureds might be taking out their policies for the first time, unaware of the scope and consequences of their pre-contractual duties. To this end, the two-step test laid down in *Pan Atlantic* is aimed at mitigating the harshness of the doctrine in favour of the insured. Nonetheless, this position (which Singapore has retained) has still been roundly criticized by various jurisdictions, with several commonwealth countries such as the United Kingdom, Australia, and Malaysia having taken comprehensive steps towards reforming this area of the law.

Misrepresentation

24.4.8 The duty not to misrepresent has typically received less attention than the duty of non-disclosure even though both grounds are often pleaded together as vitiating factors. The nature of both claims however differ fundamentally as a misrepresentation claim is founded on the untruth of a positive statement made while a non-disclosure claim is based on the failure to reveal certain details.

24.4.9 Additionally, while the same test of materiality applies to both non-disclosure and misrepresentation claims (see: section 20(2) of the Marine Insurance Act), only representations found to be untrue for the purposes of section 20(1) of the Marine Insurance Act will qualify as a misrepresentation. To this end, some leeway has been given to representations of expectation or belief by virtue of section 20(5) of the Marine Insurance Act such that the representation need only be made in good faith based upon an honest belief (*Economides v Commercial Union Assurance Co Plc* [1998] QB 587), and will not be upheld to standards of factual accuracy.

Insurer's Duty of Good faith

24.4.10 Evident from the wording of section 17 of the Marine Insurance Act, the duty of utmost good faith applies to both parties and not just the policyholder. Such an interpretation has been upheld by the courts and includes the insurer's duty to draw an insured's attention to unusual terms in a policy (*Tay Eng Chuan v Ace Insurance Ltd [2008] 4 SLR(R) 95*).

24.4.11 However, as *Banque Financiere de la Cite SA v Westgate Insurance Co* [1991] 1 AC 249 has clarified, such a breach will not sound in damages and only the sole remedy of avoidance applies. To such an extent, it is clear that despite the reciprocal nature of the duty, the insurer's duty of good faith is largely toothless as the remedy of avoidance is likely to be of little utility to most insureds. Beyond which, the limited content of the insurer's duty of good faith has also been recognized in obiter by the Singapore High Court (*The Stansfield Group Pte Ltd (trading as Stansfield College and another v Consumers' Association of Singapore and another* [2011] SGHC 122 (unreported judgment) at [195]).

Section 5: Terms in the Insurance Contract

24.5.1 Despite the similarities between general contract law and insurance law, certain deviations must be duly noted. For instance, insurance contracts are expressly excluded from the ambit of the Unfair Contract Terms Act (Cap. 396) pursuant to paragraph 1(a) of the First Schedule. Additionally, certain types of terms bear special consideration in the context of an insurance contract.

Warranties

24.5.2 Warranties in insurance contracts take on a different meaning as it is commonly understood under general contract law. Instead, warranties in insurance contracts are best characterized by their draconian nature in requiring strict compliance of a certain condition. Absent which, there is an automatic discharge of the insurer's liability from the date of the breach (*Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd)* ("The Good Luck") [1988] 1 Lloyd's Rep 514. This is regardless of materiality, causality, or whether it has been remedied (see: section 33 of the Marine Insurance Act).

24.5.3 In creating a warranty, it must be noted that the mere usage of labels is not necessarily conclusive. The inclusion of the term *'warranty'* will not automatically entitle an insurer to an automatic discharge in the event of non-compliance (L'Union des Assurances de Paris IARD v HBZ International Exchange Co (Singapore) Pte Ltd [1993] 3 SLR 161). Instead, the courts will give effect to parties' intentions on the true construction of the policy.

24.5.4 To circumvent such uncertainty, insurers have instead opted to incorporate basis of the contract clauses at the foot of the proposal form. The effect of which is to make all of the insured's responses on the proposal form the basis of the contract and thus entitle the insurer to repudiate liability should any untruths be discovered subsequently. This conveniently allows insurers to sidestep the various hurdles to making a successful non-disclosure or misrepresentation claim. Evidently, the fairness of such a practice can be questioned and it has since been expressly invalidated in England's consumer insurance regime by virtue of section 6 of the Consumer Insurance (Disclosure and Representation) Act 2012.

24.5.5 Another issue that arises on the true construction of a term is whether a warranty is to past or present fact, or is a continuing / promissory warranty as to the future. This determination requires the court to undertake a contextual analysis, including considerations such as references to the future and the usage of tenses (*Hair v Prudential Assurance Co Ltd* [1983] 2 Lloyd's Rep 667). Notably, such an issue is particularly prevalent where responses to questions in a proposal form are made the basis of the contract and are ambiguous as to the scope warranted.

24.5.6 Nonetheless, despite the all-or-nothing nature of breaches of warranty, one exception is where there is a waiver of the breach of warranty (see: section 34(3) of the Marine Insurance Act). For the sake of clarity, it must further be noted that the automatic discharge of an insurer on the insured's breach of warranty precludes the option of waiver by election, and only waivers by estoppel will apply in respect of breaches of warranty.

24.5.7 Accordingly, to establish waiver by estoppel there must be an unequivocal representation that the insurer is content not to rely on his right, whether expressly made or implied by conduct, and proof of the policyholder's consequent reliance on such a representation. Notably, an unequivocal representation is an objective legal concept, and silence or inaction of the insurer simpliciter would fall short of such a standard (*Liberty Insurance Pte Ltd and Another v Argo Systems Fze* [2011] EWCA Civ 161).

Clauses delimiting the risk

24.5.8 Alternatively, a clause that may appear to be a warranty on its face may be reinterpreted as a mere clause delimiting or describing the risk on its true construction (*Provincial Insurance Co v Morgan* [1933] AC 240). Delimiting clauses merely stipulate that coverage will be suspended for the duration of the non-compliance, and will resume when remedied, unlike breaches of warranties which lead to an automatic discharge regardless of whether the non-compliance is remedied. Judicial interpretation of such clauses therefore mitigates the harshness of a warranty in favour of the insured.

Condition Precedent

24.5.9 While warranties entitle an insurer to be discharged from liability on non-compliance, condition precedents operate similarly to the extent that compliance with certain requirements may be stipulated as a pre-condition to an insurer's liability.

Section 6: Intermediaries

24.6.1 As insurance providers are companies which have to act through designated persons, intermediaries play a particularly pertinent role in the arrangement of insurance policies.

Regulation of Insurance Intermediaries

24.6.2 Insurance intermediaries are regulated under the auspices of both the Insurance Act as well as the Financial Advisers Act (Cap. 110).

24.6.3 The terms "insurance agent", "insurance broker" as well as "insurance intermediary" are defined in section 1A of the Insurance Act, with an insurance agent identified as a person who carries on insurance business as an agent for the insurer, an insurance broker as a person who carries on insurance business as an agent for the insured, and an insurance intermediary as a broad umbrella term for both insurance agents and insurance brokers alike.

24.6.4 The Insurance Act governs general insurance which is often consumption-based and not considered investment products. Under which, insurance intermediaries are subject to various regulations which include the duty on pre-contractual disclosure (section 35P), the duty not to misrepresent (section 35R), as well as the requirement of registration for insurance brokers (see sections 35W to 35Z).

24.6.5 On the other hand, the Financial Advisers Act governs the entire range of financial advisory services, and specifically includes the *"arranging [of] any contract of insurance in respect of life policies"*, alongside the dispensation of advice regarding any investment-linked life insurance plans (Section 2 read with Schedule 2 of the Financial Advisers Act). Life insurance agents are therefore subject to additional licensing requirements (Part II Financial Advisers Act) and checks on the conduct of business (Part III Financial Advisers Act).

Issues of Agency

24.6.6 The role of intermediaries in the procurement of insurance business from prospective policyholders can often become contentious. In the advisory and application process, the knowledge and acts of an insurance intermediary becomes relevant when an agent may fail to, or erroneously record certain details in the proposal form. The question then becomes whether a policy applicant should be penalized for the acts of the insurance intermediary.

24.6.7 The general rule that has emerged from the prevailing judicial authorities is that a person vested with the authority by the policy applicant to fill in a proposal form will be deemed the insured's agent for the purposes of filling in the proposal form (*Globe Trawlers Pte Ltd v National Employers' Mutual General Insurance Association Ltd [1989] SLR 192*). This is based on the notion that a man cannot contract with himself, and a person who fills up the proposal form thus cannot logically be the person accepting the proposal as well. The courts have thus held it impermissible to impute the knowledge of a scribe or amanuensis for the policy applicant to the insurer.

24.6.8 Moreover, the principle of the sanctity of one's signature has also been consistently upheld by the court, on the basis of commercial certainties. It is therefore no defence for an applicant to sign on a proposal form and later allege that he was not aware of the contents (*Biggar v Rock Life Assurance Co* [1902] 1 KB 516).

Duties of an Intermediary

24.6.9 On the finding of a principal-agent relationship, it must be noted that the agent will be subject to fiduciary duties as well as duties of care and skill.

24.6.10 On the former, it is trite that a fiduciary is subject to the strict duty to avoid conflicts of interests – unless he does so with full disclosure and his principal's consent (*Boardman v Phipps* [1966] UKHL 2).

24.6.11 On the latter, an insurance intermediary is held out to the standard reasonably expected of him (*Zurich Insurance v B-Gold Interior Design and Construction [2008] 3 SLR(R) 1029*), and there is no requirement of dishonesty before a breach will be made out.

24.6.12 However, the duties owed to the principal will vary depending on the circumstances of each case, and relevant considerations can include the particular instructions received. Nevertheless, the agent for the insured is duty-bound to ensure that he attains adequate coverage for the insured (*McNealy v Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep 18), and should point out any special circumstances such as the shaky financial position of the insurer (Osman v J Ralph Moss Ltd [1970] 1 Lloyd's Rep 313) or any terms in the policy that might leave the policyholder underinsured (*J W Bollom & Co Ltd v Byas Mosley & Co Ltd* [2000] Lloyd's Rep IR 136).

Section 7: Construction of the Insurance Contract

24.7.1 To determine the true construction of a word or a phrase, the courts endeavor to give effect to the intention of parties objectively ascertained. As construction is a question of law, previous judicial interpretations of a certain word or phrase are necessarily binding or, at the very least, persuasive authority on subsequent claims.

24.7.2 Words used will be given their plain and ordinary meaning, unless they are (a) legal terms of art (*Lake v Simmons* [1927] AC 487); (b) have acquired special meaning by long usage in a trade (*Robertson v French* [1803] 102 ER 779); or (c) their given context requires otherwise (*Kearney v General Accident Fire and Life Assurance Corporation Ltd* [1968] 2 Lloyd's Rep 240). Terms thus will not typically be construed *in vacuo*, and will be understood in the context of the entire contract (*Hamlyn v Crown Accidental Insurance Co Ltd<.em> [1893] 1 QB 750).*

24.7.3 In event of ambiguity, a term will be construed in favour of the party who did not draft the term by virtue of the *contra proferentem* rule. Additionally, the parol evidence rule stipulates that once a contract is reduced into writing, extrinsic materials such as negotiations are not typically admissible. However, it must be noted that this rule only kicks in on the finding that the contract in question was intended by parties to contain all terms of the contract. Extrinsic evidence and the surrounding circumstances of the contract are thus permissible and necessary considerations for the court to first make this preliminary finding, before the parol evidence rule would come into effect (*Zurich Insurance v B-Gold Interior Design and Construction [2008] 3 SLR(R) 1029*).

Section 8: Illegality and public policy

24.8.1 The general rule against contractual illegality applies with equal force to insurance contracts. To this end, as per the oft-cited latin maxim *ex turpi causa non oritur actio* (no action can arise from a wrongful cause), no person can rely on his own illegal act or an illegal contract to make a claim on his insurance policy (*Tinsley v Milligan* [1994] 1 AC 340), nor can a person benefit from his own criminal conduct (*Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147). From a policy standpoint, it is evident that

indemnifying such risks would be to encourage the commission of crimes or civil wrongs and would be wholly against public policy (*Gray v Barr* [1971] 2 QB 554).

24.8.2 Illegality can manifest in several forms. For instance, a contract will be deemed illegal from its inception where an insurer agrees to indemnify a policyholder in respect of crimes or civil wrongs which they knew the policyholder intended to commit (*Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 at 760).

24.8.3 Alternatively, a claim will be tainted by illegality when a policyholder seeks recovery under a policy based on his own criminal or tortious act. In such a scenario, the policyholder's claim is barred not just by the general rule against illegality, but the rule specific to insurance law that an assured would not typically be allowed to recover on an intentional act. This rule should be understood as a rule of construction of the insurance policy. On the policy argument, the English courts have gone so far as to suggest that the overwhelming weight of policy considerations in ensuring one does not benefit from his illegal act can override any express provisions in the policy (*Beresford v Royal Insurance Co* [1938] AC 586).

24.8.4 The finding of illegality forms an exception to the rule that all premiums already paid would be disgorged for total failure of consideration (see: section 84(1) of the Marine Insurance Act).

Section 9: Loss

Causation

24.9.1 Although a loss may prima facie fall within the terms of an insurance policy on its true construction, a policyholder is still required to prove the element of causation between the loss incurred and the insured risk before the insurer will make the relevant pay out.

24.9.2 The element of causation becomes particularly complex where a sequence of events precedes the loss, and there are multiple causes and some of which are expressly excluded from policy coverage.

24.9.3 When a sequence of events precedes a loss, it will be necessary to first determine the proximate cause. This is a question of fact in all cases and judicial precedents thus serve as mere guidelines and are not binding. However, the principles that have emerged are instructive, chief of which is that a proximate cause is not necessarily the most recent cause. At all times, the proximate cause must be understood as the effective and actual cause. Thus, as long as a loss or damage is the necessary consequence of the insured peril, causation is prima facie proven.

24.9.4 Where there are multiple causes that are both necessary but individually insufficient for the occurrence of the loss, it is suggested that the insured will not be able to recover in respect of the entire claim – even if only one of the causes is excluded under the policy (*Lloyd (JJ) Instruments Ltd v Northern Star Insurance Co (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32).

24.9.5 However it must be noted that the common law principles on causation can be expressly modified by policy wording where insurers may only cover losses caused by the insured peril *"independently and exclusively of all other causes"* (See e.g. *Jason v Batten* [1969] 1 Lloyd's Rep 281).

Valued and unvalued policies

24.9.6 The loss recoverable by an insured is determined by the type of policy coverage taken out. On an unvalued policy, the indemnity recoverable will be calculated based on the value at the time and place of loss. On the other hand, on a valued policy, an

insured will simply recover the agreed value. Parties thus contract out of indemnity and by doing so are thus insulated from any possible incidences of over or under insurance; regardless of whether the actual loss is greater or lesser than the agreed valuation, the insurer will still be liable for the agreed amount.

24.9.7 However, it must be noted that whether a policy is a valued or unvalued policy turns on the construction of the policy and the mere fact that the policy states the sum insured does not automatically mean that the policy is a valued policy (*Quorum A/S v Schramm* [2002] 1 Lloyd's Rep. 249; *Allianz General Insurance Malaysia Bhd v Navis Shim Lee Hiong* [2004] 1 MLJ 437).

Over and Under Insurance

24.9.8 Most insurance policies are subject to a limit on recovery. However, since the market value of the insured subject-matter may fluctuate in goods and property insurance, the subject-matter may accordingly become over or under insured.

24.9.9 Looking specifically at under insurance, i.e. where the market value is beyond the maximum sum recoverable under the policy, a policyholder becomes his own insurer for the sum not covered (assuming there is no preliminary issue of non-disclosure or breach of warranty). While such a scenario only seems fair, what bears noting is that an insured will nevertheless be able to recover fully in respect of partial losses as long as the partial loss incurred remains within the stated limits on recovery. Accordingly, insurers have thus sought to protect themselves from such a scenario by incorporating average clauses into the policy, which ensure that a policyholder bears a rateable proportion of any loss should underinsurance arise.

24.9.10 On the other hand, no such issue arises under a valued policy. In respect of partial losses under a valued policy, it is settled law that the insurer will be liable for a portion of the agreed sum, with the agreed sum reduced in proportion to the depreciation in the actual value (i.e. market value) of the property (*Elcock v Thomas* [1949] 2 KB 755).

Value of loss

24.9.11 Another issue that arises is the method of assessing the value of the loss. It must be noted that the value of a loss can be calculated in more than one way, and can be calculated in terms of (1) the market value of the loss/damage, (2) the replacement value, or (3) reinstatement costs (*Reynolds v Phoenix Assurance Co* [1978] 2 Lloyd's Rep 440). The most appropriate method of indemnification will depend on the specific circumstances of the case, and the actual loss suffered must be determined as a question of fact.

Section 10: Claims

Claims Procedure

24.10.1 The claims procedure is typically governed by express terms and conditions in the policy. This includes clauses requiring notification of the loss, clauses requiring the provision of documentary evidence, as well as arbitration clauses (see e.g. *Tay Eng Chuan v Ace Insurance Ltd [2008] 4 SLR(R) 95*). However, whether such clauses are condition precedents to the insurer's liability must be determined on the true construction of the contract.

Fraudulent claims

24.10.2 A fraudulent statement if made knowingly, is made without belief in its truth, or if made recklessly, is made carelessly whether it is true or not. However, a fraudulent claim must be properly distinguished from an exaggerated claim used as a bargaining device. Mere exaggeration is not immediately fraud without more *(Orakpo v Barclay Insurance Services Co Ltd* [1994] CLC 373) as

commercial reality dictates that policyholders will often put forward a claim higher than they reasonably believe they would recover, not dishonestly, but as a starting figure for the purposes of negotiation.

24.10.3 Typically, most policies incorporate a clause stating that an assured who make a fraudulent claim forfeits all benefit under his policy and his policy may be prospectively terminated.

24.10.4 Absent an express contractual provision governing the consequences of such conduct, the common law will nevertheless apply to penalize the policyholder. As summarized by the UK Law Commission, the duty not to make a fraudulent claim has been differently characterized as (a) an implied term of the contract *(Orakpo v Barclays Insurance Services Co Ltd* [1994] CLC 373), (b) part of the section 17 duty of utmost good faith in the Marine Insurance Act (*Black King Shipping Corporation v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437) and (c) a standalone common law rule based on public policy (*Agapitos and Another v Agnew and Others (No 1) (The Aegeon)* [2003] QB 556). To the extent the source of this duty is not well-settled, there are far reaching implications as the governing principles and remedies available to an insurer remain controversial.

24.10.5 It is established at common law that in the event of a fraudulent claim, the entire claim would consequently be forfeited (*Galloway v Guardian Royal Exchange (UK) Ltd* [1999] Lloyd's Rep IR 209). However, this is obviously discordant with section 17 of the Marine Insurance Act which provides for a sole remedy of avoidance, which entitles insurers to recoup all prior payments on any genuine claims. However, as the courts have recognized this to be a largely disproportionate response (see e.g. *Manifest Shipping Co Ltd v uni-Polaris Insurance Co ltd (The Star Sea)* [2003] 1 AC 469 at [51]), and have often strained reasoning to mitigate the harshness of such a consequence.

24.10.6 For instance, Lord Justice Longmore in *K/S Merc-Scandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] 2 Lloyd's Rep 563 sought to fetter the right of avoidance by extending the pre-contractual requirements of materiality to a fraudulent claim. He thus held that the right of avoidance could only be exercised where the fraud was material and sufficiently serious to permit insurers to repudiate the contract. However, such a requirement has been criticized for being largely toothless to the extent that most cases of fraud would fulfill such a low threshold.

24.10.7 Other cases have made various attempts to distance fraudulent claims from the section 17 duty of utmost good faith. Notably, Lord Justice Mance tentatively took the position in *Agapitos and Another v Agnew and Others (No 1) (The Aegeon)* [2003] QB 556 that fraudulent claims fall outside the scope of section 17, and again observed in *Axa General Insurance Ltd v Gottlieb* [2005] EWCA 112 that the rule governing fraudulent claims was a special common law rule distinct from section 17. To this end, it is unlikely that the courts will allow insurers to avoid the entire policy in event of a fraudulent claim.

24.10.8 While most ambiguity in the area is now settled in the United Kingdom with their comprehensive legislative amendments in the Insurance Act 2015 as well as Consumer Insurance (Disclosure and Representation) Act 2012, this area of law remain mired with uncertainty in Singapore.

Section 11: Subrogation

24.11.1 As per Brett L.J. in *Castellain v Preston* (1883) 11 QBD 380:

"The contract of insurance....is a contract of indemnity.... and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified."

24.11.2 To this end, insurers are entitled to the right of subrogation on indemnity policies as premised on the general principle of unjust enrichment, and the right of subrogation will give the insurer a proprietary interest in the proceeds of a settlement between the

insured and a third party.

Aspects of Subrogation

24.11.3 There are two key aspects to an insurer's right of subrogation. First, an insured cannot make a profit from his loss. Evidently, when an insured who has been fully indemnified by his insurers separately receives compensation from a third party responsible for the loss, allowing him to retain the compensation from both the responsible party and the insurer in respect of the same loss would be to allow an insured person to profit from his own loss. However, it bears noting that an insurer's right of subrogation only exists in respect of any insured risks, and does not extend to any sums of money received by way of gift (*Burnand v Rodocanachi* [1882] 7 App. Cas. 333), unless proven that such gift was to mitigate the effects of his loss (*Stearns v Village Main Reef Gold Mining Co* [1905] 10 Com Cas 89).

24.11.4 Second, an insurer who has indemnified the insured can step into the shoes of the insured and accordingly pursue any right or cause of action available to the insured. As a fundamental rule, an insured is disallowed from doing anything that will prejudice the insurer's rights of subrogation. For instance, an insured cannot voluntarily give up his contractual or tortious rights against a third party or admit liability, and he would otherwise be accountable.

24.11.5 Moreover, to the extent that an insurer steps into an insured's shoes, an insurer can only exercise his rights of subrogation through the insured (i.e. in the insured's own name). An insurer would not be entitled to bring an action against the third party in the insurer's own name unless the insured's cause of action has been assigned to him (*Esso Petroleum Ltd v Hall Russell & Co* [1989] AC 643).

Priority of Recovery

24.11.6 While the general rule is that an insurer is only entitled to the right of subrogation after the insured is fully indemnified, this may face certain practical difficulties owing to the intricate relationship between the value of loss, the value of the insurer's indemnification and the value of damages recovered from the third party.

24.11.7 Where an insured recovers approximately the same amount in damages from a third party as well as from an insurer, it is clear that an insurer will be entitled to the entire sum recovered by the insured. However, where an insured is under-insured, or where an insured is subject to an excess clause, certain complications arise. Nevertheless, in respect of the latter situation, the House of Lords in *Lord Napier v Hunter* has since made clarification that an insured will be deemed to be his own insurer for the amount of the excess and must be assumed to have agreed to bear any loss over the sum insured. Thus, in determining the priorities to recovered damages from a third party, an insurer would have priority in recovering the sum indemnified before an insured can lay claim to the balance.

Co-Insureds/Beneficially Interested Persons

24.11.8 As a general rule, insurers are not typically entitled to exercise their rights of subrogation against any co-insureds or beneficially interested persons. To this end, the courts have relied on varying bases to arrive at such a conclusion, such as circuity of action (*Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127) – which has since lost favour – as well as the finding of an implied term (*National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582; *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2000] UKHL 17).

24.11.9 However, there is now suggestion that where there is a detailed contract in place, the courts will determine whether a party was intended to be covered by a policy on the true construction of the contract (see: *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211). A mere clause requiring joint insurance to be taken out for several parties hence does not automatically preclude a subrogation claim against any co-assured (*Tyco Fire & Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2008] 2 All ER (Comm) 584).

Section12: Contribution

24.12.1 Not unlike subrogation, contribution is premised on the need to prevent unjust enrichment. However, while subrogation is exercised against a third party, contribution is relevant as between insurers in the context of double insurance. To this end, when the same person is insured in respect of the same risk by more than one insurer (*China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd [2005] 2 SLR(R) 509*; *Lonpac Insurance Bhd v American Home Insurance Co [2011] 1 SLR 781*), equity dictates that the loss is to be borne equally by all insurers.

24.12.2 Nevertheless, the default common law position is typically modified by express contractual provisions. For instance, insurers may choose to incorporate rateable proportion clauses to expressly limit their liability to a rateable proportion where there is double insurance. Insurers may also choose to incorporate the clause ousting their liability where there is double insurance. In such circumstances, where one of two insurers has incorporated such a term in their policy, only the other insurer will be bound to indemnify the policyholder (*Nanyang Insurance Co Ltd v. Commercial Union Assurance Co Plc [1996] 1 SLR(R) 441*). However, where both insurers have incorporated such a term, they will both be equally liable. This is despite the literal implications of such a situation as the courts have held it an unreasonable construction for an insured to be left with no coverage altogether.

Ratio of Contribution

24.12.3 Another issue that arises pertains to the ratio of contribution where policies have different ranges or the sum insured under each policy is different. Two different methods to calculate the ratio of contribution have emerged, namely the maximum liability and independent liability bases, and have been applied by the courts to property and liability policies respectively.

24.12.4 In respect of property insurance, premiums are typically calculated based on the sums insured which are supposed to be representative of the value of the property (*Commercial Union Assurance Co v Hayden* [1977] QB 804). It is thus suggested that when double insurance arises, each insurer should contribute in the same proportion of their maximum liability (i.e. insured sum) to the total of the sums insured.

24.12.5 On the other hand, premiums in liability policies are calculated based on actuarial principles and statistics to reflect the risk underwritten (*Commercial Union Assurance Co v Hayden* [1977] QB 804). To this end, the independent liability basis is hence more appropriate as it gives effect to the sum each individual insurer would have been liable for under their respective policies. Each insurer thus contributes in the proportion of their liability established under their respective policies to the sum of both insurers' combined liability.

Section 13: Assignment

24.13.1 The general rule governing the assignment of insurance policies is that that they are personal to the specific policyholder and hence non-assignable. For instance, in respect of a motor insurance policy, the court in *Smith v Ralph* [1963] 2 Lloyd's Rep. 439 observed that *"the contract was in its very nature not assignable"* as the risk insured would be altered in toto if assigned to the purchaser who would be an entirely different driver.

24.13.2 In the same vein, the transfer of property does not transfer with it the benefit of the policy without more. The conveyance of land does not include therein the fire insurance policy taken out on that property (*Rayner v Preston* [1881] 18 Ch. D. 1), and applies analogously to the sale of insured vehicles and motor insurance policies (*Smith v Ralph* [1963] 2 Lloyd's Rep. 439). Instead, any

insurance policy would lapse on the sale of the subject-matter on the basis that the policyholder no longer fulfills the insurable interest requirement (*Sadlers' Co v Badcock* (1743) 2 Atk 554).

24.13.3 Nevertheless, the assignment of an insurance policy is still permissible if there is a contemporaneous assignment of the subject-matter of the policy (*North of England Pure Oil Cake Co v Archangel Maritime Insurance Co* (1875) LR 10 QB 249, together with the insurer's consent (*Peters v General Accident Fire and Life Assurance Corp Ltd* [1938] 2 All ER 267). There are also statutorily codified exceptions in respect of life and marine insurance policies (see: section 1 of Policies of Assurance Act (Cap 392, Rev Ed 1994) and section 50 of Marine Insurance Act) which are assignable (subject to the relevant statutory requirements) as the risk insured will not be altered regardless of policyholder.

24.13.4 Notably, there is no similar rule against assigning the benefit of the policy itself as a chose in action, and this is governed by section 4(8) of the Civil Law Act. It is further suggested that this assignment of the right of recovery can take place both before or after a loss (*Peters v General Accident Fire & Life Assurance Corp Ltd* [1938] 2 All ER 267).

Nomination of Beneficiaries

24.13.5 Additionally, in respect of life insurance policies, the law on the nomination of beneficiaries bears noting. Prior to 1 September 2009, the proceeds of an insurance policy expressed to be for the benefit of one's spouse or children would be ring-fenced on the policyholder's death by virtue of the irrevocable statutory trust created under section 73 of the Conveyancing Law and Property Act (Cap 61). Such moneys thus would not form part of the estate of the policyholder and no fixed format of "expression" is required for section 73 to be effective (*Lim Lina v Estate of Quick Cheng Gee, Deceased [2011] SGHC 267*).

24.13.6 However, with the 2009 amendments to the Insurance Act, there is now explicit provision for irrevocable and revocable nominations. Section 49L governs irrevocable nominations where a policyholder may nominate his spouse and children as beneficiaries, and may only revoke such nomination with prior written consent of the nominee. Such nomination is also unaffected by divorce or remarriage.

24.13.7 On the other hand, section 49M governs revocable nominations, and a nomination can extend to persons other than the policyholder's spouse and/or children. Any changes to the nomination can also be made unilaterally.