

LEGAL ASPECTS OF BUSINESS

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DISTINCTION BETWEEN PUBLIC COMPANY AND PRIVATE COMPANY

S. No.	Public Company	Private Company
1.	Minimum No. of Members: 7 persons	2 persons
2.	Maximum No. of Members: No limits	Not more than fifty members excluding past and present employees
3.	Name of the Company: The company name must be ended with 'Limited'.	'Private Limited' must be added at the end of the name.
4.	Article of Association: Can have its own Articles or can adopt Table A of the Companies Act, 1956.	Prepare own AOA.
5.	Commencement of Business: Shall not commence business unless granted the certificate of commencement of business	Commence business as soon as it is incorporated
6.	Invitation to public: May invite public to subscribe to its share/debentures by issuing prospectus	Cannot extend such invitation to the public
7.	Transferability of shares: No restriction on transfer of shares	Restrict the right of members to transfer the shares by its articles
8.	Qualification Shares: The directors should acquire the prescribed qualification shares	Need not acquire qualification shares
9.	Quorum: Minimum number of members should be present in a meeting is five	Two number of members should be present in a meeting

10.	Issue of Prospectus: A public limited company can issue prospectus	A private company is prohibited from issuing prospectus
11.	Issue of subsequent shares: Public company's new shares are offered first to the existing shareholders	Rights issue does not arise
12.	Issue of share warrants: It can issue share warrants	A private company cannot issue share warrant
13.	Number of directors: At least three directors	At least two directors
14.	Statutory meetings: Compulsory	No such obligations
15.	Managerial remuneration: Cannot exceed 11% of the net profit	No such restriction

PROMOTION AND FORMATION OF COMPANY



PROMOTION OF COMPANY

The term, 'promotion' refers to the process by which the idea of forming a company takes a definite shape resulting in its incorporation. It is in fact the first stage in the formation of company.

Promoter

It is the promoter who gets the idea of starting a company and undertakes all the preliminary work necessary for its formation. In other words, the promoter of a company is a person who does the necessary preliminary work incidental to the formation of the company.

Definition

Palmer explains the significance of the term promoter in the following words. "A Promoter starts a scheme of forming a company, gets together the Board of Directors, retains bankers and solicitors, prepares or gets prepared memorandum and articles of association,

provides the preliminary expenses, drafts the prospectus; in a word undertakes to form a company with reference to a given project and takes the necessary steps to get it going”.



Functions of a promoter

1. He settles the company's name and ascertains that it will be accepted by the Registrar of Companies.
2. He also settles the details of the company's Memorandum and Articles, the nomination of directors, solicitors, bankers, brokers, auditors and secretary and the registered office of the company.
3. He arranges for the printing of the Memorandum and Articles, the registration of the company, the issue of prospectus, if a public issue is necessary.

Duties of promoters

- Involved in business activities
- Instruct the solicitors to prepare necessary documents
- Secure the services of directors
- Provide registration fees
- Arranging for advertisement, circulation of prospectus, investment of capital.

Remuneration of Promoters

A promoter has no right to get compensation from the company for his services in promoting the company unless there is a contract to that effect. But in practice, a promoter takes remuneration for his services in one of the following ways;

- a. He may sell his own property to the company for cash or fully paid shares at a profit provided he makes a disclosure to this effect
- b. He may be given an option to buy an certain number of shares in the company at par
- c. He may take a commission on the shares sold
- d. He may take some shares of the company
- e. He may be paid a lump sum by the company

Any remuneration paid to the promoters must be disclosed in the prospectus, if it is paid within the preceding 2 years from the date of the prospectus.

INCORPORATION / FORMATION OF COMPANY

For registering the company with the registrar of companies, the promoter has to initiate a number of steps as outlined below;

1. Approval for the proposed name

A company can choose any name but it should not closely resemble the name of an existing company. Hence the promoter has to get the approval from the registrar for the proposed name of the company.

2. Filing of Documents

The promoter has to get prepared the following documents and file them with the registrar of companies of the State in which the registered office of the company is situated.

i) Memorandum of Association

This document which is of fundamental importance defines the scope of activities of the company. It should contain the name, the place where the registered office is situated, authorized capital and the objects of the business. It should be printed and duly stamped, signed and witnessed. A minimum of two persons in the case of a private limited company and seven in the case of a public limited company must sign the document.

ii) Article of Association

This contains the regulations connected with the internal management of the company. This document must also be duly stamped and signed by the signatories to the memorandum and witnessed.

iii) Original letter of approval

Original letter of approval of name be obtained from the Registrar and be filed.

iv) A list of directors

A list of directors who have consented to be its directors must be filed.

v) Written consent to act as directors

The directors have to give their consent in writing to act as its directors. They should also undertake to take the necessary qualification shares and pay for them.

vi) Notice of the address of the registered office

vii) Statutory declaration

A declaration stating that all the requirements of law relating to registration have been complied with is to be filed. This declaration must be given by an Advocate of the Supreme Court or High Court, or by a Chartered Accountant who is engaged in the formation of the company or by a person named in the Articles as a director or secretary of the company.

viii) The registrar will scrutinize all the documents and if he finds them in order, he will issue the certificate of incorporation

This certificate is a conclusive evidence of the fact that the company has been duly registered. A **private limited company** can commence business on getting the **certificate of incorporation**, but a **public company** has to take some more steps for getting another certificate known as **certificate for commencement of business**.

3. Issue of Prospectus

The Board of directors should arrange for drafting a prospectus when it wants to approach the public for securing capital. A prospectus contains all essential points which would induce the investing public to apply for shares in the company. A copy of the prospectus must be delivered to the Registrar before issuing to the public.

4. Minimum Subscription

A company can proceed to allot shares only if minimum subscription specified in the prospectus has been collected in cash.

5. Statement in Lieu of Prospectus

Where the promoters raise the entire capital through private arrangement, there is no need to issue a prospectus. However, a statement in lieu of prospectus, the contents of which are similar to a prospectus, must be prepared and filed with the Registrar at least three days before allotment.

6. Filing of further documents

The following documents are also to be filed with the Registrar;

- i) A declaration that the minimum subscription stated in the prospectus has been collected in cash
- ii) A declaration stating that each director has paid in cash for the application and allotment on the shares taken up by them
- iii) A declaration that no money has become refundable to applicants because of its failure to obtain permission for shares or debentures to be dealt in on any recognized stock exchange
- iv) A statutory declaration by the secretary or one of its directors stating that the above requirements have been complied with.

If the Registrar is satisfied that these documents are in order, he will issue a certificate entitling the company to commence business. It is only on getting this certificate; a public limited company can start its business.

Certificate of Incorporation

On registration, the Registrar will issue a certificate of incorporation whereby he certifies that the company is incorporated. For the date of incorporation mentioned in the certificate, the company becomes a legal person separate from its shareholders and secures a perpetual succession. Hence it is the birth certificate of the company.

Certificate of commencement of business

A private company may commence its business immediately on incorporation but a public company cannot commence business immediately after incorporation, unless it has obtained a certificate of commencement of business from the Registrar.

MEMORANDUM OF ASSOCIATION (MOA)

MOA is one of the core documents, which has to be filed with the Registrar of companies at the time of incorporation of a company. It is a document, which sets out the constitution of the company and is really the fundamental conditions upon which alone the company is allowed to be incorporated.

Contents of Memorandum

Name Clause

A company may be registered with any name it likes. But a name, which in the opinion of the Central Government is undesirable, and in particular which is identical or which too nearly resembles the name of an existing company shall register no company. Every public company must write the word 'limited' after its name and every private company must write the word 'private limited' after its name.

Rules regarding name

- i) undesirable name to be avoided
- ii) identical name to be avoided
- iii) injunction if identical name adopted
- iv) limited or private limited as the last word or words
- v) prohibition of use of certain names
- vi) restriction on use of certain key words as part of name

Registered Office Clause

This clause states the name of the state where the registered office of the company is to situate. The registered office clause is important for two reasons. First, it ascertains the domicile and nationality of a company. Second, it is place where various registers relating to the company must be kept and to which all communications and notice must be sent.

Object Clause

The object clause is the most important clause in the memorandum of association of a company. It is not merely a record of what is contemplated by the subscribers. But it serves a two-fold purpose; 1) it gives an idea to the prospective shareholders the purpose for which their money will be utilized; 2) it enables the persons dealing with the company to ascertain its powers.

Liability Clause

This clause states that the liability of the members of the company is limited. In the case of a company limited by shares, the members are liable only to the amount unpaid on the shares taken by him. In the case of a company limited by guarantee, the members are

liable to the amount undertaken to be contributed by them to the assets of the company in the event of its being wound up.

Capital Clause

The memorandum of a company limited by shares must state the authorized or nominal share capital, the different kinds of shares, and the nominal value of each share. The chief point to consider in regard to this clause is what funds are necessary to set the business going or, if it is proposed by an existing concern, what sum is needed to pay its price and what, in addition, is wanted to keep the business going.

Association Clause

This clause provides that those who have agreed to subscribe to the memorandum must signify their willingness to associate and form a company. The memorandum has to be signed by each subscriber in the presence of at least one witness who must attest the signature. Each subscriber must write opposite his name the number of shares he shall take.

Alteration of Memorandum of Association

For the purpose of alteration, the provisions of the Memorandum can be divided into two categories;

- i) The provisions which must be included in the memorandum, these are called 'conditions'. These cannot be altered except in the mode, and to the extent, for which express provision is made in the companies act, 1956.
- ii) Other provisions. Such provisions including those relating to the appointment of managing director or manager may be altered in the same manner as the articles of the company i.e., by a special resolution unless otherwise provided by the companies act, 1956.

Web links

- ebook.mca.gov.in/default.aspx
- <https://nptel.ac.in/courses/109105098/>
- https://nptel.ac.in/content/storage2/nptel_data3/html/mhrd/ict/text/109105098/lec12.pdf
- <https://www.classcentral.com/course/swayam-legal-compliance-for-incorporating-startup-5773>
- <https://www.simpletaxindia.net/2013/11/16-video-on-companies-act-2013-on-all.html>
- Classification of company: <https://www.udemy.com/course/basics-of-indian-companies-act-2013/>
- <http://www.freebookcentre.net/Law/Law-Books.html>

- <http://197.14.51.10:81/pmb/DROIT/1405899646.pdf>
- www.mooc-list.com/tags/business-law
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- <http://www.cii.co.uk/media/874535/J03%202009-10.pdf>