

# **INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO**



## **LEARNING OUTCOMES**

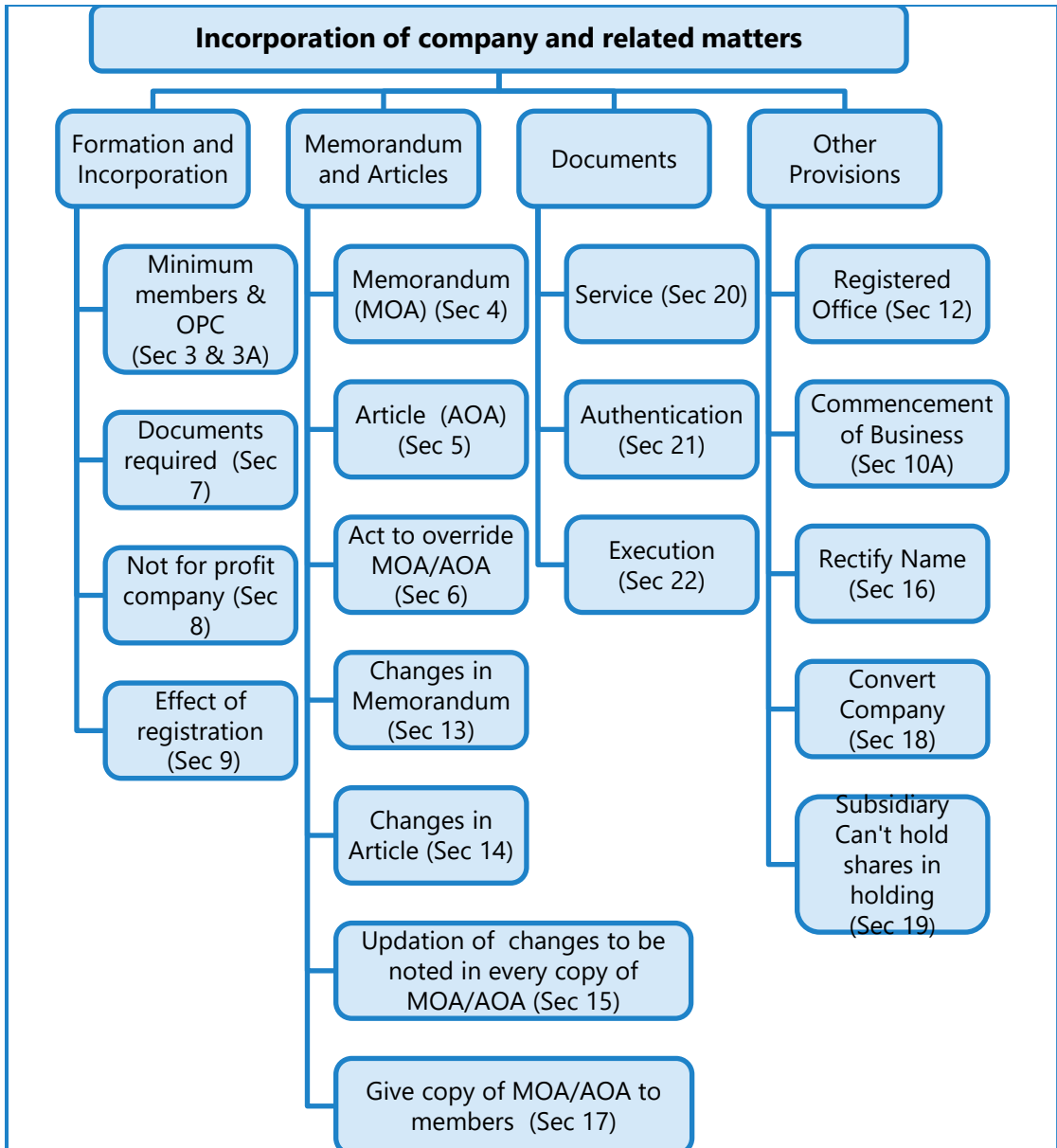
**At the end of this chapter, you will be able to:**

- ♦ Explain the Formation & Incorporation of company (Private Limited/ Public Limited), One person company (OPC) and the formation of Not for Profit Organization (Section 8 Company).
- ♦ Identify the need for Memorandum of Association (MOA) and Articles of Association (AOA) and changes incidental thereto.
- ♦ Know the effect of registration.
- ♦ Explain and identify the concepts related to registered office of company.
- ♦ Understand how documents may be served and filing thereof.
- ♦ Know about Authentication of documents, proceedings and contracts and Execution of bills of exchange, etc.

## CHAPTER OVERVIEW



This chapter will discuss in detail the provisions contained in Chapter II of the Companies Act 2013 pertaining to the incorporation of companies and matters incidental thereto. The scope of this chapter is shown in below figure;



## 1. INTRODUCTION TO INCORPORATION OF COMPANIES & PROMOTOR

Chapter II	Consists of sections 3 to 22 as well as the Companies (Incorporation) Rules, 2014.
------------	--

A company is a separate legal entity from its members. It has perpetual succession and can be incorporated only for lawful purposes. Prior to incorporation, promotion activities are essential. Promotion signifies a number of business operations familiar to the commercial world by which a company is brought into existence<sup>1</sup>

Persons who undertake promotion activities in order to incorporate the company are generally known as promoters. The section 2(69) of Companies Act, 2013<sup>2</sup> (herein after referred to as 'the Act') defines the term **"Promoter"** (already mentioned in chapter 1 of module; elaborated here). Promoter means a person;

- a. Who has been named as promoter in a prospectus; **or**
- b. Who is identified as promoter by the company in the annual return; **or**
- c. Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; **or**
- d. In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, but shall not include a person who is acting merely in a professional capacity such as attorney, technical or functional experts.

Students are advised to take note that above definition serves the purpose to make a person liable 'in capacity of promoter' for fraud through misstatement, but not highlighting what actually promoters do. Hence, considering the judicial pronouncements improves our understanding regarding role of promoter.

Promoter is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that

---

<sup>1</sup> Whaley Bridge Printing Co. v. Green (1880) 5 B.D. 109

<sup>2</sup> Act 18 of 2013

purpose.<sup>3</sup> To be a promoter, one need not necessarily be associated with the initial formation of the company; one who subsequently helps to arrange floating of its capital will equally be regarded as a promoter.<sup>4</sup>

Hence, "promoter" denotes any individual, association, partnership or a company that takes all the necessary steps to incorporate (create and mould)<sup>5</sup> a company and set it going, in a fiduciary position.<sup>6</sup>

#### Illustration (True/False)

**Statement** – *To be a promoter one necessarily be associated with the initial formation of the company.*

**Answer** - False, one who subsequently helps company to keep going, raise fund & advice to board (other than in professional capacity) will equally be regarded as a promoter.



## 2. FORMATION OF COMPANY [SECTION 3]

Earlier companies were granted rights by royal charter, but now a company may be incorporated by either a special Act of the legislature or under the Companies Act, 2013. Accordingly, an incorporated company may be either Chartered Company, Statutory Company, or Registered Company. Section 3 of the Act deals with registered companies.

### FORMS OF COMPANIES

The Companies are broadly classified into categories shown below in figure. Definitions of many of these are already covered under chapter 1 of this module.

---

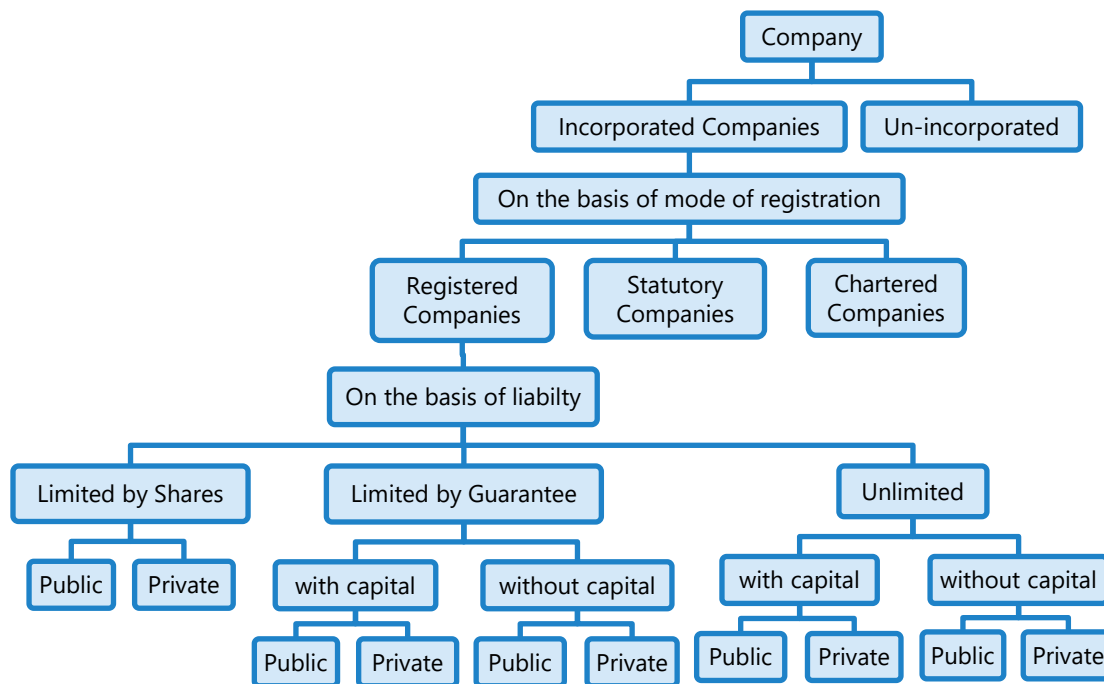
<sup>3</sup> Twycross v. Grant (1877) 2 C.P.D. 469

<sup>4</sup> Lagunas Nitrate Co. v. Lagunas Syndicate (1899) 2 Ch. 392.

<sup>5</sup> Erlanger v New Sombrero Phosphate Co. (1878) 48 LJ Ch. 73

<sup>6</sup> *ibid*

## Kind of Companies



Sub-section 1 to section 3 provides that for **lawful purpose**, by **subscribing** their name to **memorandum** and complying with requirement of this Act;

- A public company may be formed by **seven (7)** or more persons
- A private company may be formed by two (2) or more persons
- A one person company (as private company) may be formed by **one (1)** person.

Further, sub-section 2 to section 3 provides that, company formed as specified above may be incorporated either as;

- Companies limited by shares; or
- Companies limited by guarantee; or
- Unlimited liability companies.

**Note:** A limited liability companies may be Companies limited by guarantee as well as shares.

Specified IFSC Public or Specified IFSC Private Company shall be formed only as a company limited by shares. IFSC Company means a company licensed to set up businesses in any International Financial Services Center in India, like in Gujarat International Finance Tec-City.

### ONE PERSON COMPANY (OPC)

The Companies Act, 2013 for the first time allowed the formation of company by just one person with limited liability, called one person company; such a company is described as a private company under section 3(1)(c). Further section 3(1) along with rule 3 and 4 of *the Companies (Incorporation) Rules, 2014*, provides certain provisions specifically applicable in case of One Person Company listed below;

#### Who can form one person company?

Only a natural person, other than minor; who is an Indian citizen and **whether resident in India or otherwise** shall be eligible to incorporate a One Person Company.

Resident in India means a person who has stayed in India for a period of not less than one hundred and twenty days during the immediately preceding financial year.

OPC can't be incorporated or converted into a company under section 8 of the Act. Further, OPC can't carry out Non-Banking Financial Investment activities including investment in securities of any body-corporates.

#### Indicate Name & Consent Nominee

The memorandum of One Person Company shall also indicate the name of the natural person, other than minor; who is an Indian citizen, whether resident in India or otherwise (as nominee), along with his prior written consent in the Form No. INC-3, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company.

Note: This provision is to ensure perpetual succession of legal existence of OPC.

**Example** – Ms. Madhu formed an OPC wherein Mr. Sudan is nominee as his name is specified in MOA along with his consent. Ms. Madhu declared insolvent, pending

to discharge insolvency, she becomes incompetent to contract, hence, Mr. Sudan becomes the member of such OPC.

The name of such nominated person in **Form No. INC-32 (SPICe)** along with consent of such nominee obtained in Form No. INC-3 and fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.

**Note:** A natural person shall not be member of more than a One Person Company at any point of time and the said person shall not be a nominee of more than a One Person Company

Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the above specified criteria (can be member of only one OPC) within a period of one hundred and eighty days.

### Withdraw of Consent by Nominee

Such other person (nominee) **may withdraw** his consent by giving a notice in writing to such sole member and to the One Person Company

In this case, the sole member shall nominate another person as nominee **within fifteen days** of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written consent of such other person so nominated in Form No. INC-3.

**Note:** Despite name of such other (old nominee) and another person (new nominee) specified in memorandum, any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

### Replacing Nominee with another one

The member **may change** the name of the person nominated by him at any time for **any reason** including in case of death or incapacity to contract of nominee and nominate another person (new nominee) after obtaining the prior consent of such another person in Form No. INC-3.

Member can do so by intimation in writing to the company.

This is not specified, either in Act or rules whether intimation shall be prior to making change or can be made afterward, but if we consider reasonable construction the intimation shall be 'Prior Intimation'.

Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

**Example** - Rajesh has formed a 'One Person Company (OPC)', wherein his wife Roopali is named as nominee. For the last two years, his wife Roopali is suffering from terminal illness and due to this hard fact he wants to change her as nominee. He has a trusted and experienced friend Ramnivas who could be made nominee or his (Rajesh) son Rakshak who is of seventeen years of age. In the instant case, Rajesh can appoint his friend Ramnivas as nominee in his OPC and not Rakshak because Rakshak is a minor.

### When Nominee become Member

Where the **sole member ceases** to be the member and nominee become new member, then such new member shall **nominate within fifteen days** of becoming member, a person (new nominee) who shall in the event of his death or his incapacity to contract become the member of such company.

### Notice of change to Registrar

In all the three case of change discussed above (Withdraw of Consent by Nominee, Replacing Nominee with another one and When Nominee become Member) the company **within thirty days** of receipt of notice of withdrawal of consent by nominee, intimation of change of nominee from member, or cessation; shall file the notice with the Registrar of such withdrawal of consent, change or cessation respectively and intimate the name of such another person (new nominee) in Form No. INC-4 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 along with the prior written consent of such another person so nominated in Form No. INC-3.

**Note:** All the notices and intimations required above shall be in written only, whether specific form provided or otherwise.

### Illustration (True/False)

**Statement** – Even a Non-Resident Indian can form and become member of OPC.

**Answer** – True, Rule 3(1) of The Companies (Incorporation) Rules, 2014.



Only a natural person, other than minor; who is an Indian citizen and **whether resident in India or otherwise** shall be eligible to incorporate a One Person Company.

#### Additional reading

**Relaxations available to an OPC** include:

- ◆ Not required to prepare a cash-flow statement with effect of section 2(40).
- ◆ The annual return to be furnished under section 92 can be signed by the Director and not necessarily a Company Secretary, even an abridged annual return may be prescribed.
- ◆ Further, following the similar line, section 134 provides it would suffice if one director signs the audited financial statements and abridged form of director report may be prescribed.
- ◆ Holding annual general meeting as required under section 96 is not necessary in case of OPC. Moreover, certain specific provisions related to general meetings and extraordinary general meetings, specified under sections 100 to 111 not applicable to OPC.
- ◆ Even relaxation is also there in convening board meetings section 173 requires an OPC to hold only one meeting of the Board of Directors in each half of a calendar year.
- ◆ Vide section 137, the OPC are allowed to file financial statements within six months from the close of the financial year as against 30 days.



### 3. MEMBERS SEVERALLY LIABLE IN CERTAIN CASES i.e. REDUCTION IN MINIMUM MEMBERSHIP [SECTION 3A]

Member may have limited or unlimited liability depending upon nature of company. Generally, the members are jointly liable for the debt of company, but they shall be severally liable for the payment of the debts of the company and may be severally sued therefore; if at any time:

1. The number of members of a company is reduced below **seven (7)** and **two (2)** in case of a public and private company, respectively; **and**

2. Such company carries on business for **more than six months** with reduced number of members; **and**
3. Every such person who carries on business after those six months is **cognizant (aware)** of the fact that business is carried reduced members

Such members are liable for the payment of the whole debts of the company contracted during that time (after elapse of six months)

**Example** – Amar, Akbar, and Anthony along with five of their friends were member of Harmony Limited. Amar and Akbar died on 18<sup>th</sup> August 2022, resultantly members count reduced to 6 and every one aware about it. Harmony limited continued its operation without increasing members. In March 2023, Company took loan for business operations, and defaulted in payment thereof. The lender of such loan can sue company, or Anthony or any of rest of five friends, because members shall severally liable for said loan in given case.

#### **Illustration (True/False)**

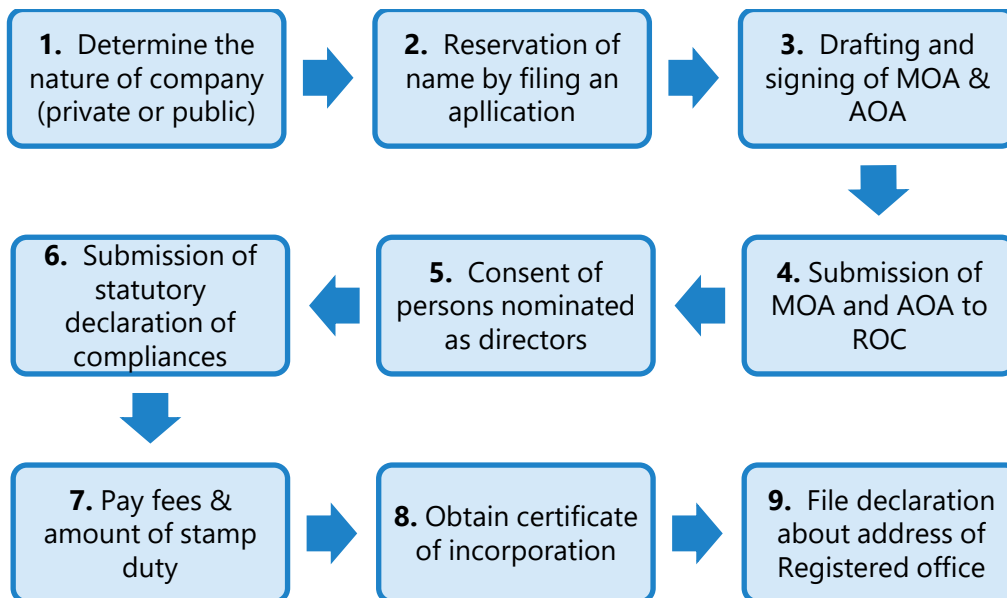
**Statement** – *Members who knowingly operating the company for more than six months with less than the minimum number of members specified in Section 3(1) are severally liable for the payment of all debts contracted by the company during the period since the number of members was first reduced.*

**Answer** – False, refer section 3A of the Act. Such members are liable severally for the payment of the whole debts of the company contracted during that time (after elapse of six months)

## 4. INCORPORATION OF COMPANY [SECTION 7]

Section 7 of the Act provides for the procedure to be followed for incorporation of a company. The steps involved in the process of incorporation are enumerated in Figure shown below (Steps for Incorporation). Majority of steps are covered under section 7 while some other related to documents such as MOA and AOA governed by section 4 and 5 respectively. Corresponding procedural aspects are described by rule 12 to 18 of the *Companies (Incorporation) Rules, 2014* and Fees are notified through rule 12 of the *Companies (Registration Offices and Fees) Rules, 2014*.

### Steps for Incorporation



**Note:** Now, it is also required to submit a declaration that all the subscribers have paid the value of shares agreed to be taken by him apart from filling of verification of registered office before the commencement of business.

### FILING OF THE DOCUMENTS AND INFORMATION WITH THE REGISTRAR [SUB-SECTION 1]

An **application** for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in **SPICE+** (Simplified Proforma for Incorporating company Electronically Plus: INC-32) **along with the fee** as provided under *the Companies (Registration offices and fees) Rules, 2014* **accompanied by** following **documents and information**;

SPICE+ is an integrated Web form offering 10 services by 3 Central Govt. Ministries & Departments. (Ministry of Corporate Affairs, Ministry of Labour & Department of Revenue in the Ministry of Finance) thereby saving as many procedures, time and cost for starting a business in India. SPICE+ is initiatives towards Ease of Doing Business. Students may refer to FAQs on SPICE+ form at MCAs' website for more details <https://www.mca.gov.in/MinistryV2/spicefaq.html>

### The duly signed memorandum of association and articles of association

The memorandum (e-MOA in Form No. INC-33) and article (e-AOA in Form No. INC-34) of company so furnished shall be duly signed by all the subscribers to the memorandum in the manner prescribed by rule 13 of the *Companies (Incorporation) Rules, 2014* as stated below:

- a. Each subscriber shall add **his name, address, description & occupation**, if any, in the presence of **at least one witness** who shall attest the signature, shall sign and add his name, address, description and occupation, if any.
- b. Where a subscriber is illiterate, he shall **affix his thumb impression** or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and **authenticate it by his own signature** and he shall also write against the name of the subscriber, the number of shares taken by him.

**Note:** The type written or printed particulars of the subscribers and witnesses shall be allowed as if it is written, so long as appends signature or thumb impression.

- c. Where the subscriber is a **body corporate**, the memorandum and articles of association shall be signed by **director, officer or employee** of the body corporate **duly authorized** in this behalf by a resolution of the board of directors.
- d. Where the subscriber is a **Limited Liability Partnership**, it shall be signed by a **partner** of the Limited Liability Partnership, **duly authorized** by a resolution approved by all the partners of the Limited Liability Partnership:

**Note:** In either case c or d stated above, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

- e. Where subscriber to the memorandum is a foreign national residing outside India his signatures and address on the memorandum and articles of association and proof of identity shall be **notarized by a Notary (Public)** with a certificate. Further, if such person residing in a country outside the Commonwealth or which is not a party to the Hague Apostille Convention, 1961, the certificate of the Notary (Public) shall be **authenticated by a Diplomatic or Consular Officer**.

- f. Where subscriber to the memorandum is a foreign national residing outside India and visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid **Business Visa**. In case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

**Practical Insight / Illustration**

**Extracts from Memorandum of Association of Infosys Limited (Corporate Identification Number: L85110KA1981PLC013115)**

We the several persons whose names and addresses are subscribed below are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the Capital of the Company set opposite to our respective names.

Signature, Name, Address, description and occupation of Subscribers	Number of Equity Shares taken by Subscriber	Signature, Name, Address, description and occupation of Witness
Nagavara Ramarao Narayana Murthy (Son of Nagavara Ramarao) Flat 6, Padmanabhan Apartment, 1126/2, Shivajinagar, Pune - 411 016 Consultant	1 (One equity)	VIPUL DEVENDRA KINKHABWALA (S/o. Devendra Vithaldas Kinkhabwala) 14, Thakurdwar Road, Zaveri Building, Bombay - 400 002. Service
Nadathur Srinivasa Raghavan (Son of N. Sarangapani) 5, "Ravikripa", Station Road, Matunga (C. R.), Bombay- 400019. Consultant	1 (One equity)	
Senapathy Gopalakrishnan (Son of P. G. Senapathy) Krishna Vihar, Kalapalayam Lane, Pathenchanthai, Trivandrum - 695 001. Consultant	1 (One equity)	
Nandan Mohan Nilekani (Son of M. R. Nilekani) 37, Saraswatput, Dharwar - 580 002. KARNATAKA Consultant	1 (One equity)	
	4 (Four equity)	

Dated this 15th day of June 1981.

Amended on August 23, 2018

### Declaration of Compliance by Professional & Director, Manager or Secretary of company

A declaration that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with shall be filled in Form No. INC-8 by:

- a. an advocate, a chartered accountant, cost accountant or company secretary in practice who is engaged in the formation of the company **and**
- b. a person named in the articles as director, manager or secretary of the company.

### Declaration by subscribers to the memorandum and persons named as the first directors

A declaration in Form No. INC-9 from each of the subscribers to the memorandum and from persons named as the first directors (if any) in the articles, stating that all the documents filed with the Registrar for registration of the company contain information that is **correct and complete** and **true** to the best of his knowledge and belief

- a. He is **not convicted** of any **offence** in connection with the promotion, formation or management of any company, **or**
- b. He has **not been found guilty** of any **fraud or misfeasance** or of any **breach of duty** to any company under this Act or any previous company law during the last five years,

### Address for correspondence

The address for correspondence till its registered office is established.

### Particulars of persons named as the first directors

The particulars i.e name, including surname or family name, the Director Identification Number (DIN), residential address, nationality and such other particulars including proof of identity of each person mentioned in the articles as first director of the company and **his interest** in other firms or bodies corporate along with his **consent** (Form No. DIR-2) to act as director of the company shall be

filed in Form No. DIR-12 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.

**Particulars of subscribers to the memorandum**

The following particulars of every subscriber to the memorandum shall be filled;

- a. Name (including surname or family name) and recent Photograph affixed
- b. Father's/Mother's name
- c. Nationality, Proof of nationality in case the subscriber is a foreign national
- d. Date and Place of Birth (District and State)
- e. Educational qualification and Occupation
- f. Permanent Account Number
- g. Email id and Phone number of Subscriber
- h. Permanent residential address and also Present address
- i. Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill, provided that Bank statement Electricity bill, Telephone or Mobile bill shall not be more than two months old
- j. Proof of Identity (For Indian Nationals - Voter's identity card, Passport copy, Driving License copy, Unique Identification Number (UIN) & for Foreign nationals and Non Resident Indians – Passport)
- k. If the subscriber is already a director or promoter of a company(s), the particulars relating to name of the company; Corporate Identity Number; Whether interested as a director or promoter

Where the subscriber to the memorandum is a body corporate, then the following particulars shall be filed with the Registrar

- a. The name of the body corporate and Corporate Identity Number of the Company or Registration number of the body corporate, if any
- b. GLN, if any

- c. The registered office address or principal place of business
- d. E-mail Id
- e. If the body corporate is a company, certified true copy of the board resolution specifying inter-alia the authorization to subscribe to the MOA
- f. If the body corporate is a limited liability partnership or partnership firm, certified true copy of the resolution agreed to by all the partners specifying inter alia the authorization to subscribe to the MOA
- g. In case of foreign bodies corporate, the details relating to the copy of certificate of incorporation of the foreign body corporate; & the registered office address.

As per rule 12 of the *Companies (Incorporation) Rules, 2014*

In case any of the objects of a company requires registration or approval from sectoral regulators such as the RBI and SEBI, then such registration or approval shall be obtained by the proposed company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation.

In case of a Company being incorporated as a Nidhi, the declaration by the Central Government under Section 406 of the Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the Company.

### **ISSUE OF CERTIFICATE OF INCORPORATION ON REGISTRATION**

The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the Form No. INC-11 to the effect that the proposed company is incorporated under this Act. Certificate of Incorporation shall mention permanent account number of the company where if it is issued by the Income-tax Department.



### Practical Insight

#### Certificate of Incorporation



#### Students are advised to take note;

The Certificate contains the name of the company, the date of its issue, CIN (Corporate Identity Number) and the signature of the Registrar with his seal.

Certificate of incorporation is evidence of registration (existence of separate legal entity with perpetual succession). Its effects are highlighted by section 9, explain later in this chapter.

Earlier, the certificate of incorporation considered as conclusive proof, but as per the Companies Act, 2013, **certificate of Incorporation is not conclusive proof of everything prior to incorporation being in order.** Sub-section (6) and (7) of section 7 signify this understanding.

**ALLOTMENT OF CORPORATE IDENTITY NUMBER (CIN)**

On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate of incorporation.

CIN is a 21 alpha-numeric digit based unique identification number, comprising data sections/elements that reveals the basis aspects about company.

**<sup>7</sup>Example - Decode the CIN**

CIN of **Infosys Limited** is **L85110KA1981PLC013115**

The first character – **L** (reveals listing status, L for listed and U for unlisted, for instance Infosys is Listed one)

The next five digits – **85110**

The next two letters – **KA** (reveals the Indian state where the company is registered, for instance KA is for Karnataka)

The next four digits – **1981** (reveals the year of incorporation of a company)

The next three characters – **PLC** (reveals the company classification - PLC for public, PTC for private, FTC for foreign, and GOI for government)

The last six digits – **013115** (reveals registration number with concerned ROC)

**MAINTENANCE OF COPIES OF ALL DOCUMENTS AND INFORMATION**

The company shall maintain and preserve copies of all the documents and information as originally filed at its registered office, till its dissolution under this Act.

**FURNISHING OF FALSE OR INCORRECT INFORMATION OR SUPPRESSION OF MATERIAL FACT AT THE TIME OF INCORPORATION (I.E. DURING INCORPORATION PROCESS)**

If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud under section 447.

---

<sup>7</sup> This Example is only for understanding of the students.

Note: Provisions of section 447 explained in detail in book chapter 3; Prospectus and Allotment of securities.

**COMPANY ALREADY INCORPORATED BY FURNISHING ANY FALSE OR INCORRECT INFORMATION OR REPRESENTATION OR BY SUPPRESSING ANY MATERIAL FACT (i.e. POST INCORPORATION)**

Where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by

- a. furnishing any **false** or **incorrect information** or representation or
- b. by **suppressing any material fact** or information in any of the documents or declaration filed or made for incorporating such company, or
- c. by any **fraudulent action**,

Then, the promoters, the persons named as the first directors of the company and the persons making declaration under this section shall each be liable for action for fraud under section 447.

**ORDER OF THE TRIBUNAL**

Where a company has been got incorporated by

- a. furnishing **false** or **incorrect information** or representation, or
- b. by **suppressing any material fact** or information in any of the documents or declaration filed or made for incorporating such company or
- c. by any **fraudulent action**,

Then, the **tribunal (NCLT)** on being satisfied that the situation so warrants, in response to an application made to it, may pass order as it may deem fit including;

- a. **regulation of the management** of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- b. direct that **liability** of the members shall be **unlimited**; or
- c. direct **removal of the name** of the company from the register of companies; or
- d. **winding up** of the company; or

**Provided that** before making any such order:

- a. the company shall be given a reasonable opportunity of being heard in the matter; and
- b. the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability

Tribunal means the National Company Law Tribunal (NCLT) constituted on 1<sup>st</sup> June, 2016 under section 408 of the Companies Act, 2013. The NCLT is a quasi-judicial body in India that adjudicates issues relating to companies in India.

**Example** - The Certificate of incorporation is not the conclusive proof with respect to the legality of the objects of the company mentioned in the objects clause of the memorandum of association. As such, if a company has been registered whose objects are illegal, the incorporation does not validate the illegal objects. In such a case, the only remedy available is to wind up the company.

## 5. FORMATION OF COMPANIES WITH CHARITABLE OBJECTS, ETC. [SECTION 8]

The underlying purpose of formation of company is not always making profit through operating economic activities, it may have charitable or social objects.

**To illustrate,** Tata Foundation (CIN U85191MH2014NPL253500) and Azim Premji Foundation (CIN U93090KA2001NPL028740). Students are advised to take note that 5<sup>th</sup> data section of both the CIN comprises of 'NPL', which signify Not-for-Profit License Company.

Such companies are licensed by Central Government\* under section 8 of the Companies Act, 2013<sup>8</sup>, relevant provisions of section 8 and applicable rules thereto are described below.

**Note:** The power of \*Central Government under section 8 delegated to:

- (i) **ROCs**<sup>9</sup> to the extent and for purpose of:

<sup>8</sup> Act 18 of 2013

<sup>9</sup> S.O. 1353(E), dated 21<sup>st</sup> May, 2014

- sub-section (1);
  - clause (i) to sub-section (4), except for alteration of memorandum in case of conversion into another kind of company; and
  - sub-section (5)
- (ii) Regional Directors<sup>10</sup>** to the extent and for purpose of:
- clause (i) to sub-section (4), for alteration of memorandum in case of conversion into another kind of company; and
  - sub-section (6)

### WHO CAN ISSUE AND GET THE LICENSE UNDER SECTION 8(1)?

As per section 8, the Central Government (ROC in its behalf) may grant such a licence if it is proved to the satisfaction that a **person** or an **association of persons** proposed to be registered under this Act as a **limited company**

- a. has in its **objects** the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
- b. intends to apply its profits (if any) or other income in promoting its objects; and
- c. intends to **prohibit payment of any dividend** to its members.

**Note:** The use of the word 'person' appears to allow even a single person to form a company for the objects specified. However, as discussed earlier also (under heading 'OPC' of this chapter) that rule 3(5) of *the Companies (Incorporation) Rules, 2014* prohibit the OPC to be incorporated or converted into a company under section 8. Likewise, as per section 2(85), a small company cannot be incorporated or converted into a section 8 company. A firm may be a member of the company registered under section 8.

Despite, members liability is limited, the words 'Limited' or 'Private Limited' shall not be added to its name. But on registration, the company shall enjoy same privileges and obligations as of a limited company.

Licence issued may on such conditions as Central Government (ROC) deems fit.

<sup>10</sup> S.O. 4090(E), dated 19<sup>th</sup> Dec, 2016

## REGISTRATION OF COMPANY USING LICENSE

After granting licence, an application shall be made to registrar under section 8(1) itself for registration of company in the manner specified in rule 19 of *the Companies (Incorporation) Rules 2014*.

### Application for registration

A person or an association of persons desirous of incorporating a company with limited liability under section 8(1), shall make an application to registrar in **Form SPICe+** (Simplified Proforma for Incorporating company Electronically Plus: INC-32) along with the fee as provided in *the Companies (Registration offices and fees) Rules, 2014*.

### Supporting document along with Application

The application furnished as specified above shall be accompanied by the following documents;

- a. The memorandum and articles of association of the proposed company in the Form No. INC-13 and Form No. INC-31, respectively;
- b. An estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
- c. The declaration in by an Advocate, a Chartered Accountant, cost accountant or Company Secretary in practice Form No. INC-14 and by each of the persons making the application in Form No. INC-15, that;
  - ◆ the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and
  - ◆ all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

## ALTERATION OF MEMORANDUM AND ARTICLES REQUIRES PRIOR PERMISSION OF GOVERNMENT

A company registered under this section requires prior permission from;

- a. Central Government (power delegated to **regional directors**) for alteration of its **memorandum** and
- b. Central Government (power delegated to **ROCs**) for alteration of its **articles**.

### CONVERSION INTO ANY OTHER KIND OF COMPANY

A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed in rule 21 and 22 of *the Companies (Incorporation) Rule 2014* as described below;

- a. A company shall pass a **special resolution** at a general meeting for approving such conversion
- b. An **explanatory statement** to notice of such general meeting must set-out the details on reason of such conversion.
- c. The company shall file an application in Form No. INC-18 with the **Regional Director** with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for conversion.

Also attach the proof of serving of the notice served by **registered post or hand delivery**, to:

- ◆ the Chief Commissioner of Income Tax having jurisdiction over the company,
- ◆ Income Tax Officer who has jurisdiction over the company,
- ◆ the Charity Commissioner,
- ◆ the Chief Secretary of the State in which the registered office of the company is situated,
- ◆ any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating.

**Note:** If any of these authorities wish to make any representation to Regional Director, it shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company.

- d. A **copy** of the application with annexures as filed with the Regional Director shall also be **filed with the Registrar**.
- e. The company shall, within a week from the date of submitting the application to the Regional Director, **publish a notice** at its own expense, and a copy of

the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in Form No. INC-19 and shall be published;

- ◆ at **least once in a vernacular newspaper** in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and **at least once in English language** in an English newspaper having a wide circulation in that district; and
  - ◆ on the **website of the company**, if any, and as may be notified or directed by the Central Government.
- f. The company should have filed all its **financial statements** and **Annual Returns** upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Act up to the date of submitting the application to the Regional Director

**Note:** In the event the application is made after the expiry of three months from the date of preceding financial year to which the financial statement has been filed, a statement of the financial position duly certified by chartered accountant made up to a date not preceding thirty days of filing the application shall be attached.

- g. On receipt of the application, and on being satisfied , the Regional Director shall issue an **order approving the conversion** of the company into a company of any other kind subject to **such terms and conditions** as may be imposed in the facts and circumstances of each case.
- h. Before imposing the conditions or rejecting the application, the company shall be given a reasonable **opportunity of being heard** by the Regional Director
- i. On **receipt of the approval** of the Regional Director, the company shall convene a **general meeting** of its members to pass a **special resolution** for amending its **memorandum of association and articles of association** and the Company shall thereafter **file these with the Registrar** (with declaration to adhere conditions if any, imposed by Regional Director)
- j. On receipt of the documents referred above, the Registrar shall register the documents and **issue the fresh Certificate of Incorporation**.



## REVOCATION OF LICENSE

- a. The Central Government (power delegated to regional director) may by order revoke the licence of the company where;
- ◆ the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or
  - ◆ the affairs of the company are conducted fraudulently, or in violation of the objects of the company or prejudicial to public interest,

**Note:** On revocation, the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register.

Before such revocation a written notice must be served on such company and opportunity to be heard in the matter shall be given.

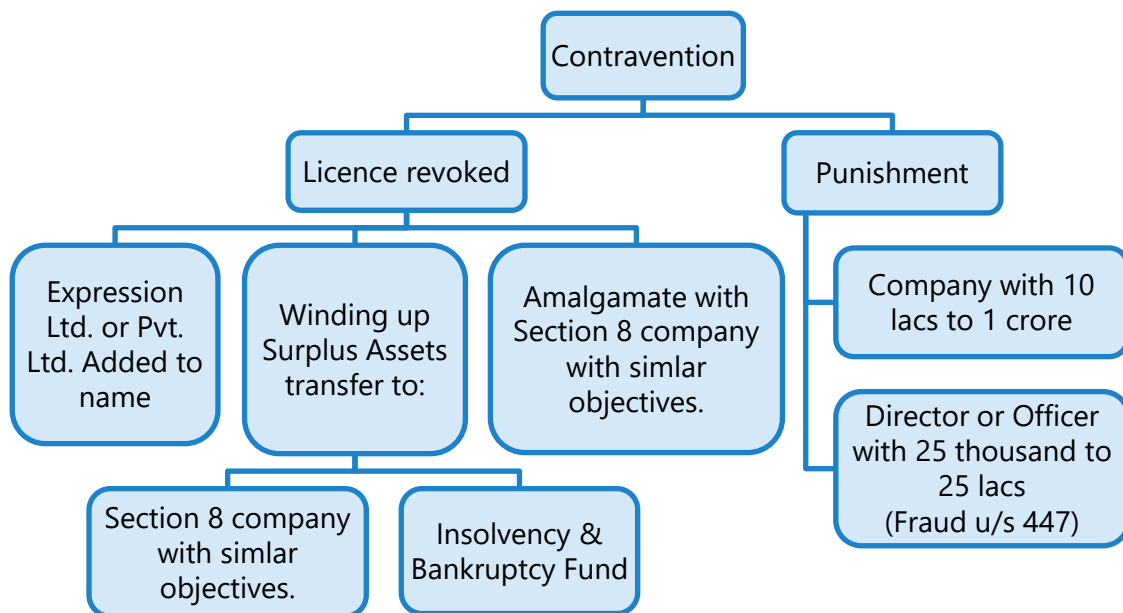
- b. Where a licence is revoked and the Central Government is satisfied, that it is essential in the public interest; then after giving a reasonable opportunity of being heard; by order it may direct that
- ◆ Company be **wound up** under this Act. **Excess assets** on the winding up or dissolution, after the satisfaction of its debts and liabilities, may be transferred to;
    - **Another company** registered under this section and **having similar objects**, subject to such **conditions** as the Tribunal may impose, **or**
    - May be **sold and proceeds thereof credited to the Insolvency and Bankruptcy Fund** formed under section 224 of the Insolvency and Bankruptcy Code, 2016.
  - ◆ Company be **amalgamated** with another company registered under this section and **having similar objects**. The Central Government empowered with **overriding effects** to **provide the said amalgamation** to form single entity with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

### PENALTY/ PUNISHMENT IN CONTRAVENTION

Penalty for offences under section 8 are summarised below;

Offence	Penalty
company makes any default in complying with any of the requirements laid down in this section	company shall, be punishable with fine varying from ten lakh rupees to one crore rupees
	directors and every officer of the company who is in default shall be punishable with fine varying from twenty-five thousand rupees to twenty-five lakh rupees
the affairs of the company were conducted fraudulently	every officer in default shall be liable for action under section 447

**FIGURE- SUMMARY OF SUB-SECTION 6 TO 11 OF SECTION 8**



### Additional reading

**Relaxations available to a Section 8 Company** include;

- ◆ Can call its general meeting by giving a clear 14 days' notice instead of 21 days.
- ◆ Requirement of minimum number of directors, independent directors etc. does not apply.
- ◆ Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.



## 6. EFFECT OF REGISTRATION [SECTION 9]

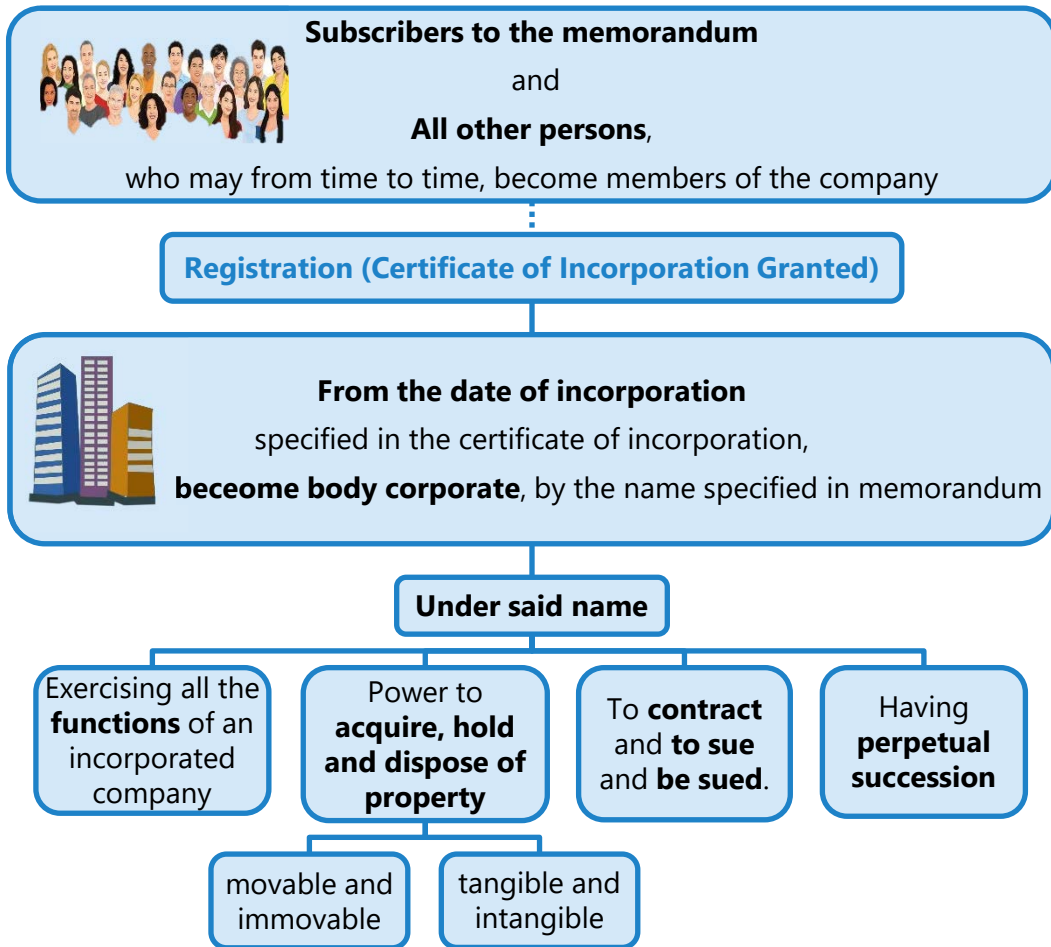
Section 9 of the Act provides for the **effect of registration** of a company, it states;

**From the date of incorporation** specified in the certificate of incorporation, the subscribers to the memorandum and all other persons, who may become members of such company, **shall be a body corporate** by the **name** as contained in the memorandum

Thereafter such body corporate, by the said name; shall be capable of;

- a. Exercising all the functions of an incorporated company under this Act and
- b. Having perpetual succession
- c. Power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible,
- d. To contract and to sue and be sued.

## SUMMARY OF SECTION 9



## 7. MEMORANDUM OF ASSOCIATION – MOA [SECTION 4]

Memorandum of association (MOA) is the fundamental document for the formation of the company, hence considered as its charter or constitution. Memorandum defines the relationship of the company with outsiders because it enables all those who deal with the company to know what its powers are and what activities it can engage in. The memorandum shall contain the following clauses:

- a. Name Clause
- b. Situation Clause (also called registered office clause)

- c. Objects Clause
- d. Liability Clause
- e. Capital Clause (applicable, if company is formed with share capital)
- f. Association Clause or Subscription Clause (specifically drafted in case of OPC)
- g. Nomination Clause (applicable, in case of OPC)

Section 4 of the Act along with relevant rules from the Companies (Incorporation) Rules 2014, provides for the requirements with respect to memorandum.

### **NAME CLAUSE [SECTION 4 (1) (a) READ WITH SUB-SECTION 2 TO 5]**

The name of the company with the last word "Limited" in the case of a public limited company, or "Private Limited" in the case of a private limited company.

The above clause is not applicable in case of section 8 companies.

In case of Specified IFSC Public Company<sup>11</sup> & IFSC Private Company<sup>12</sup>, name shall have the suffix, "International Financial Service Company" or "IFSC".

### **Application for reserving name for proposed company [sub-section 4]**

A person may make an application in SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32) accompanied by fee, as provided in *the Companies (Registration Offices and Fees) Rules, 2014*, to the Registrar for reservation of a name set out in the application as name of the proposed company.

Resubmission shall be allowed within 15 days, for rectification of defect, if any.

### **Application for reserving the name for the changing name of existing company [sub-section 4]**

A person may make an application, using web service RUN (Reserve Unique Name) along with fee as provided in *the Companies (Registration Offices and Fees) Rules, 2014*, to the Registrar for the reservation of a name set out in the application as the name to which the company proposes to change its name. Resubmission shall be allowed within 15 days, for rectification of defect, if any.

<sup>11</sup> GSR 08 (E) dated 04.01.2017

<sup>12</sup> GSR 09 (E) dated 04.01.2017

### Restriction regarding names and use of words & expressions therein [sub-section 2 and 3]

Sub-section 2 states that the name mentioned in the memorandum **shall not** be;

- a. **Identical** with or **resemble** too nearly to the name of an existing company registered under this Act or any previous company law; **or**
- b. Such, use of which by the company will constitute an **offence** under any law for the time being in force; **or**
- c. Such, use of which by the company is **undesirable** in the opinion of the Central Government (this power of Central Government has been delegated to ROC)<sup>13</sup>

Further, sub-section 3 provides, unless the **previous approval of the Central Government** has been obtained; a company **shall not** be registered with that name;

- d. Which contains any word or expression that is likely to give the **impression that the company is in any way connected with, or having the patronage** of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; **or**
- e. Which includes **words or expressions** namely Board; Commission; Authority; Undertaking; National; Union; Central; Federal; Republic; President; Rashtrapati; Small Scale Industries; Khadi and Village Industries Corporation; Financial Corporation and the like; Municipal;; Development Authority; Prime Minister or Chief Minister; Minister; Nation; Forest corporation; Development Scheme; Statute or Statutory; Court or Judiciary; Governor; Bureau; and the use of word Scheme with the name of Government (s), State, India, Bharat or any Government authority or in any manner resembling with the schemes launched by Central, State or local Governments and authorities.

#### **A name is said to 'resemble' when difference is only and only of**

- a. Plural or singular form of words in one or both names (Green Technology Ltd. is same as Greens Technology Ltd. and Greens Technologies Ltd.)

<sup>13</sup> S.O. 1353(E), dated 21<sup>st</sup> May, 2014.

- b. Type and case of letters, spacing between letters, and punctuation marks used in one or both names (ABC Ltd. is same as A.B.C. Ltd. and A B C Ltd.)
- c. Use of different tenses in one or both names (Ascend Solutions Ltd. is same as Ascended Solutions Ltd. and Ascending Solutions Ltd.)
- d. Slight variation in the spelling of the two names including a grammatical variation thereof (Disc Solutions Ltd. is same as Disk Solutions Ltd. but it is not same as Disco Solutions Ltd)
- e. Use of different phonetic spellings including use of misspelled words of an expression (Bee Kay Ltd is same as BK Ltd, Be Kay Ltd., B Kay Ltd., Bee K Ltd., B.K. Ltd. and Beee Kay Ltd)
- f. Complete translation or transliteration, and not part thereof, of an existing name, in Hindi or in English (National Electricity Corporation Ltd. is same as Rashtriya Vidyut Nigam Ltd.)
- g. Use of host name such as 'www' or a domain extension such as '.net'. org', 'dot' or 'com' in one or both names (Ultra Solutions Ltd. is same as Ultrasolutions.com Ltd. But Supreme Ultra Solutions Ltd. is not the same as Ultrasolutions.com Ltd.)
- h. The order of words in the names (Ravi Builders and Contractors Ltd. is same as Ravi Contractors and Builders Ltd.)
- i. Use of the definite or indefinite article in one or both names (Congenial Tours Ltd. is same as A Congenial Tours Ltd. and The Congenial Tours Ltd. But Isha Industries Limited is not the same as Anisha Industries Limited.)
- j. Addition of the name of a place to an existing name, which does not contain the name of any place; (If Salvage Technologies Ltd. is an existing name, it is same as Salvage Technologies Delhi Ltd. But Retro Pharmaceuticals Ranchi Ltd. is not the same as Retro Pharmaceuticals Chennai Ltd.)
- k. addition, deletion, or modification of numerals or expressions denoting numerals in an existing name, unless the numeral represents any brand (Thunder Services Ltd is same as Thunder 11 Services Ltd and One Thunder Services Ltd.)

Students may also refer to 23 instances specified in rule 8A of the Companies (Incorporation) Rules 2014 that tantamount to "undesirable names"

### Reservation of name [sub-section 5]

Upon receipt of an application the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a **period of twenty days** from the date of approval **or** such other period.

Provided that in case of **an application** for reservation of name or for change of its name by an **existing company**, the Registrar may reserve the name for a period of **sixty days** from the date of approval.

1. While allotting names, the Registrar of Companies concerned should exercise due care to ensure that the names are not in contravention of the provisions of the ***Emblems and Names (Prevention of Improper Use) Act, 1950***. It is necessary that Registrars are fully familiar with the provisions of the said Act.<sup>14</sup>
2. An application for **extension of reservation** of name under rule 9A of the Companies (Incorporation) Rules 2014 can be made before expiry of 20 days;
  - a. For another 20 days (total of 40 days) with fee of ₹ 1000, which may be further extend by another 20 day (total of 60 days) with fee of ₹ 2000.

**Or**

- b. For another 40 days (total of 60 days) with fee of 3000

### Cancellation of reserved name [sub-section 5]

Where after reservation of name, it is found that name was applied by furnishing wrong or incorrect information, then

- a. if the **company has not been incorporated**, the **reserved name shall be cancelled** and the person who has made the application shall be liable to a **penalty which may extend to one lakh rupees**;
- b. if the **company has been incorporated**, the Registrar may, after giving the company an **opportunity of being heard**;
  - ◆ Either direct the company to **change its name** within a period of 3 months, after passing an ordinary resolution;
  - ◆ Take action for **striking off** the name of the company from the register of companies; or
  - ◆ Make a petition for **winding up** of the company.

<sup>14</sup> General Circular No. 29/2014, dated 11<sup>th</sup> July, 2014



**Example:** Mr. Anil Desai, has applied for reservation of company name with a prefix "Sanwariya". He claimed that the Prefix "Sanwariya" is registered trademark in his name. Later on, it is found that the said prefix is not registered with Mr. Anil Desai, however, he has formed company by giving incorrect documents/ information while applying the name of the company. In such case, the Registrar shall take action as per the provisions of the Act after giving opportunity of being heard.

### SITUATION CLAUSE - SECTION 4 (1) (b)

Section 4(1)(b) requires, the memorandum of a company shall mention the name of state, where registered office is proposed to be situated.

The situation (place) of registered office is important from perspective of;

- a. Establishing the domicile of company for the purpose of determining jurisdictions in context to compliance (ROC, RD etc.), judicial aspects (bench of NCLT, high court etc.), fiscal aspects (taxation), and for many other purposes.
- b. Place at which the company's statutory books must normally be kept (in case of public company, general meeting also required to be conducted at registered office or in the city where it is situated).
- c. Act as the address to which notices and other communications can be sent.

A company shall, within thirty days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

### OBJECT CLAUSE & DOCTRINE OF ULTRA VIRES

Section 4(1)(c), requires the memorandum of a company shall state the **objects** for which the company is proposed to be incorporated **and** any **matter** considered necessary in furtherance thereof.

Specified IFSC Public Company & IFSC Private company **shall state** its objects to do **financial services activities** as permitted under the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and any matter considered necessary in furtherance thereof **in accordance with license to operate, from International Financial Services Centre** located in an approved multi services Special Economic Zone, granted **by the RBI, SEBI, or IRDA.**

A company can't depart away to do anything beyond or outside its objects stated in memorandum and if any act done beyond that will be **ultra vires** and **void**, same can't be ratified even by the assent of the whole body of shareholders.

**Note:** Acts ultra-vires to the authority of the directors may be ratified by the company.<sup>15</sup> Articles provide for regulations inside scope established by MOA, hence acts beyond (ultra-vires) the articles, can be ratified by the shareholders provided the relevant provisions are not beyond the memorandum. **To illustrate;** One of the director is authorised to issue cheque of ₹ 10000, but he issued for ₹ 12000; company can ratify so.

It is worth noting here that Memorandum of company can be altered to widen the scope of objects, but such alteration shall have prospective effect only; not the retrospective, hence an act once ultra-vires remain so ever.

A company may do anything which is **incidental to** and **consequential upon** the objects specified and such act will not be an ultra vires act.<sup>16</sup> **To illustrate** for trade one have rent or own a building, issue invoices, make and receive payments.

### Essence of the Doctrine of Ultra Vires

The *Doctrine of Ultra Vires* is meant to protect shareholders and the creditors of the company or anyone who deals with the company.

### Enunciation of Doctrine of Ultra Vires

The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, **Ashbury Railway Carriage and Iron Co. Ltd. v. Riche**.<sup>17</sup>

The memorandum of the company in the said case defined its objects thus: "The objects for which the company is established are to make and sell, or lend or hire, railway plants to carry on the business of mechanical engineers and general contractors....."

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words

<sup>15</sup> Rajendra Nath Dutta v. Shilendra Nath Mukherjee, (1982) 52 Com Cases 293 (Cal.)

<sup>16</sup> Attorney-General v. Great Eastern Rly Co (1880) 5 AC 473

<sup>17</sup> (1878) L.R. 7 H.L. 653

"general contractors" in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, "That is a contract which we desire to make, which we authorise the directors to make", still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

### Effects of Doctrine of Ultra Vires

The key effect will be as under;

- a. Whenever an ultra vires act has been or is about to be undertaken, any member of the company can get an injunction to restrain it from proceeding with it.<sup>18</sup>
- b. Neither party (even outsider) can sue for enforcement or specific performance of such agreement. Reason explained under heading Constructive Notice

### LIABILITY CLAUSE

Section 4(1)(d) requires, the memorandum of a company shall state;

- a. In the case of a **company limited by shares** the liability of its members is limited to the **amount unpaid**, if any, on the shares held by them; and
- b. In the case of a **company limited by guarantee**, the amount up to which each member undertakes to contribute:
  - ◆ to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
  - ◆ to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves

---

<sup>18</sup> Attorney-General v. Great Eastern Rly Co (1880) 5 AC 473

**Note:** Those shareholders who are members of the company at the time of its winding-up are included in list 'A'. They are primarily liable for making payment to the company at the time of its winding-up. While list 'B' consists of those persons who were the members of the company during the 12 months preceding the date of winding-up. B list contributories are liable to contribute if the amount realised from the contributories of list 'A' is not sufficient to discharge the liabilities of the company.

**Example -** Modern Furniture limited, a company limited by shares having share capital divided into shares with face value of ₹ 10 each, out of which ₹ 8 is called up. Mr. Singh who is having 200 share paid all ₹ 8 on each of share he hold, while Ms. Sarla owning 100 shares paid ₹ 10 (Rupee 2 in advance); whereas Mr. Sanju owning 250 shares paid ₹ 6 per share (₹ 2 in arrear per share). Liability of Mr. Singh, Ms. Sarla, and Mr. Sanju shall be maximum upto ₹ 400, Nil, and ₹ 1000 only; respectively.

### CAPITAL CLAUSE

Section 4 (1) (e) (i) requires, in the case of a **company having a share capital**, the memorandum of a company shall state;

- a. The amount of share capital with which the company is to be registered (usually termed as **authorised or nominal capital**); and
- b. The division thereof into shares of a fixed amount (i.e. **face value** and number of shares); and
- c. The number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share.

### SUBSCRIPTION CLAUSE

Section 4 (1) (e) (ii) requires, the memorandum of a company shall state, the number of shares each subscriber to the memorandum intends to take, indicated opposite his name, in the case of a company having a share capital.

### NOMINATION CLAUSE (ONLY IN CASE OF ONE PERSON COMPANY)

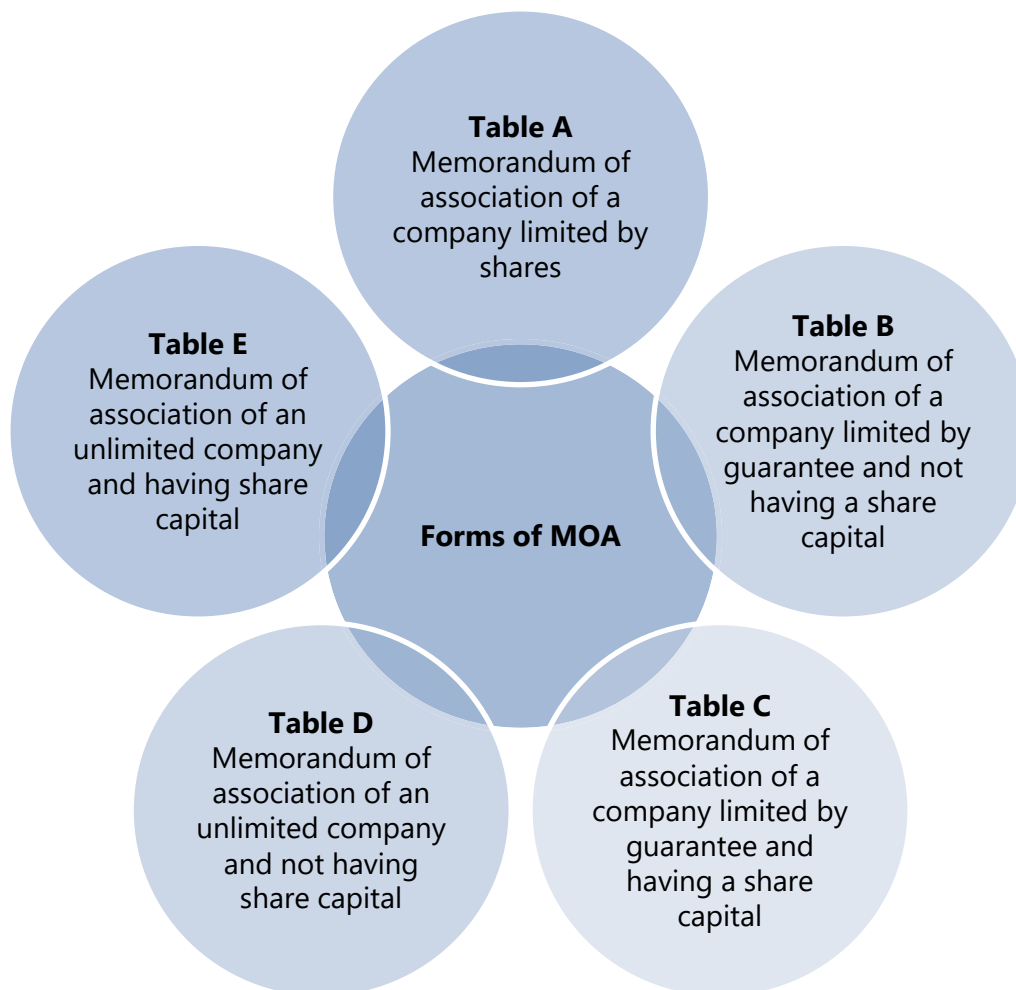
Section 4 (1) (f), requires, the memorandum of a company shall state the name of the person (nominee) who, in the event of death of the subscriber, shall become the member of the company, in the case of One Person Company.

Note: This provision is corresponding to first proviso to section 3 (1) already discussed earlier in this chapter.

## FORMS AND SCHEDULE RELATED TO MEMORANDM [SUB-SECTION 6]

The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I to the Act, as the case shown in figure;

### Forms of MOA



1. As per **section 399** of the Act, a memorandum is a public document. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

2. As per **section 4 (7)**, any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.



## 8. ARTICLES OF ASSOCIATION – AOA [SECTION 5]

Actually, articles of association of a company contains internal rules and regulations of the company. It is complementary to Memorandum and together give effect as charter of the company. Article establish a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company<sup>19</sup>

Section 5 of the Companies Act, 2013 and rule 10 and 11 of *the Companies (Incorporation) Rules, 2014* seeks to provide the contents and model of articles of association. The provisions are state below;

### CONTENTS AND MATTERS TO BE INCLUDED [SUB-SECTION 1 AND 2]

The articles of a company shall contain;

- a. The regulations for management of the company.
- b. Such matters as may be prescribed (rules 11 of *the Companies (Incorporation) Rules, 2014* refers to the matters specified in the model forms given under schedule I to the Act).

However, a company may also include such additional matters in its articles as may be considered necessary for its management.

### PROVISION FOR ENTRENCHMENT [SUB-SECTION 3 TO 5]

**Entrenchment** is the **chronic** or **deep-rooted fact** of an attitude, habit, or belief that is **firmly established** or **accustomed**, therefore it become **difficult or unlikely to change**. **To illustrate – Men don't cry**

**Entrenchment** may be possible for processes, as well as procedures in both way; that processes are so well established, it become difficult to change them **or** make process of change so rigid that process become well established.

**Students, here we are studying the word entrenchment with sense of making the process of alteration in articles more difficult, in order to enhance the protection.**

Usually an article of association may be altered by passing special resolution but entrenchment makes it more difficult to change the articles, in manner specified ahead;

<sup>19</sup> Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd. AIR 1971 SC 422

### Article may contain provisions for entrenchment [Sub-section 3]

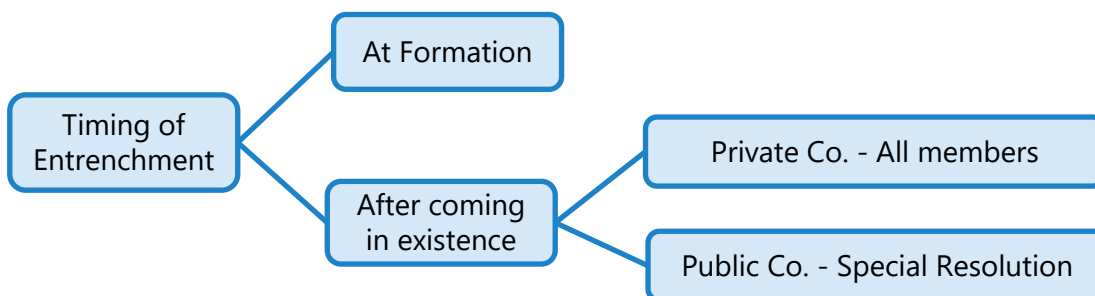
The articles may provide that specified provisions contained in it may be altered only if conditions that are more restrictive and harder than those applicable in the case of a special resolution, are met or complied with.

### Manner of inclusion of the entrenchment provision [Sub-section 4]

The provisions for entrenchment shall only be made either:

- a. On formation of a company, or
- b. By an amendment in the articles agreed to
  - ♦ By all the members of the company in the case of a private company and
  - ♦ By a special resolution in the case of a public company.

### Summary of Section 5(4)

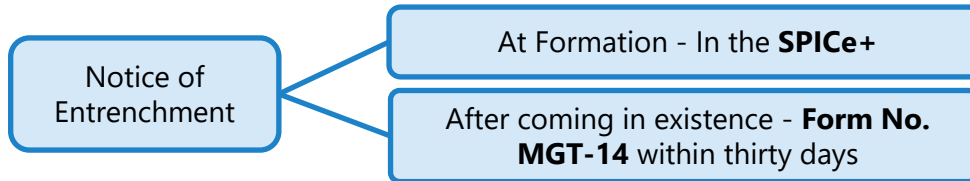


### Notice to the registrar of the entrenchment provision [Sub-section 5 read with Rule 10 of the Companies (Incorporation) Rules, 2014]

The company shall give notice to the Registrar of entrenchment provisions included in article

- a. In the **SPICe+** (Simplified Proforma for Incorporating company Electronically Plus: INC-32), along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 at the time of incorporation of the company, and
- b. In case of existing companies, in Form No. MGT-14 within thirty days from the date of entrenchment of the articles, along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.

### Summary of Section 5(5) and Rule 10

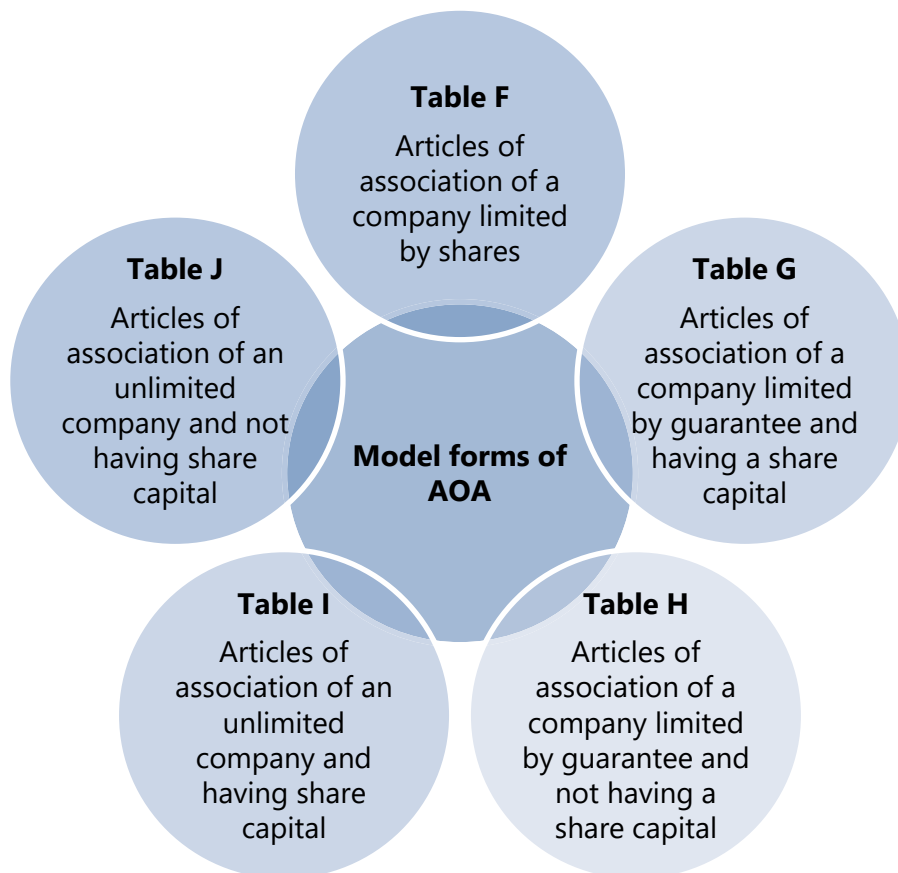


### MODEL FORMS OF ARTICLES [SUB-SECTION 6 TO 8]

Sub-section 6 provides that the articles of a company **shall** be in respective forms specified in Tables, F, G, H, I and J in Schedule I to the Act as specified in figure. Such forms are called model forms.

Further, sub-section 7 provides leeway to company, in **adopting all or any of the regulations** contained in the model articles applicable to such company.

### Forms of AOA





**Students are advised to take note:**

**Sub-section 8 provides that** in case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company – **Either exclude or modify expressly or else it applies what stated in model applicable to company.**

**Sub-section 9 restricts the scope** of section to the **articles either registered or amended under this Act** - Hence no provision of this section (section 5) shall be applicable to articles registered under previous company law; provided not amended under this Act.

**Illustration – Question & Answer**

**Question** – Highlight differences between the MOA and AOA

**Answer** - The key differences between the MOA and AOA includes;

**1. Content** - The memorandum contains the fundamental conditions as basis of incorporation. It lays down the parameters that define relation of company with outsiders. The Articles contain internal regulations of the company; hence regulate the relationship between company and the members and members inter se.

**2. Supremacy** - Memorandum cannot include any clause that is contrary to the provisions of the law, whereas the articles shall be subordinate to both the law and memorandum. Therefore, in case on conflict among the two, the MOA shall prevail.

**3. Scope** -Memorandum lays down the scope beyond which the activities of the company cannot go. An act done by a company beyond the scope of the memorandum are ultra vires and void. They cannot be ratified even by all the shareholders. Articles provide for regulations inside scope established by MOA, hence acts beyond the articles can be ratified by the shareholders provided the relevant provisions are not beyond the memorandum.



## 9. DOCTRINE OF CONSTRUCTIVE NOTICE AND DOCTRINE OF INDOOR MANAGEMENT

Both the doctrines carries the counter effect to each other, doctrine of constructive notice put onus on outsider to be aware of what is stated in MOA and AOA; whereas doctrine of indoor management protects such outsider from internal irregularities.

### DOCTRINE OF CONSTRUCTIVE NOTICE

#### Essence of Doctrine of Constructive Notice

All those who are dealing with company deemed to be aware of what is stated in its MOA and AOA, in its true perspective, because both this documents are public documents.

**Section 399\*** provides that the Memorandum and Articles when registered with Registrar of Companies 'become public documents' and then they can be inspected by any one by electronic means on payment of the prescribed fee.

Further, **Section 17** provides that a company shall on payment of the prescribed fee send a copy of each of the following documents to a member within seven days of the request being made by him

- a. Memorandum;
- b. Articles;
- c. Every agreement and every resolution referred to in sub-section (1) of section 117, if and so far as they have not been embodied in the memorandum and articles.

Any failure will make the company as well as every officer in default liable to a fine of one thousand rupee for each day during which default continues or one lac rupee whichever is less.

\*Section 399 is not part of syllabus, but essential to develop understanding.

#### Enunciation of Doctrine of Constructive Notice

The doctrine of constructive notice is based on the rule laid down in *Ernest v Nicholls*.<sup>20</sup> It was held for the first time that any person who is dealing with the company is deemed

<sup>20</sup> (1857) 6 HL Cas 401

to be familiar with the contents of all the public documents of the company. The memorandum and the articles of association of every company are registered with the Registrar of Companies. The office of the Registrar is a public office. Hence, the memorandum and the articles of association become public documents. It is therefore the duty of person dealing with a company to inspect its public documents and make sure that his contract is in conformity with their provisions.

As observed by Lord Hatherley whether a person actually reads them or not, he is to be in the same position as if he had read them.

### Effect of Doctrine of Constructive Notice

Every person (dealing with company) shall be presumed to know the contents of the documents and understood them in their true perspective.

Absence of notice of MOA and AOA cannot be an excuse to claim relief for outsiders.<sup>21</sup> Even if the party dealing with the company does not have actual notice of the contents of these documents, it is presumed that he has an implied (constructive) notice of them.

**Example** - One of the articles of a Modern Furniture Limited provides that a cheque below ₹ 1 lacs may be signed by single director but if above ₹ 1 lac shall be signed by at-least two directors. Similar instructions issued to bank with which MFL have account, as well. M/s Sagwan Wood Works, a vendor accepts a cheque of ₹ 2.20 lacs, signed only by single director. Considering Doctrine of Constructive Notice, the M/s Sagwan Wood Works (payee) has no right to claim, when cheque will be returned without payment by bank.

### Criticism of Doctrine of Constructive Notice

The 'Doctrine of Constructive Notice' is an unreal doctrine. People know a company through its officers and not through its documents. Since it does not take notice of the realities of business life, hence caused inconvenient for business transaction.

**To illustrate**, where the directors or other officers of the company were empowered under the articles to exercise certain powers subject only to certain prior approvals or sanctions of the shareholders, it is difficult for an outsider to ascertain whether necessary sanctions and approvals have been obtained before a certain officer exercises his powers or not.

---

<sup>21</sup> Kotla Venkataswamy v. Chinta Ramamurthy. AIR (1934) Mad 579

Therefore, to mitigate such a situation, those dealing with the company can assume that if the directors or other officers are entering into those transactions, they would have obtained the necessary sanctions. This is known as the '**Doctrine of Indoor Management**' or **Turquand's Rule**, and act as an exception to the constructive notice.

The Europe Communities Act, 1972 has abrogated this doctrine through effect of its section 9. Even in India also the Calcutta High Court<sup>22</sup> enforced a security which was not signed in accordance with the company's articles.

## DOCTRINE OF INDOOR MANAGEMENT

### Essence of Doctrine of Indoor Management

The people who are dealing with company are entitled to presume that internal proceedings and requirements has been duly met.

### Enunciation of Doctrine of Indoor Management

The Doctrine of Indoor Management was first laid down in the case of **Royal British Bank v. Turquand**<sup>23</sup>

The directors of a company were authorised by the articles to borrow on bonds such sums of money as should from time to time, by a resolution of the company in general meeting, be authorised to be borrowed. The directors gave a bond to Turquand without the authority of any such resolution. The question arose whether the company was liable on the bond. Held, the company was liable on the bond, as Turquand was entitled to assume that the resolution of the company in general meeting had been passed.

### Rationale of Doctrine of Indoor Management

What happens internally in a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.

If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

---

<sup>22</sup> Charnock Collieries Co Ltd v. Bholanath Dhar. ILR (1912) 39 Cal 810.

<sup>23</sup> (1856) 6 E & B 327

### Exceptions to Doctrine of Indoor Management

Relief on the ground of 'indoor management' cannot be claimed by an outsider dealing with the company in the following circumstances;

- a. **Knowledge of irregularity** - In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.
- b. **Negligence:** If with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.
- c. **Forgery:** The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.
- d. Where the **question** is in regard to the very **existence of an agency**.
- e. Where a **pre-condition** is required to be fulfilled before company itself can exercise a particular power. In other words, the act done is not merely ultra vires the directors/officers but ultra vires the company itself.

### Illustration

*The doctrine of indoor management is considered to be \_\_\_\_\_ to the doctrine of constructive notice.*

- a. *Exception*
- b. *Extension*
- c. *Alternative*
- d. *Not related*

**Answer** – a. Exception

## 10. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC. [SECTION 6]

The provisions of this Act shall have overriding effect to the provisions contained in;

- a. Memorandum of company; **or**
- b. Articles of company; **or**
- c. Any agreement executed by it; **or**
- d. Any resolution passed by the company in general meeting or by its Board of Directors

Whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act

Any provision contained in the memorandum, articles, agreement or resolution, to the extent in conflict to the provisions of the Act; shall be void.

**Example** - Section 123 declares that no dividend shall be paid by a company except out of profits. The force of this section cannot be undone by any provision in the articles of association, because the articles cannot sanction something which is forbidden by the Act. Even still it attempts then shall be void.

**Note:** This section starts with saving clause *i.e.* "Save as otherwise ....", means if any other section of the Act says that provisions contained in the memorandum, articles, agreement or resolution is superior then we will treat it accordingly.

**Example** - Section 47 of the Act deals with voting power of members. A notification dated 5<sup>th</sup> June, 2015 says that section 47 is applicable to a private company subject to its Article of Association (AOA). Now if AOA of a private company says that section 47 is not applicable to it then, in this case AOA will become superior and section 47 of the Act will not be applicable.

## 11. EFFECT OF MEMORANDUM AND ARTICLES [SECTION 10]

Sub-section 1 to Section 10 aims to impart contractual force to the Memorandum and Articles. It provides, when the memorandum and articles got registered; it shall bind the

- a. Members to the company;
- b. Company to the members;
- c. Members to the members;

To observe all the provisions of the memorandum and of the articles, as signatory thereof.

**Example (Member to the Company)**

The articles of association of the Steel Bros & Co Ltd contained clauses to the effect that on the bankruptcy of a member his shares would be sold to a person and at a price fixed by the directors. Borland, a shareholder, was adjudicated bankrupt. His trustee in bankruptcy claimed that he (Borland) was not bound by these provisions and should be at liberty to sell the shares at their true value. But it was held that contracts contained in the articles of association is one of the original incidents of the shares. Shares having been purchased on those terms and conditions, it is impossible to say that those terms and conditions are not to be observed.<sup>24</sup>

**Example (Company to the Member)**

The articles of the Odessa Waterworks Co provided that "the directors may, with the sanction of the company at general meeting, declare a dividend to be paid to the members". Instead of paying the dividend in cash to the shareholders a resolution was passed to give them debenture bonds. In an action by Mr. Wood, a member to restrain the directors from acting on the resolution, it was held that "The question is whether that which is proposed to be done in the present case is in accordance with the articles of association of the company. Those articles provide that the directors may, with the sanction of a general meeting, declare a dividend to be paid to shareholders. Prima facie that means to be paid in cash. The debenture bonds proposed to be issued are not a payment in cash."<sup>25</sup>

**Example (Member to the Member)**

Mr. Rayfield was a shareholder in a company. Clause 11 of the articles of company required him to inform the directors of his intention to transfer his shares in the company and which provided that the directors will take the said shares equally between them at a fair value. In accordance with this provision the Mr. Rayfield so

---

<sup>24</sup> Borland's Trustee v Steel Bros & Co Ltd (1901) 1 Ch 279

<sup>25</sup> Wood v Odessa Waterworks Co (1889) 42Ch D 636

notified the directors (who are members as well), who contended that they were not bound to take and pay for the shares. They said, articles could not impose such obligation upon them in their capacity as directors. Their argument was set aside by the court by treating those directors as members. Accordingly, the directors (being members) were compelled to take the Mr. Rayfield's shares at a fair value.<sup>26</sup>

**Students are advised to take Note;**

**1.** Articles bind the members to the company and the company to the members. But neither of them is bound to an outsider to give effect to the articles. **"No Article can constitute a contract between the company and a third person."**

**Example** - The articles of association of a company, *La Trinidad* contained a clause to the effect that Browne should be a director and should not be removable till after 1888. He was, however, removed earlier and had brought an action to restrain the company from excluding him. It was held that there was no contract between Browne and the company. No outsider can enforce articles against the Company even if they purport to give him certain rights.<sup>27</sup>

**2.** Further sub-section 2 to section 10 provides, all monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

**Example** - A company can recover calls in arrear from a member as forcefully as it is recovering loan due.

## 12. ALTERATION OF MEMORANDUM [SECTION 13]

### PROCEDURE OF ALTERATION OF MEMORANDUM

Alteration includes the making of additions, omissions and substitutions. Section 13 of the Act along with Rules 29 to 32 of the Companies (Incorporation) Rules, 2014 provides the provisions that deals with the alteration of the memorandum, detailed below;

<sup>26</sup> Rayfield v Hands (1958) 2 WLR 851

<sup>27</sup> Browne v La Trinidad (1887) 37 Ch D 1



### Alteration by special resolution [Sub-section 1]

Company may alter the provisions of its memorandum with the approval of the members by a special resolution. Further, as per section 13(6) (a) company shall file with the Registrar, such special resolution.

### Name change of the company [Sub-section 2 and 3]

As per sub-section 1, any change in the name of a company shall be effected only with the approval of the Central Government (power delegated to ROC by Central Government)<sup>28</sup> in writing in Form No. INC-24 along with fee.

However, no such approval shall be necessary where the change in the name of the company is only the addition/deletion of the word "Private", on the conversion of any one class of companies to another class in accordance with the provisions of the Act.

The change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. Once the necessary documents filled or payment or repayment made then change shall be allowed.

As per clause (b) to sub-section 6 to section 13, the approval from the Central Government, shall be filed with registrar by the company. Practically importance of provision is demeaned as power of central government is already delegated to ROC.

Further, as per **sub-section 2**, on any change in the name of a company, the **Registrar shall enter the new name in the register** of companies in place of the old name and issue a **fresh certificate of incorporation** in the Form No. INC-25 with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

**Example** – Tata Sky Limited changed its Name to Tata Play Limited (CIN U92120MH2001PLC130365).

### Industrial Insight

On August 24, 1910, a company was registered in India under the name Imperial Tobacco Company of India Limited. As the Company's ownership progressively

<sup>28</sup> Notification S.O. 1353(E), dated 21<sup>st</sup> May, 2014

Indianised, the name of the Company was changed to India Tobacco Company Limited in 1970 and then to I.T.C. Limited in 1974. In recognition of the ITC's multi-business portfolio encompassing a wide range of businesses, the full stops in the Company's name were removed effective September 18, 2001. The Company now stands rechristened 'ITC Limited,' where 'ITC' is today no longer an acronym or an initialised form.

**Students are advised to that note that:**

Even If a company has to rectify its name under section 16, then also, nothing shall prevent such company from subsequently changing its name in accordance with the provisions of section 13.

**RECTIFICATION OF NAME OF COMPANY [SECTION 16]**

Where Central Government (power of Central Government under this section conferred (delegated) upon **Regional Directors** by section 458 of the Act) <sup>29</sup> is of opinion that name (original or revised/new) of company is **identical** with or **too nearly resembles** to the name by which a company in existence;

- a. On its own **or**
- b. On an application by a proprietor of already registered trade mark under the Trade Marks Act, 1999

Then it may direct the company to change its name;

The company **shall change** its name or new name, as the case may be, **within a period of three months** from the issue of such direction, after adopting an **ordinary resolution** for the purpose.

**Note** - Application by a proprietor of registered trade mark shall be made **within three years** of incorporation or registration or change of name of the company

Further, the company, after changing its name or obtains a new name shall give notice of the change to the Registrar along with the order of the Central Government (Regional Directors) within a period of **fifteen days** from the date of such change.

Registrar on receipt of notice shall carry out necessary changes in the certificate of incorporation and the memorandum.

---

<sup>29</sup> S.O. 4090(E), dated 19<sup>th</sup> December, 2016

If a company makes default in complying with any directions for rectification;

- a. company shall be punishable with fine of ₹ 1,000 for every day during which the default continues **and**
- b. every officer who is in default shall be punishable with fine which shall not be less than ₹ 5000 but which may extend to ₹ 1,00,000.

### Change in the registered office [Sub-section 4, 5, and 7]

#### Application [sub-section 4]

The alteration of the memorandum relating to the place of the registered office from **one State to another** shall not have any effect unless it is approved by the Central Government (power delegated to Regional Director by Central Government)<sup>30</sup> on an application in Form No. INC-23 along with the fee and shall be accompanied by the following documents, namely;

- a. Copy of Memorandum of Association, with proposed alterations;
- b. Copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;
- c. Copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.
- d. List of creditors and debenture holders
- e. Acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.

#### Advertisement in Newspapers

The Company **not more than thirty days before** the date of filing the above application, shall advertise in the Form No. INC-26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with wide circulation in the state in which the registered office of the company is situated.

---

<sup>30</sup> Notification S.O. 4090(E), dated 19<sup>th</sup> December, 2016

**Dispose of the application by central government [sub-section 5]**

The Central Government (power delegated to Regional Director by Central Government) shall dispose of the application of change of place of the registered office **within a period of 60 days**. Before passing of order, Central Government may satisfy itself that-

- a. the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
- b. the sufficient provision has been made by the company either for the due discharge of all its debts and obligations, or
- c. adequate security has been provided for such discharge.

**Filing of the certified copy of the order with the registrar [sub-section 7]**

Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States in Form No. INC-28 along with the fee **within thirty days** from the date of receipt of certified copy of the order, who shall register the same.

**Issue of fresh certificate of incorporation [sub-section 7]**

The **Registrar** of the State **where the registered office is being shifted** to, shall issue a fresh certificate of incorporation indicating the alteration.

**Change in the object of the company [Sub-section 8 and 9]****Who can make change in object clause & How? [Sub-section 8]**

Where the company has **raised money from public** through prospectus and has any **un-utilised amount** out of the money so raised, can change the objects for which the money so raised is to be applied only after passing a **special resolution through postal ballot** and the notice in respect of the resolution for altering the objects shall contain the following particulars, namely;

- a. Total money received;
- b. Total money utilized for the objects stated in the prospectus;
- c. Un-utilized amount out of the money so raised through prospectus,

- d. Particulars of the proposed alteration or change in the objects;
- e. Justification for the alteration or change in the objects;
- f. Amount proposed to be utilised for the new objects;
- g. Estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
- h. Other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
- i. Place from where any interested person may obtain a copy of the notice of resolution to be passed.

#### **Advertisement [Sub-section 8]**

The advertisement giving **details of each resolution** to be passed for change in objects, simultaneously to the dispatch of **postal ballot** notices to shareholders; shall be:

- a. Published in the **newspapers** (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and
- b. Hosted on the **website** of the company, if any.

#### **Dissenting shareholders to change of object [Sub-section 8]**

The dissenting shareholders shall be given an **opportunity to exit** by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board of India.

#### **Registrar to certify the registration on alteration of the objects [sub-section 9]**

The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration **within a period of 30 days** from the date of filing of the special resolution under clause (a) to sub-section 6 of this section.

**Sub-section 10** provides that alteration made under this section (section 13) shall have effect only after it has been registered in accordance with provisions of section.

**Sub-section 11** states any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person

a right to participate in the divisible profits of the company otherwise than as a member, shall be void. This provision is confirming and extending provision to Section 4(7).



## 13. ALTERATION OF ARTICLES [SECTION 14]

Section 14 of the Companies Act, 2013, vests companies with power to alter its articles. A company cannot divest itself of these powers<sup>31</sup>. Matters as to which the memorandum is silent can be dealt with by the alteration of article. The law with respect to alteration of articles is as follows:

### ALTERATION BY SPECIAL RESOLUTION [SUB-SECTION 1]

A company may alter its articles by a special resolution, subject to the provisions of this Act and the conditions contained in its memorandum. Alteration of articles include alterations having the effect of conversion of a private company into a public company or vice-versa,

Any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made **within sixty days** from the date of passing of special resolution, be filed with Regional Director in e-Form No. RD-1 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by the following documents, namely;

- a. Draft copy of Memorandum of Association and Articles of Association, with proposed alterations;
- b. Copy of the minutes of the general meeting at which the special resolution authorising such alteration was passed together with details of votes cast in favour and or against with names of dissenters;
- c. Copy of Board resolution or Power of Attorney dated not earlier than thirty days, as the case may be, authorising to file application for such conversion;
- d. Declaration by a key managerial personnel regarding the compliance under difference section of the Act and rules made there under;

---

<sup>31</sup> Andrews vs. Gas Meter Co. (1897) 1 Ch. 161

In case of a private company, where post alteration the articles no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall cease to be a private company, from the date of such alteration.

#### **FILING OF ALTERATION WITH THE REGISTRAR [SUB-SECTION 2]**

Every alteration of the articles and a copy of the order of the Central Government approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of **fifteen days** in Form No. INC 27 along with fee, who (Registrar) shall register the same.

**Sub-section 3** provides that alteration made under sub-section 1 and registered under sub-section 2 subject to provision of this, shall be valid and have effect as if it were originally contained in the Articles.

### **14. ALTERATION OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY [SECTION 15]**

Section 15 of the Act requires that every alteration made in memorandum and articles of a company shall be noted in every copy. Be it issued in electronic form or otherwise; because MOA and AOA considered to be public document under section 399.

If a company makes any default in complying with the stated provisions, the company **and** every officer who is in default shall be liable to a penalty of **one thousand rupees for every copy** of the articles issued without such alteration.

### **15. REGISTERED OFFICE OF COMPANY [SECTION 12]**

A company is considered to be a separate legal entity from the members. Once a company gets incorporated, it is required to maintain a registered office. This is a physical office where the corporation will receive service of legal documents from ROC or in case of a lawsuit, etc.

This address cannot be a P.O. Box but must be a physical location where someone is present, to receive service of legal documents during normal business hours. It could be different from a Head Office or Corporate office.

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices, letters etc. The domicile and the nationality of a company is determined by the place of its registered officer. This is also important for determining the jurisdiction of the court.

### REGISTERED OFFICE & VERIFICATION THEREOF [SUB-SECTION 1 & 2]

As per **sub-section 1**, a company shall, **within thirty days** of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

Further, **sub-section 2** requires the company shall furnish to the Registrar **verification** of its registered office **within a period of thirty days** of its incorporation.

With the respected specified IFSC public & IFSC private companies, they shall have its registered office at the IFSC located in the approved multiservice SEZ set up under the SEZ Act, 2005 read with SEZ Rules, 2006.<sup>32</sup>

In case of specified IFSC public & IFSC private company word "thirty days" will be read as "sixty days".<sup>33</sup>

### LABELING OF COMPANY [SUB-SECTION 3]

**Every company shall;**

- a. **Paint or affix** its **name**, and the **address** of its **registered office**, and keep the same painted or affixed, on the outside of **every office or place** in which its business is carried on, in a **conspicuous position**, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.
- b. Have its name engraved in legible characters on its seal, if any;
- c. Get its name, address of its registered office and the **Corporate Identity Number** along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and
- d. Have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed:

---

<sup>32</sup> G.S.R. 08 (E) dated 4th January, 2017

<sup>33</sup> *ibid*



**Note:**

Where a company has **changed its name(s) during the last two years**, it shall paint or affix or print, both or all such names in case of point **a** as well as **c** above.

**In case of One person company**, the words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

**NOTICE OF CHANGE & VERIFICATION TO REGISTRAR [SUB-SECTION 4]**

Notice of every change of the situation of the registered office after the date of incorporation of the company, verified in the Form No. INC-22, along with fee as prescribed shall be given to the Registrar within 30 days of the change, who shall record the same.

In case of specified IFSC public & IFSC private company word "thirty days" will be read as "sixty days".<sup>34</sup>

**APPROVAL/CONFIRMATION OF CHANGE [SUB-SECTION 5]**

**Change by passing of special resolution**

The registered office of the company shall be changed only by passing of special resolution by a company, outside the local limits of any city, town or village where such office is situated or where it may be situated later by virtue of a special resolution passed by the company.

**Change of registered office outside the jurisdiction of registrar**

Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to be confirmed by the Regional Director on an application made by the company. Application shall be made in Form No. INC-23 along with fee.

In case of specified IFSC public & IFSC private company Board resolution will sufficient, provided that such Company shall not change the place of its registered office to any other place outside the said International Financial Services Centre.<sup>35</sup>

<sup>34</sup> G.S.R. 08 (E) dated 4th January, 2017

<sup>35</sup> G.S.R. 08 (E) dated 4th January, 2017

**COMMUNICATION AND FILING OF CONFIRMATION [SUB-SECTION 6]**

The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be:

- a. **Communicated within 30 days** from the date of receipt of application **by the Regional Director** to the company, and
- b. The **company shall file** the confirmation with the Registrar **within a period of 60 days** of the date of confirmation who shall register the same, and
- c. Certify the registration **within a period of thirty days** from the date of filing of such confirmation.

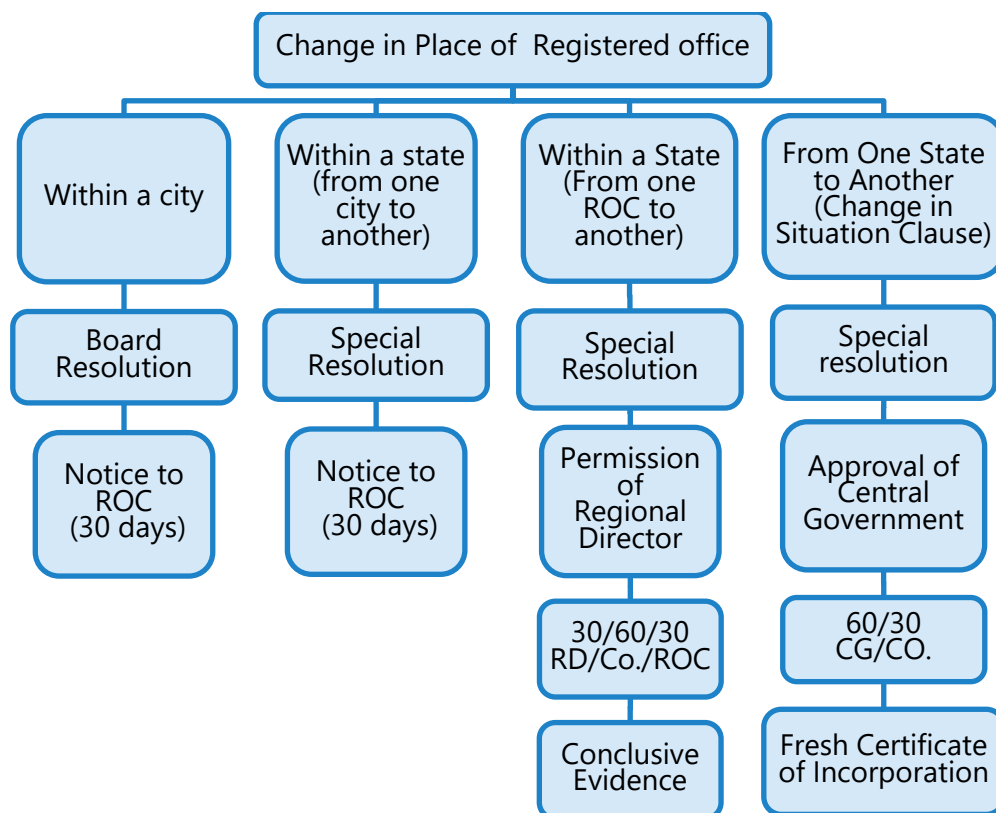
The certificate so issued by registrar shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.

If the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the registered office of the company in such manner as may be prescribed and if any default is found to be made in complying with the requirements of sub-section (1), he may without prejudice to the provisions contained in this section regarding the penalties, initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

**PENALTIES IN CASE OF DEFAULTS [SUB-SECTION 8]**

If any default is made in complying with the requirements of this section, the company **and** every officer who is in default shall be liable to a penalty of **one thousand rupees for every day** during which the default continues **but not exceeding one lakh rupees**.

**Summary of Provisions applicable in case of change of place of registered office**



## 16. COMMENCEMENT OF BUSINESS ETC. [SECTION 10A]

### CONDITIONS FOR COMMENCEMENT OF BUSINESS

A company incorporated

- a. After the commencement of the Companies (Amendment) Ordinance, 2019 **and**
- b. Having a share capital

Shall commence any business or exercise any borrowing powers only if;

- a. The company has filed with the Registrar a **verification of its registered office** as provided in sub-section (2) of section 12, **and**

- b. A declaration is filed with the Registrar, by a director, within a period of **180 days** of the date of incorporation of the company, in Form No. INC-20A, duly verified by a Company Secretary or a Chartered Accountant or a Cost Accountant, in practice, along with prescribed fee; that **every subscriber to the memorandum has paid the value of the shares** agreed to be taken by him on the date of making of such declaration

Note:

1. Section 12(2) i.e. Verification of registered office with registrar, discussed earlier heading i.e. 15 in this chapter.
2. In the case of a company pursuing objects requiring registration or approval from any sectoral regulators such as the Reserve Bank of India, Securities and Exchange Board of India, etc., the registration or approval, as the case may be from such regulator shall also be obtained and attached with the declaration.

### OUTCOME WHERE CONDITIONS ARE NOT SATISFIED

#### Penalty

If any default is made in complying with the requirements of this section, the penalty shall be:

Liabe	Quantum of penalty
Company	Fifty thousand rupee
Every officer who is in default	One thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.

#### Declaration not filled by director within 180 days

Where no declaration has been filed by directors within a period of 180 days of the date of incorporation with the Registrar **and** the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

Note: Action by registrar for removal of name can be take place simultaneously with levy of penalty.

**Example** – Modern Furniture incorporated on 27th June 2022, its directors filled a declaration regarding receipt of payment i.e. value of share (against share subscribed by subscriber) to registrar on 30th January 2023. The company shall be charged with penalty of ₹ 50,000, while penalty of its officers (officers who are in default) shall be ₹ 34000 (for 34 days i.e. 4 days of December 2022 and 30 days of January 2023).

## 17. CONVERSION OF COMPANIES ALREADY REGISTERED [SECTION 18]

Section 18 of the Act, empower a company to convert itself into some other class of company by altering its memorandum and articles of association.

Following is the law with respect to the conversion of the companies already registered.

### BY ALTERATION OF MEMORANDUM AND ARTICLES

A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.

### FILE AN APPLICATION TO THE REGISTRAR

Wherever conversion to be done under section 18, **Registrar** on **basis of an application** filled with it by company, shall after **satisfying himself** that the provisions applicable for registration of companies have been complied with,

- a. Close the former registration of the company; and
- b. After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.

**Students may also refer to:** Rule 6, 7, 7A, and 20 to 22 of the Companies (Incorporation) Rules, 2014 and 37 and 38 of the Companies (Incorporation) Rules, 2016 & Form Nos. INC-5 & INC-6 under the Companies (Incorporation) Rules, 2014 and INC-27 under the Companies (Incorporation) Rules, 2016.

### NO EFFECT ON THE DEBTS, LIABILITIES ETC. INCURRED BEFORE CONVERSION

The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the

company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

To put in more simple way, the company remains the same entity as it was before in respect of its debts and liabilities, obligations or contracts.



## 18. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY [SECTION 19]

As per section 19 of the Act, a subsidiary company is not allowed to hold shares of its holding company. The prohibition also extends up to the nominees of the subsidiary company.

Consequently, any allotment or transfer of shares in a holding company to its subsidiary shall be void. If the holding company is a guarantee or unlimited company, not having a share capital the above restriction will apply on holding the interest, whatever be the form of interest.

The prohibition does not apply to the following cases:

- a. Where the subsidiary is concerned as a **legal representative** of a deceased member of the holding company; or
- b. Where the subsidiary holds such shares as a **trustee**; or
- c. Where the subsidiary company is a shareholder even **before it became a subsidiary company** of the holding company.

### Note:

- a. Right to vote at a meeting of the holding company only in respect of the shares held by it as a **legal representative** or as a **trustee**
- b. The prohibition does not apply to the case of a subsidiary company which already had shares in its holding company at the commencement of the Act
- c. A subsidiary can buy shares in its holding company where it is a part of a scheme of amalgamation sanctioned by the court/tribunal.<sup>36</sup>

<sup>36</sup> Himachal Telematics Ltd v Himachal Futuristic Communications Ltd, (1996) 37 DRJ 476

**Example** - RPIP Ltd. has invested 51% in the shares of SSP Pvt. Ltd. on 31<sup>st</sup> March 2019. SSP Pvt. Ltd. have been holding 2% equity of RPIP Ltd. since 2013. SSP Pvt. Ltd. cannot increase its equity beyond that 2% on or after 31<sup>st</sup> March 2019. However, it could continue to hold or reduce its initial 2% stake.



## 19. SERVICE OF DOCUMENTS [SECTION 20]

Section 20 of the Companies Act, 2013 read with Rule 35 (Service of Documents) of *Companies (Incorporation) Rules, 2014*, provides the mode in which documents may be served on the company, on the members and also on the registrars. Law with respect to the service of documents is as follows-

### SERVING OF DOCUMENT TO COMPANY OR AN OFFICER THEREOF

A document may be served on a company **or** an officer thereof by sending it to the company **or** the officer at the registered office of the company by-

- a. registered post, or
- b. speed post, or
- c. courier service, or
- d. leaving it at its registered office, or
- e. means of such electronic or other mode as may be prescribed

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

### SERVING OF DOCUMENT TO REGISTRAR OR MEMBERS

Save as provided in this Act or the rules made thereunder for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by—

- a. Post, or
- b. registered post, or
- c. speed post, or
- d. courier, or
- e. by delivering at his office or address, or
- f. by such electronic or other mode as may be prescribed.

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

For the purposes of this section, the term "courier" means a person or agency which delivers the document and provides proof of its delivery.

The term "electronic transmission" means a communication that creates a record that is capable of retention, retrieval (recovery) and review, and which may thereafter be rendered into clearly legible tangible form. It may be made by

- ◆ Facsimile telecommunication (**fax**) or electronic mail (**email**), which the company or the officer has provided from time to time for sending communications,
- ◆ Posting of an **electronic message board** or **network** that the Registrar or the member has designated for those communications, and which transmission shall be validly delivered upon the posting, or
- ◆ Other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person purporting to send the transmission.

Further sub-section 2 provides, in case of delivery by post, such service shall be deemed to have been effected:

- a. In the case of a notice of a meeting, at the **expiration of 48 hours** after the letter containing the same is posted; **and**
- b. In any other case, at the time at which the letter would be delivered in the **ordinary course of post**.

Section 20 (2) shall apply to a Nidhi Company, subject to the modification; that

- a. The **document may be served only on members** who hold shares of more than ₹ **1,000** in face value **or** more than **1% of the total paid-up** share capital; whichever is less.
- b. For other shareholders, document may be served by a **public notice in newspaper** circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi.



**Example** – Modern Furniture sent the notice of general meeting through postal mail 48 hours after the post of letter containing such notice, shall be deemed to be served. Hence, requirement of 21 clear days' notice under section 101 of the Act, if seen in this context, Modern Furniture Limited should have posted the letter containing notice 23 days prior to meeting day (48 hours of post-delivery+21 clear days).

## 20. AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS [SECTION 21]

As per section 21 of the Act:

- a. A document or proceeding requiring authentication by a company **or**
- b. Contracts made by or on behalf of a company

May be signed by:

- a. Any key managerial personnel<sup>37</sup>, **or**
- b. An officer or employee of the company duly authorized by the Board in this behalf.

In the case of specified IFSC public company and IFSC private company, for the word "An officer" read as "An officer or any other person".<sup>38</sup>

## 21. EXECUTION OF BILLS OF EXCHANGE, ETC. [SECTION 22]

Sub-section 1 provides, a **bill of exchange, hundi or promissory note** shall be deemed to have been **made, accepted, drawn or endorsed** on behalf of a company if made, accepted, drawn, or endorsed **in the name of, or on behalf of or on account of**, the company **by any person acting under its authority**. Authority can be either express or implied.

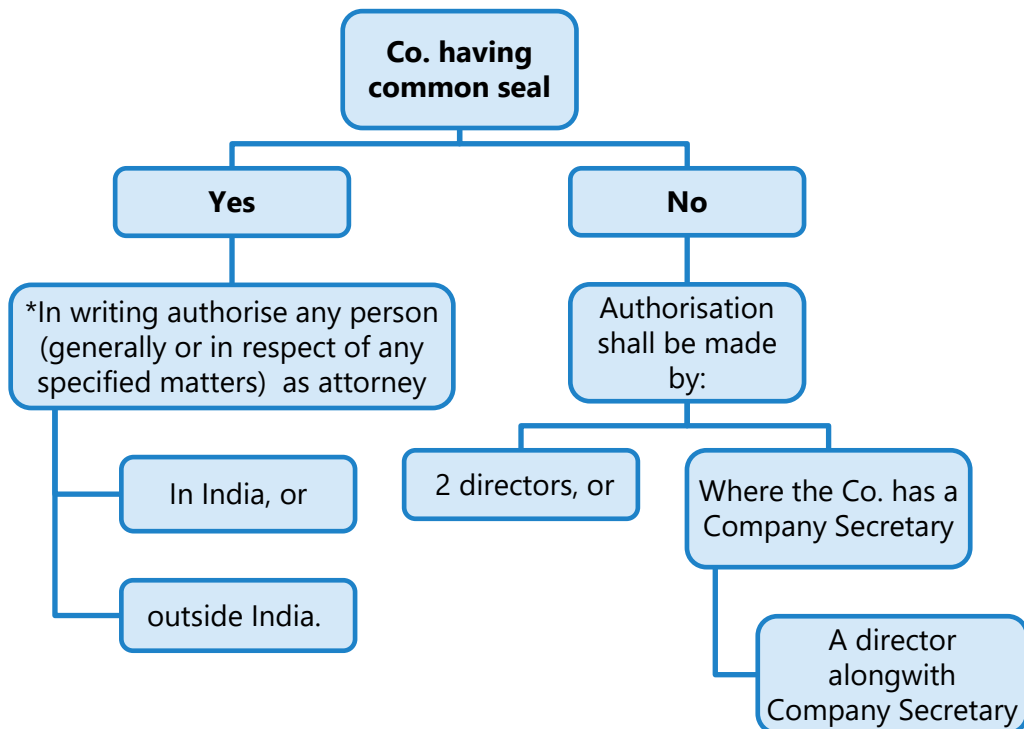
<sup>37</sup> Who all are included in key managerial person under section 2 (51) already discussed in chapter 1 of this module

<sup>38</sup> G.S.R. 08 (E) dated 4th January, 2017

Formal deeds can be executed only through a power of attorney. Therefore sub-section 2 and 3 together provides;

- a. A company may, by writing under
  - Its common seal, if any,
  - Where in case a company does not have a common seal, then authorized by 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.
- b. Authorize any person,
- c. Either generally or in respect of any specified matters,
- d. As its attorney to execute other deeds on its behalf
- e. In any place either in or outside India.
- f. Deed signed by such an attorney on behalf of the company and under his seal shall bind the company.

#### Summary of sub-section 2



**Note:** It can be observed from above that a company may or may not have a common seal. If company decides to have a common seal then it has to affix the same for specified matters, execution of deeds on behalf of the company.

The seal is a method of making a physical impression upon the documents of the company, of its name, etc.

Section 22 comes into play when a person wants to enforce obligations against a company arising out of a contract and the company denies the contract or disputes its liability. The section cannot be used where the proceeding is by the company.

## SUMMARY

- ◆ Once an association becomes incorporated it acquires a legal status, it becomes a legal entity in its own right, separate from the individual members. It will have perpetual succession i.e. not affected by the death, insanity, or insolvency of an individual member.
- ◆ Earlier, the certificate of incorporation considered as conclusive proof, but as per the Companies Act, 2013, certificate of Incorporation is not conclusive proof of everything prior to incorporation being in order.
- ◆ CIN is a 21 alpha-numeric digit based unique identification number, comprising data sections/elements that reveals the basis aspects about company
- ◆ The memorandum of association (MOA) is the document that sets up the company and the articles of association (AOA) set out how the company is run, governed and owned. These documents can be altered.
- ◆ As per Doctrine of Ultra Vires, acts outside the powers conferred under MOA are ultra-vires. Such acts and resulting agreements are void.
- ◆ Doctrine of Constructive Notice put onus on those who deal with company to be aware of what is stated in MOA and AOA, while Doctrine of Indoor Management protects outsider as an exception to earlier specified doctrine.
- ◆ A company of any class may convert itself as a company of other class by alteration of its MOA and AOA.
- ◆ Certain relaxations are provided in case of specified IFSC companies working in or from International Financial Services Centre, regarding provisions contained in chapter II of the Act.

## TEST YOUR KNOWLEDGE

### Multiple Choice Questions

1. *Entrenchment enhance the protection. Modern Furniture Limited, an existing private company willing to insert the provisions for entrenchment; it*
  - (a) *Can amend the article by passing an ordinary resolution*
  - (b) *Can amend the article by passing a special resolution*
  - (c) *Can amend the article agreed by all the members*
  - (d) *Can't amend article to made the provisions for entrenchment*
2. *Today, it's May 2023. Mr. Nilanjan Chattopadhyay a 24 years old Indian youngster, who returned back to India in January month of 2023 after completing his education in bio-nutrient and willing to form an OPC; but not sure about the requirements or pre-conditions regarding eligibility. He read some articles on provisions related to OPC and concluded;*
  - (i) *OPC can be formed by Indian Citizen only*
  - (ii) *He can't form OPC because in immediate previous year he was not resident in India*
  - (a) *Both the conclusions are valid*
  - (b) *None of the conclusion is valid*
  - (c) *First conclusion is invalid*
  - (d) *Second conclusion is invalid*
3. *In case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of ..... from the date of approval*
  - (a) *90 days*
  - (b) *60 days*
  - (c) *30 days*
  - (d) *20 days*

4. *Modern Furniture incorporated on 30<sup>th</sup> June 2022, its directors filled a declaration under section 10A (1)(a) regarding receipt of payment i.e. value of share (against share subscribed by subscriber) to registrar on 18<sup>th</sup> April 2023. The company and its officers (officers who are in default) shall be charged with penalty of:*
- (a) ₹ 1,11,000 and ₹ 1,11,000 respectively
  - (b) ₹ 50,000 and ₹ 1,11,000 respectively
  - (c) ₹ 1,11,000 and ₹ 50,000 respectively
  - (d) ₹ 50,000 and ₹ 1,00,000 respectively
5. *I.T.C limited changed its name to ITC limited. Company and officers thereat made default by failing to make alteration in every issued copy of memorandums and articles. In this context you are required to pick incorrect statements out of followings*
- (i) *Alternation shall be made to every copy of MOA/AOA because these are considered as public document.*
  - (ii) *Alternation shall be made to every copy be it in electronic form or otherwise.*
  - (iii) *Penalty shall be rupees one thousand for every copy of the articles issued without such alteration.*
- (a) (ii) only
  - (b) (iii) only
  - (c) (ii) and (iii) only
  - (d) None of (i), (ii) and (iii)

### **Descriptive Questions**

1. *Yadav dairy products Private limited has registered its articles along with memorandum at the time of registration of company in December, 2019. Now directors of the company are of the view that provisions of articles regarding forfeiture of shares should not be changed except by a resolution of 90% majority. While as per section 14 of the Companies Act, 2013 articles may be changed by passing a special resolution only. One of the directors said that they cannot make a provision against the Companies Act. You are required to advise the company on this matter.*

2. *A group of individuals intend to form a club namely 'Budding Pilots Flying Club' as limited liability company to impart class room teaching and aircraft flight training to trainee pilots. It was decided to form a limited liability company for charitable purpose under Section 8 of the Companies Act, 2013 for a period of ten years and thereafter the club will be dissolved and the surplus of assets over the liabilities, if any, will be distributed amongst the members as a usual procedure allowed under the Companies Act.*

*Examine the feasibility of the proposal and advise the promoters considering the provisions of the Companies Act, 2013.*

3. *Alfa school started imparting education on 1<sup>st</sup> April, 2010, with the sole objective of providing education to children of weaker society either free of cost or at a very nominal fee depending upon the financial condition of their parents. However, on 30<sup>th</sup> March 2020, it came to the knowledge of the Central Government that the said school was operating by violating the objects of its objective clause due to which it was granted the status of a section 8 company under the Companies Act, 2013. Describe what powers can be exercised by the Central Government against the Alfa School, in such a case?*
4. *XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Pune (within the State of Maharashtra, but from Mumbai ROC to Pune ROC). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.*
5. *Anushka security equipments limited is a manufacturer of CCTV cameras. It has raised ₹ 100 crores through public issue of its equity shares for starting one more unit of CCTV camera manufacturing. It has utilized 10 crores rupees and then it realized that its existing business has no potential for expansion because government has reduced customs duty on import of CCTV camera. Hence imported cameras from China are cheaper than its own manufacturing. Now it wants to utilize remaining amount in mobile app development business by adding a new object in its memorandum of association.*

*Does the Companies Act allow such change of object? If not, then what advise will you give to company. If yes, then give steps to be followed.*

6. *The object clause of the Memorandum of Vivek Industries Limited., empowers it to carry on real-estate business and any other business that is allied to it. Due to a downward trend in real-estate business, the management of the company has decided to take up the business of Food processing activity. The company wants to alter its Memorandum, so as to include the Food Processing Business in its objects clause. Examine whether the company can make such change as per the provisions of the Companies Act, 2013?*
7. *The persons (not being members) dealing with the company are always protected by the doctrine of indoor management. Explain. Also, explain when doctrine of Constructive Notice will apply.*
8. *Manglu and friends got registered a company in the name of Taxmann advisory private limited. Taxmann is a registered trademark. After 5 years when the owner of trademark came to know about the same, it filed an application with relevant authority. Can the company be compelled to change its name by the owner of trademark? Can the owner of registered trademark request the company and then company changes its name at its discretion?*
9. *Explain in the light of the provisions of the Companies Act, 2013, the circumstances under which a subsidiary company can become a member of its holding company.*
10. *Shri Laxmi Electricals Ltd. (S) is a company in which Hanuman power suppliers Limited (H) is holding 60% of its paid up share capital. One of the shareholder of H made a charitable trust and donated his 10% shares in H and ₹ 50 crores to the trust. He appoint S as the trustee. All the assets of the trust are held in the name of S. Can a subsidiary hold shares in its holding company in this way?*
11. *Explain the provisions of the Companies Act, 2013 relating to the 'Service of Documents' on a company and the members of the company.*
12. *Ashok, a director of Gama Electricals Ltd. gave in writing to the company that the notice for any general meeting and of the Board of Directors' meeting be sent to him only by registered post at his residential address at Kanpur for which he deposited sufficient money. The company sent notice to him by ordinary mail under certificate of posting. Ashok did not receive this notice and could not attend the meeting and contended that the notice was improper.*

Decide:

- (i) Whether the contention of Ashok is valid.
  - (ii) Will your answer be the same if Ashok remains in U.S.A. for one month during the notice of the meeting and the meeting held?
13. Parag Constructions Limited is a leading infrastructure company. One of the directors of the company Mr. Parag has been signing all construction contracts on behalf of company for many years. All the parties who ever deal with the company know Mr. Parag very well. Company has got a very important construction contract from a renowned software company. Parag constructions will do construction for this site in partnership with a local contractor Firozbhai. Mr. Parag signed partnership deed with Firozbhai on behalf of company because he has an implied authority. Later in a dispute company denied to accept liability as a partner. Can the company deny its liability as a partner?

## ANSWERS

### Answer to MCQ based Questions

1.	(c) Can amend the article agreed by all the members
2.	(d) Second conclusion is invalid
3.	(b) 60 days
4.	(d) ₹ 50,000 and ₹ 1,00,000 respectively
5.	(d) None of (i), (ii) and (iii)

### Answer to Descriptive Questions

1. As per section 5 of the Companies Act, 2013 the article may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if more restrictive conditions than a special resolution, are met.
- The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.



Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in prescribed manner.

In the present case, Yadav dairy products Private Limited is a private company and wants to protect provisions of articles regarding forfeiture of shares. It means it wants to make entrenchment of articles, which is allowed. But the company will have to pass a resolution taking permission of all the members and it should also give notice to ROC regarding entrenchment of articles.

- 2.** According to section 8(1) of the Companies Act, 2013, where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—
- (a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
  - (b) intends to apply its profits, if any, or other income in promoting its objects; and
  - (c) intends to prohibit the payment of any dividend to its members;

the Central Government may, by issue of licence, allow that person or association of persons to be registered as a limited liability company.

In the instant case, the decision of the group of individuals to form a limited liability company for charitable purpose under section 8 for a period of ten years and thereafter to dissolve the club and to distribute the surplus of assets over the liabilities, if any, amongst the members will not hold good, since there is a restriction as pointed out in point (b) above regarding application of its profits or other income only in promoting its objects.

Further, there is restriction in the application of the surplus assets of such a company in the event of winding up or dissolution of the company as provided in sub-section (9) of Section 8 of the Companies Act, 2013. Therefore, the proposal is not feasible.

- 3.** Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, education, sports etc. Such company intends to apply its profit in promoting its objects. Section 8 companies are registered by the Registrar only when a

license is issued by the Central Government to them. Since, Alfa School was a Section 8 company and it had started violating the objects of its objective clause, hence in such a situation the following powers can be exercised by the Central Government:

- (i) The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.
  - (ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section. However, no such order shall be made unless the company is given a reasonable opportunity of being heard.
  - (iii) Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.
4. The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Pune, does not result in the alteration of the Memorandum and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under section 12 (5) of the Act which deals with the registered office of company, the change in registered office from one town or city to another in the same state, must be approved by a special resolution of the company.

Further, registered office is shifted from one ROC to another, therefore company will have to seek approval of Regional director.

- 5.** According to section 13 of the Companies Act, 2013 a company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—
- (i) the details in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
  - (ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with SEBI regulations.

Company will have to file copy of special resolution with ROC and he will certify the registration within a period of thirty days. Alteration will be effective only after this certificate by ROC.

Looking at the above provision we can say that company can add the object of mobile app development in its memorandum and divert public money into that business. But for that it will have to comply with above requirements.

**6. Alteration of Objects Clause of Memorandum**

The Companies Act, 2013 has made alteration of the memorandum simpler and more flexible. Under section 13(1) of the Act, a company may, by a special resolution after complying with the procedure specified in this section, alter the provisions of its Memorandum.

In the case of alteration to the objects clause, section 13(6) requires the filing of the Special Resolution by the company with the Registrar. Section 13 (9) states that the Registrar shall register any alteration to the Memorandum with respect to the objects of the company and certify the registration within a

period of thirty days from the date of filing of the special resolution by the company.

Section 13 (10) further stipulates that no alteration in the Memorandum shall take effect unless it has been registered with the Registrar as above.

Hence, the Companies Act, 2013 permits any alteration to the objects clause with ease. Vivek Industries Limited can make the required changes in the object clause of its Memorandum of Association.

## 7. Doctrine of Indoor Management

According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.

Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps to protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management is opposite to the doctrine of constructive notice. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company.

This doctrine also is a safeguard against the possibility of abusing the doctrine of constructive notice.

### **Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)**

- (i) **Knowledge of irregularity:** In case an 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

- (ii) **Negligence:** If with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply.

The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.

- (iii) **Forgery:** The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.

8. According to section 16 of the Companies Act, 2013 if a company is registered by a name which,—

- ◆ in the opinion of the Central Government, is identical with the name by which a company had been previously registered, it may direct the company to change its name. Then the company shall by passing an ordinary resolution change its name within 3 months.
- ◆ is identical with a registered trade mark and owner of that trade mark apply to the Central Government within three years of incorporation of registration of the company, it may direct the company to change its name. Then the company shall change its name by passing an ordinary resolution within 6 months.

Company shall give notice to ROC along with the order of Central Government within 15 days of change. In case of default company and defaulting officer are punishable.

In the given case, owner of registered trade-mark is filing objection after 5 years of registration of company with a wrong name. While it should have filed the same within 3 years. Therefore, the company cannot be compelled to change its name.

As per section 13, company can anytime change its name by passing a special resolution and taking approval of Central Government. Therefore, if owner of registered trademark request the company for change of its name and the company accepts the same then it can change its name voluntarily by following the provisions of section 13.

9. In accordance with the provisions of Section 19 of the Companies Act, 2013, a subsidiary company cannot either by itself or through its nominees hold any shares in its holding company and no holding company shall allot or transfer its shares to any subsidiary companies. Any such allotment or transfer of shares in a company to its subsidiary is void. The section however does not apply where:
- (1) the subsidiary company holds shares in its holding company as the legal representative of a deceased member of the holding company,
  - (2) the subsidiary company holds such shares as a trustee, or
  - (3) the subsidiary company was a shareholder in the holding company even before it became its subsidiary.
10. According to section 19 of the Companies Act, 2013 a company shall not hold any shares in its holding company either by itself or through its nominees. Also, holding company shall not allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Following are the exceptions to the above rule;

- (a) Where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) Where the subsidiary company holds such shares as a trustee; or
- (c) Where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company, but in this case, it will not have a right to vote in the meeting of holding company.

In the given case, one of the shareholders of holding company has transferred his shares in the holding company to a trust where the shares will be held by subsidiary company. It means now subsidiary will hold shares in the holding company. But it will hold shares in the capacity of a trustee. Therefore, we can conclude that in the given situation S can hold shares in H.

11. Under section 20 of the Companies Act, 2013 a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its registered office or by means of

such electronic or other mode as may be prescribed. However, in case where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

Under section 20 (2), save as provided in the Act or the rule thereunder for filing of documents with the registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed. However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

- 12.** According to section 20(2) of the Companies Act, 2013, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed.

Provided that a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Thus, if a member wants the notice to be served on him only by registered post at his residential address at Kanpur for which he has deposited sufficient money, the notice must be served accordingly, otherwise service will not be deemed to have been effected.

Accordingly, the questions as asked may be answered as under:

- (i) The contention of Ashok shall be tenable, for the reason that the notice was not properly served.
  - (ii) In the given circumstances, the company is bound to serve a valid notice to Ashok by registered post at his residential address at Kanpur and not outside India.
- 13.** As per section 22 of the Companies Act, 2013 a company may authorise any person as its attorney to execute deeds on its behalf in any place either in or outside India. But common seal should be affixed on his authority letter or the authority letter should be signed by two directors of the company or it

should be signed by one director and secretary. This authority may be either general for any deeds or it may be for any specific deed.

A deed signed by such an attorney on behalf of the company and under his seal shall bind the company as if it were made under its common seal.

In the present case company has not neither given any written authority nor affixed common seal of the authority letter.

It means that Mr. Parag is not legally entitled to execute deeds on behalf of the company. Therefore, deeds executed by him are not binding on the company. Therefore, company can deny its liability as a partner.



[illegible]

