

Corporate Law

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Formation and Incorporation of Company

- The first step in the formation of a company is to prepare a document called the memorandum of association.
- Section 2(56) of the Act “memorandum” means the memorandum of association of a company as originally framed and altered, from time to time, in pursuance of any previous company law or this Act.
- The memorandum should be printed, numbered and divided into paragraphs. It should also be signed by the subscribers of the company.

Forms of MOA

Section 4(6) of the Act provides that the memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

Tables	Company
Table A	Companies limited by shares
Table B	Companies limited by guarantee not having a share capital
Table C	Companies limited by guarantee having a share capital
Table D	Unlimited companies not having a share capital
Table E	Unlimited companies having a share capital

Contents of MOA

As per Section 4(1), the memorandum of a limited company must state the following:

- Name Clause
- Registered Office Clause
- Object Clause
- Liability Clause
- Capital Clause
- Subscription Clause

Contents of MOA

- Name Clause
 - Pvt. Ltd. or Limited 4(1)
 - Undesirable, resembles , identical or misleading 4(2)
 - Not include bank, insurance, banking, co-operative, sahkaari, investment, trust unless justified.
 - Not connote Govt. participation – national, union, president, central.
 - Emblems and name (Prevention of Improper Use) Act 1950 – UNO, WHO, WTO, INTERPOL, UNESCO Indian Flag, Central & State Govt., Mahatama Gandhi, Javahar Lal Nehru, Shivaji, PM, Ashok Chakra, International Olympic Committees
 - Name must appear outside every office or place of business. Name should be engraved on seal.

Contents of MOA

- Registered Office Clause 4(3)
Registered office of Reliance Capital Limited is “Trade World, B-Wing, 7th Floor, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai Mumbai City MH 400013.”
- Name of the State in which the registered office of the company is situated.
- This helps to determine the jurisdiction of the Registrar of Companies (RoC).
- The company is required to inform the location of the registered office to the Registrar of Companies within 30 days from the date of incorporation of the company
- The company must have a registered office to which all communications and notices may be sent.
- According to Section 12(3) of the Act, every company is required to display its name and address in legible letters in conspicuous position and in all its business letters, bill heads, letter papers.

Contents of MOA

- Object Clause 4(1)(c)
 - Illegal, against public policy and Companies Act
 - The acts beyond this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts.
 - Although express powers are necessary, a company may do anything which is incidental to and consequential upon the powers specified, and the act will not be ultra vires [Attorney General v. G.E. Rly. Co., (1880) 5 A.C. 473]. Thus, a trading company has an implied power to borrow money, draw and accept bills of exchange in the ordinary form.

Contents of MOA

- Liability Clause

- Section 4 sub-section 1(d) of the Act, states that the liability of members of the company is to be specifically mentioned in the MoA. It is provided that the liability of member may either be limited or unlimited.
- Alteration compelling members to take more shares is null and void.

- Capital Clause

- nominal, "authorised," or "registered" capital
- “The capital of the company is 10,00,000 rupees divided into 1,00,000 equity shares of 10 rupees each”.

Contents of MOA

- Association Clause

“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 our respective names”.

Then follow the names, addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness.

- Each subscriber must state the number of shares he is subscribing to.
- The subscribers have to sign the memorandum in the presence of two witnesses.
- Each subscriber must subscribe to at least one share.

Doctrine of Ultra Vires Acts

Ultra vires is a Latin term made up of two words “ultra” which means beyond and “vires” meaning power or authority. Ultra vires acts are any acts that lie beyond the authority of a company to perform.

The ultra vires acts are null and void ab initio. These acts do not bind the company. Even the company cannot sue or be sued. Ultra vires contracts are void ab initio and cannot become intra vires because of estoppel or ratification.

- Ultra Vires the Company Act
- Ultra Vires the MOA
- Ultra Vires the AOA

Ultra Vires the Company Act (6)

- The provisions of the Companies Act, 2013 shall prevail notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in 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 act done contrary to or in excess of the scope of activity of the Companies Act will be ultra vires the Companies Act. Such an act is **void and cannot be ratified even by unanimous resolution of all the shareholders.**

Ultra Vires the MOA & AOA

MOA:

- Any act done in contrary to the object clause of the memorandum of association will be ultra vires the memorandum of association.
- Such an act is **void and cannot be ratified even by unanimous resolution of all the shareholders.**

AOA:

- If a company acts which are ultra vires the Articles of Association but intra vires the memorandum of association will be ultra vires the Articles of Association.
- These acts are also **void, but the company in general meeting may alter the Articles by a special resolution and ratify the unauthorized acts.**

Ultra Vires the Directors

- An act which is intra vires the company but outside the authority of the directors may be **ratified** by the company in proper form [Rajendra Nath Dutta v. Shilendra Nath Mukherjee, (1982) 52 Com Cases 293 (Cal.)].
- The rule is meant to protect shareholders and the creditors of the company. If the act is ultra vires (beyond the powers of) the directors only, the shareholders can ratify it.

Articles of Association

Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

Section 5(1), the articles of a company shall contain the regulations for management of the company.

Section 7(1) provides that at the time of incorporation of a company the company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company **duly signed by all the subscribers to the memorandum** in the prescribed manner.

Articles of Association

The articles of a company shall be in respective forms specified in Schedule I as may be applicable to such company either in totality or otherwise. [Section 5(6)]

A company may adopt all or any of the regulations contained in the model articles applicable to such company. [Section 5(7)].

Tables F: company limited by shares, articles are not registered

Tables G: limited by guarantee and having a share capital

Tables H: limited by guarantee and not having a share capital

Tables I: unlimited company and having a share capital

Tables J: unlimited company and not having a share capital

Contents of AOA

- Calls on shares
- The process for the transfer of shares
- Transmission of shares
- Forfeiture of shares
- Surrender of shares
- Process for conversion of shares to stocks
- Alteration of capital: Increase, decrease, or rearrangement of capital
- General meetings and proceedings
- Voting rights of members
- The appointment, remuneration, qualifications, powers of directors, etc.
- Proceedings of the boards of directors' meetings
- Dividends and reserves
- Accounts and Audits
- Borrowing Powers of the company
- Provisions relating to the winding up of the company

Provisions for Entrenchment

- The word “entrench” means to develop habit so firmly that change is very difficult or unlikely.
- An entrenchment clause is the one which makes certain amendments either impossible or difficult.
- Entrenchment provisions allow certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions (such as obtaining 100% consent) greater than those prescribed under the Act.

Provisions for Entrenchment

- The provisions for entrenchment shall only be made by:
 - Private Company:
 - New Company: During formation of a company
 - Existing Company: By an amendment in the Articles agreed to by all the members of the company
 - Public Company:
 - New Company: During formation of a company
 - Existing Company: By passing a special resolution
- This provision protects the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

Alteration of MOA

- Section 13(1), a company can modify its memorandum's provisions by means of a special resolution.
- Name Change:
 - Special resolution and
 - Obtain written approval from the Central Government.
 - The Central Government's approval is optional if the change involves adding or deleting the word 'Private' from the company's name due to converting a private company to a public company or vice versa.
 - Once a company undergoes a name change, Registrar will update the register of companies by replacing the old name with the new name. Subsequently, the Registrar will issue a new certificate of incorporation reflecting the updated name. This company's name change will become effective upon issuing the new certificate.

Alteration of MOA

- Registered Office: BOD, Share holders & Approval from the Central Government
- Object Chance:
 - Passing a special resolution
 - File a special resolution with the Registrar in relation to any alteration made to the memorandum.
 - According to Section 13(9), the Registrar is required to register the memorandum's alteration regarding the company's objectives and provide certification within thirty days from the submission of the special resolution as per Section 13(6)(a).

Alteration of MOA

- Liability Change: Pass special resolution & intimate the registrar.
- Capital Change: This alteration may encompass the following actions:
 - Increasing the authorized share capital of the company.
 - Adjust each share's value, either increasing or decreasing it.
 - Converting fully paid-up shares into stock or vice versa.
 - Cancelling shares.
- Pass an ordinary resolution
- Within 30 days of the resolution being approved, the company must submit Form MGT 14 to the Registrar of Companies (RoC), who will then officially record the alteration in the Register of Companies.

Alteration of AOA

Companies have been given wide powers to alter their AoA.

Procedure

- 1) By passing a special resolution.
- 2) A copy of resolution altering AOA. shall be filed with the ROC within 15 days of its passing. [section 14(1)]
- 3) ROC shall register the same. [Section 14 (2)]
- 4) Any alteration of the articles registered under section 14(2) shall be valid as if it were originally in the articles. [Section 14(3)]

Alteration of AOA

- Section 14(1) provides that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of a private company into a public company; or a public company into a private company.
- First proviso to section 14(1) lays down that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company.
- Second proviso to section 14(1) stipulates that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the **approval of the Tribunal** which shall make such order as it may deem fit. (yet to be notified)
- The right to alter the articles is so important that a company cannot in any manner, either by express provisions in the articles or by independent contract, deprive itself of the powers to alter its articles. [**Walker vs. London Tramway Co**]
- However, in spite of the power to alter its articles, a company can exercise this power subject only to certain limitations.

Section 8 Company

- **Cannot alter Article except with the approval of Central Government.**
- Section 8(4)(i) provides that a company registered under section 8 i.e. companies with charitable objects shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

Legal Effect of The Memorandum And Articles or Binding Effect of MOA & AOA

The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles.

The memorandum and articles bind:

- a) the members to the company;
- b) the company to the members;
- c) the members inter se; and
- d) the company to outsiders.

Members are Bound to The Company

- When memorandum and articles are registered, it shall be deemed that these documents were signed by every member of the company individually.
- Every member shall be bound to comply with the provisions contained in the memorandum and articles.

Company is Bound To Members

- a) Every member of the company is given some individual rights under the Act and the articles. If a company deprives any of its members of such rights, such a member can sue the company for enforcement of his rights.
- b) The company is bound to comply with all the terms and conditions contained in the MOA and AOA.

Therefore, the following conclusions may be drawn:

- If a company is about to commit a breach of any terms and conditions of memorandum and articles, any member can obtain an injunction from the Court, thereby restraining the company from committing such breach.
- If a company has already committed a breach of any terms and conditions of memorandum or articles, any member can sue the company, directors and the other officers who are responsible for the breach.

Members are bound Inter se (with each other)

- Every member is bound to all the other members.
- However, there is no privity of contract between the members.
- But a member may enforce his/her rights against another member only through the company and not directly.

Company Not Bound to Outsiders

The articles do not bind a company to the outsiders. This is based on the general rule of law that a stranger to a contract does not acquire any rights under the contract. Therefore, an outsider cannot take the help of the articles to establish a contract with company.

Distinction between MOA and AOA

Basis	MOA	AOA
Nature of document	MOA is the charter of the co. indicating the nature of its business, nationality, and its capital	AOA are regulations for the internal mgt. of the co. and are subsidiary to the MOA.
Scope	MOA define the scope of the activities of the co. (beyond which it cannot do anything).	AOA. are the rules for carrying out the objects of the company
Supremacy	MOA is the supreme document.	AOA are subordinate to the MOA. If there is any conflict between the AOA and MOA, the latter prevails.
Requirement	Every co. must have its own MOA.	A co. limited by shares need not have AOA. of its own. It can adopt Table F.
Restrictions on alteration	There are strict restrictions on its alteration in the MOA.	AOA can be altered by a special resolution.
Ultra vires	An act ultra-vires the MOA is wholly void and cannot be ratified even by the whole body of the shareholders.	An act ultra-vires the AOA (but intra-vires the MOA) can be confirmed by the shareholders.

Promotion & Incorporation

Promotion refers to the process by which a company is established. The promotions on mark the initial phase of a company's journey.

“the discovery of business opportunities and the subsequent organization of funds, property and managerial ability into a business concern for the purpose of making profits there from.”

C.W.Gerstenberg

The registration process of a company under the Companies Act 2013 involves several vital steps.

Promotion & Incorporation

Filing of company registration papers with the registrar

- 1) The company's Memorandum and Articles require all subscribers' signatures to the memorandum.
- 2) The person responsible for forming the company must provide a declaration confirming compliance with all requirements and regulations outlined in the Act. Additionally, an individual mentioned in the Articles must also sign this declaration.
- 3) Each subscriber to the Memorandum, as well as the individuals named as the first directors in the Articles, must submit an affidavit containing the following information:
 - 1) A declaration stating their non-conviction for any offense related to a company's establishment, promotion, or management.
 - 2) Confirmation that they have not been found guilty of fraud or breaching any duties to any company within the past five years.
 - 3) An affirmation that the documents filed with the registrar are complete and accurate to their knowledge.
 - 4) An address for correspondence until the registered office is established.

Promotion & Incorporation

- 4) If the subscriber to the Memorandum is an individual, they must provide their full name, residential address, nationality, and proof of identity. If the subscriber is a body corporate, the prescribed documents need to be submitted.
- 5) Individuals mentioned as subscribers to the Memorandum in the Articles should provide the details mentioned above, along with their Director Identification Number.
- 6) The individuals mentioned as the first company's first directors in the Articles must provide information regarding their interests in other firms or corporate bodies with their consent to act as company directors, as per the prescribed form and manner.

Certificate of Incorporation

According to Section 7(2) of the Act, the Registrar is mandated to register all the documents and information submitted under Section 7(1).

Subsequently, the Registrar will enter the said documents, input them into the register, and provide a certificate of incorporation, as per the prescribed format, confirming that the proposed company has been successfully incorporated under the Companies Act.

The Certificate of Incorporation issued by the Registrar for any association serves as conclusive proof that the association has fulfilled all the requirements specified in the Act concerning registration and associated matters. **The validity of the registration cannot be questioned after the certificate is issued.**

- Fraud, illegal objects: The persons furnishing false or incorrect information shall be liable for punishment.

Case Discussion

Moosa vs. Ebrahim

The Memorandum of Association of a company was signed by two adults and a guardian on behalf of five minors subscribers. The Registrar registered the company and issued a Certificate of Incorporation. It was argued that this

- Certificate of Incorporation should be invalidated.
- Lord Macnaughten responded by stating, “Their Lordships will assume that the registration requirements stipulated by the Indian Companies Act were not duly fulfilled, that there were not seven subscribers to the Memorandum, and that the Registrar should not have granted the certificate. However, the certificate holds conclusive validity in all respects. Consequently, the certificate prevents anyone from asserting that the company does not exist.”

Certificate of Incorporation

- Section 7(3) states that on and from the date mentioned in the certificate of incorporation issued under subsection (2), the Registrar shall allot to the company a corporate identity number (CIN), which shall be a distinct identity for the company, and which shall also be included in the certificate.
- Section 7(4) states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed under subsection (1) till its dissolution under this Act.

Promoter

“Promoter is one who undertakes to form a company with reference to a given object and to set it going, and who takes the necessary steps to accomplish that purpose.”

C. Cockburn

The person who takes on the task of promotion and invests their initial capital is known as the company's promoter. The promoter decides whether to establish a public or private company and has responsibility for preparing the required documents for the company's incorporation.

The term "promoter" is commonly used to refer to any individual, corporation, syndicate, association, or partnership that has taken all the necessary steps to establish and initiate a company.

Promoters

- The Companies Act of 2013 in India was the first legislation to define a promoter's role formally.
- Section 2 (69) of the Companies (Amendment) Act, 2013, the persons whose advice, directions, or instructions are regularly followed by the company's Board of Directors are considered promoters.
 - a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
 - b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
 - c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:
- However, if someone is solely providing professional advice to the Board of Directors in their professional capacity, they will not be classified as a promoter.

Legal Position of Promoter

- Promoters play a crucial role in bringing a company into existence, but their legal position is distinct from that of directors or shareholders.
- Promoters have **fiduciary duty** towards the company. Promoters must act in the best interests of the company and its prospective shareholders. They must exercise good faith, disclose all material information, and avoid any conflicts of interest that may arise during the promotion and formation process. Failure to fulfil this duty may result in legal consequences, including potential liabilities.
- Promoters are also responsible for the **disclosure of information** to potential investors.
- Promoters may enter into various **contracts** on behalf of the company during the **pre-incorporation stage**. These contracts, known as pre-incorporation contracts, bind the company once it is formed. However, promoters are personally liable for any obligations arising from such contracts until the company is incorporated and assumes those liabilities.
- Promoters may also receive certain benefits, such as remuneration or shares, for their efforts in promoting the company.
- The legal position of a promoter involves fiduciary duties, the duty of disclosure, potential personal liabilities, and entitlement to benefits. Promoters must adhere to legal requirements, act in the company's best interests, and ensure transparency throughout the promotion and formation process.

Rights of Promoters

- Promoter cannot make secret profits
- Right of a Promoter to receive preliminary expenses
- The right to seek reimbursement from co-promoters

Duties of the Promoter

- **Not to make undisclosed profit**
- **Duty to disclose secret profits:** Company has the right to demand an explanation and hold the promoter personally responsible if promoter obtains undisclosed profits and fails to comply with.
- **Duty to take permission from the shareholders:** If the company has unused fund left out of the capital collected and company wants to change the object then objectives cannot be altered for which the funds were raised. But special resolution needs to be passed. Dissenting shareholders should be allowed to exit by the promoters and shareholders in control, following the regulations specified by the SEBI. The SEBI will determine the exit price, method, and conditions of the offer through relevant offer conditions in accordance with Section 167(3)

Duties of the Promoter contd.

- **Duty to serve as a director in specific situation:** Section 168(3), if all the directors of a company resign from their positions or vacate their positions as outlined in Section 167, the promoter or, in the promoter's absence, the Central Government is responsible for appointing the necessary number of directors. These appointed directors will serve until new directors are appointed by the company in a general meeting.
- **Duty to cooperate in the event of winding up:** Section 284(1) the promoters, directors, officers, and employees who are currently or were previously employed by or associated with the company are required to provide full cooperation to the Company Liquidator during the winding-up process overseen by the Tribunal. Their collaboration is essential for the proper execution of the liquidator's responsibilities and duties.

Liabilities of a promoter

- **False information during company incorporation:** Section 7(6) of the Companies Act states that if it is proven that a company was incorporated by providing false or incorrect information, misrepresentations, or by suppressing material facts, or through fraudulent actions, the promoters, the individuals named as the initial directors of the company, and the individuals making the declaration will be held liable for fraud under section 447.
- **Obligations regarding prospectus disclosures:** Section 26 of the Act specifies the information and reports to be included in the prospectus. Promoters may be held accountable for non-compliance with the provisions of this section. Additionally, section 26(1)(a)(xiv) mandates the disclosure of sources of the promoter's contribution in the prospectus.

Liabilities of a promoter

- **Civil liability for misleading statements in the prospectus:** Promoter is legally responsible for any misleading statement in the prospectus that induces a person to subscribe to company securities.

According to section 35(1), if a person suffers losses or damages as a result of subscribing to securities based on misleading statements or the inclusion or omission of some issues in the prospectus, the company and specific individuals mentioned in the section, including the promoter, may be liable to compensate the affected individuals.

A promoter cannot be held liable under this section if they can prove that the prospectus was issued **without their knowledge** or consent. Furthermore, suppose the promoter becomes aware of the issuance and promptly gives a **reasonable public notice** stating that the prospectus was issued without their knowledge or consent. In that case, they will not be held responsible.

Liabilities of a promoter

- **Fraudulent inducement to invest money:** According to section 36, any individual who knowingly or recklessly makes false, deceptive, or misleading statements, promises, or forecasts or intentionally conceals material facts to persuade someone else to enter into agreements related to securities, or to obtain credit facilities from a bank or financial institution, shall be subject to punishment for fraud under section 447. These agreements may involve acquiring, disposing of, subscribing for, underwriting securities, or seeking profit based on the yield of securities or fluctuations in their value.

Liabilities of a promoter

- **Criminal liability for false statements in the prospectus:** In addition to civil liability, promoters can face criminal consequences under Section 34 if they issue a prospectus that contains untrue or misleading statements, either in its form or context or if the inclusion or omission of any matter is likely to deceive. Section 447 imposes severe penalties on promoters who intentionally make false or misleading statements in a prospectus to obtain capital. The prescribed punishment includes **imprisonment for at least six months but not exceeding ten years** and a **fine equal to or greater than the amount involved in the fraudulent activity, which may extend up to three times that amount**. If the fraud affects the public interest, the minimum imprisonment term is **three years**.

However, a promoter can avoid punishment by proving either (i) that the statement or omission was insignificant or (ii) that they had reasonable grounds to believe, and genuinely believed until the time of issuing the prospectus, that the statement was true, or the inclusion or omission was necessary.

Prospectus

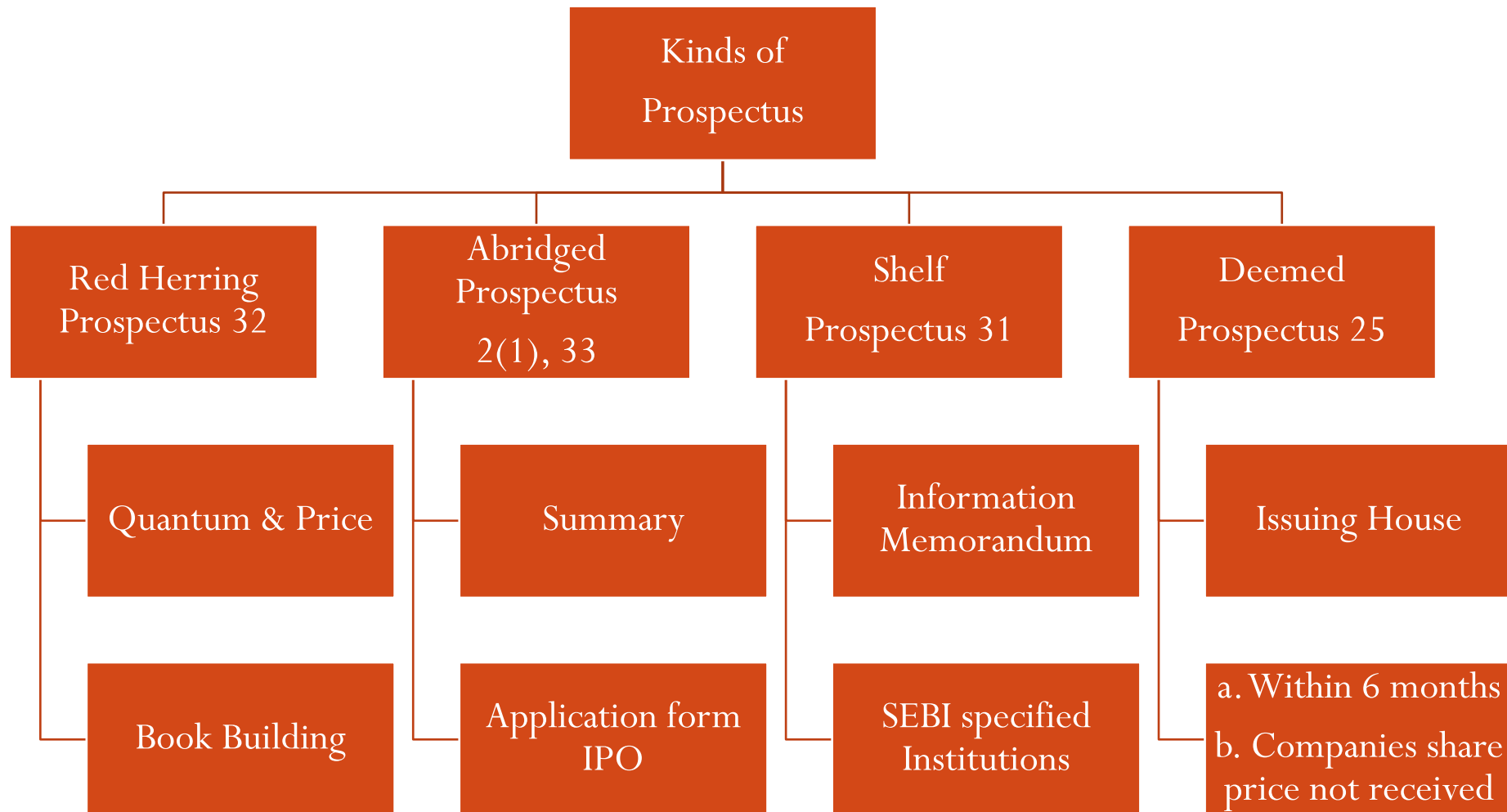
- A prospectus is a formal invitation extended to the general public, inviting them to subscribe to the company's securities. If a document allows anyone to bring their money and apply for share capital using the prescribed form, it is considered to be issued to the public.
- Prospectus shall be issued by the public companies only. However, for private companies, there is another concept named **private placement** through which private companies can raise their funds.
- A document is deemed to be issued to the public if the invitation to subscribe for share capital is such as to be open to anyone who brings money and applies in the prescribed form, whether the prospectus was addressed to him / her or not.

Prospectus

Section 2(70) of the Companies Act, 2013 defines a prospectus as

“any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.”

Prospectus Section 2(70)



Kinds of Prospectus

- 1) **Red Herring Prospectus:** Red Herring Prospectus is a prospectus that does not include complete particulars of the **quantum or price** of the securities contained in therein. During the **book-building process**, a red herring prospectus is issued. This prospectus contains either the **minimum price** at which the securities are offered or a **price range** indicating the permissible range within which bids can be placed.

Kinds of Prospectus

- 2) **Abridged Prospectus:** Abridged Prospectus refers to a summary document that includes the **key highlights of a prospectus**, as specified by the SEBI through regulations. According to Section 33, it is mandatory to provide an abridged prospectus along with any application form for purchasing securities of a company. This ensures that potential investors receive essential information about the offering in a concise format before making their purchase decisions.

Sec 2(1) “abridged prospectus” means a memorandum containing such salient features of a prospectus as may be specified by the SEBI by making regulations in this behalf;

Kinds of Prospectus

- 3) Shelf Prospectus: A Shelf Prospectus is a document submitted by a company to authorize **multiple issuances** of securities within **one year** from the date it is approved by the Registrar of Companies (ROC). This provision enables the company to make several public offers of its securities within the designated validity period of the Shelf Prospectus, eliminating the need to file a new prospectus for each individual offer.

A company filing a shelf prospectus shall be required to file an **information memorandum** containing all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities and such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

Kinds of Prospectus

- Provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.
- Where an information memorandum is filed, every time an offer of securities is made, such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

Kinds of Prospectus

- 4) **Deemed Prospectus:** A Deemed Prospectus is any document that possesses the essential features of a prospectus and extends an invitation to subscribe or offer securities of a company. This category includes various forms of communication such as advertisements, pamphlets, circulars, or any other means offering public securities for subscription or purchase.

Document issued by issuing house inviting the public for sale of shares or debentures.

Kinds of Prospectus

- **Deemed Prospectus Section 25: Document containing offer of securities for sale to be deemed prospectus.**— (1) Where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company; and all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in subsections (3) and (4) and shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

Doctrine of Constructive Notice

- Every person dealing with the company is treated as having the knowledge of the contents of the memorandum. (Public documents of the company)
- It seeks to protect the company against the outsider.
- Constructive / implied notice – whether the party concerned has actual knowledge or not.

Doctrine of Indoor Management

- Persons dealing with the company are assumed to have read the public documents of the company.
- They need not inquire into the regularity of the internal proceeding and may assume that all is being done regularly
- An outsider is presumed to know the constitution of the company, but not what may or may not have taken place within the doors that are closed to him or her.
- It operates to protect outsiders against the company.
- Royal British Bank vs. Turquand 1856

Exceptions to the Doctrine of Indoor Management

- Knowledge of irregularity
- No knowledge of Articles
- Forgery
- Negligence
- Others: agency

Directors

Section 2(34) director means a director appointed to the Board of a company;

Section 2(10) Board of Directors or Board, in relation to a company, means the collective body of the directors of the company;

Directors

According to Section 149(1) of the Companies Act 2013, every company must have a minimum of:

- three directors for public companies,
 - two directors for private companies, and
 - one director for One Person Companies.
- The maximum number of directors a company can appoint is fifteen.
 - If a company wishes to appoint more than fifteen directors. In that case, it can do so by passing a special resolution in a general meeting without requiring the approval of the Central Government.
 - Such class or classes of companies as may be prescribed shall have at least one-woman director.

Directors

- Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.
- Every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Number of directorships

- No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than **twenty companies** at the same time:
- Provided that the maximum number of **public companies** in which a person can be appointed as a director shall not exceed **ten**.
- For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.

Qualifications

- No academic or professional qualifications
- No Share holding except articles mentions
- DIN: Numeric 08 digits
- Individual

Types of Directors

- Executive and Non- Executive Directors
- MD
- WTD
- Independent Directors
- Nominee Directors
- Small Shareholders Directors
- Resident Director
- Women Director
- Shadow Director

Executive Vs. Non-Executive Director

Executive	Non Executive
Member of Board & day to day responsibility	Member of Board, does not take part in day to day work
WTD, MD	Nominee, ID
In company employment	Not employment of Company
Inside Director	Part time / outside

Managing Director

Section 2(54) Managing director means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Whole-time director

Section 2(94) whole-time director includes a director in the whole-time employment of the company;

Clause 49

'Independent Director' means a non executive director of the company who:

- a. apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director.
- b. is not related to promoters or management at the board level or at one level below the board;
- c. has not been an executive of the company in the immediately preceding three financial years;
- d. is not a partner or an executive of the statutory audit firm or the internal audit firm that is associated with the company, and has not been a partner or an executive of any such firm for the last three years. This will also apply to legal firm(s) and consulting firm(s) that have a material association with the company.
- e. is not a supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director; and
- f. is not a substantial shareholder of the company, i.e. owning two percent or more of the block of voting shares.

Companies Act 2013

'Independent Director' means a non executive director of the company other than a nominee director:

1. Who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;
2. Who, neither himself nor any of his relatives:
 - i. Has or had any pecuniary relationships or transactions with the company, its holding, subsidiary or associate company or its promoters, or directors, amounting to 10% or more of its gross turnover or total income during the two immediately preceding financial years or during the current financial year;
 - ii. Holds or has held any senior management position of a key managerial personnel or is or had been employee of the company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;
 - iii. is or has been an employee or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of:
 - a. a firm of auditors or company secretaries in practice or cost auditors of the company; or
 - b. Any legal or a consulting firm(s) that had any transaction with the company, its holding, subsidiary or associate company amounting to 10% or more of the gross turnover of such firm;
 - iv. Holds together with his relatives 2% or more of the total voting power of the company; or
 - v. Is a Chief Executive or director, by whatever name called, of any non profit organization that receives 25% or more of its income from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or
3. Who possess such other qualifications as may be prescribed.

Independent Director

Clause 49	Companies Act 2013
<p>½ of the Board must be non executive directors.</p> <p>Chairman – Executive director – ½ ID</p> <p>Chairman – Non executive – 1/3 ID</p>	<p>Every listed public company having such amount of paid up share capital as may be prescribed shall have at least 1/3 ID.</p> <p>Central Govt. prescribe ID for other public companies.</p>

Nominee Director

Nominee director means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

Small Shareholder Director

Section 151 Appointment of director elected by small shareholders:

A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

- *Explanation.*—For the purposes of this section —small shareholders means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

Resident Director

Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

Shadow Director

Shadow Director is a person who is not formally appointed as a director, but in accordance with whose directions or instructions the directors of a company are accustomed to act. This is a concept adopted from English law. However, a person is not a shadow director merely because the directors act on advice given by him in a professional capacity.

Duties of Directors Section 166

- The Act specifies that a director must:
 - Act in accordance with the company's articles.
 - Act in good faith to promote the company's objectives for its members, employees, shareholders, community, and environmental protection.
 - Exercise their duties with reasonable care, skill, and diligence, and exercise independent judgment.
 - Avoid situations where they have or may have a conflicting interest with the company's interest.
 - Not seek undue personal gain or advantage for themselves, their relatives, partners, or associates. If found guilty of such actions, the director must repay the company an amount equal to the gain.
 - Not transfer their position as a director, as any such transfer would be considered invalid. Directors who violate these provisions may face a fine ranging from Rs. 100,000 to Rs. 500,000.

Liabilities of the Directors

- Liability to the company
- Liability to third parties
- Liabilities for breach of statutory duties
- Liability for acts of co-directors
- Criminal liability

Liabilities of the Directors

- Liability to the company
 - Breach of fiduciary duty
 - Ultra vires acts
 - Negligence
 - Mala fide acts

Liabilities of the Directors

- Liability to the company
- Liability to third parties
 - Liabilities under the provision of Companies Acts
 - Liability for breach of warranty of authority
- Liabilities for breach of statutory duties
- Liability for acts of co-directors

Liabilities of the Directors: Criminal liability

- **Criminal liability for mis-statements in prospectus:**

Where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises the issue of such prospectus shall be liable under section 447:

Provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

Liabilities of the Directors: Criminal Liability

- **Punishment for fraud:** Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Liabilities of the Directors: Criminal Liability

- **Punishment for false statement:** Save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—
 - (a) which is false in any material particulars, knowing it to be false; or
 - (b) which omits any material fact, knowing it to be material, he shall be liable under section 447.

Liabilities of the Directors: Criminal Liability

- **Punishment for false evidence:**

Save as otherwise provided in this Act, if any person intentionally gives false evidence—

(a) upon any examination on oath or solemn affirmation, authorised under this Act; or

(b) in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and with fine which may extend to ten lakh rupees.

Liabilities of the Directors: Criminal Liability

- **Punishment where no specific penalty or punishment is provided:**

If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to ten thousand rupees, and where the contravention is continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.

Liabilities of the Directors: Criminal Liability

- **Punishment in case of repeated default:**

If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

Liabilities of the Directors: Criminal Liability

- **Punishment for wrongful withholding of property:**

(1) If any officer or employee of a company:

(a) wrongfully obtains possession of any property, including cash of the company;
or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(2) The Court trying an offence under sub-section (1) may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to two years.

Liabilities of the Directors: Criminal Liability

- **Punishment for improper use of Limited or Private Limited:**

If any person or persons trade or carry on business under any name or title, of which the word Limited or the words Private Limited or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated with limited liability, or unless duly incorporated as a private company with limited liability, as the case may be, punishable with fine which shall not be less than five hundred rupees but may extend to two thousand rupees for every day for which that name or title has been used.

Liabilities of the Directors: Criminal Liability

- **Punishment for fraudulently inducing persons to invest money:**

Any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or

(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or

(c) any agreement for, or with a view to obtaining credit facilities from any bank or financial institution, shall be liable for action under section 447.