ANNAI WOMEN'S COLLEGE, KARUR

Company Law

(16CACCM1D)

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CONTENT

COMPANY LAW

Objective: To enable the students to know the importance of company law and its provisions.

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Definition of Joint Stock Company – Kinds – Formation – Incorporation- Characteristics.

Unit-II

Memorandum of Association – Contents - Doctrine of Ultra Vires – Articles of Association – Contents – Prospectus – Contents – Statement in lieu of Prospectus. .

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UNIT – I
INTRODUCTION

Meaning:

A company in common parlance means a group of persons associated together for the attainment of a common end, social or economic. In the common law a company is a juristic personality or legal person separate from its members. A company is an artificial or legal person created and devised by the laws for a variety of purposes such as promotion of charity, art, research, religion, commerce or business. The company just like a natural person possesses similar lights and owes similar obligations but has neither a mind nor a body of its own.

Definition:

- According to **Sec 3(1) (i)** of the **Indian Companies Act** a company is one, "Formed and registered under this act or an existing company".
- "According to Sec 3(1) (ii) defines that an existing company means company formed and registered under any of the previous company law".
- "A company is an incorporated association which is an artificial person created by law, having separate entity with a perpetual succession and a common seal" – **Haney.**

About definition clearly bring out the characteristics of a company.

- A company is created by law.
- A company comes into existence only when it is registered under the act.
- The capital of the company is divided in to transferable shares.
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FEATURES / CHARACTERS / NATURES OF COMPANY

1. Artificial legal person

A company is an artificial person which exists only in the eyes of law. It has neither a body to bury nor a soul to destroy. It is invisible, intangible and has an entity of its own in the eyes of law. Its functions through a board of directors elected by the shareholders.

2. Separate legal entity

A company has a distinct and independent legal entity. It cannot bind its members by its actions. Nor can it be bounded by the actions of its members. Its functions in its own name and it alone are responsible for all its transactions. As any other individual, it can enter into contracts, acquire property, sue and be sued, al in its own name.

3. Incorporated association

A company is the creation of law and it comes into existence only when it is registered under the Indian companies act, 1956. Registration marks the birth of a company.

4. Common seal

Being an artificial person, it cannot sign the documents. The common seal containing the name of the company is used as a substitute for the signature of the company. Every document,

to be binding on the company, shall bear the common seal of the company, attested by at least two directors.

5. Limited liability

The liability of the members of a company limited by shares is limited to the extent of the nominal value of the shares held by them. If the company goes into liquidation, each member is liable to pay the uncalled amount on the shares held by him when the board makes a call.

6. Perpetual succession

A company has continuous existence. The life and continuity of a company is not affected by the death, insolvency or insanity of any member of the company. There may be constant change in the membership of a company but such change does not interrupt the continuity of the company.

7. Transferable shares The shares in a public company are freely transferable. A member may liquidate his share holdings in the open market and realize the amount. It is a statutory right conferred on the member whom the company cannot take away by a provision in its articles.

8. Ownership and the management

The shareholders of the company are scattered over hook and corner of the country and as a result they cannot directly participate in the day to day management of the company. Hence, the company is managed through elected representatives called directors.

DIFFERENT KINDS OR TYPES OR CLASSIFICATION OF COMPANIES

Chartered companies

A chartered company is one which is incorporated under a special charter granted by the king or queen of England in the exercise of prerogative powers e.g., East India company, bank of England, standard chartered bank. The chartered companies are governed by the provisions of the special charter.

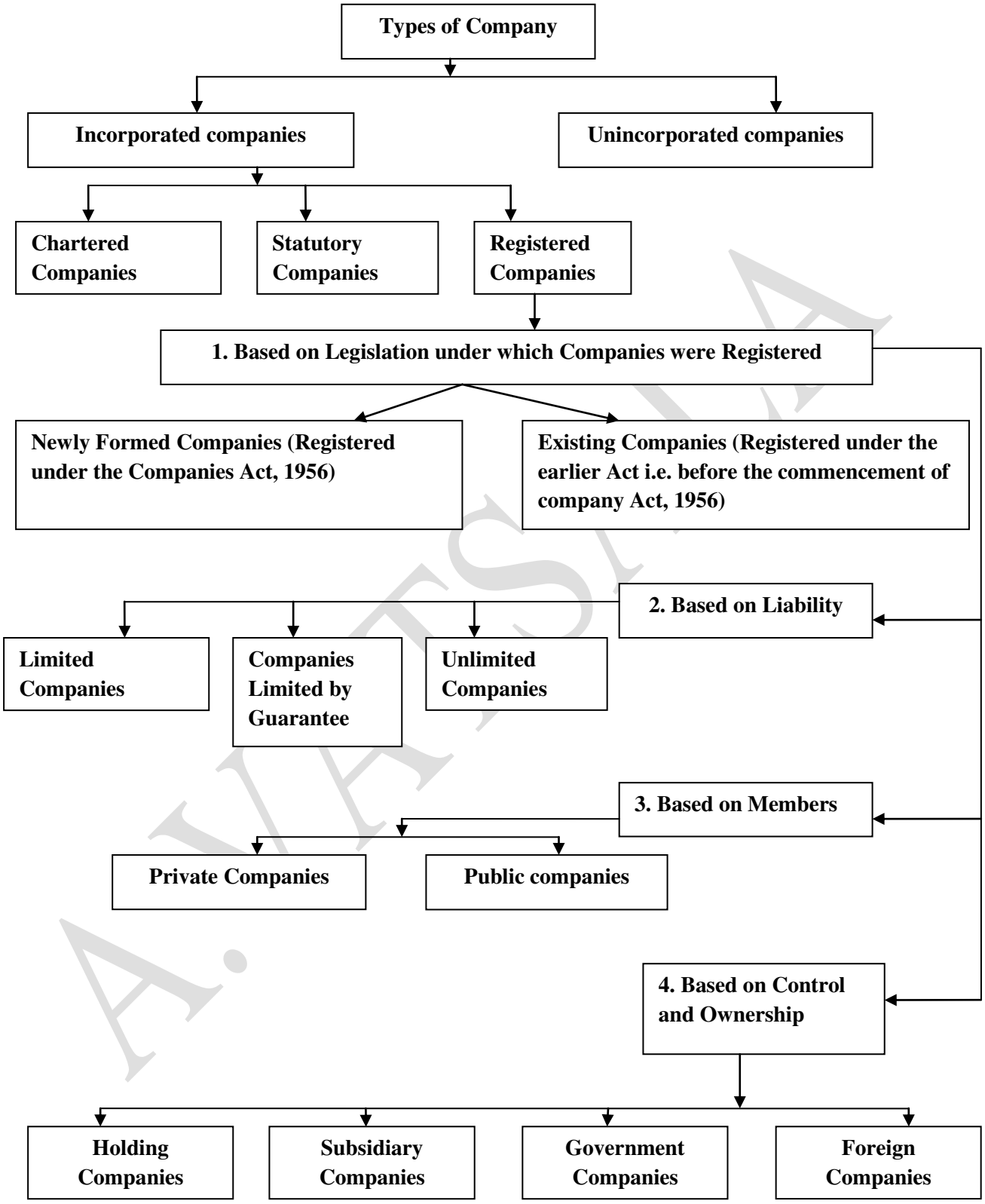
Statutory companies

The statutory companies are also known as corporations. Such companies are, generally, created for the public utility services, and their main object is not to earn profits, but to serve the general public. A statutory company resembles with the company created under the companies act as it has a separate legal entity and the liability of its members it also limited. It may not be required to use the word “limited” after its name. Moreover, it is also not required to have memorandum and articles of association.

Registered companies

A registered company is one which is formed and registered under the companies act, 1956. It also includes an existing company, which was formed and registered under the earlier companies acts. It may be noted that a registered company comes into existence when it is registered under the companies act, and a certificate of incorporation is granted to it by the registrar of companies. It may be of two, namely:

1. Limited companies
2. Unlimited companies



1. LIMITED COMPANIES

A limited company is one in which the liability of the members is limited i.e., the members are liable up to a limited amount, and beyond that limit they cannot be asked to contribute anything towards the payment of company's liabilities. Thus, if in the event of winding up of a company, the assets of the company are not sufficient to pay its liabilities, then

the private property of the members cannot be utilized for the payment of company's liabilities. It is required to add the word "limited" after its name.

It may be of two kinds, namely:

- Companies limited by shares.
- Companies limited by guarantee.

Companies limited by shares

Companies, in which the liability of the members is limited by the memorandum to the unpaid amount of the shares held by them, are called companies limited by shares. When we, generally talk about a "company" we mean only this type of company.

Companies limited by guarantee

Companies in which the liability of members is limited by the memorandum to such an amount as the members undertake to pay are called companies limited by guarantee. A company, limited by guarantee, may or may not have the share capital. If the company has the share capital, then the members are also liable to pay the unpaid amount on their shares. However, the amount of guarantee can be called only at the time of winding up of the company. It may be either private or public companies.

2. UNLIMITED COMPANIES

An unlimited company is one in which the liability of the members is unlimited i.e., the members are also personally liable for the payment of companies liabilities. Thus, if in the event of winding up of a company, the assets of the company are not sufficient to pay its liabilities. Then the private property of the members can also be utilized for the payment of company's liabilities.

CLASSIFICATION ON THE BASIS OF MEMBERS

- **Public companies**
  - ✓ It has a minimum paid up capital of Rs.5, 00,000 or such higher paid up capital; as may be prescribed.
  - ✓ It is a private company, which is a subsidiary of a company, which is not a private company.
  - ✓ It has minimum 7 members, at the maximum there is no limit.
- **Private companies**

According to Sec 3(1) (iii), a "private company" means a company which has a minimum paid up capital of Rs.1,00,000 or such higher paid up capital as may be prescribed, and by its articles.

- ✓ Restricts the right of the members to transfer shares,
- ✓ Limits the number of members to 50
- ✓ Prohibit any invitation to the public to subscribe for its shares or debentures, and
- ✓ Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

CLASSIFICATION ON THE BASIS OF CONTROL AND OWNERSHIP

Holding company

- ✓ A company is deemed to be a holding company of another if, but only if, that other is its subsidiary. [(Sec 4(4)] when on company has control over another, it is called holding company.
- ✓ If it controls the composition of the board of directors of another company.
- ✓ If the company holds majority of the equity share capital of another company. But where another company is an existing company and has preference shares with some voting rights, the company should hold majority of the total voting power of the another company.
- ✓ If another company is subsidiary of the company subsidiary.

Subsidiary company

The company which is controlled by another company is subsidiary company. A company is deemed to be called controlled by another company in the following three cases:

- ✓ If another company controls the composition of the board of the company.
- ✓ If another company holds majority of the nominal value of the equity share capital of the company. In case the company is an existing company and has preference shares with equal voting rights, another company holds the majority of the total voting powers.

Government Company

- ✓ A company which is not less than 51% of the paid up share capital is held by the central government or by any state government or governments or partly by the central government and partly by one or more state governments is called a government company.

Foreign company

- ✓ A foreign company is a company incorporated outside India but which established a place of business in India.
- ✓ According to Sec 591(2) of the companies amendment act, 1974, where not les than 50% of the paid up share capital of a foreign company is held by citizens of India or Indian companies or by both, such company shell be treated as if it was an Indian company.

FORMATION OF A COMPANY

Introduction:

A company is a legal entity; it has to follow legal procedures for its formation. The company is formed brought up and even wound up after following legal formalities. A company has to follow certain legal steps the process of forming a company can be divided into four stages.

- Promotion.
- Registration (or) incorporation.
- Capital subscription.

- Commencement of business.

In case of a private company it has to follow the first two stages only but in case of public company having a share capital, it has to go through all four stages mentioned above.

VARIOUS STAGES IN THE FORMATION OF A COMPANY

Following are the four stages in the formation of a company.

PROMOTION INCORPORATION CAPITAL SUBSCRIPTION COMMENCEMENT OF BUSINESS

1. Promotion of a company

Promotion is the first step in the formation of a company. The birth of a new business enterprise is similar to the new business enterprise is similar to the birth of a human child. The gestation period for business enterprises varies according to nature and size of the business enterprise.

The term promotion refers to the aggregate of activities for promotion of a company referees to the sum total of the actives of all the those who participate in the building of the enterprise up to the building of the enterprise up to the organization of the company and completion of the plan to exploit the idea.

2. Registration or incorporation of a company

Incorporation or registration is the second stage in the formation of a company. Incorporation is the registration of the company as a body corporate under the company as a body corporate under the companies Act. 1956, section 12 provides that for formation a public. Company at least 7 people and for forming a private company at least 2 persons are required. It is the registration that brings a company into existence. A company is properly constituted only when is duly registered under the Act.

A company cannot be incorporated all of a sudden. It has to fulfill certain legal requirements. A company has to follow the procedures.

3. Capital subscription (or) subscription stage:

A private company can commence business immediately after obtaining the certificate of incorporation. A public company; can commerce business only on the receipt of the certificate of commencement of business, for this purpose a public company has to go through capital subscription stage and commencement of business arrangements for raising the capital of the company, a meeting of the board of directors will be convened usually the promoters are the first directors of the company.

4. Commencement of business:

A private company can commence its business after its incorporation, Section 149 exempts a private company has obligation certificate to commerce business but public company has to obtain certificate commence business. This certificate can be obtained only after "flotation of the company".

PROMOTION

Meaning

Promotion is the first stage in which an idea is conceived by an individual or by a few persons and is worked up with the help of his or their own resources, influences and skill. The term generally refers to the sum total of all the activities connected with the formation of a company.

DEFINITION OF PROMOTION

Promotion is "The discovery of business opportunities and the subsequent organization of funds, properly and management ability in to a business concern for the purpose of making profit there from". --**- Grestenberg**.

Promotion may be defined "as the process of organizing and planning the financial of a business enterprise under the corporation form". -**- L.H.Haney.**

PROMOTER

Meaning of Promoter:

The person who takes all necessary steps to create a company and set it going is known as a promoter.

Definition:

"A promoter is a person who undertakes to form a company with reference to a given object and to set it going and who takes necessary steps to accomplish that purpose". **– Coekburn**

"Promoter is a person who conceives the idea, studies the prospects of the business criticaloly, chalks out an at tentative scheme of organization, brings together the requisite men, materials, machinery, money and managerial ability and float the enterprise" **– Haney.**

"It is not a term of low but of business operations familiar to the commercial world by which a company generally brought into existence". **– Bower L.J., in Whaley Bridge.**

CERTIFICATE OF INCORPORATION

Meaning:

A company comes into legal existence upon the issue of a certificate of incorporation by the registrar. It is often described as the birth certificate of the company and identifies the company by its name, the serial number at the register and states whether it is a private or public company.

Conclusiveness of the certificate of incorporation

Thus the certificate of incorporation is conclusive on the following points.

- ✓ That all the preconditions i.e. legal requirements of registration have been complied with.
- ✓ That the company is properly registered.
- ✓ That the company came in to existence on the date of certificate of incorporation.

A certificate of incorporation is therefore conclusive evidence that everything is in order as regards registration and that the company has come in to existence from the earliest moment of the day of incorporation stated therein with rights and liabilities of a natural person, competent to enter in to a contract. It may however be noted that if the company is registered with illegal objects, then the objects do not become legal by the issue of certificate of incorporation.

Steps in incorporation of a company:

The following duly completed and executed documents together with the necessary fees must be filed with the registrar of companies:

- A memorandum of association signed by at least two subscribers, dated and witnessed.
- Articles of association signed by the same subscribes, dated and witnessed.
- A statement in the prescribed form by the directors to act as such and undertaking to take and pay for qualification shares.

- A statutory declaration by an advocate of the Supreme Court or of a high court, an attorney or a pleader entitled to appear before a high court or a chartered accountant practicing in India who is engaged in the formation of the company or by a person named in the articles as a director, manager or secretary of the company.

ADVANTAGES AND DISADVANTAGES OF INCORPORATION OF ACOMPANY

The following are the advantages and disadvantage of incorporation of a company.

Advantage of incorporation:

1. Company has a legal existence and it can sue and be sued in its own name.
2. In the case of Limited Liability Company the liability of the members is limited to the extent of nominal value of share.
3. A company can acquire and dispose of immovable properties in its own name.
4. From the point of view of payment of tax allowances and rebates could be enjoyed.
5. By registration a company enjoys better control and administration with regard to its management.
6. By registration, a company has perpetual succession unless it is wound up.
7. Only after registration of a company capital could be mobilized by issue of prospectus.

Disadvantage of incorporation:

1. When it is not registered it cannot sue nor be sued in its own name. Besides, it may have to comply with several statutory formalities like maintenance of registers, submission of returns and convening meeting etc.

2. In case if the company; is not registered each and every member will be jointly and severally liable, provided the minimum number falls below the limit.
3. It cannot sell or assign or mortgage an immovable property without obtaining the approval of the general body by a special resolution.
4. Accounts have to be audited and approved by the general body in annual meeting. Then only account submitted by the company could be considered as authentic by tax authorities.
5. By non registration a company cannot enjoy that much of control and administration and secrecy with regard to their choice on employment of personnel.
6. No such perpetuity will be there if the company is not registered.
7. If it is not registered neither prospectus could be issued nor could capital be obtained.

SPECIMEN OF THE CERTIFICATE OF INCORPORATION:

CERTIFICATE OF INCORPORATION

I here by; certify that the **'X'** ltd India ltd., is this day incorporated under the companies Act, 1956 and that the company is limited.

Given under may hand at Chennai this third day of April, 2007.

SEAL

The registrar of companies.

COMMENCEMENT OF BUSINESS

Meaning:

A private company can commence business right from the date of the certificate of incorporation. But a public company cannot commence business immediately upon incorporation. A further certificate known as certificate of commencement of business is necessary before it commences its business or exercises its borrowing powers. In order to get this certificate the company must comply with the provisions of sec 149 of the companies act.

❖ **When the company issued a prospectus**

When the company had issued the prospectus the promoter should file the following documents with the registrar.

1. A declaration stating that shares up to the amount of minimum subscription have been applied for and the amount is received in cash and the shares have been allotted as such.
2. A declaration stating that every director has paid the amount due from them for their qualification shares.
3. A statement that no money is liable to be refunded to any applicant because of the failure of the company to apply for or to obtain permission for the shares to be dealt with in the stock exchange.
4. A statutory declaration by the secretary or any one of the directors or where the company has not appointed a secretary, a secretary in whole time practice that the legal requirements have been complied with.

❖ **When the company has not issued a prospectus**

If the company has not issued a prospectus the following documents are to be filed with the registrar.

1. A statement in lieu of prospectus
2. A declaration stating that each director has paid the amount due on the shares taken by him.
3. A statutory declaration by the secretary or any one of the directors or where the company has not appointed a secretary, a secretary in whole time practice that the legal requirements have been complied with.

On filing of these documents with the necessary fees, the registrar grants a certificate known as "Certificate of commencement of business". This certificate is conclusive evidence that the public company can commence business and exercise its borrowing powers.

SPECIMEN OF CERTIFICATE OF COMMENCEMENT OF BUSINESS

COMMENCEMENT OF BUSINESS

I here by certify that _____ltd. of _____ which was incorporated under the Indian companies Act. 1956 on the _____ day of _____ 2013 and which has his day filed statutory declaration in the prescribed form that the condition of sec.149 have been complied with, in entitled to commence business.

Given under my hand at Chennai this _____ day of _____ two thousand_____.

SEAL
Company Registrar.

II - UNIT

MEMORANDUM OF ASSOCIATION

INTRODUCTION:

The preparation of this document is the first step in the formation of a company. It contains the fundamental conditions on which the company is to be incorporated. In fact this document is of great importance in relation to the affairs of the proposed company. It may rightly be called a 'charter' or the 'construction' of the company as it regulates the relationship of the company with the outside world. It is the found stone of the company upon which the future structure of the company will stand.

Every company must have its own memorandum of association. Therefore it is a basic document of the company.

Meaning

"It is a document of great importance in relation to the proposed company. Its importance lies in the fact that it contains the fundamental clauses which have often been described as the conditions of the company's incorporation".

DEFINE MEMORANDUM OF ASSOCIATION

According to Sec 2(28) of the companies act, "The memorandum means, the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous companies' law or of this act."

REQUISITES AND PURPOSE OF THE MEMORANDUM

Purpose of memorandum

Its purpose is twofold.

- Firstly the shareholders are in a position to know how their savings are to be used and the field in which or the purpose for which their funds are to be utilized and risk involved in making the investment.

- Secondly anyone who is dealing with the company can understand the permitted range of the company, its powers and object.

Requisites or form of the memorandum of association

- It must be printed and should be divided in to two paragraphs. Each paragraph should be consecutively numbered.
- In case of a private company, it must be signed by at least 2 persons and in case of a public company it must be signed by at least 7 persons.

- The address and occupation of each signatory together with the signatures, address and occupation of the witnesses must be added.

ALTERATION OF THE MEMORANDUM OF ASSOCIATION

❖ **Alteration of the Name Clause**

- The secretary should write to the register of companies of the state in which the registered office of the company is situated with a view to enquire whether the changed name is undesirable.
- He should also obtain the approval of central government. If the change involves only the addition or deletion of the word private, then the approval of central government is not necessary.
- The new changed name acceptable to the registrar must be adopted within a period of three months.
- He should arrange for a meeting of board of directors to recommendation the changed name to the Members.
- He should get the copies of the special resolution signed by the chairman of the meeting to the field with the registrar. This should be done within 30 days of the date of passing of the resolution.
- He has to incorporate the change of name in the memorandum and articles of association of the company.
- The secretary should file altered copies of memorandum with the registrar within 3 months.
- The secretary should also arrange for the company's name to be changed outside the registered office of the company and other premises.
- The secretary should notify all the parties dealing with the company about the change of name.

❖ **Alteration of the Situation Clause**

- **Change of registered office in the same town or village**

A mere resolution of the board of directors is enough for the change. A notice of the change should be field with the registrar within 30 days of the change.

- **Change of registered office from one place to another with in a state**

A company can change the place of its registered office from one place to another with in a state, if it is confirmed by the regional director.

- **Change of registered office from one state to another**

The change of registered office from one state to another state involves alteration of memorandum, and the change can be effected by a special resolution of the company which must be confirmed by the company law board.

❖ **Alteration of the Liability Clause**

The liability clause cannot be altered to make the liability of the members unlimited. But if all the members agree, and if the articles permit, the liability of all the directors or any of the directors can be altered. The liability of the person holding office as director or manager before such alteration shall not be made unlimited until the expiry of his present term.

❖ **Alteration of the Capital Clause**

Alteration proper

If the articles of association permit, a company can make an alteration under this head by passing an ordinary resolution.

- ✓ Increase its share capital by new issue.
- ✓ Consolidate or sub-divide all or any of its share capital
- ✓ Convert the fully paid up shares into stock or reconvert stock into shares.
- ✓ Cancel the unissued shares and to that extent diminish the amount of its share capital.

Reduction of capital

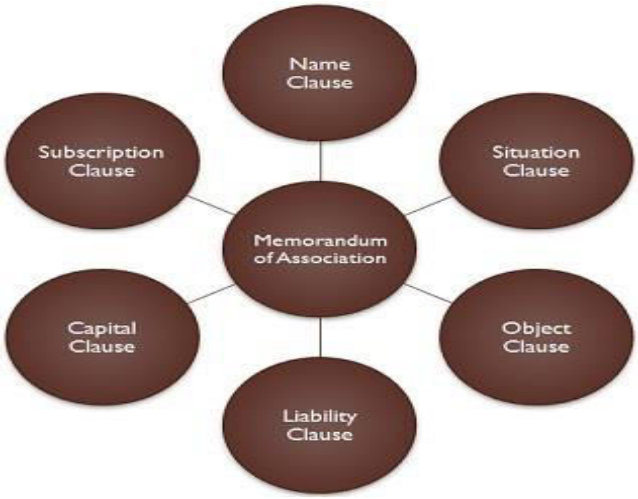
- ✓ Authorization of the articles of association is necessary
- ✓ The company should pass a special resolution
- ✓ A copy of the resolution and the order of the court should be filed with the registrar.

CONTENTS OR CLAUSES OF MEMORANDUM OF ASSOCIATION

❖ **Name Clause**

This clause contains the name of the company. Any suitable name may be chosen for the company. The last word of the name of a company, if it is a public company, must be “limited” and if it is a private company, must be “private limited”.

The proposed name of a company must not be identical with or similar to the name of any other registered company and the name must not be undesirable, in the opinion of the central government, and it must not symbolize the patronage of the government.



❖ **Situation clause**

This clause contains the name of the state in which the registered office of the company is situated. There is no need to give the full address of the company in this clause if the registered office is not yet situated. However, the full address of the registered office must be communicated to the registrar within 30 days of incorporation.

❖ **Objects clause**

In the objects clause, the Memorandum must state the objects for which the proposed company is to be established. In case of companies formed before the companies Amendment Act, 1965, the objects clause has simply to state the objects of the company [Sec.13 (1) (c)]. But in case of companies formed after the Amendment Act. The objects clause must be divided into two sub-clauses namely,

1. **Main objects:**

The main objects to be pursued by the company and objects incidental or ancillary to the attainment of the main object.

2. **Other objects:**

The object which are not included in the above clause [Sec. 13(1) (d)]. The framers of the memorandum can give to the contrary to the general law or to the provisions of the Companies Act.

❖ **Capital Clause**

A company having share capital states in this clause the amount of share capital with which the company is to be registered and the division of capital the company into the shares of fixed denomination.

❖ **Liability Clause**

This clause states the nature of liability of the members of the company. This clause is included in the memorandum of company limited by shares or guarantee.

❖ **Association Clause**

This clause contains the declaration of association made by the signatories to the memorandum. The subscriber declares that they desire to be formed into a company and agree to take the shares stated against their respective names.

ARTICLES OF ASSOCIATION

INTRODUCTION:

The articles of association are another important document which is required to be filled with the registrar of companies. This document contains the rules and regulations regarding the internal management of the company. The articles enable the management to achieve the objects given in the memorandum.

ARTICLES OF ASSOCIATION

Articles of association briefly called '**articles**' and it contains the rules and regulations which are formed for the internal management of the company. It is obligatory i.e. legally compulsory for the following companies.

- Private limited companies.
- Unlimited companies.
- Public companies limited by guarantee.

DEFINES ARTICLES OF ASSOCIATION OR DEFINE ARTICLES

According to sec 2(2) Company Act, "Articles means the articles of association of a company originally framed or as altered from time to time in pursuance of any previous company's law or of this act. They also include so far as they apply to the company, those in Table A in schedule I annexed to the act or corresponding provisions in the earlier acts".

CONTENTS OF ARTICLES OF ASSOCIATION

The articles of association of a company contain the rules and regulations on the following matters.

1. Definition of important terms and phrases.
2. Adoption or execution of pre incorporation contracts.
3. Share capital and the rights of the shareholders.
4. Allotment of shares.

5. Procedure as to making of calls on shares.
6. Procedure as to forfeiture of shares.
7. Transfer of shares.
8. Lien on shares.
9. Share certificate and share warrants.
10. Alteration of share capital.
11. Conversion of shares in to stocks.
12. Dividend, reserves and capitalization of profits.
13. Appointment of managerial personnel.
14. Meetings
15. Borrowing powers.
16. Accounts and audit.
17. Common seal of the company.
18. Voting rights and proxies.
19. Winding up of the company.
20. The exclusion, total or partial of 'Table A' of schedule I of the companies act.

IMPORTANCE OF ARTICLES OF ASSOCIATION

Following are some of the important provisions wherein the company can act only if so authorized by its articles.

- ✓ To issue redeemable preference shares.
- ✓ To accept calls in advance from shareholders.
- ✓ To increase share capital.
- ✓ To consolidate and divide its share capital in to shares of large amount than existing shares.
- ✓ To convert its fully paid up shares in to stock, and to reconvert that stock in to fully paid up shares.
- ✓ To sub divide its shares into shares of smaller amount than is fixed by the memorandum.
- ✓ To reduce its share capital.

STATUTORY REQUIREMENTS OR FORM FOR THE ARTICLES OF ASSOCIATION

The articles must be printed, divided in two paragraphs, numbered consecutively and stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filled along with the memorandum. The articles must not contain anything illegal or ultra vires the memorandum nor should it be contrary to the provisions of the companies' act 1956.

PROCEDURE FOR ALTERATION OF ARTICLES OF ASSOCIATION

The company may alter its articles of association at any time by following the procedure as prescribed in the companies act by passing a special resolution. A certified copy of the resolution must be filed with the registrar within 30 days of passing it.

However the following alterations shall not have any effect unless the same have been approved by the central government. The alteration which has the effect of converting a public company in to a private company. The alteration which has the effect of increasing the remuneration of any director inducing a managing or whole time director.

The altered articles shall be binding on the members in the same way as original articles.

The following points must be noted while altering the articles.

1. The alteration must not be against the provisions of the companies act.
2. The alteration should not be against the provisions of the memorandum.
3. The alteration must not be illegal or against the public policy.
4. The alteration should not affect the rights of an outsider.
5. The alteration should not cause a breach of contract.
6. The alteration should not oppress or constitute a fraud on the minority.
7. It must be made bonafide for the benefit of the company as a whole.
8. The alteration should not increase the liability of members unless they agree to it in writing.
9. The alteration should not force the members to take more shares or to pay more money for the shares already purchased by them.
10. If the court alters the articles of association of a company, the articles should not contain anything against the provisions of the order of the court.

RELATIONSHIP BETWEEN THE MEMORANDUM AND THE ARTICLES

- Both these documents are subordinate to the companies act.
- Both these documents are public documents. Members of the company and outsiders can inspect them and can purchase a copy of them by paying the prescribed fee in the office of the registrar.
- The terms of the memorandum cannot be modified by the articles.
- The memorandum must always be read together with the articles which classifying certain things.

DISTINGUISH BETWEEN ARTICLE AND MEMORANDUM

ARTICLES OF ASSOCIATION	MEMORANDUM OF ASSOCIATION
1. Bye law or internal regulation of the company.	1. Charter of the company and defines also confines the fundamental conditions and objects for which company is granted incorporation.
2. Subordinate to the memorandum.	2. Subordinate to the companies act
3. Secondary document.	3. Principal document.
4. Specifies the procedure to be followed to carry out the objectives stated in the memorandum.	4. Specifies the scope of authority and the objectives.
5. Defines the relationship between the company and its members and between the members inter se.	5. Defines the relationship between company and outsiders.
6. Alteration is comparatively easy.	6. Alteration is difficult.
7. The company need not have its own articles.	7. It is compulsory for all companies.
8. Acts ultra vires to articles can be ratified by suitable legal formalities. Outsiders have a remedy even if the act is ultra vires the articles.	8. Act ultra vires to memorandum cannot be ratified and outsiders have no remedy against the company.
9. The articles can be altered easily by a special resolution provided the changes are lawful and within the limits of the company.	9. It is not easy to alter the memorandum.

UNIT – III

SHARE CAPITAL

Share capital – Kinds of shares – Voting rights – Borrowing powers of companies.

Meaning of shares

The share capital is the most important requirement of a business. It is divided into a 'number of indivisible units of a fixed amount. These units are known as 'shares'. According to Section 2 (46) of the Companies Act, 1956, a share is a share in the share capital of a company, and includes stock except where a distinction stock and shares is expressed or implied.

The person who is the owner of the shares is called 'Shareholder' and the return he gets on his investment is called 'Dividend'.

Equity shares

An equity share, commonly referred to as ordinary share also represents the form of fractional or part ownership in which a shareholder, as a fractional owner, undertakes the maximum entrepreneurial risk associated with a business venture. The holders of such shares are members of the company and have voting rights.

Types of Equity Shares

Rights Issue/ Rights Shares: The issue of new securities to existing shareholders at a ratio to those already held.

- Bonus Shares: Shares issued by the companies to their shareholders free of cost by capitalization of accumulated reserves from the profits earned in the earlier years.
- Preferred Stock/ Preference shares: Owners of these kind of shares are entitled to a fixed dividend or dividend calculated at a fixed rate to be paid regularly before dividend can be paid in respect of equity share.

Preference shares

Preference shares are shares in the equity of a company that entitle the holder to a fixed dividend amount to be paid by the issuer. This dividend must be paid before the company can issue any dividends to its common shareholders. Also, if the company is dissolved, the owners of preference shares are paid back before the holders of common stock. However, the holders of preference shares do not usually have any voting control over the affairs of the company, as do the holders of common stock.

Types Of Preference Shares

1. Cumulative Preference Shares

When unpaid dividends on preference shares are treated as arrears and are carried forward to subsequent years, then such preference shares are known as cumulative preference shares. It means unpaid dividend on such shares is accumulated till it is paid off in full.

2. Non-cumulative Preference Shares

Non-cumulative preference shares are those type of preference shares, which have right to get fixed rate of dividend out of the profits of current year only. They do not carry the right to receive arrears of dividend. If a company fails to pay dividend in a particular year then that need not to be paid out of future profits.

3. **Redeemable Preference Shares**

Those preference shares, which can be redeemed or repaid after the expiry of a fixed period or after giving the prescribed notice as desired by the company, are known as redeemable preference shares. Terms of redemption are announced at the time of issue of such shares.

1. **Non-redeemable Preference Shares**

   Those preference shares, which can not be redeemed during the life time of the company, are known as non-redeemable preference shares. The amount of such shares is paid at the time of liquidation of the company.

2. Participating Preference Shares

Those preference shares, which have right to participate in any surplus profit of the company after paying the equity shareholders, in addition to the fixed rate of their dividend, are called participating preference shares.

3. **Non-participating Preference Shares**

Preference shares, which have no right to participate on the surplus profit or in any surplus on liquidation of the company, are called non-participating preference shares.

4. Convertible Preference Shares

Those preference shares, which can be converted into equity shares at the option of the holders after a fixed period according to the terms and conditions of their issue, are known as convertible preference shares.

5. Non-convertible Preference Shares

Preference shares, which are not convertible into equity shares, are called non-convertible preference shares.

Definition of share premium

The amount that is over and above par value on the amount that has been subscribed to for a new issue of corporate capital. Share premium can only be used for certain specific purposes that are laid out in the corporation's bylaws.

Shares at Discount Definition

When a share is issued by the company at a price that is less than the face value of the share, the share is said to be issued at a discount. The difference between the par value (face value) of the share and the amount received on the share is called discount on issue of shares.

Allotment of shares

- **Provide the applicants with a form of application**

Firstly you need to offer the shares to the intended recipients, which can be done verbally or in writing, but for a private company must be done in such a way that it is not regarded as an invitation to the public to subscribe for shares.

Those people wishing to apply for shares will complete an appropriate Application for new shares. They should return this to the company along with the payment required for the shares.

- **Shares are allotted via board resolution**

You should convene a board meeting at which the directors will consider the forms of application that have been submitted. You can adapt our template board resolution to issue shares to your circumstances (including removing any sections that don't apply) and this will then form part of the minutes of the meeting. If you allot shares using Inform Direct, you can produce a fully pre-populated directors' resolution or board minute at the touch of a button.

At the very least, the resolution should:

1. Approve the applications for shares received
2. Authorise the allotment of shares and detail who they're being allotted to
3. Instruct the required form(s) to be submitted to Companies House
4. Authorise the issue of share certificates in respect of the new shareholdings
5. Instruct the required updates to the register of members and register of allotments

The allotment of shares formally occurs when authority to enter the name of the allottee in the register of members is granted, after the directors resolve to issue shares.

- **Issue share certificates to those who have been allotted shares**

Companies generally issue share certificates in respect of the shares allotted, and by and large it's something that shareholders will expect the company to do. Elsewhere we've looked at

the requirements for share certificates, and Inform Direct will create and save share certificates *automatically* when you allot shares, ready for you to print them.

- **Complete a return of allotments via form SH01 to Companies House**

Within a month of the date of the share allotment, form SH01 must be delivered to Companies House. This form includes a "statement of capital", which describes the overall structure of a company's shares and how much (if anything) is left unpaid on them.

The SH01 form does not require you to give details of the shareholders to whom shares have been issued, just the shares themselves. However, you'll need to include details of who owns how many shares in the company's nextconfirmation statement – which we look at below.

- **Update the register of members and register of allotments**

It's good practice to update the register of members promptly as this is the primary evidence of who owns shares in the company – someone effectively becomes a shareholder when their name is entered into the register of members. However, in law the deadline for updating the register of members is two months following the board approving the allotment.

At the same time, the company should also update the register of allotments with details of each separate allotment of shares. Even if someone already has shares in the company, you'll need to add a new line into the register of allotments to reflect the new shares you've issued to them.

When you process share allotments in Inform Direct, all of the updates to your online statutory registers are completely automatic, saving you the effort of recording them separately.

- **Include the allotments in the company's next Confirmation Statement**

It is only the form SH01 that needs to be sent to Companies House. New share certificates do not need to be lodged at Companies House: they are simply sent to the shareholders. However, since form SH01 only includes details of the shares allotted and not the shareholders, the names of the new shareholders must be included in the company's next Confirmation Statement (which replaced the annual return from 30 June 2016). Needless to say, having completed allotments in Inform Direct your next confirmation statement will automatically be populated with the appropriate details.

- **Show the new shares issued within the company's accounts**

You'll need to liaise with your accountant to ensure that the new share allotments are correctly reflected in the company's accounts for the period.

When the company issues new shares, it increases the level of shareholders' funds shown in the balance sheet. Within the balance sheet itself, there is different treatment given to the total amounts raised in respect of the nominal value of shares and share premium:

Minimum Subscription

Minimum subscription is the term which is used to represent the amount of the issue which has to be subscribed or else the shares can't be issued if it is not being subscribed. Company which is offering the shares to the public then they set a specific amount for the subscription which can be taken by the public in order to issue the shares.

What is the minimum subscription required for a company to utilize funds?

The minimum subscription which is required for a company to utilize funds as follows:-

1. Infrastructure company won't have to have the requirement of 25% of its securities as public offer.
2. If the infrastructure company offers the requirement for the shareholders in that case Rs. 1 lakh can be waive off.
3. Infrastructure companies which are having public issues for them minimum subscription of 90% is not necessary and it should be given by the alternate source through that fund is coming to the company.
4. Infrastructure company can keep the issue open for 21 days only which would give the sufficient amount of time to get the funds for their issues.

Forfeiture of Shares

Forfeiture of shares means cancellation of shares as such whatever amount has already been received on shares being forfeited is seized. The shareholder, who applies for the shares of the company makes an offer on the one hand, and on the other hand company by accepting or allotting shares accords acceptance. In this way, offer and acceptance with the lawful consideration makes a valid contract between the shareholder and the company. The contract makes it binding upon the shareholder to pay the installment of amount due on allotment and calls, whenever due.

Notice before Forfeiture:

If a member having been called upon to pay any call on his shares fails to pay the calls, the directors may either by adoption of Table A or by an express provision on the articles proceed to forfeit the shares held by such a defaulting member. Before the shares can be forfeited the company may serve a notice on the defaulting member requiring payment of the call.

The notice must give not less than fourteen days' time from the date of service of notice for the payment of the amount due. The notice must also state that in the event the non-payment

of the amount due within the period mentioned in the notice the shares in respect of which call was made will be liable to forfeiture.

Non-compliance of Notice:

If the shareholder fails to comply with the requirement of this notice, the directors may pass a resolution effecting the forfeiture of the shares.

Effect of Forfeiture:

When the shares have been forfeited, the defaulting shareholder ceases to be member of the company and he loses all rights or interests in his shares. But notwithstanding the forfeiture he remains liable to pay to the company all moneys which at the date of forfeiture were payable by him to the company in respect of the shares.

Debenture

A debenture is one of the capital market instruments which is used to raise medium or long term funds from public. A debenture is essentially a debt instrument that acknowledges a loan to the company and is executed under the common seal of the company. The debenture document, called Debenture deed contains provisions as to payment, of interest and the repayment of principal amount and giving a charge on the assets of a such a company, which may give security for the payment over the some or all the assets of the company. Issue of Debentures is one of the most common methods of raising the funds available to the company. It is an important source of finance.

Different Types of Debentures:

A company can issue different types of debentures for raising funds for long term purposes.

Ordinary Debenture:

Such debentures are issued without mortgaging any asset, i.e. this is unsecured. It is very difficult to raise funds through ordinary debenture.

Mortgage Debenture:

This type of debenture is issued by mortgaging an asset and debenture holders can recover their dues by selling that particular asset in case the company fails to repay the claim of debenture holders.

Non-convertible Debentures:

A non-convertible debenture is a debenture where there is no option for its conversion into equity shares. Thus the debenture holders remain debenture holders till maturity.

Partly Convertible Debentures:

The holders of partly convertible debentures are given an option to convert part of their debentures. After conversion they will enjoy the benefit of both debenture holders as well as equity shareholders.

Fully Convertible Debenture:

Fully convertible debentures are those debentures which are fully converted into specified number of equity shares after predetermined period at the option of the debenture holders.

Redeemable Debentures:

Redeemable debenture is a debenture which is redeemed/repaid on a predetermined date and at predetermined price.

Irredeemable Debenture:

Such debentures are generally not redeemed during the lifetime of the company. So, it is also termed as perpetual debt. Repayment of such debenture takes place at the time of liquidation of the company.

Registered Debentures:

Registered debentures are those debentures where names, address, serial number, etc., of the debenture holders are recorded in the register book of the company. Such debentures cannot be easily transferred to another person.

Unregistered Debentures:

Unregistered debentures may be referred to those debentures which are not recorded in the company's register book. Such a type of debenture is also known as bearer debenture and this can be easily transferred to any other person.

IV – UNIT
MEETING AND RESOLUTIONS

Meetings and Resolutions – Statutory Meeting – Annual general meeting – Extra – Ordinary general meeting – Resolutions – Ordinary & Special.

Meeting

A meeting is an event in which a group of people come together todiscuss things or make decisions.

An assembly of people for a particular purpose, especially for formal discussion.

Types of Company Meetings

1. Statutory Meeting
2. Annual General Meeting
3. Extraordinary General Meeting
4. Meeting of the Board of Directors
5. Class Meeting 6. Meeting of Creditors
7. Meeting of Debenture Holders
8. Meeting of Creditors and Contributories.

1. Statutory Meeting:

Every public company limited by shares—and every company limited by guarantee and having a share capital—must, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members which is to be called the Statutory Meeting.

In this meeting the members are to discuss a report by the Directors, known as the Statutory Report, which contains particulars relating to the formation of the company.

Private companies are exempted from holding this meeting.

Statutory Report:

The nature of business conducted at the statutory meeting involves consideration and adoption of the Statutory Report. The Statutory Report is drafted by Directors and certified as correct by at least two of them. A copy of the report must be sent to every member at least 21 days before the date of the meeting. A copy is also to be sent to the Registrar for registration.

2. Annual General Meeting:

General Meeting of a company means a meeting of its members for specified purposes.

There are two kinds of General Meetings:

(i) The Annual General Meeting and

(ii) Other General Meetings.

The statutory provisions regarding the Annual General Meeting are:

(a) Section 166:

The first Annual General Meeting of a company may be held within a period of not more than 18 months from the date of its incorporation. If such a meeting is held within the period, it is not necessary for the company to hold any annual general meeting in the year of its incorporation or in the following year.

Subject to the above-mentioned provision, a company must hold an Annual General Meeting each year. Not more than 15 months shall elapse between the date of one Annual General Meeting and the next. The Registrar may, for any special reason, extend the time of holding an Annual General Meeting (other than the first Annual General Meeting) by a period not exceeding 3 months.

The notice, by which an Annual General Meeting is called, must specify it as such. Every Annual General meeting shall be called during business hours, on a day which is not a public holiday, at the Registered Office of the company or at some other place within the town or village where the Registered Office is situated. The Central Govt. may exempt any class of companies from the provisions mentioned in this paragraph.

The time of holding of the Annual General Meeting may be fixed by the articles of the company. A public company or a private company which is a subsidiary of a public company, may, by a resolution passed in one general meeting, fix the time for its subsequent general meetings. Other private companies may do so by a resolution agreed to by all the members thereof.

(b) Section 167:

If default is made in holding an Annual General Meeting in accordance with Sec. 166, the Regional Director of the Company Law Board may, on the application of any member of the company, call or direct the calling of a general meeting. He may also give directions regarding the calling, holding and conducting the meeting. Such a meeting shall be deemed to be an Annual General Meeting of the company

(c) Section 168:

If the provisions of Sections 166 and 167 are not complied with, the company and every officer of the company be fined.

(d) Section 171:

A general meeting may be called by giving not less than 21 days' notice in writing. The Annual General Meeting may be called with a shorter notice if it is agreed to by all the members entitled to vote in the meeting. The Court has no power to direct the calling of the Annual General Meeting.

3. Extraordinary General Meeting:

Any general meeting of the company which is not an Annual General Meeting or a Statutory Meeting is called Extraordinary General Meeting. An Extraordinary General Meeting is held for dealing with some business of special or extraordinary nature and which is outside the scope of the Annual General Meeting.

This meeting is also held to transact some urgent business that cannot be deferred till the next Annual General Meeting. This meeting may be called by the Directors or requisitioned by the member's according to Sec.169 of the Companies Act, 1956. The Board of Directors can be compelled to hold

4. Meeting of the Board of Directors:

The management of the company is vested on the Board of Directors. Therefore, the Directors are to meet frequently to decide both policy and routine matters.

The provisions regarding Board Meeting are:

1. Board Meeting must be held once in every three calendar months and at least four times in every year. This provision may be exempted by the Central Govt.

2. Notice of Board Meeting shall be given in writing to every director for the time being in India and at his usual address in India.

3. The Quorum:

Quorum means the minimum number of members required to hold a meeting. According to the Act, quorum is constituted by 5 members personally present in the case of a public company and 2 members personally present in the case of other companies.

The articles may prescribe a larger number. If there is no quorum within half an hour of the notified time for starting the meeting, it is dissolved. No quorum is necessary in any adjourned meeting.

The quorum of members must be present not only at the beginning but it also be maintained throughout the meeting. Otherwise the business transacted at the meeting will be invalid. If a quorum is not present at the starting time, the Chairman may allow some extra time (e.g. half an hour) to enable the meeting to form the quorum.

If even the quorum is not present, the meeting shall stand adjourned and will be held again at a place, time and date as may be determined by the Chairman.

4. The Agenda:

Agenda means "things to be done" at the meeting. It is the list of businesses to be transacted at the meeting. The Secretary prepares the agenda in consultation with the Chairman. The notice of every meeting must specify the business to be transacted in the meeting.

The Act states that the notice must annex an "Explanatory Statement" at which some special business is to be transacted. The statement must contain all the material facts relating to each item of the business, indicating the nature and extent of the interest of every director and manager of the company. The statement must mention the time and place where all documents relating to special business can be inspected.

5. Chairman:

Unless otherwise laid down in the articles, the members personally present at the meeting shall elect a Chairman from amongst themselves by show of hands. But if a poll is demanded, it must be taken forthwith with a Chairman elected for the purpose. Every director has one vote but the Chairman has an extra vote known as casting vote, i.e., either for or against the resolution.

6. Proxy:

Any member, entitled to attend and vote in a meeting, can appoint another person to attend and vote on his behalf. The person appointed is called the Proxy. The appointment of a Proxy must be made by a written instruction signed by the appointer and deposited with the company, not more than 48 hours before the meeting.

A Proxy is not entitled to speak in the meeting and vote only in a poll unless the articles provide otherwise. A Proxy need not be a member of the company. A member of a private company cannot appoint more than one Proxy to attend on the same occasion, unless the articles otherwise provide.

A body corporate which is a member of a company can appoint a representative or proxy, by resolution of the Board. The President of India or the Governor of a State, if he is a member of a company, may appoint any person to act as his representative in a meeting.

7. Method of Voting:

Resolutions are to be voted upon, in the first instance, by show of hands. The Chairman's declaration of the results of voting by show of hands is conclusive.

A poll is to be taken:

(i) If the Chairman so directs;

(ii) In all cases, if it is demanded by members holding at least 1/10th of the voting power or paid-up capital;

(iii) In the case of public companies if it is demanded by at least 5 members present and entitled to vote; and

(iv) In the case of private companies if it is demanded by any one member if not more than 7 members are present and by 2 members if more than 7 members are present.

A poll on a resolution for adjournment or for the appointment of a Chairman is to be taken immediately. In other cases it is to be taken when the Chairman decides, but it must be within 48 hours of the demand for poll.

A poll is to be taken in the manner decided by the Chairman. The usual method is to ask each member to record his decision on ballot papers provided for the purpose. The Chairman shall appoint two scrutinizers to scrutinize the ballot papers.

Notice:

Notice is an instrument of giving intimation to all persons who are entitled to attend a meeting regarding the place, date, time and purpose of the meeting.

Requisites of a valid notice are:

(i) Notice must be issued in accordance with the provisions of the statute.

(ii) It should be in writing. Oral notice may also be sufficient.

(iii) Notice must state the nature of the meeting.

(iv) Notice must be given not only to members but also to all persons entitled to attend a meeting, for e.g., in case of Annual General Meeting, notice has to be served to the auditors of the company.

(v) Proper length of notice must be given. A General Meeting requires 21 days' notice in writing. A meeting may be called by a shorter notice if all members give their consent.

(vi) Notice must be adequate. It must clearly state the place, date and hour of the meeting. A complete agenda is appended as a part of the notice.

(vii) Notice must be signed and issued by the proper authority.

(viii) Notice is not the same as a circular. Notice is given to members but circulars are given to customers and public.

5. Class Meeting:

These meetings are held by a particular class of shareholders for the purpose of effecting variation in the Articles in respect of their rights and privileges or for conversion of one class into another.

The provision for variation must be contained in the Memorandum or Articles and this variation must not be prohibited by the terms of issue of shares of that particular class. Such resolutions are to be passed by three-fourth majority of the members of that class.

6. Meeting of Creditors:

These meetings are called when the company proposes to make a scheme of arrangement with its creditors. The Court may order a meeting of the creditors or a class of creditors on the application of the company or of liquidator in case of a company being wound-up.

Such a meeting is held and conducted in such a manner as the Court directs. If arrangement is passed by a majority of three-fourth in value of creditors and the same is sanctioned by the Court, it is binding on all the creditors.

7. Meeting of Debenture Holders:

These meeting are called according to the rules and regulations of the Trust Deed or Debenture Bond. Such meetings are held from time to time where the interests of debenture holders are involved at the time of re-organisation, reconstruction, amalgamation or winding-up of the company. The rules regarding the appointment of Chairman, notice of the meeting, quorum etc. are contained in the Trust Deed.

8. Meeting of Creditors and Contributories:

These meetings are held when the company has gone into liquidation to ascertain the total amount due by the company to its creditors. The main purpose of these meetings is to obtain the approval of the creditors and contributories to the scheme of compromise or rearrangement to save the company from financial difficulties. Sometimes, the Court may also order for such a meeting to be held.

When a company desires to vary the rights of debenture-holders, such meetings are to be held according to the rules laid down in the Debenture Trust Deed. They are also held to enable the company to issue new debentures or to vary the rate of interest payable to debenture-holders. The term "contributory" covers every person who is liable to contribute to the assets of the company when the company is being wound-up.

General meeting resolutions

Many body corporate decisions have to be made at a general meeting. A decision is made at a general meeting if a motion is included on the agenda, and owners vote to pass the motion. This is called a resolution.

There are different types of resolutions for general meetings. When a motion is included on a general meeting agenda, the voting paper must say what type of resolution is needed to pass the motion.

The Body Corporate and Community Management Act 1997 (PDF) says how to count the votes for each type of resolution to work out whether the motion passes or fails.

In some cases the legislation will say what type of resolution is needed to pass a motion on a certain issue.

If no resolution type is given the issue can be decided by an ordinary resolution. The committee may also be able to decide the issue.

Ordinary resolution

Ordinary resolutions are the most common type of general meeting resolution.

A motion is passed by ordinary resolution if the votes counted for the motion ("yes" votes) are more than the votes counted against the motion ("no" votes). If a voter abstains from voting, that is not included in the count of votes.

Examples of motions which need an ordinary resolution include:

- adopting administrative and sinking fund budgets
- setting annual body corporate contributions.

Each lot has 1 vote on a motion that can be decided by ordinary resolution. However, a person entitled to vote can ask for a poll vote.

Special resolution

The motion is passed by special resolution only if:

1. at least two-thirds of the votes cast are in favour of the motion
2. the number of votes against the motion is not more than 25% of the total number of lots
3. the total contribution schedule lot entitlements of the votes against the motion is not more than 25% of the total contribution schedule lot entitlements for all lots in the scheme.

All 3 conditions must be met for the motion to pass by special resolution. If 1 of the conditions is not met the motion will fail.

The types of motions which need a special resolution include:

- consent to record a new community management statement to change the body corporate by-laws (not including exclusive use by-laws)
- an improvement to common property by the body corporate costing more than $2000 per lot
- a motion to engage a body corporate manager to act in place of the committee.

If a voter abstains from voting, that is not included in the count of votes.

Resolution without dissent

A motion is passed by resolution without dissent only if there are no votes against the motion (i.e. there are no, "no" votes).

If a voter abstains from voting, that is not included in the count of votes.

Examples of motions which need a resolution without dissent are:

- a proposal to sell or dispose of part of common property
- to consent to record a new community management statement to amend or add an exclusive use by-law.

Majority resolution

Majority resolutions are uncommon.

A motion is passed by majority resolution if the votes counted for the motion ("yes" votes) are more than 50% of the lots whose owners are entitled to vote on the motion. Votes must be in writing. Proxies are not allowed.

If a voter abstains from voting, that is not included in the count of votes.

An example of a motion which needs a majority resolution is a motion to transfer a letting agent's management rights.

Duties of resolution officer

1. Maintaining a complaints case-load, including time spent taking calls through the PHIO Complaints Hotline number.

2. Providing coaching and mentoring to the Dispute Resolution Officers and assist the Manager, Dispute Resolutions in improving and measuring performance.

3. Deputising in the absence of the Manager, Dispute Resolution.

4. Providing expert advice in case meetings to assist effective complaint resolution.

5. Investigating more complex complaints.

6. Identifying trends in inquiries and complaints received and making suggestions for remedial action where appropriate.

7. Providing comment on procedures within the Ombudsman's office to maintain work quality and introduce new procedures in line with the PHIO requirements.

8. Undertaking projects and duties relating to the functions of the Ombudsman as required.

V – UNIT
WINDINGUP OF A COMPANY

Winding up of a company – Modes of winding up – winding up by the court – Voluntary winding up – Members' voluntary winding up – Creditors' voluntary winding up.

Meaning

Prof. L.C.B. Gower, Winding-up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. A liquidator is appointed and he takes control of the company, collects its debts and finally distributes any surplus among the members in accordance with their rights. The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law.

Introduction

Winding-up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

Winding-up is the process by which management of a company's affairs is taken out of its directors' hands, its assets are realized by a liquidator and its debts are realized and liabilities are discharged out of proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. At the end of the winding up the company will have no assets or liabilities and it will, therefore, be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation to be brought to an end.

The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law. However, the purpose must not be exploited for the benefit or advantage of any class or person entitled to submit petition for winding up of a company. It may be noted that on winding up, the company does not cease to exist as such except when it is dissolved. The administrative machinery of the company gets changed as the administration is transferred in the hands of the liquidator. Even after commencement of the winding-up, the property and assets of the company belong to the company until dissolution takes place. On dissolution the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

MODES OF WINDING UP

A company registered under the Companies Act, 1956 may be wound up by any of the following modes:

1. By the Court i.e. compulsory winding up;
2. Voluntary winding up, which may be either:
    (a) Members' voluntary winding up; or
    (b) Creditor's voluntary winding up;

3. Winding up subject to the supervision of the Court. (omitted and the same is yet to be notified)

Section 425 of the Companies Act, 1956 lays down the above three modes of winding up and provides that the provisions of the Act with respect to winding up shall apply, unless the contrary appears, to the winding up of a company in any of these three modes.

In every winding up, a liquidator or liquidators is or are appointed to administer the property of the company and he or they must apply the assets of the company, first, in the payment of the creditors in their proper order, and then, in distributing the residue among the members according to their rights.

WINDING UP BY THE COURT

Winding up by the Court or compulsory winding up is initiated by an application by way of petition to the appropriate Court for a winding up order. A winding up petition has to be resorted to only when other means of healing an ailing company are of absolutely no avail.

Grounds on which a Company may be wound up by the Court

A company under Section 433 may be wound up by the Court if

(a) the company has passed a special resolution of its being wound up by the Court; or

(b) default is made in delivering the statutory report to the Registrar or in holding the statutory meeting; or

(c) it does not commence business within a year from its incorporation or suspends business for a whole year; or

(d) the number of its members in the case of a public company is reduced below seven and in the case of a private company, below two; or

(e) it is unable to pay its debts; or (f) the Court is of the opinion that it is just and equitable that it should be wound up.

(g) the company has made a default in filing with the registrar its balance sheet and profit and loss account or annual returns for any five consecutive financial years.

(h) the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or

(i) the court is of the opinion that the company should be wound up under the circumstances specified in Section 424G. Provided that the tribunal shall make order for winding up of a company under clause (h) on application made by the Central Government or a State Government. The winding up petition is not a legitimate means of seeking to enforce payment of debt, which is bonafide disputed by the company.

Who may file Petition for the Winding up?

An application for the winding up of a company has to be made by way of petition to the Court. A petition may be presented under Section 439 by any of the following persons:

(a) the company; or

(b) any creditor or creditors, including any contingent or prospective creditor or creditors; or

(c) any contributory or contributories; or

(d) all or any of the parties specified above in clauses (a), (b), (c) whether together or separately; or

(e) the Registrar; or

(f) any person authorised by the Central Government in the case falling under Section 243, i.e., following upon a report of inspectors. *

(g) by the Central government or state Govt., in a case falling under clause (h) of Section 433.

Jurisdiction of Court for entertaining Winding up Petition

In terms of the provisions of Section 10 of the Companies Act, 1956, the jurisdiction for entertaining winding up petition vests either in the High Court having jurisdiction in relation to the place where the registered office of the company is situated or the District Court of the area subordinate to the High Court, in which the jurisdiction has been vested either by the Act or by the Central Government by notification in the Official Gazette.

VOLUNTARY WINDING UP

The companies are usually wound up voluntarily as it is an easier process of winding up. It is altogether different from a compulsory winding up. In voluntary winding up the company and its creditors are left to settle their affairs without going to a Court, although they may apply to the Court for directions or orders, as and when necessary. One or more liquidators are to be appointed by the company in general meeting for the purpose of winding up the affairs and

distributing the assets of the company. The remuneration of the liquidators is also required to be fixed by the company in general meeting. Unless the remuneration as aforesaid is fixed the liquidators shall not take charge of his/their offices (Section 490). The circumstances in which a company may be wound up voluntarily are:

(a) when the period fixed for the duration of the company as mentioned in its articles has expired; or the event, on the happening of which the articles provide that the company is to be dissolved has occurred; and the company passes a resolution in general meeting requiring the company to be wound up voluntarily;

(b) if the company passes a special resolution that the company be wound up voluntarily [Section 484(1)].

Thus, a company may be wound up voluntarily on the expiry of the term fixed for duration of the company or on the occurance of the event as provided in its articles. In these two cases only an ordinary resolution may be passed in the general meeting of the company. Apart from these two cases, a company may be voluntarily wound up for any other reason for which a company has to pass a special resolution. A proper notice required for the respective meetings must be given to all the members and in the latter case the text of the special resolution to be passed together with the reason to wind up voluntarily must be explained therein.

The resolution (whether ordinary or special), when passed, must be advertised within 14 days of the passing of the resolution in the Official Gazette and also in some newspaper circulating in the district where the registered office of the company is situated. A default in complying with the above requirements renders the company and every officer of the company, who is in default, liable to a penalty which may extend to five hundred rupees for every day during which the default continues. A liquidator of the company is deemed to an officer of the company for the purposes of the above requirements (Section 485).

A voluntary winding up commences from the date of the passing of the resolution for voluntary winding up. This is so even when after passing a resolution for voluntary winding up, a petition is presented for winding up by the Court. The effect of the voluntary winding up is that the company ceases to carry on its business except so far as may be required for the beneficial winding up thereof. The corporate status and the powers of the company, however, continue until it is dissolved [Section 487].

Kinds of Voluntary Winding Up

Section 488(5) divides voluntary winding up into two kinds:

(i) Members' voluntary winding up; and

(ii) Creditors' voluntary winding up.

Members' Voluntary Winding Up

When the company is solvent and is able to pay its liabilities in full, it need not consult the creditors or call their meeting. Its directors, or where they are more than two, the majority of its directors may, at a meeting of the Board, make a declaration of solvency verified by an affidavit stating that they have made full enquiry into the affairs of the company and that having done so they have formed an opinion that the company has no debts or that it will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding up as may be specified in the declaration.

Creditors' Voluntary Winding Up

As discussed earlier, where a declaration of solvency of the company is not made and delivered to the Registrar in a voluntary winding up it is a case of creditor's voluntary winding up.

Distinction between Members' and Creditors' Voluntary Winding Up

The main differences between the two are as follows:

1. A member's voluntary winding up results where, before convening the general meeting of the company at which the resolution of winding up is to be passed, the majority of the directors file with the Registrar a statutory declaration of solvency. A creditors' voluntary winding up is one where no such declaration is filed.
2. In a member's voluntary winding up, the creditors do not participate directly in the control of the liquidation, as the company is deemed to be solvent; but in a creditors' voluntary winding up, the company is deemed to be insolvent and, therefore, the control of liquidation remains in the hands of the creditors.
3. There is no meeting of creditors in a members' voluntary winding up and the liquidator is appointed by the company; whereas in a creditors' voluntary winding up, meetings of creditors have to be called at the beginning and subsequently the liquidator is appointed by the creditors.
4. In a members' voluntary winding up the liquidator can exercise some of his powers with the sanction of a special resolution of the company; but in a creditors' voluntary winding up he can do so with the sanction of the Court or the Committee of Inspection or of a meeting of creditors.

Powers of the Court to Intervene in Voluntary Winding Up

In voluntary winding up it is left to the company, the contributories and the creditors to settle their affairs without intervention of the Court as far as possible. However, the Companies Act, 1956, contains certain provisions which provide a means of access to the Court with a view

to speed up the liquidation proceedings and to overcome the difficulties that may arise in the course of liquidation. The Court will intervene in the voluntary winding up whenever it is satisfied that such an intervention will be just and beneficial. In appropriate cases the Court can be approached for compulsory winding up (Section 440) or winding up being conducted under the supervision of the Court (Section 522).

The Court is vested with the following powers in voluntary winding up:

(i) To appoint the Official Liquidator or any other person as liquidator where no liquidator is acting [Section 515(1)].

(ii) To remove the liquidator and appoint the Official Liquidator or any other person as liquidator on justifiable cause being shown [Section 515(2)].

(iii) To determine the remunerations of liquidator when the Official Liquidator is appointed as a liquidator [Section 515(3)].

(iv) To amend, vary, confirm or set aside the arrangement entered into between a company and its creditors on an appeal being made by any creditor or contributory within 3 weeks of the completion of the arrangement (Section 517).

(v) On an application of the Liquidator or contributory or creditor: (a) to determine any question arising in the winding up of a company [Section 518(1)(a)]; (b) to exercise, as respects the enforcing of calls, the staying of suits or other legal proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court [Section 518(1)(b)].

(vi) To set aside any attachment, distress or execution started against the estate or effects of the company after the commencement of the winding up on such terms as it thinks fit on an application made by the liquidator, creditor or contributory if the Court is satisfied that it is just and beneficial to do so [Section 518(3) and (4)].

(vii) To order public examination of any person connected with promotion or formation of a company or any officer connected with the affairs of the company in regard to matters of promotion or formation or conduct of the business of the company or as to his conduct or dealing as officer thereof. Such an examination can be ordered on a report of the liquidator where he is of the opinion that a fraud has been committed by the persons aforesaid in the formation or promotion of the company or in the conduct of its affairs [Section 519(1)].

COMMENCEMENT OF WINDING UP

Section 441 of the Companies Act provides for the provisions relevant to commencement of winding up. The winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. But where, before the presentation of the petition a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution. Any proceedings taken in voluntary winding up will be deemed to have been validly taken unless the Court directs otherwise on proof of fraud or mistake.

In all other cases, the winding up of a company must be deemed to have commenced at the time of the presentation of the petition for the winding up [Section 441]. Where an order is made by the Court on more than one petition the commencement of the winding up dates from the earliest petition. [See Kent v. Freehold Land Co., (1868) 3 Ch. App. 493]. It may be noted here that voluntary winding up shall be deemed to commence at the time when resolution for voluntary winding up is passed (Section 486).

MODES OF WINDING UP UNDER COMPANIES

ACT 2013 Under Companies Act 2013, the Company may be wound up in any of the following modes:

1. By National Company Law Tribunal (Tribunal);
2. Voluntary winding up:

Inability to pay debts (Section 271(2)

A company shall be deemed to be unable to pay its debts,—

(a) if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

(b) if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the company.

Special Resolution

Where the Company has, by Special Resolution, resolved that the company may be wound up by the Tribunal, it may present an application for winding up to the tribunal.

Just and Equitable

If the Tribunal is of opinion that it is just and equitable that the company should be wound up, it may be ordered to be wound up.

Petition by the Company

The company may make a petition through its directors with the authority of a special resolution passed at a general meeting.

A petition by the Company for winding up before the tribunal will be admitted only it is accompanied by the statement of affairs, prescribed in form 4 and shall state the facts upto the date which shall not be a date more than fifteen days prior to the date of making the statement. This statement shall be certified by a 716 EP-CL chartered accountant. (Section 272(5) read with Rule 5 made under Chapter XX of the Companies Act 2013)

Every contributory or creditor of the company shall be entitled to be furnished, by the petitioner or his authorized representative, with a copy of a petition. The contributory may seek an electronic copy from the registry of tribunal on payment of prescribed fee. (Rule 5(4) of the rules made under Chapter XX of the Companies Act 2013.

Petition by Creditor

A creditor or creditors (including any contingent or prospective creditor) may make petition before the tribunal would make a winding up order on such petition if the creditor proves that the claims are undisputed debt.

Petition by Contributory Who is a Contributory? S

ection 2(26) defines "contributory" means a person liable to contribute towards the assets of the company in the event of its being wound up. For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory;

Section 273(2) states that a contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution

among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

Petition by Registrar

The Registrar shall be entitled to present a petition for winding up under sub- section (1) on any of the grounds specified in sub-section (1) of section 271, except on the grounds specified in clause (b), clause (d) or clause (g) of that sub-section. Accordingly the registrar can present a petition on the following grounds.

1. if the company is unable to pay its debts;
2. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
3. if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
4. if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.