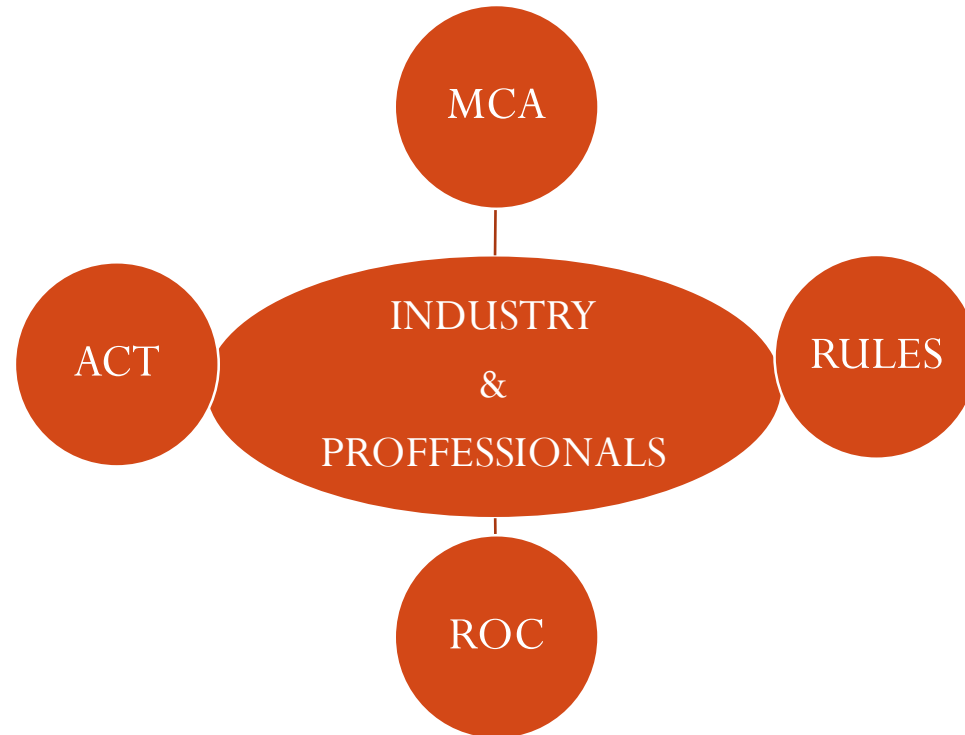

***Critical Aspects of Chapter I and II of Companies Act, 2013
(Section 1 to Section 22)
read with Companies (Specification of Definitions Details) Rules, 2014 and
Companies (Incorporation) Rules, 2014***

By Nilesh A. Pradhan & Co., LLP

Interpretation



Let's study some of the critical and practical aspects....

Chapter 1 covers Section 1 and 2

Section 1 contains Basic of the Act

Section 2 contains 95 Definitions

Associate Company [Section 2(6)]

- *“Associate Company”, in relation to another company, means a company in which that other company has a **significant influence**, but which is not a subsidiary company of the company having such influence and includes a joint venture company.*

Explanation.—For the purpose of this clause,—

*(a) the expression "**significant influence**" means **control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement.***

*(b) the expression "**joint venture**" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.*

Cont....

- *Whether consolidation is mandatory for associate Company???*
Yes, its mandatory

Control [Section 2(27)]

“*Control*” shall include the *right to appoint majority of the directors or to control the management or policy decisions* exercisable by *a person or persons* acting *individually or in concert*, directly or indirectly, including by *virtue* of their *shareholding or management rights or shareholders agreements or voting agreements* or in any other manner.

Cont....

How to decide control of or participation in business decisions ?

Whether through agreements ???

As the agreements are confidential how one can have access to the same???

Should the same be noted through Board Resolutions ???

Preference shares....

Whether to be taken into consideration ???

Drafting of JV Agreements....

What care should be taken ???

Do we have access to the information?? How we can access???????????????

Terms about open access to documents including agreements???

DEPOSIT 2(31)

- “Deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

Cont....

Filing of DPT-3 ????

What amount shall be considered as Deposits???

Additional yearly compliance????

Financial Year [Section 2(41)]

*In relation to any Company or Body Corporate, means the period ending on 31st day of **March** every year, and where it has been **incorporated on after 1st January**, of a year, the period ending on the 31st day of **March** of the following year, in respect whereof **financial statement of the** company or body corporate is made up.*

- ***Provided that** where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the **Central Government** may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.*

Cont...

- *Provided also that any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Ordinance, 2019, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.*
- *Provided also that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause;*

Cont....

- *Maximum two resubmission ????*
- *Time taken for receipt of documents from parent company?*

Holding Company [Section 2(46)]

- *“**Holding company**” , in relation to one or more other companies, means a company of which such companies are subsidiary companies;*

Explanation.—For the purposes of this clause, the expression "company" includes any body corporate.

Whether this cover LLP, companies incorporated outside India.?

Key Managerial Personnel [Section 2(51)]

“Key Managerial Personnel”, in relation to a company, means—

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer;

(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and

(vi) such other officer as may be prescribed.

Cont....

How to define one level below directors?

Board Resolution???

Whether HR Policies come into picture?

Organization Chart ???

Access to the HR polices ???

Scapegoat policies?

Man Friday !!

Whether KMP can be considered as officer in default ?

Yes , KMP is included in the officer of default as per Section 2(60) of the Act.

Subsidiary Company [Section 2(87)]

*“Subsidiary company” or “Subsidiary” in relation to any other company (that is to say the holding company), means a company in which the **holding company-***

- i.** controls the composition of the **Board of Directors**; or*
- ii.** exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.*

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Cont....

□ *Explanation.*—For the purposes of this clause,—

- (a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;*
- (b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;*
- (c) the expression "company" includes any body corporate;*
- (d) "layer" in relation to a holding company means its subsidiary or subsidiaries.*

Cont..

How to determine deemed control on the Board by another Company ???

Board resolution ????

Auditor's Certificate ???

Internal Agreements ??

Cont...

□ Restriction on number of layers for certain classes of holding companies

The Companies (Restriction on Number of Layers) Rules, 2017

- *No Company other than a company belonging to such class shall have more than two layers of subsidiaries.*
- *Provided that in computing the number of layers one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.*

Chapter II
Incorporation of Company and matters
incidental thereto
(Section 3 to 22)

Members Liability [Section 3A]

Insertion of new Section 3A

Members severally liable in certain cases

- *In case the number of members is reduced below the statutory limit*

For Private Company: - 2 & Public Company: - 7

And

- *the Company carries on business for more than 6 months, every person who is member after those 6 months and has knowledge of the fact shall be severally liable for payment of whole debts contracted during that time and may also be severally sued.*
- *Why this provision ???*
- *Simplicity ...*

Commencement of business [Section 10A]

Companies incorporated after the commencement of the Companies (Amendment) Ordinance, 2019 (14th January, 2019) & having share capital shall not commence business or exercise any borrowing powers unless:-

- *Declaration is filed in **Form INC-20A** by a director **within 180 days of the date of incorporation** specifying that every subscriber to memorandum has paid value of the shares as on the date of filing declaration.*
- *Verification of its Registered Office has been filed with RoC.*

Non-Compliance of Section 10A

- *Company liable to pay penalty of **Rs.50,000/-***
- *Every Officer-in Default liable to pay penalty of **Rs.1,000/-** for each day during which the default continues but **not exceeding Rs.1,00,000/-***

Additional ground for striking off name of the Company from Register of Companies (Section 248)

- *If the Company fails to file Form INC-20A within the **required time limit** or the Company is not carrying on any business or operation as per physical verification of the registered office under section 12(9) RoC may initiate action for removal of name of the Company.*

Drawbacks

- *How to open bank account when the promoters are foreigners ?*
- *How to meet minimum balance requirement at the time of opening of bank account ?*
- *Inability to start business operations immediately on incorporation?*
- *Restriction on filing of certain forms (for e.g. ADT-1 for appointment of first Auditor within 15 days of date of appointment)*



Registered Office: [Section 12]

- *Every Company shall have Registered Office ***within 30 days** of its incorporation and at all times thereafter to receive communications and notices.*
- *In case Registered Address is not mentioned in the incorporation form INC-22 is to be filed ***within 30 days** of incorporation.*
- *Notice of every change of the situation of the Registered Office shall be given in Form INC-22 ***within 30 days** of the change.*

*(*as amended by the Companies (Amendment) Act, 2017 w.e.f. 27th July, 2018)*

Verification of Registered Office (Form INC-22)

Rule 25 of the Companies (Incorporation) Rules, 2014

Attachments to Form INC-22

- *Proof of Registered Office address (Conveyance/ Lease Deed/ Rent Agreement)*
- *Copies of utility bill (Telephone, gas, electricity showing address of the premises not older than two months)*
- *Altered Memorandum of Association (mandatory in case registered office is being shifted from one state to another within jurisdiction of same RoC or from one state to another outside jurisdiction of same RoC)*

Cont...

- *NOC from the owner of the premises [mandatory if registered office is owned by any other entity/person (not taken on lease by the company)]*
- *Certified copy of order of competent authority. (mandatory in case registered office is being shifted from one RoC to another within the same state or from one state to another within jurisdiction of same RoC or from one state to another outside jurisdiction of same RoC)*

Active Company Tagging Identities and verification (ACTIVE) Rule 25A of the Companies (Incorporation) Rules,2014



- *Inserted by the Companies (Incorporation) Amendment Rules, 2019 dated 21st February, 2019*
- *Every Company incorporated on or before 31st December, 2017 to file particulars of Company and its registered office in **Form INC-22A** on or before 25th April, 2019. The date extended to 15th June, 2019.*

Form INC-22A



➤ *Attachments to Form INC-22A*

- *Photographs of **Registered Office** showing external building and inside office also showing therein at least one Director / KMP whose DSC is affixed to the Form (also showing therein name of the Company, registered office address, CIN affixed or painted on the outside of the office)*
- *To be Digitally signed by one Director and one KMP or two Directors in case of other than OPC.*

➤ *In case of OPC it can be signed by One Director.*

Cont...

- *Circumstances under which Companies cannot file Form INC-22A*
 - *Non-filing of Financial Statements or Annual Return for F.Y. 2017-18*
 - *Non-filing of DIR-3KYC or any Director is Disqualified under Section 164(2)*
- *Companies that have been struck off or are under the process of striking off or liquidation or amalgamated or dissolved exempted from filing e-Form ACTIVE.*
- *Companies to be marked as “**ACTIVE-non-compliant**”*
- *Physical Verification of the registered office of the Company under Section 12(9) by Registrar of Companies.*

Non-Compliance in Filing Form INC-22A

- *Non-acceptance of event based forms or changes*
 - *SH-07 (Change in Authorized Capital);*
 - *PAS-03 (Change in Paid-up Capital);*
 - *DIR- 12 (Changes in Director except cessation);*
 - *INC-22 (Change in Registered Office);*
 - *INC-28 (Amalgamation, de-merger).*
- *Filing fees after 15th June, 2019 Rs. 10,000/-*

Cont...

- *Recent concept of hiring cubical in office spaces where non fixed table place is taken on rent*
- *Name plate ????*
- *Whether it can be termed as Registered Office???*
- *How to comply with INC-22A.*
-



Cont...

- *Company has filed GNL-2 data of auditor is not pre-filled ???*
- *Company do not have Company Secretary / CFO???*
- *One of the Director of the Company is disqualified ???*
- *KYC not done ???*



Incorporation of a Company [Section 7 read with Rules]

➤ *Reservation of name*

❖ *Chance of re-submission*

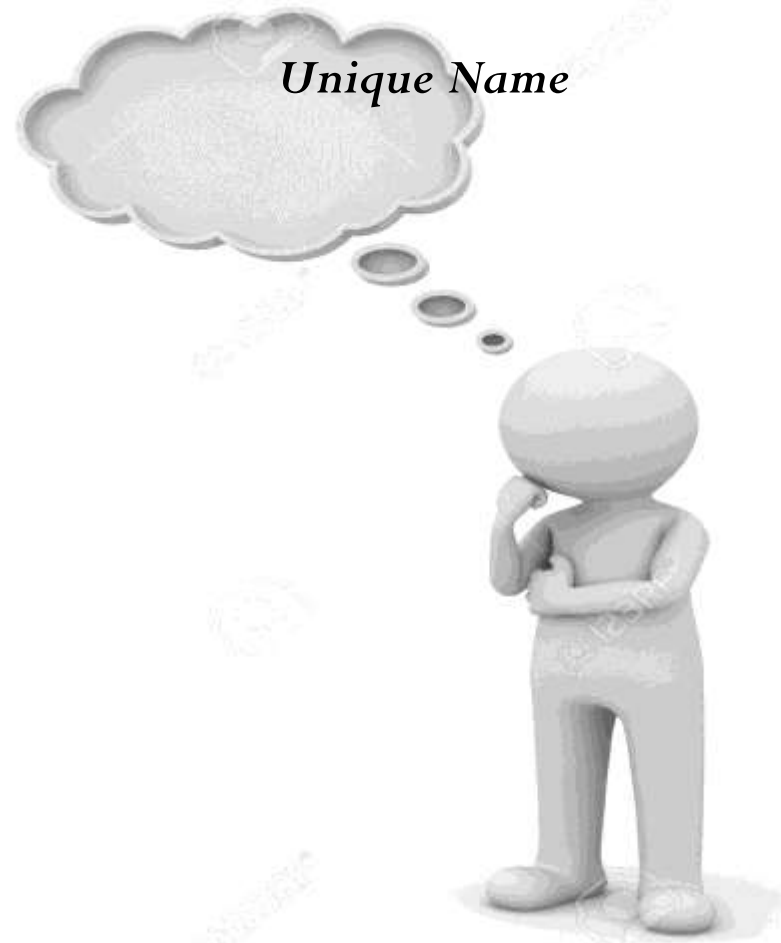
❖ *Application upto 2 proposed names*



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Cont...

- *Linking with trademark ???*



Cont...

- *An application for reservation of name shall be made through **Form RUN**(Reserve Unique Name) along with application fees of Rs.1,000/-, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre after allowing **re-submission** of such application **within fifteen days** for rectification of the defects, if any.*

[as amended by the Companies (Incorporation) Second Amendment Rules, 2018 w.e.f. 23.03.2018]

Cont...



- *The name approved through RUN is available for 20 days and incorporation forms to be submitted before that.*
- *Whether the period of 20 days is sufficient to submit incorporation documents ???*

Cont...

- ***Points to be taken care while making RUN application***

- ✓ *Selection of unique name for Company.*

- ✓ *The proposed name selected does not contain any word which is prohibited under Section 4(2) & (3) of the Companies Act, 2013 read with Rule 8 of the Companies (Incorporation) Rules, 2014.*

(Such as using word, British India Limited, Japan Limited , If P.Q. Industries limited is existing then P and Q Industries or Pee Que Industries or P n Q Industries or P & Q Industries shall not be allowed)

- ✓ *Proper search related to trademark shall be taken in order to avoid rejection based on trademark.*

Cont...

- ✓ *Main object of the Company can be explained in the comments.*
- ✓ *If the proposed name contains the first word of the name of existing group company then the NOC in form of resolution is required to be attached.*
- ✓ *Similarly in case of subsidiary company resolution from parent company needs to be attached.*

Cont...

- ✓ *If the holding company is foreign company then the above mentioned resolution is required to be notarized & appostile at home country.*
- ✓ *If the trademark similar to the name of Company is available the NOC from trademark owner is required to be attached along with the trademark certificate.*
- ✓ *Avoid using the word architecture in the main object or otherwise in the construction & related business as it requires specific approval.*
- ✓ *If the proposed company is required to have specific sectoral regulator approval then such approvals or necessary declarations shall be submitted .*

Cont...

- *The same user login ID is required to be used for RUN application & submission of incorporation forms.*
- *Affidavit is replaced by Declaration.*
- *The fees of SPICe (INC-32) is not applicable if authorized capital is less than or equal to fifteen lakhs.*

Drafting of Documents

- Documents required to be drafted with respect to the incorporation of Company . [SPICe INC-32]
 1. Memorandum of Association [eMOA (INC-33)]
 2. Articles of Association [eAOA (INC-34)]
 3. Declaration from the first subscriber and Directors as required under Section 7(1) (c) of the Companies Act, 2013.
 4. DIR-2 towards consent to act as Director .
 5. Resolution of the promoter company.
 6. NOC for using the address as the registered office.
 7. Disclosure of interest of first directors in other entities.

Cont...

➤ Drafting and signing of Memorandum and Articles

Type of Company	Applicable Table of Companies Act, 2013 (MOA)	Applicable Table of Companies Act, 2013 (AOA)
Company Limited by shares	Table A	Table F
Company Limited By Guarantee And Not Having A Share Capital	Table B	Table H
Company Limited By Guarantee And Having A Share Capital	Table C	Table G
Unlimited Company And Not Having Share Capital	Table D	Table J
Unlimited Company And Having Share Capital	Table E	Table I

Cont...

Where the subscriber to the memorandum is a body corporate

The memorandum and articles of association shall be signed by director, officer or employee of the body corporate duly authorized in this behalf by a resolution of the board of directors of the body corporate.

Where the subscriber to the memorandum is a Limited Liability Partnership

The memorandum and articles of association shall be signed by a partner of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership.

➤ ***Provided** the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association*

Cont....

➤ Where subscriber to the memorandum is a *foreign national residing outside India-*

▪ In a country in any part of the Commonwealth	His signatures and address on MOA and AOA and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth
▪ In a country which is a party to the Hague Apostille Convention, 1961	His signatures and address on MOA and AOA and proof of identity shall be notarized before the Notary (Public) of the country of his origin and be duly apostillised in accordance with the said Hague Convention

Cont...

▪ <i>In a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961</i>	<i>His signatures and address on MOA and AOA and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf.</i>
▪ <i>visited in India and intended to incorporate a company</i>	<i>incorporation shall be allowed if, he/she is having a valid Business Visa</i>

- *In case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.*
- ***Declaration** from each of the subscribers to the memorandum and first directors named in the Articles in Form INC-9.*

[as amended by the Companies (Incorporation) Third Amendment Rules, 2018 w.e.f. 27.07.2018]

Cont....

➤ **Particulars of every subscriber**

- *Name and recent photograph affixed and scan with MOA and AOA*
- *Father's/ Mother's/ name*
- *Nationality and Income-tax permanent account number (for Indian Nationals)*
- *Date of Birth and Place of Birth (District and State)*
- *Educational qualification and Occupation*
- *Permanent residential address and also Present address (Time of stay at present address and address of previous residence address (es) if stay of present address is less than one year)*
- *Email ID, Phone No. of Subscriber*
- *Proof of Identity*

For Indian Nationals	For Foreign Nationals and Non Resident Indians
PAN card and any one of – Voter's Identity Card, Passport copy, Driving License copy	Passport

- *In case the subscriber is already holding a valid DIN, and the particulars provided therein have been updated as on the date of application, and the declaration to this effect is given in the application, the proof of identity and residence need not be attached.*

Cont....

- Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill (not more than 2 months old)
- Proof of nationality in case the subscriber is a foreign national
- In case subscriber is already a director or promoter of a company(s)
 - Name, CIN of the Company and whether interested as a director or promoter.
- In case subscriber is a body corporate
 - Name, CIN, registered office address or principal place of business, E-mail Id of the body corporate.

If the body corporate is a company

Certified true copy of the board resolution specifying the authorization to subscribe, number of shares proposed to be subscribed and the name, address and designation of the person authorized to subscribe

- In case of a body corporate the particulars of the person subscribing for body corporate are to be provided.
- In case of foreign body corporate – copy of certificate of incorporation and registered office address.

If the body corporate is a limited liability partnership

Certified true copy of the resolution agreed to by all the partners specifying authorization to subscribe, number of shares proposed to be subscribed and the name of the partner authorized to subscribe

Change of name of existing Company

- *Application in Form RUN for reservation of name.*
- *The name approved through RUN is available for 60 days from the date of approval.*
- *Attachments to Form INC-24*
 - *Minutes of the members' meeting*
 - *CTC of special resolution*
 - *Altered MOA*
 - *Altered AOA*
 - *Affidavit pursuant to Rule 29 of the Companies (Incorporation) Rules, 2014.*

Authentication of Documents, Proceedings and Contracts [Section 21]

- *a document or proceeding requiring authentication by a Company;*
- *contracts made by or on behalf of a company.*
- *may be signed by any key managerial personnel or **an officer or employee of the company** duly authorised by the Board in this behalf.*

[as amended by the Companies (Amendment) Act, 2017 w.e.f. 09.02.2019]

More convenience in day to day operations of the Company???

Some other important points

- *Application for conversion of public to private company (powers are delegated to regional director) to be made to central government and not Tribunal.*
- *Application for shifting of registered office from one State to another state is required to be filed with the Central Government (Powers delegated to Regional Director.).*
- *The requirement of giving notice of proposed shifting in newspaper having widest circulation is replaced with newspaper with wide circulation.*

Q and A Session



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*Thank you
for your attention!*

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