

**COMPANIES ACT, 2013**

**INCORPORATION  
OF  
COMPANIES AND  
MATTERS INCIDENTAL  
THERE TO**



**THE INSTITUTE OF  
Company Secretaries of India**  
**IN PURSUIT OF PROFESSIONAL EXCELLENCE**  
Statutory body under an Act of Parliament

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

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## **Introduction**

A company comes into existence is generally by a process referred to as incorporation. Once a company has been legally incorporated, it becomes a distinct entity from those who invest their capital and labour to run the company.

Usually the first step to form a company is the process known as 'promotion' where a person persuades others to contribute capital to a proposed company before it is incorporated . Such a person is called the promoter of the company. Promoters also can enter into a contract on behalf of a company before or after it has been granted a certificate of incorporation, and arrange share issues in the name of the company.

Section 3 to 22 of the Companies Act, 2013 (herein after called the Act) read with Companies (Incorporation) Rules, 2014 made under Chapter II of the Act (herein after called 'the Rules') cover the provisions with regard to incorporation of companies and matters incidental thereto.

## **PROMOTERS**

### *1. Definition of the word promoter*

Section 2 (69) of the Companies Act, 2013 defines the term 'promoter' as under:-

"Promoter" means a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that sub-clause (c) shall not apply to a person who is acting merely in a professional capacity.

By virtue of above definition, persons in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act are also treated as promoters. However, if a person is merely acting in a professional capacity i.e. giving only professional advice to the Board of directors, he shall not be treated as a promoter.

Further, according to SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, "promoter" includes:

- (i) the person or persons who are in control of the issuer;
- (ii) the person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public;
- (iii) the person or persons named in the offer document as promoters.

Is a director/officer/employee of the issuer a promoter?

A director/officer/employee who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise is considered as a promoter. As per 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.

However, a director or officer or employee of the issuer or a person, if acting as such merely in his professional capacity, shall not be deemed as a promoter.

But a person may be a promoter even if he has undertaken a lesser active role in the formation of a company. Any person who becomes a director, places shares or negotiates preliminary agreements, may be covered by this term. Who constitutes a promoter in a particular case, has to be seen in the light of a clear legislative definition provided under section 2(69) the Companies Act, 2013. A company may have several promoters. A promoter may be a natural person or a company.

It is clear from the foregoing that the word "promoter" is used in common parlance to denote any individual, corporate, syndicate, association or partnership which has taken all the necessary steps to create and mould a company and set it going. The promoter originates the scheme for the formation of a company; gets together the subscribers

to the memorandum, gets the Memorandum and Articles prepared, executed and registered, finds the bankers, brokers and legal advisers, finds the first directors, settles the terms of preliminary contracts with vendors and agreement with underwriters, and makes arrangement for preparation, advertisement and circulation of the prospectus and placement of the capital. But a person who merely acts in a professional capacity on behalf of the promoter, such as a solicitor who draws up an agreement or articles, an accountant or valuer who prepares figures or valuation on behalf of a promoter, and who is paid for the same, is not a promoter.

The Companies Act, 2013, contains some provisions regarding the duties of promoters. The fiduciary duties of a promoter are as under:

1. As per section 102, where as a result of the non-disclosure or insufficient disclosure in any explanatory statement annexed to the notice of a general meeting, by a promoter, director, manager, if any, or other key managerial personnel, any benefit accrues to such promoter, director, manager or other key managerial personnel or their relatives, either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

In the case of default in complying with above provisions, every promoter, director, manager or other key managerial personnel who is in default shall be punishable with fine which may extend to 50,000 rupees or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is more.

The above provision is based on the principle that a promoter cannot make either directly or indirectly, any profit at the expense of the company he promotes, without the knowledge and consent of the company and that if he does so, in disregard of this rule, the company can compel him to account for it. In relation to disclosure it may be noted that part disclosure will also attract the same consequences. A promoter is not forbidden to make profit but he is barred from making any secret profit. He may make a profit out of promotion with the consent of the company in the same way as an agent may retain a profit obtained through his agency with his principal's consent.

2. A promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed. If a promoter contracts to sell his own property to the company without making a full disclosure, the company may either repudiate the sale or affirm the contract and recover the profit made out of it by the promoter. Either way the dishonest promoter is deprived of his advantage.

### **FORMATION OF A COMPANY**

In terms of Section 3(1), a company may be formed for any lawful purpose by—

- a. seven or more persons, where the company to be formed is to be a public company;
- b. two or more persons, where the company to be formed is to be a private company; or
- c. one person, where the company to be formed is to be One Person Company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.

This is done by subscribing to their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.

(2) A company formed under sub-section (1) may be either—

- (a) a company limited by shares; or
- (b) a company limited by guarantee; or
- (c) an unlimited company.

### **One Person Company**

With the implementation of the Companies Act, 2013, a single person could constitute a Company, under the One Person Company (OPC) concept.

The introduction of OPC in the legal system is a move that would encourage corporatisation of micro businesses and entrepreneurship.

In India, in the year 2005, the JJ Irani Expert Committee recommended the formation of OPC. It had suggested that such an entity may be provided with a simpler legal regime through exemptions so that the small entrepreneur is not compelled to devote considerable time, energy and resources on complex legal compliance.

As per section 2(62) of the Companies Act, 2013, "One Person Company" means a company which has only one person as a member.

The memorandum of One Person Company is required to indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles. Such nomination shall be filed in Form No INC.2 along with consent of such nominee obtained in Form No INC.3 and fee as provided in the Companies (Registration offices and fees) Rules, 2014. The member of One Person Company may at any time change the name of such other person by giving notice, change the name of the person nominated by him at any time for any reason including in case of death or incapacity to contract of nominee and nominate another person after obtaining the prior consent of such another person in Form No INC.3.

Similarly, the other person may withdraw his consent by giving a notice in writing to such sole member and to the One Person Company.

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

The company shall within thirty days of receipt of the notice of withdrawal of consent under sub-rule (3) file with the Registrar, a notice of such withdrawal of consent and the intimation of the name of another person nominated by the sole member in Form No INC.4.

*Rule 3 of Companies (Incorporation) Rules, 2014 –*

One Person Company.-

- (1) Only a natural person who is an Indian citizen and resident in India-
  - (a) shall be eligible to incorporate a One Person Company;
  - (b) shall be a nominee for the sole member of a One Person Company.

*Explanation.-* For the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of

not less than one hundred and eighty two days during the immediately preceding one calendar year.

- (2) No person shall be eligible to incorporate more than a One Person Company or become nominee in more than one such company.
- (3) Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days.
- (4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.
- (5) Such Company cannot be incorporated or converted into a company under section 8 of the Act.
- (6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates.
- (7) No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of One Person Company, except threshold limit (paid up share capital) is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

## **PROCEDURAL ASPECTS WITH REGARD TO INCORPORATION**

### **1. Application for Availability of Name of company**

As per section 4(4) a person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

- (a) the name of the proposed company; or
- (b) the name to which the company proposes to change its name.

As per Rule 9 of Companies (incorporation) Rules 2014, an application for the reservation of a name shall be made in Form No. INC.1 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.

According to section 4(2), the name stated in the memorandum of association shall not—

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or
- (b) be such that its use by the company—
  - (i) will constitute an offence under any law for the time being in force; or
  - (ii) is undesirable in the opinion of the Central Government.

Section 4(3) provides that without prejudice to the provisions of section 4(2), a company shall not be registered with a name which contains—

- (a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or
- (b) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Section 4(5)(i) lays down that upon receipt of an application under sub-section (4), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of 60 days from the date of the application.

Rule 8 of Companies(incorporation) Rules, 2014 states that in determining whether a proposed name is identical with another, the differences on account of certain aspects may be disregarded, the details of the same is stated in that rule.

## **2. Preparation of Memorandum and Articles of Association**

### *A. Memorandum of Association*

The Memorandum of Association is the charter of a company. It is a document, which amongst other things, defines the area within which the company can operate.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact

memorandum is one of the most essential pre-requisites for incorporating any form of company under the Act.

As per section 2(56) “memorandum” means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.

Section 4 of the Act prescribes the particulars to be mentioned in a memorandum of association and other requirements. It is the constitution document of the company. The company cannot depart from the provisions of the memorandum. If it enters into a contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be ultra vires (Beyond Powers) the company and hence void.

Section 4(6) of the Companies Act, 2013 provides that the memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

- i. The Form in Table A is applicable in the case of companies limited by shares;
- ii. the Form in Table B is applicable to companies limited by guarantee not having a share capital;
- iii. the Form in Table C is applicable to the companies limited by guarantee having a share capital;
- iv. the Form in Table D is applicable to unlimited companies not having a share capital;
- v. the Form in Table E is applicable to unlimited companies having a share capital.

A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.

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

- (a) the name of the company with “Limited” as its last word in the case of a public company; and “Private Limited” as its last words in the case of a private company;(Name Clause)
- (b) the State in which the registered office of the company is to be situated;(Situation Clause)

- (c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;(objects clause)

Provided that nothing in this clause shall apply to a company registered under section 8;

- (d) the liability of members of the company, whether limited or unlimited, and also state,—(Liability Clause)

- (i) in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and

- (ii) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute—

- (A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and

- (B) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

- (e) in the case of a company having a share capital,—(Capital Clause)

- (i) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share per subscriber; and

- (ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

- (f) in the case of a One Person Company, the name of the person who, in the event of the death of the subscriber, shall become the member of the company.

According to section 4(7), any provision in the memorandum or articles, in the case of a company limited by guarantee and not having

a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

The above clauses are compulsory and are designated as “conditions” prescribed by the Act, on the basis of which a company is incorporated.

It is to be noted that the Companies Act, 2013 shall override the provisions in the memorandum of a company, if the latter contains anything contrary to the provisions in the Act (Section 6).

### **Name Clause**

A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known. The company may adopt any suitable name provided it is not undesirable.

### **Publication of Name**

The name of the company and the address of its registered office must be painted or displayed outside every office or place at which its business is carried on, in a conspicuous position and in legible letters in English and in the language in general use in that locality. The name must also be engraved on the company’s common seal. Further, the name of the company and the address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any must be mentioned in legible characters in all business letters, in all its bill heads, letter papers and in all its notices and other official publications, as well as in all negotiable instruments and other prescribed documents (Section 12).

However, where a company has changed its name or names during the last two years, it shall paint or display or print, as the case may be, along with its name, the former name or names so changed during the last two years as required above.

Further in case of One Person Company, the words “One Person Company” shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

Ministry of Corporate Affairs (MCA) has clarified that display of its name in English in addition to the display in the local language will be a sufficient compliance with the requirements of the section.

### **Rectification of name of a company (Section 16)**

Section 16 provides that if by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company whether registered under this Act or the previous company law, the Central Government may direct the company to change its name. The company shall change its name within a period of 3 months from the issue of the above direction after passing an ordinary resolution for the purpose. The Central Government is empowered to direct a company, at any point of time to rectify its name if by inadvertence it has been registered with a name similar to that of an existing company. If a company is so directed by the Central Government, it must change the name within 3 months of the direction after passing an ordinary resolution.

This section also gives enhanced power to the Central Government to order rectification of name where such name in its opinion constitutes an infringement of a registered trade mark. The proprietor of the registered trade mark may make an application to the Central Government for an order for rectification of name because it is identical to or too nearly resembles the applicant's registered trade marks. Such application must be made within three years from the date of incorporation or the registration or change of name whether under this Act or previous company law. In such a case the Central Government may direct the company to change its name and the company shall change its name, within a period of six months from the issue of such direction, after passing an ordinary resolution for the purpose.

Where a company changes its name or obtains a new name, it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

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

### **Situation Clause**

The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein. Within 15 days of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent. The company must also furnish to the Registrar

verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

Section 12(3) states that (3) every company shall—

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

Provided that where a company has changed its name or names during the last two years, it shall paint or affix or print, as the case may be, along with its name, the former name or names so changed during the last two years as required under clauses (a) and (c).

### **Objects Clause**

The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1)(c) of the Companies Act, 2013, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond

this ambit are ultra vires and hence void. Even the entire body of shareholders cannot ratify such acts.

### **Liability Clause**

The fourth compulsory clause must state that liability of the members is limited, if it is intended that the company be limited by shares or by guarantee. The effect of this clause is that, in a company limited by shares, no member can be called upon to pay more than what remains unpaid on the shares held by him.

In a company limited by guarantee, the liability clause will state the amount which each member should undertake to contribute to the assets of the company in the event of liquidation of the company. He cannot be called upon to pay anything before the company goes into liquidation.

This is the fifth compulsory clause which must state the amount of the capital with which the company is registered, unless the company is an unlimited liability company. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously described as "nominal", "authorised" or "registered".

The amount of nominal capital is determined having regard to the present as well as future requirements of the company with reference to its objects. The usual way to state the capital in the memorandum is: "The capital of the company is Rs. 10,00,000 divided into 1,00,000 equity shares of ` 10 each". This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013.

If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorised to issue capital beyond its authorised/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorised capital, the amount received on excess number of shares should be returned.

Out of the issued capital, the total amount actually subscribed or agreed to be subscribed is known as subscribed capital, and this subscribed capital again may be wholly paid or partly paid, in which latter case the balance would be payable on future calls when made. The amount actually paid by the shareholders is called the paid-up capital.

According to Section 60 of the Act, if the amount of the authorised capital (nominal capital), of the company is stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall also contain a statement in an equally prominent position and in equally conspicuous terms the amount of capital which has been subscribed and the amount paid-up.

### **Declaration for Subscription**

The subscribers to the memorandum declare: "We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names". Then follow the names, addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness. (Refer to INC 13 of Companies (Incorporation) Rules 2013)

The statutory requirements regarding subscription of memorandum are that:

- each subscriber must take at least one share;
- each subscriber must write opposite his name the number of shares which he agrees to take. [Section 4(1)(e)]

### **Signing of Memorandum**

Rule 13 Companies (Incorporation) Rules, 2014

The Memorandum and Articles of Association of the company shall be signed in the following manner, namely:-

- (1) The memorandum and articles of association of the company shall be signed by each subscriber to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any and the witness shall state that "I witness to subscriber/subscriber(s), who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in".
- (2) Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as

such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him.

(3) Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of association.

(4) 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 and where the subscriber is a Limited Liability Partnership, it shall be signed by a partner of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership:

Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

(5) Where subscriber to the memorandum is a foreign national residing outside India-

(a) in a country in any part of the Commonwealth, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.

(b) in a country which is a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the Notary (Public) of the country of his origin and be duly apostilled in accordance with the said Hague Convention.

(c) in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association 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 under section 3 of the Diplomatic and Consular Officers

(Oaths and Fees) Act, 1948 (40 of 1948) or, where there is no such officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vic.C.10), or in any Act amending the same;

- (d) visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa.

*Explanation.*– For the purposes of this clause, it is hereby clarified that, in case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

#### B. *Articles of Association*

According to Section 2(5) of the Companies Act, 2013, ‘articles’ means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

- i. The Form in Table F is applicable in the case of companies limited by shares;
- ii. the Form in Table G is applicable to companies limited by guarantee having a share capital;
- iii. the Form in Table H is applicable to the companies limited by guarantee not having a share capital;
- iv. the Form in Table I is applicable to unlimited companies having a share capital;
- v. the Form in Table J is applicable to unlimited companies not having share capital.

In terms of section 5(1), the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association.

The memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company

are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

Section 5(2) provides that the articles shall also contain such matters, as may be prescribed. However, nothing prescribed in this subsection shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management.

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

Section 5(8) provides that in case of any company, which is registered after the commencement of Companies Act 2013, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

Therefore in terms of Section 5 of the Companies Act, 2013 a public company limited by shares may at its option register its articles of association signed by the same subscribers as to the memorandum, or alternatively it may adopt all or any of the regulations contained in Table F of First Schedule of the Act. If articles are not registered, automatically Table F in Schedule I apply, and if registered, Table F in Schedule I apply except in so far as it is excluded or modified by the articles. To avoid any confusion, normally every public company delivers its articles alongwith the memorandum for registration. Further it will be specifically stated therein that Table 'F' will not apply. The articles of a private company must contain the three restrictions as contained in Section 2(68).

However nothing in section 5 shall apply to the articles of a company registered under any previous company law unless amended under this Act [Section 5(9)].

### **Entrenchment Provisions**

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The Companies Act, 2013 recognizes an interesting concept of entrenchment. Essentially, the entrenchment provisions allow for

certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions (such as obtaining a 100% consent) greater than those prescribed under the Act. This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment referred to in section 5(3) shall be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed. [Section 5 (5)]

### **Contents of Articles**

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.
10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. Share certificates.
14. Dematerialisation.
15. Conversion of shares into stock.

16. Voting rights and proxies.
17. Meetings and rules regarding committees.
18. Directors, their appointment and delegations of powers.
19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.
22. Managing director, Whole-time director, Manager, Secretary.
23. Additional directors.
24. Seal.
25. Remuneration of directors.
26. General meetings.
27. Directors meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalisation of reserves.

Utmost caution must be exercised in the preparation of the articles of association of a company. At the same time, certain provisions of the Act are applicable to the company “notwithstanding anything to the contrary in the articles”. Therefore, the articles must contain provisions in respect of all matters which are required to be contained therein so as not to hamper the working of the company later.

Act to over-ride Memorandum and Articles

Section 6 of the Companies Act, 2013 provides that:-

- (a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and
- (b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.

### **3. Filing of documents**

Section 7(1) that the following documents and information for registration shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated:

*Memorandum and Articles of Association of the company duly signed*

Section 7(1)(a) states that the memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed;

Rule 13 of Companies (Incorporation) Rules 2014 states that

The Memorandum and Articles of Association of the company shall be signed in the following manner, namely:-

- (1) The memorandum and articles of association of the company shall be signed by each subscriber to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any and the witness shall state that "I witness to subscriber/subscriber(s), who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in"
- (2) Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him.
- (3) Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of association.
- (4) 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 and where the subscriber is a Limited Liability Partnership, it shall be signed by a partner of the

Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership:

Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association.

- (5) Where subscriber to the memorandum is a foreign national residing outside India-
- (a) in a country in any part of the Commonwealth, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.
  - (b) in a country which is a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the Notary (Public) of the country of his origin and be duly apostilled in accordance with the said Hague Convention.
  - (c) in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association 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 under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (40 of 1948) or, where there is no such officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vic.C.10), or in any Act amending the same.
  - (d) visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa.

Explanation.- For the purposes of this clause, it is hereby clarified that, in case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

*Declaration from the professional*

Section 7(1)(b) states that a declaration in the prescribed form by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company,

and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with;

Rule 14 of The Companies (Incorporation) Rules 2014 states that for the purposes of clause (b) of sub-section (1) of section 7, the declaration by an advocate, a Chartered Accountant, Cost accountant or Company Secretary in practice shall be in Form No. INC.8.

Explanation (i) "chartered accountant" means a chartered accountant as defined in clause (b) of sub section 1 of section 2 of the Chartered Accountants Act, 1949 (ii) "Cost Accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and (iii) "company secretary" means a "company secretary" or "secretary" means as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980.

*Affidavit from the subscribers to the Memorandum*

Section 7(1)(c) states that an affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he is not convicted of any offence in connection with the promotion, formation or management of any company, or that he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

Rule 15 of The Companies (Incorporation) Rules 2014 states that

For the purposes of clause (c) of sub-section (1) of section 7, the affidavit shall be submitted by each of the subscribers to the memorandum and each of the first directors named in the articles in Form No.INC.9

*The address for correspondence till its registered office is established;*

Under Section 12, a company shall, on and from the 15th day of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The company can furnish to the registrar verification of registered office with in 30 days of incorporation in the manner prescribed. As per rule 25(1) of Companies

(Incorporation) Rules 2014, the verification of registered office shall be filed in Form no INC 22.

Where the location of the registered office is finalised prior to Incorporation of a company by the promoters, the promoters can also file along with the Memorandum and Articles, the verification of its Registered office in Form no INC 22.

*Particulars of subscribers*

Section 7(1)(e) states that the particulars of name, including surname or family name, residential address, nationality and such other particulars of every subscriber to the memorandum along with proof of identity, as may be prescribed, and in the case of a subscriber being a body corporate, such particulars as may be prescribed;

Rule 16 of Companies (Incorporation) Rules states that

Particulars of every subscriber to be filed with the Registrar at the time of incorporation.

(1) The following particulars of every subscriber to the memorandum shall be filed with the Registrar-

- (a) Name (including surname or family name) and recent Photograph affixed and scan with MOA and AOA:
- (b) Father's/Mother's/ name:
- (c) Nationality:
- (d) Date of Birth:
- (e) Place of Birth (District and State):
- (f) Educational qualification:
- (g) Occupation:
- (h) Income-tax permanent account number:
- (i) Permanent residential address and also Present address (Time since residing at present address and address of previous residence address (es) if stay of present address is less than one year) similarly the office/business addresses :
- (j) Email id of Subscriber;
- (k) Phone No. of Subscriber;
- (l) Fax no. of Subscriber (optional)

Explanation.- information related to (i) to (l) shall be of the individual subscriber and not of the professional engaged in the incorporation of the company;

(m) Proof of Identity:

For Indian Nationals:

PAN Card ( mandatory) and any one of the following

Voter's identity card

Passport copy

Driving License copy

Unique Identification Number (UIN)

For Foreign nationals and Non Resident Indians

Passport

(n) Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill:

Provided that Bank statement Electricity bill, Telephone or Mobile bill shall not be more than two months old;

(o) Proof of nationality in case the subscriber is a foreign national.

(p) If the subscriber is already a director or promoter of a company(s), the particulars relating to-

(i) Name of the company;

(ii) Corporate Identity Number;

(iii) Whether interested as a director or promoter;

(q) the specimen signature and latest photograph duly verified by the banker or notary shall be in the prescribed Form No.INC.10.

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

(a) Corporate Identity Number of the Company or Registration number of the body corporate, if any

(b) GLN, if any;

(c) the name of the body corporate ;

(d) the registered office address or principal place of business;

- (e) E-mail Id;
- (f) if the body corporate is a company, certified true copy of the board resolution specifying inter alia the authorization to subscribe to the memorandum of association of the proposed company and to make investment in the proposed company, the number of shares proposed to be subscribed by the body corporate, and the name, address and designation of the person authorized to subscribe to the Memorandum;
- (g) if the body corporate is a limited liability partnership or partnership firm, certified true copy of the resolution agreed to by all the partners specifying inter alia the authorization to subscribe to the memorandum of association of the proposed company and to make investment in the proposed company, the number of shares proposed to be subscribed in the body corporate, and the name of the partner authorized to subscribe to the Memorandum;
- (h) the particulars as specified above for subscribers in terms of clause (e) of sub-section (1) of section 7 for the person subscribing for body corporate;
- (i) in case of foreign bodies corporate, the details relating to-
  - (i) the copy of certificate of incorporation of the foreign body corporate; and
  - (ii) the registered office address.

*Particulars of first directors*

Section 7(1)(f) states that the particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the Director Identification Number, residential address, nationality and such other particulars including proof of identity as may be prescribed. Section 7(1)(g) states that the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Rule 17 of Companies (Incorporation) Rules 2014 states that

The particulars of each person mentioned in the articles as first director of the company and his interest in other firms or bodies corporate along with his consent to act as director of the company shall be filed in Form No.DIR.12 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.

As per section 152 (3), no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154. Section 152(4) provides that every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number. By virtue of section 153, every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number in Form no Dir 3. Any individual who intends to be a director of a company will have to mandatorily apply for DIN first. DIN has to be obtained by the directors of the company before commencing the procedure for incorporation of a company.

#### *Power of Attorney*

With a view to fulfilling the various formalities that are required for incorporation of a company, the promoters may appoint an attorney empowering him to carry out the instructions/requirements stipulated by the Registrar. This requires execution of a Power of Attorney on a non-judicial stamp paper of a value prescribed in the respective State Stamp Laws.

#### **4. Issue of Certificate of Incorporation by Registrar**

Section 7(2) states that the Registrar on the basis of documents and information filed under sub-section (1) of section 7, shall register all the documents and information referred to in that sub-section in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name. (Section 9). The subscribers would become the members of the company.

The company as separate legal entity enables a director, representing the company, to enter into a contract of employment with himself in his individual capacity [Lee v. Lee's Air Farming Ltd., (1961) 31 Com Cases 233, 246, 248, 249: (1960) 3 All ER 420 (PC)]. Two companies which are incorporated with the same set of shareholders are

nevertheless distinct and separate entities. [*Patinson v. Bindhya Debi*, AIR 1933 Pat 196].

A company may also act, as trustee, executor or administrator, provided its constitution, i.e., its Memorandum of Association permits or authorises the doing of such business.

*Conclusive Evidence*

A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act.

**5. Allotment of Corporate identity number**

Section 7(3) states that on and from the date mentioned in the certificate of incorporation issued under sub-section (2), the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

*Preservation of Documents of incorporation*

Section 7(4) states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

**PUNISHMENT FOR FURNISHING FALSE OR INCORRECT INFORMATION AT THE TIME OF INCORPORATION**

The Companies Act, 2013 imposes severe punishment for incorporation of a company by furnishing false or incorrect information. The persons furnishing false or incorrect information shall be liable for following punishment:-

- (i) If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be punishable for fraud under section 447. [Section 7(5)]
- (ii) Without prejudice to the above liability, where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or

declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under section 7(1)(b) shall each be punishable for fraud under section 447. [Section 7(6)]

*Powers of the Tribunal in case of Incorporation of a Company by furnishing false or incorrect information*

As per Section 7(7), where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants:-

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit.

Provided that before making any order under this sub-section,—

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

**PROVISIONS SPECIFICALLY RELATING TO INCORPORATION OF COMPANIES WITH CHARITABLE OBJECTS UNDER SECTION 8**

*Rule 19-20 of Companies (Incorporation) Rules, 2014*

Rule 19. License under section 8 for new companies with charitable objects etc.-

- (1) A person or an association of persons (hereinafter referred to in

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<sup>1</sup> Section 7(7) is yet to be notified.

this rule as “the proposed company”), desirous of incorporating a company with limited liability under sub-section (1) of section 8 without the addition to its name of the word “Limited”, or as the case may be, the words “Private Limited”, shall make an application in Form No.INC.12 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 to the Registrar for a license under sub-section (1) of section 8.

- (2) The memorandum of association of the proposed company shall be in Form No.INC.13.
- (3) The application under sub-rule (1) shall be accompanied by the following documents, namely:—
  - (a) the draft memorandum and articles of association of the proposed company;
  - (b) the declaration in Form No.INC.14 by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, that the draft memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;
  - (c) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
  - (d) the declaration by each of the persons making the application in Form No. INC.15.

*Rule 20 -License for existing companies.-*

- (1) A limited company registered under this Act or under any previous company law, with any of the objects specified in clause (a) of sub-section (1) of section 8 and the restrictions and prohibitions as mentioned respectively in clause (b) and (c) of that sub-section, and which is desirous of being registered under section 8, without the addition to its name of the word “Limited” or as the case may be, the words “Private Limited”, shall make an application in Form No.INC.12 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 to the Registrar for a licence under sub-section (5) of section 8.

- (2) The application under sub-rule (1), shall be accompanied by the following documents, namely:-
- (a) the memorandum and articles of association of the company;
  - (b) the declaration as given in Form No.INC.14 by an Advocate, a Chartered accountant, Cost Accountant or Company Secretary in Practice, that the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;
  - (c) for each of the two financial years immediately preceding the date of the application, or when the company has functioned only for one financial year, for such year (i) the financial statements, (ii) the Board's reports, and (iii) the audit reports, relating to existing companies;
  - (d) a statement showing in detail the assets (with the values thereof), and the liabilities of the company, as on the date of the application or within thirty days preceding that date;
  - (e) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
  - (f) the certified copy of the resolutions passed in general/ board meetings approving registration of the company under section 8; and
  - (g) a declaration by each of the persons making the application in Form No.INC.15.
- (3) The company shall, within a week from the date of making the application to the Registrar, publish a notice at his own expense, and a copy of the notice, as published, shall be sent forthwith to the Registrar and the said notice shall be in Form No. INC.26 and shall be published-
- (a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the proposed company is to be situated or is situated, and circulating in that district, and at least once in English

language in an English newspaper circulating in that district; and

- (b) on the websites as may be notified by the Central Government.
- (4) The Registrar may require the applicant to furnish the approval or concurrence of any appropriate authority, regulatory body, department or Ministry of the Central Government or the State Government(s).
- (5) The Registrar shall, after considering the objections, if any, received by it within thirty days from the date of publication of notice, and after consulting any authority, regulatory body, Department or Ministry of the Central Government or the State Government(s), as it may, in its discretion, decide whether the license should or should not be granted.
- (6) The licence shall be in Form No.INC.16. or Form No.INC.17, as the case may be, and the Registrar shall have power to include in the licence such other conditions as may be deemed necessary by him.
- (7) The Registrar may direct the company to insert in its memorandum, or in its articles, or partly in one and partly in the other, such conditions of the license as may be specified by the Registrar in this behalf.

#### **ALTERATION OF MEMORANDUM OF ASSOCIATION**

Section 13(1) of the Companies Act, 2013 provides that save as provided in section 61 (Dealing with power of limited company to alter its share capital), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. The memorandum of association of a company may be altered in the following respects:

- (1) By changing its name [Sections 13(2)].
- (2) By altering it in regard to the State in which the registered office is to be situated [Section 13(4) & (7)].
- (3) By altering its objects [Section 13 (1) & (9)].
- (4) By altering its share capital (Section 61).
- (5) By re-organising its share capital (Sections 230 to 237).
- (6) By reducing its capital (Section 66).

The provisions or conditions of the memorandum of association relating to the name clause, registered office clause, the objects clause, limited liability clause, subscriber's share clause as provided in Section 4 of the Companies Act, 2013 or any other specific provisions contained therein, can be altered by following the prescribed procedure laid down in the Act. Strict compliance of the prescribed procedure is demanded by law. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a nullity.

Further section 13(6) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1).

Section 13(10) provides that no alteration made under this section shall have any effect until it has been registered in accordance with the provisions of the said section.

Further, any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. [Section 13 (11)]

The procedure for the alteration of the compulsory clauses or conditions of the memorandum is discussed in detail in the following paragraphs.

### **Alteration of Name Clause**

The name of the company can be altered by a special resolution and with the approval of the Central Government in writing. Approval of the Central Government is not necessary if the change relates to the addition/deletion of the word 'Private' to the name of the company consequent to the conversion of a private company into a public company and vice versa. [Section 13(1) & (2)]

When any change in the name of a company is made under section 13(2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate [ Section 13(3)].

A company shall, in relation to any alteration of its name clause in the memorandum, file with the Registrar the special resolution passed by it in e-form no. 23 and also the approval of the Central Government under section 13(2) sanctioning the change of name. [Section 13(6)].

Under Section 16 of the Act, rectification of the name of the company is required to be carried out if, through inadvertence or otherwise, a company (whether on its first registration or on its registration by a new name) is registered by a name which is identical to or too nearly resembles the name of a company already in existence. The rectification of the name must also be carried out if the Central Government so directs at any point of time after the registration of the company. The direction of the Central Government is required to be complied with by the company within a period of 3 months from the date of issue thereof. Further where a company changes its name or obtains a new name under section 16 (1), it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum. Any default in complying with the direction issued by the Central Government would render the company liable for punishment with fine which may extend to one thousand rupees for every day during which default continues and its officers in default shall be liable for fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

*Rule 29 of Companies(incorporation) Rules 2014 states that*

- (1) The change of name shall not be allowed to a company which has defaulted in filing its annual returns or financial statements or any document due for filing with the Registrar or which has defaulted in repayment of matured deposits or debentures or interest on deposits or debentures.
- (2) An application shall be filed in Form No.INC.24 along with the fee for change in the name of the company and a new certificate of incorporation in Form No.INC.25 shall be issued to the company consequent upon change of name.

### **Name change requirement under Clause 32 of Listing Agreement**

If the company has changed its name suggesting any new line of business, it shall disclose the net sales or income, expenditure and net profit or loss after tax figures pertaining to the said new line of business separately in the financial results and shall continue to make such disclosures for the three years succeeding the date of change in name.

Further, all listed companies which decide to change their names shall be required to comply with the following conditions:

1. A time period of atleast 1 year should have elapsed from the last name change.

2. At least 50% of its total revenue in the preceding 1 year period should have been accounted for by the new activity suggested by the new name, or, the amount invested in the new activity/project (Fixed Assets + Advances + Work in Progress) is at least 50% of the assets of the company. The 'advances' shall include only those extended to contractors and suppliers towards execution of project, specific to new activity as reflected in the new name. To confirm the compliance, the company would have to submit auditor's certificate to the stock exchange.
3. The new name along with the old name shall be disclosed through the web sites of the respective stock exchange/s where the company is listed for a continuous period of one year, from the date of the last name change.

#### *Effect of Change*

The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.

#### **Alteration of Registered Office Clause**

##### *(a) Change within the local limits of same town*

Section 12(5) of the Act provides that except on the authority of a special resolution passed by a company, the registered office of the company shall not be changed,—

- (a) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company; and
- (b) in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company:

No company shall change the place of its registered office from then jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director on an application made in this behalf by the company in the prescribed manner.

Thus according to Section 12(5), a company can change its

registered office from one place to another within the local limits of the city, town or village, where it is situated, by merely passing a Board resolution. A notice of the change is required to be given to the Registrar in Form no INC 22, within 15 days of such change.(Section 12(4) read with rule 27 of Companies(incorporation) Rules, 2014. This does not involve alteration of memorandum.

*(b) Change from one city to another within the same State*

If the registered office is to be shifted from one city, town or village to another city, town or village within the same State, a special resolution has to be passed in the general meeting of the company. A notice of the change is required to be given to the Registrar in Form no INC 22, within 15 days of such change along with Form no MGT 14, as required under Section 117(1), towards special resolution passed...

*(c) Change within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies*

Proviso to Section 12(5) provides that confirmation by the Regional Director will be necessary for changing registered office of a company from one place to another if the change of registered office is from the jurisdiction of one Registrar to the jurisdiction of another within the same State.

Section 12(6) states that the Regional Director, after hearing the parties shall pass necessary orders within a period of thirty days from the date of the receipt of the application. Thereafter, the company concerned shall file a copy of the said order with the Registrar of Companies (ROC) within a period of sixty days from the date of the confirmation order by Regional Director. The said ROC shall record the ordered changes in its records. The ROC of the state where the registered office of the company was previously situated, shall transfer all the documents and papers to the new ROC.

*Rule 28 of Companies(Incorporation) Rules 2014 states that*

(1) An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in Form no.INC.23 along with the fee.

(2) The company shall, not less than one month before filing any

application with the Regional Director for the change of registered office.-

- (a) publish a notice, at least once in a daily newspaper published in English and in the principal language of that district in which the registered office of the company is situated and circulating in that district; and
- (b) serve individual notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within twenty one days of the date of publication of that notice:

Additionally, Form no MGT.14 is to be filed with the Registrar towards special resolution.

*(d) 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 Central Government on an application made to it [Section 13(4)].

According to Section 13(1), a company may, by special resolution and after complying with the procedure specified alter the provisions of its memorandum

Further, the alteration of the provisions of the memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Central Government on an application made to it in the prescribed form and manner [Section 13(4)].

The Central Government shall dispose of the application under subsection (4) within a period of sixty days and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge. [Section 13(5)].

A company shall, in relation to any alteration of its memorandum involving change of registered office from one State to another, file

with the Registrar the special resolution passed by it in MGT 14 [Section 13(6)].

Where an alteration of the memorandum results in the shifting of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. [Section 13(7)].

*Rule 30-31 of Companies (Incorporation) Rules 2014*

Rule 30 states that

- (1) An application under sub-section (4) of section 13, for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in Form No. INC.23 along with the fee and shall be accompanied by the following documents, namely:-
  - (a) a copy of the memorandum and articles of association;
  - (b) a copy of the notice convening the general meeting along with relevant Explanatory Statement;
  - (c) a copy of the special resolution sanctioning the alteration by the members of the company;
  - (d) a copy of the minutes of the general meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favor or against the resolution;
  - (e) an affidavit verifying the application;
  - (f) the list of creditors and debenture holders entitled to object to the application;
  - (g) an affidavit verifying the list of creditors;
  - (h) the document relating to payment of application fee;
  - (i) a copy of board resolution or Power of Attorney or the executed Vakalatnama, as the case may be.

- (2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:-
- (a) the names and address of every creditor and debenture holder of the company;
  - (b) the nature and respective amounts due to them in respect of debts, claims or liabilities:

Provided that the applicant company shall file an affidavit, signed by the Company Secretary of the company, if any and not less than two directors of the company, one of whom shall be a managing director, where there is one, to the effect that they have made a full enquiry into the affairs of the company and, having done so, have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge.

- (3) There shall also be attached to the application an affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government or the Union territory
- (4) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding ten rupees per page to the company.
- (5) There shall also be attached to the application a copy of the acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.
- (6) The company shall at least fourteen days before the date of hearing-
- (a) advertise the application in the Form No.INC.26 in a

vernacular newspaper in the principal vernacular language in the district in which the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district;

- (b) serve, by registered post with acknowledgement due, individual notice(s), to the effect set out in clause (a) on each debenture-holder and creditor of the company; and
  - (c) serve, by registered post with acknowledgement due, a notice together with the copy of the application to the Registrar and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.
- (7) Where any objection of any person whose interest is likely to be affected by the proposed application has been received by the applicant, it shall serve a copy thereof to the Central Government on or before the date of hearing.
- (8) Where no objection has been received from any of the parties, who have been duly served, the application may be put up for orders without hearing.
- (9) Before confirming the alteration, the Central Government shall ensure that, with respect to every creditor and debenture holder who, in the opinion of the Central government, is entitled to object to the alteration, and who signifies his objection in the manner directed by the Central government, either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Central Government. (10.) The Central Government may make an order confirming the alteration on such terms and conditions, if any, as it thinks fit, and may make such order as to costs as it thinks proper:

Provided that the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

Rule 31 The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in Form No.INC.28 along with the fee as with the Registrar of the State within thirty days from the date of receipt of certified copy of the order.

**Alteration of Objects Clause**

According to section 13(1), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change its objects by passing a special resolution. Further section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1). As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13(6)(a).

Consequently pursuant to Section 13(1), a company can change its objects clause by passing a special resolution. Further in case of a listed company, the special resolution for alteration in the objects clause of the Memorandum of Association needs to be passed through Postal Ballot in terms of section 110.

Further, section 13(8) lays down that a company, which has raised money from public through prospectus and has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and—

- (i) the details, as may be prescribed, in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
- (ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

Also for deleting any portion of the objects clause, the procedure laid down in this section has to be followed.

A company may wish to alter its objects stated in its memorandum due to various reasons e.g. if a company wishes to cut-back i.e. where it feels it has diversified in various directions and that management of the company has become difficult or uneconomical, it may alter its objects to sell or dispose of whole or part of its undertaking(s).

Rule 32 of Companies (Incorporation) Rules states that :

- (1) when the company has raised money from public through prospectus and has any unutilised amount out of the money so raised, it shall not change the objects for which the money so raised is to be applied unless a special resolution is passed through postal ballot and the notice in respect of the resolution for altering the objects shall contain the following particulars, namely:-
  - (a) the total money received;
  - (b) the total money utilized for the objects stated in the prospectus;
  - (c) the unutilized amount out of the money so raised through prospectus,
  - (d) the particulars of the proposed alteration or change in the objects;
  - (e) the justification for the alteration or change in the objects;
  - (f) the amount proposed to be utilised for the new objects;
  - (g) the estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
  - (h) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
  - (i) the place from where any interested person may obtain a copy of the notice of resolution to be passed.
- (2) The advertisement giving details of each resolution to be passed for change in objects which shall be published simultaneously with the dispatch of postal ballot notices to shareholders.
- (3) The notice shall also be placed on the website of the company, if any.

### **Registration of Alteration**

Section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar :

- (a) the special resolution passed by the company under section 13(1); and
- (b) the approval of the Central Government under section 13(2), if the alteration involves any change in the name of the company.

The special resolution shall be filed with the Registrar within thirty days of the passing or making thereof in the prescribed manner and payment of prescribed fees within the time specified under section 403.

As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13 (6)(a).

Further section 13(7) provides that where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

The certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and confirmation thereof have been complied with. The Registrar of the State from which the registered office is transferred will send to the Registrar of the other State all the documents relating to the company registered in his office.

No alteration made under section 13 (i.e., alteration of memorandum) shall have any effect until it has been registered in accordance with the provisions of this section. [Section 13(10)].

The main spirit behind Section 13(7) of the Companies Act, 2013 in regard to the filing of the order confirming the transfer of the company's registered office from one State to another State with the Registrar of Companies of each State is that the Registrar of Companies from whose State the registered office is transferred should keep the order duly registered in his office as an evidence to such shifting and should transfer all other records of the company to the Registrar of Companies to whose State the Registered Office has been so shifted. The other Registrar of Companies will register the other copy of the order and keep that order with the records transferred to him by his counterpart.

### **Alteration of Liability Clause**

According to section 13(1), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can

change the liability clause of its memorandum of association by passing a special resolution. Further section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1).

### **Alteration of Capital Clause**

A limited company having a share capital may make the following types of alterations in its memorandum by an ordinary resolution, if so authorised by its articles, at its general meeting to (Section 61)—

- (i) increase its authorised share capital by such amount as it thinks expedient;

A company may at any time increase its authorised share capital by the alteration of its memorandum. Although, section 61(1) (a) of the Companies Act, 2013 refers to the issue of new shares, it really deals with a case of increase in the authorised share capital, and not increase of the issued share capital. The case of increase of the issued or subscribed capital is dealt with separately by section 62 of the Act.

- (ii) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares:
- (iii) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
- (iv) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that the proportion between the amount paid and unpaid shall remain the same.
- (v) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders shall not take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of the

passing of the resolution along with an altered memorandum. [Section 64(1)]

The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both. It must be noted that cancellation of shares in pursuance of section 61(1) does not amount to reduction of share capital.

### **Alteration of Articles of Association**

A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Section 14(1) provides that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of a private company into a public company; or a public company into a private company. First proviso to section 14(1) lays down that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company. Second proviso to section 14(1) stipulates that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit.<sup>2</sup>

Every alteration of the articles under this section and a copy of the order of the Tribunal approving the alteration as per section 14(1) shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same. [Section 14 (2)]

Any alteration of the articles registered under section 14(2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles. [Section 14(3)]

### **Copies of memorandum, articles, etc., to be given to members**

(1) A company shall, on being so requested by a member, send to him within seven days of the request and subject to the payment of such fees as may be prescribed, a copy of each of the following documents, namely:—

(a) the memorandum;

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<sup>2</sup> Second proviso to Section 14(1) is yet to be notified.

- (b) the articles; and
  - (c) every agreement and every resolution referred to in sub-section (1) of section 117, if and in so far as they have not been embodied in the memorandum or articles.
- (2) If a company makes any default in complying with the provisions of this section, the company and every officer of the company who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

### **CONVERSION OF COMPANIES ALREADY REGISTERED**

Section 18 provides as under with regard to conversion of companies already registered:

- (1) A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
- (2) Where the conversion is required to be done under this section, the Registrar shall on an application made by the company, after satisfying himself that the provisions of this Chapter applicable for registration of companies have been complied with, close the former registration of the company and after registering the documents referred to in sub-section (1), issue a certificate of incorporation in the same manner as its first registration.
- (3) The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

### **Subsidiary company not to hold shares in its holding company**

Section 19 provides that no company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies. Any such allotment or transfer of shares of a company to its subsidiary company shall be void.

However, this will not apply in the following cases:

- (a) where the subsidiary company holds such shares as the legal

representative of a deceased member of the holding company;  
or

(b) where the subsidiary company holds such shares as a trustee;  
or

(c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company

It is further provided that the subsidiary company referred to above shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b).

In case of a holding company which is a company limited by guarantee or an unlimited company, not having a share capital, the reference of 'share' shall be construed as a reference to the interest of its members, whatever be the form of interest.

### **SERVICE OF DOCUMENTS**

Section 20 (1) provides that a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed.

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

As per the rules, the term, "electronic transmission" means a communication—

(a) delivered by –

- (i) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the company or the officer has provided from time to time for sending communications to the company or the officer respectively;
- (ii) posting of an electronic message board or network that the company or the officer has designated for such communications, and which transmission shall be validly delivered upon the posting; or
- (iii) other means of electronic communication, in respect of which the company or the officer has put in place reasonable

systems to verify that the sender is the person purporting to send the transmission; and

- (b) that creates a record that is capable of retention, retrieval and review, and which may thereafter be rendered into clearly legible tangible form.

Other than filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed. For this purpose “electronic transmission” means a communication –

- (a) delivered by –
  - (i) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the Registrar or the member has provided from time to time for sending communications to the Registrar or the member respectively;
  - (ii) posting of an electronic message board or network that the Registrar or the member has designated for those communications, and which transmission shall be validly delivered upon the posting; or
  - (iii) other means of electronic communication, in respect of which the Registrar or the member has put in place reasonable systems to verify that the sender is the person purporting to send the transmission, and (b) that creates a record that is capable of retention, retrieval and review, and which may thereafter be rendered into clearly legible tangible form

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

#### **AUTHENTICATION OF DOCUMENTS**

Section 21 states that unless otherwise provided, a document or proceeding requiring authentication by a company; or contracts made by or on behalf of a company, may be signed by any key managerial personnel or an officer of the company duly authorized by the Board in this behalf.

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