CS EXECUTIVE

SETTING UP OF BUSINESS ENTITY AND ITS CLOSURE

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Choice of Business Organization

Introduction

When a person plans to set up a business an important decision has to be taken regarding the choice of the form of organization. One has to measure all the advantages & disadvantages of each type of organization and choose the one which suits him the best.

Being a long term commitment, the choice of the form of organization is very crucial as the success or failure of business depends on choice or organization. Once a choice is made, it will be difficult to switch over to another form. Therefore, the form of organization should be chosen after proper thought and consideration.

Type of Business Organization

Factors governing decision for suitable form of Business

1. Nature of Business activity

This is an important factor having a direct bearing on the choice of a form of ownership. In small trading businesses, professions, and rendering of personal services, sole-proprietorship is predominant.

The partnership is suitable in all those cases where sole proprietorship is suitable, provided the business is to be carried on a slightly bigger scale with help of one or more partner

Where the persons intending to start a business wish to launch a business organisation clothed with a legal entity and in corporate form with a feature of having their sole ownership and control thereon, they may decide to form an OPC or other form of company. An alternative form of organisation is LLP under LLP Act 2008

2. Scale of Operation

If the scale of operations of business activities is small, sole proprietorship or a One Person Company (OPC) is suitable

if the scale of operations is modest — neither too small nor too large — partnership or limited liability partnership (LLP) is preferable; whereas, in case of large scale of operations, the company form is advantageous.

3. Capital requirements

Requirement of capital is closely related to the type of business and scale of operations. Enterprises requiring heavy investment (like iron and steel plants, large scale infrastructure projects, etc.) should be organised as companies.

Enterprises requiring small investment can be best organised as sole proprietorships or even as Partnerships.

4. Managerial Ability

It is difficult for a sole proprietor to have expertise in all functional areas of business. Further, the size of the business may not permit engagement of professional management.

In other forms of organizations like partnership and company, there is division of work among the partners which allows the partners to specialize in specific areas, leading to better outputs and decision making

5. Degree of control and management

a person wishing to have complete and direct control of business prefers proprietary organisation rather than partnership or company. If he is prepared to share it with others, he will choose partnership. But, if the activities are large, professional managers are required to handle the day to day affairs and there is need for corporate structure and management, he will prefer the company form of organisation.

6. Degree of risk and liability

Companies and LLPs have a real advantage, as far as the risk is concerned, over the other forms of business organisation. Creditors can force payment of their claims only to the limit of the company's and LLPs assets. Thus, while a shareholder/member/partner may lose the entire money he puts into or agreed to put into the company and LLP, he cannot be forced to contribute additional funds out of his own pocket to satisfy the business debts of the company and LLP.

7. Stability of business

The illness of owner may derange the business and his death cause the demise of the business. Partnerships are also unstable, since they are terminated by the death, insolvency, insanity, retirement, admission, expulsion or withdrawal of/ by one of the partners. Companies and LLPs have the most business stability due to its feature or perpetuity being an artificial or legal person. The life of the company and LLP is not dependent upon the life of its members/partners. Members/partners may come, members/partners may go, but the company/LLP goes on forever unless and until it being wound up.

8. Flexibility of administration

Any substantial change in the existing line of business activity — say from cotton textiles to sugar manufacturing — may not be permitted by law if such a provision is not made in the 'objects clause' of the Memorandum of Association of the company. Thus, from flexibility point of view, sole proprietorship has a distinct edge over other forms.

9. Division of profit

Profit is the guiding force of private business and it has a tremendous influence on the selection of a particular form of business organisation. An entrepreneur desiring to pocket all the profits of business will naturally prefer sole proprietorship.

10. Costs, procedure, and government regulation:

Partnerships are also quite simple to be initiated. Even a written document is not

necessarily a prerequisite since an oral agreement can be equally effective. However, in actual practice, written partnership deed is usually entered into, as it is needed for registration of the firm and for tax authorities. The procedure for dissolution of partnership is also, relatively simple.

Company form of business organisation is more complicated to form. It can be created by law, dissolved by law, and operate under the express provisions of the law. In the formation of a company, a number of legal formalities have to be gone through which entails, at times, quite a substantial amount of expenditure. Further, various formalities have to be complied with for closure of companies. Non - payment of dues may land the company into insolvency or liquidation.

11. Tax implication

In the choice of the form of business organisation, tax implication plays an important factor. In smaller entities, such as sole proprietorship or partnership, tax liability is dependent on the extent of profits. However, the liability of the owner(s) is unlimited.

In case of company or LLP the liability of shareholder is limited to the value of shares held by him hence their liability could be higher.

12. Geographical mobility

The extent to which the product or service is proposed to be manufactured or made available also plays a vital role in choosing the type of business organisation. If a concern deals with local market, a seasonal product or perishable goods or is meant to cater to specific city or locality then sole proprietorship or partnership form of business may be suitable. If it is proposed to market the product or service all over India (which may also entail providing customer support services), a company form of organisation may be preferred.

13. Transferability of ownership

Partnership form of organisation is one where two or more partners share the profits and/or losses in the agreed proportion. If a partner exits, the partnership, may decide to induct a new partner with benefits of ownership and share of profits or losses. In the company form of organisation, transfer of ownership is possible by transfer of shareholding by any person or group of persons in favour of another person or group of persons.

14. Managerial Needs

When the concern is small and it caters to local needs only then one person will be enough to manage the business. Sole – proprietorship form of organisation will be suitable for such a business. If business caters to more areas, then more persons

will be needed to look after various business functions in various areas. When a business is run on a large – scale basis, it will require the services of specialists to manage various departments. The company form of organisation will be suitable for such concerns.

15. Secrecy

In case of small businesses, secrecy has supreme importance which can be ensured in sole proprietorship. In case, he has partners, he will have to carefully weigh whether other partners will be able to maintain the secrecy. He will have to exercise great care in taking partners. In case of a company, secrecy may be restricted to the manufacturing process or the manner in which business is conducted. However, certain aspects of their business such as their board of directors, shareholding, financial statements and other information which are statutorily required to be placed in public domain are accessible to any person.

16. Independence

The company is subject to strict government regulations. So, if the entrepreneur wants to have a freedom in business with little governmental interference, he has to go for either sole proprietorship or partnership.

CLASSIFICATION OF COMPANIES

PRIVATE COMPANY [Sec 2(68)]

A company, which has a minimum paid-up share capital as may be prescribed and which by its articles provides the following:

i. Restricts the **right to transfer** its shares;
ii. Except in the case of OPC, limits the number of its members to **two hundred**(200) excluding present and past employees who continue to be the members of the company (here joint members shall be counted as one); and
iii. **Prohibits** any **invitation to the public** to subscribe for any securities ofthe company.

There should be at least two persons to form a private company i.e. the minimum no. of members in a private company is two. A private company should have at least two directors. The name of a private limited company must end with the words "Private Limited".

Privileges of a Private Limited Company

Some privileges and exemptions enjoyed by a private company or its advantages over a public company include the following:

Nature of Exemptions/Privileges

1. Financial assistance can be given to its employees for purchase of or subscribing to its own shares or shares in its holding company.
2. Need not prepare a report on the Annual General Meeting.
3. Need not prepare a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.
4. Private company need not have more than two directors.
5. Need not appoint Independent directors on its Board.
6. A proportion of directors need not retire every year.
7. Additional grounds for disqualification for appointment as a director may be specified by the company in its articles.
8. Restrictive provisions regarding total number of directorships which a person may hold in a public company do not include directorships held in a private company which is neither a holding nor subsidiary company of a public company.
9. Additional grounds for vacation of office of a director may be provided in the Articles
10. The provisions relating to contract of employment with managing or whole-time directors does not apply to a private company
11. Total managerial remuneration payable by a private company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed eleven per cent of the net profits.

Special Obligations of a Private Company

In addition to the restrictions imposed u/s 2(68) of the Companies Act, a private company owes certain special obligations as compared to a public company,

Which are as follows:

A private company, while filing its annual return with the Registrar of Companies as required u/s 92, must also send with this return,

A certificate stating that:

i. The company has not, since the date of the closure of the last FY with reference to which the last return was submitted or in the case of a 1st return since the DOI of the company, issued any invitation to the public to subscribe for any securities of the company;
ii. Where the annual return discloses the fact that the no. of members, except in case of a OPC, of the company exceeds 200, the excess consists wholly of persons who under 2nd proviso to Sec 2(68)(II) (i.e. the person who is or were in the employment of the Co.) of the Act are not to be included in reckoning the no. of 200;
iii. The Company continued to be a Private Company during the FY.

Question:	
21 Dec 2012	The name of every company must end with the word limited. Comment

Public Company [Sec 2(71)]

A public Company means a Company which:
i. Is **not a private Company and (w.e.f 3/1/18)**
ii. Has a **minimum paid up capital** as may be prescribed

A private Company which a subsidiary of a public Company shall also be **deemed to be a public company** for the purpose of Co. Act.

A Public co. must have minimum 7 members and minimum 3 directors.

BASIS	PUBLIC COMPANY	PRIVATE COMPANY
Mini members	7 members	2 members
Max members	Unlimited	200 members
Public deposits	Free to accept public deposits.	Can accept deposits only from its members, Directors and their relatives.
Transferability of Shares	Freely transferable	Restricted but not prohibited.
Public Issue	Can issue prospectus to invite general public to subscribe to its shares, debentures and deposits.	Cannot issue prospectus
Directors	3 Directors –Minimum 15 Directors – Maximum	2 Directors- Minimum 15 Directors- Maximum
Increase in number of Directors	Special resolution is required to be passed.	Central Government approval is not required.

ONE PERSON COMPANY (OPC) [Sec 2(62)]

- A company which has **only one person** as a member.
- It is basically a private company with some unique features.
- As regards the name of anOPC, the act provides that the words "one person company" or "OPC" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
- The concept of OPC provides a more flexible structure and less compliance requirements of a company.
- Only a **natural person** who is an **Indian citizen and resident** in India shall be eligible to incorporate a one person company;

  Resident in India"→a person who has stayed in India for a period of **not less than 182days** during the immediately preceding one **calendar year.**

PRIVILEGES TO AN OPC

As much public interest is not involved, many relaxations have been granted to OPC in compliances and procedural aspect, which are as follows:

i. Mainly it is a **private Company.**
ii. **No need** to hold Annual General Meeting (AGM)
iii. Information to be provided in the **directors' report** has been significantly reduced (as compared to a private company).
iv. In the case of OPC annual return shall be **signed by company secretary** and in case of his absence it will be signed by **director** of the company, In other companies it shall be signed by director and company secretary and in case of no company secretary by a **practicing company secretary** .
v. The requirement of a minimum number of Board meetings to be convened shall **not apply** to an OPC having **one director**. However, in case of OPC having **more than onedirector,** the OPC shall hold at **least one meeting** of the board of directors in each **half of calendar year** and the gap between two meetings is **not less than ninety days.**

NOMINATION BY THE SUBSCRIBER OR MEMBER OF ONE PERSON COMPANY

- The subscriber to the memorandum of an OPC shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that one person company.
- The name of the person nominated shall be mentioned in the memorandum of OPC and such nomination inform in form no. INC.32 along with consent of such nominee obtained in Form No. INC.3 and fee as provided in the Companies (Registration offices and fees Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its MOA & AOA.

WITHDRAWAL OF CONSENT BY NOMINEE

i. The person nominated by the subscriber or member of an OPC may, withdraw his consent by giving a notice in writing to such sole member and to the OPC.
ii. The sole member shall nominate another person as nominee **within15 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.**
iii. The company shall, within 30 days of receipt of the notice of withdrawal of consent, file with the ROC, 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** along with fee as provided in the Companies **(Registration offices and fees) Rules, 2014** and the written consent of such another person so nominated in **Form No. INC.3.**

CHANGE OF NOMINEE BY SOLE MEMBER

i. The subscriber/member of anOPC may, by intimation in writing to the company, 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**

ii. The company shall, on the receipt of such intimation, file with the ROC and a notice of such change in **Form No. INC.4** along with fee as provided in the companies (Registration offices and fees) Rules,2014 and with the written consent of the new nominee in Form No.INC.3 within 30 days of receipt of intimation of the change.

DEATH OF SOLE MEMBER

- Where the sole member of one Person Company ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such one person company,
- Such new member shall nominate within fifteen days of becoming member,
- A person who shall in the event of his death or his incapacity to contract become the member of such company,
- And the company shall file with the registrar an intimation of such cessation and nomination in Form No. INC.4 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014
- Within thirty days of the change in membership and with the prior written consent of the person so nominated in Form No. INC.3.

MISCELLANEOUS PROVISIONS

i. No person shall be eligible to incorporate more than a one person company or become nominee in more than one such company.
ii. No minor shall become member or nominee of the one person company.
iii. Such company cannot be incorporated or converted into a company u/s 8 (Non-Profit Companies) of the act.
iv. OPC cannot carry out non-banking financial investment activities.
v. OPC cannot invest in securities of a body corporate.

Conversion of Private Company into OPC

1. A private company (other than Sec 8 co.) having paid up capital of **≤Rs. 50 Lakhs** or avg. annual turnover during the relevant period is **≤ R.s 2 cr.** may convert itself into OPC by passing **special resolution** in GM.
2. Before passing such resolution, the co. shall obtain **NOC** in writing from its members and creditors.
3. File copy of the special resolution with the **ROC within 30 days** from the date of passing such resolution in **Form no. MGT 14**
4. The co. shall file an application in **INC 6** for its conversion into OPC along with prescribed fees by attaching the following documents, namely:
5. The directors of the co. shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the co. have given their consent for conversion, the paid up share capital co. is **≤Rs. 50 Lakhs** or avg. turnover is **≤ R.s 2 cr.** as the case may be
6. The list of member and list of creditors
7. The latest audited balance sheet and the profit and loss account and
8. The copy of No objection letter of secured creditors
9. On being satisfied and complied with requirements stated herein the ROC shall issue the certificate.

Conversion of Pvt. Co. into Public co

1. The AOA shall be altered to delete the 3 matters as given 2(68). Alteration of AOA requires special resolution in general meeting
2. If the number if members are below 7, step should be taken to increase it to a minimum of 7
3. If the number of directors is less than 3, it should appoint more directors to make it 3 at least
4. Within 30 days from the date of alteration the co. shall file the following to ROC
5. Either a prospectus or a statement of lieu of prospectus and
6. Form 23 together with a certified copy of special resolution
7. ROC will issue a fresh certificate of incorporation
8. The change of name is to be noted in MOA, AOA, letterheads, bills, invoices, seals etc.

Conversion of public company into private company

1. The AOA shall be altered to include 3 matters required u/s 2 (68) of co. Act 2013
2. Alteration of AOA requires as special resolution in GM
3. The alteration shall not have effect unless such alteration has been approved by the central Govt. within 3 months
4. A printed copy of AOA as altered shall be filed with ROC within 30 days from the date of approval of central Govt.

Question:	
22 June 2015	One person company shall be formed only as a company limited by shares. Comment.

SMALL COMPANY (Sec 2(85))

''Small Company'' means a company, other than a public company,—

i. Paid-up share capital of which does not exceed *Rs.50 Lakhs* or such higher amount as may be prescribed *which shall not be* ***more than Rs. 10 cr.*** ~~*Rs.5 Cr.*~~; or

ii. Turnover of which as per P & L account for the immediately preceding FY does not exceed *Rs.2 Cr.* or such higher amount as may be prescribed which shall not be more than **Rs. 100 Cr.** ~~*Rs.20 Cr.*~~

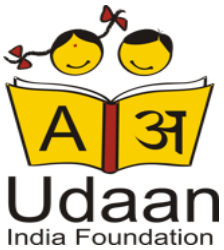
NOTHING IN THIS SECTION SHALL APPLY TO

a. A holding company or a subsidiary company.
b. A company registered under section 8 (Companies formed for charitable purposes); or
c. A company or body corporate governed by any special Act.

LOGIC AND ADVANTAGES OF NEW CONCEPT SMALL COMPANY

- The 2013 act provides for a new entity in the form of small company, empowering the central government to provide for a simpler compliance regime for small companies.
- Because of their size, they cannot be burdened with the same level of compliance requirements as, say, the large public listed companies.
- The small companies have to be enabled to take quick decisions, be adaptable and nimble in the changing economic environment, and yet be encouraged to comply with the essential requirements of the law through low cost of compliance cost.
- The relaxations provided to small companies would not be available to a public company, a holding company, a subsidiary company, a company incorporated for charitable purposes, or a body corporate governed by any special act.

NON-PROFIT ORGANISATION AS A COMPANY [Sec 8]



A person or an association of persons may be registered under this Act as a limited company if the following conditions are satisfied:

a) OBJECT
Its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object.

b) APPLICATION OF PROFITS
It intends to apply its profits, if any, or other income in promoting its objects; and

c) PROHIBITION ON PAYMENT OF DIVIDEND
It intends to prohibit the payment of any dividend to its members, etc.

LICENCE TO BE GRANTED BY CENTRAL GOVERNMENT

If above conditions are satisfied then, the Central Government may grant the company a licence to be registered as a Company.

IMPORTANT NOTES:

1. **NO USE OF WORDS 'LIMITED' OR 'PVT. LTD'**
2. **SAME PRIVILEGES AND OBLIGATIONS AS A LIMITED COMPANY**
3. **FIRM CAN ALSO BECOME ITS MEMBER**
4. **NO ALTERATION IN MOA & AOA EXCEPT THE PRIOR APPROVAL OF CG**
5. **CONVERSION ALLOWED AFTER SATISFYING THE CONDITIONS**
6. **LICENSE MAY BE REVOKED**
7. **PAYMENT OF DEBTS AND LIABILITIES**
   If on the winding up or dissolution of the company under this act, there remains, after the payment of debts and liabilities, any assets, they may be transferred to another company under the same section, with similar object, subject to such conditions as the tribunal may impose, or be sold and proceeds thereof, credited to Insolvency and Bankruptcy Fund formed under the IBC Code, 2016.
8. **ADDITION OF WORDS 'LIMITED' OR '(P) LTD'**
   On revocation of license CG shall direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited", as the case may be, to its name.
9. **OPPORTUNITY OF BEING HEARD**
   Before revocation of license opportunity of being heard shall be given to the company.

GOVERNMENT COMPANIES [Sec 2(45)]

A Government Company is a Company in which not less than 51% of the paid up share capital is held by:

1. Central Government, or
2. Any State Government or Governments, or
3. Partly by Central Government and partly by one or more State Government.

It also includes a Company which is a subsidiary of a Government Company.
Employees of the government company are not government servants, so they have no legal right to claim that the government should pay their salary or any additional expenditure incurred on account of revision of pay scale should be met by the government. It is the responsibility of the Company to pay them the salary.

Case Law 18	*Andhra Pradesh Road Transport Corporation* v. *ITO*

The Andhra Pradesh State Road Transport Corporation claimed exemption from taxation by invoking Articles 289 of the Constitution of India according to which the property and income of the State are exempted from the Union taxation. The Supreme Court, while rejecting the Corporation's claim, held that though it was wholly controlled by the State Government, it had a separate entity and its income was not the income of the State Government.

The Court, observed that the companies which are incorporated under the Companies Act, have a corporate personality of their own, distinct from that of the Government of India. The land and buildings are vested in and owned by the companies, the Government of India only owns the share capital.

In *Hindustan Steel Works Construction Ltd.* v. *State of Kerala* [1998] 2 Comp LJ 383, it was held that in spite of all the control of the Government, the company is neither a Government department nor a Government establishment, it is just an agency of the Government, and hence not exempt from the purview of Kerala Construction Workers Welfare Funds Act.

The employees of a Government Company are not the employees of the Central or State Government. A Government Company may, in fact, be wound up like any other company registered under the Companies Act. It may become insolvent or be unable to pay its debts. That does not mean that the Government holding the shares, viz, Central or State, as the case may be, has become bankrupt.

Non-Govt. Companies

The Company other than Govt. Company is Non-Government Company.

LISTED COMPANY (Sec 2(52))

"Listed company" means a company has any of its securities listed on any recognised stock exchange.

FOREIGN COMPANIES (Sec 2(42))

A Company **incorporated outside India** which has established a **place of business in India** is a foreign company.
Following activities are held as not constituting "carrying on of business":

1. Carrying small transactions
2. Conducting meeting of shareholders.
3. Operating bank account
4. Transferring of shares and other securities.

- Where a company incorporated outside India, has a representative in India, who on behalf of the company receives orders form the customers , shall be treated as **"foreign company"** only if such company has place of business in India and conducts business activities.

- If company holds BM or GM in India, the company shall not be treated as **"foreign company"** unless the company carries some business activity and has a place of business in India.

INVESTMENT COMPANIES

A Company whose primary business is the acquisition of shares, stock, debentures or other securities of other companies is an investment Company.

PRODUCER COMPANIES

Section 465(1) of the Companies Act, 2013 provides that the Companies Act, 1956 and the Registration of Companies (Sikkim) Act, 1961 (hereafter in this section referred to as the repealed enactments) shall stand repealed.

However, proviso to section 465(1) provides that the provisions of Part IX A of the Companies Act,1956 shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

In view of the above provision, Producer Companies are still governed by the Companies Act, 1956. Companies (Amendment) Act, 2002 had added a new Part IXA to the main Companies Act, 1956 consisting of 46 new Sections from 581A to 581ZT.

Section 581A(l) of the Companies Act, 1956 → A producer company is a body corporate having objects or activities specified in Section 581B and which is registered as such under the provisions of the Act. The membership of producer companies is open to such people who themselves are the primary producers, which is an activity by which some agricultural produce is produced by such primary producers.

Objects of Producer Companies

a. Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefit.
b. Processing including preserving, drying, distilling, brewing, vinting, canning and packaging of the produce of its members.
c. Manufacturing, sale or supply of machinery, equipment or consumables mainly to its members.
d. Providing education on the mutual assistance principles to its members and others.
e. Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its members.
f. Generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce.
g. Insurance of producers or their primary produce.
h. Promoting techniques of mutuality and mutual assistance.
i. Welfare measures or facilities for the benefit of the members as may be decided by the Board.
j. Any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) above or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner.
k. financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) above, which include extending of credit facilities or any other financial services to its members.

It has also been clarified that every producer company shall deal primarily with the produce of its active members for carrying out any of its objects specified above.

FINANCIAL COMPANIES

A financial Company is a non-banking Company which is a financial institution within the meaning of Section 45 of RBI Act, 1934.

HOLDING COMPANY [SEC 2(46)]

"A company shall be deemed to be a holding company of another only if the other is its subsidiary".
~~As per the Co. Act, only 'company' can be a holding company. A body corporate other than 'company' cannot be regarded as 'holding company'.~~
[Explanation: Here company includes any body corporate] w.e.f 3.01.2018

SUBSIDIARY COMPANY OR SUBSIDIARY [SEC 2(87)]

In relation to any other company (that is to say the holding company), means a company in which the holding company—
(i) Controls the composition of the Board of Directors; or
(ii) Exercises or controls more than one-half of **[Total Voting Power]** ~~the total share capital~~ either at its own or together with one or more of its subsidiary companies (w.e.f 3rd Jan 2017)

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed. **[Right *now that prescribed number of layers is 2]***

Explanation — for the purposes of this clause-

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

MEMBERSHIP OF HOLDING COMPANY [SECTION 19]

A subsidiary company cannot be a member of its holding company and any allotment or transfer of shares by a company to subsidiary company shall be void.

EXCEPTIONS

A. A subsidiary company can become the member of its holding company and ***CAN*** vote in its meeting:
   i. Where the subsidiary is holding shares in the capacity of a legal representative of a deceased member of the holding company. Or
   ii. Where the subsidiary is holding shares as a trustee.

B. A subsidiary company can become the member of its holding company but ***CANNOT*** vote in its meeting:
   Where subsidiary company was the member of holding company either
   1. Before the commencement of this act or
   2. Before becoming the subsidiary of that company

ASSOCIATE COMPANY Section 2 clause (6)

In relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company (JVC).

W.e.f 3rd Jan 2018
a) Whereas the term "Significant influence" used in the definition means control of at least 20% of total voting power [~~total shares~~], or control of or participation in business decision under an agreement.

b) the expression "JV" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement

DORMANT COMPANY (SEC 455)

Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

This concept was not there in Companies Act, 1956. Another Name of this concept by Professionals is "**ASSET SHIELDING CONCEPT"**

UNDER COMPANIES ACT 2013".

- A Dormant Company offers excellent advantage to the promoters who want to hold an asset or intellectual property under the **corporate shield** for its usage at a later stage.
- **For instance:** if a promoter wants to buy lands now for its future project at a comparatively lesser price, he may do the same through dormant company so that he can use the land for its future project. Thus, dormant company status is a new phenomenon in the Companies Act 2013 and is [an excellent tool for keeping assets in the company for its future usage. A dormant company may be either a public company or a private company or a one person company.

Procedure and conditions to be complied with, to form a dormant company:

1. Where a company is formed and registered under this act for a future project or to hold property or an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may **make an application** to the registrar in such a manner as may be prescribed for obtaining a status of a dormant company.
2. The registrar on consideration of an application shall **allow** the status of the dormant company to the applicant and **issue a certificate** in such manner as may be prescribed.
3. The registrar shall **maintain a register** of a dormant company in such form as may be prescribed.
4. In case a company which has **not filed financial statements or annual returns for 2 years consecutively,** the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies
5. Further, a dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the registrar and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed.

"SIGNIFICANT ACCOUNTING TRANSACTION"

"Significant accounting transaction" means any transaction other than—

i. payment of fees by a company to the Registrar;
ii. payments made by it to fulfil the requirements of this Act or any other law;
iii. Allotment of shares to fulfil the requirements of this Act; and
iv. Payments for maintenance of its office and records.

PROCESS FOR OBTAINING STATUS OF DORMANT COMPANY:

1. Call a Board meeting- to the EGM.
2. Authorization to director to make application for Dormant with ROC.
3. Issue Notice of General Meeting
4. Engage an Auditor/ Chartered Accountant to issue certificate.
5. Hold extraordinary General meeting
6. Pass Special Resolution.
7. Must file E-Form MGT-14 with ROC.

INCORPORATION OF COMPANY

Companies (Incorporation) Rules, 2014.

Reservation of Name: an application shall be made by using RUN along with prescribed fees which may be approved or rejected by ROC (Central Registration centre). (w.e.f 20/01/18)

Upon receipt of an application for reservation of name, the ROC may, on the basis of information and documents furnished along with the application, reserve the name for a period of 20 days from the date of approval or such other period as may be prescribed:
Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of 60 days from the date of approval.". **(w.e.f 3/1/18)**

Rule 10: Form INC 7 shall be Omitted. (w.e.f 20/01/18)

Rule 12: Application for incorporation of company shall be made in INC 32 (SPICe) along with fees as may be prescribed.
Provided that in case pursuing of any of the objects of a company requires registration or approval form sectoral regulators such as RBI SEBI, registration or approval as the case may be from such regulators shall be obtained by the proposed co. before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation of the co. (w.e.f 20/01/18)

Rule 38 → Simplified Proforma for Incorporating Company Electronically (SPICe).-

1. The application for incorporation of a company under this rule shall be in FORM No. INC-32 (SPICe) along-with e-MOA in Form No.lNC-33 and e-AOA in Form no. INC-34. Provided that in case of incorporation of a company falling u/s 8 of the Act, FORM No. INC-32 (SPICe) shall be filed along with FORM No. INC-13 (MOA) and FORM No.lNC-31 (AOA) as attachments,
   Provided further that in case of incorporation of co. having more than 7 subscribers or where any of the subscriber to MOA/AOA is signing at a place outside India, MOA/AOA shall be filed with INC 32 (SPICe) in the respective format as specified in Table A to J in schedule I without filing INC 33 and INC 34 (w.e.f 20/01/18)
2. The application for allotment of DIN up-to 3 Directors, reservation of a name, incorporation of company and appointment of Directors of the proposed **OPC, private company, public company and Section 8 company Shall be filed in FORM No. INC-32 (SPICe),**with the ROC, within whose jurisdiction the registered office of the company is proposed to be situated along with the fee of **Rs. 500** in addition to the registration fee as specified in the Companies (Registration of Offices and Fees) Rules. 2014.
   Provided that where an applicant has already applied for reservation of a name and which has been approved therein, he may fill the reserved name as proposed name of the company.
3. For the purposes of filing SPICe Form, the particulars of maximum of 3 directors shall be allowed to be filled in FORM No. INC-32 (SPICe), and allotment of DIN of

maximum of 3 proposed directors shall be permitted in FORM NO. INC-32 (SPICe) in case of proposed directors not having approved DIN.

4. The promoter or applicant of the proposed company shall propose only one name in FORM NO. INC-32 (SPICe).
5. The promoter or applicant of the proposed company shall prepare e-MOA in FORM No. INC-33 and e-AOA in FORM No. INC-34.
   Provided that the subscribers and witness or witnesses shall affix their digital signatures to the e-MOA and e-AOA
6. For incorporation using application as provided in this rule, provisions of section 4(5)(i) of the Act, Rule 9, and Rule 16(1)(a) to the extent of affixing recent photograph shall not apply.
7. A company using the provisions of this rule may furnish verification of its registered office u/s 12(2) of the Act by filing FORM NO. INC-32 (SPICe) in which case the company shall attach along with such FORM No.lNC-32 (SPICe), any of the documents referred in rule 25 (2).
8. FORM No.lNC-22 shall not be required to be filed in case the proposed company maintains its registered office at the given correspondence address.
9. (a) Where the ROC on examining FORM No. INC-32 (SPICe), finds that it is necessary to call for further information or finds such application or document to be defective or incomplete in any respect, he shall give intimation to the applicant to remove the defects and re-submit the e-form **within 15 days** from the date of such intimation given by the ROC.
   (b) After the resubmission of the document, if the ROC still finds that the document is defective or incomplete in any respect, he shall give one more opportunity of **15 days** to remove such defects or deficiencies.
   Provided that the total period for re-submission of documents shall not exceed 30 days.
10. The Certificate of Incorporation of company shall be issued by the ROC in Form No. INC-11.".

STEPS OF INCORPORATION OF A COMPANY.

1. Company shall file to ROC the following documents & info -

1) Memorandum of Association and Article of association duly signed by subscribers in prescribed manner.

2) Declaration

A declaration that all the requirements of this Act and the rules, in respect of registration and related matters have been complied with in the prescribed form by

i. An advocate/ a chartered accountant/ cost accountant/ company secretary in practice, who is engaged in the formation of the company, **and**
ii. By a person named in the articles as a director/manager/secretary of the company.

3) Declaration ~~Affidavit~~ by Subscribers & First Directors

An declaration ~~affidavit~~ from each of the subscribers to the memorandum and from persons named as the 1st directors, if any, in the articles that

i. He is not convicted of any offence in connection with the *promotion*, formation or management of any company, **OR**
ii. 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 5 years **AND**
iii. 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.

4) Address for Correspondence

The address for correspondence till its registered office is established.

5) **Particulars of every subscriber to the Memorandum**
6) **Other relevant particulars**

2. ROC shall register all the documents and shall issue a Certificate of Incorporation in **INC 11**.
3. On and from the date of Incorporation, a unique Corporate Identification number shall be allotted to company.
4. All the documents and information filed with ROC shall be maintained by Co. till its dissolution in original format.
5. If any wrong, false or incorrect information is furnished or if any material information is supressed then such officer or promoter or any other person in default shall be punishable **u/s 447**.
6. In above case, NCLT may, on application & on being satisfied, may –
   a. Pass such order as it may deem fit.
   b. Direct that liability of members shall be unlimited
   c. Direct removal of name of co. from register of company
   d. Pass such other order as it may think fit

   BUT
   An opportunity of being heard shall be provided to company.

ISSUE CERTIFICATE OF INCORPORATION

The Registrar on the basis of documents and information filed shall register all the documents in his register and issue a certificate of incorporation in **INC 11.**

Case Law **Patinson v. Bindhya Debi AIR, 1933**

Two companies which are incorporated with the same set of shareholders are nevertheless distinct and separate entities.

Details of CIN:

Every Indian company (listed or unlisted) has a unique 21 digits CIN

Digit number	What it shows?	Remark
1st digit	Listing status	If the company is listed it will start with "L" and if the company is unlisted it will start with "U"
Next 5 digits	Industry code	
Next 2 digits	State code	Eg. MH for Maharashtra
Next 4 digits	Year of incorporation	i.e. A company formed in the calendar year 2011 , it will be 2011
Next 3 digits	Ownership	PLC for Public Limited Company PTC for Private Limited Company OPC for One Person Company
Next 6 digits	Registration No.	Eg. 090868

Director Identification Number

Director Identification Number (DIN) is a unique Identification number for an existing director or a person intending to become the director of a company. Any individual who is a director or intends to be a director of a company should apply for DIN. Inthe scenario of e - filing, DIN will be a pre - requisite for filing of certain company related documents.

LIABILITY IN CASE OF FALSE INFORMATION

If any person furnishes

- any false or incorrect particulars of any information or
- Suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action.

EFFECT OF CERTIFICATE OF INCORPORATION

1) 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.
2) It shall be a body corporate.
3) It shall exercise all the functions of an incorporated company.
4) Upon incorporation, the Company becomes a legal person separate from its members.
5) It acquires perpetual succession and common seal.
6) It shall have power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible.
7) It shall have power to contract and to sue and be sued, by the said name.

MEANING OF CERTIFICATE OF INCORPORATION

- A certificate which certifies that the company is registered is called‘ Certificate of Incorporation’. It is issued by the ROC.
- It contains the **name of the company**, the **date of it issue** and the **signature of Registrar with his seal**.
- The Company comes into existence from the date of the certificate of incorporation.
- After scrutinizing the documents filed with the ROC, and after being satisfied that all the requirements have been fulfilled, the Registrar will enter the name of the company in the Register of companies and shall certify under his hand that the company is incorporated.

CERTIFICATE OF INCORPORATION IS A CONCLUSIVE EVIDENCE

- Company’s life commences from the date of incorporation and the date appearing on it is conclusive, even if it is wrong.
- Certificate of Incorporation given by the Registrar in respect of any Company shall be **conclusive** evidence of registration of the company.
- In other words, no one can question the validity of certificate of incorporation once it is issued.
- Thus, the certificate is conclusive evidence on the following points:
  - All the **requirements** under the Act have been complied with in respect of registration of Company and matters precedent and incidental thereto, and
  - The association is a Company, **authorized** to be registered and duly registered under this Act.
- Thus, if Memorandum of Association is:
- **Materially altered** after signature but before registration, or
- **Signed** by only 1 person for all 7 subscribers, or
- If signatories are all **minors**, or
- If all or some of the signatures on the Memorandum and Articles are **forged**,
- Contains illegal objects,
- The certificate would be conclusive and would not affect the status and existence of the Company as legal person although such irregularities might give rise to claims between the subscribers.

DECIDED CASE LAWS

CASE LAW **Jubilee Cotton Mills Vs. Lewis**

- Documents for registration of the Company were filed with the ROC on 6th January.
- ROC issued Certificate of Incorporation on 8th January but dated it 6th January.
- On 6th January, the Company made an allotment of shares to Lewis.
- It was contended that the allotment is void on the ground that it was made before the company come into existence.
- However, the Court held that the Certificate of Incorporation is conclusive evidence of incorporation of Company on 6th January and hence the allotment was valid.

CASE LAW **Moosa Goolam ArifVs Ibrahim Goolam Arif**

- The Memorandum and Articles of the Company was signed by 2 persons and by a guardian of 5 other members, who were minors.
- The ROC however registered the Company and issued under his hand a Certificate of Incorporation.
- The court held that though there were less than 7 members and the registrar should not have granted the certificate but the certificate granted by the ROC is conclusive for all purposes.
- And hence the existence of the Company cannot be questioned.

CASE LAW **T V Krishna vs. Andhra Prabha P. Ltd.**

- If the Company has been incorporated with illegal objects, illegal objects would not become legal by issue of Certificate of Incorporation.
- If a Company with illegal objects happens to be registered, the existence of certificate means that the corporate status of the Company cannot be questioned.
- But the Company is forbidden to carry on its illegal objects.

PRELIMINARY CONTRACTS

A pre-incorporation contract means a contract entered into by the promoters on behalf of the Company before its incorporation. Before incorporation, the promoters usually enter into certain contracts for the purchase of assets on company's behalf. A company cannot be sued nor can it sue for the pre-incorporation contracts.

CONDITIONS FOR ENFORCEMENT OF PRELIMINARY CONTRACTS

Ordinarily, pre-incorporation contracts are not binding on the company even after its incorporation. However, Pre-incorporation contracts are enforceable only if the following conditions are fulfilled:

i. The contracts were entered into by promoters before incorporation of the company.
ii. The contracts were entered in to on behalf of Proposed Company.
iii. Such contracts are **warranted by the terms** of its incorporation.
iv. The Company has **adopted** such contract after incorporation and has **communicated** the same to the other party.
v. The company has entered into a fresh contract with the third parties on the same terms and conditions as contract entered into by the promoters.

EFFECTS WHEN COMPANY ADOPTS PREINCORPORATION CONTRACTS

i. The contracts can be enforced by the company.
ii. The contract becomes binding on the company.
iii. The promoters are not personally liable on such a contract.

EFFECTS WHEN COMPANY DOES NOT ADOPT PREINCORPORATION CONTRACTS

i. The pre-incorporation contract shall not bind the company.
ii. Even if the contract stipulates that the company after incorporation shall be bound by it, the company shall not be bound by such contract.
iii. Even if the company takes the benefit of pre-incorporation contract, it is not bound by it.
iv. The company cannot ratify a pre-incorporation contract.
v. The Company, after incorporation, cannot enforce a pre=incorporation contract.
vi. The promoters are personally liable on pre-incorporation contract.

TO MAKE IT BY HEART

CS PRAVEEN CHOUDHARY
PROF ABHIJEET JAISWAL

MEMORANDUM AND ARTICLE OF ASSOCIATION OF COMPANY

Memorandum (Sec 2(56))

- "Memorandum of Association of a Company
- as originally framed or altered from time to time
- in pursuance of any previous Companies Law or of this Act"

Memorandum meaning:

Following meaning is drawn from definitions by **Palmer, Bowen L J. and Lord Cairns**

- It is the charter of a Company.
- It contains the objects for which the Company is incorporated.
- It defines the possible scope of operations of the Company.
- It defines the powers as well as limitations on the powers of a Company.
- It contains fundamental conditions upon which alone a company is allowed to be incorporated.

A document which enables the outside persons dealing with the company to know

I. power and range of activities of the company;
II. That a particular act is within the objects of the company

Case Law **Pacific Coast Coal Mines Ltd. Vs. Arbuthnot (1917)**

The company has no power to do any act not authorized expressly or impliedly by its memorandum and any act so done is ultra vires and incapable of ratification, even if every member of the company assents to it.

Case Law ***Ashbury Railway Carriage & Iron Co. Ltd.* v. *Riche***

Lord Cairn observed: "The MOA of a company is its charter and defines the limitations of the powers of the company. It contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it states negatively, if it is necessary to state, that nothing shall be done beyond that ambit"

Case Law **Cricket Club of India Ltd. V. Madhav L. Apte**

Sec 6 of companies act says that any provisions of MOA or AOA would be void if it is repugnant not only to express provisions of the companies act but also to those provisions which have to be read in the act by necessary implication.

Purpose:

For 3rd parties	To provide information to the third parties as to whether the contracts they are intending to enter into with the Company are within the object clause of the Company or not.
For shareholders	To provide information to the intending shareholder regarding the purpose for which his money is going to be used by the Company and the amount of risk he is taking in making the investment.

Case Law **Egyptian Salt And Soda Co. Vs. Port Said Salt Association Ltd.**

In short, the memorandum enables shareholders, creditors and all those who deal with the company to know what its powers are and what the range of its activities is.

FORMAT OF MEMORANDUM SEC 4(6)	
TABLE A	Company Limited By shares
TABLE B	Company limited by Guarantee & Not having share Capital
TABLE C	Company limited by Guarantee & having share Capital
TABLE D	Unlimited Companies & Not having share Capital
TABLE E	Unlimited Companies & having share Capital

Case Law **Palaniappa Mudaliar Vs. Official Liquidator,**

Minor and incompetent person cannot be subscriber.

Contents of Memorandum Section 4

Following are the Clauses/Conditions of Memorandum.

1) 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.

a) In case of Public Company: "Ltd" as last word.
b) In case of Pvt Co: "Pvt Ltd" as last word.
c) In case of OPC: "OPC" in Bracket below name of Co.

Note: Company registered under Section 8 for charitable objects has been exempted from this requirement.

Publication of Name

The name of the company and the address of the RO and the CIN 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.

However, if company has changed its name or names during the last **2 years**, it shall print, along with its name, the former name or names so changed during the last **2 years** as required above.

Restriction* on *the Name sec 4(2)

- Name stated in the **MOA** shall not be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous **Company Law;** or
- 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.

Case Law **Atlas Cycles (Haryana) Ltd. Vs. Atlas Products Pvt. Ltd (2008)**

Use of the brand name as corporate name was settled. Both the plaintiff and the defendant companies belong to the same family. The Appellant-plaintiff was the proprietor of the trade mark in the name "Atlas", The Respondent- defendant company containing the name "**Atlas**" in its corporate name started dealing in bicycles. The plaintiff objected to the use of the name "Atlas" by the defendant company. The Defendants were restrained from using the word 'Atlas' in their

corporate/trade name in respect of bicycles and bicycle parts.

The Name should not give Impression that the Company is Connected with the Government Sec 4(3)

Company shall not be registered with a name which contains any word or expression which is likely to give the impression that the company is connected with the Government, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Application for Reservation of Name* to *the Registrar [Sec 4(4)]

A person may make an application, in the Form **RUN** with the fee as per **Companies (Registration Office and Fees) Rules, 2014** to the ROC 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.

Approval for Reservation of Name by the Registrar for a Period of 20 Days from the date of approval or such other period as may be prescribed (w.e.f 3/1/18)

Note: Provided that in case of an application for reservation of name or for change of its name by an existing co., the ROC may reserve the name for a period of 60 days from the date of approval.

ROC has power to cancel the Name Reserved upon wrong or Incorrect Information if the Company has not been incorporated.

Powers of the Central Government in the matter of name where the Company has been incorporated Sec 16.

Rule 8 of companies (Incorporation) Rules 2014

In determining whether a proposed name is identical with another, the difference on account of the following shall be disregarded

a. Words like private, pvt., Pvt. (P), Ltd, Limited.
b. Plural version of any of the words appearing in the name
c. Spacing between letters and punctuation marks
d. Use of a different tense or number of the same words
e. Misspelled words, whether intentionally or not
f. Using different phonetic spellings or spelling variations
g. If the proposed name is the Hindi or English translation of name of existing company or LLP.
h. Different combination of the same words does not make a name distinguishable from an existing name
i. The addition of words like New, Modern, Shri Sri, OM, Jai Sai, The does not make a name distinguishable from an existing name.
j. The addition of an internet related designation such as .com, .net, .edu, .gov, does not make a name distinguishable from an existing name

The name of company shall be considered undesirable in following cases

1. Emblems and Names act 1950
2. Trademark
3. Offensive
4. Identical to LLP
5. Not related to principal objects
6. Financial Activities not included
7. Resemblance with foreign co. or LLP

8. British India
9. Embassy/ consular/ Connection
10. LLP in Liquidation
11. Special Business approval by Regulators

Note:

1. If any co. has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of 6 months from the change of activities after complying with all the provisions as applicable to change of name.
2. For the Sec 8 companies, the name shall include the words foundation, forum, association, Federation, chambers, confederation, council, Electoral, trust etc. Ever co. incorporated as Nidhi shall have the last word Nidhi Ltd. As part of its name.
3. The name released on change of name by any co. shall remain in data base and shall not be allowed to be taken by any other co. including the group co. of the co. who has changed the name for at least 3 yrs from the date of change subject to specific direction from the competent authority in the course of compromise, arrangement and amalgamation.
4. Proposed name is identical to the name of company dissolved as a result of liquidation proceeding and a period of 2 years have not elapsed from the date of such dissolution. If the proposed name is identical with the name of co. which is struck off in pursuance of action u/s 248, then the same shall not be allowed before expiry of 20 years form the publication in official gazette being so struck off.
5. The name including phrase "Commodity Exchange" may be allowed, if a NOC from forward market commission (FMC) is furnished. (MCA circular in 2014)

Case Law **Ewing V Buttercup Margarine Co. Ltd**

- The plaintiff was carrying on the business of selling margarine (a kind of butter) and tea as a sole trader in the name and style of Buttercup Dairy Company.
- The defendant Co. was registered in the name of buttercup margarine Ltd.
- The business of both the plaintiff and the defendant were the same.
- The court granted an injunction restraining the defendant company from using that name, as it was likely to deceive the public or cause confusion to the public.
- The court held that word 'Buttercup Margarine Company Ltd' was undesirable since the word 'Buttercup' was fancy one and it could mislead the public that the company was associated with Buttercup Dairy Company.

2) Situation or Registered Office Clause (Sec 12(1))

A company shall, **within 30 days from (w.e.f 3/1/18)** 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 shall furnish to the ROC verification of its registered office within 30 days of its incorporation in **Form INC-22**.

3) Objects Clause

All companies must state in their MOA the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. It sets out the objects and is the most important of all clauses. It indicates the extent of company's power and the sphere of its activities. It defines the limit of operations to be carried on by the company.

Any business carried on by the company should be stated in the MOA hence the business activities not mentioned in the objects clause of the memorandum shall be *ultra vires* and therefore, void. **(Doctrine of *Ultra Vires)***.

The objects should be stated in the following manner

a. The objects to be pursued, by the company on its incorporation are:
b. Matters which are necessary for furtherance of the objects specified in clause *3(a)* are:

Note: Here the word necessary for furtherance means ancillary, if object of a company is illegal, such company cannot be registered.

4) Liability Clause

Every company must state whether the liability of its members is limited by shares or limited by guarantee.

I. In a company limited by shares, that liability of its members is limited to the amount unpaid, the liability of a member whose shares are fully paid up is nil.

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 1 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.

5) Capital clause (Only in case of Company having Share Capital)

To be stated in the case of a company having a share capital only.

- 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 MOA agree to subscribe which shall not be less than **1** share per subscriber; and
- The number of shares each subscriber to the MOA intends to take indicated opposite his name.
- The authorised share capital can also be termed as Registered or Nominal Share Capital.

6) Association or Subscription clause

The subscribers to the MOA 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 all shares each subscriber has agreed to take and their signatures attested by a witness.

Note:

- Each subscriber must take at least **1** share; and
- Each subscriber must write opposite his name the number of shares which he agrees to

take.

7) Succession Clause (Only in case of OPC)

Name of person (Nominee) who in the event of death of subscriber, shall become member of company.

REQUIREMENTS FOR MEMORANDUM

- The MOA shall be **Printed,**
- Divided into **paragraphs** and **numbered** consecutively, **Signed by each subscriber**, who shall mention his address, description and occupation, if any.
- The signature shall be made in the presence of at least **1** witness who shall attest the signatures.

Alteration of Memorandum of Association (MOA) Sec 13

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 MOA.

1. By changing its name.
2. By altering it in regard to the State in which the registered office is to be situated.
3. By altering its objects.
4. By altering the liability clause.
5. By altering its share capital.

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 u/s 13(1).

Section 13(10) provides that no alteration made under this section shall have any effect until it has been registered with ROC. Further, any alteration of the MOA 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.

(Alteration of Name Clause (Sec 13(2))	
VOLUNTARY CHANGE OF NAME	
a) Availability of Name	The availability of the desired name is to be obtained from ROC by filing an application along with the prescribed fees.
b) Pass a special Resolution	The change in the name has to be approved by the shareholders by passing special resolution.
c) Approval of CG.	The prior approval of Central Government is required. Except for insertion of "PVT" or deletion of "Pvt".
d) Filing of Form MGT.14 with ROC	Form MGT.14 should be filed within 30 days together with a copy of the Special Resolution and the approval of the CG.
e) The approval of Central Government is not required	Where change is only addition or deletion of word 'private' consequent on conversion of private company into public company and vice versa.

B. RECTIFICATION OF NAME (COMPULSORY CHANGE OF NAME)
In the following cases CG has power to give directions to rectify its name if a Company has been

registered either inadvertently or otherwise, with a name, which i. Is identical with, or too nearly resembles the name of an existing Company ii. Infringes a registered trademark.	
(i) Procedure for change in case the name is identical with, or too nearly resembles the name of an existing Company	a. Ordinary Resolution passing of ordinary resolution in the shareholders meeting. b. Compliance with CG directions c. The Company shall comply with the direction within 3 months of the date of direction by the Central Government.
(ii) Procedure for change in case the name infringes a registered trademark on application within 3yeras from date of incorporation or change in name.	a. Ordinary Resolution b. Compliance with CG directions c. Passing of ordinary resolution in the shareholders meeting. d. The Company shall comply with the direction within 6 months of the date of direction by the Central Government.

EFFECT OF CHANGE IN NAME OF THE COMPANY
a. Where a Company changes its name it shall give notice to the ROC **within 30 days** and the ROC shall enter the new name on the register in place of the old name and shall issue a fresh COI with the necessary alterations. b. The change of name shall be complete and effective only on the issue of fresh COI by the ROC. c. The ROC shall also make the necessary alteration in the MOA of the Company.

Change in name of Listed Company:
Subject to following condition

1. A time period of at least 1 year shall be elapsed form the last name change.
2. At least 50% of the total revenue in the preceding one year period has been accounted for by the new activity suggested by the new name. OR
3. The amount invested in the new activity/ project is at least 50% of the assets of the listed entity;
   Provided that if listed entity has changed its activity which are not reflected in its name, it shall change its name in line with its activities within a period of 6 months form the change of activities in compliance of provisions of companies act 2013.

Note:

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

Procedure of Name change

1. A board meeting shall be convened to consider a new name for the company

2. After deciding, an application is required to be made to ROC in RUN for along with a fee of Rs. 1000 for ascertaining the availability of new name.
3. On confirmation from ROC, a board meeting is held to:
   a. Note down the new name
   b. Decide the day, date, time and venue of general meeting
   c. Approve the notice of General meeting
   d. Authorise the CS or any one director to issue the notice general meeting
4. Issue notice of GM to all members, auditors and directors at least 21 clear days before the date of general meeting.
5. Hold the GM and pass the special Resolution.
6. Special Resolution along with ES shall be filed with ROC in MGT 14 within 30 days from the date of passing the SR.
7. An application shall be made to CG in INC 24 along with certified copy of SR & altered copy of MOA within 60 days from the date of name reserved by ROC or 30 days from the date of passing the SR (w.i.e)
8. Apply to ROC in INC 25 for issue of fresh COI.

Change of Registered Office Sec 13(4) & 13(7)

1. **Within local limit of same city:**
   - 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 passing a **Board Resolution.**
   - A notice of the change is to be given to the **ROC** in **Form No. INC-22**.
   - This change of registered office does not involve alteration of MOA.

2. **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 (except OPC and other company up to 200 members) Notice to **ROC** in **Form no INC 22**, along with Form no MGT 14 **(within 30 days of passing of SR)**

3. **Change from One City to Another within the Same State Involving Change of Jurisdiction of Registrar of Companies:**
   - Proviso to **Section 12(5)** provides that along with Special Resolution, 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 **RD (Form INC 23)**, after hearing the parties shall pass necessary orders within a period of **30 days** from the date of the receipt of the application.
   - Thereafter, the company concerned shall file a copy of the said order with the ROC within a period of 60 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.

     A notice of the change is required to be given to the Registrar in **Form no INC 22**, along with **Form no MGT 14**, towards special resolution passed.

     Note: This provision is applicable only in those states where there are more than one

ROC. i.e. Maharashtra and Tamil Nadu.

4. Change from One State to Another State been obtained

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 (RD) on an application made to it.

The CG shall dispose of the application within a period of 60 days and after satisfying itself that the consent of the creditors, debenture-holders and other persons concerned have 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. File SR to ROC in MGT-14 within 30 days and certified copy of CG order. New ROC shall issue fresh COI to Company.

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 CG approving the alteration shall be filed by the company with the ROC 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.

Case Law **Minerva Mills Ltd. vs. Government of Maharashtra**

A State Government cannot oppose shifting of the registered office of a company from one state to another on the ground that by this change the State would be deprived of its revenue. The question of loss of revenue to one state would have to be considered in the context of total revenue of the Republic of India and in the interest of the country as a whole.

Alteration of Object Clause Sec (13)

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 MOA needs to be passed through Postal Ballot in terms of Section 110.

The Company needs to file SR in the **Form MGT-14** along with the altered copy of the MOA and other relevant documents with the RO with the filing fee as prescribed Thereafter the ROC shall register alteration of the MOA with respect to the objects of the company and certify the registration within a period of **30 days** from the date of filing of the SR.

Sec 13(8) and Rule 32 of Companies (Incorporation) Rules states that

I. When the company has raised money from public through prospectus and has any unutilised amount out of the money so raised, a special resolution has to be passed through postal ballot and the notice for SR for altering the objects shall contain the following particulars, namely:-
   - the total money **received**;
   - the total **money utilized** for the objects stated in the prospectus;
   - the **unutilized amount** out of the money so raised through prospectus,
   - the particulars of the **proposed alteration** or change in the objects;
   - the **justification** for the alteration or change in the objects;

- the **amount proposed to be utilised** for the new objects;
- the estimated **financial impact** of the proposed alteration on the earnings and cash flow of the company;
- the **other relevant information** which is necessary for the members to take an informed decision on the proposed resolution;
- The **place** from where any interested person **may obtain a copy of the notice** of resolution to be passed.

II. 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, (except **OPC** and other companies with members not exceeding 200).

III. The notice shall also be placed on the website of the company, if any.

Case law 37 **Cyclists Touring Club Co.**

If object of MOA of any company prescribe certain units on company and if expansion of object is inconsistent with nature of original business. Such alteration will not be granted.

Alteration of Liability Clause

a. **Limited to unlimited:** All members must agree in writing.

b. **Unlimited to limited company:** Such change shall not affect any existing debt, liquidity, obligation or contract.**Conversion of unlimited liability company into a limited liability company**

It shall not be converted if

a) Its net worth is negative OR
b) An application is pending under co. act 1956 or co. act 2013 for striking off its name OR
c) The co. is in default of any of its annual Return or financial statement under the provisions of co. act 1956 or co. act 2013
d) The co. has not received amount due on calls in arrears, from its directors for at least 6 months from the due date OR
e) A petition for winding up is pending against the company
f) An inquiry, inspection or investigation is pending against company.

Process of Conversion

1. A special resolution is required to be passed.
2. Within 7 days, from the date of passing the Special Resolution, the company shall publish a notice in INC 27A of such proposed conversion in 2 Newspaper (one English and one vernacular) in the district in which the registered office of the company is situated and shall also place the same on the website of the company, seeking objection if any, from the person interested in its affairs to such conversion and cause a copy of such notice to be dispatched to its creditors and debenture holders made as on the date of notice o the general meeting by registered post or by speed post or through courier with proof of dispatch.
3. The notice shall also state that the objections, if any, may be intimated to ROC and to the company within 21 days of the date of publication of the notice, duly indicating nature of interest and ground of opposition.
4. The company shall within 45 days of passing of SR file an application to ROC for its conversion into a company limited by shares or guarantee by attaching the following documents

a. Notice of GM along with ES
b. Copy of SR
c. Copy of newspaper publication
d. A copy of altered MOA & AOA duly certified by one of director authorised or CS of co.
e. Declaration signed by at least 2 directors of co. including MD, that such conversion shall not affect any debts, liabilities, obligations or contracts incurred or entered into by or on behalf of the company before conversion (except to the extent that the liability of the members shall be limited)
f. A complete list of creditors and debenture holders.
g. A declaration of solvency signed by at least 2 directors of co. one of whom shall be the MD.
h. A certificate of solvency from auditor.
i. NOC from sectoral regulator, if applicable
j. NOC from all secured creditors, if any.

5. After wards the ROC shall suitably decide whether the approval for conversion should or should not be granted within 30 days form the date of receipt of application complete in all respects.
6. The certificate of incorporation consequent to conversion of unlimited liability company to into a company limited by share or guarantee be in form INC 11A issued to the company upon grant of approval for conversion.

Conditions to be complied with, after conversion

1. Company shall not change its name for a period of one year form the date of such conversion.
2. The company shall not declare or distribute any dividend without satisfying past debts, liabilities, obligations or contracts incurred or entered into before conversion.

Conversion of company limited by guarantee into a company limited by shares

1. A co. other than sec 8 company may convert itself into a company limited by shares.
2. The company seeking conversion shall have a share capital equivalent to the guarantee amount.
3. A special Resolution is required to be passed.
4. A copy of such SR shall be filed with ROC within 30 days along with altered MOA and AOA and a list of members with the no. of shares held aggregating to minimum paid up capital which is equivalent to the amount of guarantee hither to provided by its members.
5. The ROC shall take a decision on the application filed under these rules within 30 days from the date of receipt of application complete in all respect and upon approval of form INC 27, the company shall be issued with a certificate of incorporation in Form INC 11B.

Alteration of Capital Clause Sec 61

A company limited by shares may, by passing an ordinary resolution in a general meeting, alter the capital clause of its MOA; provided authority to alter is given to it by its AOA. A notice of alteration in Form No. SH-7 and copy of resolution is required to be filed with the ROC within 30 days.

Ways of altering capital clause:

- By **increasing** its authorized share capital by an issue of new shares. 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.
- By **Consolidating and dividing** existing shares into shares of larger denomination.
- By **sub-dividing** shares into shares of smaller denomination than is fixed by the MOA, so, however, that the proportion between the amount paid and unpaid shall remain the same.
- By converting **fully - paid shares into stock** or vice - versa.
- **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 NCLT, if it does not result in changes in the voting percentage of shareholders.

These alterations are, however, required to be notified and a copy of the resolution should be filed with the ROC within 30 days of the passing of the resolution along with an altered MOA. [Section 64(1)].

➢ ***Reduction of paid up share capital by the confirmation of the Tribunal Sec 66***

Subject to confirmation by the NCLT on an application by the company, a company and having a share capital may, by a special resolution, reduce the share capital in any manner and in particular, may-

a. extinguish or reduce the liability on any of its shares in respect of the share capital not paid - up; or
b. either with or without extinguishing or reducing liability on any of its shares,-
   I. Cancel any paid-up share capital which is lost or is unrepresented by available assets; or
   II. Payoff any paid-up share capital which is in excess of the wants of the company, alter its MOA by reducing the amount of its share capital and of its shares accordingly.

Case Study ***Sandvik Asia Ltd. v Bharat Kumar Padamsi***

The prayer for reduction of the share capital of the appellant company was allowed because not only the non-promoter shareholders were being paid a fair value for their shares, an overwhelming majority of them had voted in favour of the resolution for reduction of the capital.

Articles of Association Sec 2 (5)

"Articles" means Articles of Association of the company as originally framed or as altered from time to time in pursuance of any previous company's law or of this Act.

Form and Contents of Articles Sec 5 [Section 5]

The AOA of a company shall be in respective forms specified in Tables, **F, G, H, I** and **J** in Schedule 1 as maybe applicable to such company.

➢ The Form in Table F is applicable in the case of companies limited by shares;
➢ The Form in Table H is applicable to the companies limited by guarantee not having a share capital;

- The Form in Table G is applicable to companies limited by guarantee having a share capital;
- The Form in Table J is applicable to unlimited companies not having share capital.
- The Form in Table I is applicable to unlimited companies having share capital;

The AOA of a company shall contain the regulations for management of the company. The AOA 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 AOA 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 MOA and shall also contain such matters, as may be prescribed. Sec 5(2)

Contents of AOA

AOA usually contain provisions relating to the following matter.

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

Note: AOA shall be in printed form and shall be signed by signatories to MOA. A Pvt. Co. Ltd by guarantee, unlimited liability company may have their own AOA, if any provisions of AOA is contrary or inconsistent to the Companies Act or beyond the power of company, then such provision shall be ultra vires and void.

Entrenchment Provisions [Section 5]

The AOA may contain provisions for entrenchment to the effect that specified provisions of the AOA 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.

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. (Sec 5(3))

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 AOA 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)]

Such alteration shall be notified to ROC in prescribed form and with fees.

Alteration of Articles of Association [Section 14]

- A company has a statutory right to alter its AOA
- Subject to the provisions of the Act and to the conditions contained in the MOA;
- A company may, by a special resolution, alter its AOA including alterations having the effect of conversion of a private company into a public company; or vice versa;
- It 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 NCLT;
- Section 14(2) - 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.
- Copy of altered AOA+ order of NCLT shall be filed with ROC in 15days.

Restriction on Alteration of Articles of Association

- Alteration must not exceed the powers given in MOA.
- Alteration must not be inconsistent with Companies Act.
- Alteration must be in the bonafide interest of company.
- Alteration must not be illegal.
- Alteration must not be against to public policy.
- No alteration regarding expulsion of member.

  Note: any irregular alteration, which have been acted upon for many years, are binding.

Article subordinate to MOA/ Articles in relation to MOA.

Section 6 Act to Override MOA and AOA

Section 6 of the Companies Act, 2013 provides that:

- If the MOA & AOA or resolution passed by board or members contain provisions which are contrary to the act, then the provisions as contained under the act shall prevail.
- If the provisions contained in the MOA & AOA or the resolution passed by Board or members is more restrictive than that of the Act, then such restrictive provisions shall prevail over the act.

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:-

- The memorandum;
- The articles; and
- Every agreement and every resolution referred to in subsection (1) of Section 117, if and in so far as they have not been embodied in the MOA or AOA.

2) In case of default the company and every officer in default shall be liable, to a penalty of 1000/- rupees for each day of default or Rs.1, 00,000/- whichever is less.

Legal Effect of registration of MOA and AOA (Sec 10)

Subject to the provisions of the Act, the MOA and AOA shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member; and contained a covenant on its and his part to observe all the provisions of the MOA and AOA.

The effect of documents, when registered, may be discussed under the following heads:-

1) Members bound to the Company;
2) Company bound to the members;
3) Member bound to Member; and
4) Company not bound to outsider.

1. Members Bound to the Company

The MOA and AOA constitute a contract bind the members to the company. The company can, therefore, enforce articles against any member.

Case law 38 **Boreland's trustee vs. steel brother and company ltd.**

AOA of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons at a price fixed by the directors. Boreland a shareholder was adjudicated bankrupt.

His trustee in bankruptcy claimed that she was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the AOA as the shares were purchased by Boreland in terms of the AOA of the company.

2. Company Bound to Members

Just as the members are bound to the company, so also the company is bound to the members to observe and follow the AOA.

Case law 39 **Wood vs. Odessa Waterworks co.**

The AOA provided that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in cash. Instead of paying the dividend in cash to the shareholders resolution was passed to give them debentures/bonds. The directors were restrained from acting on the resolution.

3. Member Bound to Member

_Case law 40 **Rayfield vs. Hands**

As between the members inter-se each member is bound by the articles to the other members. In Rayfield Vs. Hands, the plaintiff was shareholder of company. The articles required him to inform the director of his intention to transfer his shares and the director (who were also member) were to

take those shares at a fair price. The plaintiff notified the directors, who contended that they were not bound to take the shares and pay for them. It was held that the articles were banking upon the plaintiff as *member* and the directors as members, so that the member- directors upon the plaintiff as a member and the directors as members, so that the member-directors were bound to purchase plaintiff's shares and pay for them.

4. Company not Bound to Outsider

The team "outsider" signifies a person who is not member of the company, even if she is a director of and/or solicitor to the company. The AOA do not constitute a contract between a company and an outsider. No outsider can acquired any enforceable rights by virtue of AOA. The AOA do not confer any contractual rights even upon a member, in a capacity other than that of a member. To succeed, the party suing must prove a contract outside and independent of the AOA of the company.

Difference between Memorandum and Article of Association

- The memorandum, being the charter of the company, is the supreme document. Articles are subordinate to the memorandum. If there is conflict between the articles and the memorandum, the latter prevails.
- Memorandum is the charter of the company, which defines the fundamental conditions and objects for which it is incorporated. Articles of association contain the internal rules and regulations framed by the company to govern its internal management.
- The memorandum defines the area beyond which the activities of the company cannot go while articles lay down the regulations for the internal management of the company within the area determined by the memorandum (Ashbury versus Riche).
- Registration of Memorandum is mandatory for all classes of companies, however a public company with share capital may adopt the model specified in Table F of Schedule I as its Articles, so as to avoid the formalities of registration of articles with the Registrar.
- Memorandum can be altered by following various prescribed provisions which may include approval of NCLT. In case of articles, the alteration can be done by a special resolution, to any extent, provided they do not conflict with the Memorandum and the Companies Act.
- Any act of the company which is ultra vires, the memorandum is wholly void and cannot be ratified even by the whole body of shareholders. Any act of the company, which is ultra vires the articles, but is intra vires the memorandum, can be confirmed by the shareholders.

Doctrine of ultra vires

The meaning of the term 'ultra vires' is **beyond the powers** of. Anything which is outside the specified objects and powers or not reasonably incidental to or necessary for the attainment of objects of the company is ultra vires the company and therefore is **void.**

No rights and liabilities, on the part of the company, arise out of such transactions and it remains nullity even if every member assents to it. Consequently, an act, which is ultra vires the company, does not bind the company and neither the company not the other contracting party can sue on it.

The study of the objects clause in the MOA cannot be complete without understanding the evolutionary process that this aspect has undergone in the UK during the last 133 years. The *ultra vires* doctrine of the object was finally settled and truly laid in the celebrated case of *Ashbury Railway Carriage and Iron Co.* Vs. *Riche* In that case, as illustrated that the object of the company was "to make and sell, or lend on hire, railway carriages and wagons and all kinds of railway plant, and to carry on the business general contractors; to purchase, lease, work and sell mines, minerals, lands and to do all such other things as are necessary, contingent or conducive to all or any of such objects."

"The company entered into a contract with the plaintiff for the financing of the construction of a railway line in Belgium and the question that came up before the court was whether the contract was valid. The House of Lords held that the contract was *ultra vires* the company and observed that the Memorandum of Association "states affirmatively the ambit and extent of vitality and power which by law are given to the corporation and it states negatively that nothing shall be done beyond that ambit and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

- **Ultra vires act**

  An ultra vires act cannot be ratified even by whole body of shareholders.

  The execution of a document by the managing directors, without the common seal, is an ultra vires act and a subsequent resolution cannot ratify it.
- **Ultra vires contract**

  A contract, which is ultra vires the company, is no contract at all.
- **Ultra vires borrowings**

  In a case where the borrowing is ultra vires directors and intra vires the company the money could be recovered in an action for money and received.
- **Ultra vires grants and guarantees**

  A guarantee for the payment of dividends, which enables the guarantor to bring an action against the company for reimbursement even when there are no profits, is ultra vires and void.

Consequences or Effects of Ultra Vires Act

- ✓ **Injunction:** Any member of the company can bring injunction against the company restraining it from proceeding with the ultra vires acts.
- ✓ **Personal liability of Directors:** The funds of the company under the act can only be applied in carrying out its authorized objectives. If director has made an ultra vires payment he may be compelled to refund the money to the company.
- ✓ **Property acquired**
- ✓ Ultra vires/ ultra vires Torts.

Doctrine of Constructive Notice

The office of the ROC is a public office and documents filed or registered therewith are public documents. These documents are open and accessible to all for inspection. The MOA and AOA of a company assume the character of public document on their registration with the concerned ROC, therefore the AOA are open to any person to read these documents and ensure that his contract is in keeping with the provisions contained in the Articles.

Case law 42 **Kotla Venkata Swamy Vs. Ramamurthy**

Outsiders dealing with the company are presumed to have constructive notice of contents of the memorandum and the articles.

The 'Doctrine of Constructive Notice' is a negative Doctrine. Because it is against the outsiders dealing with the company and cannot resort to the plea that they did not read or understand the MOA/AOA fully. However, there is one exception to the wholesome rule of Constructive notice, which is called "Doctrine of Indoor Management".

Doctrine of Indoor Management

The Doctrine of Indoor Management restricts the scope of the "Doctrine of Constructive Notices".

This Doctrine is also termed as '**Turquand Rule**' and was enunciated in the famous and leading case of ***Royal British Bank* vs. *Turquand*** in 1856.

It is based on the maxim **Omnia Praesumuntur Rit Esse Acts** (all things are presumed to have been done rightly). It seeks to protect outsiders against the company and its management. It provides a shelter to the outsiders dealing with the company that are, in no way, bound to judge the regularity of the internal procedures of a company. In case of companies where closed door policy is adopted, it will not be within the reach of the outsider dealing to know the regularity of the internal management of the company. It is none of the business of outsiders to conduct an inquiry and make sure that internal procedures have been duly and timely adhered to by the company and they can rely on them.

Exceptions to the Doctrine of Indoor Management

i. The doctrine of indoor management has its own exceptions as stated hereunder.-
ii. The rule does not protect a person actually having knowledge of the irregularity.
iii. The rule will not apply in favour of a person who does not make inquiry regarding the transaction being made under suspicious circumstances. Non-making of inquiry by him where the circumstances so warrant may be considered as negligence on his part and may not be able to resort to this doctrine as his shelter.
iv. The rule does not protect void or illegal *ab initio* transactions.
v. If the acts are outside the scope of the apparent authority, rule will not render protection.

The rule cannot be invoked in favour of a person who did not consult the Memorandum and articles of Association.

Doctrine of Alter Ego

It is used by the courts to ignore the status of shareholders, officers, and directors of a company in reference to their liability in their respective capacity so that they may be held personally liable for their actions when they have acted fraudulently or unjustly.

Case law 43 **Lennards carrying co. ltd. Vs. Asiatic petroleum ltd.**

Viscount Haldane propounded the "alter ego" theory and distinguished it from vicarious liability. The House of Lords stated that the default of the managing director who is the "directing mind and will" of the company, would be attributed to him and he will be held for the wrong doing of the company.

TO MAKE IT BY HEART

CS Praveen Choudhary
Prof. Abhijeet Jaiswal

LIMITED LIABILITY PARTNERSHIP

CONCEPT OF LLP

LLP is a corporate business vehicle combining the vital aspects of a partnership firm and the advantages of a limited liability company. LLP is a hybrid of a company and a partnership. The LLP is a separate legal entity which can continue its existence irrespective of changes in its partners

LLP enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as a partnership.

The LLP Act, 2008 (LLP Act) does not provide an exhaustive definition.
As per Section 2(n) - "limited liability partnership" means a partnership formed and registered under this Act.

NATURE AND CHARACTERISTICS OF LLP

1. The LLP is a body corporate having **separate entity** from its partners and **perpetual succession**.
   The LLP being a separate legal entity is liable for all its assets, with the liability of the partners limited only to the amount of contributed by them just like a company. No partner will be individually liable for any wrongful acts of other partners.
   However if the LLP was formed for the purpose of defrauding creditors or for any fraudulent purpose, then the liability of the partners who had the knowledge will be unlimited
2. An LLP in India is **governed by the LLP Act, 2008** and, therefore, the provisions of Indian Partnership Act, 1932 are not applicable to it.
3. Every LLP shall **use the words "LLP"** or its acronym "**LLP**" as the last words of its name.
4. An LLP is a **result of an agreement between the partners**, and the mutual rights and duties of partners of an LLP are determined by the said agreement subject to the provisions of LLP Act, 2008.
5. There must be **at least 2 designated partners** in every LLP of whom **1 shall be resident in India**.
6. Every LLP shall maintain **annual accounts** to show its true state of affairs. It must prepare a **statement of accounts and solvency** every year and file with the Registrar.
7. The **Central Government** may, whenever it thinks fit, **investigate** into the affairs of an LLP by appointing a **competent Inspector**.
8. A **firm**, **private company** or **an unlisted public company** have the option to **convert itself into LLP** as per the provisions of the Act. Upon such conversion, the Registrar will issue a certificate to that effect.
   After issuance of a certificate of registration, all the property of the firm or the company, all assets, rights, obligations relating to the company shall be vested in the LLP so formed, and the firm or the company stands dissolved. The name of the firm or the company is then removed from the Registrar of Firms or Registrar of Companies, as the case may be.
9. Like the company, an **LLP can be wound up either voluntary or by the Tribunal** established under The Companies Act, 2013

10. The LLP Act 2008 also enables the Central Government to apply the provisions of the Companies Act whenever it thinks appropriate.

ADVANTAGES OF LLP

1. **Easy to form:** Forming an LLP is an easy process. It is less complicated and time consuming unlike the process of formation of a company.
2. **Liability:** The partners of the LLP is having limited liability which means partners are not liable to pay the debts of the company from their personal assets. No partner is responsible for any other partner's misconduct.
3. **Perpetual succession:** The life of the LLP is not affected by death, retirement or insolvency of the partner. The LLP will get wound up only as per provisions of the LLP Act.
4. **Management of the affairs:** An LLP has partners, who own and manage the business. This is different from a company, whose directors may be different from shareholders.
5. **Easy transferability of ownership-** There is no restriction upon joining and leaving the LLP. It is easy to admit as a partner and to leave the firm or to easily transfer the ownership to others.
6. **Taxation**: an LLP is not subject to Dividend Distribution Tax (DDT). Distributed profits in the hands of the partners is not taxable. For Income Tax purposes, LLP is treated on par with partnership firms.
7. **No compulsory audit required:** Every business has to appoint an auditor for checking the internal management of the company and its accounts. However, in the case of LLP, there is no mandatory audit required. The audit is required only if turnover of the LLP **exceeds Rs. 40 lakhs** and where the contribution by partners exceeds Rs 25 lakhs.
8. **Fewer compliance requirements**: An LLP is much easier and cheaper to run than a company as there are just few compliances every year. On the other hand, a company has a lot of compliances to fulfil.
9. **Flexible agreement:** The partners are free to draft the agreement as they please, with regard to their rights and duties within the ambit of LLP Act 2008.
10. **Easy to wind-up:** Not only is it easy to start, it is also easier to wind-up an LLP, as compared to a company.

DISADVANTAGES OF LLP

1. **Restricted Access to Capital Markets:** LLPs are small form of business and cannot get its shares listed in any stock exchange through initial public offerings. With this restriction, LLP may find it difficult to attract outside investors to buy the shares.
2. **Rights of partners:** An LLP can be structured in such a way that one partner has more rights than another. So it isn't a one vote per share system. So, some lesser partners may feel compromised if higher percentage holder choose to move the business in a direction that affects their interests.
3. **Public Disclosure of LLP Information:** A LLP must file its Annual Returns, Financial Statements etc. to the ROC annually. Which become public document once filed with ROC and may be inspected by general public including competitors by paying some fees to the ROC. Information disclosure can make an entity competitively disadvantaged. Competitors – especially those not required to disclose any documents – can access that information and use it to improve their own business.

4. **Limitations in Formation of LLP:** LLP cannot be formed by a single person. A non – resident Indian and a Foreign National willing to form a LLP in India must have one person resident in India to act as Designated Partner.
   (Scarlett Johansson and Gal Gadot cannot form a LLP by them self's they will have to come to Abhijeet Sir as he is resident in India and can act as Designated Partner)
   Further FDI in LLP is allowed through government route only and that too in those sectors only, where 100% FDI is allowed under automatic route under the FDI Policy. This limitation makes LLP an unattractive form of business.
5. **Offenses and penalties:** LLP Act, 2008 provides that for non-compliance on procedural matters such as delay in filing of e-forms, one has to pay default fee of Rs. 100 for every day for which the default continues.
   The offense can result in either
   i. Payment of fine **OR**
   ii. Payment of fine as well as imprisonment of the offender.
6. **Exit Options are Not Easy for LLPs in default of Filings:** A LLP which has *defaulted in filings its statement of accounts and annual return with the ROC*, willing to shut down its operations and wind up, *will have to make its default good first by filing necessary e-forms with late filing fee*. This provision is making LLP an unattractive form of business as in India there are many businesses that are ignorant about compliances.
7. **Limitation in External Commercial Borrowings (ECB):** LLPs are not allowed to raise ECB. Therefore, a LLP cannot avail commercial loans from its foreign partners, FIIs, Foreign Banks, and any financial institution located outside India.

PROVISIONS RELATED TO PARTNERS

Any person (Individual or Body Corporate) may be a partner in a LLP.

Disqualification of Partners
Individual shall not be capable of becoming a partner of a LLP, if-

a) He has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
b) He is an undischarged insolvent; or
c) He has applied to be adjudicated as an insolvent and his application is pending.

Minimum number of partners
(1) Every LLP shall have at least 2 partners.
(2) If at any time the number of partners is reduced below 2 and the LLP carries on business for more than 6 months while the number is so reduced, the person, who is the only partner of the LLP during the said time and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the LLP incurred during that period.

Section 7(1) - Designated partners.

Every LLP shall have at least 2 designated partners who are individuals and at least one of them shall be a resident in India:

- ✓ Provided that in case of a LLP in which all the partners are bodies corporate **OR**
- ✓ in which one or more partners are individuals and bodies corporate,

at least 2 individuals who are partners of such LLP or nominees of such bodies corporate shall act as designated partners.

Explanation :- For the purposes of this section, the term "resident in India" means a person who has stayed in India for at least 182 days during the immediately preceding one year.

STEP BY STEP PROCEDURE TO REGISTER A LLP

STEP 1- OBTAIN DIRECTORS' IDENTIFICATION NUMBER (DIN)

Every individual intending to be appointed as designated partner of a LLP has to make an application for allotment of DIN. The applicant can submit E-form DIR-3 to apply for DIN. And such DIN shall be sufficient for being appointed as designated partner (w.e.f 12/06/18)

In case of change in his particulars he shall intimate such change to CG in DIR 6 within 30 days(w.e.f 12/06/18)

STEP 2 – REGISTER DIGITAL SIGNATURE OF DESIGNATED PARTNERS

The applicants whose signatures would be placed on the application forms must have a Class 2 Digital Signature Certificate (DSC) from an authorized certifying agency.
This DSC has to be registered on the MCA website.

STEP 3 – -FILE ~~FORM 1~~ (RUN LLP) FOR NAME AVAILABILITY

- ✓ Such application shall be made through the web service, RUN-LLP, available at www.mca.gov.in and be accompanied by prescribed fee which may either be approved or rejected, as the case may be, by the Registrar at CRC after allowing a re-submission of such application within 15 days for rectification of defects.
- ✓ Fill ~~FORM 1~~ **(RUN LLP)** for reservation of name and fill in the details. Select name of the proposed LLP (up to 2 choices can be indicated).
- ✓ State the significance of the key or coined word in the proposed name in brief Enter the details of the applicant or any other relevant information in comments section.
- ✓ Any partner or designated partner in the proposed LLP may submit ~~FORM 1~~ **(RUN LLP)**.
- ✓ Once the name approval application is accepted by the MCA, a LLP name approval letter will be issued to the proposed Partners.

STEP 4 – FILING OF ~~(FORM 2)~~ (FiLLiP) FOR INCORPORATION AND SUBSCRIPTION DOCUMENT

Within 60 days from receiving the Name approval Letter from ROC as per Section 11, File incorporation documents in **(~~FORM 2~~)** **(FiLLiP)** along with fees , with the Registrar having jurisdiction over the State in which the registered office of the LLP is to be situated.

The form must be digitally signed by a person named in the incorporation document as a designated partner having DIN or DPIN. If an individual do not have DPIN or DIN, application for allotment of DPIN shall be made in FORM FiLLiP but allowed only up-to 2 individuals only.

Provided also that an application for reservation of name may be made thorough FiLLip

Also, it has to be digitally signed by an advocate/Company Secretary/Chartered Accountant/Cost Accountant in practice.

Where the ROC, on examining Form FiLLiP, finds that it is necessary to call for further information or finds such application or document to be defective or incomplete in any respect, he shall give intimation to the applicant to remove the defects and re-submit the e-form within 15 days from the date of such intimation given by the ROC.

And if the filing is still defective, ROC may give one more opportunity of 15 days to remove such deficiencies.

However, in any case total period shall not be more than 30 days.

After the ROC is satisfied that all the formalities with respect to the incorporation has been complied, he will issue a Certificate of Incorporation in form 16 as to formation of the LLP within maximum of 14 days from date of filing of documents

"

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GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS
Central Registration Centre
Form 16
[Refer Rule 11(3) of the Liability Partnership Rules, 2009]
CERTIFICATION OF INCORPORATION

LLP Identification Number:

It is hereby certified that ..... is incorporated pursuant to section 12(1) of the Limited Liability Partnership Act 2008.

Given under my hand at Manesar this ..... day of ..... Two Thousand .....

For and on behalf of the Jurisdictional Registrar of Companies
Registrar of Companies
Central Registration Centre

Disclaimer: This certificate only evidences incorporation of the LLP on the basis of documents and declarations of the applicant(s). This certificate is neither a license nor permission to conduct business or solicit deposits or funds from public. Permission of sector regulator is necessary wherever required. Registration status and other details of the LLP can be verified on www.mca.gov.in

Step 5 – DRAFTING & FILING OF LLP AGREEMENT

After incorporation of LLP, LLP agreement has to be drafted in accordance with LLP Act.
LLP agreement is to be filed **within 30 days** of incorporation of LLP.
The Designated Partners has to file the information in **Form 3** (Information with regard to LLP Agreement and changes, if any, made therein).

LLP AGREEMENT

LLP agreement defines the roles, responsibilities, rights, and powers of the partners to LLP and to each other. Hence, it creates the foundation for the smooth running of LLP. LLP agreement clarifies the managerial, operational as well administrative responsibilities and sets clear methodologies for decision making, adding a new partner and disassociation of existing partner.

Section 2(1)(O) of the LLP Act, 2008 defines it as under

LLP Agreements mean any written agreement between the partners of the LLP or between the LLP and its partners which determines mutual rights and duties of the partners and their rights and duties in relation to that LLP."

The value of stamp paper on which the LLP agreement must be printed or stamp duty to be paid on the LLP agreement is dependent on the state of incorporation and amount of capital contribution from the partners

PREPARATION OF LLP AGREEMENT

- ✓ Draft the agreement and print it on a Stamp paper of requisite value. Value of Non-judicial Stamp Paper depends on the state in which Registration of LLP is done and on the amount of capital contribution.
- ✓ All partners should sign the agreement at the bottom of all pages
- ✓ Two witnesses should sign the agreement at the end of the document
- ✓ Each partner should be provided a copy of the agreement

ESSENTIAL CLAUSES/ CONTENTS TO BE INCLUDED IN THE LLP AGREEMENT

SR. NO.	PARTICULARS	DESCRIPTION
1	**INTERPRETATION / DEFINITIONS**	This clause is the essence of any LLP agreement. An LLP Agreement must provide for various definitions such as the definition of designated partners, the accounting period, business of LLP and the name with which the LLP will be known. The agreement must also provide with full address of the registered office of the LLP as well as the address of all the partner
2	**DESIGNATED PARTNERS**	LLP agreement shall clearly mention the name, age and address of each of the Designated Partners correctly.
3	**NAME OF THE LLP**	This clause shall state that business of the LLP shall be carried

	AND CHANGES TO IT	on in the name and style of [Name of LLP]. Any change in the name of the LLP shall be notified to the Registrar by the Designated Partner(s) in accordance with the provisions of the LLP Act and the Rules.
4	**REGISTERED OFFICE OF THE LLP**	LLP agreement shall state that partnership business shall be carried on at the under mentioned address, which shall also be its registered office The business shall also be carried from such other places as may be mutually decided by the partners from time to time.
5	**BUSINESS OF THE LLP**	This clause must clearly specify the nature of the business that the LLP will be carrying on.. The LLP may engage in any and all activities necessary, desirable or incidental to the accomplishment of the conduct of such business of the LLP including but not limited to such ancillary business. It may also include any other business conducted in such manner as may be decided by the majority of Partners from time to time
6	**CAPITAL CONTRIBUTION**	Total contribution of the LLP and the contribution by each partner along with the percentage of contribution to be mentioned in this clause. .If any partner is contributing in non-monetary form, that is, he / she is going to render services instead of monetary contribution, add the same. Manner of Additional capital contribution by partner during the course of agreement to be included as well .Manner in which contribution can be withdrawn by the partners shall also be stated in this clause.
7	**PROFIT SHARING RATIO**	An ideal LLP Agreement must also mention the ratio in which the profits and the losses of the business will be shared among the partners. The partners must clearly state the amount of profit that each member receives, or the amount of the loss that they're liable for will be set out in the agreement.
8	**RIGHTS AND DUTIES OF DESIGNATED PARTNERS**	The LLP Agreement must specify the various rights and duties of the Designated Partners as may be mutually agreed by them. In the absence of such separate agreement between the partners about such rights and duties, etc., the provisions of Schedule I of the Limited Liability Act, 2008 will apply as given in Section 23(4) of the said act.
9	**ADMISSION OF PARTNER, RETIREMENT RESIGNATION AND EXPULSION OF PARTNERS**	LLP agreement must include the provisions regarding admission of new partners, retirement as well as the death of a partner, etc. The agreement must provide guidelines for the expulsion of partners as well.
10	**REMUNERATION & INTEREST TO BE PAID TO**	The LLP agreement shall contain a clause regarding the amount of remuneration to the Designated Partner(s), for rendering the services as such. This clause shall contain the

	PARTNERS	rate of interest to be paid to the partners on their capital contribution
11	**BANK ACCOUNT**	This clause shall set out the modus operandi of the Bank account transactions of the LLP
12	**BOOKS OF ACCOUNTS AND ACCOUNTING YEAR**	The LLP agreement shall contain clause relating to maintenance of books of accounts and other documents, method of accounting and the details relating to the Accounting year of the LLP.
13	**MEETINGS**	LLP agreement shall clearly state the manner in which the decisions of LLP shall be taken in the meeting of the partners and shall also provide as to how the same shall be recorded in the minutes and the place of maintenance of such minutes book etc.
14	**INDEMNITY**	The LLP agreement should contain a provision regarding indemnities. The clause of indemnity states that the LLP must protect its partners from any kind of liability or claim incurred by them while carrying the business of the LLP. The partners should also agree to indemnify the LLP for the loss caused by it due to any breach committed by them.
15	**DISPUTE RESOLUTION**	A well-drafted LLP must always contain a provision for resolving disputes between the members. In a normal course, every LLP prefers Arbitration as a mode of resolving disputes. Such LLP is governed by the Arbitration and Conciliation Act, 1996. Thus, every LLP agreement must incorporate a clause providing for a dispute resolution mechanism to avoid disputes that result in lengthy and expensive litigation.
16	**TERM OF LLP /WINDING UP**	The partners must specify the term of validity of such LLP agreement whether it is a perpetual agreement or is valid for a fixed period. The agreement must also provide for the situations when the partners have agreed to wound up the affairs of the LLP either voluntarily or by an order of Tribunal for the specific violations as mentioned in Section 64 of the Act.
17	**GENERAL PROVISIONS**	The LLP agreement shall in addition to the above mentioned clauses shall include general provisions on binding on heirs ,successors ,counterparts, serving of notices ,waiver, Governing law etc.

ALTERATION TO THE LLP AGREEMENT

The LLP Agreement is the charter of the LLP, similar to the Memorandum of Association and Articles of Association for a private limited company. It defines the scope and extent of the LLP's operations as well as the rights, duties, obligations of the partners.

- ✓ Altering the agreement can be done by passing a resolution approving the revision in the LLP Agreement.

- ✓ The second step is to file Form-3 with the Registrar within 30 days of the amendment in the agreement.

The Documents to be attached to the Form 3 shall include the following

- Initial LLP Agreement
- Supplementary/ Altered agreement
- Optional attachments if any

CHANGE IN PARTNER /DESIGNATED PARTNER

If the change in LLP agreement is due to change in partner(s)/ designated partner(s), Form 4 is also required to be filed along with Form 3.

DOCUMENTS TO BE ATTACHED WITH FORM 4

- ✓ Consent of the partner
- ✓ Evidence of cessation
- ✓ Affidavit or any proof of change of name
- ✓ If the partner or a designated partner is a company, copy of resolution of the company to become partner in LLP
- ✓ Copy of resolution/ authorization letter mentioning name and address of individual nominated as representative nominee/ partner

CHANGE OF NAME Section 19

A LLP that is registered in India may, under certain circumstances, need to change its name. The reasons can be business-related or on account of certain directives from the Central Government (if the name of the LLP is considered undesirable or similar to an already existing LLP, the Government can ask for a name change and failure to comply with the directives could attract a penalty of up to Rs. 5 lakh for the business and up to Rs. 1 lakh for each partner)

PROCEDURE FOR CHANGING THE NAME OF THE LLP

- ✓ An application for changing the name of the LLP should be, first, submitted to the Ministry of Corporate Affairs.
- ✓ The application must have maximum six name preferences. One must ensure that the preferences are in accordance with the LLP naming guidelines that have been laid out in India. To start with, it should not be identical or similar to an already existing one. One can also check out the availability of a name on the MCA portal and then finalize a name.
- ✓ Along with the LLP name change application, the partners need to submit the following documents.
  1. Certified copy of consent of all partners involved for the name change;
  2. Copy of the existing LLP agreement;
  3. Trademark copy or a copy of the registration certificate;
- ✓ After the suggested name gets approved, one has to file **Form LLP-5**, giving notice of the change in the name. The form has to be submitted to the ROC **within 30 days.**
- ✓ The ROC, after taking into consideration the application, will approve/deny the name change.
- ✓ If the name is approved, the ROC will issue a certificate and the new name will be effective from the date mentioned in the certificate.

- ✓ Once the partners get the new certificate of registration, a supplementary agreement needs to be laid out mentioning the changes in the LLP agreement as a result of the name change

SHIFTING OF REGISTERED OFFICE

Notice of change of registered office to be filed with the ROC **within 30 days** from the date of the change in **Form 15** along with the prescribed fees.

List of documents required to attached with Form 15:

1. Consent letter of all DP's
2. Consent letter of all Secured Creditors
3. Copy of Board Resolution
4. Copy of Advertisement

5 Proof of New Registered Office Address (If Rented then Rent Agreement, Utility Bill in the name of Owner & NOC)

Action to be taken	**Change of Registered office within the same State and within jurisdiction of same Registrar**	**Change of Registered Office within the same State from the jurisdiction of one Registrar to another Registrar**	**Change of registered office from one state to another**
Resolution for Change of Address	Consent of all partners	Consent of all partners	Consent of all partners
Secured Creditors	No Consent Required	No Consent Required	Consent of secured creditors is required
Form to be filed	Form- 15 within 30 days from the date of the change	**Form-15** within 30 days from the date of the change	**Form-15** within 30 days from the date of the change
Public Notice	No public notice required.	No public notice required.	Publish a general notice, at least 21 days before filing any notice with Registrar

ANNUAL COMPLIANCES OF LLP

All LLPs registered under the LLP Act, 2008 need to file Annual Returns and Statement of Accounts for every Financial Year.

It is mandatory for a LLP to file a return irrespective of whether it has done any business or not. There are three mandatory compliance requirements to be followed by LLPs.

(A) FILING OF ANNUAL RETURN

• Annual returns are filed in **Form 11** within 60 days of the closure of the Financial year Hence this Annual Return should be filed on or before 30th May every year by the LLP.

This form is a summary of the management affairs of the LLP, such as number of partners and their names.

• In case the annual turnover of the LLP
  - ✓ crosses Rs 5 crores or
  - ✓ the Capital contribution from Partners exceeds more than Rs 50 Lakhs

the Annual return should be accompanied by a Certificate from Practising Company Secretary.

(B) FILING OF STATEMENT OF THE ACCOUNTS OR FINANCIAL STATEMENTS

All LLPs are required to maintain their Books of Accounts in Double Entry System. They also need to prepare a **Statement of Solvency** (Accounts) every year ending on 31st March. For this purpose, **LLP Form 8** should be filed with the Registrar of Companies on or **before 30th October** every year.

It should be noted that LLPs whose annual turnover exceeds Rs. 40 lakh or in which contribution by partners exceeds Rs. 25 lakh are required to get their accounts audited by a qualified Chartered Accountant mandatorily.

♣ The penalty for non-filing of these forms with the ROC is Rs. 100 per day per form.

(c) EVENT BASED COMPLIANCES FOR LLP

Nature of events	Compliance requirement	Penalty for noncompliance
Consent & Particulars of Partner/Designated Partner	**Form-4** within 30 days of appointment as the designated partner	Minimum Rs. 10,000 & may extend to Rs. 5,00,00
Vacancy of Designated Partner	Filing of vacancy in Designated Partner within 30 days of vacancy and intimation of same to ROC in **Form- 4** within 30 days of filing the vacancy	Minimum Rs. 10,000 & may extend to Rs. 5,00,00
Change of Registered Office	File the notice of any change in registered office with the ROC in **Form - 15** within 30 days of shifting and any such change shall take effect only upon such filing.	Minimum Rs. 2,000 & may extend to Rs. 25,000
Change of Name	LLP may change its name registered with the ROC by filing with the ROC notice of such change in **Form- 5** within 30 days of such change.	Minimum Rs. 50,000 & may extend to Rs. 5,00,000
LLP Agreement & Changes therein	LLP Agreement and any changes made therein shall be filed with the ROC in Form-3 within 30 days of incorporation of LLP or	Minimum Rs. 2,000 & may extend to Rs. 25,000

	such alteration of LLP agreement	
Change in Designated Partners	Form- 4 within 30 days of the change	Minimum Rs. 2,000 & may extend to Rs. 25,000

CS Praveen Choudhary
Prof. Abhijeet Jaiswal

DIFFERENT FORM OF BUSINESS ORGANISATIONS & ITS REGISTRATION

The very 1st decisions that is faced by an entrepreneur is how the business should be structured. All businesses must adopt some legal configuration that defines the rights and liabilities of participants in the business's ownership, control, personal liability, life span, and financial structure. This decision will have long-term implications, so he has to select the form of ownership that is right for him.

In making a choice, he will want to take into account the following:

- ✓ Size and nature of the business.
- ✓ Level of control.
- ✓ Structure.
- ✓ Business's vulnerability to litigation.
- ✓ Tax implications.
- ✓ Expected profit (or loss).
- ✓ Need to re-invest earnings into the business.
- ✓ Access to cash out of the business.

SOLE PROPRIETORSHIP

- ✓ The vast majority of small businesses start out as sole proprietorships.
- ✓ The sole proprietorship is a form of business that is **owned, managed and controlled by an individual**.
- ✓ He has day-to-day responsibility for running the business.
- ✓ He has to arrange capital for the business and he alone is responsible for its management.
- ✓ He is therefore, entitled to the profits and has to bear the loss of business.
- ✓ Sole proprietorships own all the assets of the business.
- ✓ He also assumes complete responsibility for any of its liabilities or debts.
- ✓ In the eyes of the law and the public, the sole proprietor and the business are one and the same. It is the simplest and most easily formed business organization as not much legal formality is required to establish it.

Merits of Sole Proprietorship

i. **Easy formation**: A sole proprietorship business is easy to form where no legal formality involved in setting up this type of organization.

ii. **Better Control**: In sole proprietary organisation, all the decisions relating to business operations are taken by one person, which makes functioning of business simple and easy. This gives better control to business.

iii. **Sole beneficiary of profits:** The sole proprietor is the only person to whom the profits belong. There is a direct relation between effort and reward. This motivates him to work hard and bear the risks of business

iv. **Benefits of small-scale operations:** The sole proprietorship is generally organized for small-scale business. This helps the proprietor's family members to be employed in business

v. **Inexpensive Management:** The sole proprietor does not appoint any specialists for various functions. He personally supervises various activities and can avoid wastage in the business.

Limitations of Sole Proprietorship:

i. **Limitation of management skills:** A sole proprietor may not be able to manage the business efficiently as he is not likely to have necessary skills regarding all aspects of the business. This poses difficulties in the growth of business also.

ii. **Limitation of Resources**: The sole proprietor of a business is generally at a disadvantage in raising sufficient capital. His own capital may be limited and his personal assets may also be insufficient for raising loans against their security. This reduces the scope of business growth.

iii. **Unlimited liability:** The sole proprietor is personally liable for all business obligations. For payment of business debts, his personal property can also be used if the business assets are insufficient.

iv. **Lack of continuity:** A sole proprietary organisation suffers from lack of continuity. If the proprietor is ill, this may cause temporary closure of business. If he dies, the business may be permanently closed.

From the above account of the merits and limitations , it becomes clear that it is only personal services like repair work, tailoring etc. small factories, retail shops and professional activities which can be set up as sole proprietary organisations. In India, this form of organisation is quite popular and accounts for the largest number of business units.

PROCEDURE FOR FORMATION OF SOLE PROPRIETORSHIP

Sole Proprietor is formed, managed and controlled by one individual. No deed or agreement is required to constitute a Sole Proprietorship.

However, in actual practice and keeping in mind the nature of business activity, registration may be required under the following enactments as prevailing in the respective States or of the Central Government, such as

i. Shops and Commercial Establishments Act(State specific)
ii. Law relating to Professional Tax (State specific)
iii. Registration under Micro, Small and Medium Enterprises Development Act, 2006.
iv. Registration as a Small Scale Industry(State specific)
v. GST registration
vi. Intellectual Property laws.

PARTNERSHIP

Partnership is an association of persons who agree to combine their financial resources and managerial abilities to run a business and share profits in an agreed ratio. Since the resources of a sole proprietor to finance, and his capacity to manage a growing business are limited, he feels the need for a partnership firm. Partnership business, therefore usually grows out of the need for expansion of business with more capital, better supervision and control, division of work and distribute risks

The Indian Partnership Act 1932 defines partnership as "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all.

The persons who have agreed to join in partnership are individually called "Partners" and collectively a 'firm'. A partnership firm can be formed with a minimum of two partners and it can have a maximum of 100 partners (as per companies act 2013) but 50 as per co. (misc)rules 2014.

FEATURES OF PARTNERSHIP:

i. **Existence of an agreement:** Partnership is formed on the basis of an agreement between two or more persons to carry on business. It does not arise out of the operation of law as in the case of joint Hindu family business. The terms and conditions of partnership are laid down in a document known as Partnership Deed.
ii. **Engagement in business: A partnership must be formed to carry out any business activity** with a view to earn profit.
iii. **Sharing of profits and losses:** In a partnership firm, partners are entitled to share in the profits and are also to bear the losses, if any.
iv. **Agency relationship:** The partnership business may be carried on by all or any of the partners acting for all. Thus the partner acts as an agent on behalf of other partners as well as the firm.
v. **Unlimited Liability:** The liabilities of the partners are unlimited. Even the personal assets of the partners can be utilized to meet the liabilities of the firm
vi. **Common Management:** Every partner has a right to take part in the running of the business. This right is not effected even if one or few partners are acting on behalf of other partners. Consent of all partners need to be taken on important decisions.
vii. **Restriction on transferability of share:** No partner can transfer his share in partnership to any other person. He may, however, do so with the consent of all other partners.
viii. **Registration:** Registration of a partnership firm is not compulsory rather it is optional.

ix. **Duration:** The partnership firm continues at the pleasure of the partners. Generally a partnership comes to an end if any partner dies, retires or becomes insolvent. However, if the remaining partners agree to work together under the original firm's name, the firm will not be dissolved and will continue its business after settling the claim of the outgoing partner.

MERITS OF PARTNERSHIP

i. **Ease in Formation:** A partnership is very easy to form. All that is required is an agreement among the partners. Even the expenses to be incurred for registration are-not much.
ii. **Pooling of Financial Resources:** A partnership commands more financial resources compared to sole proprietorship.
iii. **Pooling' of Managerial Skills:** A partnership facilitates pooling of managerial skills of all its partners. This leads to greater efficiency in business operations.
iv. **Balanced Business Decisions:** In a partnership firm, decisions are taken unanimously after considering all the major aspects of a problem.
v. **Sharing of Risks:** Unlike sole proprietary organisation, the risks of partnership business are shared by partners on a predetermined basis.

LIMITATIONS OF PARTNERSHIP

i. **Uncertainty of Existence:** The existence of a partnership firm is very uncertain. The retirement, death, bankruptcy or lunacy of any partner can put an end to the partnership
ii. **Risks of Implied Authority:** It is true that like the sole proprietor each partner has unlimited liability.
iii. **Risks of Disharmony:** In partnership, since decisions are taken unanimously, it is essential that all partners reconcile their views for the common good of the organisation.
iv. **Difficulty in Withdrawal From the Firm:** Investment in a partnership can be easily made but cannot be easily withdrawn. This is so because the withdrawal of a partner's share requires the consent of all other partners.
v. **Lack of Institutional Confidence: A** partnership business does not enjoy much confidence of banks and financial institutions as it does not have separate legal existence in the eyes of law and the nature of its activities is not disclosed to public and the agreement among partners is not regulated by any law.
vi. **Difficulties of Expansion:** It is difficult for a partnership firm to undertake modernization
of expansion of its, operations. This is because of its inability to raise adequate funds for the purpose

PARTNERSHIP DEED

Partnership deed, also known as a partnership agreement, is a document that outlines in detail the rights and responsibilities of all parties to a business operation.

The key ingredients of a Partnership Deed are given below:

1. Definitions and vital information
2. Investment
3. Accounting
4. Duties, powers and obligations of the partners
5. Withdrawals
6. Expulsion
7. Dissolution
8. Arbitration

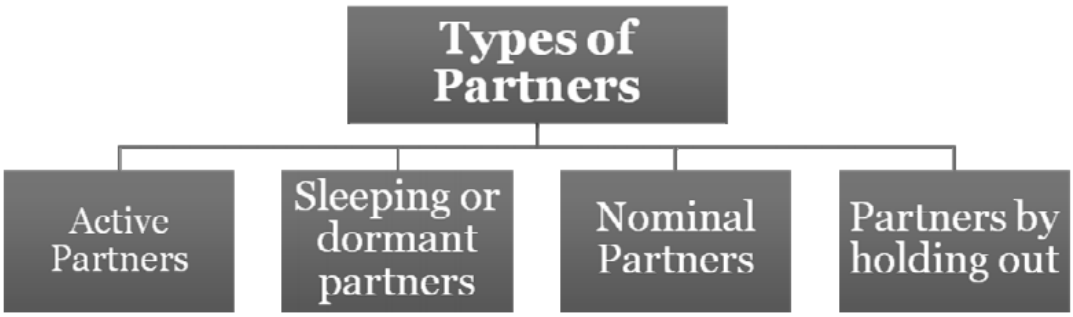
Types of Partnership

According to the nature of agreement among partners, there can be three types of partnership as follows:

i. **Partnership at-will:** Such a partnership exists on the will of the partners. That is, it can be brought to an end whenever any partner gives notice of his intention to do so.

ii. **Particular partnership:** A particular partnership is formed for undertaking a particular venture. It comes to an end automatically with completion of the venture.

iii. **Partnership for a fixed duration:** Such partnership is for a fixed period of time say 2 years, 5 years or any other duration.



The various types of partner found in partnership firms are as follows:

i. **Active Partners:** Partners who take active part in the conduct of day-to-day business of the firm are called active partners. These partners carry on business on behalf of the other partners.

ii. **Sleeping or dormant partners:** Sleeping or dormant partners are those who do not take active part in the management of the business. Such partners only contribute capital in the firm and are bound by the activities of other partners. However, they share in the profits and losses of the business.

iii. **Nominal Partners:** Nominal partners are those who do not have interest in the business but lend their name to the firm. They do not make any capital contribution, and are not entitled to take part in management, but are liable, like

other partners, to third parties. Such partners generally have a pecuniary interest (like a share in the profits) in lending their name to a firm. However in certain cases they may not have any pecuniary interest in doing so. For example, a reputed industrialist may, without any profit motive lend his name to a firm run by his family members.

iv. **Partners by holding out:** If a person by his words or conduct holds out to another that he is a partner, he will be prevented from denying that he is not a partner. The person who thus becomes liable to third parties to pay the debts of the firm is known as a partner by holding out

Minor admitted into the benefits of partnership

A minor is a person who has not attained the age of 18 years. Since a minor is not capable of entering into a valid agreement, he cannot become partner of a firm. He may, however, be admitted to the benefits of an existing partnership.

PROCEDURE FOR FORMATION OF A PARTNERSHIP

Partnership firms in India are governed by the Indian Partnership Act, 1932. While it is not compulsory to register your partnership firm as there are no penalties for non-registration, however, it is advisable since the following rights are denied to an unregistered firm:

- ✓ A partner cannot file a suit in any court against the firm or other partners for the enforcement of any right arising from a contract or right conferred by the Partnership Act
- ✓ A right arising from a contract cannot be enforced in any Court by or on behalf of your firm against any third party
- ✓ Further, the firm or any of its partners cannot claim a set off (i.e. mutual adjustment of debts owned by the disputant parties to one another) or other proceedings in a dispute with a third party

Procedure

(a) Application of Registration to Registrar should be made in **Form-1.**
(b) The application should be verified & signed by each partner.
(c) The following documents should be attached to the Application:
- ✓ Duly filled Affidavit
- ✓ Certified copy of the Partnership deed
- ✓ Proof of ownership of the place of business or the rental/lease agreement thereof.

Once the Registrar of Firms is satisfied than he shall issue a Certificate of Registration.

Special Note:

It should be noted that registration with the Registrar of Firms is different from registration with the Income Taxation Department. It is mandatory for all firms to apply for registration with the Income Tax Department and have a PAN Card of Firm.

HINDU UNDIVIDED FAMILY(HUF)

The Hindu Undivided Family (HUF) business is a form of business organization found only in India. In this form of business, all the members of a Hindu undivided family own the business jointly. The affairs of business are managed by the head of the family, who is known as the "KARTA". A Hindu Undivided Family business comes into existence as per the Hindu Inheritance Laws of India. The Karta or manager works in consultation with other members of the family but ultimately he has a final say. The liability of Karta is unlimited while the liability of other members is limited to their shares in the business.

There are two schools of Hindu Law-one is Dayabhaga which is prevalent in Bengal and Assam and the other is Mitakshara prevalent in the rest of the-country. According to Mitakshara law, there is a son's right by birth in the property of joint family. It means, when a son is born in family, he acquires an interest in the property jointly held by the family. Whereas in Dayabhaga, the son has no right to the father's ancestral property until after his death, or the father's ownership becomes extinct through other means, such as being excluded from the caste or becoming ascetic.

Characteristics of a Joint Hindu Family Business

1. **Governed by Hindu Law:** The business of the Joint Hindu Family is controlled and managed under the Hindu law i.e. Hindu succession Act 1956.

2. **Management**: All the affairs of a Joint Hindu Family are controlled and managed by one person who is known as 'Karta' or 'Manager'. The Karta is the senior most male member of the family. He works in consultation with other members of the family but ultimately he has a final say. The members of the family have full faith and confidence in Karta. Only Karta is entitled to deal with outsiders. But other members can deal with outsiders only with the permission of Karta

3. Membership by Birth: The membership of the family can be acquired only by birth. As soon as a male child is born in family, he becomes a member. Membership requires no consent or agreement.

4. Liability: Except the Karta, the liability of all other members is limited to their shares in the business. The Karta is not only liable to the extent of his share in the business but his separate property is equally attachable and amount of debt can be recovered from his separate property.

5. Permanent Existence: The death, lunacy or insolvency of any member of the family does not affect the existence of the business of Joint Hindu Family. The family goes on doing its business.

6. Implied Authority of Karta: In a joint family firm, only Karta has the implied authority to contract debts and pledge the credit and property of the firm for the ordinary purpose of the businesses of the firm.

7. Minor also a Partner: In a partnership, minor cannot become co-partner though he may be admitted to the benefit of partnership. In a Joint Hindu Family firm minor is a partner.

8. Dissolution: The Joint Hindu Family Business can be dissolved only at the will of all the members of the family. Any single member has no right to get the business dissolved.

BENEFITS OF HUF

1. Easy to Start: It is very easy to start the Joint Hindu Family Business. No legal formalities are required to be faced, such as registration. It requires no agreement, though in actual practice, it is documented to avoid litigation and for regulatory purposes.

2. Efficient Management: The management of Joint Hindu Family Business is centralised in the hands of Karta of family. In this business, Karta takes all decisions and gets them implemented with the help of other member. No other member interferes in his management.

3. Secrecy: In Joint Hindu Family Business, all the decisions are taken by the 'Karta' himself. He is in a position to keep all the affairs to himself and maintains perfect secrecy in all matters.

4. Prompt Decision: The Karta is the only person who exercises control and direction over the business. He may not consult anyone in taking decisions. This ensures prompt or quick decisions. Being the sole master, he takes prompt decisions and makes advantage of the opportunity.

5. Economy: For the success of any business, economy is a must. It is well- balanced and maintained in Joint Hindu Family Business. The Karta of family spends money with great caution and economy.

6. Credit Facilities: In Joint Hindu Family Business the credit facilities are more. One reason for this is that liability of the 'Karta' is unlimited. Karta is having personal relations with others, which are also helpful in raising credit.

7. Natural Love between Members: In Joint Hindu Family Business, it is the natural love and affection which the members are having for each other. It helps to run the business more efficiently and smoothly.

8. Freedom regarding Selection of Business: The Karta is at freedom to select any business of his choice. He has not to depend on others.

PROCEDURE FOR FORMATION OF A HUF

(i) Create a HUF Deed.

You have to prepare a deed on stamp paper declaring the formation of the HUF. It should have all the details, including the name of karta, co-parceners , address and source of funds in the corpus. Creating a HUF Deed is not mandatory. However it is always beneficial to have a HUF Deed.

Key issues to be noted in preparation of a HUF Deed are:

a) A HUF deed is a written formal document on a stamp paper (as applicable in the respective State) specifying the name of Karta and Coparceners of HUF.
b) The eldest male member of HUF becomes Karta of HUF.
c) The name of members of HUF and the name of the HUF is also required to be stated in the HUF Deed at the time of creating of HUF.
d) The name of HUF is usually the name of the Karta followed by the word HUF e.g. Ram Kumar HUF.
e) HUF Deed also states the capital with which the HUF has been initiated. There are various sources through which capital can be introduced.
f) A declaration is also provided by each member of family where they declare the name of Karta and also state that—
    i. Karta has the authority of the accounts vested in his hand
    ii. Karta holds the right to govern all the transactions of the HUF accounts on behalf of the members.
g) Further, a rubber stamp of HUF will also be prepared. Rubber stamp should be Rectangular. Rubber Stamp will be affixed on all the documents pertaining of HUF to authorize the transaction.
h) It is recommended that the Deed should be notarised.

(ii) Register the Deed

(iii) Obtain PAN. Once the declaration deed is made, the karta should apply for a permanent account number (PAN) for the HUF. This is mandatory because all financial transactions must carry PAN.

(iv) Open bank account After you are allotted a PAN, open a bank account in the name of the HUF. It is also advisable to get some stationery printed for official communication.

The HUF is now functional . The karta will have to invest in tax saving instruments and file tax returns on behalf of the HUF.

While there are tax advantages of forming an HUF, the following matters merit consideration:

- ✓ *One person cannot form HUF. An HUF is formed by a family.*
- ✓ *HUF consists of a common ancestor and all of his lineal descendants, including their wives and unmarried daughters. after 1-9-2005, daughter married or unmarried, is a coparcener like a son.*
- ✓ *Hindus, Buddhists, Jains and Sikhs can form HUFs.*
- ✓ *Use a capital asset to establish the corpus of the HUF. This can be ancestral property, assets gifted by relatives and friends, or received by the HUF through a will. If you give a personal asset to the HUF, the income will be clubbed with your own. Gifts of over 50,000 a year received by HUF will be taxable. The best way is for the HUF to receive assets as part of a will.*

Key Points in creation of HUF and format of Deed for creation of HUF

- ✓ *Under the Income Tax Act 1961, an HUF is a separate entity for the purpose of income tax return.*
- ✓ *The same tax slabs are applicable to HUF as to individual assessee.*
- ✓ *Members of HUF cannot transfer your own assets/money into HUF.*
- ✓ *If you have ancestral property and earning some income from this property, then it is better to transfer this asset to HUF and save tax up to exemption limit applicable to individual.*
- ✓ *Co parcerners can transfer the money received on sale of ancestral property /assets into your HUF.*
- ✓ *The income from property of HUF can be further invested in instruments such as shares, mutual funds, etc. and will be assessed under HUF.*
- ✓ *Existence of property or multiple members is not a pre-requisite to create HUF. A family which does not own any property may still have the character of Hindu joint family. This joint-ness is understood in terms of faith and food. This is because a Hindu is born as a member of the joint family.*
- ✓ *Any gifts received by the members of HUF (birthday, marriage, etc.) can be treated as assets of HUF.*
- ✓ *The HUF is taxable as separate person under income tax hence one can save tax from basic exemption of Rs. 2.5 lakh. HUF will also gain from the tax slab structure of computing income tax.*
- ✓ *Apart from basic exemption of Rs. 2.50 lakh, section 80C deduction up to Rs. 1.50 lakh is also available to HUF.*

MULTI STATE CO-OPERATIVE SOCIETY

The Multi-State Cooperative Societies (MSCS) Act, enacted in 1984, was modified in 2002, in keeping with the spirit of the Model Cooperatives Act. Unlike the State Laws,

which remained as a parallel legislation to co-exist with the earlier laws, the MSCS Act, 2002 replaced the earlier Act of 1984. The Act and the Rules thereunder facilitates the incorporation of cooperative societies whose objects and functions spread over to several states.

The Act provides for formation of both primary (with both individual and institutional members) and federal cooperatives (with only institutional membership).

Their main objects shall be serving the interests of members in more than one state and their by-laws shall provide for social and economic betterment of their members through self-help and mutual assistance in accordance with co-operative principles (Sec. 7).

A multi-state co-operative society is a body corporate with limited liability (sec. 9).

No part of the fund other than net profit shall be distributed among members (Sec.62).

Investment of society's fund only in recognized securities is permissible (Sec.64).

Contribution to political parties or loans to non-members or borrowing from external sources are prohibited.

Annual auditing by recognized auditors is mandatory (Sec.65).

Central Government may direct for special audit if it is of the opinion that the society's affairs are not being managed in accordance with the co-operative principles or prudent commercial practices (Sec.77).

Any application for the registration of a multi-state cooperative society, of which all the members are individuals, should be signed by at least fifty persons from each of the states concerned. In the case of a society of which the members are cooperative societies, it should be signed by duly authorized representations of at least five such societies registered in different states .

BENEFITS OF MULTI STATE CO-OPERATIVE SOCIETY

1. MSCS provides loans at **reasonable rates of interest** to the poor. This benefits them, as they do not have to go to financers or banks who lend at high interest rates.
2. MSCS **can function pan India** as they can start branches in different districts and states.
3. As regulatory requirements of filing, etc., is minimum, MSCS have **low compliance costs**.
4. A Multi State Co-operative Credit Society belongs to its members, who are at the same time the owners and the customers of their Society. This creates a sense of belonging and ownership among the members.

FORMATION OF MULTI STATE CO-OPERATIVE SOCIETY

[A] An application in Form -1(under sub-rule(1) of rule 3 of the Multi State Cooperative Societies Rules, 2002) should be filed with the Central Registrar of Cooperative Societies, New Delhi along with the **following enclosures:**

1. A certificate from the bank stating credit balance there in favour of the proposed multi-state cooperative society.
2. A scheme explaining how the proposed multi state co-operative society has reasonable prospects of becoming a viable unit.

3. Four copies of bye-laws in original.
4. Proposed area of operation for registration shall initially be permitted for two contagious states only.
5. List of at least 50 members from each state. The list has to be submitted in the format annexed with the Multi State Cooperative Societies Act, 2002 (MSCS Act, 2002) along with the copies of ID proofs of the members duly attested by Chief promoter.
6. Certified copies of the resolutions passed by the proposed society along with the certified copy of the resolution of the promoters which shall specify the name and address of one of the applicant(s) to whom the Central Registrar may address correspondence under the rules before registration and dispatch or hand over registration documents.
7. Contact number and e-mail address of the Chief Promoter of Society on cover page.

[B] For societies having objects related to thrift and credit for multi-purpose societies following additional documents are required to be submitted along with documents mentioned at point [A] above:

1. No Objection Certificate (NOC) from the Registrar of Cooperative Societies of the States/U.T. where the area of operation of the society is proposed to be confined.
2. A certificate to the effect that the credentials of the Chief Promoter/Promoters have been verified by the Registrar of Co-operative Societies of the state where the head office is proposed to be located. All documents to be submitted in original with the signatures of the Chief Promoter/Promoters on each page

CS Praveen Choudhary
Prof. Abhijeet Jaiswal

FORMATION AND REGISTRATION OF NGO'S

A non-governmental organization (NGO) is any non-profit, organisation which is organized at local, national or international level. People with a common interest comes together and joins hands to perform a variety of service and humanitarian functions. They bring citizen concerns to Governments, and encourage political participation to resolve the problem and concerns in society.

The **Societies Registration Act I860**, the **Indian Trusts Act 1882** and the **Section 8** of the **Companies Act 2013** are the three enactments which seem to fulfil requirements of non profit organizations created for the larger public good. An NGO can be registered as a Section 8 Company **OR** Trust **OR** Society.

SECTION 8 COMPANY

An association which is registered u/s 8 of the Companies Act, 2013 is known as Association not for Profit.

Section 8 of the Companies Act, 2013 reads as under:

Section 8(1): If Central Government is satisfied that a person or an association of persons proposed to be registered under this Act as a limited company —

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

Then

The CG may, by licence issued in prescribed manner, and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word "Limited", or "Private Limited" , and thereupon the ROC shall, on application, register such person or association of persons as a company under this section.

Section 8(2) The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies.

Section 8(3) A firm can become a member of the company registered under this section.

Section 8(4)

i. A company registered under this section shall not alter the provisions of its MOA & AOA without prior approval of the CG.
ii. A company registered under this section may convert itself into company of any other kind of company after complying with prescribed conditions.

Section 8(5) if any other limited company has been formed with any of the objects specified for NGO and with the restrictions and prohibitions as mentioned for NGO, CG

may allow the company to be registered as NGO and thereupon the Registrar shall, on application, register such company as NGO.

Section 8(6) The CG may, by order, revoke the licence granted to a company registered as NGO, if the company contravenes any of the **requirements or conditions** subject to which a licence was issued or **the affairs of the company are conducted fraudulently** or **in violation of the objects of the company** or **prejudicial to public interest**, and without prejudice to any other action against the company under this Act, direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited", as the case may be, to its name and thereupon the Registrar shall, register the company accordingly.
But company shall be given a **reasonable opportunity of being heard** and a copy of such order shall be given to the ROC also.

Section 8(7) Where a licence is revoked, the CG may, by order, direct to wind up the company **OR** to amalgamate with another NGO. But such order shall be made only after giving reasonable opportunity of being heard.
Section 8(8) If amalgamation is ordered by CG then, notwithstanding anything to the contrary contained in this Act, the CG may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

Section 8(9) If such co. is wound up or dissolved, then remaining asset, may be transferred to another NGO and having similar objects, subject to such conditions as the NCLT may impose, OR may be sold and proceeds thereof credited to Insolvency and Bankruptcy Fund formed u/s 224 of the IBC, 2016.

Section 8(10) NGO shall amalgamate only with another NGO having similar objects.

Section 8(11) In case of Default, the company shall be punishable with fine of minimum Rs. 10 Lakhs but up to Rs. 1 Cr. and the directors and every officer of the company who is in default shall be punishable with imprisonment up to 3 years **OR** with fine of miniumum Rs. 25,000 but Up to Rs. 25,00,000 b with both.
BUT
In case of fraud, every officer in default shall be liable for action u/s 447.

Features of a Section 8 Company

1. It is formed for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object.
2. The profits, if any, are applied in promoting its objects.
3. It prohibits the payment of dividends to its members.

4. The name of the Company can be incorporated without using the word "Limited" or "Private Limited" as the case may be.
5. There is no requirement of any minimum paid up capital.
6. It is exempted from stamp duty registration.
7. Many privileges and exemptions are available to such a company.
8. An OPC cannot function as a Section 8 Company.
9. Section 8 company has its independent corporate legal entity, similar to private company, public company or a Limited Liability Partnership and hence enjoys credibility in the eyes of the public.

Exemptions available to Section 8 Company

a. Not required to have CS.
b. No need for minimum share capital.
c. Shorter notice period for general meetings.
d. No necessity to record minutes of meetings.
e. Only two directors required and Independent Directors not required.
f. Exemption regarding first meeting and other board meetings.
g. Directorship in more than 20 companies.
h. Relaxation in formation of certain Committees.
i. Certain decision allowed to be taken by circulation instead of at a meeting.
j. Disclosure of interest in related party transactions in some cases only.

Procedure for Registration of Section 8 Company

1) **Obtaining Digital Signature Certificate (DSC) & Directors Identification Number (DIN)**
Obtain the DSC of the persons who wish to be Directors in Sec 8 Company. File Form DIR-3 with ROC for getting the DIN.

2) Name Reservation
The promoter should apply for name reservation through RUN facility on MCA website.

3) Draft MOA /AOA
The object clause of MOA should include promotion commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any related object.

4) Application for Obtaining License from Government
Once name is reserved, an application will be made for obtaining licence in Form No. INC-12.

Attachment in INC-12:

- ✓ Draft MOA as per Form INC-13
- ✓ Draft AOA as per Form INC - 31
- ✓ Declaration as per Form INC-14 (Declaration from Practicing CA, CS, Cost Accountant, Advocate in practice)

- ✓ Declaration as per Form INC-15 (Declaration from each person making application
- ✓ Estimated Income & Expenditure for next 3 years

5) Grant of License

Once the Form is approved, license u/s 8 will be issued in Form INC-16

6) Application for Incorporation

Composite Form SPICe (INC-32) can also be filed which deals with the single application for reservation of name, incorporation of a new company and/or application for allotment of DIN and/or application for PAN and TAN. This Form is accompanied by supporting documents including details of Directors & subscribers, MOA and AOA etc.

7) Issue of Certificate of Incorporation and Corporate Identification Number (CIN)

If ROC is satisfied, a Certificate of Incorporation is issued which carries a CIN.

Some important points

i. For conversion of sec 8 co. into other forms, application shall be made to RD, in form no. INC 18 and approval shall be given by RD in **FORM no. INC 17.**
j. Intimation to ROC for surrender of Licence shall be given in **FORM no. INC 20**

TRUST

A Trust is a relationship in which a person or entity holds a valid legal title to a certain property which is known as the Trust property. The Trust is bound by a fiduciary duty to exercise that legal title for the benefit of any one or more individuals or group of individuals or organisations, who are known as the Beneficiaries. The Trust shall be governed by the terms of the Written Trust agreement also called as Trust Deed.

Trust is defined in section 3 of the Indian Trust Act, 1882 as -

- ✓ "an obligation annexed to the ownership of property
- ✓ and arising out of a confidence reposed in and
- ✓ accepted by the owner, or declared and accepted by him,
- ✓ for the benefit of another or of another and the owner.

In other words, it is simply a transfer of property by one person (the settlor) to another (the "trustee") who manages that property for the benefit of someone else (the "beneficiary"). The settlor must legally transfer ownership of the assets to the trustee of the trust.

Author of Trust

The person who reposes or declares the confidence is called the "author of the trust".

Trustee

The person who accepts the confidence is called the "trustee".

Beneficiary

The person for whose benefit the confidence is accepted is called the "beneficiary".

Trust Property

The property which is bestowed on to the trustee , to be utilized or hold for the benefit of the Beneficiary.

Types of Trusts

The trust have been broadly classified as

1. Public Trust
2. Private Trust

Public Trust

When Trust is constituted wholly or mainly **for the benefit of Public at large**, in other words beneficiaries in the Public trust constitute a body which is incapable of ascertainment. The Public trusts are essentially charitable or religious trusts and are governed by the general Law. The provisions of Indian Trusts Act do not apply on Public Trusts.

The Charitable and Religious Trust Act, 1920, the Religious Endowments Act, 1863, the Charitable Endowments Act, 1890, the Societies Registration Act, 1860, and the Bombay Public Trust Act, 1950 are the relevant legislations for the recognition and enforceability of public trusts. Moreover, in recent times, trusts can also be used as a vehicle for investments, such as mutual funds and venture capital funds. These trusts are governed by Securities and Exchange Board of India (SEBI)

Private Trusts

A trust is called a Private Trust when it is constituted for the benefit of one or more individuals who are, or within a given time may be, definitely ascertained. Private Trusts are governed by the Indian Trusts Act.

'Public Trust V/s 'Private Trust'

The criterion for deciding, whether a particular trust is of private nature or not, is whether the said trust is for the benefit of certain individuals or not. Where the intention of the founder was that the property was to be dedicated for the benefit of idols, the trust is undoubtedly of a public nature and not for the benefit of the individual members of family.

The essential difference between a private and a public trust is that in the former the beneficiaries are definite and ascertained individuals or individuals who within definite time can be definitely ascertained but in the latter the beneficial interest must be

vested in an uncertain and fluctuating body of persons either the public at large or some considerable portion of it answering a particular description.

Public Trust	Private Trust
The beneficiaries are uncertain and fluctuating and cannot be identified	If beneficiaries are limited and can be identified.
Public trust has fluctuating beneficiaries.	Private trust has fixed beneficiaries.
Public trusts have larger and wider domain.	Private trusts have limited and narrow domain.

Persons who can create a Trust

a. Any competent Person.
b. Company.
c. Trust by a woman.
d. Association of Persons (AOP).
e. Hindu Undivided Family.
f. By or on behalf of minor with the permission of civil court.

Persons who can be a Trustee (Sec 10)

Any person **who is capable of holding property** may be a trustee.

Duties of Trustee (Sec 11 to Sec 22)

Duties of Trustee are as under:

i. Proper execution of the trust as per the directions given in the instrument of the trust (Trust Deed).
ii. Acquaintance(be familiar) with the nature of the trust property, so as to do justice with the trust and it purpose.
iii. Protect and preserve the trust property.
iv. Not to set up an adverse title.
v. To deal as a man of ordinary prudence would deal with such property as if it were his own.
vi. To convert the property of a wasting nature into that of permanent nature.
vii. To act impartially or in favour of all beneficiaries.
viii. In case of a trust created for several people in succession, if one person is doing something injurious to the trust property, the trustee needs to take preventive steps
ix. To maintain accurate accounts of the trust property and to invest the trust property and funds in the eligible securities.
x. To sell the trust property with authority by the Court.

Powers & Rights of Trustee

Powers of Trustee are as under:

1. Selling the trust property, if allowed by trust deed.
2. To vary or alter investments as per the requirements of the situation, in interest of Beneficiaries.
3. To apply the trust property or income generated from it for the maintenance of the trust property itself.
4. To settle claims unless a contrary intention appears from the instrument of the trust.
5. To give receipt(s) for the money received on account of the trust. In case of death of one of the trustees, the other trustees have a right to act, unless a contrary intention appears from the instrument of the trust.

Exemptions available to Charitable and Public Trust:

Section 10 of the Income Tax Act, 1961

Total tax exemption is available for certain types of Trusts, if both the following conditions are satisfied -

- ✓ The activities of Trust shall be related to sports, education, scientific professions, or promotion of khadi and village based industries, hospitals etc. and
- ✓ They shall be notified as charitable or religious institutions.

Section 11 of the Income Tax Act, 1961

If the trust is for any religious or charitable purpose then, any income, profits or gains earned by such trust from a property held by the trust shall not be included in the total income of the trust.

Section 12 of the Income Tax Act, 1961

- ✓ Income received by way of voluntary contributions towards the corpus of the trust shall not be taxable.
- ✓ If Charitable trusts are created for the benefit of any of the socially and economically backward castes such as Scheduled Castes, Scheduled Tribes or women or children, then its Income shall be exempt from Tax.

Procedure for Registration of Trust

1) **Creation of a Trust Deed**

   A trust deed may be created using any language sufficient to show the intention. It has following contents:

   - ✓ Name of the author/settlor of the trust;
   - ✓ Name of the trustee;
   - ✓ Name if any, of the beneficiary or whether it shall be the public at large;
   - ✓ Name by which the trust shall be known;
   - ✓ Place of principal and other offices of trust;
   - ✓ The property that shall devolve;
   - ✓ An intention to divest the trust property upon the trustee;

- ✓ Object and purpose of the trust;
- ✓ Procedure for appointment, removal or replacement of a trustee, their rights, duties and powers, etc.
- ✓ Rights and duties of the beneficiary.
- ✓ Mode and method of determination (dissolution) of the trust.

2) **Signing of deed**
The deed must be signed by Settlor(author) and Trustees in presence of at-least 2 witnesses.
3) **Printing the deed on stamp paper**
Print the Trust deed on appropriate value stamp paper.
4) **Registration of the deed**
Registering the deed with the Sub-Registrar at the time of registration, the settlor and witnesses must be personally present with their identity proof in original
5) **Application for PAN & Bank Account**
After registration Trust should apply for PAN and opening a bank account.

SOCIETY

A society is an association of persons united together by mutual consent to deliberate, determine and act jointly for some common purpose.
Societies are usually registered for promotion of charitable activities like education, art, religion, culture, music, sports, etc., In India, The Societies Registration Act, 1860 lays down the procedure for society registration and operation in India. The Act has been adopted by most of the State Governments with/without modifications as considered by the respective State Governments.
According to Section 20 of the Societies Registration Act, 1860, societies can be formed for the following purposes:

i. Charitable societies,
ii. The military orphan funds or societies established at the several presidencies of India,
iii. societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge,
iv. The diffusion (spreading) of political education,
v. the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public,
vi. public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. Besides these purposes, the respective State Governments may provide for any other objects by their legislations.

Advantages of Society

- ✓ The process of formation and registration is simple.

- ✓ Record-keeping requirements are minimum and compliance with regulations is easy.
- ✓ Cost of compliance is low.
- ✓ Least possibility of interference by the regulator.
- ✓ Exemption from tax due to charitable nature of operations.

Disadvantages of Society

- ✓ Since such institutions are of charitable nature, it is an inappropriate form of a commercial venture;
- ✓ The concept of equity investment or ownership is virtually absent; Hence, it is not attractive for commercial investors interested in microfinance;
- ✓ Commercial investors regard the investments in such entities as risky mainly on account of their lack of professionalism and managerial practices and political leanings(in some cases) and are, therefore, reluctant to provide large scale funding to such bodies;
- ✓ In accordance with Section 45S of the RBI Act, 1934, no unincorporated bodies are allowed to accept deposits from the public. Organisations registered under the Societies Registration Act and the Trust Act are considered unincorporated bodies. and
- ✓ It is vulnerable to the implication under the Money Lenders Acts (prevention of usurious interest rates) of various State Governments.

Consequences of Registration / Non-Registration of a Society

The Societies Registration Act, 1860 lays down procedure for registration of societies for various bonafide purposes. The registration gives the society a legal status and is essential for:

- ✓ obtaining registration and approvals under Income Tax Act;
- ✓ lawful vesting of property in the societies;
- ✓ provides authenticity and recognition to the society before all authorities and the world at large; and
- ✓ for opening bank accounts and transaction of business.

Effect of Registration

- ✓ Only after registration, the internal rules & regulations and bye – laws bound its members.
- ✓ The society can undertake only the activities which are mentioned in its objects.
- ✓ A non-registered society may exist in reality but not in law. Means it has no identity in the eyes of law.
- ✓ An unregistered society cannot claim benefits under the Income-tax Act, 1961.
- ✓ Only a registered society can sue and be sued.

Note: An object which is inconsistent with the Act shall be inoperative even after registration.

Differences between Trust and Society:

1. **Charter :** The main document for the trust is Trust Deed whereas for the societies it is Bye laws, rules & regulations.
2. **Members:** Minimum of 2 members are required and there is no maximum limit for formation of trust. Minimum of 7 members are required and there is no maximum limit for formation of trust.
3. **Meetings :** The Indian Trust Act doesn't contain any provision regarding the meeting of persons but conducting an Annual General Meeting is mandatory in society as per the law.

FORMATION OF A SOCIETY

Under Section 1 of the Societies Registration Act, 1860, any 7 or more persons who have come together for any legal pursuits, including literary, scientific, charitable or social pursuits, may subscribe their names to a memorandum of association and file the same with the Registrar and form themselves into a society under this Act.

The MOA filed with the Registrar should contain details such as the name and objectives of the society, names, addresses and occupations of the members of the governing body with which the management of the affairs of the society is entrusted.

A copy of the rules and regulations of the society should be provided. With the completion of these processes, the society could be registered with the Registrar after payment of a fee as specified by the State Government from time to time. As per Section 4 of the Act, once in every year, an annual general meeting of the society should be conducted. If the rules do not provide for an annual general meeting, a list of the names, addresses and occupations of the members of the governing body should be presented to the Registrar, every year.

Registration can be done either at the state level (i.e., in the office of the Registrar of Societies) or at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies)

The documents needed to be submitted to the Registrar are:

1. A letter requesting registration, signed by founding members. This letter will state the purpose of formation of the society and a requisition indicating that the society is registered under the Act. The signature of all members is mandatory.
2. A certified copy of the MOA, signed by the founding members, with a duplicate copy.
3. A certified copy of the rules and regulations, signed by the founding members, along with a duplicate copy.
4. A table with the names and address and occupation of all members of the society with their signatures

5. Minutes of the meeting (general body meeting conducted to set the rules and regulations of proposed society)
6. Declaration by the president of the society
7. Address proof of registered office and no-objection certificate from the landlord.
8. An affidavit sworn by the president or secretary of the society on non-judicial stamp paper of Rs.20-/, together with a court fee stamp.
9. A declaration by the members of the managing committee that the funds of the society will be used only for the purpose of furthering the aims and objects of the society.

The documents are to be filed with the Registrar along with the fees, and a suitable name and if the Registrar is satisfied with the application, the society will be registered.

Steps for Registration of Society

1) Selection of Name for the Society

A name should be selected for the society keeping in mind the following points:

- ✓ Cannot use identical or similar name of a currently registered society
- ✓ The name shall not suggest any connection with State Government or Government of India
- ✓ It shall not contravene with the provisions of the Emblem & Names Act, 1950.

2) Draft Memorandum of Association containing

a. Name of the society;
b. Objects of the society;
c. Names, addresses and occupation of the members of the governing body,
d. Place of registered office of the Society, and
e. Names, addresses and full signatures of the 7 or more persons subscribing their names to the MOA. Their signatures should be witnessed.

3) Draft AOA/ Rules and regulations/ Bye Laws containing

- ✓ Rules for taking the membership of the society.
- ✓ Details about the meetings of the society and the frequency with which they are going to be held.
- ✓ Information about the Auditors.
- ✓ Arbitration in case of any dispute between the members of the society.
- ✓ Ways for the dissolution of the society will also be mentioned.

4) Application for Registration

Application shall be made to Registrar along with prescribed fees and above mentioned documents.

CS Praveen Choudhary
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FINANCIAL SERVICES ORGANISATION AND ITS REGISTRATION PROCESS

NON BANKING FINANCIAL COMPANY (NBFC)

A (NBFC) is a company registered under the Companies Act, 2013 (or any earlier enactments) engaged in the principle business of:

- ✓ Loans and advances,
- ✓ Acquisition of shares/stocks/bonds/ debentures/securities issued by Government or local authority or other marketable securities of a like nature,
- ✓ Leasing,
- ✓ Hire-purchase,
- ✓ Insurance business,
- ✓ Chit business

BUT does not include any institution whose principal business is that of:

- ✓ Agriculture activity,
- ✓ Industrial activity,
- ✓ Purchase or sale of any goods (other than securities) or
- ✓ Providing any services and sale/purchase/construction of immovable property.

Residuary Non-Banking Company

A non-banking institution which is a company and has *principal business of receiving deposits under any scheme or arrangement in one lump sum or in instalments by way of contributions or in any other manner,* is also a non-banking financial company (Residuary non-banking company).

Principal Business / 50-50 test

Financial activity as principal business is when:

- ✓ A company's financial assets constitute more than 50 % of the total assets **and**
- ✓ Income from financial assets constitute more than 50 % of the gross income.

A company which fulfils both these criteria will be registered as NBFC by RBI. This test is popularly known as 50-50 test and is applied to determine whether a company is into financial business or not.

NBFCs lend and make investments and hence their activities are akin to that of banks; however there are a few differences as given below:

i. NBFC cannot accept demand deposits;

ii. NBFCs do not form part of the payment and settlement system and cannot issue cheques drawn on itself;

iii. *deposit insurance facility of* ***Deposit Insurance and Credit Guarantee Corporation*** *is not available to depositors of NBFCs, unlike in case of banks.*

Information about DICGC

In terms of Section 45-IA of the RBI Act, 1934, no NBFC can commence or carry on business of a NBFI without -

a) obtaining a ***certificate of registration*** *from the RBI and*

b) without having a Net Owned Funds of 2 crore

TYPES/CATEGORIES OF NBFC'S

1. Asset Finance Company (AFC)
2. Investment Company (IC)
3. Loan Company (LC)
4. Infrastructure Finance Company (IFC)
5. Systemically Important Core Investment Company
6. Infrastructure Debt Fund - Non- Banking Financial Company (IDF-NBFC)
7. Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI)
8. Non-Banking Financial Company – Factors (NBFC-Factors)
9. Mortgage Guarantee Companies (MGC)
10. NBFC

I. Asset Finance Company (AFC):

An AFC is a company which is a financial institution carrying on as its principal business as the financing of physical assets supporting productive/economic activity, such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipment, moving on own power and general purpose industrial machines.

Principal business for this purpose is defined as aggregate of financing real/physical assets supporting economic activity and income arising therefrom is not less than 60% of its total assets and total income respectively.

II. Investment Company (IC):

Any company which is a financial institution carrying on as its principal business the acquisition of securities and shares of other body corporates.

III. Loan Company (LC):

LC means any company which is a financial institution carrying on as its principal business of providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an Asset Finance Company.

IV. Infrastructure Finance Company (IFC):

IFC is a non-banking finance company

a. Which deploys at least 75 % of its total assets in infrastructure loans,
b. Has a minimum Net Owned Funds of Rs. 300 crore,
c. Has a minimum credit rating of 'A 'or equivalent and
d. A capital adequacy ratio of 15%

(*The Capital Adequacy Ratio (CAR) is a measure of a bank's available capital expressed as a percentage of a bank's risk-weighted credit exposures. The Capital Adequacy Ratio, also known as capital-to-risk weighted assets ratio (CRAR)*)

V. Systematically Important Core Investment Company (CIC-ND-SI):

An NBFC carrying on the business of acquisition of shares and securities which satisfies the following conditions: -

a) Assets of NBFC are Rs. 100 Cr and above
b) At-least 90% of the assets are in the form of investment in shares or debt instruments or loans in group companies
c) Out of 90%, 60% should be invested in equity shares or those instruments which can be compulsorily converted into equity shares in the next 10 years.
d) Such companies shall not accept public deposits.

VI. Infrastructure Debt Fund - Non- Banking Financial Company (IDF-NBFC):

IDF-NBFC is a company registered as NBFC to facilitate the flow of long term debt into infrastructure projects. IDF-NBFC raise resources through issue of Rupee or Dollar denominated bonds with minimum 5 year maturity. Only Infrastructure Finance Companies (IFC) can sponsor IDF-NBFCs

VII. Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI):

NBFC-MFI is a non-deposit taking NBFC having not less than 85% of its assets in the nature of qualifying assets which satisfy the following criteria:

a. Loan disbursed by an NBFC-MFI to a borrower with a rural household annual income not exceeding Rs. 1,00,000 or urban and semi-urban household income not exceeding Rs. 1,60,000;

b. Loan amount shall not exceed Rs. 50,000 in the first cycle and Rs. 1,00,000 in subsequent cycles;

c. Tenure of the loan not to be less than 24 months for loan amount in excess of Rs. 15,000 with prepayment without penalty;

d. Loan to be extended without collateral security;

e. Aggregate amount of loans, given for income generation, is not less than 50 % of the total loans given by the MFIs;

f. Loan is repayable on weekly, fortnightly or monthly instalments at the choice of the borrower.

VIII. Non-Banking Financial Company – Factors (NBFC-Factors):

NBFC-Factor is a non-deposit taking NBFC engaged in the principal business of factoring.

- ✓ The financial assets in the factoring business should constitute at least 50 % of its total assets and
- ✓ Its income derived from factoring business should not be less than 50 % of its gross income.

Factoring

IX. Mortgage Guarantee Companies (MGC)

MGC are financial institutions for which

- ✓ At least 90% of the business turnover is mortgage guarantee business **OR**
- ✓ At least 90% of the gross income is from mortgage guarantee business **AND**
- ✓ Net owned fund is Rs. 100 Cr.

X. NBFC- Non-Operative Financial Holding Company (NOFHC)

It is financial institution through which promoter / promoter groups will be permitted to set up a new bank .It's a wholly-owned Non Operative Financial Holding Company (NOFHC) which will hold the bank as well as all other financial services companies regulated by RBI or other financial sector regulators, to the extent permissible under the applicable regulatory prescriptions.

BENEFITS OF INCORPORATING NBFC:

According to research and studies it is proved that NBFCs are outperforming banks. The continued better performance from NBFCs has given rise to an uptick of 15% customer satisfaction as compared to the banking customers. The same is agreed by the RBI according to the recent Financial Stability Report. Banks and NBFCs are financial intermediaries and the services offered by them are pretty much the same as banks. However, the benefits of incorporating an NBFC and carrying on its activities are listed below:

1.Competitive Interest Rates:

Rate of interest is one of the main aspects of all types of loans. Non-Banking Financial Sectors have started to concentrate on this area in the recent decades and have brought down the interest rates to either equal to bank lending rates or at times even lower to bank rates. With all the other benefits when rate of interest is also lowered, borrowers found this more easy and affordable.

2.Quick Processing:

At banks, it is very important that the applicant should fulfil the eligibility criteria but NBFC are lenient in this aspect. This makes loan approval easier, smoother process and quicker. Most of the times, people apply for loan when they are in immediate need of money. NBFCs have taken this as an opportunity to meet the demand by quickly processing the loans at competitive rate of interest.

3.Less Rules and Regulations:

As NBFC are incorporated under the Companies Act, (though regulated by the RBI), the rules and regulations for lending are not as stringent as banks. This helps borrowers to get loans easily. In view of less complicated loan processing requirements, borrowers are highly satisfied.

4.Loan available for Individuals with Poor Credit Rating:

Individuals with poor credit rating generally will not get loans from banks. The reason for this is banks consider borrowers are high-risk individuals if the credit score is low. Unless the credit score is above 600-650,it is very difficult to get a loan sanctioned from banks. On the other hand, loans will be offered to individuals with low credit score by NBFCs but most of the time the interest rates for such borrowers will be higher than market rates. Due to these aforementioned advantages, most of the NBFCs are growing.

Procedure for Registration of NBFC

NO NBFC can commence or carry on business of a financial institution without obtaining a Certificate of Registration(COR) from the RBI and having a Minimum Net Owned Funds of RS. 2 Crore.

1. **Incorporation of Company**

Firstly, incorporate a Company following the normal procedure as prescribed under co. act 2013 and rules made thereunder.

2. **Pre-requisite of Registration with RBI**
   a) It should be a company registered under Companies Act,2013 or previous Companies Act,1956.
   b) It should have minimum net owned funds of INR Rs. 2 crore.
   c) It should have minimum 1 director from NBFC background or senior Bankers as full-time director in the company

d) Clean CIBIL records
e) Understanding of NBFC/Finance business

1. Filing of Application with RBI

An online application available on RBI's website (cosmos.rbi.gov.in) should be filled in along with all the necessary documents.

Note: *A CARN number will be generated which shall be preserved for inquiring about the status of the application.*

2. Submission of Hard Copy Documents

The hardcopy of the application along with attached documents should be submitted to the regional branch of RBI.

3. Grant of License

A license will be granted only after careful scrutiny of the application and documents.

HOUSING FINANCE COMPANIES

Housing Finance Company (HFC) is a type of NBFC which is primarily engaged in the business of providing home loans and other related products. Unlike other NBFC which are governed under the regulatory framework of RBI, HFCs are regulated by the National Housing Bank (NHB).

- ✓ Collateral securities are accepted against loans advanced by HFCs.
- ✓ The amount of loan advanced depends upon the value of the collateral offered.
- ✓ The value of the collateral ensures that the lender is secured and has covered itself from the risk of default.
- ✓ It is necessary to have correct and realistic valuation of properties or fixed assets at the time of advancement of loan.
- ✓ Loans given by HFC's are usually for a long period of time.
- ✓ HFC is a company registered under the Companies Act, 2013 or any earlier enactment which primarily transacts or has as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly.
- ✓ An HFC is also requires registration with National Housing Bank(NHB) for commencing or carrying on the business of housing finance.
- ✓ The National Housing Bank was set up as wholly owned subsidiary of RBI under the National Housing Bank Act, 1987. HFCs are governed by the said Act and by Circulars, Guidelines, Notifications and Directions issued by National Housing Bank

Procedure for Registration of HFC

No HFC can commence or carry on business of a financial institution without obtaining a Certificate of Registration (COR) from the National Housing Bank and having a Minimum Net Owned Funds of Rs. 10 Crore

1) Incorporation of Company

Firstly, incorporate a Company following the normal procedure

2) Filing Application with NHB

- ✓ The applicant company is required to submit a physical copy of the application (in duplicate) along with the essential documents to the Head Office of the National Housing Bank.
- ✓ Further, Company is also required to attach a Demand Draft for Rs. 10,000 favoring National Housing Bank payable at New Delhi.

3) Grant of License

NHB after satisfying itself on the fulfilment of following conditions may grant Certificate of Registration:

- ✓ It shall *be* in a position to pay its present or future depositors in full as and when their claims accrue;
- ✓ Affairs of the HFC *are* not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;
- ✓ management shall not be prejudicial to the public interest or to the interests of its depositors;
- ✓ It has adequate capital structure and earning prospects;
- ✓ Grant of certificate of registration shall serve Public interest;
- ✓ Grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country

ASSET RECONSTRUCTION COMPANY(ARC)

Asset Reconstruction Company (Securitization Company / Reconstruction Company) is a company registered under *Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act, 2002*.

It is regulated by RBI as a NBFC. RBI has exempted ARCs from the compliances under section 45- IA, 45-IB and 45-IC of the Reserve Bank Act, 1934.

ARC has been set up to provide a focused approach to Non-Performing Loans resolution issue by:-

a) Isolating Non Performing Loans (NPLs) from the Financial System (FS),
b) Freeing the financial system to focus on their core activities and
c) Facilitating development of market for distressed assets.

As per RBI notification dated 23, April 2003, ARC performs the following functions:-

i. Acquisition of financial assets.

ii. Change or takeover of Management / Sale or Lease of Business of the Borrower
iii. Rescheduling of Debt
iv. Enforcement of Security Interest.
v. Settlement of dues payable by the borrower.

ARCs are created to manage and recover NPA acquired from the banking system. ARCs are act as a bad bank by isolating NPA from the balance sheet of bank/FII and facilitate the latter to concentrate in normal banking activities.

Banks and financial institutions with a large proportion of their bad loans or Non Performing Assets can sell to a separate entity i.e. ARC. Then Asset Reconstruction Companies recover a sum through attachment, liquidation etc. The objective is to help banks in making clean books by reducing NPA. ARCs are also making profit by buying NPA at a lower price.

Benefits of incorporating an ARC

- As the cash realisation activity from defaulting borrowers is a lengthy and cumbersome procedure, relieving banks of the burden of NPAs will allow them to focus better on managing the core business including providing new business opportunities for the ARC.
- The transfer should help restore depositor and investor confidence by ensuring the lender's financial health. The banks use it as a method to hive off the bad loans from their balance sheet. ARCs can maximise recovery value while minimizing costs.
- ARCs also helps building industry expertise in loan resolution and restructuring management, besides serving as a catalyst for important legal reforms in bankruptcy procedures and loan collection.
- ARCs play an important role in developing capital markets through secondary asset instruments.

Procedure for Registration of ARC

1. **Incorporation of Company**
   Firstly, incorporate a Company following the normal procedure.
2. **Filing Application with RBI**
   The applicant company is required to submit to the Chief General Manager-in-Charge, Department of Non-Banking Regulation, Central Office, RBI, Centre 1, World Trade Centre, Cuffe Parade, Colaba, Mumbai 400 005
3. **Commencement of Business**
   An ARC shall commence business within 6 months from the date of grant of Certificate of Registration by the Bank; RBI may grant extension for further period not exceeding 12 months.

Special Note: An ARC shall have a Net Owned Funds (NOF) of Rs. 2 Crores or such higher amount as may be specified. By a Notification dated April 28, 2017, the requirement of NOF has been fixed at Rs. 100 Crore on an ongoing basis.

ARC'S already registered with RBI as on the date of the said notification and not having the minimum revised NOF shall achieve the minimum NOF of Rs. 100 Crore latest by March 31, 2019 and the same shall be duly certified by the Statutory Auditors

MICRO FINANCE INSTITUTIONS (MFI)

A microfinance institution is an organization that offers financial services to low income populations. Almost all give loans to their members, and many offer insurance, deposit and other services. Organisations which finance on a larger scale are regarded as micro finance institutes. They are those that offer credits and other financial services to the representatives of poor strata of population (except for extremely poor strata). An increasing number of microfinance institutions (MFIs) are seeking NBFC status from RBI to get wide access to funding, including bank finance.

NABARD has defined microfinance as "provision of thrift, credit and other financial services and products of very small amounts to the poor in rural, semi-urban and urban areas provided to customers to meet their financial needs; with only qualification that (1) transactions value is small and (2) customers are poor."

Characteristics of a Micro Finance Institution

a. The size of the loan given by the MFI is small.
b. The repayment period is short.
c. MFI can mobilise resources both from internal and external sources.
d. No collateral for loan is required.
e. the purpose of end use of loan is flexible.
f. loans given are mostly group loans, trickling down to individuals.
g. Transaction cost is low, due to group lending.

Procedure for Registration of MFI

1. Incorporation of Company

Firstly, incorporate a Company following the normal procedure

2. Filing Application with RBI

The applicant company is required to submit an application with RBI, with following documents:

1. Certificate of Incorporation of Company.
2. Extract of Object Clause of MOA.
3. Requisite Board Resolution of compliance of conditions.
4. Audited Balance sheets & P & L account for last 3 years or lesser period of existence.

5. Certificate of qualifications & experience of Directors.
6. Any other Documents depending upon type of MFI.

NIDHI COMPANY

A Nidhi Company, is one that belongs to the non-banking finance sector and is recognized u/s 406 of the Companies Act, 2013. Their core business is borrowing and lending money between their members. They are also known as Permanent Fund, Benefit Funds, Mutual Benefit Funds and Mutual Benefit Company. Nidhis are more popular in South India and are highly localized single office institutions. They are mutual benefit societies, because their dealings are restricted only to the members; and membership is limited to individuals. The principal source of funds is the contribution from the members.

Characteristics of a Nidhi Company

1. It is allowed to transact business only with its members and with nobody else. Hence, in case a person wishes to place deposit with a Nidhi or borrow money from a Nidhi, he must first become a member(shareholder) of the Nidhi by subscribing to 10 equity shares or shares equivalent to Rs. 100
2. After commencement of the Companies Act, 2013, no Nidhi shall issue preference shares.
3. They are allowed to open branches subject to compliance with Rule 10 of the Nidhi Rules, 2014, but do not operate on a pan India (all India) basis.
4. They are incorporated as public companies with a minimum paid up equity share capital of Rs 5,00,000.
5. Loans may be provided only to its members and should be fully secured.
6. A director of a Nidhi shall be a member and shall hold office for a term upto 10 consecutive years on the Board of a Nidhi.
7. Nidhi can declare dividend not exceeding 25% and any higher amount shall be specifically approved by-the Regional Director.
8. Nidhi shall adhere to the prudential norms for revenue recognition and classification of assets in respect of mortgage loans or jewel loans as provided in Rule 20 of the Nidhi Rules, 2014

Benefits of incorporating a Nidhi Company

1. A Nidhi mobilises small savings, mostly of the middle class and disburses loans to eligible borrowers. Owing to their small size and closeness to the customers, disbursement of loans is speedy. This is especially useful in case the borrower is in urgent needs of funds.
2. The repayment is guaranteed, as the loans are secured and due to peer pressure, borrowers ensure that loan is repaid on due dates.
3. Nidhis offer a higher rate of interest on deposits. This makes it an attractive investment opportunity for people, especially the senior citizens.

4. The Board of Directors of a Nidhi normally consists of senior persons who have experience in handling finances and who are well respected in social circles. This lends credibility to the institution and instils confidence in the minds of borrowers and depositors

General restrictions or prohibitions on Nidhis (Rule 6)

No Nidhi shall-

- Carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate;
- Issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;
- Open any current account with its members;
- Acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi.
- Carry on any business other than the business of borrowing or lending in its own name. Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.
- Accept deposits from or lend to any person, other than its members;
- Pledge any of the assets lodged by its members as security;
- Take deposits from or lend money to any body corporate;
- Enter into any partnership arrangement in its borrowing or lending activities;
- Issue or cause to be issued any advertisement in any form for soliciting deposit. Private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words "for private circulation to members only" shall not be considered to be an advertisement for soliciting deposits.
- Pay any brokerage or incentive for mobilising deposits from members or for deployment of funds or for granting loans.

PAYMENT BANKS

Payments banks is a new model of banks conceptualised by the RBI. These banks can accept a restricted deposit, which is currently limited to Rs. 1 lakh per customer and may be increased further.

They can pay interest on these deposits just like savings bank account. Both current account and savings accounts can be operated by such banks.

Payments banks can issue services like ATM cards, debit cards, net-banking, third party transfers and mobile-banking and offer remittance services, These banks cannot grant loans or issue credit cards.

The main objective of payments bank is to widen the spread of payment and financial services to small business, low-income households, migrant labour workforce in

secured technology-driven environment. With payments banks, RBI seeks to increase the penetration level of financial services to the remote areas of the country.

To open a bank account and the application process of payments bank is made very easy as compared to other banks. These bank accounts can be opened instantly through their respective mobile apps just by providing details like Aadhar number with KYC verification. Most of the payment banks have a non-NBFC heritage and will use payment bank as a customer retention and acquisition mechanism

1. **Minimum Capital Requirement**: The minimum capital requirement is Rs. 100 Cr.
2. **Promoter's Stake**: For the first 5 years, the stake of the promoter should remain at least 40%.
3. **Foreign shareholding permitted**: Foreign shareholding will be allowed in these banks as per the rules for FDI in private banks in India.
4. **Voting Rights**: The voting rights will be regulated by the Banking Regulation Act, 1949. The voting right of any shareholder is capped at 10%, which can be raised to 26% by RBI. Any acquisition of more than 5% will require approval of the RBI.
5. **Composition of Board**: The majority of the bank's board of directors should consist of independent directors, appointed according to RBI guidelines.
6. **Cap of Deposits**: Initially, the deposits will be capped at Rs. 1,00,000 per customer, but it may be raised by the RBI based on the performance of the bank.
7. **No lending activities:** The bank cannot undertake lending activities.
8. **Branches:** 25% of its branches must be in the unbanked rural area.
9. **Name:** The bank must use the term "payments bank" in its name to differentiate it from other types of bank.
10. **License:** The banks will be licensed as payments banks under Section 22 of the Banking Regulation Act, 1949.
11. **Registered as Public Company:** It will be registered as public limited company under the Companies Act, 2013.

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STARTUPS AND ITS REGISTRATION

INTRODUCTION

Startups are becoming very popular in India. The Government of India to develop Indian economy and attract talented entrepreneurs has started and promoted Startup India under the leadership of Prime Minister, Narendra Modi.

A startup is a newly established business, usually small in size. The difference between startup and other new businesses is that a startup offers a new Innovative product or service. The keyword is **innovation.** The business either develops a new product/service or redevelops a current product/service into something better.

STARTUPS

A start-up company (start-up) is an entrepreneurial venture which is typically an emerging , fast growing business that aims to solve an unmet need by developing a viable business model around an innovative product, service, process or a platform. A start-up is usually a company designed to effectively develop and validate a scalable business model.
Start-ups may have high rates of failure, but the minority of successes includes companies that have become large and influential.

EVOLUTION OF STARTUPS

Startup companies can come in all forms and sizes. Some of the critical tasks are to build a co-founding team to secure key or complementary skills, know-how, financial resources, and other elements to build the product for the target market.

Typically, a start-up will begin by building a first minimum viable product (MVP), a prototype, to validate, assess and develop the new ideas or business concepts. In addition, start-ups founders do research to deepen their understanding of the ideas, technologies or business concepts and their commercial potential.

A Founders' agreement are often agreed early on to confirm the commitment, ownership and contributions of the founders and to deal with the intellectual properties and assets that may be generated by the start-up. A Shareholders' Agreement (SHA) is entered into between the founders and investors to confirm investment terms, rights of investors, exit clauses and any other important agreement terms.

Business models for start-ups are generally found via a "bottom-up" or "top-down" approach. A company may cease to be a start-up as it passes various mile stones, such as

becoming publicly traded on the stock market in an Initial Public Offering (IPO), or ceasing to exist as an independent entity via a merger or acquisition.

Companies may also fail and cease to operate altogether, an outcome that is very likely for start-ups, given that they are developing disruptive innovations which may not function as expected and for which there may not be market demand, even when the product or service is finally developed.

Given that start-ups operate in high-risk sectors, it can also be hard to attract investors to support the product/service development or attract buyers

STARTUP INDIA POLICY

- ✓ Start-ups policies;
- ✓ Government initiatives
- ✓ Exemptions for Start-ups
- ✓ Tax benefits
- ✓ Cooling period for start ups

Start-up India campaign is based on an action plan aimed at promoting bank financing for start-up ventures to boost entrepreneurship and encourage start ups with jobs creation. The campaign was first announced by Prime Minister Narendra Modi in his 15 August 2015 address from the Red Fort.

The Government of India has announced 'Startup India' initiative for creating a conducive environment for startups in India. The various Ministries of the Government of India have initiated a number of activities for the purpose.

To bring uniformity in the identified enterprises, an entity shall be considered as a 'startup'-

(a) Up to 5 years from the date of its incorporation/registration,
(b) If its turnover for any of the financial years has not exceeded Rs. 25 Cr., and
(c) It is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property;

Any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'start-up'.

An entity shall cease to be a start-up on completion of 5 years from the date of its incorporation/registration or if its turnover for any previous year exceeds Rs. 25 Cr. The words “entity” means a private limited company as defined in the Companies Act, 2013, or a registered partnership firm registered u/s 59 of the Partnership Act, 1932 or a LLP under the LLP Act, 2002. The words “Turnover” is as defined under the Companies Act, 2013.

An entity is considered to be working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property if it aims to develop and commercialize:

a) A new product or service or process, or
b) A significantly improved existing product or service or process, that will create or add value for customers or workflow.

Process of Recognition of Startup

The process of recognition as e start-up' shall be through mobile app/portal of the Department of Industrial Policy and Promotion.

Startups will be required to submit a simple application with any of following documents

a) A recommendation (with regard to innovative nature of business), in a format specified by DIPP, from any Incubator established in a post- graduate college in, India; **OR**
b) A letter of support by any incubator which is funded (in relation to the project) from Government of India or any State Government as part of any specified scheme to promote innovation; **OR**
c) A recommendation (with regard to innovative nature of business), in a format specified by DIPP, from any Incubator recognized by Government of India; **OR**
d) A letter of funding of not less than 20 % in equity by any Incubation Fund/Angel Fund/Private Equity Fund/Accelerator/Angel Network duly registered with SEBI that endorses innovative nature of the business. **OR**
e) A letter of funding by Government of India or any State Government as 'part of any specified scheme to promote innovation; **OR**
f) A Patent filed and published in the Journal by the Indian Patent Office in areas affiliated with the nature of business being promoted.

Key points

- ✓ Single Window Clearance even with the help of a mobile application.
- ✓ Rs. 10,000 crore fund of funds.
- ✓ Reduction in patent registration fee.
- ✓ Modified and more friendly Bankruptcy Code to ensure 90-day exit window.
- ✓ Freedom from Capital Gain Tax for 3 years.
- ✓ Freedom from tax in profits for 3 years.
- ✓ Self-certification compliance.
- ✓ Innovation hub under Atal Innovation Mission.
- ✓ Starting with 5 lakh schools to target 10 lakh children for innovation programme.
- ✓ New schemes to provide IPR protection to start-ups and new firms.
- ✓ Encourage entrepreneurship.
- ✓ Stand India across the world as a start-up hub.

BENEFITS TO STARTUPS

1. **Simple process:** Anyone interested in setting up a startup can fill up a simple form on the website or through mobile app. The entire process is completely online.

2. **Reduction in cost:** Startups will enjoy 80% reduction in cost of filing patents. The government also provides lists of facilitators of patents and trademarks, who will provide high quality Intellectual Property Right Services at lower fees. The government will bear all facilitator fees and the startup will bear only the statutory fees.

3. **Easy access to Funds:** A Rs. 10,000 crore fund is set-up by government to provide funds to the startups as venture capital.

4. **Tax holiday for 3 Years:** Startups will be exempted from income-tax for 3 years provided they get a certification from Inter-Ministerial Board (IMB).

5. **Apply for tenders:** Startups can apply for government tenders. They are exempted from the "prior experience/turnover" criteria applicable for normal companies answering to government tenders.

6. **R&D facilities:** Seven new Research Parks will be set up to provide facilities to startups in the R & D sector.

7. **Quick & Easy compliances:** Various compliances have been simplified for startups to save time and money.

8. **Tax saving for investors:** People investing their capital gains in the venture funds setup by government will get exemption from capital gains. This will help startups to attract more investors.

9. **Easy exit:** In case of exit, a start up can close its business within 90 days from the date of application of winding up.

10. **Startup Fests:** 2 startup fests will be held annually both nationally and internationally to enable the various stakeholders of a startup to meet. This will provide huge networking opportunities

TAX EXEMPTIONS TO STARTUPS

To avail these benefits, the entity must obtain a certificate from the Inter-Ministerial Board of Certification. The board consists of the following members:

- Joint Secretary, Department of Industrial Policy and Promotion;
- Representative of the Department of Science and Technology; and
- Representative of the Department of Biotechnology.

Particulars	Exemption	Conditions(if any)
Tax Exemption on Income for 3 years (80-IAC)	The Startup incorporated after April 1, 2016 is eligible for getting 100% tax rebate on profit for a period of 3 years out of 7 years.	It is incorporated after April 1, 2016. The annual turnover must not exceed Rs. 25 Crores in any financial year up to 31st March, 2021.
MAT Exemptions for 5 years	MAT @18.5% not chargeable for the first 5 years In case the startup fails to make any profit	If startup fails to make any profit.
Exemption from tax on LTCG (54 EE)	A new section has been inserted In the Income Tax Act for the eligible startup to exempt their tax on a LTCG if such a LTCG or a part thereof Is Invested In a fund notified by CG.	The capital gain should be invested within 6 months from the date of transfer of asset. The maximum amount that can be Invested in the long-term specified asset is Rs 50 lakh. The amount shall remain invested for a period of 3 years otherwise exemption will be revoked.
Tax exemption on investments above the FMV	The government has exempted the tax being levied on investments above the fair market value in eligible startups.	
Tax exemption to individual/HUF on investment	If an individual or HUF sells a residential property and invests the capital gains to subscribe the 50% or more equity shares of the eligible startups, then tax on LTCG will be exempt	Lock in period of investment is 5 years.

COMPANY LAW EXEMPTIONS TO STARTUP

Meaning of Start Up Company

"Start-up Company" means a private company incorporated under the Companies Act, 2013 or the Companies Act, 1956 and recognized as start-up in accordance with the notification issued by the DIPP, Ministry of Commerce and Industry.

- ✓ An amount of Rs. 25 Lakhs or more received by a start-up company, in a single tranche, from one single person by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) shall not be treated as a deposit.
- ✓ Provisions of Section 73 of the Act related to deposit shall not apply to a start-up company for 5 years from the date of its incorporation.

- ✓ The upper limit on the acceptance of deposits has been enhanced to 35% of net worth instead of earlier 25%.
- ✓ Start-ups are allowed to issue Employee Stock Options to promoters working as employees.
- ✓ The limits with regard to sweat equity that can be issued by a start-up company from 25% of paid up capital to 50% of paid up capital.
- ✓ The annual return of a start-up company may be signed by the company secretary, or where there is no company secretary, by the director of the company.
- ✓ For start-ups, convening at least one meeting of the board of directors in each half of a calendar year with the gap between the two meetings of not less than Ninety (90) days is sufficient to meet the requirement of frequency of Board Meetings

Important points for a Startup

1. Choose the right legal structure for your startup

Choosing an appropriate legal structure is one of the most crucial decisions for any startup. The decision should be taken based on individual circumstances and a host of factors such as nature/sector of business operation, business trajectory, regulatory and tax considerations, costs of formation and ongoing administration, external capital requirement and, type of funding sought, of legal liability protection required, number of stakeholders, balance required between ownership and management, proposed mechanism for profit sharing or distribution amongst stakeholders. Preferred entity structures for startups in India are limited liability partnership and private limited company

2. Registrations and business licenses:

Post incorporation of a business entity in India, some necessary registrations are required and mandated by law. Some examples are Permanent Account Number (PAN), GSTIN etc.

3. Intellectual Property Protection:

Intellectual Property Rights are a very important asset class for a startup. Developing and protecting intellectual property with proper registration can help startups gain competitive. advantage. It is essential to obtain trademark registration for the business name/trade name under the Trademarks Act. Registration of a company or business in India does not by itself give protection against others who might commence using identical or similar marks.

4. Founder Equity — Split and Vesting:

Founder equity should be split amongst founders based on the nature of role played by each founder along with their time, effort and capital contribution to the startup. Splitting founder equity equally by default without a through discussion on expectations

and contribution generally leads to tension and unhappiness amongst founding teams as the
startup matures.

5. Founder agreements:
The founder's agreement is the most valuable tool to establish the relationship between the founders of a startup. The agreement should represent a clear understanding between the founders on all key issues related to the startup.

6. Employment contracts:
Startups must ensure to enter into clear employment contracts detailing terms and conditions of employment with their employees. While employment contracts are certainly valuable to the employees as it details terms regarding description of job profile, compensation and other associated benefits, a number of clauses may be inserted to safeguard and protect the interest of the startup — such as stopping employees from setting up competing entities (non-compete clause), poaching other employees/clients/customer (non-solicitation clause), preventing employees from claiming any intellectual property right on the work done/developed during the course of employment (assignment of intellectual property rights).

7. Employee Stock Option Pool (ESOP):
ESOP's are incentives given to employees/directors of a company to attract talent and retain employees by rewarding them. ESOPs create a sense of ownership amongst employees. It is important to note that ESOPs are **not shares. They are** structured in a way that they are option to buy **shares at a discounted** price and can be exercised only after a certain **vesting period which** is decided by the company granting the ESOPs. **In India, we** typically see a pool of 10 per cent to 15 per cent allocation **towards an** ESOP Pool.

8. Third Party Agreements:
Prior to entering into a third-party agreement and while negotiating the terms, it is advisable to execute a non-disclosure agreement. If creation/development of intellectual property is a component of such a third- party agreement, it must clearly state that all rights to the intellectual property rights shall vest and be owned by the startup and the third-party shall not stake any claim on the same and will do all acts to ensure the protection of the intellectual property.

9. Investment structuring:
One of the most challenging and time consuming aspects of operating **a startup is** to raise capital for working capital requirement and growth. **In India,** Investors (HNIs/Angels/Funds) invest in early and growth stage **companies** in different structures and on varied terms.

10. Compliance management:

Compliance and its importance is often overlooked by many startups. **There are** multiple laws applicable to specific entity structures under **which separate** event based and annual compliance is mandated. It is **extremely** critical for the sustainable growth of any business that the **startup** is in compliance with legal, secretarial, accounting, taxation, employee related and other associated compliances. The consequences of non-compliance can be levy of punitive fines on the startup

PROCEDURE FOR SETUP STARTUP

1. Incorporation of the Business

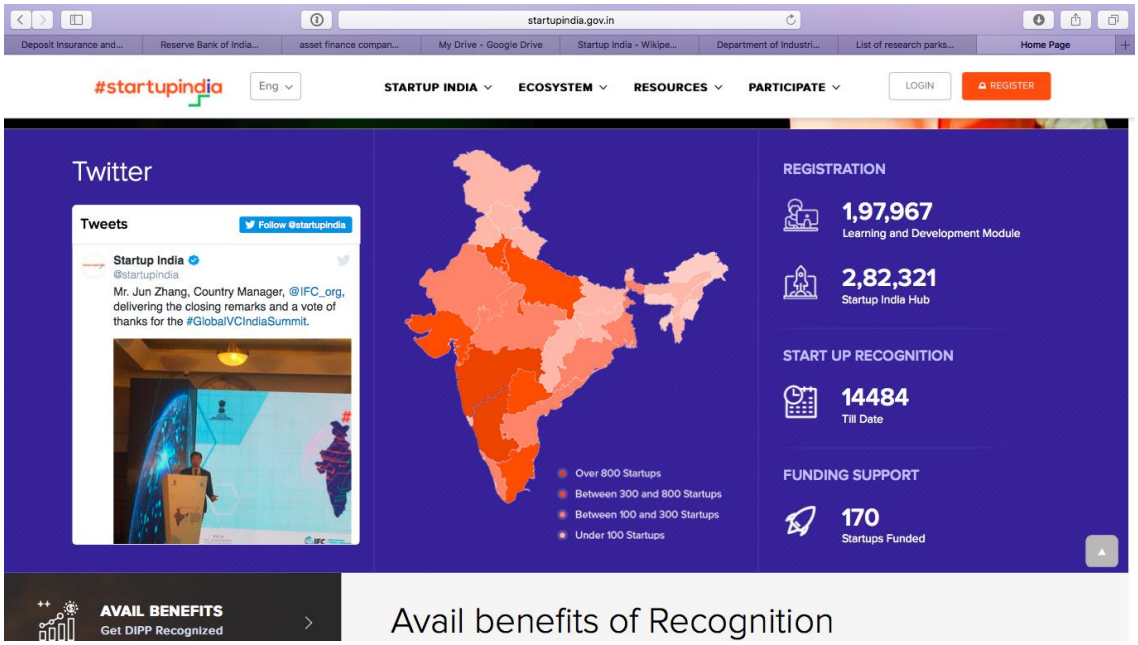
Incorporate your business normally in any of the following forms**:**

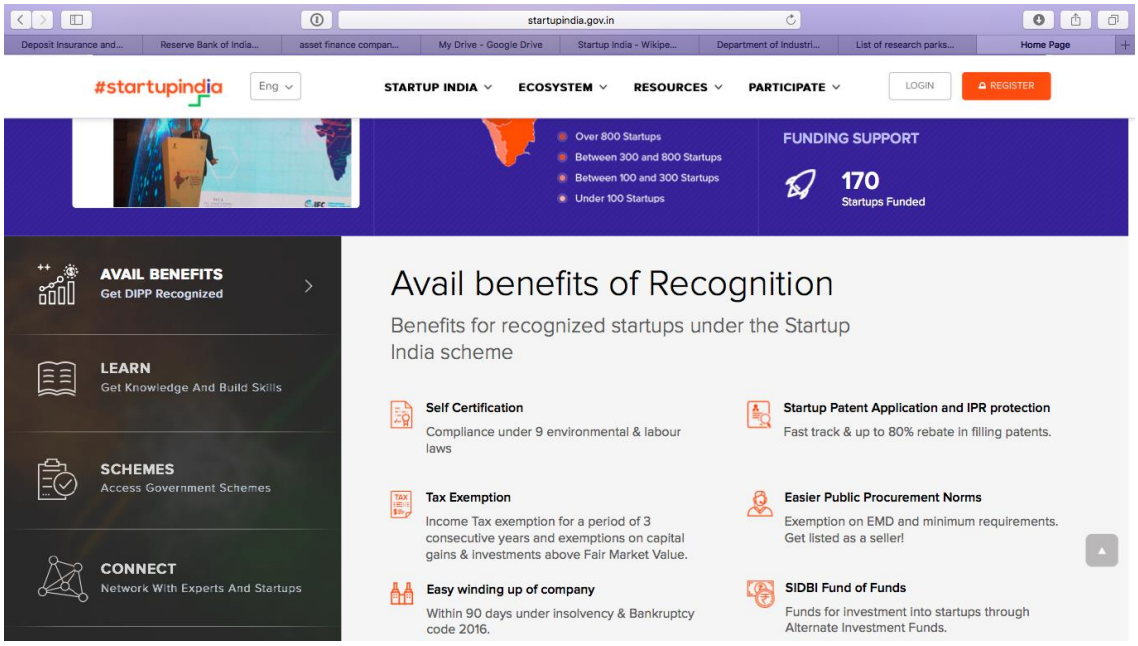
- Private Company
- Limited Liability Partnership
- Partnership

Note: Follow the ordinary procedures as a certificate of incorporation, Pan card and other compliances related to the particular type of business.

2. Registering business with Startup India

Upload an online form with all requisite details & documents at www.startupindia.gov.in website. The entire process is simplified and made online by the government





3. Documents to be uploaded

1. Recommendation letter from any the following:

- ✓ Any patent filed and published in patent journals available online or offline.
- ✓ Incubators who are established in post-graduation colleges in India.
- ✓ Support letter from *one* of the startups who is funded through Central or State Government authorities or any incubator which is duly recognized by the Government of India.
- ✓ Letter of funding which should not be less than 20% in equity by angel or incubation fund.

2. Incorporation certificate of the business
3. A brief description of your business

4. Choice to avail Tax Benefits

Startups are provided various tax benefits. But to avail these benefits, they must be certified by the Inter-Ministerial Board (IMB).

5. Self-Certification

Self-certification of the following details

- ✓ The business is registered as a Private Limited Company, Partnership firm or a Limited Liability Partnership
- ✓ Business is incorporated/registered in India, not before 7 years.
- ✓ Turnover is less than Rs. 25 crores per year.
- ✓ Innovation is a must- the business is working towards innovating something new or significantly improving the existing used technology.
- ✓ The business is not a result of splitting up or reconstruction of an existing business

6. Certificate of Registration

You are all set to apply for the recognition and on applying you will be allotted with one unique recognition number. Certificate of recognition will be issued after going through the documents submitted by you.

Certificate No.:DIPP1300

Department of Industrial Policy & Promotion
Ministry of Commerce & Industry
Government of India

CERTIFICATE OF RECOGNITION
Department of Industrial Promotion and Policy

This is to certify that ***Recherche Tech LLP*** incorporated/ registered as a ***Limited Liability Partnership*** on ***12-07-2016,*** is recognized as a startup by the Department of Industrial Policy and Promotion.

Date of Issue: 16-09-2016
Place of Issue:New Delhi

The certificate shall only be valid for the entity:
- Up to five years from the date of its incorporation/ registration; and
- If its turnover for any of the financial years has not exceeds Rupees 25 crore.

Note:
- **Authorities accepting this Certificate may check its validity on the Startup India portal(www.startupindia.gov.in)**
- This certificate is not the Certificate issued by the Inter Ministerial Board and is not valid for availing Tax benefits
- This is a system generated certificate and hence does not require physical signature

FINANCING OPTIONS AVAILABLE FOR STARTUP COMPANIES

Finance is the life blood of any business. In case the venture is self-funded there can be no better option than that. However, a Start-up is mostly the result of a novel idea that is the brainchild of its founder(s) and more often than not, funds are always a challenge. Let us examine the different financing options

Seed Capital

Start-up business needs the nurturing of finance to explore and grow. The funding done at the nascent (early) stage is called seed funding and the capital is known as a seed capital.

- ✓ Initial capital used at the time of starting the business.
- ✓ Come from the founders, families or friends.
- ✓ Required for the market research, product development, and other initial stage operations.
- ✓ Permits exploration of the business idea and converting it into a viable product or service that further attracts venture capitalists.
- ✓ A business founder must be clear on how to utilise seed capital in the most optimum manner to ensure smooth transition to the advanced stage of the business.
- ✓ It is a risky investment option, as most funding agencies would like to adopt a **wait and watch approach** to see whether the idea has a business potential.

- ✓ From the founder's point of view, the option of obtaining seed funding has to be carefully utilised as obtaining seed funding may result in dilution of ownership of the founder.
- ✓ paperwork involved in seed funding is relatively less and straightforward, compared to advanced rounds of funding. Even the legal fees required are also quite less as compared to other options. The interest rates too are usually lower and there are mostly no restrictions in the manner of business working as it is still in the nascent stage.

Financing is generally of two types i.e. (a) equity financing; or (b) debt-financing

Equity Financing

Start-ups are usually equity financed/funded by way of a venture capital/ private equity investors and/or angel investors.

(i) Venture Capitalist/Private Equity

- ✓ Venture capital ("VC") / Private Equity ("PE") is often the first large investment a start-up can expect to receive.
- ✓ **Convertible instruments** are usually the preferred option and most commonly used securities for VC/PE investment which includes compulsory convertible preference shares and compulsory convertible debentures.
- ✓ The investor and start-up will normally enter into a **non-binding offer** based on the preliminary valuation of the start-up usually followed with a financial, legal and technical due diligence on the start-up as required by the investors.
- ✓ Due-diligence will help the investors to finalize the representation and warranties and also to identify conditions precedent to the completion of investments and conditions subsequent in the aforesaid transaction documents.

ii) Angel Investors

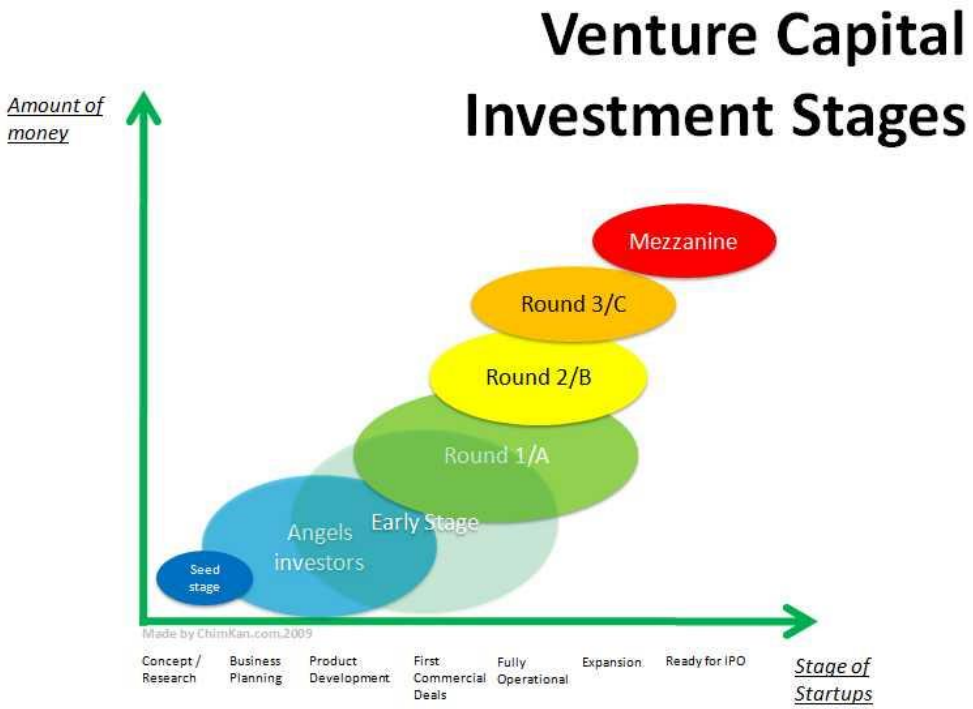
Angel investors are usually **individuals** or a **group of industry professionals** who are willing to fund the venture in return for an equity stake. Under the SEBI (Alternative Investment Funds) Regulations, 2012 which was subsequently amended in 2013, SEBI has made the **following restrictions** applicable to angel funds investing in an Indian company:

a) An investee company has to be **within 3 years** of its incorporation, not listed on the floor of a stock exchange, and should have a turnover of less than INR 250 million and not be promoted by or related to an industrial group (with group turnover exceeding INR 3 billion).
b) The deal size is required to be between INR 5 million and INR 50 million. Separately, it is required that an investment shall be held for a period of at least 3 years.

(iii) Series Funding

After Seed Funding Round or Angel Funding Round and Bridge Funding Round, Series Funding Round will start like Series A to Z.

Series preferred stock is the first round of stock offered during the seed or early stage round by a portfolio company to the venture capital investor. Series preferred stock is often convertible into common stock in certain cases such as an Initial public offering (IPO) or the sale of the company.



Series rounds are traditionally a critical stage in the funding of new companies. A typical **series A** round is in the range of $2 million to $10 million, purchasing 10% to 30% of the company. The capital raised during a series round is usually intended to capitalize the company for 6 months to 2 years as it develops its products, performs initial marketing and branding, hires its initial employees, and otherwise undertakes early stage business operations

B. Debt Financing

i. Loan from Banks & NBFCs

Banks are traditionally the first place an entrepreneur approaches when in need of funds. The downside is that the banks follow strict criteria in granting loan to Startups. They never take risk no matter how exciting the idea is. Further they want their interest and principal repayment irrespective of performance of business

ii. External Commercial Borrowing

External Commercial Borrowings (ECB) refer to commercial loans in the form of bank loans, buyers' credit, suppliers' credit, securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible

preference shares) availed of from non-resident lenders with a minimum average maturity period of 3 years.

In short, ECBs are commercial loans raised by eligible Indian Companies from the recognized non-resident entities. ECB borrowings should follow all the parameters with regard to minimum maturity period, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc.

iii. CGTMSE Loan

Under the Credit Guarantee Trust for Micro and Small Enterprises scheme one can get loans of up to Rs. 1 crore without collateral or surety. Any new and existing micro and small enterprise can take the loan under the scheme from all scheduled commercial banks and specified institutions

C. INITIAL PUBLIC OFFER (IPO)

Once the startups achieve stable operations and revenue flows, it may consider an Initial Public Offering (IPO) to raise the funds or increase the magnitude of the business operations

D. NON-CONVENTIONAL METHODS

1. Crowd Funding

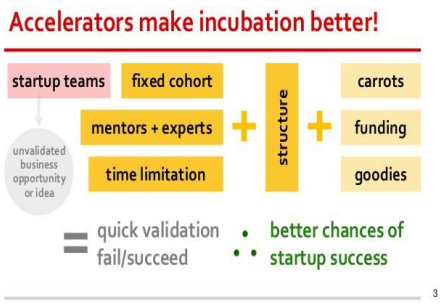
This is a new method of raising fund. The entrepreneur can get money for his venture by showcasing his idea before a large group of people and trying to convince people of its utility and success.

The entrepreneur needs to put up on a portal his profile and presentation, which should include the business idea, its impact, and the rewards and returns for investors. It should be supported by suitable images and videos of the project.

2. Incubators & Accelerators

Incubators & Accelerators can be used as a funding option in the early stage of business. Incubators nurture the business just as a parent does to a child. The difference between

Incubators & Accelerators is that where incubators nurtures the business to walk, Accelerators help the business to run or take a giant leap.



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JOINT VENTURE COLLABORATION & SPECIAL PURPOSE VEHICLES

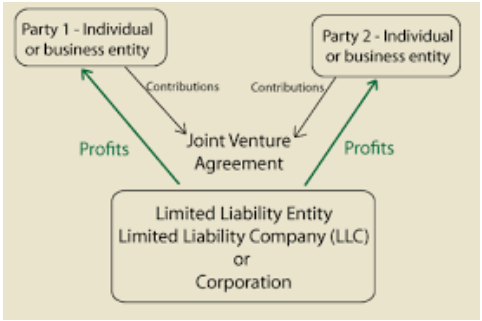
INTRODUCTION

'Joint Venture' is a commercial enterprise undertaken jointly by two or more parties which otherwise retain their distinct identities, to undertake economic activity together. The parties agree to create a new entity to share in the revenues, expenses, and control of the enterprise. Joint Ventures are generally created for a single activity or project, and may have a limited time span. The use of a separate entity allows the parties to limit the liabilities associated with the relationship.

The contributions to the joint ventures are either in the form of

- ✓ Money [capital],
- ✓ Services,
- ✓ Physical asset(s), i.e. equipment or intellectual property [software, patents], etc.,
- ✓ A combination of all.

Business entities, who do not individually have the capacity, in terms of resources finances and technical know-how etc. can get benefit by forming Joint Venture for pooling of resources, sharing technical know-how and exploring larger markets for their goods and services.



Examples of Joint Venture Companies in India are Indian Oil Skytanking Ltd.(between Holders -Ruchi Soya and Indian Oil), Ratnagiri Gas & Power Private Limited(between

NTPC Ltd and GAIL India Ltd.), Mahanagar Gas Ltd.{ BG Group of U.K. and GAIL India Ltd.) and Petronet LNG Ltd.(between PSU's, namely, BPCL, GAIL India Ltd., ONGC and IOCL)

ADVANTAGES JOINT VENTURE

(i) Risk Sharing: Risk sharing is one of the biggest advantage of forming a Joint Venture, particularly, in those industries where the cost of product development and likelihood of failure of any particular product is very high.

(ii) Economies of Scale: for the industries which has high fixed costs, a JV with a larger company can provide the economies of scale necessary to compete locally or globally and can be an effective way by which two companies can pool resources and achieve critical mass.

(iii) Market Access: For companies that lack a basic understanding of customers and the relationship/ infrastructure to distribute their products to customers, forming a JV with the right partner can provide instant access to established, efficient and effective distribution channels and receptive customer bases. This is important to a company because creating new distribution channels and identifying new customer bases can be extremely difficult, time consuming and expensive activities.

(iv) Exploring the Global Market: Formation of JV can be advantageous to those companies, which are foreseeing an attractive business opportunity in a foreign market. Partnering with foreign company would provide an ease to that Company for penetrating a foreign market, which can otherwise be difficult both because of a lack of experience in such market and local barriers to foreign-owned or foreign-controlled companies.

(v) Easy acquisition of other entity or business: When a company wants to acquire another, but cannot due to cost, size, or geographical restrictions or legal barriers, teaming up with a JV Partner can be an attractive option. The JV is substantially less costly and thus less risky than complete acquisitions, and is sometimes used as a first step to a complete acquisition with the JV Partner. Such an arrangement allows the purchaser the flexibility to cut its losses if the investment proves less fruitful than anticipated.

(vi) Cost Efficiency: For a small-scale company/ entity, sometimes it is difficult to set up the infrastructure and the machinery required product development. In the moment of need, joint venture is the perfect solution. For example, if a company has a plan for the perfect product, however, due to financial shortage there is not enough machinery or resources available. At such a time, if another company, which is equipped, lends a hand in the form of joint venture, by way of resource sharing and cost sharing it becomes easier to produce.

(vii) Flexible nature: The joint venture enterprises provide flexibility, each participant has the freedom to continue with their individual businesses. The joint venture participants can only interfere within the participated project. Thus, during the term of the contract participants can freely resume their business as long as they fulfil the needs mentioned in the agreement.

DISADVANTAGES OF JOINT VENTURE

(i) Restricted flexibility where full concentration is required for JV Project: Flexibility is important however, some projects require full concentration and thus the simultaneous work may become impossible. In times like such the participants need to focus on the product of the joint venture and the individual businesses suffer in the process. **For example**, **company A** requires technological assets thus in joint venture **company B** avails the facility. In the same time, if the **company B** requires those technical assets then he has to postpone the individual project for the time being.

(ii) Lack of equal involvement: An equal involvement from all the Joint Venture partners may not be possible. It is extremely unlikely for all the companies working together to share the same involvement and responsibilities.

(iii) Cultural Differences: Different cultures and management styles may result in poor co-operation and integration. People with different beliefs, tastes, and preferences can get in the way big time if left unchecked.

(iv) Extensive Research and planning required: Joint venture can result in a frustrating experience and ultimately a failure if it lacks adequate planning and research.

(v) Lack of clear communication: joint venture involves different companies from different horizons with different goals, there is often a severe lack of communication between partners.

(vi) Unreliable partners: Because of the separate nature of a joint venture, it is possible that the partners do not devote 100% of their attention to the project and become unreliable.

(vii) Creation of competitor: Another potential disadvantage of an JV is the possibility of the creation of a competitor or a potential competitor in the form of one's own joint venture partner.

STRATEGIC ASPECTS OF JOINT VENTURE

Joint ventures can be very effective for growth and success of a business. If formed strategically Joint Ventures can be extremely valuable and chances of their failure can be reduced to a greater extent.

1. **Identification of prospective Joint Venture Partner**
   The prospective partner should be strong in terms of business, technology and resources. One partner must be able to compliment the other partner.
   *For example, one entity's strength is **economies of scale** and another entity's strength is **strong marketing** and their **brand value**. Both the entities if formed into JV can compliment each other and they can have a larger market for their products.*

2. **Reliable Partners**
   JV with strong and trustworthy partner would generate enormous benefits for both the partners and Joint Venture entity.

3. **Development of Strong Joint Venture Relationship**
   Joint venture relationships should be strong and easy to maintain, financially profitable, rewarding, and long-lasting.

4. **Equal Contribution**
   Joint Venture Partners must make sure that all the partners have equal contribution in the Joint Venture entity in terms of skills, resources, capital, and so on. Unequal contributions are never healthy for the success of a Joint Venture entity.

5. **Written Agreement**
   The agreement between two or more parties always be written and must clearly define all the terms in simple language.

6. **Well defined business model**
   The business model of the JV should be clearly defined as this will form a base of legal and financial framework. Strategies of Joint Venture

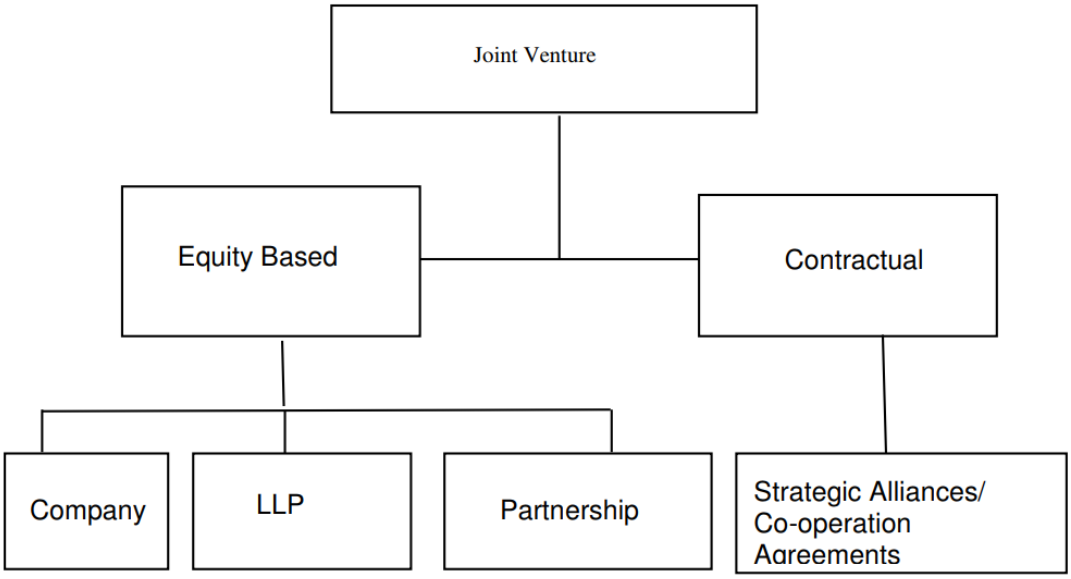
7. **Clearly defined Exit Routes**
   JV Partners much lay down clear exit routes.

FORMATION OF JOINT VENTURES

Joint Ventures can be formed via two modes/methods:

(1) Equity Joint Venture

(2) Contractual Joint Venture



(1) Equity Joint Venture

The equity joint venture is an arrangement whereby a separate Business entity is created in accordance with the agreement of 2 or more parties.

The parties undertake to provide money or other resources as their contribution to the assets or other capital of that legal entity. The entity is **generally** established as a limited liability company and is distinct from either of the parties which participate in its creation.

The newly created company, thus, becomes the owner of the resources contributed by the parties to the joint venture arrangement. Each of the parties in turn becomes the owner of the company having equity in the company.

The parties to a joint venture agreement agree on purposes and functions of the newly created entity, the proportion of capital contribution by each party and the share of each party in the profits of the company and on other matters such as its management, operation, duration and termination.

The key characteristics of equity-based joint ventures are as following:

a) There is an agreement to either create a new entity or for one of the parties to join into ownership of an existing entity .
b) Shared Ownership by the parties involved.
c) Shared management of the jointly owned entity.
d) Shared responsibilities regarding capital investment and other financing arrangements.
e) Shared profits and losses according to the Agreement.

Note: *All above features* ***need not be fulfilled*** *in every equity based joint venture.*

For example*,*

One of the parties to the agreement may be providing investment but have no say in the management of the Joint Venture. Again, a foreign company may want to exercise

management control even though it is not investing in the JV company. Typically, if a foreign company is providing technology and other knowledge-based inputs, it may want to ensure that the JV company is managed as per its directions. In such cases, the foreign company may retain an option to invest in the JV Company on a later date. This may be done by a foreign company to create a foothold for itself in a sector where Foreign Direct Investment (FDI) is not allowed.

(2) Contractual Joint Venture

The contractual joint venture might be used where -

- ✓ The establishment of a separate legal entity is not needed or
- ✓ The creation of such a separate legal entity is not feasible in view of one or
- ✓ Any other reasons.

The 2 parties do not share ownership of the business entity but each of the two parties exercises some elements of control in the joint venture.

The contractual joint venture agreement can be entered into -

- ✓ In situations where the project involves a **narrow task OR**
- ✓ A limited activity **OR**
- ✓ Is for a limited term **OR**
- ✓ Where the laws of the host country do not permit the ownership of property by foreign citizens.

For the purposes of contractual joint venture, the relationship between parties is set forth in the contract or agreement concluded between them.
An example of a contractual joint venture is a franchisee relationship.

The key characteristics of such a relationship are:

i. 2 or more parties have a common intention of running a business venture.
ii. Each party will bring some inputs in the form of money or materials.
iii. Both parties exercise some a certain degree of control on the venture.
iv. The relationship is not a transaction to transaction relationship but has a character of relatively longer time duration.

The above four characteristics are the distinguishing features of a Contractual Joint Venture as opposed to an Equity based relationship.

It is important to note that a joint venture agreement, be it for the establishment of a limited liability company or not, and the different contracts must be concluded in accordance with laws and regulations applicable to such companies including tax laws concerning these companies or the laws relating to agency or partnership as well as other economic laws, in addition to laws relating to labour, sales of goods, insurance and foreign economic and trade contract.

Restrictions under FDI Policy of Government of India

Generally speaking, any non-resident entity can set up an equity based joint venture in India. However, some entities face restrictions under FDI Policy of Government of India. The restrictions are as follows:

1. Citizen or entity of Pakistan can invest only after approval of Government of India. They cannot invest in defence, space, atomic energy and sectors prohibited for foreign investment.

2. Citizen or entity of Bangladesh can invest only after approval of Government of India. However, there are no barred areas as in the case of entities from Pakistan.

3. NRI residents in Nepal and Bhutan as well as citizens of Nepal and Bhutan can invest on repatriation basis subject to investment coming in free foreign exchange (USD or EURO) through normal banking channels.

4. A Foreign Institutional Investor (FII) can invest only under the Portfolio Investment Scheme which limits the individual holding of an FII to 10% of the capital of the company and the aggregate limit for FII investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap / statutory ceiling, as applicable, by the Indian Company concerned through a Board Resolution followed by a special resolution to that effect by its General Body and subject to prior intimation to RBI. The aggregate FII investment, in the FDI and Portfolio Investment Scheme, should be within the above caps.

5. A Foreign Venture Capital Investor (FVCI) duly registered in India may contribute up to 100% of the capital of an Indian Company under the automatic route and may also set up a domestic asset management company to manage the fund. Such investments are subject to the relevant regulations and FDI policy including sectoral caps, etc. SEBI registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident entities, in other companies, subject to FDI Policy and other regulations.

Essential components of a Joint Venture Agreement

In India, there is no legally prescribed format of a Joint Venture Agreement.
However, the agreement contains the following components. Though the list is illustrative and not exhaustive:

- ✓ Description (nature of the Agreement)
- ✓ Parties (full description of the parties to the Agreement)
- ✓ Recitals (states the situation as it existed prior to the execution of this Agreement; It is also used to convey the intention of the parties)
- ✓ Operative Part (defines the rules for the future; typically consists of name and constitution of the new entity being set up, equity investments, rules relating to loans by either party, activities to be undertaken, role of each party, constitution of the

Board, names of the Chairman and Managing Director and their powers, duties, etc, matters to be decided by consensus, managerial remuneration, milestones to be reached and plan of action)

- ✓ Legal aspects:
  - Amendments of the JV Agreement.
  - Duration of the JV & its Termination.
  - Dispute resolution method.
  - Confidentiality and Non-Disclosure Agreement.
  - Non-compete clause.
  - Indemnification.
  - Procedure for execution.

SPECIAL PURPOSE VEHICLE (SPV)

A special Purpose Vehicle (SPV) or Special Purpose Entities (SPE) are **generally** formed to achieve a pre-determined special purpose. Scope of these kind of companies or entities are limited only to those activities which are required to be performed to attain that specific purpose. These companies/entities close their operations once the purpose is attained. The operations of these entities are limited to the acquisition and financing of specific assets. SPVs are **generally** a subsidiary company whose obligations are secured even if the parent company goes bankrupt.

A SPVs/SPEs may be formed through limited partnerships, trusts, corporations, limited liability corporations or other entities. An SPV/SPE may be designed for independent ownership, management and funding of a company or as protection of a project from operational or insolvency issues. SPVs help companies securitize assets, create joint ventures, isolate corporate assets or perform other financial transactions

Benefits of Special Purpose Vehicle

a) **Ownership of Assets** – An SPV allows the ownership of a single asset often by multiple parties and allows for ease of transfer between parties.
b) **Minimum Statutory Requirement** – Depending on the choice of jurisdiction, it is relatively cheap and easy to set up an SPV.
c) **Clarity of documentation** – It is easy to limit certain activities or to prohibit unauthorised transactions within the SPV documentation.
d) **Tax benefits** – SPVs are often used to make a transaction tax efficient by choosing the most favourable tax residence for the vehicle. SPVs are method of financial engineering schemes which have as their main goal, the avoidance of tax. Some countries have different tax rates for capital gains and gains from property sales.
e) **Legal protection** – By structuring the SPV appropriately, the sponsor may limit legal liability in the event that the underlying project fails.
f) **Accounting Reasons** -Debts raised through SPV are not reflected in the balance sheet of the sponsor. It reflects a pleasant picture and enhances the debt raising ability of the sponsor. Losses incurred by SPV are not shown in the balance sheet of

the sponsor, so it helps to maintain the healthy picture of the sponsor in the eyes of its stakeholders.

g) The key advantage is that it **helps in separating the risk and freeing up the capital**. As a result, the SPV and the sponsoring company are protected against risks like insolvency, which may arise during the course of operation.

h) The SPV also **allows securitization of assets** without disturbing the managerial relationship. Under the arrangement, any predictable income stream generated by secured assets can be securitized.

PURPOSE OF FORMING SPV

An SPV is set up with the help of its promoters or sponsors. The sponsoring company diverts some of its assets from the rest of the company. This isolation of assets creates a distance b/w the SPV and the sponsoring company for various following reasons:

1. **Speculative Investment by Parent Company**
   To allow the parent company to make highly leveraged or speculative investments without endangering the entire company. If the SPV goes bankrupt, it will not affect the parent company.

2. **SPVS by Banks and financial institution for Securitization**
   The total assets of banks or financial institution mainly comprise of loans and receivables. It is transferred to a separate entity, which may be formed for a specific purpose. By securitization through SPV the risk involved in this activity is separated from the general business of the bank.

3. **Indirect acquisition of assets**
   SPVs can be used for acquiring assets indirectly for the purpose of tax saving. In this method, the sponsor takes the assets on lease from its SPV. Expenses incurred as rent, is allowed as a deduction to sponsor for income-tax purpose. On the other hand, the SPV acquires the asset through raising debt, the interest on which is a deductible expense for tax purpose. This way the same asset can be used to claim deduction by both, which results in saving of tax

LLP Firm as a Special Purpose Vehicle

A LLP Firm combines the simplicity of a partnership firm with the advantage of limited liability as available in the case of a company.

Before. the passing of The LLP Act in 2008, a foreign company intending to participate in tender or some other project in consortium with an. Indian company had only the option of setting up a company (whether private or public) as a Special Purpose Vehicle (SPV). The disadvantage was that winding up such a company was difficult.

Essential Features of a Shareholders' Agreement (SHA) /Joint Venture Agreement / LLP Partnership Agreement (PA)

Some of the key issues which must be kept in mind while drafting the SHA/PA are summarised below:

i. The business of the new company/LLP
ii. Manner and extent to which resources (financial, manpower, technology, etc.) Will be brought in.
iii. Provisions relating to allotment and transfer of shares
iv. Constitution of the Board of .Directors/Designated Partners.
v. Manner in which decision making will take place(majority vote or consensus?
vi. Decision regarding the Chairman and Managing Director of the entity; their
vii. rights, duties and responsibilities

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SETTING UP OF BUSINESS OUTSIDE INDIA AND ISSUES RELATING THERETO

In 1991, India started its Economic Reforms. It is considered as a Golden Year of Indian Economy. The budget of Dr. Manmohan Singh in the year 1991 changed India forever by introducing Liberalisation, Privatisation and Globalisation (LPG Model). This also opened the gates for Indian Entities for making an investment abroad. Thereafter, in year 2000, FERA (Foreign Exchange Regulation Act) had been replaced with FEMA (Foreign Exchange Management Act). The entire perspective on foreign exchange has been changed from Regulation to Management. This Act enacted with intention to manage and facilitate foreign exchange transaction and not to restrict it.

There are many Overseas Investments which have been made by Indian Companies like *Investments by Adani Enterprises Ltd. of USD 16.5 billion in Australia in Carmichael mines and rail, Intas Pharma Investments in two companies of UK and Ireland, from Israeli Pharma Major Teva Pharmaceutical Industries Ltd, for an enterprise value of GBP 600 million (US$ 754.14 million).* This trend of overseas investments is quite visible considering the current global scenario, therefore It is necessary to understand the provision of overseas investments

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

Section 6 of the FEMA, 1999 provides powers to the RBI to specify, in consultation with the CG, the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions.

Section 6(3) of the aforesaid Act provides powers to the RBI to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations.

Overseas Investment (or financial commitment) can be made under two routes viz.

(i) Automatic Route and

(ii) Approval Route

I. **Automatic Route:** In this route, no prior approval is required from RBI for Overseas Investment. An eligible entity can make financial commitment (FC)/investments up-to USD 1 billion under automatic route subject to up-to 400% of the net worth of the Indian Party as per the last audited balance sheet without any approval from RBI.
II. **Approval Route:** In this route, prior approval is required from RBI for Overseas Investment. Any financial commitment/Investments exceeding USD 1 billion in a financial year would require prior approval of RBI when the total FC of the Indian Party is within the eligible limit (i.e., within 400% of the net worth as per the last audited balance sheet).

Eligibility (Entitles are Referred to as "Indian Party")

Legal Entities permitted to make investments

- ✓ Company incorporated in India or a body created under an Act of Parliament.
- ✓ Limited Liability Partnership (LLP), registered under the Limited Liability.
- ✓ Partnership Act, 2008 Partnership firm registered under the Indian.
- ✓ Partnership Act, 1932, Any other entity in India as may be notified by the RBI.

Prohibitions in Overseas Investments

An eligible Indian entities are prohibited in the following:

(a) Real Estate/Banking:

In a foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the RBI.

(b) A Foreign Entity deals in Financial Products linked to Indian Rupee:

An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the RBI.

AUTOMATIC ROUTE

For the purpose of making investment/ undertaking financial commitment in overseas JV/ WOS, the Indian Party should approach an **Authorized Dealer Category - I bank** with an application in **Form-ODI** (Master Document on Reporting) and prescribed enclosures/ documents for effecting such remittances.

Methods of Funding

An Indian Party can choose any of the following methods for Investment in an overseas Joint Venture/Wholly Owned Subsidiary:

- ✓ Drawal of foreign exchange from an AD Bank in India.
- ✓ Capitalization of exports.
- ✓ Swap of shares.
- ✓ Utilization of proceeds of ECB/FCCBs.
- ✓ In exchange of ADRs/GDRs.
- ✓ Balances held in EEFC account of the Indian party; and
- ✓ Utilization of proceeds of foreign currency funds raised through ADR/GDR issues.

Note: In any forms of funding, the limit of overseas investments should not exceed as prescribed by RBI (i.e. up-to USD 1 Billion/400% of Net worth.)

Conditions of Investments

Overseas investments are subject to the following conditions:

(a) **Investment via JV/WOS with equity participation:** The Indian entity may extend loan/guarantee only to an overseas JV/WOS in which it has equity participation. JV/WOS without equity contribution, may be considered by RBI under the approval route.
Note: *JV/WOS with Equity Participation means a foreign entity in which an Indian Entity has equity shares for forming JV/WOS.*

(b) **Not in the list of defaulters:** The Indian Party should not be on the RBI's Exporters' caution list/list of defaulters to the banking system circulated by RBI/Credit Information Bureau (India) Ltd. (CIBIL)/or any other credit information company or under investigation by any investigation/enforcement agency or regulatory body.

(c) **Transactions through AD Bank:** All transactions relating to a JV/WOS should be routed through one branch of an Authorized Dealer bank to be designated by the Indian Party.

(d) **Valuation of shares:** In case of partial/full acquisition of an existing foreign company, where the investment is more than USD 5 million, valuation of the shares of the company shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker and, in all other cases by a CA or a Certified Public Accountant.

(e) **Valuation of shares** (for swapping of shares): In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Category I Merchant Banker **registered** with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

(f) **Investment in Foreign Entity engaged in bonafide business activity:** An Indian Party may acquire shares of a foreign company engaged in a bonafide business activity, in exchange of ADRs/GDRs issued to the latter in accordance with the Scheme for issue of FCCB and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and other guidelines issued **by GOI.**

Investments not Under Automatic Route require Approval of RBI

Overseas Proposals which require prior approval of RBI are:

a) All other cases of direct investment (or financial commitment) abroad other than Automatic route investments.
b) For this purpose, an application together with relevant documents should be submitted in Form ODI through AD Category-I banks with their specific recommendation.
c) AD before forwarding the proposal should submit the Form ODI in the on-line ODI application under approval route and the transaction number generated by the application should be mentioned in the letter.
d) In case the proposal is approved, the AD-bank should effect the remittance under advice to RBI so that the UIN (Unique Identification Number) is allotted.

Note: RBI would consider following points while approving applications:

- ✓ *Prima fade viability of the JV/WOS outside India.*
- ✓ *Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment).*

- ✓ *Financial position and business track record of the Indian Party and the foreign entity; and*
- ✓ *Expertise and experience of the Indian Party in the same or related line of activity as of the JV/WOS outside India.*

ISSUES IN CHOOSING LOCATION OUTSIDE INDIA

An Indian Entity should consider the following points before finalizing any location for Overseas Investments.

1) **Geographical Location of the business**
   a. Infrastructure like ports, airports, storage, specific storage etc.
   b. Access (transportation of goods, materials and personnel)
   c. Relevance to supply-chain: raw material sourcing, processing, dispatch of finished produce)
   d. Availability of talent pool for productions (labour), services and management

2) **Economic aspects**
   a. Ease of doing business: entering, establishing, restructuring and closing the business, visa availability
   b. Cost of doing business: return on investment computations
   c. Laws relating to labour
   d. Laws relating to taxation: investment allowances, subsidies, distribution of profits, repatriation of profits, withholding taxes, existence of double-taxation avoidance agreements, information sharing requirements such as FATCA (Foreign Account Tax Compliance Act), TRC (Tax Resident Certificate), etc.

3) **Political Aspects**
   a. Friendly country, MFN status.
   b. Long-standing and established legislative precedents with companies going through regulatory recourse.
   c. Their relations with nearing countries and neighbors and your country.

4) **Social Aspects**
   a. Trade bodies, interaction between commercial entities of both nations.
   b. Expatriate-friendliness of the nation for relocating key employee personnel.

5) **Technological aspects**
   a. Intellectual property Rights protection, create, maintain and extract IP at the location or provision thereof from another location to the nation with free entry and egress (exit).
   b. Power, communication, telecom etc. availability, quality and cost Issues like infrastructure, geography, time zone, political considerations/conditions, safety of investments, economic policy and stability of the country, culture and language have a critical bearing on the strategy for globalization.

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PROCEDURE OF CONVERSION OF BUSINESS ENTITIES

CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY

Section 14 of Companies Act, 2013 plays an important role during conversion of a Private company into a Public company. Conversion of a Private company into a Public company involves alteration of AOA u/s 14 which cannot be done without passing **special resolution** of Shareholders in the General Meeting.

Procedure for Conversion of a Private Limited Company into a Public Limited

1. **Calling of Board Meeting:** Issue notice for convening a Board Meeting. Main agenda for this Board meeting would be to:
   a. Pass a board resolution to get in-principal approval of Directors for conversion of a Private company into a public company by altering the AOA.
   b. Fix date, time and place for holding EGM to get approval of shareholders, by way of ***Special Resolution***, for conversion.
   c. To approve notice of EGM along with Agenda and Explanatory Statement to be annexed to the notice of General Meeting.
   d. To authorize the Director or CS to issue Notice of the EGM as approved by the board.
   e. Pass Board resolution for increase in No. of Directors up-to 3, if director are less than 3.

2. **Issue of EGM Notice:** Issue Notice of the EGM to *all Members, Directors and the Auditors* of the company in accordance.

3. **Holding of EGM:** Hold the EGM on due date and pass Special Resolution, to get shareholders' approval for Conversion of Private Company into a Public company along with alteration in **AOA** u/s 14 for such conversion.

4. **ROC Form filing:**
   a) File Form MGT -14 with ROC within 30 days of passing SR.
   Attachments of E-form MGT-14:
      i. Certified True copy of Notice of EGM along with copy of explanatory statemen.
      ii. Certified True copy of SR.
      iii. Certified True copy Altered MOA.
      iv. Certified True copy Altered AOA.
      v. Certified True copy of Board Resolution may be attached as an optional attachment.

b) File **INC-27** with ROC for application for conversion of a Private company into a Public company with all the necessary annexures and with prescribed fee.

Attachments of E-form INC. 27:

i. Minutes of the member's meeting where approval was given for conversion.
ii. Altered AOA.
iii. Certified True copy of BR may be attached as an optional attachment.
iv. Other information if any can be provided as an optional attachment.

5. **Issue of fresh Certificate of Incorporation (COI):** On scrutiny of documents ROC will issue fresh COI in Form no. **INC 11**

Conversion of a Public Company into a Private Limited

✓ Conversion of status of company from public to private would become effective from the date of receipt of the approval of the ROC by means of issuing a new COI.

- Section 13, 14, 15 & 18 of Companies Act, 2013.
- Rule 33(2) of Companies (Incorporation) Rules, 2014 and
- Rule 68 of NCLT Rules, 2016

Regulate the conversion of public Company into Private Limited Company.

✓ As per Section 13 & 14 of the Act **read with** Rule 33 of Companies (Incorporation) Rules, 2014. A public company can be converted into the private company only after obtaining its ***shareholders' approval*** by way of passing of ***special resolution in general meeting*****.**

✓ 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 NCLT which shall make such order as it may deem fit.

Procedure for Conversion of a Public Limited Company into a Private Limited

1) HOLDING OF MEETINGS-

Holding of Board Meeting (as per sec 173 & SS-1)

✓ To in principally Approve Conversion of Company.
✓ To authorize any Director, CS of the Company for completing the necessary compliances, formalities, issue of Notice of General Meeting etc.
✓ To authorizing professional or legal practitioner/ advocate to appear before NCLT.
✓ To fix date, time and place for holding EGM to get approval of shareholders, by way of SR, for conversion of a public company into a private company.

Holding of General Meeting

Company will convey the General meeting to pass special resolution for alteration in AOA & MOA of the Company for the purpose of conversion of the Company.

Filing of MGT-14 with ROC (Section 117(3))

Copy of this SR is required to be filed with concerned ROC through filing of form **MGT-14 within 30 days** of passing Special Resolution.

2) PREPARATION OF PETITION

Preparation of Petition

The petition for the approval of conversion of public company into a private company shall be filed with the NCLT in **form No. NCLT-1.**

Time Period of Filing of Petition

The petition shall be filed with the Tribunal within 3 month from the date of passing of Special Resolution.

Particulars of Petition in NCLT-1 (Rule 68(2) of NCLT Rules 2016)

Every petition filed under **NCLT-1** shall set out the following particulars:

(i) The date of the Board meeting at which the proposal for alteration of AOA was approved.
(ii) The date of the general meeting at which the proposed alteration was approved.
(iii) State at which the registered office of the company was situated.
(iv) Number of members in the company, number of members attended the meeting and number of members of voted for and against the resolution.
(v) Reason for conversion into a private company.
(vi) Effect of such conversion on shareholders, creditors, debenture holders and other related parties.
(vii) The nature of the company, that is, a company limited by shares, a company limited by guarantee (having share capital or not having share capital) or unlimited company and whether company is listed or unlisted.

3) PREPARATION OF DOCUMENTS TO BE FILED WITH PETITION IN NCLT-1

Details of Creditors & Debenture Holders

There shall be attached to the petition.

- ✓ List of creditors,
- ✓ List of debenture holders,

Note: List of Creditors and debentures holders should **not be older than 2 month** from the date of filing of application with NCLT.

List should contain the following details, namely

i. The names and address of every creditor and debenture holder of the company.
ii. The nature and respective amounts due to them in respect of debts, claims or liabilities.
iii. In respect of any contingent or unascertained debt or any such claim admissible to proof in winding up of the company, the value, so far as can be justly estimated of such debt or claim.

Affidavit verifying the List of Creditors/ Debenture Holders

Company shall file an affidavit signed by the CS of the company, if any, and **not less than 2 directors** of the company, one of whom shall be a MD, where there is **1**, 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.

Inspection of List of Creditors/ Debenture Holders

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 business hours, inspect and take extracts from the same on payment of the sum of Rs. 10 per page.

Affidavit of Acknowledgement of Issue of Advertisement and service of Notice

An affidavit shall be filed to the NCLT, **not less than 3 days** before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule 35 and whether the notices, if any, have been duly served upon the persons required to be served.

4) <u>Publication and Service of application</u>

Publication of Advertisement

i. The Company shall **at least 14 days** before the date of hearing advertise the petition in accordance with **Rule 35**. The application will be advertise in **Form NCLT 3A**.
ii. To be publish at least once in a **vernacular newspaper** in the principal vernacular language of the district in which the registered office of the company is situate, and at least once in English language in an **English newspaper** circulating in that **District**.

Details to be mentioned in Advertisement

Every such advertisement shall state -

i. The date on which the application, petition or reference was presented.
ii. The name and address of the applicant, petitioner and his authorised representative, if any.
iii. The nature and substance of application, petition or reference.
iv. The date fixed for hearing.
v. A statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorised representative, if any, indicating the nature of

interest and grounds of opposition so as to reach him **not later than 2 days** previous to the day fixed for hearing.

Publication on Website of the Company

Where the advertisement is being given by the company, then the same may also be placed on the website of the company, (if any).

Notice to Creditors/ Debenture Holders

The Company shall **at least 14 days** before the date of hearing serve, by registered post with acknowledgement due, individual notice in **Form No. NCLT-3B** to each debenture-holder and creditor of the company

Notice to Authorities

The Company shall **at least 14 days** before the date of hearing serve , by registered post with acknowledgement due, a notice together with the copy of the petition to the **CG**, **ROC** and to **the SEBI**, in the case of **listed companies** and to the **regulatory body**, if the company is regulated under any other Act.

Objections

Where any objection of any person whose interest is likely to be affected by the proposed petition has been received by the petitioner, it shall serve a copy thereof to the **ROC** on or before the date of hearing.

5) Hearing by Tribunal

Tribunal shall hear the Company and all the parties that have raised objections and are desirous of being heard. It will also take note of the observations/objections, if any, received from the **statutory authorities**.

After hearing all the Parties, if it is satisfied, having regard to all the circumstances of the case, that the conversion would be in the interest of the company or is not being made with a view to contravene or to avoid complying with the provisions of the Act, allow the conversion.

6) Filing of Form with ROC

After receiving of order from NCLT, Company shall file **Form INC- 27** along with copy of the order of the Tribunal along with below mentioned attachment **within 15 days** from the date of order.

- Copy of Order of **NCLT**.
- Minutes, CTC of SR, Notice & **explanatory statement** of General Meeting.
- Altered copy of **MOA & AOA**.
- **List of Creditor**.
- **Affidavit** from the Director or **MD or WTD** affirming **letter of no objection** is obtained from the **all creditors and debenture holders**.

7) New Certificate of Incorporation from ROC

On being satisfied that all the information and documents are submitted and all requirements under the Act are complied with, **ROC** shall issue a **new certificate** of **incorporation** of the Company.

CONVERSION OF SECTION 8 COMPANY INTO ANY OTHER KIND

A company registered u/s 8 may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

Note: Section 8 company cannot be converted to OPC.

Rule 21 of Companies (Incorporation) Rules, 2014

Conditions for conversion of a company registered u/s 8 into a company of any other kind:-

(A) APPROVAL FROM SHAREHOLDERS

(1) pass a SR at a **General Meeting** for approving such conversion.

(2) The explanatory statement annexed to the notice shall set out in detail the reasons for opting for such conversion including the following, namely:-

- **a.** The **DOI** of the company.
- **b.** The **principal objects** of the company as set out in the MOA.
- **c.** The **reasons** as to why the activities for achieving the **objects** of the company cannot be carried on in the **current structure** i.e. as a **section 8** company.
- **d.** In case of alteration of object clause altered objects and the reasons for the alteration.
- **e.** **Privileges or concessions** currently enjoyed by the company, such as **tax exemptions, approvals** for **receiving donations** or **contributions** including foreign contributions, land and **other immovable properties**, if any, etc.
- **f.** Details of impact or benefit of the proposed conversion on the members.

(3) A certified true copy of the **SR** along with a copy of the Notice convening the meeting including the ES shall be filed with the **ROC** in Form **No. MGT-14** along with the fee.

(B) APPROVAL OF REGIONAL DIRECTORS

(1) **application to RD in Form No. INC - 18** with the fee and following documents

- **a.** certified true copy of the special resolution.
- **b.** a copy of the Notice convening the meeting including the explanatory statement.
- **c.** the proof of serving of the notice served to all the authorities mentioned.

(2) A copy of the application with annexures as filed with the RD shall also be filed with the ROC.

Publication of notice: *The company shall publish a notice in 2 newspapers (one in local language newspaper where registered office of the company is located & another in*

English language newspaper) and on the website of the company within a week from the date of submitting the application to the RD.

Note: *The Company shall bear the cost of publication of the notice and shall be sent the said notice to RD.*

(c) Conditions for Conversion

1. **No dividend/bonus shares:** The BOD of the company shall give a declaration that no portion of the income or property of the company has been or shall be paid or transferred directly or indirectly by way of dividend or bonus or otherwise to persons who are or have been members of the company.

2. **NOC from Govt. authorities:** The Company has to obtain NOC from Income Tax Department, Charity Commissioner or any organisation or Department of Central Government, State Government, Municipal Body or any recognized authority from where the company has obtained any exemptions, grant, benefits and privileges. The NOC shall be filed along with the application of conversion to the RD.

3. **Compliance Certificate for conversion:** The company shall attach along with the application, a certificate from PCS or PCA or practicing Cost Accountant certifying that the conditions laid down in the Act and these rules relating to conversion section 8 company into any other Company, have been complied with.

4. **Give up the concessions & privileges:** On receipt of the application, the RD shall issue an order approving the conversion of the section 8 company and shall impose the conditions like:

   (a) **No Exemptions:** The Company shall give up and shall not claim any exemption or privileges from the date its conversion takes effect;

   (b) **Payment of Differential Market Price:** If the company had acquired any immovable property free of cost or at a concessional cost from any government or authority, it may be required to pay the difference between the cost at which it acquired such property and the market price of such property at the time of conversion.

   (c) **Payment of Statutory Dues & Loan:** Any accumulated profit or unutilized income of the company brought forward from previous years shall be first utilized to settle all outstanding statutory dues, amounts due to lenders', claims of creditors, suppliers, service providers and others including employees and lastly any loans advanced by the promoters or members or any other amounts due to them and the balance, if any, shall be transferred to the IEPF within 30 days of receiving the approval for conversion

(d) Compliances after the Approval of RD

On receipt of the approval of the RD, the company has to comply with the following compliances:

(i) **Convene a General Meeting:** The Company shall convene a general meeting of its members to pass a **special resolution** for amending its MOA and AOA.

(ii) **Filing of copy of Order passed by RD:** A certified copy of the approval order passed by the RD shall be filed with ROC within 30 days from the date of receipt of the order in *Form No. INC-20* along with the fee attached with amended MOA & AOA and a declaration by the directors in respect of compliances of the order passed by RD.

Note: On receipt of the above documents, the ROC shall register the documents and issue the fresh Certificate of Incorporation

CONVERSION OF COMPANY INTO LLP

Any existing private company or unlisted public company can be converted into LLP by complying with the Provisions of the LLP Act. Form 18 needs to be filed with the ROC along with **Form 2** for such conversion.

1. Obtain Din

Obtain DIN for those designated partners who don't posses DIN.

2. Board Meeting

- ✓ Call board meeting.
- ✓ Pass Resolution for Conversion of Company into LLP.
- ✓ Pass Resolution to authorize any director to Apply for Name of LLP.

3. Application for Name Availability

- ✓ File e-form ~~**LLP-1**~~ **RUN LLP** with ROC.
- ✓ Attachments: Board Resolution Board resolution passed by the Company approving the conversion into LLP shall be attached with the aforesaid form

4. Obtain name Approval Certificate from ROC

5. Drafting of limited liability partnership agreement:

Contents of Agreement are:

- ✓ Name of LLP
- ✓ Name of Partners & Designated Partners
- ✓ Form of contribution
- ✓ Profit Sharing ratio
- ✓ Rights & Duties of Partners
- ✓ Proposed Business
- ✓ Rules for governing the LLP

It is not necessary to have the LLP Agreement signed at the time of incorporation, as the details of the same needs to field in **e-form-3 within 30 days** of incorporation but in order to avoid any dispute between the partners as to the terms & conditions of the agreement after the conversion into LLP.

6. Filling of Incorporation Documents:

File E-Form- 2 with ROC along with following ATTACHMENTS:

- ✓ Proof of Address of Registered office of LLP.
- ✓ Subscription sheet signed by the promoters. (Notice of Consent & Appointment of Designated Partners with their personal details)
- ✓ Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner

7. Filling of application for conversion:

File **E-FORM- 18** with ROC along with following Attachments:

- ✓ Statement of shareholders.
- ✓ Incorporation Documents & Subscribers Statements in Form 2 filed electronically.
- ✓ Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.
- ✓ List of all the Secured creditors along with their consent to the conversion.
- ✓ Approval of the governing council (In case of professional private limited companies)
- ✓ NOC from Income Tax authorities and Copy of acknowledgement of latest income tax return.
- ✓ Approval from any other body/authority as may be required.
- ✓ Particulars of pending proceedings from any court/Tribunal etc.

After all formalities and filings been complied with by the applicants and approved by the Ministry, REGISTRAR OF LLP TO ISSUE **A CERTIFICATE OF REGISTRATION** in **form no. 19** as to conversion of the LLP. The Certificate of Registration issued shall be the conclusive evidence of conversion of the LLP.

8. Filling of E-Form-3: This form provides information in respect to the LLP Agreement entered into between the partners.

9. ATTACHMENT: LLP Agreement

10. Certificate of incorporation as LLP form ROC.

CONVERSION OF LLP INTO COMPANY

An LLP can be converted into a Pvt. Ltd. company as per the provisions contained in Section 366 of the Companies Act, 2013 and the Companies (Authorized to Register) Rules, 2014. MCA has passed a notification on 31st May, 2016 in such notification it is allowed conversion of LLP into Company. These rules called as "the Companies (Authorized to Register) (Amendment) Rules, 2016

Procedure for Conversion of LLP into Company

1) Meeting of the Partners

Hold a meeting of the partners

- ✓ To take assent of majority of its members for the conversion of LLP into Company.
- ✓ To authorize one or more partners to take all steps necessary and to execute all papers, deeds, documents etc.

2) Reservation of Name

LLP have to apply for availability of the Name through the online RUN facility.

3) Filing Form URC-1 with ROC

File Form URC-1 with following attachments:

a) List of names, addresses, and occupations shares held by all persons named therein as members.

b) Details of first director of the Company along with affidavit that they are not disqualified to be appointed as a Director.

c) A list including the names & addresses of partners of LLP and a copy of LLP agreement & certificate of registration duly verified by two designated partners of LLP must be enclosed.

d) A statement indicating the following specifications:

- ✓ Nominal share capital of firm & the number of shares into which it is separated
- ✓ Number of shares taken & the amount paid for every share
- ✓ Name of the firm, with the addition of word 'limited' or 'private limited' is required.
- ✓ A written consent or No objection certificate from all creditors

4) Filing of Form INC SPICe 32

Company required to file e-form INC-32 (SPICE) along with URC-1 as linked form with all the attachments as required in normal Incorporation of Company like:

(i) MOA & AOA
(ii) INC-9
(iii) INC-8

CONVERSION OF ONE PERSON COMPANY TO PRIVATE COMPANY

Conversion of an OPC into Private Limited Company *(Section 18 of the Companies Act, 2013 and the provisions of Companies (Incorporation) Rules of 2014)*

These rules will not affect the existing debts, liabilities, obligations or contracts of the OPC.

There are two ways of converting an OPC into a private limited company either

1. Voluntarily or
2. Mandatorily

Voluntary Conversion

Voluntary conversion into a private limited company is not permitted unless **2 years** is expired from the **DOI** of the **OPC**. Though, if the **PSC** exceeds **Rs. 50 lakhs** or if its average turnovers exceed Rs. 2 Cr.

Then

within 2 months, the OPC could convert into a company even before expiry of 2 years.

(a)Passing of Resolution: An **OPC** may also convert itself into a **private** or **public company** by **passing a resolution** in the general meeting.
(b)Application for conversion: The OPC shall file an application in ***Form No.INC-6*** for its conversion into Private or Public Company **within 30 days** from the date of passing of the **resolution**.
(c) Statutory Requirements on conversion: An OPC can get itself converted into a Private or Public company after increasing the minimum number of members and directors**.**

Note: A fresh **COI** will be issued by the **ROC** on the submission application for conversion.

Procedure for Conversion of an OPC into Private Limited (Voluntary Conversion)

1) **Calling of Board Meeting and Passing of Board Resolution**
   a. **ISSUE NOTICE** for convening a board meeting. Main agenda for this Board meeting would be -
      i. To discuss with directors that **Company** want to convert **OPC** into Private Limited Company.
      ii. Pass Board resolution for increase in No. of Directors.
      iii. Pass a board resolution to get in principal approval of Directors for increase shareholder of the Company.
      iv. Pass Resolution to get shareholders' approval for Alteration in MOA & AOA of Company

Note: As per Section 122(1) *there is no need to hold* ***EGM by OPC****, it shall be sufficient if, in case of* ***OPC****, the resolution is communicated by the member of the company and entered into the minutes books signed and dated by member and such date shall be deemed to be the date of the meeting for all the purpose under this Act.*

2) **ROC FORM FILING**
   Application for **conversion of OPC** is to be filed with ROC in **INC-6 within 30 days** of passing of **Resolution**.
   ATTACHMENTS:
   a. Certified true copy of **board resolution** where person giving notice has been authorized.
   b. Altered copy of **MOA & AOA**.
   c. Copy of the duly attested latest **financial statements**.
   d. Certified true copy of **resolution** where person giving notice has been authorized.
   e. Any other information can be provided as an **optional attachment**.

3) **Issue of fresh Certificate of Incorporation (COI)**
   ROC will check the E-forms & if satisfied, shall issue the COI

Mandatory Conversion of OPC into Private Limited:

a) **Conditions:** When the PSC of an **OPC exceeds Rs.50 lakhs** or its average annual turnover during the relevant period exceeds **Rs. 2 crores**, in such conditions, OPC ceases to continue as an OPC.

b) Timeline for conversion: If an OPC exceeds the above mentioned limits then it has to convert itself either in private or public company **within 6 months** after crossing the above limits.

c) **Alteration of MOA and AOA:** The OPC shall alter its MOA & AOA by passing a resolution to give effect to the conversion and to make necessary changes incidental thereto.

d) Notice to ROC: The OPC shall give notice to **ROC within 60 days** from the date of applicability of compulsory conversion in ***Form No. INC - 5***. Such notice contains information about the crossing of the limits mentioned above; therefore, it requires to convert itself in-to a private company or a public company.

e) **Application for Conversion:** The OPC shall file application for conversion of OPC in *Form INC-6*

f) **Statutory Requirements on conversion:** An OPC can get itself converted or Public company after increasing the minimum number of members and directors.

PROCEDURE FOR CONVERSION (RULE 6 OF THE COMPANIES (INCORPORATION) RULES, 2014)

1) BOARD MEETING

- **a. ISSUE NOTICE** for convening a meeting of the Board of Directors. Main agenda for this Board meeting would be -
  - **i.** To discuss with directors that Company has crossed the Limits as given above and there is need of mandatory conversion of OPC into Company.
  - **ii.** Pass Board resolution for increase in No. of Directors.
  - **iii.** Pass a board resolution to get in principal approval of Directors for increase shareholder of the Company.
  - **iv.** Pass Resolution to get shareholders' approval for Alteration in MOA & AOA of Company.

2) Information to ROC in INC- 5 that it has ceased to be an OPC

Information to ROC is required to be given in **INC-5 within 60** days from the date of exceeding limits that it has ceased to be an OPC and that it is now required to convert itself into a private company or public company, along with Copy of the duly attested latest financial statements

3) **Filing application for conversion of OPC with ROC in Form INC- 6**
Application for conversion of OPC is to be filed in INC-5 **within 6 months** from the date of exceeding limits.

4) **Issue of fresh Certificate of Incorporation (COI)**
ROC will check the E-forms and attached documents filed by the Company for Conversion of Private Company into OPC. On being satisfied that Company has complied with prescribed requirements the ROC shall issue the COI.

VARIOUS INITIAL REGISTRATIONS AND LICENSES

A business entity is required to secure various registration and licenses in order to set up its businesses in India. This chapter deals with the list of Mandatory as well as Additional Registration requirements and the Licenses along with their detailed procedures, in order to apprise the readers on the hassle free process of setting up of business in India

MANDATORY REGISTRATION

PAN

A permanent account number is a unique **10-digit alphanumeric** number which is issued by the Income Tax Department to every tax payer. It also serves as an identity proof from a large number of purposes.

Any corporate body doing business in India requires a **PAN card** whether it is registered in India or abroad. Equally, an individual or entity which is engaged in a business with an Indian firm/entity requires a PAN card. It is also required for anybody who is involved in generating money out of India if the company is registered, or has a permanent establishment, or an office in India

Given below is a list of the bodies that are required to hold a PAN card in India

- ✓ Body Corporate
- ✓ Companies
- ✓ Firms other than LLP
- ✓ One Person Company
- ✓ LLP Firm
- ✓ Sole proprietorship
- ✓ Trusts
- ✓ Corporations
- ✓ Limited Liability companies
- ✓ Private firms
- ✓ Other Associations
- ✓ Foreign Institutional Investors
- ✓ Hedge funds

SIGNIFICANCE OF PAN FOR SETTING UP OF BUSINESS

- ✓ It serves as a reference number of its holder for the Income Tax Department to track the financial transactions carried out by it.
- ✓ Even if one is not required to pay income tax, it is mandatory for him to hold a PAN if he is earning money.
- ✓ Companies, registered abroad or in India, are required to pay tax for businesses carried out in India. Without the PAN, the government has the mandate to deduct tax at the highest possible rate
- ✓ Just like individuals, companies are required to provide their Tax Registration Number **(TRN)** to whomever is paying them. A TRN can be obtained only when the company holds a PAN.

APPLICATION AND REGISTRATION OF PAN

1. Application for allotment of PAN can be made online. Further, requests for changes or correction in PAN data or request for reprint of PAN card (for an existing PAN) may also be made through internet
2. Online application of PAN can be made on the **NSDL website** or **UTIITSL website**. Both have been authorized by the Government of India to issue the PAN or to make changes/corrections in the PAN on behalf of the Income Tax Department
3. The applicant is required to fill and submit the online application form along with online payment of the respective processing fee
4. The application is made in **Form - 49A** in case of Indian Citizen and in **Form 49AA** in case of foreign citizens.
5. Once the application and payment is accepted, the applicant is required to send the supporting documents through courier/post to NSDL/UTITSL. Only after the receipt of the documents, PAN application would be processed by NSDL/UTITSL
6. **With effect from July 1, 2017**, fees for PAN application (including GST) for dispatch outside India has changed to 1020/- INR. However, PAN application fees for dispatch within India is 110/- INR.

Important Points:

1. Any Body corporate doing business in India required PAN whether it is registered in India or outside.
2. An Individual or entity which is engaged in a business with an Indian firm/entity requires a PAN card.
3. It is also required for any body who is involved in generating money out of India if the company is registered or has permanent establishment or an office in India.
4. In the absence of PAN, the Govt. will charge withholding tax which can be at the rate of more than 30% of the total invoiced payment.

Tax Deduction and Collection Account Number (TAN)

TAN is unique **10 digit alphanumeric** number required to be obtained by all persons who are responsible for deducting or collecting tax. U/S 203A of the Income Tax Act, 1961, it is mandatory to quote TAN on all TDS returns.

Types of TAN Applications

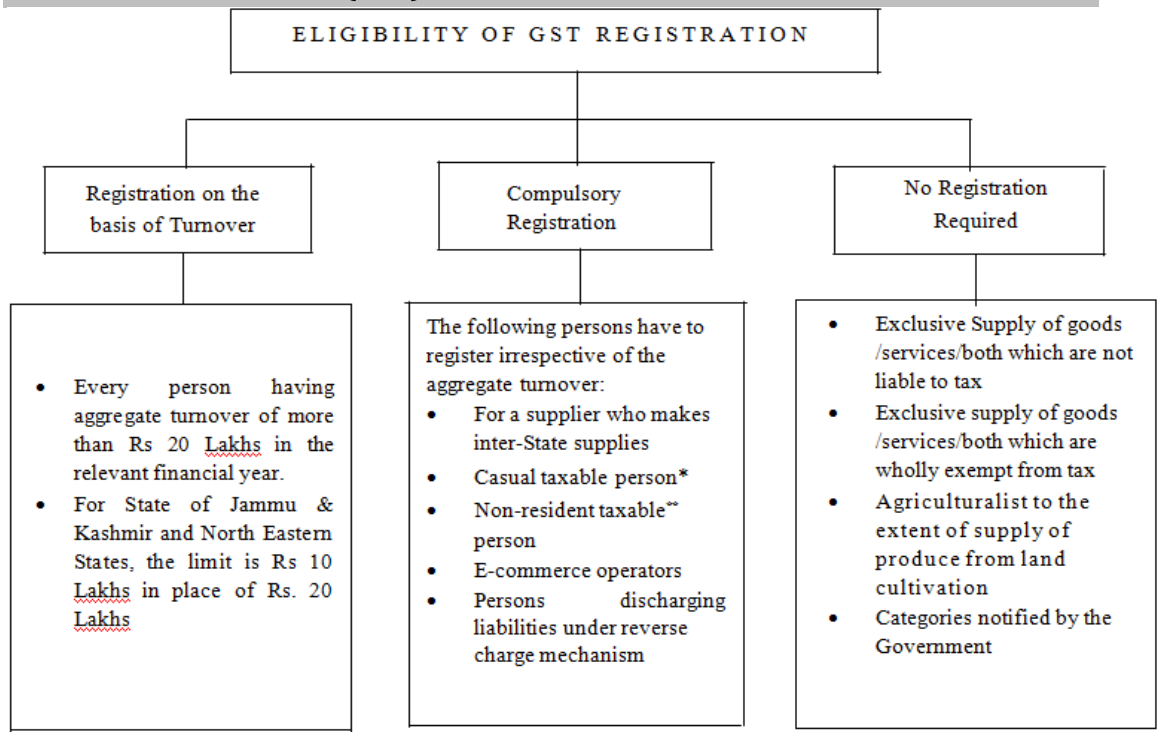
1. Application for issuance of new TAN
2. Application for Change or Correction in TAN

The processing fee for both the applications is 65/- INR (including GST).

Application & Registration of TAN

A deductor may either make an online application through website or submit physical TAN Application to any TIN-Facilitation Center (TIN-FC) of NSDL for issuance or changes or correction in TAN data

GOODS & SERVICES TAX (GST) REGISTRATION



Important Points

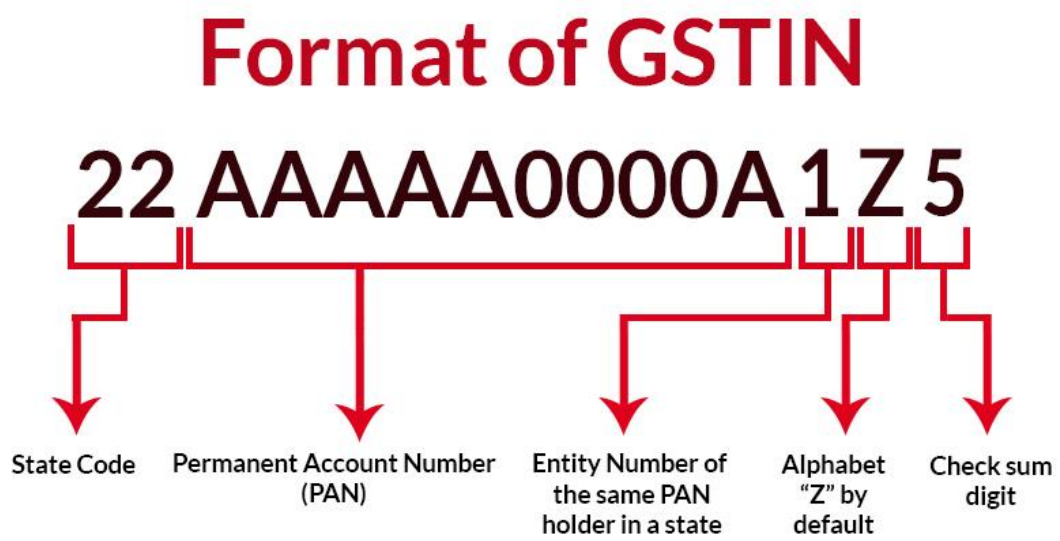
1. North-Eastern States would include Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, and Tripura along with hilly areas of Himachal Pradesh and Uttaranchal.
2. If a person has his place of business in different States including the State of Jammu & Kashmir/ North Eastern, then the limit will reduce to **Rs 10 Lakhs**.
3. *Casual taxable person is someone who has a business in a different State, but comes to a different State for a business purpose temporarily. **For example**, a

cotton dealer registered in Gurgaon comes for an exhibition at Indore, Madhya Pradesh for participating in the exhibition, then such person would need to register as a casual taxable person at Indore and he will be granted registration for a maximum period of 90 days.

4. **Non-resident taxable person is someone who has a business outside India, but comes to a different State for a business purpose temporarily. For example, a Watch dealer of Paris comes for an exhibition at Indore, Madhya Pradesh for participating in the exhibition, then such person would need to register as a casual taxable person at Indore and he will be granted registration for a maximum period of 90 days.

GST IDENTIFICATION NUMBER (GSTIN)

The registration under GST is PAN based and state-specific. GST Identification Number (GSTIN) is a **15-digit number** and a certificate of registration, incorporating the GSTIN is made available to the applicant upon registration.



APPLICATION & REGISTRATION OF GSTIN

Regular Taxpayer	Within 30 days of becoming liable
Casual Taxable Person.	5 Days before commencing activity
Non Resident Taxable Person	5 Days before commencing activity

REGISTRATION UNDER SHOPS & ESTABLISHMENTS

One of the important regulation to which most businesses in India are subject to is the Shop and Establishment Act, enacted by every state in India. The Act is designed

to regulate payment of wages, hours of work, leave, holidays, terms of service and other work conditions of people employed in shop and commercial establishments

Registration under the Act is required by

- ✓ Shop
- ✓ Establishment

Establishment means:

- ✓ Commercial establishments,
- ✓ Residential hotels,
- ✓ Restaurants,
- ✓ Eating houses,
- ✓ Theatres, or
- ✓ Other places of public amusement or entertainment.
- ✓ Additionally, other establishments that the SG may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act would then classify as establishments.

Shop means any premises:

- ✓ Where goods are sold, either by retail, wholesale, or
- ✓ Where services are rendered to customers.
- ✓ **It includes** an office a store-room, go-down, warehouse or work place, whether in the same premises or otherwise, used in connection with such trade/ business.
- ✓ **A shop does not include** a factory, a commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment

Licenses Registration & License under Shops & Establishments Act

Any shop or commercial establishment that commences operation must apply to the *Chief Inspector* for a Shop and Establishment Act License within 30 days of starting any work in shop/establishment along with the prescribed fees and following information:

a) Employer Name
b) Name of a manager, if any;
c) Address of your establishment;
d) Name of your establishment;
e) Other prescribed particulars

Grant of Certificate : After verification inspector shall enter the details in the Register of Establishments and issue a registration certificate which shall be **valid for 5 years** and has to be renewed thereafter.

Note: registration certificate has to be prominently displayed at your establishment

In case of any change with respect to any of the information given during the application for registration, the same has to be notified to the Inspector's office **within 15 days** after the change has taken place.

Closing of Establishment to be communicated to Inspector

- ✓ In case the shop or establishment would like to close down the business, the occupier should notify the Chief Inspector in writing **within 15 days of the closing**.
- ✓ The Chief Inspector after reviewing the request for closure can remove the shop or commercial establishment from the register and cancel the registration certificate

SSI/MSME

To promote the growth & development of Small Scale Industries and Medium, Small and Micro Enterprises, the Government of India has extended various incentive and support system. To avail such benefits these units should seek registration with the Director of Industries of the concerned State Government

Objectives of the Registration Scheme

1. To enumerate and maintain a roll of small industries to which the package of incentives and support are targeted.
2. To provide a certificate enabling the units to avail statutory benefits mainly in terms of protection.
3. To serve the purpose of collection of statistics.
4. To create nodal centres at the Centre, State and District levels to promote SSI.

Benefits of SSI/MSME Registration

Under this registration scheme, the units normally get registered to avail some benefits, incentives or support given either by the Central or State Govt.

Micro and Small Enterprises:	**Medium Enterprises:**
1. Easy finance availability from Banks, without collateral requirement 2. Preference in procuring Government tenders, 3. Stamp duty and Octroi benefits. 4. Concession in electricity bills. 5. Reservation policies to manufacturing/production sector enterprises. 6. Time-bound resolution of disputes	1. Easy finance availability from Banks, without collateral requirement. 2. Preference in procuring Government tenders. 3. Reservation policies to manufacturing/production sector enterprises. 4. 4. Time-bound resolution of disputes with Buyers through conciliation and arbitration.

with Buyers through conciliation and arbitration. 7. Reimbursement of ISO Certification Expenses. **8.** 8. Subsidies from various authorities.	

Registration

1. Micro & Small Enterprises shall have to apply either online at the website of NSIC (National Small Industries Corporation) www.nsicspronline.com or on the prescribed application form (in duplicate) along-with requisite fee and documents to the Zonal/Branch/Sub Branch and Sub Office/Extension office of NSIC situated nearest to their location.
2. The duplicate copy will be forwarded to the inspection agency for their report
3. After receiving Inspection Report, NSIC will issue the GP Registration Certificate

Validity of G.P. Registration

The G. P. Registration Certificate granted to the Micro & Small Enterprise under Single Point Registration Scheme (Revised), 2003 is valid for 2 Years and will be reviewed and renewed after every two years.

Documents Required for Renewal of the Registration

1. Original GP Registration Certificate.
2. A copy of Acknowledgement of Entrepreneurs Memorandum Part-II/UAM;
3. List of major Govt. Orders executed during last 2 (two) years on letter head as per format of Annexure 'G'.
4. Copies of Audited Balance sheet for last 3 years duly signed by the authorized person under his seal.
5. Annexure 'C' of GP Application form duly signed by Chartered Accountant (same as in fresh case).
6. List of addition/deletion in the plant and machinery after the initial registration/ preceding renewal in the letter head duly singed.
7. Annexure 'D' and 'E' duly signed by MSE.
8. For renewal of registration where monitory limit is more than Rs 10 Crores and inspection has not been carried out by Technical Inspecting Agency or NSIC during the last one year, such units will be inspected by the respective Branch Office of NSIC before issue of renewal Certificate.

Fees:

Micro Enterprises→ Rs.6000/- inclusive of GST
Small Enterprises→ Rs.8000/- inclusive of GST

NSIC Registration (National Small Industries Corporation Limited)

The Government is the single largest buyer of a variety of goods. With a view to increase the share of purchases from the small-scale sector, the Government Stores Purchase Programme was launched in 1955- 56.

NSIC registers Micro & small Enterprises (MSEs) under Single Point Registration scheme (SPRS) for participation in Government Purchases

- ✓ NSIC Registration is required to be renewed on every 2 years
- ✓ The National Small Industries Corporation enlists SSI as competent to undertake supply of various items to the Government.

The registered units are extended various facilities so as to promote their participation, and consequently enhance the share in Government purchases.

The rationale of this Scheme is to avoid multiplicity of registration with various Government agencies and to ensure that the units registered with NSIC are considered at par with those registered directly with the purchasing agency. Bona-fide Directorate of Industries / District Industries Centres are enlisted under this Scheme.

BENEFITS OF NSIC REGISTRATION

- ✓ Issue of the Tender Sets free of cost.
- ✓ Exemption from payment of Earnest Money Deposit.
- ✓ In tender participating MSEs quoting price within price band of L1+15 % shall also be allowed to supply a portion up-to 20% of requirement by bringing down their price to L1 Price where L1 is non MSEs.
- ✓ Every Central Ministries/Departments/PSUs shall set an annual goal of minimum 20 % of the total annual purchases of the products or services produced or rendered by MSEs.
- ✓ Out of annual requirement of 20% procurement from MSEs, 4% is earmarked for units owned by Schedule Caste /Schedule Tribes (as per PPP Order dated 23.03.2012 overall procurement goal shall be mandatory w.e.f. 01/04/2015)
- ✓ In addition to the above, 358 items are also reserved for exclusive purchase from SSI Sector.

ELIGIBILITY FOR NSIC REGISTRATION under its Single Point Registration Scheme (SPRS).

- ✓ All Micro & Small Enterprises which are
  - Registered with the Director of Industries (DI)/District Industries Centre (DIC)
  - As manufacturing/service enterprises or
  - Having Acknowledgement of Entrepreneurs Memorandum [EM Part-II (Now UdhyogAadhar Memorandum)] are eligible for registration with NSIC

- ✓ Micro & Small Enterprises who have already commenced their commercial production but not completed one year of existence.
  The Provisional Registration Certificate can be issued to such Enterprises with monitory limit of Rs. 500 Lacs which shall be valid for the period of one year only from the date of issue after levying the registration fee and obtaining the requisite documents**.**

Application

Online→ www.nsicspronline.com

Physical→ in prescribed application form in Duplicate, to be submitted to the concerned Zonal/Branch Office of NSIC located nearest to the unit

S.No.	Category (Net Sales Turnover Based)	Fee
I	Fee for Fresh Registration of Micro & Small Enterprises: Turnover up-to Rs. 100 lakh	Turnover up-to Rs. 100 lakh: For Micro Enterprises: Rs.3000/- For Small Enterprises : Rs.5000/-
	Turnover exceeding Rs. 100 lakh	Turnover exceeding Rs. 100 lakh For Micro Enterprises: Rs.3000/- plus Rs. 1500/- for every additional turnover of Rs. 100 Lakh For Small Enterprises : Rs. 5000/- plus Rs. 2000/- for every additional turnover of Rs. 100 Lakh With cap of Rs. 1 lac for all categories.
II	a. Fee for issuance of amendments in stores (Qualitative & Quantity); Fee for issuance of change in monetary limit or any other amendment in the certificate, and	50% of the charges proposed at I Enterprises respectively with a cap of Rs. 50,000/-
	b. b) Fee for issuance of Renewal of G.P. Registration (Every Two Years)	

OTHER COMPLIANCES

EMPLOYEE'S STATE INSURANCE →ESI Registration

- ✓ It is a self-financing scheme for Indian workers
- ✓ covers health insurance and social security.
- ✓ functions as an independent corporation
- ✓ comes under Ministry of Labor and Employment in India
- ✓ regulated by the guidelines and regulations of the ESI Act. 1948
- ✓ Under this scheme, the employer needs to contribute an amount of 4.75% of the total monthly salary payable to the employee whereas the employer needs to contribute only 1.75% of his monthly salary every month of the year. Those employees who earn up to INR 100/- per day, are exempted from paying their share of contribution to the ESI scheme

Benefits of ESI Registration for both Employer & Employee

- ✓ It advised for employees to register under ESI scheme because:
- ✓ In case of certified illness which lasts for a certain period of time sickness benefits at the rate of 70% (in the form of salary).
- ✓ Medical Benefits to an employee and his family members
- ✓ Maternity Benefit to the women who are pregnant (paid leaves)
- ✓ If the death of the employee takes place while on work - 90% of salary is given to his dependents every month after the death of the employee.
- ✓ If the disability of the employee takes place while on work - 90% of salary is given to every month after the disablement of the employee.
- ✓ Funeral expenses.
- ✓ Old age care medical expenses.

ESI Registration Procedure for both Employer & Employee

- ✓ Any employer having more than 10 employees who have the maximum salary of Rs. 21000/- (Rs. 25000 if employee is disable) has to mandatorily register itself with the ESIC in Employer's registration form (**Form-01**),
- ✓ Within 15 days of submission of **Form-01**, the company or firm is expected to obtain an Identification number from the Regional office. This figure will be used in correspondence related to the scheme. Form3 accompanies Form 1.

Documents required:

- ✓ Documents about the establishment of the company.
- ✓ Evidence supporting date of commencement of production/business.
- ✓ List of partners, stakeholders, directors along with necessary information and proof of address.
- ✓ Copy of PAN
- ✓ Identity proof like voter id/passport
- ✓ List of employees

Registration of Employee

Each employee (eligible to this scheme) is needed to fill in the Form-I, and submit a family photograph to the employer.

PROVIDENT FUND (PF) REGISTRATION

Employee's Provident Fund Scheme (EPFS) was enacted by the Parliament to provide financial stability and security to employees when they are retired or no longer fit to work.

The CG trust manages these funds, and employees are required to contribute a part of their salary to it every month during their employment tenure, so that they can save for their old age.

When is registration required?

a) It is compulsory for establishments with more than 20 employees compulsorily have to register under EPFS.
b) An establishment with less than 20 employees can voluntarily opt for PF registration to protect employee's benefits.

Steps for Registration under PF

1) A detailed application form called **'Performa of coverage**' and **form 5A** with **Annexure-1** has to be filed online
2) A temporary PF Registration number will be allotted, after which required documents have to be submitted online
3) PF authorities carry out an inspection of the premises and verify the documents submitted online
4) Once satisfied, registration will be granted

List of Documents to be submitted

1. A copy of Memorandum and Articles of Association and the certificate of incorporation issued by the Registrar of Companies, in the case of Public and Private Ltd. Companies.
2. A copy of partnership deed in the case of partnerships.
3. A copy of Registration certificate issued by the Registrar of Co-operative societies.
4. A copy of Registration certificate issued by Registrar in the case of societies registered under Societies Registration Act along with a copy of the objects and Rules of the Society.
5. Partition deeds creating HUF.
6. Any agreement or other legal documents in the case of Association of persons as defined in the Income Tax Act.

Foreign Contribution Regulation Act, 2010 → FCRA Registration

Charitable Trusts, Societies, Section 8 Company that receive foreign contribution or donation from foreign sources are required to obtain registration under Section 6(1) of Foreign Contribution Regulation Act, 2010. Such a registration under the Foreign Contribution Regulation Act, 2010 is called a FCRA registration.

Eligibility for FCRA Registration

1. Applicant to be a Trust or Society or a Section 8 Company.
2. The above applicant must have been in existence for a minimum of 3 years.
3. It should not have received any foreign contribution prior to that without the Government's approval.
4. It should have spent at least Rs.10,00,000/- over the last 3 years on its aims and objects, excluding administrative expenditure.

Note:
Statements of Income & Expenditure, duly audited by Chartered Accountant, for last 3 years are to be submitted to substantiate that it meets the financial parameter.
In case a newly registered entity would like to receive foreign contributions, then approval through the Prior Permission (PP) method is needed

Criteria for grant of FCRA Registration
Once, an FCRA application is made in the prescribed format, the following criteria are check before providing registration
(a) The '**person'** or '**entity**' making an application for registration or grant of prior permission-

- ✓ Is not fictitious or benami;
- ✓ Has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
- ✓ Has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
- ✓ Has not been found guilty of diversion or mis-utilisation of its funds;
- ✓ Is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
- ✓ Is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
- ✓ Has not contravened any of the provisions of this Act;
- ✓ Has not been prohibited from accepting foreign contribution;
- ✓ The person being an individual, such individual has neither been convicted under any law for the time being in force nor is any prosecution for any offence pending against him.
- ✓ The person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor is any prosecution for any offence pending against him.

Foreign Contribution cannot be accepted
The acceptance of foreign contribution by the entity / person is not likely to affect prejudicially

- ✓ The sovereignty and integrity of India;
- ✓ The security, strategic, scientific or economic interest of the State;
- ✓ The public interest;
- ✓ Freedom or fairness of election to any Legislature;
- ✓ Friendly relation with any foreign State;
- ✓ Harmony between religious, racial, social, linguistic, regional groups, castes or communities

The acceptance of foreign contribution

- ✓ Shall not lead to incitement of an offence;
- ✓ Shall not endanger the life or physical safety of any person.

Procedure for Application for FCRA registration

Form No: Application in Form FC-3.

Documents to be submitted:

- ✓ Self-certified copy of registration certificate/Trust deed etc., of the association
- ✓ Self-certified copy of relevant pages of MOA/AOA showing aim and objects of the association
- ✓ Activity Report indicating details of activities during the last 3 years;
- ✓ Audited statement of accounts for the past three years

Validity: Once FCRA registration is granted, it is valid for a period of five years. An application for renewal of FCRA registration can be made 6 months prior to the date of expiry, to keep the registration valid.

REGISTRATION IN CASE OF POLLUTION LAWS

In case of pesticides, bulk drugs and pharmaceuticals, asbestos and asbestos products, integrated paint complexes, mining projects, tourism projects of certain parameters, tarred roads in Himalayan areas, distilleries, dyes, foundries and electroplating industries.	Statutory clearances relating to Pollution Control And Environment to be obtained from the Ministry of Environment, Government of India, *irrespective of investment size.*
In case of other notified industries if investment size is less than Rs. 1000 million.	No Clearance required
In case of other notified industries if investment size is Rs. 1000 million and more.	Statutory clearances relating to Pollution Control And Environment to be obtained from the
Any item reserved for the small scale sector with investment of less than Rs 10 million.	No Clearance required
Any item reserved for the small scale sector with investment of Rs 10 million or more.	Statutory clearances relating to Pollution Control And Environment to be obtained from the

Setting up industries in certain locations considered ecologically fragile (e.g. Aravalli Range, coastal areas, Doon valley, Dahanu, etc.)	Are guided by separate guidelines issued by the Ministry of Environment of the Government of India.

SECTORWISE REGISTRATION

IE Code

- ✓ It is a **10 digit code** issued by the **Directorate General of Foreign Trade** (DGFT).
- ✓ All businesses which are engaged in Import and Export of goods require registering IEC.
- ✓ IE code has lifetime validity.
- ✓ Importers are not allowed to proceed without this code
- ✓ exporters can't take benefit of exports from DGFT, customs, Export Promotion Council, if they don't have this code.
- ✓ The IE Code must be quoted by importers while clearing customs.
- ✓ For exporters, IE Code must be quoted while sending shipments.
- ✓ banks require the exporters IE Code while receiving and sending money abroad.

Application for IE Registration	**Documents Required for IEC Registration**
STEP 1- prepare an application form in the prescribed format i.e. Aayaat Niryaat form 2A (ANF2A) format and filed with the proper DGFT Regional office. **STEP 2-** prepare the necessary documents related to the applicant's identity & address proof and legal entity proof. **STEP 3-** After preparation, file the form online at http://dgft.gov.in with the DGFT and pay the appropriate fee or cost of the IEC Registration. **STEP 4-** Once the application is approved IEC Code will be generated	✓ IEC Code Registration required following things: ✓ Individual Person ✓ Personal or Company or Firm Pan Card Copy. ✓ Personal AADHAR card or voter id or passport copy. ✓ Personal or company or firm current bank account cancel cheque copy. ✓ Electricity Bill Copy or Rent Agreement or Sale deed of the premise copy

in the soft copy.	

Salient Features

- ✓ International Exposure
- ✓ Government Benefits
- ✓ lifetime validity
- ✓ No Annual Compliance
- ✓ can be obtain by the individual person also

DRUG LICENSE

To start a pharmacy business, a drug license is required. The Central Drugs Standard Control Organization and State Drugs Standard Control Organization control the issue of drug license in India.

TYPE	
Wholesale: Issued to persons or agencies engaged in wholesale of drugs and medicines.	**Retail:** *Issued to run a general chemist shop. *Issued only to persons who possess a degree or diploma in pharmacy from a recognized institute or university

Conditions for grant of license

1. **Area**: The minimum area of 10 square meters is required to start a medical shop or pharmacy or wholesale outlet. In case, the pharmacy business combines retail and wholesale, a minimum of 15 square meters is required.
2. **Storage Facility**: The store must have refrigerator & air conditioner in the premises. Drugs like vaccines, sera, insulin injections etc., are required to be stored in the refrigerator.
3. Technical Staff:
   a) **Wholesale -** The sale of drug by wholesale shall be made either in the presence of registered pharmacist or in the presence of a competent person who shall be a graduate with 1 year's experience in dealing in drugs or a person who has passed Senior Secondary with 4 years' experience in dealing in drugs
   b) **Retail** - The sale of drug by retail must be made in the presence of registered pharmacist approved by the department who shall be present throughout the working hours

Documents Required

a) Application form in the prescribed format
b) Covering Letter
c) Challan of fee deposited
d) Declaration form in the format prescribed
e) Key plan and Site Plan for the premises
f) Basis of possession of the premises (Owned or Rented)
g) Proof of ownership of the premises, if rented
h) Proof of constitution of the business (COI/ MOA / AOA /Partnership Deed)
i) Affidavit or Declaration required.

FOOD SAFETY AND STANDARDS AUTHORITY OF INDIA (FSSAI) LICENSE

Need: All the manufacturers, traders, restaurants who are involved in food business must obtain a **14-digit registration** or a license number which must be printed on food packages

Objective

- ✓ To ensure that food products undergo certain quality checks,
- ✓ Reducing the cases of adulteration,
- ✓ Reduce sub-standard products and
- ✓ Improve accountability of manufacturers

Governed by The registration and licensing of food business in India is governed by the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulation, 2011

FSSAI Registration

- ✓ Petty food business operators are required to obtain a FSSAI registration Registration is obtained by submitting an application for registration in Form A.
- ✓ The application for registration should be accepted or rejected in writing within 7 days of receipt of an application by authority.
- ✓ The certificate must be prominently displayed at the place of food business, at all times.

***Special Note**:*

Petty food business operator is any person or entity who:

a) Manufactures or sells any article of food himself or a petty retailer, hawker, itinerant vendor or temporary stall holder; or
b) Distributes foods including in any religious or social gathering except a caterer; or
c) Other food businesses including small scale or cottage or such other industries relating to food business or tiny food businesses with an annual turnover not exceeding Rs 12 lakhs and whose:

- ✓ Production capacity of food (other than milk and milk products and meat and meat products) does not exceed 100 kg/ltr per day **OR**
- ✓ Procurement or handling and collection of milk is up to 500 litres of milk per day.
- ✓ Slaughtering capacity is 2 large animals or 10 small animals or 50 poultry birds per day or less.

FSSAI Licence

Any person or entity that is not classified as a petty food business operator is required to obtain a FSSAI license for operating a food business in India. FSSAI license is of two types, State FSSAI License and Central FSSAI License.

- ✓ Large food manufacturer/processors/transporters and importers of food products require central FSSAI license;
- ✓ State FSSAI license is required for medium sized food manufacturers, processor and transporters

Fee Structure

Please Note: License/Certificate can be applied for a maximum period of 5 Years.

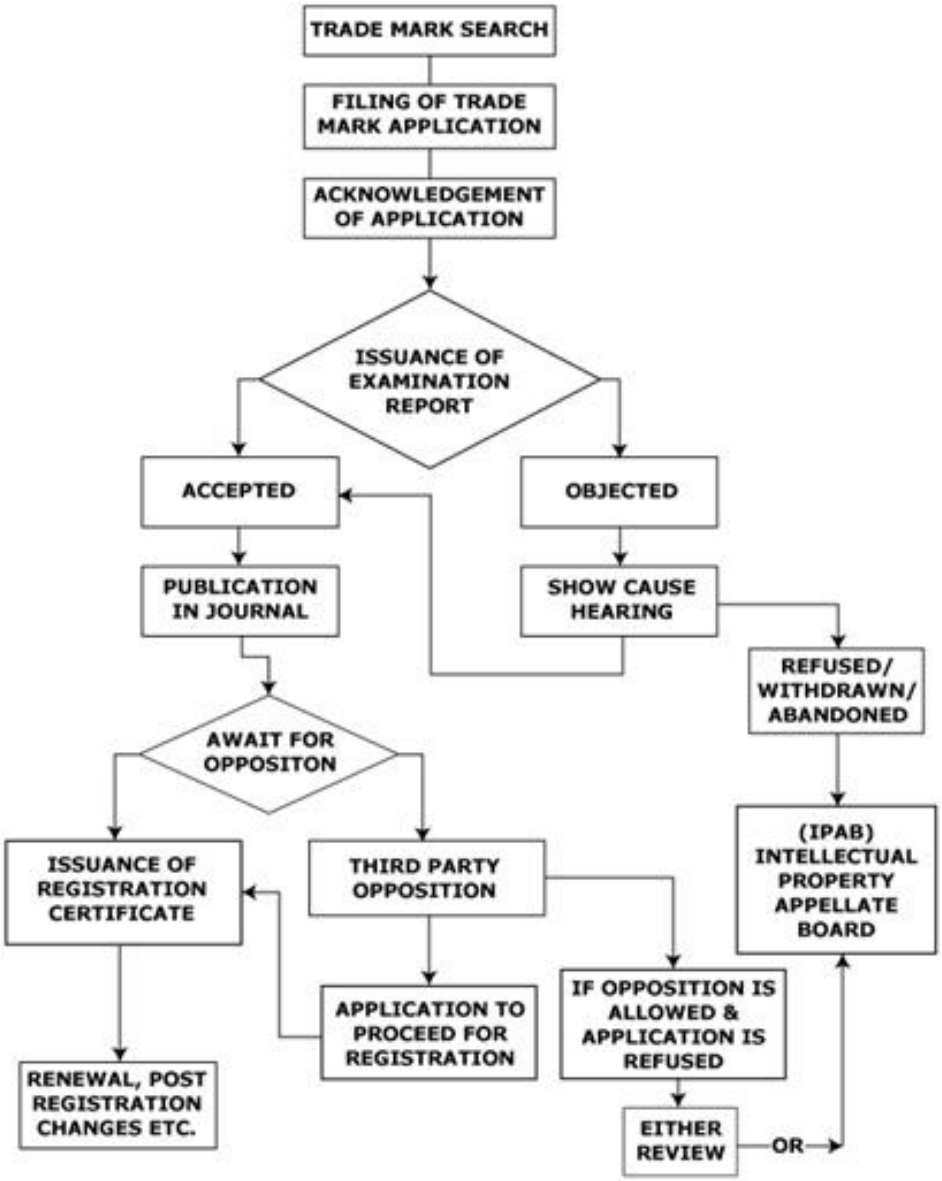
	Central (1 Year)	State (1 Year)	Registration (1 Year)	Konkan/Indian Railway (1 Year)
New Application	Rs. 7500	View	Rs. 100	Rs. 2000
Renewal Application	Rs. 7500	View	Rs. 100	Rs. 2000
License/Certificate Modification	Rs. 7500	View	Rs. 100	Rs. 2000
Duplicate License/Certificate	10% of the Applicable License Fee	View	10% of the Applicable Certificate Fee	10% of the Applicable Certificate Fee

Note: License is obtained by submitting an application in **Form A.**

Special Note: FSSAI license is granted for a period of **1 to 5 years** as request by the food business operator. Higher fee would be applicable for obtaining FSSAI license for more years.

TRADEMARK

The Trade Marks Registry was established in India in, 1940 and presently, it administers the Trade Marks Act, 1999 and the rules framed thereunder. It acts as a resource and information Centre and is a facilitator in matters relating to trade marks in the country.



The objective of the Trade Marks Act, 1999 is

- ✓ To register trademarks applied for in the country and
- ✓ To provide for better protection of trade mark for goods and
- ✓ Services and also to prevent fraudulent use of the mark.

The main function of the Registry is to register trademarks which qualify for registration under the Act and Rules.

Note: For forms and fees, refer module, Page no. 314

Copyright

The Copyright Act, 1957 came into effect from January 1958. This Act has been amended 5 times The Copyright (Amendment) Act, 2012 is the most substantial. The main reasons for amendments to the Copyright Act, 1957 include

a) to bring the Act in conformity with WCT and WPPT;
b) to protect the Music and Film Industry and address its concerns;
c) to address the concerns of the physically disabled and to protect the interests of the author of any work;
d) Incidental changes;
e) to remove operational facilities; and enforcement of rights.

The Indian Copyright Act today is compliant with most international conventions and treaties in the field of copyrights. India is a member of the Berne Convention of 1886 (as modified at Paris in 1971), the Universal Copyright Convention of 1951 and the Agreement on TRIPS Agreement of 1995. Though India is not a member of the Rome Convention of 1961, the Copyright Act, 1957 is fully compliant with the Rome Convention provisions as well.
The 2 Internet Treaties were negotiated in 1996 under the auspices of WIPO. These treaties are called the 'WIPO Copyrights Treaty (WCT)' and the 'WIPO Performances and Phonograms Treaty (WPPT)'.

The Copyright Rules, 2013 was notified on 14 March, 2013 replacing the old Copyright Rules, 1958. The Rules, inter alia, provide for procedure for relinquishment of Copyright; grant of compulsory licences in the matter of work withheld from public; to publish or republish works (in certain circumstances); to produce and publish a translation of a literary or dramatic work in any language; licence for benefit of disabled; grant statutory licence for cover versions; grant of statutory licence for broadcasting literary and musical works and sound recordings; registration of copyright societies and copyright registration.

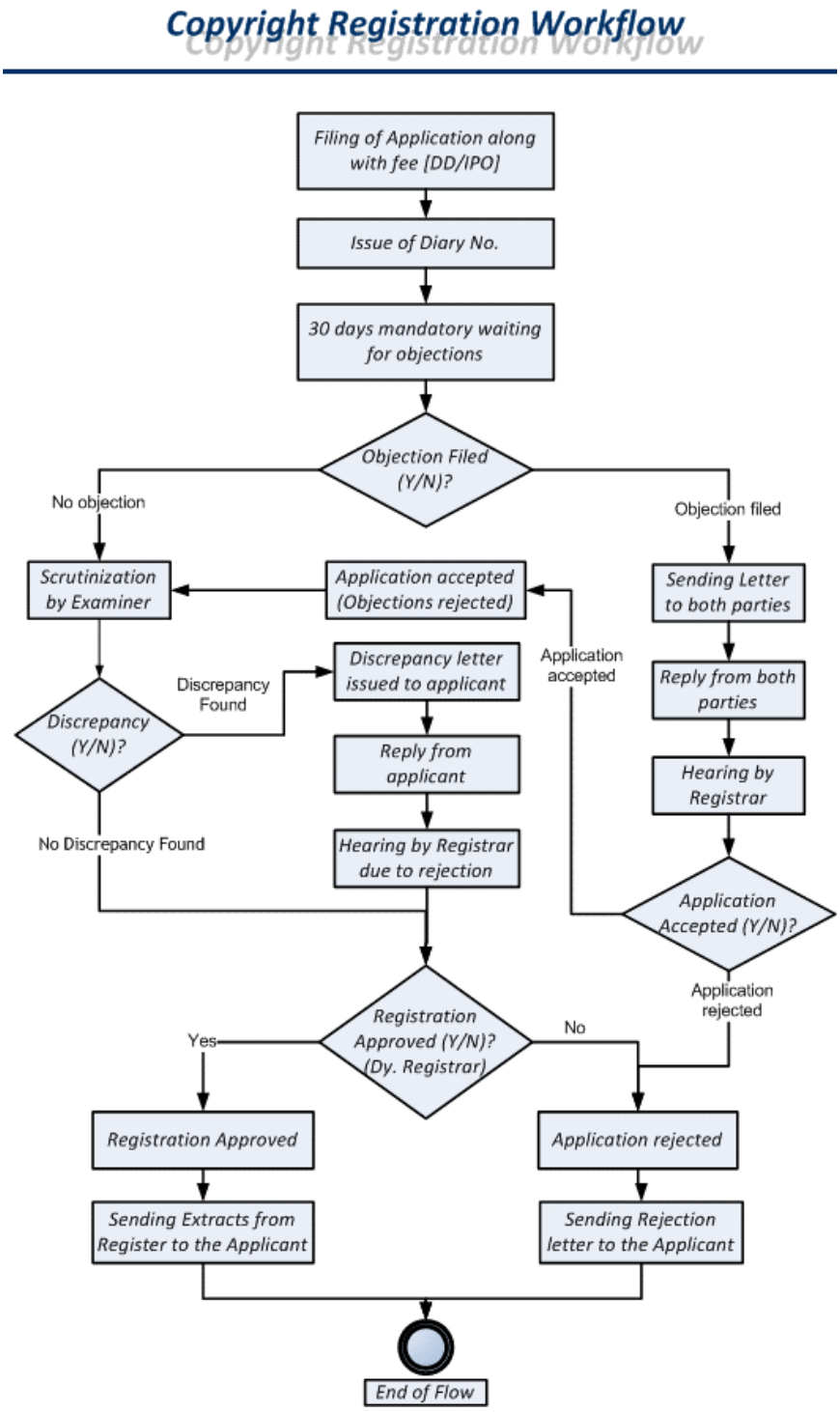
Copyright Registration Procedure

The procedure for registration is as follows:

a) Application for registration is to be made on as prescribed in the 1st schedule to the Rules;
b) Separate applications should be made for registration of each work;
c) Each application should be accompanied by the requisite fee prescribed in the 2nd schedule to the Rules ; and
d) The applications should be signed by the applicant or the advocate in whose favor a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Note: after one files the application and receives diary number, one has to wait for a mandatory period of 30 days so that no objection is filed in the

Copyright office against the claim that particular work is created by applicant.



Scope and Extent of Copyright Registration

Both published and unpublished works can be registered. Copyright in works published before the Copyright Act, 1957, can also be registered, provided the works

still enjoy copyright. 3 copies of published work may be sent along with the application.
If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. In case 2 copies of the manuscript are sent, 1 copy of the same duly stamped will be returned, while the other will be retained, as far as possible, in the Copyright Office for record and will be kept confidential. It would also be open to the applicant to send only extracts from the unpublished work instead of the whole manuscript and ask for the return of the extracts after being stamped with the seal of the Copyright Office. When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with prescribed fee.

All kinds of literary and artistic works can be copyrighted, one can also file a copyright application for the website or other computer program. Computer Software or programme can be registered as a 'literary work'.

Note: For fees, refer page no. 322 of Module.

Patent
Patent filing has become increasingly popular in India due to the rising intellectual property rights awareness and Start-up India Action Plan. In the Start-up India Action Plan, eligible start-ups would receive an 80% rebate in patent filing fee to provide a boost to patent registered by Indian companies. Hence, there is tremendous interest amongst start-ups for obtaining patent registration and in this article, we look at the documents required for patent registration in India.

Filing Patent Application
While filing a patent application, provisional specifications or complete specifications can be filed by the

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Maintenance of Registers and Records

As per Companies Act, 2013, every company shall maintain a statutory register at its registered office until the dissolution of the company.

Some important terms of maintaining registers and keeping records are as below:

- ✓ Some of the Registers are required to be kept open for inspection by Directors, Members, and Creditors and by other persons.
- ✓ A Company is also required to provide the extracts from the Registers, if demanded by Directors, Members, and Creditors and by other persons on payment of specified fees.
- ✓ Failure to maintain statutory register could result in a fine for company of not less than Rs.1 lakh, and up to Rs.10 lakh. Further, the Officers of the company may also be punishable with imprisonment for a term which may extend to 6 months or with a fine min Rs. 25,000 max up to Rs.1 lakh.

List of Register and Records required to be maintained by an enterprise

Form	Name of the Register
MGT-1	Register of Members
MGT-2	Register of Debenture Holders/ Other Securities Holders
MGT-3	Foreign Register of Members, Debenture holders, other security holders or beneficial owners residing outside India
Register	Register of Directors and KMP and Their Shareholding
Register	Index of Members
Register	Index of Debenture Holders
Register	Register and Index of Beneficial Owner
SH-2	Register of Renewed and Duplicate Share Certificate
SH-3	Register of Sweat Equity Shares
SH-6	Register of Employee Stock Option
SH-10	Register of Shares/Other Securities Bought Back

Other Important Books and Registers

Minutes Book

- ✓ Board Meeting Minutes Book
- ✓ General Meeting Minutes Book (i.e. AGM, EGM, Postal Ballot, Creditors Meetings, Debenture holders Meetings)

Books of Accounts/Financial Statements /Register of Directors/ Attendance at Board/Committee Meetings details include:

- ✓ Invoices received
- ✓ Credit card statements
- ✓ Receipts/ counterfoils
- ✓ Cheque book counterfoils
- ✓ Cash vouchers

- ✓ Salary information
- ✓ Credit Documents.

Banking Records

To be able to correctly ascertain the financial strength of an enterprise it is necessary that the bank balances as per records be in sync with the reality. To accomplish this a business must maintain up to date records of:

a. Bank account statements along with reconciliations
b. Cheque books, with completed counterfoils
c. Cheque/ Cash Deposit Counterfoils

The aforementioned data sets allow one to determine the exact deposits and withdrawals from the bank as well as identify the nature and purpose of such withdrawals along with the identity of the person to whom such payments have been made

Cash Records

Despite all advances in banking technology and facilities, businesses must still undertake a large number of transactions in cash.

To be able to actively ascertain the exact amount of cash available, a business must maintain two principle documents:

- ✓ Cash collection register, to record and reconcile all collections made by the business in cash, and;
- ✓ Day books / Cash book to map the inward and outward movement of cash from the business.

Place of Keeping the Records and Registers

If it is inconvenient to make certain records available for inspection at the registered office, it may be kept at some other near premises under the jurisdiction of the company.

It must be **notified**, if any statutory records at kept at the place other than the registered office of the company.

Further, one must notify if they move any records, and the company is expected to confirm their location whenever you file an annual confirmation statement (previously called an annual return).

Inspection of Statutory Registers

Companies are required by law to make their statutory records available for public inspection at their registered office or at an alternative address every working day between working hours.

Advance notice of the date and time of inspection must be provided to the company.

Suggested Method of Keeping Statutory Registers

The companies have an option to keep all of their statutory registers together in a bound or loose-leaf folder or book. This ensures all important company documents are filed together and easily accessible for inspection purposes. Furthermore one may also keep digital copies instead of, or in addition to the paper registers.

Identifying Laws applicable to Various Industries and their Initial Compliances

Under the transforming move of vision New India 2022, India is venerating an emerging market, registering itself as one of the biggest and fastest growing economies in the world. “Skill India”, “Digital India”, etc., are started to build the interest and ease among various domestic and overseas stake holders to set up and advance the entrepreneurship in India.

Indeed, when the entrance and advancement to Indian business market would be of ultimate fortune, there are various laws which need to be abided for successfully setting up and taking forward an enterprise in India.

Formalizing and Deciding the Business Structure
The foremost requirement for setting up this business is to understand and decide what kind of business venture it would be.
For example,
- ✓ if it’s a company, it would be governed under Companies Act, 2013,
- ✓ in case of Partnership, the Partnership Act, 1932 would be applicable,
- ✓ if it is an MSME, the MSME Act, 2006 would come into picture.

It shows that there is a plethora of laws which need to be complied with the respective form of businesses. Therefore, the first thing for starting any business is to determine the nature and type of the business.

Founders need to incorporate the business as a specific business type –
- ✓ Sole proprietorship,
- ✓ Private limited,
- ✓ Public limited,
- ✓ Partnership,
- ✓ Limited liability partnership etc.

It is very essential to have this clarity at the very beginning as this will be integral to the business’ overall vision and goals, both short term and long term.

Here is a quick look into the legal implications for the major business types in India

COMPARITIVE OF MAJOR BUSINESS TYPES IN INDIA

Legal details	Proprietorship	partnership	LLP	Company
Registration	No formal registration required	Optional	With MCA under the LLP Act 2008	With MCA under the Co. Act 2013
Legal status	Not recognised as a separate entity and promoter is personally responsible for all liabilities	Not recognised as a separate entity and promoter is personally responsible for liabilities	Is a separate legal entity. The promoters of the LLP are not personally liable towards the LLP	Is a separate legal entity. The promoters of the co. are not personally liable the co.
Members liability	unlimited	unlimited	Limited liability to the extent of contribution towards LLP	Limited liability to the extent of share capital
No. of members required	1 person	Minimum 2	Minimum 2	Minimum 1 required for OPC
Transferability	Not transferable	Not transferable	Ownership can be transferred	Ownership can be transferred by means of shares
Taxation	Taxed as individual, based on total income of Proprietor.	Partnership profits are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable	LLP profits are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable	Private Limited Company profits are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable
Annual statutory meeting	No requirement for annual statutory meetings	No requirement for annual statutory meetings	No requirement for annual statutory meetings	BM & GM should be conducted periodically
Annual fillings	No requirement to file annual report with the ROC.	No requirement to file annual	Must file Annual Statement of Returns &	Must file Annual Statement of Returns &

	Income tax to be filed on the income of the proprietorship	report with the ROC. Income tax to be filed on the income of the partnership.	Solvency and Annual Return with the Registrar every year. Tax returns must also be filed annually	Solvency and Annual Ret with the ROC every year. Tax returns must also be filed annually
Existence or Survivability	Proprietorship existence is dependent on proprietor	Partnership existence is dependent on partners. Can be dissolved at will or upon on the death of partner(s)	Existence not dependent on partners. Can be dissolved voluntarily or by order of the NCLT.	Existence not dependent on directors or shareholders. Can be dissolved voluntarily or by Regulatory Authorities
Foreign ownership	Foreigners are not allowed to be sole proprietors	Foreigners are not allowed to be part of partnership	Foreigners are allowed in invest with/without the approval of the RBI & other applicable permissions for the relevant Government of India authorities depending on the category of business they are interested to invest.	Foreigners are allowed in invest with/without the approval of the RBI & other applicable permissions for the relevant Government of India authorities depending on the category of business they are interested to invest.

Annual Compliances for Company

Compliances	OPC	Small Co.	Pvt. Co.	Unlisted co.	Listed co.
Receipt o MBP 1 (Annual disclosure given by Directors u/s 184					
Receipt of DIR 8 (Intimation by Directors regarding his qualification or Disqualification)					

Board Meeting	Min: 2 in a year with min gap of 90 days	Min: 2 in a year with min gap of 90 days	Min 4 in a yr with max gap of 120 days	Min 4 in a yr with max gap of 120 days	Min 4 in a yr with max gap of 120 days
Holding AGM every year					
Filing Report of AGM					
Providing e voting facility					
Adoption of Financial Accounts & Board Report					
Filing of Adoption of Financial Account & Board report in MGT 14					
Appointment of Auditor					
File form ADT-1 of Auditor appointment					
Maintenance of Statutory Registers					
Filing of Annual Accounts					
Certification of Annual Return by PCS			If PSC ≥ 10 Cr OR TO ≥ 50 Cr.	If PSC ≥ Rs. 10 Cr OR TO ≥ Rs. 50 Cr.	
Secretarial Auditor Appointment				Public co. having PSC ≥ Rs. 50 Cr. OR TO ≥ Rs. 250 Cr.	
Constitution of Audit					

committee					
Constitution of Nomination committee					
Annual Compliance prescribed in SEBI (LODR) Reg 2015					

Annual Compliance for LLP

1. Maintenance of Minute Book
2. File E form 4 for any change of partner and designated partner
3. Supplementary LLP agreement require to file in E form 3 if not filed at the time of incorporation.
4. Holding General Meeting every year.
5. Statement of account and solvency is required to be filed annually in E form 8.
6. Annual Return should be filed with ROC in Form 11.
7. File Income tax return
   - ✓ LLP whose accounts are not required to be audited under any Law: 31st July of every year.
   - ✓ LLP whose accounts are subject to audit under any Law: 30th sept of every year.

Annual Compliance for Sole Proprietorship

Filing of Annual Tax Returns & GST returns

Annual Compliance for Sole Partnership

- ✓ Intimation of change in principal place/ nature of business/ firm name in Form B
- ✓ Intimation of Change in the name (person/limited company and address of the partner) in Form D
- ✓ Intimation of Change in Constitution- Admission/Retirement/Dissolution/ Death of Partner/minor partner in Form E

Industry Specific Laws to be complied

The Factories Act, 1948	It is enacted to regulate the working conditions in factories. Its administered by the Ministry of Labour and Employment through its Directorate General Factory Advice Service & Labour Institutes (DGFASLI) and by the State Governments through their factory inspectorates.
The Plantation Labour Act 1951	It is enacted to provide for the welfare of plantation labour.

	It regulates the conditions of work in plantations. The Act is administered by the Ministry of Labour through its Industrial Relations Division.
The Mines Act, 1952	It contains provisions for measures relating to the health, safety and welfare of workers in the coal and oil mines. The Act is administered by the Ministry of Labour and Employment through the Directorate General of Mines Safety (DGMS). DGMS is the Indian Government regulatory agency for safety in mines and oil-fields.
The Shops and Establishments	It was enacted to provide statutory obligation and rights to employees and employers in the unorganised sector of employment, i.e. shops and establishments. It is applicable to all persons employed in an establishment with or without wages, except the members of the employer's family. It is a State legislation and each State has framed its own rules for the Act.
The Contract Labour (Regulation & Abolition	It is enacted to regulate employment of contract labour so as to place it at par with labour employed directly, with regard to the working conditions and certain other benefits. The Act is implemented both by the CG and SG. The CG has jurisdiction over establishments like railways, banks, mines etc. Whereas SG have jurisdiction over units located in that state.
The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979	It was enacted to protect the rights and safeguard the interest of migrant workers. The Act intends to regulate the employment of inter-state migrant workmen and to provide their conditions of service. It applies to every establishment and the contractor, who employ 5 or more inter-state migrant workmen.

The Mica Mines Labour Welfare Fund Act, 1946	For constitution of a fund for financing the activities which promote welfare of labour employed in the mica mining industry.
The Limestone and Dolomite Mines Labour Welfare Fund Act, 1972	For the levy and collection of a cess on limestone and dolomite for financing the activities which promote the welfare of persons employed in the limestone and dolomite mines.
The Iron Ore Mines, Manganese Ore Mines & Chrome Ore Mines Labour Welfare Fund Act, 1976	To provide for financing the activities which promote the welfare of persons employed in the iron ore mines, manganese ore mines and chrome ore mines.
The Beedi Workers Welfare Fund Act, 1976	To provide for financing the measures which promote the welfare of persons engaged in beedi establishments.
The Cine Workers Welfare Fund Act, 1981	To provide for financing the activities which promote the welfare of certain cine-workers.
The Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996	To regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures. It contains provision for immediate assistance to the workers in case of accidents; old age pension; loans for construction of house; premium for group insurance; financial assistance for education, medical expenses and maternity benefits, etc.
The Sales Promotion Employees (Conditions of Service) Act, 1976	to regulate certain conditions of service of sales promotion employees in certain establishments.

Apart from the above laws there are various laws which are applicable depending on sector in which industry is working

Pharmaceutical Industry	✓ Pharmacy Act, 1948; ✓ Drugs and Cosmetics Act, 1940; ✓ Homoeopathy Central Council Act, 1973 ✓ Drugs and Magic Remedies (Objectionable

	Advertisement) Act, 1954 ✓ Narcotic Drugs and Psychotropic Substances Act, 1985 ✓ Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ✓ The Medicinal & Toilet Preparations (Excise Duties) Act, 1955 ✓ Petroleum Act 1934 ✓ Poisons Act 1919 ✓ Food Safety and Standards Act, 2006 ✓ Insecticides Act 1968 ✓ Biological Diversity Act, 2002 ✓ The Indian Copyright Act, 1957 ✓ The Patents Act, 1970 ✓ The Trade Marks Act, 1999
Computer Programming, Consultancy and Related Services	✓ The Information Technology Act, 2000 ✓ The Special Economic Zone Act, 2005 ✓ Policy relating to Software Technology Parks of India and its regulations ✓ The Indian Copyright Act, 1957 ✓ The Patents Act, 1970 ✓ The Trade Marks Act, 1999
Gas Industry	✓ The Petroleum Act, 1934 ✓ Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962 ✓ Explosives Act, 1884 ✓ The Oilfield (Regulation & Development) Act , 1948 Petroleum and Natural Gas Regulatory Board Act, 2006 ✓ The Oil Industry(Development) Act 1974 ✓ The Mines Act, 1952
Oil & Petroleum Sector	✓ The Petroleum Act, 1934 ✓ Petroleum and Minerals Pipelines (Acquisition of Right of User Inland) Act, 1962 ✓ Explosives Act, 1884 ✓ The Oilfield (Regulation & Development) Act , 1948

	✓ Petroleum and Natural Gas Regulatory Board Act, 2006 ✓ The Oil Industry(Development) Act, 1974 ✓ The Mines Act, 1952 ✓ Mines and Minerals (Regulations and Development) Act, 1957 ✓ The Territorial Waters, Continental Shelf, Exclusive Economic Zone And Other Maritime Zones Act, 1976 ✓ Offshore Areas Minerals (Development and Regulation) Act, 2002
Power Industry	✓ The Electricity Act, 2003 ✓ National Tariff Policy ✓ Essential Commodities Act, 1955 ✓ Explosives Act, 1884 ✓ Mines Act, 1952 (wherever applicable) ✓ Mines and Mineral (Regulation and Development) Act, 1957 (wherever applicable)
Sugar Industry	✓ Sugar Cess Act, 1982 ✓ Levy Sugar Price Equalisation Fund Act, 1976 ✓ Food Safety And Standards Act, 2006 ✓ Essential Commodities Act,1955 ✓ Sugar Development Fund Act, 1982 ✓ Export (Quality Control and Inspection) Act, 1963 Agricultural and Processed Food Products Export Act, 1986
Tobacco Industry	✓ Tobacco Board Act, 1975 ✓ Tobacco Cess Act, 1975 ✓ Beedi and Cigar Workers (Conditions of Employment) Act, 1966 as amended in 1993 ✓ Beedi Workers Welfare Cess Act, 1976 ✓ Beedi Workers Welfare Fund Act, 1976 ✓ Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COPTA)

	✓ The Cable Television Network (Regulation) Act, 1955
Insurance	✓ Insurance Act, 1938 ✓ Insurance Regulatory and Development Authority Act, 1999 ✓ General Insurance Business (Nationalisation) Act, 1972 ✓ Industrial Disputes (Banking and Insurance Companies) Act, 1949 ✓ Marine Insurance Act, 1963
Commercial Banks (Other Than Nationalised Banks And State Bank Of India)	✓ RBI Act, 1934 ✓ SARFAESI Act, 2002 ✓ The Bankers' Books Evidence Act, 1891 ✓ Recovery of Debts due to Banks & Financial Institution Act, 1993 ✓ Credit Information Companies (Regulation) Act, 2005 ✓ Prevention of Money Laundering Act, 2002 ✓ The Deposit Insurance and Credit Guarantee Corporation Act, 1961 ✓ Industrial Disputes (Banking and Insurance Companies) Act, 1949 ✓ Information Technology Act, 2000
Beverages (Non-Alcoholic)	✓ Food Safety and Standards Act, 2006 ✓ The Insecticide Act, 1968 ✓ Export (Quality Control and Inspection) Act, 1963 ✓ Inflammable Substances Act,1952 ✓ Agricultural and Processed Food Products Export Cess Act, 1986 ✓ Agricultural Produce (Grading and Marking) Act, 1937
Real Estate Sector	✓ Housing Board Act, 1965 ✓ Transfer of Property Act, 1882 ✓ Building and Other Construction Workers' (Regulation of Employment and Conditions of Services) Act, 1996

Automobile	✓ Motor Vehicles Act, 1988 ✓ The Motor Transport Workers Act, 1961 ✓ The Explosive Act, 1884 ✓ The Petroleum Act, 1934 ✓ The Environment (Protection) Act, 1986 ✓ The Water(Prevention and Control of Pollution) Act, 1974 ✓ The Air(Prevention and Control of Pollution) Act, 1981
Aviation Sector	✓ Aircraft Act, 1934 ✓ Airports Authority of India Act, 1994 ✓ Carriage by Air Act, 1972 ✓ T okyo Convention Act, 1975 ✓ Anti-Hijacking Act, 1982 ✓ Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 ✓ Airports Economic Regulatory Authority of India Act,2008
Human Health Sector	✓ Clinical Establishment (Registration and Regulation) Act, 2010 ✓ Indian Medical Council Act, 1956 ✓ Indian Medical Degrees Act, 1916 ✓ Indian Nursing Council Act, 1947 ✓ The Dentists Act, 1948 ✓ Rehabilitation Council of India Act, 1992 ✓ Drugs and Cosmetic Act, 1940 ✓ The Drugs Control Act, 1950 ✓ Pharmacy Act, 1948 ✓ Narcotics and Psychotropic Substances Act, 1985 ✓ Homoeopathy Central Council Act, 1973 ✓ Insecticide Act, 1968 ✓ Transplantation of Human Organs Act, 1994 ✓ Drugs and Magic Remedies (Objectionable) Advertisements Act, 1954 ✓ Birth and Death and Marriage Registration Act, 1886 ✓ Mental Health Act, 1987 ✓ Ear Drums and Ear Bones (Authority for Use For

	Therapeutic Purposes) Act, 1982 ✓ Eyes (Authority for Use For Therapeutic Purposes) Act, 1982 ✓ The Epidemic Disease Act 1897
Mining Of Metal Ores	✓ Mines Act, 1952 ✓ Mines and Minerals (Development and Regulation) Act, 1957 ✓ Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Cess Act, 1976 ✓ Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Fund Act, 1976
Edible Oils	✓ National Oil Seeds and Vegetable Oils Development Board Act, 1983 ✓ Cotton Copra and Vegetable Oils Cess (Abolition) Act, 1987 ✓ Seeds Act, 1966 ✓ Protection of Plant Varieties and Farmers Right Act, 2001 ✓ Food Safety And Standards Act, 2006
Road Transport	✓ National Highways Act, 1956 ✓ The Multimodal Transportation of Goods Act, 1993 ✓ Control of National Highways (Land and Traffic) Act, 2002 ✓ Carriage by Road Act, 2007 ✓ Road Transport Corporations Act, 1950 ✓ Motor Vehicles Act, 1988

INTELLECTUAL PROPERTY LAWS

INTRODUCTION (IP)

IP refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce.

It is divided into two categories:

1) <u>Industrial property Rights</u> which includes, ✓ inventions (patents), ✓ trademarks, ✓ industrial designs, and ✓ geographic indications of source	2) <u>Copyright</u>, which includes ✓ literary and artistic works such as novels, poems and plays, ✓ films, ✓ musical works, ✓ artistic works such as drawings, paintings, ✓ photographs and sculptures, and architectural designs ✓ it also includes those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs

DIFFERENCE BETWEEN INTELLECTUAL PROPERTY AND OTHER FORMS OF PROPERTY

Intellectual property is **intangible**.
It must be expressed in some distinct way to be protectable.

Generally, "intellectual property" encompasses **four** separate and distinct types of intangible property namely

- ✓ Patents,
- ✓ Trademarks,
- ✓ Copyrights, and
- ✓ Trade secrets.

However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms under the gambit of intellectual property. In recent times, **geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information** have been brought under the umbrella of intellectual property.

TRADE MARKS ACT, 1999

Trademarks mean any words, symbols, logos, slogans, product packaging or design that identify the goods or services from a particular source.

As per the definition provided under **Section 2 (zb)** of the TM Act, "trade mark" means

- ✓ a mark capable of being **represented graphically** and
- ✓ which is capable of **distinguishing the goods** or services of one person from those of others and
- ✓ may include shape of goods, their packaging and combination of colours

For Example: *Apple, Google Samsung, Coca-cola, Tata, yahoo, Facebook, PCbaba.*

The Trade Marks Act 1999 ("TM Act") provides, inter alia, for registration of marks, filing of multiclass applications, the renewable term of registration of a trademark as well as recognition of the concept of well-known marks, etc. It is pertinent to note that the ***"letter R"*** *in a circle i.e. "®" with a trademark can be used only after the registration of the trademark under the TM Act 1999.*

Functions of Trademark

- ✓ It **identifies the goods and services** and its origin;
- ✓ It guarantees its **unchanged quality**;
- ✓ It **advertises** the goods and services;
- ✓ It **creates an image** for goods and services

It should be noted that before registering any trademark, an applicant should conduct a search of federal and state databases to make sure a similar trademark doesn't already exist. This exercise can help to reduce the amount of time and money.

The Trade Marks Act, 1999 allows for the registration of a trademark for a period of **10 years** and renewal of same trademark for a period of **10 years.**

<u>POINTS TO CONSIDER WHILE ADOPTING A TRADEMARK</u>

Any startup needs to be cautious in selecting its trade name, brands, logos, packaging for products, domain names and any other mark which it proposes to use. Applicant must do a proper due diligence before adopting a trademark.

The trademarks can be broadly classified into following five categories:

a) Generic	Generic marks means using the name of the product for the product, like "Salt" or "Water" for salt & Water.
b) Descriptive	It means a mark describing the characteristic of the products, like using the mark "Fair" for the fairness creams *Example:* "Cold & Creamy", a potential mark for ice cream, but since it describes one of the characteristics of the product, it isn't likely to qualify as trademark.

c) Suggestive:	It means a mark suggesting the characteristic of the products. *Example:* Microsoft (microcomputer software), Android (artificially intelligent user interactive software)
d) Arbitrary	It means a mark which exists in popular vocabulary, but has no logical relationship with the goods or services for which they are used, like "Apple" for phones/Computers.
e) Invented/ Coined	It means a new word which has no dictionary meaning, like "Adidas".

India follows the NICE Classification of Goods and Services for the purpose of registration of trademarks. The NICE Classification groups products into 45 classes (classes 1-34 include goods and classes 35-45 include services).

- ✓ *The strongest trademarks would be invented (coined) or arbitrary marks to protect the commercial Interest. The weaker marks are descriptive or suggestive marks which are very hard to protect. The weakest marks are generic marks which can never function as trademarks.*
- ✓ *Please note that India recognizes the concept of the "Well-known Trademark" and the principle of "Trans-border Reputation". Example: Well-known trademarks are Google, Tata, Yahoo, Pepsi, Reliance, etc. and "Trans-border Reputation", Trademarks are Apple, Gillette, Whirlpool, and Volvo, which despite having no physical presence in India.*

ENFORCEMENT AGAINST THE INFRINGEMENT OF TRADEMARK

Meaning of infringement of Trademark: A registered trademark is infringed when a person other than a registered proprietor or a person using by way of permitted us, uses in course of trade.

Instances of Infringement of trademark:

a) *Use of deceptively similar mark*
b) *Use of mark likely to cause confusion because of identity/similarity*
c) *Use of identical or similar registered trademark even on dissimilar goods, if the registered trademark has a reputation in India*
d) Unauthorized use of trademark in an advertisement, taking unfair advantage in the advertisement or showing a registered trademark in an advertisement in bad light which is against the reputation of that product
e) Where the distinctive elements of a registered trademark consist or includes words, spoken use of words as well as its visual representation may be infringement of trademark

Who can apply for Registration of Trademark?

- ✓ Any person claiming to be the proprietor of trademark used or proposed to be used can apply for registration of his trademark.
- ✓ It may be noted that a single application may be filed for different classes of goods and services but separate fees is payable for each class.
- ✓ The application for registration of shall be filed with the Office of Registry of Trademark under whose territorial jurisdiction the principle place of business of proprietor is situated.

What is not infringement of trademark /limits on effects of registered trademark?

a. Honest practice in trade.
b. Use only to indicate quality, quantity, characteristics, price, etc.
c. Use as per limitations and conditions in registered trademark.
d. Use of trademark registered by the proprietor but subsequently allowed to other by the proprietors for its use.
e. Use of trademark for indicating services performed by the proprietor of trademark.
f. Purchase of goods bearing the registered trademark and then displayed for sale.

Infringement and Passing-off

a) Unauthorized use of registered trademark is infringement of trademark. However, Damages can also be claimed even if the trademark is not registered. This is called passing-off.
b) Thus, in India protection in respect of trademark is available both under the statute law as well as under the common law.
c) Hence, infringement action can only be in respect of registered trademark while passing-off action can be in case of both registered as well as unregistered trademark.

Following ***reliefs*** can be granted in any suit for infringement or passing - off:

a) *Injunction.*
b) *Either damages or an account of the profits ,at the option of the plaintiff.*
c) *Order for delivery of infringing labels and marks for destruction.*

Assignment and Transmission

- ✓ A registered trademark can be assigned by the proprietor of trademark to any other person, in return of some consideration with or without goodwill of business concerned, in respect of all goods and services or some of the goods or services.

- ✓ An unregistered trademark can also be assigned with or without goodwill of the business concerned.
- ✓ It may be further noted that assignment or transmission is not permitted, if by such assignment exclusive rights are created in more than one person in respect of same goods or services or associated goods or services if it is likely to cause confusion.
- ✓ Similarly, assignment or transmission is not possible if after the assignment it may happen that one person has exclusive rights in one part of India while another person has exclusive rights in respect of identical or similar trademark in another part of India in respect of same goods or services or associated goods or services.

Grounds for refusal to register trademark:

Absolute grounds

Following types of trademarks cannot be registered:

i. Common **or non-distinctive trademark**
   a) Which are devoid of any distinctive character i.e., not capable of distinguishing goods and services of one person from those of another person;
   b) Which consist exclusively marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, value, geographical origins, or the time of production of goods or rendering the service or other characteristics of goods or services;
   c) which consist exclusively marks which have become customary in the current language or in the bonafide and established practices of trade.
   Example: Green dot used to indicate vegetarian and Red dot used to indicate non veg content in food stuff, grapes indicate wine.

ii. Confusing, obscene or prohibited trademark
   a. which is likely to deceive or cause confusion;
   b. which comprises of scandalous or obscene matters;
   c. which contains any matter likely to hurt religious sentiments;
   d. use of which is prohibited under the Emblems and names (Prevention of improper use) Act, 1950

iii. Trademarks regarding certain shapes
   a. Shape of which result from nature of goods themselves;
   b. Shape of goods which is necessary to obtain a technical result;
   c. Shapes which give substantial value to the goods

Relative grounds

(A) Trademark which are likely to create confusion in case of similar goods:

A trademark shall not be register if there exists a likelihood of confusion on the part of the public because of the following factors:

a. Its identity with the earlier trademark & similarity of goods or services covered by trademark;
b. Its similarity to an earlier trademark and the identity of goods or services covered by trademark.

(B) Dissimilar goods but trademark already registered: (Well known trademark)

Trademark which is identical with or similar to an earlier trademark, but in respect of goods or services which are not similar to those for which earlier trademark is already registered with different proprietor, shall not be registered, if the extent of earlier trademark is a well known trademark in India and the use of latter mark (which is proposed to be registered) could unfair advantage of the earlier trademark.

A well-known trademark in relation to any goods or services means a mark which has become so popular among the public which uses such goods or services such that the use of such mark in relation to other goods or service would be likely to be taken as indicating a connection between the goods & services and the first mentioned goods or services.

Thus in case of dissimilar goods with identical or similar trademark will not be registered if earlier is well known trademark in India and of mark proposed to be registered could be unfair detrimental to the proprietors of well- known trademark.

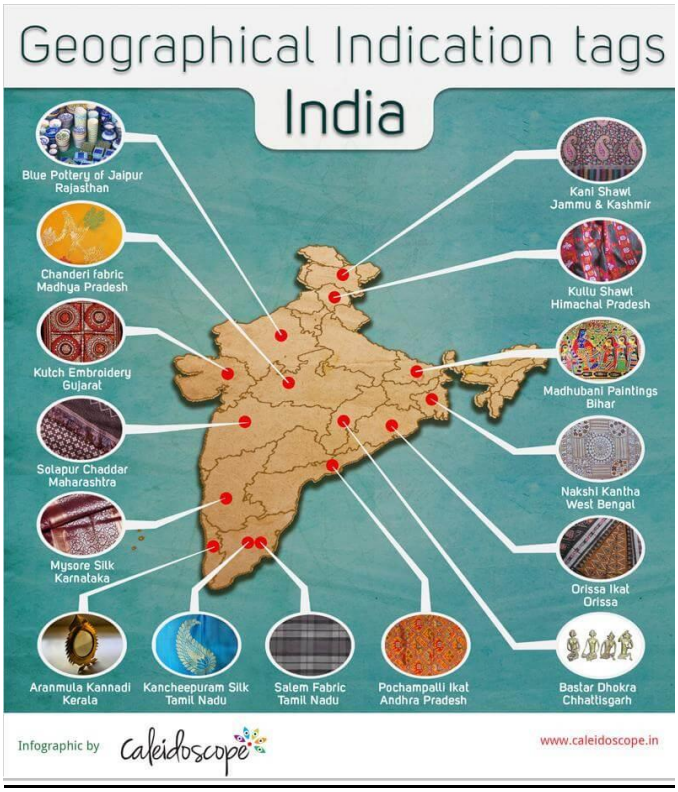
GEOGRAPHICAL INDICATION OF GOODS (REGISTRATION AND PROTECTION) ACT, 1999

Introduction

This Act seeks provide for the registration and better protection of geographical indications relating to goods in India.

Examples of Indian Geographical Indications are -

- ✓ Darjeeling Tea,
- ✓ Kanchipuram Silk Saree,
- ✓ Alphanso Mango,
- ✓ Nagpur Orange,
- ✓ Kolhapuri Chappal etc,.



Registration of geographical indication

Section 8 of the Act provides that a geographical indication may be registered in respect of all the goods, comprised in such class of goods as may be classified by a region or locality in that territory, as the case may be the Registrar deems fit and in respect of a definite territory of a country.

The Registrar may also classify the goods in accordance with the International classification for the purposes of registration of geographical indications and publish in the manner in an alphabetical index of classification of goods.

Any question arising as to the class within which any goods fall or the definite area in respect of which the geographical indication is to be registered or where any goods are not specified in the alphabetical index of goods published shall be determined by the Registrar whose decision in the matter shall be final

Prohibition of registration of certain geographical indications (Section 9):

a) The use of which would be likely to deceive or cause confusion; or Eg: Paris and Eifil tower
b) The use of which would be contrary to any law for the time being in force; or
c) Which comprises or contains scandalous or obscene matter; or

d) Which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India; or
e) Which would otherwise be disentitled to protection in a court; or
f) Which are determined to be generic names or indications of goods and are therefore, not or ceased to be protected in their country of origin, or fallen into disuse in that country; or
g) which, although literally true as to the territory, region or locality in which the goods originate, but falsely represent the persons that goods originate another region or locality,

Application for registration

U/S 11 any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods shall apply in writing to the Registrar in such form and in such manner and accompanied by such fees as may be prescribed for the registration of the geographical indication.

Registration

The registration of a geographical indication shall be for a period of 10 years, but may be renewed from time to time in accordance with the provisions of this section.

The Registrar shall, renew the registration of the geographical indication or authorized user, as the case may be, for a period of 10 years from the date of expiration of the original registration or of the last renewal of registration, as the case may be on application being made.

The salient features of this legislation are as under:

a) Provision of definition of several important terms like "geographical indication", "goods", "producers", "packages", "registered proprietor", "authorized user" etc.
b) Provision for the maintenance of a Register of Geographical Indications in 2 parts-Part A and Part B and use of computers etc. for maintenance of such Register. While Part A will contain all registered geographical indications, Part B will contain particulars of registered authorized users.
c) Registration of geographical indications of goods in specified classes.
d) Prohibition of registration of certain geographical indications.
e) Provisions for framing of rules by Central Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications.

f) Compulsory advertisement of all accepted geographical indication applications and for inviting objections.
g) Registration of authorized users of registered geographical indications and providing provisions for taking infringement action either by a registered proprietor or an authorized user.
h) Provisions for higher level of protection for notified goods.
i) Prohibition of assignment etc. of a geographical indication as it is public property.
j) Prohibition of registration of geographical indication as a trademark.
k) Appeal against Registrar's decision would be to the Intellectual Property Board established under the Trade Mark legislation.
l) Provision relating to offences and penalties.
m) Provision detailing the effects of registration and the rights conferred by registration.
n) Provision for reciprocity powers of the registrar, maintenance of Index, protection of homonymous geographical indications etc.

DESIGNS ACT, 2000

The objective of the Designs Act, 2000 is to protect new or original designs so created to be applied or applicable to particular article to be manufactured by Industrial Process or means. Sometimes purchase of articles for use is influenced not only by their practical efficiency but also by their appearance

The important purpose of design Registration is to see that the artisan, creator, originator of a design having aesthetic look is not deprived of his bonafide reward by others applying it to their goods.

The design law excludes from its purview the functioning features of an article and grants protection only to those which have an artistic appeal.
Example: *The design of a teacup must have a hollow receptacle for holding tea and a handle to hold the cup. These are functional features that cannot be registered. But a fancy shape or ornamentation on it would be registrable*

Salient features of the Designs Act, 2000 are as under:

a) Provisions for the registration of Design.
b) Provision of identification of non-registrable designs.
c) Provision for substitution of applicant before registration of a design.
d) Substitution of Indian classification by internationally followed system of classification.
e) Provision for inclusion of a register to be maintained on computer as a Register of Designs.
f) Provision for restoration of lapsed designs.
g) Provisions for appeal against orders of the Controller before the High Court instead of Central Government.
h) Revoking of period of secrecy of 2 years of a registered design.
i) Providing for compulsory registration of any document for transfer of right in the registered design.
j) Enhancement of quantum of penalty imposed for infringement of a registered design.
k) Enhancing initial period of registration from 5 to 10 years, to be followed by a further extension of five years.
l) Provision for allowance of priority to other convention countries and countries belonging to the group of countries or inter-governmental organizations apart from United Kingdom and other Commonwealth Countries.
m) Provision for avoidance of certain restrictive conditions for the control of anti-competitive practices in contractual licenses

COPYRIGHTS ACT, 1957

The invention of printing laid the benchmark for the idea of copyright protection. The right of the intellectual creators is dealt with in the Copyright law with regard to literary, artistic, music etc. The law deals with the creativity concerned with the mass communication.

In other words, Copyrights Act protects original works of authorship, such as literary works, music, dramatic works, pantomimes and choreographic works, sculptural, pictorial, and graphic works, sound recordings, artistic works, architectural works, and computer software. With copyright protection, the holder has the exclusive rights to modify, distribute, perform, create, display, and copy the work.

To get protection under copyright laws, the work must be fixed in a touchable medium of expression, such as words on a piece of paper or music notes written on a sheet. A copyright exists from the moment the work gets created, so registration is required to provide proper protection to one's work and also to prevent the chances of its misuse and unauthorized use.

Need of copyright protection

a) It safeguards the right of authors over their creations.
b) It protects and rewards their creativity.
c) Economic and social development of a society is encouraged through the protection of creativity.
d) It also creates an environment conducive to the creativity by providing protection to the efforts of writers, artists, musicians and many more

Copyright protection also includes novel rights which involve the right to claim authorship of a work, and the right to oppose changes to it that could harm the creator's reputation. The creator or the owner of the copyright in a work, can enforce his right administratively and in the courts by inspection of premises for evidence of production or possession of illegally made "pirated" goods related to protected works. The owner may obtain court orders to stop such activities, as well as seek damages for loss of financial rewards and recognition.

This Act also provides protection to the computer industry especially for computer programming. Computer programming was included in the definition of "literary work' vide an amendment in this Act in 1994.

The Copyrights (Amendment) Act, 1999 makes it free for purchaser of a gadget/ equipment/Computer to sell it onwards if the item being transacted is not the main item covered under the Copyrights Act. This means computer software which is built in the integral part of a gadget/equipment/Computer can be freely transacted without permission of copyright owner. This amendment ensures fair dealing of 'broadcasting' gaining popularity with the growth of the Internet

Copyright protection:

Copyright protections are available in the following classes of work:

a) Original literary,
b) Dramatic,
c) Musical work (consists of music and also graphic notation of such works but excludes any words or action intended to be sung, spoken or performed with music)

d) Artistic works (painting, sculpture, drawing, engraving, photograph, architecture or any other work of artistic craftsmanship (whether or not any such work poses artistic work)
e) Cinematograph films (work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording); and
f) Sound recordings (recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced)

Protection to Authors

Copyright protects the rights of authors i.e., creators of intellectual property in the form of literary, musical, dramatic and artistic works, software, cinematograph films and sound recordings.

The following rights of authors are protected:

a) Reproduce the work.
b) Issue copies of the work to the public.
c) Perform the work in public.
d) Communicate the work to the public.
e) Make cinematograph film or sound recording in respect of the work.
f) Make any translation of the work.
g) Make any adaptation of the work (conversion of dramatic work into non-dramatic work, literary work into dramatic work, re-arrangement of literary or dramatic work, depiction in comic form or through pictures of a literary or dramatic work, transcription of musical work or any act involving rearrangement or alteration of an existing work and the making of a cinematograph film of literary or dramatic or musical work).

In addition to all the rights applicable to a literary work, owner of the copyright in a computer programme enjoys the rights to sell or give on hire or offer for sale or hire, regardless of whether such a copy has been sold or given on hire on earlier occasion.

Owners of copyrights

a) In musical sound recordings: lyricist, composer, singer, musician and the person or company who produced the sound recording shall be owner.
b) In works by journalists/any other person during their employment: In the absence of any agreement to the contrary, the proprietor (Employer) shall be owner.

c) **In works produced for valuable consideration at the instance of another person:** In the absence of any agreement to the contrary, the person at whose instance the work is produced.

Assignment of Copyright

An assignment may be defined as the transfer of a particular right, leaving nothing with the assignor by virtue of assigning a particular right, and giving on the assignee the whole of the legal interest in the right issued.

The essential points connected with the assignment of copyright are as follow:

a) Mere transfer of the manuscript does not lead to the transfer of the copyright.
b) A person can acquire a right to reproduce a work that is the copyright by assignment of it to himself.
c) Assignment of copyright can be done in existing as well as future work.
d) In case of assignment of copyright in any future work, the assignment has the real effect only when the work comes into existence.
e) Assignee also includes the legal representative of the assignee.

Provisions relating to Assignment:

(a) An assignment of copyright should be in writing signed by the owner of the copyright.
(b) Mere acceptance of remuneration or delivery of manuscript does not constitute an assignment of copyright.
(c) The assignment of copyright should specify the assigned work, rights including duration, territorial extent of assignment and the amount of royalty.
(d) In the absence of duration and territorial extent, the assignment shall be valid for a period of five years and within the territory of India.
(e) If assignee does not exercise his rights within a period of one year, the assignment in respect of such rights lapsed after the expiry of said period.

Note: If the period of assignment is not stated it shall be deemed to be 5 years from the date of assignment. If the territorial extent of assignment of the rights is not specified it shall be presumed to extend within the whole of India.

Term of Copyright:

a) Literary, dramatic, musical or artistic works enjoy copyright protection for the **life time of the author plus 60 years beyond** i.e. 60 years after his death.
b) In the case of joint authorship, the term of copyright is to be construed according to the author who dies last.

c) In case of any organization, this right is to enjoy by every broadcasting organization is for a **period of 25 years.**
d) Performer's right to be enjoyed for a **period of 50 years.**

Exceptions to the use of Copyright:

Copyright law provides exemption in the following cases:

a) for the purpose of research or private study,
b) for criticism or review,
c) for reporting current events,
d) in connection with judicial proceeding,
e) performance by an amateur club or society if the performance is given to a non-paying audience, and
f) the making of sound recordings of literary, dramatic or musical works under certain conditions, for the purpose of education and religious ceremonies

Application for registration:

a) Application for registration is to be made in Form IV as prescribed in 15t Schedule to the Rules accompanied along with requisite fees as prescribed in the Second Schedule to the Rules;
b) Separate applications should be made for registration of each work;
c) The applications should be signed by the applicant or the advocate in whose favour a Vakalatnama or Power of Attorney has been executed.

Administration of the Copyright Law:

The Copyrights Act provides for a quasi-judicial body called the Copyright Board consisting of a Chairman and 2 or more, but not exceeding 14, other members for adjudicating certain kinds of copyright cases. The Chairman of the Board is of the level of a judge of a High Court.

The Copy Right Board has the following power:

a) hear appeals against the orders of the Registrar of Copyright;
b) hear applications for rectification of entries in the Register of Copyrights;
c) adjudicate upon disputes on assignment of copyright;
d) grant compulsory licence to publish or republish works (in certain circumstances)
e) grant compulsory licence to produce and publish a translation of a literary or dramatic work in any language after a period of 7 years from the first publication of the work;
f) determination of royalties payable to the owner of copyright;

g) hear and decide disputes as to whether a work has been published or about the date of publication or about the term of copyright of a work in another country;
h) fix rates of royalties in respect of sound recordings under the cover-version provision; and
i) fix the resale share right in original copies of a painting, a sculpture or a drawing and of original manuscripts of a literary or dramatic or musical work.

Note: Compulsory license means a license of copyrighted works issued by the Govt. to other person other than original creator. If, in case of an Indian work, it is impossible to trace the author or the author is dead, then anybody can apply to the Copyright Board for a licence to publish such work or a translation thereof in any language

Rights of the Registrar of Copyrights

The Registrar of Copyrights has the similar powers of a civil court when trying a suit under the Code of Civil Procedure in respect of the following matters, namely:
a) summoning and enforcing the attendance of any person and examining him on oath;
b) requiring the discovery and production of any document;
c) receiving evidence on affidavit;
d) issuing commissions for the examination of witnesses or documents;
e) requisitioning any public record or copy thereof from any court or office;
f) any other matters which may be prescribed.

Infringement of Copyright

Copyright in a work is considered as infringed only if a substantial part is made use of unauthorized. For example, if a lyricist copies a very catching phrase from another lyricist's song, there is likely to be Infringement even if that phrase is very short.

In short, a copyright is said to be infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a licence so granted.

Common acts of infringement of copyright:

a) Making infringing copies for sale or hire or selling or letting them for hire;
b) Permitting any place for the performance of works in public where such performance constitutes Infringement of copyright;
c) Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright;
d) Public exhibition of infringing copies by way of trade; and

e) Importation of infringing copies into India.

A copyright owner can take legal action against any person who infringes the copyright and is entitled to remedies by way of injunctions, damages and accounts.

Penalty for infringement:

The minimum punishment for infringement of copyright is imprisonment for 6 months along with the minimum fine of Rs. 50,000/- In the case of a second and subsequent conviction the minimum punishment is imprisonment for 1 year and fine of Rs. 1 lakh

All infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright

PATENT ACT, 1970

A Patent is a statutory right to an Inventor for invention of a new product or process. It is generally, granted for a limited period by the Government to the inventor excluding others, from making, producing or selling that new product. One could get a patent by filing a patent application with the Patent Office in India

The patent gives monopoly to the inventor to control the output and price of the commodity produced by it, within the limits is known as Patent. In other words, it is a reward to an inventor under the Patents Act, 1970 which encourages the inventors for scientific research, developing new technology and new invention for commercial utility.

"Invention" includes any new and useful -

a) art, process, method or manner of manufacture;
b) machine, apparatus or other article;
c) substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention

What can be patented?

An invention to become patentable subject-matter must meet the following criteria:

(a) It should be novel (New).
(b) It should have inventive step or it must be non-obvious.
(c) It should be capable of Industrial application.

In short, "Invention" includes the new product as well as new process. Therefore, a patent can be applied for the "Product" as well as "Process" which is new, involving inventive step and capable of industrial application can be patented in India

What are not inventions?

The following are not inventions:

a) A frivolous or contrary to the natural laws invention;
b) An invention contrary to the public order or morality;
c) Mere discovery of scientific principle, or a living or non-living organism;
d) The mere discovery of a new form of a known substance;
e) A substance obtained by mere admixture of the components or a process;
f) A method of agriculture or horticulture;
g) Any medicinal or surgical process;
h) A presentation of information;
i) Inventions relating to atomic energy.

In short, the invention will not be considered new if it has been disclosed to the public in India or anywhere else in the world by a written or oral description or by use or in any other way before the filing date of the patent application.

Who can file an Application for Patent?

The following persons are entitled to make application for patent:

a) Inventor: The person claiming to be true and first inventor of the invention;
b) Assignee: Assignee of the person claiming to be true and first inventor of the invention;
c) Legal Representative: The legal representative of the deceased person claiming to be true and first inventor of the invention.

TERM OF PATENT

The term of every patent granted after the commencement of the Patents (Amendment) Act, 2002 and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, shall be 20 years from the date of filing of application for the patent.

The term of patent in case of international applications shall be 20 years from international filing date. If the renewal fee is not paid the patent will cease to have

effect at the expiry of the period for which it was prescribed. Patent can also be renewed for another term of 20 years.

Use of Technology or Invention

While using any technology or invention, the start-up firm should check and confirm that it does not violate any patent right of the patentee. If the start-up desires to use any patented invention or technology, the start-up is required to obtain a license from the patentee.

Enforcement of Patent Rights

Please note that the patent infringement proceedings can only be initiated after grant of patent in India but may include a claim retrospectively from the date of publication of the application for grant of the patent. Infringement of a patent includes unauthorized making, importing, using, offering for sale or selling any patented invention within the India.

Under the (Indian) Patents Act, 1970 only a civil action can be initiated in a Court of Law. Like trademarks, the relief which a court may usually grant in a suit for infringement of patent includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings

CS PRAVEEN CHOUDHARY
PROF. ABHIJEET JAISWAL

Compliances under Labour Law

Factories Act; 1948

Applicability of the Act

Any premises wherein **10 or more persons with the aid of power or 20 or more workers** are/were without aid of power are working on any day in the **preceding 12 months**, wherein Manufacturing process is being carried on.

Employer to ensure health of workers pertaining to – (Section 11 to 20)

- ✓ Cleanliness
- ✓ Disposal of wastes and effluents.
- ✓ Ventilation and temperature dust and fume.
- ✓ Overcrowding
- ✓ Artificial humidification
- ✓ Lighting.
- ✓ Drinking water.
- ✓ Spittoons.

Safety Measures

- ✓ Facing of machinery
- ✓ Work near machinery in motion.
- ✓ Employment prohibition of young person on dangerous machines.
- ✓ Striking gear and devices for cutting off power.
- ✓ Self-acting machines.
- ✓ Casing of new machinery.
- ✓ Prohibition of employment of women and children near cotton-openers.
- ✓ Hoists and lifts.

Working Hours, Spread Over & Overtime of Adults

- ➢ Weekly hours not **more than 48.**
- ➢ Daily hours, **not more than 9 hours**.
- ➢ Intervals for rest **at least ½ hour on working for 5 hours**.
- ➢ Spread over **not more than 10½ hours**.
- ➢ Overlapping **shifts prohibited**.
- ➢ Extra wages for **overtime double than normal rate of wages**.
- ➢ Restrictions on employment of **women before 6 AM** and **beyond 7 PM**.

Welfare Measures

- Washing facilities.
- Facilities for sitting.
- Facilities for storing and drying clothing.
- First-aid appliances – one first aid box **not less than one for every 150 workers**.
- Canteens when there **are 250 or more workers**.
- Shelters, rest rooms and lunch rooms when there are **150 or more workers.**
- Crèche's when there are **30 or more women workers.**
- Welfare office when there **are 500 or more workers**.

Employment of Young Persons

- Prohibition of employment of **young children** e.g. below 14 years.
- Non-adult workers to **carry tokens** e.g. certificate of fitness.
- Working hours for children **maximum 4 ½ hrs.** And not permitted to work during **night shift.**

Annual Leave with Wages

✓ A worker having worked for **240 days @1 day for every 20 days** and for a child **1 day for working of 15 days**.
✓ Accumulation of leave for **30 days**.

Offence	Penalties
For contravention of the Provisions of the Act or Rules	Imprisonment upto 2 years **or** fine upto Rs.1,00,000 **or** both
On Continuation of contravention	Rs. 1000 per day
On contravention of Chapter IV pertaining to safety or dangerous operations	Not less than Rs. 25,000(death) Not less than Rs.5000 (serious injuries)
Subsequent contravention of some provisions.	Imprisonment upto 5 years **or** fine **not less than** Rs. **10, 000** which may extend to **2 lakhs** .
Obstructing inspector	Imprisonment upto **6 months** Fine upto **10,000** or Both
Wrong full disclosing result pertaining to results of analysis.	Imprisonment upto **6 months** Fine upto 10,000 **or** Both
For contravention of the provisions of Sec.41B, 41C and 41H pertaining to compulsory disclosure of information by occupier, specific responsibility of occupier or right of workers to work imminent danger.	Imprisonment upto 7 years with fine **up-to Rs. 2,00,000** And on continuation fine @ **Rs. 5, 000 per day.** Imprisonment of **10 years** when contravention continues for **one year**

For forms and rules ref. Module pg. no. 406-409

Minimum Wages Act; 1948

Object of the Act
To provide for fixing minimum rates of wages in certain employments

Fixation of Minimum Rates of Wages (Section 3)
- ✓ The appropriate government to fix minimum rates of wages.
- ✓ To make review at such intervals not exceeding **5 years** the minimum rates or so fixed and revised the minimum rates.

Overtime (Section 5)
- ✓ To be fixed by the hour, by the day or by such a longer wage-period works on any day in excess of the number of hours constituting normal working day.
- ✓ Payment for **every hour or for part of an hour** so worked in excess at the overtime rate double of the ordinary rate of (1½ times or for agriculture labour)

Composition of Committee (Section 9)
Representation of employer and employee in schedule employer in equal number and independent persons not exceeding **1/3rd** of its total number. one such person to be appointed by the Chairman.

Payment of Minimum Rates of Wages (Section 12)
Employer to pay to every employee engaged in schedule employment at a rate not less than minimum rate of wages as fixed by Notification by not making deduction other than prescribed.

Fixing Hours for Normal Working (Section 13)
The intent of the act will fail if the employer by paying minimum wages exploit the employee more than the normal therefore it was essential to fix normal working hours for the employees:
- ✓ Weekly working hours not more than 48 hours
- ✓ Daily hours should not exceed 9 hours with 1 hour of rest.

Note:
- ✓ If an employee works for less than normal working days, they will be entitled to receive wages as if he had worked for full normal working day.

Maintenance of registers and records (Section 18)
- ✓ Register of Fines – **Form I Rule 21(4)**
- ✓ Annual Returns – **Form III Rule 21 (4-A)**
- ✓ Register for Overtime **– Form IV Rule 25**
- ✓ Register of Wages–**Form X, Wages slip–Form XI, Muster Roll–Form V Rule 26**
- ✓ Representation of register – for three **year Rule 26-A**.

Offences	Penalties
For paying less than minimum rates of wages	Imprisonment **upto 6 months** or with **fine upto 500/-**

For contravention of any provisions pertaining to fixing hours for normal working day etc.	Imprisonment **upto 6 months** or with **fine upto 500/-**

Payment of Wages Act; 1936

Object of the Act

- To regulate payment of wages to specific employee.
- To avoid unnecessary delay in the payment of wages.

Applicability of Act

To regulate the payment of wages of certain classes of employed persons.

- ✓ Employed in any factory
- ✓ By a railway administration either directly or through sub contractor.
- ✓ Industrial establishment or other establishment.
- ✓ Gov. May apply it to any establishment by giving 3 month notice for the intention of applying the act.

Time of payment of wages (Section 5)

- ❖ **Employer shall** fix wages (weekly, fortnightly , monthly)
- ❖ **The wages** period shall **not exceed 1 month**

Time of payment of wages: the employer shall pay the wages within specific days.

- ➢ When **less than 1000** persons are employed, shall be paid within **7 day of the end of the period.**
- ➢ When **more than 1000** workers are employed, within 10 **days of the end of the period.**

Modes of payment of wages:

- ➢ All wages shall be paid in **current coin or currency notes OR**
- ➢ By **cheque or by crediting the wages in the bank account of the employee**.

Deduction made from wages (Sec. 7)

- ✓ Fines not to impose unless the employer is given an opportunity to show cause
- ✓ To record in the register.
- ✓ The employer shall not make any deductions authorised by the act.
- ✓ For default or negligence of an employee resulting into loss. Show cause notice has to be given to the employee

Offences	Penalty
On contravention of S.5 (except sub-sec.4), S.7, S.8 (except Ss.8), S.9, S.10 (except Ss.2) and Secs.11 to 13.	Fine **not less than Rs.1000, which may extend to Rs.5000**. On subsequent conviction fine **not less than Rs.5000,** may **extend to Rs.10, 000**. On contravention S.4, S.5 (4), S6, S.8 (8), S.10 (2) or S.25 **fine not less than Rs.1000. – may extend to Rs.5000. On subsequent**

	On conviction fine not less
For failing to maintain registers or records; or Wilfully refusing or neglecting to furnish information or return; **or** Wilfully furnishing **or** causing to be furnished any information **or** return which he knows to be false or Refusing or wilfully giving a false answer to any question necessary for obtaining any information required to be furnished under this Act	Fine which shall **not be less than Rs.1000** but may **extend to Rs.5000** – On record conviction fine **not less than Rs.5000** may **extend to Rs.10, 000.** For second or subsequent conviction, **fine not less than Rs.5000 but may extend to Rs.10,000**
Wilfully obstructing an Inspector from his duties under this Act; or Refusing to afford an Inspector any reasonable facility for making any entry, inspection etc. Wilfully refusing to produce on the demand of an inspector any register or other document kept in pursuance of this Act; or preventing any person for appearance etc.	Fine **not less than Rs.1000** extendable **Up to Rs.5000** – On subsequent conviction **fine not less than Rs.5000** – may extent to **Rs.10,000**
On conviction for any offence and again guilty of Contravention of same provision. Failing or neglecting to pay wages to any employee	Imprisonment **not less than 1 month** extendable **up to 6 months** and fine not **less than Rs.2000** extendable up to **`15000.** **Additional fine up to `100 for each day.**

For forms and rules of payment and wages act ref. module pg. no. 415 and 416

Employees' State Insurance Act; 1948

Objectives:
Providing financial relief in case:
- ✓ Sickness
- ✓ Maternity
- ✓ Disablement and
- ✓ Medical benefits to employees of factories.

Applicability of the Act
1. **Non seasonal factories**:
   Using power and employing 10 or more persons and to non-power using manufacturing units and establishments employing 20 or more person earning up to **Rs.21000/- per month**.
2. **Shop and commercial establishment**:
   It has also been extended upon shops, hotels, restaurants, roads motor transport undertakings, equipment maintenance staff in the hospitals.

Non applicability:
- ✓ Factories or establishment under the control of CG/SG.
- ✓ PSUs

Registration of Employer
- ✓ Download employer registration form (**Form 1)**
- ✓ Fill the form and submit it on the website /appropriate regional officer along with all the requisite documents, **within 15 days** of act becoming applicable.
- ✓ After verification of form, the government will issue **17 digits unique no.**

Registration of employee:
The employee who will provide the employer with the filled form of his members as a part of process of the registration and will get an ESI card after registration.

Advantages for employers
- ✓ Employers are **granted exemption** pertaining to the applicability of Maternity Benefit Act, Workmen Compensation Act etc. in respect of employees covered under the ESIC Scheme.
- ✓ Employers possessing a productive and well-secured workforce,
- ✓ In case of employee's injury or sickness, the responsibility of paying cash benefits (wages) shifts from the employer to the ESIC.
- ✓ Any amount or sum paid by way of contribution under the ESIC Act is **deducted in computing 'Income'** under the Income Tax Act.

Coverage of factory/establishment
- ✓ The Act is applicable to **all non-seasonal factories** utilizing power and employing **10 or more** individuals,
- ✓ as well as is applicable to non-power using manufacturing organizations and establishments employing **20 or more persons** for wages and falling under the ambit of an implemented geographical area.

- ✓ As of now, employees of establishments, companies or factories that fall within the ambit of coverage and earning wages **not exceeding Rs. 10,000/- per month** are covered under this ESIC Scheme.

Contributions
The amount payable to the Corporation by the Principal Employer in respect of an employee is termed as Contribution. It comprises the amount payable by the employee and the employer.

Contribution rate:
- Employees- 1.75% of wages
- Employers -4.75% of wages

Contribution period
1st April to 30th September.
1st October to 31st March
E.g. If the person joined insurance employment for the first time, say on 5th January, his first contribution period will be from 5th January to 31st March and his corresponding first benefit will be from 5th October to 31st December.

Benefits under ESIC to the employees:

Medical Benefit
All the insured individuals and their dependents including their family members under ESIC scheme are entitled to free, full and comprehensive medical care under the ECIS Scheme. The Medical benefit package covers all aspects of healthcare ranging from primary to super-specialty facilities.

Sickness Benefit
The maximum duration of Sickness Benefit is 91 days in two consecutive benefit periods. However, there is a waiting period of 2 days which is waived if the insured person is certified sick within 15 days of the spell for which sickness benefit was last paid. The sickness benefit rate is approximately equivalent to 50% of the average daily wages of the insured person.

Extended Sickness Benefit
After exhausting the Sickness Benefit **payable up to 91 days, an** insured person if suffering from Cancer, T.B., Leprosy, Mental or malignant diseases or any other specified long-term ailment, then such an employee is entitled to Extended Sickness Benefit **at a higher cash benefit rate of about 70%** of average daily wage for a period of 2 years.

Enhanced Sickness Benefit
For undergoing sterilization operations for the purpose of family planning, insured persons are eligible to Enhanced Sickness Benefit which is double the rate of sickness benefit.

Maternity Benefit:
Maternity benefit comprises of periodical cash payments to an insured woman as certified by a duly appointed medical officer or mid wife in cases such as confinement or

miscarriage or sickness arising on account of pregnancy, confinement, premature birth of child or miscarriage.

Disablement Benefit:
Disablement benefit is admissible for disablement that is caused by employment injury.

- ✓ Temporary Disablement Benefit (TDB) is payable as long as the temporary disability lasts.
- ✓ Permanent Disablement Benefit (PDB) is payable till the death of the insured individual.

No contributory conditions have been prescribed for this benefit.

Dependent Benefit
if an individual dies of employment injury even on the first day of his employment, cash benefits / wages the amount of such benefits upto the day of his date to be payable to his dependants or family members are entitled to the aforesaid benefit.

Funeral Expenses
Expenses are made to meet the expenditure incurred on the funeral of deceased insured individual. This amount is paid either to the eldest surviving member of the family or in his/her absence to that individual who actually incurs the funeral expenses.

Penalties
Various penalties are prescribed for various offences along with action under with IPC

For forms and rules of Employees State Insurance Act, 1948 ref.pg.no.421- 425

Employee provident Funds and Miscellaneous Provisions Act; 1952

Objectives:

- ✓ To provide security
- ✓ Monitory assistance to the employee and their family in case of death

Applicability

- ✓ Applies to entire India (except Jammu & Kashmir)
- ✓ Applies to every establishment which is a factory engaged in any industry specified in **Schedule 1** & **in which 20 or more persons** are employed
- ✓ Any other establishment **employing 20 or more persons** whom Central Government may, by notification
- ✓ Any establishment employing **even less than 20 persons** can be covered **voluntarily.**

Payment of Contribution

Employer: 12% of wages (upto 15000)
Employee: 12% of wages (can contribute above 12% voluntarily)
Wages include basic wages, dearness allowance and retaining allowance, if any

Note: In the following organisation contri. Of 10% is required in place of 12%

- ✓ Estb. Having **less than 20** employees
- ✓ Sick industrial Co. Declared by board of industrial and financial reconstruction

Timing of contribution:

- ✓ In respect of employees employed through Contractor, Contractor shall recover the contribution payable by such employee and pay to Principal Employer amount of contribution along with administrative charges or Contractor may deposit such contribution directly to EPFO – after taking a separate EPFCode No.
- ✓ Employer needs to deposit its statutory contribution by 15th of every month. (With respect to wages of immediate preceding month).

Transfer of employees

If the employee leaves the existing establishment and obtains re-employment to the establishment in which this act is applicable, it is the duty of the employer to transfer the accumulations to the credit of such employee's account in the fund in which he is re-employed.

Benefits

- ✓ Employees covered enjoy a benefit of Social Security in the form of a non-attachable and non-withdrawable (except in severely restricted circumstances like buying house, marriage/education, etc)
- ✓ This sum is payable normally on retirement or death. Other Benefits include Employees' Pension Scheme and Employees' Deposit Linked Insurance Scheme EDLI

Penalty

In case the employer has made default in transferring of the accumulated amount, he is required to pay damages as follows:

- ✓ If period of default is **less than 2 months- 5 % of arrears per annum**
- ✓ If period of default **are 2 -4 months- 10 % of arrears per annum**
- ✓ If period of default are **4 -6 months- 15 % of arrears per annum**
- ✓ If period of default is **more than 6 months**- ***25 % of arrears per annum***.

For forms and rules of employees provident fund ref.pg.no. 428-430 of module

Payment of Bonus Act; 1965

Objective:

Payment of bonus person employed in:

- ✓ Estb. On the basis of profit or
- ✓ Estb. On basis of production or
- ✓ Productivity and for matters connected there with.

Applicability:

- ✓ Every factory (as defined under Factories Act, 1948)
- ✓ Establishment in **which 20 or more persons** are employed on any day during an accounting year. (CG may specify lesser no. of employees)

Eligibility of Bonus

Employees/workers who have worked for **more than 30 days** in a month and drawing salary/remuneration **of Rs. 21,000/- per month**.

Responsibility and Amount of Bonus

Employer to pay **minimum bonus** rate:

1. Employee aged upto 15 years ,
   - 8.33% of salary
   - Or Rs. 60, whichever is higher
2. Employee age above 15 years ,
   - 8.33% of salary
   - Or RS. 100 w.e.h.
3. **Maximum bonus 20% of salary**

Note: if the salary of employee exceeds Rs. 7,000 per month the salary or wages for the purpose of computation of bonus to be treated as 10,000

Miscellaneous:

Time of Payment: within 8 months of closure of financial year

For forms and rules of payment of bonus act ref.pg.no. 431 and 432 of module

Payment of Gratuity Act; 1972

Objective:

- ✓ Voluntary payment by employer to employee in consideration of employees contribution to organisation .
- ✓ To help employee after retirement or
- ✓ Physical disablement .

Applicability

It is applicable to

- ✓ Factories (as registered under Factories Act, 1948)
- ✓ Company (As registered under Companies Act, 1956/2013),
- ✓ Shop & Establishment (As registered under State Shops & Establishment Act),
- ✓ Education institution, employing 10 or more employees(notified by the CG)
- ✓ Registration of establishment

Wages for Calculation

Payment of Gratuity (15 days salary for every completed year of service) to be payable to an employee **after rendering services of 5 years on his** -

- ✓ Superannuation
- ✓ Retirement or resignation
- ✓ Death or disablement due to accident or disease.

Formula for calculation:

{Last drawn salary **x** no. of completed year **x** 15/26}

Compliance and Procedure

- ✓ Intimation in prescribed Form for any change in the name, address of employer or nature of business - within 30 days of such change.

Employee to submit his nomination in Form F - within 30 days of appointment.

Recovery of Gratuity

To apply **within 30 days** in **Form I**. by an employee
To apply within 30 days in **Form J** by a nominee
To apply **within 1 year** in **Form K** by the legal heir .

Forfeiture of Gratuity

- ✓ On termination of an employee for moral turpitude or riotous or disorderly behaviour.
- ✓ Wholly or partially for wilfully causing loss, destruction of property etc.

Protection of Gratuity

It can't be attached in execution of any decree.

Penalties

Imprisonment for 6 months or fine up to Rs.10, 000 for avoiding to make payment by making false statement or representation.

Imprisonment not less than 3 months and up to 1 year with fine on default in complying with the provisions of Act or Rules 11

Max. Amt. Of gratuity payable: Rs. 20lakhs

For forms and rules of Payment of Gratuity Act; 1972 ref.pg.no. 433 -435 of module

Employees Compensation Act; 1923

Objective:

- ✓ Providing financial protection to workman and their dependants in case of accidental injury
- ✓ Providing social security to worker.

Applicability (Section 1)
It is applicable **all over India.**

Coverage of Workmen
All workers irrespective of their status or salaries either directly or through contractor or a person recruited to work abroad.

Employer's liability to pay compensation to a workman

On death or **personal injury** resulting into **total or partial disablement** or **occupational disease** caused to a workman arising out of and during the course of employment.

Amount of compensation
Where **death** of a workman results from the injury

- Rs. 80,000
- 50% of monthly wages ***X*** relevant factors W.E.H

On permanent total disablement out of injury

- Rs. 90,000
- 60% monthly wages ***X*** relevant factor W.E.H

Procedure for calculation
Higher the age – Lower the compensation

- Relevant factor specified in second column of Schedule IV giving slabs depending upon the age of the concerned workman.
- In respect of any injury which does result in the total or partial disablement of the workman for a period **exceeding 3 days.**
- In respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to-
- The workman having been at the time thereof under the influence of drink or drugs, or
- Wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or
- Wilful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workman.

Offences	Penalties
In case of default by employer	50% of the compensation amount +interest to be paid to the work man or his dependants as the case may be
Deposit of composition	**Within 1 month** with the compensation commissioner.

Contract Labour (Regulation and Abolition) Act; 1970

Applicability

- Every establishment in which 20 or more workmen are employed or were employed on any day of the preceding 12 months as contract labour.
- Every contractor who employs or who employed on any day of the preceding 12 months, 20 or more workmen.

Object of the Act

To regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

Registration of Establishment

Principal employer employing ≥ 20 through the contractor or the contractor(s) on deposit of required fee in Form 1.

Revocation of Registration

When obtained by -

- ✓ Misrepresentation or suppression
- ✓ Of material facts etc. after opportunity to the principal Employer.

Licensing of Contractor

- ✓ Engaging 20 or more than 20 workers and on deposit of required fee in Form IV.
- ✓ Valid for specified period.

Revocation or Suspension & Amendment of Licences

- ✓ When obtained by misrepresentation or suppression of material facts.
- ✓ Failure of the contractor to comply with the conditions or contravention of Act or the Rules.

Welfare measures to be taken by the Contractor

- ✓ Contract labour either one hundred or more employed by a contractor for one or more canteens shall be provided and maintained.
- ✓ First Aid facilities.
- ✓ Number of rest-rooms as required under the Act.
- ✓ Drinking water, latrines and washing facilities

Penalties

Offenses	**Penalties**
Obstructions; For obstructing the inspector or failing to produce the register etc.	**3 months imprisonment or fine up to 500 or both**
Violation of provisions of the act or rules	**Imprisonment of 3 months or fine up to 1000. On continuing default additional fine up to 100 per day**

Industrial Disputes Act; 1947

Objective of the Act
The objective of the Industrial Disputes Act 1947 is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations.

This act deals with the retrenchment process of the employees, procedure for layoff, procedure and rules for strikes and lockouts of the company.

Meaning of Industrial Dispute
Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

Dispute Settlement Authorities under the Act
The I.D. Act provides elaborate and effective machinery for the investigation and amicable settlement of industrial disputes by setting up the various authorities. These are:
- ✓ Works Committee;
- ✓ Conciliation Officer;
- ✓ Conciliation Board;
- ✓ Court of Enquiry;
- ✓ Labour Court;
- ✓ Industrial Tribunal;
- ✓ National Tribunal;
- ✓ Arbitrators;
- ✓ Grievances Settlement Authority.

Dismissal, etc., of an individual workman to be deemed to be an industrial dispute. (Sec 2A)

Works Committee (Sec. 3)
In the case of an industrial establishment in which 100 or more workmen are employed, the appropriate Government may require the employer to constitute a 'Work Committee'. It consists of equal number of representatives of employers and workmen engaged in the establishment. The representatives of the workmen shall be chosen from amongst the workmen engaged in the establishment and in consultation with the registered trade union, if any. Works committee deals with the workers problem arising day to day in the industrial establishment.

Conciliation Officer (Sec. 4)
- ✓ He acts as the mediators in between the parties to resolve the dispute.
- ✓ Hold conciliation proceedings relating to Strikes and lockouts procedural matters of public utility services.

- ✓ Investigate the matters of the disputes.
- ✓ Conciliation officers shall induce the parties to come to a fair and amicable settlement of the dispute.
- ✓ Duty to send the report of settlement of dispute and memorandum of the settlement signed by the parties to the dispute to the government or his superior.
- ✓ Duty to send the report to the government or his superior within 14 days from the commencement of the proceeding or within such shorter period as may be fixed by the appropriate Government.

Conciliation Board (Sec. 5)

It consists of a chairman who shall be an independent person, and 2 or 4 other members.

Duties of Board (Sec 13)

- ✓ To endeavour to bring about a settlement of dispute.
- ✓ To investigate the matters relating to the dispute between parties and inducing the parties to come to a fair and amicable settlement of the dispute.
- ✓ Duty to send to the government the report of facts and circumstances relating to the disputes and board opinion, a settlement could not be arrived at

Court of Enquiry (Sec. 6)

This Court of Inquiry was to find out matters connected with or relevant to an industrial dispute. A Court of Inquiry looks into only matters which are referred to it by Government and submits its report to the Government.

Adjudication

1. **Labour Court -** The appropriate Government is empowered to constitute one or more Labour Courts. Its function is the adjudication of industrial disputes relating to any matter specified in the Second Schedule.
2. **Industrial Tribunal** -The appropriate Government may, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter, whether specified in the 2nd Schedule or the 3rd schedule.
3. **National Tribunal** - The CG may, constitute one or more National Industrial Tribunals. Its main function is the adjudication of industrial disputes which involve questions of national importance or affecting the interest of 2 or more States.

Arbitration

An arbitrator is appointed by the Government. The arbitrators conduct the investigation in to the dispute matters and give arbitration award.

Grievance Settlement Authority

The employer in relation to every industrial establishment in which 50 or more workmen are employed or have been employed on any day in the preceding 12 months, shall provide for, a Grievances Settlement Authority.

- ✓ Every industrial establishment employing 20 or more workmen shall have one or more Grievance Redressal Committee for the resolution of disputes arising out of individual grievances having equal number of representatives.

- ✓ The chairperson shall be selected from the employer and from among the workmen alternatively on rotation basis every year.
- ✓ The total number of members of the Grievance Redressal Committee shall not exceed 6 members:
- ✓ The Grievance Redressal Committee may complete its proceedings within 45 days on receipt of a written application by or on behalf of the aggrieved party.
- ✓ Aggrieved workmen may prefer an appeal to the employer against the decision of GRC and the employer shall, within 1 month from the date appeal, dispose off the same and send a copy of his decision to the concerned workman.

Awards (Decree)

- ✓ The award shall be in writing and signed by its presiding officer.
- ✓ Every Award shall, within 30 days, be published in prescribed manner.
- ✓ Award published shall be final.
- ✓ An award shall become enforceable after 30days of its publication.
- ✓ The appropriate Government or the CG may, within 90 days from the date of publication of the award, make an order rejecting or modifying the award, to legislature of sate or parliament.
- ✓ Any award as rejected or modified laid before legislature of state or parliament, shall become enforceable after **15 days** from the date on which is so laid.

Period of Operation of Settlements and Awards

- ✓ A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.
- ✓ An award shall remain in operation for a period of one year from the date on which the award becomes enforceable under section 17A.
- ✓ Provided that the appropriate Government may reduce the said period and fix such period as it thinks fit.
- ✓ The appropriate Government may, before the expiry of the said period, extend the period of operation
- ✓ by any period not exceeding one year at a time as it thinks fit, so however, that the total period of operation of any award does not exceed three years from the date on which it came into operation.

Strikes and Lockout

Strikes

"A cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal under a common understanding of any number of persons who are or have been so employed, to continue to work or to accept employment".

Lockouts

The temporary closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him". Lockout is the antithesis of strike.

- ✓ It is a weapon of the employer while strike is that of the workers.
- ✓ Just as a strike is a weapon in the hands of the workers for enforcing their industrial demands, lockout is a weapon available to the employer to force the employees to see his points of view and to accept his demands.

- ✓ The Industrial Dispute Act does not intend to take away these rights.
- ✓ However, the rights of strikes and lockouts have been restricted to achieve the purpose of the Act, namely peaceful investigation and settlement of the industrial disputes.

Procedure of Strikes

No person employed in a public utility service shall go on strike in breach of contract-

- ✓ Without giving to the employer notice of strike, as hereinafter provided, within 6 weeks before striking; **OR**
- ✓ Within fourteen days of giving such notice; **OR**
- ✓ Before the expiry of the date of strike specified in any such notice as aforesaid; **OR**
- ✓ During the pendency of any conciliation proceedings before a conciliation officer and 7 days after the conclusion of such proceedings.

Procedure of Lockout

No person employed in a public utility service shall go on Lockout in breach of Contract.

- ✓ Without giving to the employer notice of Lockout, as hereinafter provided, within 6 weeks before lockout; **OR**
- ✓ Within fourteen days of giving such notice; **OR**
- ✓ Before the expiry of the date of lockout specified in any such notice as aforesaid; **OR**
- ✓ During the pendency of any conciliation proceedings before a conciliation officer and 7 days after the conclusion of such proceedings.

Lay-Offs

Certain establishments do not have any provisions relating to layoff of the employees by the employer. In such circumstances, layoff would be considered without any authority of law.

Such establishments are*:*

i. Industrial establishments in which less than 50 workmen are employed, on an average per working day.
ii. Industrial establishments which are of a seasonal character and in which work is performed only intermittently.

Therefore the parties can enter into an agreement not to continue lay-off after a period of 45 days in a year.

Workmen not entitled to compensation in certain cases

i. If he refuses to accept;
ii. If he does not present himself for work
iii. If such laying-off is due to a strike or slowing-down of production on the part of workmen in another part of the establishment.

Retrenchment

The termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include –

- ✓ Voluntary retirement of the workmen OR
- ✓ Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf OR

- ✓ Termination of the service of the workman as a result of the non renewal of the contract of employment between the employer and the workmen concerned on its expiry or of such contract being terminated under a stipulati0on on that behalf contained therein; OR
- ✓ Termination of the services of workman on the ground of continued ill health.

The principle of 'Last come; First go is followed

Retrenchment Condition

- ✓ Employee should have continuous service for **atleast 1 year** under an employer.
- ✓ 3 months notice in writing indicating the reasons for retrenchment or payment for the period of the notice.
- ✓ Compensation which shall be equivalent to 15 days' average pay [for every completed year of continuous service] or any part thereof in excess of 6 months.
- ✓ Notice in the prescribed manner is served on the appropriate government.

Penalty for Lay-Off and Retrenchment without Previous Permission

Applies to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than 100 workmen were employed on an, average per working day for the preceding 12 months.

Prohibition of Unfair Labour Practice either by employer or workman or a trade union as stipulated in 5th schedule

Offences	Penalties
Committing unfair labour practices	Imprisonment upto 6 months or with fine upto 3000
Illegal strikes and lockouts	Imprisonment upto 1 month or with fine upto RS.50(1000 for lockouts)or both
Instigation etc. For illegal strikes and lockouts	Imprisonment upto 6 months or with fine upto 1000
Giving financial aid to illegal strikes and lockouts	Imprisonment upto 6 months or with fine upto 1000
Breach of settlement of award	Imprisonment upto6 months or fine on continuity of offence fine upto Rs. 200 per day
Disclosing confidential information pertaining to Sec 21	Imprisonment upto 6 months or with fine upto 1000
Closure without 60 days notice u/s 25 FFA	Imprisonment upto 6 months & fine upto Rs. 5000
Contravention of sec. 33 pertaining to change of conditions of service during pending of dispute etc.	Imprisonment upto 6 months or with fine upto 1000
Where no penalty is provided for contravention	Fine upto Rs. 100 or as the court decides

For forms and rules of Industrial Dispute Act, 1947 ref. pg. no. 455 - 458 of module

Trade Unions Act; 1926

Object of the Act

- ✓ To provide for the registration of Trade Union and in certain respects
- ✓ To define the law relating to registered Trade Unions

Registration of Trade Union

- ✓ **Any 7 or more members of** a trade union may, by subscribing their names .
- ✓ There should be **at least 10%, or 100** of the work-men, whichever is less, engaged or employed in the establishment or industry with which it is connected

Cancellation of Registration

- ✓ If the certificate has been obtained by fraud or mistake or it has ceased to exist or has wilfully contravened any provision of this Act.
- ✓ If it ceases to have the requisite number of members.

Returns

Annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union **during the year ending on the 31st December**.

Maternity Benefit (Amendment) Act, 2017

Object of the Act

To protect the **dignity of motherhood** and the dignity of a new person's birth by providing for the full and healthy maintenance of the woman and her child at this important time when she is not working.

Cash Benefits

- ✓ Leave with average pay **for 8 weeks before** the delivery.
- ✓ Leave with average pay for **6 weeks after** the delivery.
- ✓ A medical bonus of **Rs.25** if the employer does not provide free medical care to the woman.
- ✓ An additional leave with pay up to **1 month** if the woman shows proof of illness due to the pregnancy, delivery, miscarriage, or premature birth.
- ✓ In case of miscarriage, **6 weeks** leave with average pay from the date of miscarriage.

Non cash Benefits/Privilege

- ✓ Light work for 10 weeks before the date of her expected delivery, if she asks for it.
- ✓ 2 nursing breaks in the course of her daily work until the child is 15 month old.
- ✓ No discharge or dismissal while she is on maternity leave.
- ✓ No change to her disadvantage in any of the conditions of her employment while on maternity leave.
- ✓ Pregnant women discharged or dismissed may still claim maternity benefit from the employer.

Exception: Women dismissed for gross misconduct lose their right under the Act for Maternity Benefit

Applicability:
The Act is applicable to all establishments which are

- ✓ Factories,
- ✓ Mines,
- ✓ Plantations,
- ✓ Government establishments,
- ✓ Shops and establishments under the relevant applicable legislations, or any other establishment as may be notified by the CG.

Eligibility: As per the Act, to be eligible for maternity benefit, a woman must have been working as an employee in an establishment for a period of **at least 80 days** in the past 12 months. Payment during the leave period is based on the average daily wage for the period of actual absence.

Period of benefits (for first children and also for subsequent 3rd child**)**
Paid Maternity leave increased to **26 weeks.**
Leave prior to expected delivery date - **8 weeks**

Adoption/Surrogacy:
A woman who adopts a child below the age of 3 months, or a commissioning mother (means a biological mother, who uses her egg to create an embryo implanted in any other woman), will be entitled to Maternity Benefit for a period of 12 weeks from the date the child is handed over to the adopting mother or the commissioning mother.

Crèche Facility:
Every establishment having 50 or more employees are required to have a mandatory crèche facility (within the prescribed distance from the establishment), either separately or along with other common facilities. The woman is also to be allowed 4 visits a day to the crèche, which will include the interval for rest allowed to her.

Work from home:
If the nature of work assigned to a woman is such that she can work from home, an employer may allow her to work from home post the period of Maternity Benefit. The conditions for working from home may be mutually agreed between the employer and the woman.

Prior Intimation:
Every establishment will be required to provide woman at the time of her initial appointment, information about every benefit available under the Act.

Leave for Miscarriage & Tubectomy Operation
Leave with wages at the rate of maternity benefit, for a period **of 6 weeks** immediately following the day of her miscarriage or her medical termination of pregnancy.

Child and Adolescent Labour (Prohibition and Regulation) Act; 1986

Objective:

An Act to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments.

Prohibition of Employment of Children in Certain occupations and Processes

- ✓ No child shall be employed or permitted to work in any of the occupations set forth in part A of schedule OR In any workshop wherein any of the processes set forth in Part B of the Schedule is carried on.

Note: Nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government

Regulation of Conditions of Work of Children

Application of Part

- ✓ to an establishment or
- ✓ a class of establishments in which none of the occupations or process referred to in section 3 is carried on.

Hours and Period of Work

(1) No child shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed.
(2) The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.
(3) The period of work of a child shall be so arranged that inclusive of his interval for rest, it shall not be spread over more than 6 hours, including the time spent in waiting for work on any day.
(4) No child shall be permitted or required to work between 7 p.m. and 8 a.m.
(5) No child shall be required or permitted to work overtime.
(6) No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Weekly holidays

Every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in 3 months.

Notice to Inspector

A written notice containing the following particulars should be provided within 30 days to inspector -

a) The name and situation of the establishment.

b) The name of the person in actual management of the establishment.
c) The address to which communications relating to the establishment should be sent. and
d) The nature of the occupation or process carried on in the establishment.

Disputes as to age

If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority.

Maintenance of register

There shall be maintained by every occupier in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment, showing:

a) The name and date of birth of every child so employed or permitted to work;
b) Hours and periods of work of any such child and the intervals of rest to which he is entitled;
c) The nature of work of any such child; and
d) Such other particulars as may be prescribed.

Display of notice containing abstract

Every railway administration, every port authority and every occupier shall cause to be displayed in a conspicuous and accessible place at every station on its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract

Health and Safety

1) The appropriate Government may, by notification in the Official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.
2) Without prejudice to the generality of the foregoing provisions, the said rules may provide for all or any of the following matters, namely:
   - ✓ Cleanliness in the place of work and its freedom from nuisance
   - ✓ Disposal of wastes and effluents;
   - ✓ Ventilation and temperature;
   - ✓ Dust and fume;
   - ✓ Artificial humidification;
   - ✓ Lighting;
   - ✓ Drinking water;
   - ✓ Latrine and urinals;
   - ✓ Spittoons;
   - ✓ Fencing of machinery;
   - ✓ Work at or near machinery in motion;
   - ✓ Employment of children on dangerous machines;
   - ✓ Instructions, training and supervision in relation to employment of children on dangerous machines;

- ✓ Device for cutting off power;
- ✓ Self-acting machines;
- ✓ Easing of new machinery;
- ✓ Floor, stairs and means of access;
- ✓ Pits, sumps, openings in floors, etc.
- ✓ Excessive weights;
- ✓ Protection of eyes;
- ✓ Explosive or inflammable dust, gas, etc.
- ✓ Precautions in case of fire;
- ✓ Maintenance of buildings; and
- ✓ Safety of buildings and machinery.

Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act; 2013

Objectives of the Act
To provide protection against sexual harassment of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.

Sexual Harassment
The Act has adopted the definition of 'sexual harassment' from Vishaka Judgment and the term sexual harassment includes any unwelcome acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Section 3 of the Act provides that no woman shall be subjected to sexual harassment at any workplace.

Complaints Committee & Complaint Procedure
Internal Complaints Committee
The Act makes it mandatory for every employer to constitute an internal complaints committee ("ICC") which entertains the complaints made by any aggrieved women. The members of the ICC are to be nominated by the employer and ICC should consist of -

i. A Presiding Officer;
ii. Not less than 2 members from amongst employees preferably committed to the cause or women or who have had experience in social work or have legal knowledge and;
iii. 1 member from amongst non-governmental organizations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. In order to ensure participation of women employees in the ICC proceedings, the Act requires that **at least ½** of the members of ICC nominated by employer are women.

Local Complaints Committee

Provisions are provided under the Act to form Local Complaints Committee (LCC) for every district for receiving complaints of sexual harassment from establishments where the ICC has not been formed due to having less than 10 workers or if the complaint is against the employer himself.

CS PRAVEEN CHOUDHARY
PROF. ABHIJEET JAISWAL

COMPLIANCE RELATING TO ENVIRONMENTAL LAWS

The development of an economy should not be at the cost of the unrepairable damage to the environment. With the rapid growth in the industries there has been tremendous increase in the pollution, leading to degradation of environment at a very high pace.

The constitution of India in its fundamental duties casts a duty on every citizen of India to protect and improve the natural environment including forests, lakes rivers and wildlife and to have compassion for living creatures.

Further, the directive principles of state policy of constitution also stipulate that the state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.



With the recognition of right to healthy environment as a human right under the universal declaration of human rights and its related covenants, various laws were enacted and strict measures were taken to enforce to protect the environment.

Particulars	**Water (Prevention & control of Pollution)**	**Air (prevention & control of pollution)**	**Environment Protection Act 1986**

	Act 1974	**Act 1981**	
Objective	1. Prevention and control of water pollution. 2. Maintaining or restoring wholesomeness of water. 3. Establishment of Boards to prevent and control water pollution. 4. Assigning powers and functions to such boards.	1. To prevent, control and abate air pollution by - ✓ Declaration of Air Pollution area ✓ Setting standards for emission of air pollution ✓ Restriction on usage of certain industrial plants 2. Establishment of boards to prevent and control air pollution 3. Assigning powers and functions to such boards	1. Protection and improvement of environment and 2. Prevention of hazards to human beings, other living creatures, plants and property.
Boards	✓ Central pollution control board constituted by CG to lay down standards for the prevention and control of water pollution. ✓ State pollution control board constituted by SG to function under the direction of CPSB.	✓ CPCB ✓ SPCB ✓ If SG has constituted SPCB under water acct then it will act as SPCB in Air Act too. ✓ Otherwise SG has to constitute it separately under Air Act.	
Compliances under the Act/ Responsibilities of Business houses	1. Obtain consent to establish 2. Obtain consent to operate and renew it before expiry 3. Pay water CESS 4. Pay interest in case of delay in paying the water CESS 5. Pay penalty for non payment of CESS 6. Affix water meters of the prescribed standards 7. Provide access to SPCB	1. Obtain consent to establish 2. Obtain consent to operate and renew it before expiry 3. Not to discharge air pollutant in excess of the prescribed standards 4. Furnishing information to the SPCB of any accident. 5. Allow entry and inspection if declared under the Act 6. Allow samples to be taken	1. Comply with the directions issued by the CG, which may include: ✓ Closure, prohibition or regulation of any industry OR ✓ Stoppage or regulation of the supply of electricity, water or any other services 2. Prevent discharge or emission in excess of the prescribed

		7. A prior Notice of inspection to be served by the SPCB 8. Opportunity to file objections with SPCB within 15 days from the date of service of notice.	standards 3. Furnish information of any accident 4. Allow entry and inspection if declared under the Act. 5. Allow samples to be taken 6. Submit an environmental statement every year to the SPCB 7. Obtain prior environmental clearances from MOEF in case of a new project or for modernization/ expansion of the existing project.

Water (Prevention & control of pollution) Act, 1974

Particulars	Yes	No	NA
The company has got any direction from the State Board: For abstracting water from any such stream or well in the area in substantial quantities. For discharging sewage or trade effluent in to any such stream or well			
Whether the co. complied with the direction of state board or any other officer empowered			
Whether the company has got any direction from the state board or whether any other authorized body has taken sample of water or sewage or trade effluents fro the company			
Whether the person authorized by state board has visited the plant to check the compliance and examining plant			
Whether prior consent of the state board is taken to set up any industry, plant or process which is likely to discharge sewage or trade effluent in to a stream or well or sewer or on land			
Whether any notice has been received by the company from state board for not taking prior consent as mentioned above			
Whether the company has received order from state			

board to remove the matter, which is or may cause pollution; or remedy or mitigate the pollution, or issue prohibition orders to the concerned persons from discharging any poisonous or noxious or polluting matter.			
Whether the company has received any order restraining the company from polluting the water in any stream or well.			
Whether the company has received any directions in writing for - • Closure • Prohibition • Regulation of any industry, operation or process			

Air (Prevention & control of Pollution) Act 1981

Particulars	**Yes**	**No**	**NA**
Whether company has established any industrial plant in an air pollution control area. If yes, whether the company has taken previous consent of the SPCB			
Whether the consent given to company has been cancelled by SPCB before the expiry of the period for which it is granted for non fulfilment of conditions?			
Whether the SPCB or any other authorized body has taken sample of air or emission from the company.			
Whether the person authorized by SPCB has inspected			
Whether the company has received any direction from the state board for supply of any information.			
Company is discharging or causing or permitting to be discharged the emission of any air pollutant in excess of the standards laid down.			
Whether the company has complied with the following conditions as laid down in the consent by State board: ✓ Installation and operation of the control equipment. ✓ Alteration or replacement of the existing control equipment. ✓ Keeping the control equipment in good running condition ✓ Erection or re erection of chimney, ✓ Such other conditions as the state board may specify.			

Environment Protection Act 1986

Particular	Yes	No	NA
Whether the company has received any direction in writing for • Closure, • Prohibition or, • Regulation Of any industry, operation or process			
Whether the company has complied with the above mentioned direction of state board			
Whether the company is discharging or causing or permitting to be discharged the emission of any environmental pollutant in excess of the standards laid down			
Whether the state board of any other authorised body has taken sample of air, water, soil, or other substance from any Factory , premises or other place			
Whether the person authorised by state board has done any inspection to check the compliance & examining plant			
Whether the company complied with the safeguard measure as per prescribed for handling any hazardous substance.			
Whether the company has submitted an environmental Audit report to SPCB for the FY ending 31st march on before the 30th September in Form V			
In case of discharge of environmental pollutant in excess of prescribed standard, whether the company has given intimation to all the concerned authorities or agencies • The officer in charge of emergency or disaster relief operation • Central or state Board			

PUBLIC LIABILITY INSURANCE ACT,1991

The growth of hazardous industries has not only increased the risk of accidents to the workmen of Such undertakings, but also member of the public in the vicinity. The Act has its roots in the Bhopal gas tragedy.

Whereas the worker are generally protected under the Workmen's Compensation Act & The Employee's State Insurance Act, member of the public who may be victim are not assured of Any relief except through tedious legal Procedures.

Most of these affected people belong to weaker section of the society, and have very limited resources available with them to go through legal procedure.

Salient feature of the Act

1. **Compulsory Insurance**
   - The owner to take out one or more insurance policies, before starting the handling of hazardous substance.
   - The Amount of Insurance policy should not be less than PSC of the undertaking handling any hazardous substance
   - The amount of insurance policy should not exceed Rs. 50 crore
2. **Relief**
   - ➢ Owner to provide relief in case of death or injury or damage to property from an accident.
   - ➢ Owner to pay the amount of any award as specified by the collector.

3. **Contribution to environment relief fund (ERF)**
   CG shall establish ERF by notification in the official gazette. The Said Fund to be utilised for paying relief under the award made by the collector. Owner to pay additional amount as contribution to the "ERF".

4. **Other Responsibilities of Owner**
   - ✓ Owner to provide any information required for ascertaining compliance with the provision of the Act.
   - ✓ Owner to allow entry and inspection to ascertain compliance with the provision of the Act.
   - ✓ Comply with the direction issued in writing by the CG, direction may include;
     i. Prohibition or regulation of handling of any hazardous substance, or
     ii. Stoppage or regulation of the supply of electricity, water or any other services.

NATIONAL GREEN TRIBUNAL ACT, 2010

NGT is a specified body equipped to handle environment disputes involving multi-disciplinary issue. The NGT was introduced to ensure speedy trail related to environment issue. It proposed to have 5 places of sitting with Delhi as it headquarters & other being Bhopal, Pune, Kolkata & Chennai.

The CG has enacted the NGT Act, 2010 thereby repealing NET Act, 1995 & NEAA Act, 1997 as the previous Acts had a very limited Scope.

The Tribunal shall entertain Civil Cases and not be bound by the procedure laid down under the Code of Civil Procedure 1908, but shall be guided by principles of natural justice.

Objective of The Act

The effective and speedy disposal of the cases relating to environment protection & conversation of forests & other natural resources. All the previous pending cases will also be heard by the Tribunal.

Special note:

All the possible effort will be made to dispose of the case within 6 months from the date of filing the suit. The period for filing a suit with NGT is up-to 5 years from the date on which the cause for compensation arose. Extension of 60 days may be granted for filing the case.

- ✓ It aims at enforcing all the legal rights relating to the environment.
- ✓ It also accounts for providing compensation and relief to effected people for damages of property.

Jurisdiction of the Tribunal

Tribunal shall have the jurisdiction over all civil cases under the following enactment:

i. The Water (Prevention & Control of Pollution) Act, 1974;
ii. The Water (Prevention & Control of Pollution) Cess Act, 1977;
iii. The Forest (Conservation) Act, 1980;
iv. The Air (Prevention & Control of Pollution) Act,1981;
v. The Environment (Protection) Act, 1986;
vi. The Public Liability Insurance Act, 1991;
vii. The Biological Diversity Act, 2002

Power of the Tribunal

The Tribunal has been Entrusted with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, namely -

- ✓ Summoning & enforcing the attendance of any person & examining Him on Oath;
- ✓ Requiring the discovery and production of documents;
- ✓ Requisitioning any public records or documents from any office;
- ✓ Issuing Summon for the Examination of witnesses or Documents;
- ✓ Reviewing its decision;
- ✓ Dismissing a case or deciding it *ex-parte*;
- ✓ Setting Aside any order or dismissal or any order passed by it *ex-parte*;
- ✓ Pass an interim order;
- ✓ To cease & desist from committing any offence;
- ✓ Any other matter prescribed by CG.

Striking off Name of Company

Introduction

Section 248 provides that Where the ROC has reasonable cause to believe that—

a) A company has failed to commence its business within 1 year of its incorporation [or];
b) [Omitted].
c) A company is not carrying on any business or operation for a period of 2 immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under.

Nothing shall apply to a company registered under section 8.The ROC shall send a notice to the company and all the directors of the company to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents **within 30 days** from the date of the notice.

A company may, after extinguishing all its liabilities, by a special resolution file an application in the prescribed manner to the ROC for removing the name of the company from the register of companies on all or any of the grounds specified above.

The ROC shall on receipt of application serve a public notice. In the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

A notice issued shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

At the expiry of the time mentioned in the notice, the ROC may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

The ROC before passing an order shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the MD, director or other persons in charge of the management of the company.

Nothing in this section shall affect the power of NCLT to wind up a company the name of which has been struck off from the register of companies.

Removal of name of company from the Register on Suo Motu basis

The following categories of companies shall not be removed from the register of companies –

i. listed companies;
ii. companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
iii. vanishing companies;

iv. companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;
v. companies where notices under section 234 of the Companies Act, 1956 (1 of 1956) or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;
vi. companies against which any prosecution for an offence is pending in any court;
vii. companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;
viii. companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
ix. companies having charges which are pending for satisfaction; and
x. companies registered under section 08 of the Companies Act, 2013 or section 8 of the Act.

Note: The expression "vanishing company" means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the ROC and Stock Exchange for a consecutive period of 2 years, and is not maintaining its registered office at the address notified with the ROC or Stock Exchange and none of its directors are traceable.

Restrictions on Making Application under Section 248 in Certain Situations Section 249

An application shall not be filed on behalf of a Company if, at any time in the previous three months, the company—

(a) has changed its name or shifted its registered office from one State to another;
(b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;
(c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;
(d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
(e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

An application filed shall be withdrawn by the company or rejected by the ROC as soon as conditions are brought to his notice.

Fraudulent Application for Removal of Names Section 251

Where it is found that an application by a company has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—

(a) Be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and
(b) Be punishable for fraud in the manner as provided in section 447.

The ROC may also recommend prosecution of the persons responsible for the filing of an application.

Appeal to tribunal for Restoration of the name of Company Section 252

Any person aggrieved by an order of the ROC, notifying a company as dissolved may file an appeal to NCLT within a period of 3 years from the date of the order of the ROC and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the ROC, it may order restoration of the name of the company in the register of companies:

Before passing any order the Tribunal shall give a reasonable opportunity of making representations and of being heard to the ROC, the company and all the persons concerned:
if the ROC is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may **within 3 years** from the date of passing of the order dissolving the company an application before the Tribunal seeking restoration of name of such company.

A copy of the order passed by the Tribunal shall be filed by the company with the ROC **within 30 days** from the date of the order and on receipt of the order, ROC shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, NCLT on an application made by the company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

Rule 3 of Companies (Miscellaneous) Rules 2014

Application for obtaining status of dormant company.-
For the purposes of sub-section (1) of section 455, a company may make an application in Form MSC-1 along with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 to the ROC for obtaining the status of a Dormant Company, after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value):

Provided that a company shall be eligible to apply under this rule only, if-

(i) No inspection, inquiry or investigation has been ordered or taken up or carried out against the company;
(ii) No prosecution has been initiated and pending against the company under any law;
(iii) The company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;
(iv) The company is not having any outstanding loan, whether secured or unsecured: Provided that if there is any outstanding unsecured loan, the company may apply under this rule after obtaining concurrence of the lender and enclosing the same with Form MSC-1;
(v) There is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;
(vi) The company does not have any outstanding statutory taxes, dues, duties etc. payable to the CG or any SG or local authorities etc.;
(vii) The company has not defaulted in the payment of workmen's dues;
(viii) The securities of the company are not listed on any stock exchange within or outside India.

Sec 455(2) → ROC on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.
Sec 455(3) → ROC shall maintain a register of dormant companies in such form as may be prescribed in Rule 5 under Companies (Miscellaneous) Rules, 2014.
Sec 455(4) → In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the ROC shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

Rule 4 of Companies (Miscellaneous) Rules 2014

Certificate of status of dormant company.-
The ROC shall, after considering the application filed **in Form MSC-1**, issue a certificate in **Form MSC-2** allowing the status of a Dormant Company to the applicant.

Sec 455(5) → A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed in Rule 6 & 9 under Companies (Miscellaneous) Rules, 2014 to the ROC to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and requisite fee as may be prescribed.
Sec 455(6) → The ROC shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.
Note: - Rotation of auditors does not apply to these companies.

Register of dormant companies Rule 5

The Register maintained under the portal maintained **by MCA on its web-site www.mca.gov.in** or any other website notified by the cg, shall be the register for dormant companies.

Return of dormant companies Rule 7

A dormant company shall file a "Return of Dormant Company" annually, inter alia, indicating financial position duly audited by a CA in practice in **Form MSC- 3** along with such annual fee as provided within 30 days from the end of each financial year:
Provided that the company shall continue to file the return or returns of allotment and change in directors in the manner and within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company.

Application for seeking status of an active company Rule 8

(1) An application, u/s 455(5), for obtaining the status of an active company shall be made in Form MSC-4 along with fees and shall be accompanied by a return in Form MSC-3 in respect of the financial year in which the application for obtaining the status of an active company is being filed. The ROC shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive 5 years.
(2) The Registrar shall, after considering the application filed, issue a certificate in Form MSC-5 allowing the status of an active company to the applicant.
(3) Where a dormant company does or omits to do any act mentioned in the Grounds of application in Form MSC-1 submitted to ROC for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within 7 days from such event, file an application, for obtaining the status of an active company.
(4) Where the ROC has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry u/s 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the ROC may remove the name of such company from register of dormant companies and treat it as an active company.

THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Notified on: 28*th May*, 2016

Introduction

An Act to consolidate and amend the laws relating to **reorganization and insolvency resolution** of **corporate persons**, **partnership firms** and **individuals** in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

The code extends to the whole of India:
However, Part III does not extend to the State of Jammu and Kashmir.

IBC shall be applicable on following:

a. Company under Co. Act
b. Special Act company
c. LLP
d. Notified body corporate; and
e. Partnership firms and individuals,

In relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

CORPORATE INSOLVENCY RESOLUTION PROCESS

6. Persons who may initiate corporate insolvency resolution process.

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

7. Initiation of CIR process by financial creditor.

(1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before AA when a default has occurred.

Note: *Here* a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) An application shall be made in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

a) Record of the default recorded with the information utility or such other record or evidence of default as may be specified;

b) The name of the resolution professional proposed to act as an interim resolution professional; and
c) Any other information as may be specified by the Board.

(4) AA shall, **within 14 days**, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

(5) Where AA is satisfied that—
a. A default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
b. Default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:
Provided that AA shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application **within 7 days** of receipt of such notice from AA.

(6) The CIR process shall commence from the date of admission of the application.

(7) The **AA** shall communicate—
a. The order to the financial creditor and the corporate debtor;
b. The order to the financial creditor, **within 7 days** of admission or rejection of such application, as the case may be.

8. Insolvency resolution by Operational Creditors

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

(2) The corporate debtor shall, **within 10 days** of the receipt of the demand notice or copy of the invoice, bring to the notice of the operational creditor—
a. Existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
b. the repayment of unpaid operational debt—
i. By sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
ii. By sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Demand Notice → a notice served by an operational creditor to the corporate debtor demanding repayment of the operational debt in respect of which the default has occurred.

9. Application for initiation of corporate insolvency resolution process by operational creditor.

(1) After 10 days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the AA for initiating a CIR process.

(2) The application under sub-section (*1*) shall be filed in such form and manner and accompanied with such fee as may be prescribed.

(3) The operational creditor shall, along with the application furnish—

a. A copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;
b. An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
c. A copy of the certificate from financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and
d. Such other information as may be specified.

(4) An operational creditor initiating a **CIR process**, may propose a resolution professional to act as an interim resolution professional.

(5) The AA shall, **within 14 days** of the receipt of the application, by an order—

(i) Admit the application and communicate such decision to the operational creditor and the corporate debtor if,—
(a) The application is complete;
(b) There is no repayment of the unpaid operational debt;
(c) The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
(d) No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
(e) There is no disciplinary proceeding pending against any resolution professional proposed.

(ii) reject the application and communicate such decision to the operational creditor and the corporate debtor, if—
a) The application is incomplete;
b) There has been repayment of the unpaid operational debt;
c) The creditor has not delivered the invoice or notice for payment to the corporate debtor;
d) Notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
e) Any disciplinary proceeding is pending against any proposed resolution professional:
Provided that AA, shall before rejecting an application, give a notice to the applicant to rectify the defect in his application **within 7 days** of the date of receipt of such notice from the **AA**.

(6) The **CIR process** shall commence from the date of admission of the application.

10. Initiation of corporate insolvency resolution process by corporate applicant.

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating **CIR process** with the **AA**.

(2) The application shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

(3) The corporate applicant shall, along with the application furnish the information relating to—
(a) Its books of account and such other documents relating to such period as may be specified; and
(b) The resolution professional proposed to be appointed as an interim resolution professional.

(4) The AA shall, **within 14 days** of the receipt of the application, by an order—
(a) Admit the application, if it is complete; or

(b) Reject the application, if it is incomplete:
Provided that **AA** shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application **within 7 days** from the date of receipt of such notice from the **AA**.

(5) The **CIR process** shall commence from the date of admission of the application.

11. Persons not entitled to make application.

(a) a corporate debtor undergoing a **CIR process**; or

(b) a corporate debtor having completed CIR process **12 months** preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) A corporate debtor in respect of whom a liquidation order has been made.

Note: *Here* a corporate debtor includes a corporate applicant in respect of such corporate debtor.

12. Time-limit for completion of insolvency resolution process.

(1) Subject to sub-section (*2*), the **CIR process** shall be completed **within 180 days** from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the AA to extend the period of the CIR process beyond **180 days**, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of **75%** of the voting shares.

(3) On receipt of an application, if the AA is satisfied that the subject matter of the case is such that **CIR process** cannot be completed **within 180 days**, it may by order extend the duration of such process **beyond 180 days** by such further period as it thinks fit, but not **exceeding 90 days**:
Provided that any extension of the period of **CIR process** shall not be granted more than once.

13. Declaration of moratorium and public announcement.

(1) The **AA**, after admission of the application **u/s 7 or 9 or 10**, shall, by an order—

a. **Declare a moratorium** for the purposes referred **u/s 14**;
b. Cause a public announcement of the initiation of **CIR process** and call for the submission of claims **u/s 15**; and
c. Appoint an interim resolution professional in the manner as laid down u/s 16.

(2) The public announcement shall be made immediately after the appointment of the interim resolution professional.

14. Moratorium.

(1) Subject to provisions of sub-sections (*2*) and (*3*), on the insolvency commencement date, the **AA** shall by order declare moratorium for prohibiting all of the following, namely:—

a. the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
b. transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
c. any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the **SARFAESI Act, 2002**;
d. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the CG in consultation with any financial sector regulator.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the **CIR process** period, if **AA** approves the resolution plan u/s 31(1) or passes an order for liquidation of corporate debtor **u/s 33**, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

15. Public Announcement of CIR Process

(1) The public announcement of the **CIR process** under the order shall contain the following information, namely:—

a. Name and address of the corporate debtor under CIR process;
b. Name of the authority with which the corporate debtor is incorporated or registered;
c. The last date for submission of claims;
d. Details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims;`
e. Penalties for false or misleading claims; and
f. The date on which the CIR process shall close, which shall be the 180th day from the date of the admission of the application **u/s 7, 9 or 10**, as the case may be.

(2) The public announcement shall be made in such manner as may be specified.

16. Appointment and tenure of interim resolution Professional

(1) The AA shall appoint an interim resolution professional **within 14 days** from the insolvency commencement date.

(2) Where the application for **CIR process** is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application u/s 7 or 10, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(3) Where the application for **CIR process** is made by an operational creditor and—

(a) No proposal for an interim resolution professional is made, the AA shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional;

(b) A proposal for an interim resolution professional is made, the resolution professional as proposed, shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him.

(4) The Board shall, **within 10 days** of the receipt of a reference from the AA, recommend the name of an insolvency professional to the AA against whom no disciplinary proceedings are pending.

(5) The term of the interim resolution professional **shall not exceed 30 days** from date of his appointment.

Guidelines by Insolvency Professionals to act as interim Resolution professionals or Liquidators (Recommendation) Guidelines, 2017 (15/11/17)

The board (IBBI) shall prepare a Panel of IPs for appointment as IRP or Liquidator and share the said Panel with AA. The AA may pick up any name from the Panel for appointment of IRP or

Liquidator for a CIRP or Liquidation, as the case may be. The panel will have bench wise list of IPs based on the registered office of IP. It will have a validity of six months and a new panel will replace the earlier Panel every 6 months.
Example: 1st Panel will be valid for appointments during Jan – June 2018, the next Panel will be valid for July – Dec 2018 and so on.

An IP will be eligible to be in the Panel of IPs if –

a) **there is no disciplinary proceeding pending against him**
b) **he has not been convicted at any time in the last 3 years by a court of competent jurisdiction and**
c) **he expresses his interest to be included in the Panel for the relevant period.**

17. Management of affairs of corporate debtor by interim resolution professional.

(1) From the date of appointment of the interim resolution professional,—
- *(a)* The management of the affairs of the corporate debtor shall vest in the interim resolution professional;
- *(b)* The powers of the BOD or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional; Public announcement of **CIR process**. Appointment and tenure of interim resolution professional. Management of affairs of corporate debtor by interim resolution professional.
- *(c)* The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
- *(d)* The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

(2) The interim resolution professional vested with the management of the corporate debtor shall—
- *(a)* Act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;
- *(b)* Take such actions, in the manner and subject to such restrictions, as may be specified by the Board;
- *(c)* Have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor;
- *(d)* Have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified.

18. Duties of interim resolution professional.

The interim resolution professional shall perform the following duties, namely:—
- *(a)* Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—
  - *(i)* Business operations for the previous two years;
  - *(ii)* Financial and operational payments for the previous two years;
  - *(iii)* List of assets and liabilities as on the initiation date; and
  - *(iv)* Such other matters as may be specified;

(b) Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
(c) Constitute a committee of creditors;
(d) Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
(e) File information collected with the information utility, if necessary; and
(f) Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—
  (i) Assets over which the corporate debtor has ownership rights which may be located in a foreign country;
  (ii) Assets that may or may not be in possession of the corporate debtor;
  (iii) Tangible assets, whether movable or immovable;
  (iv) Intangible assets including intellectual property;
  (v) Securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies; Duties of interim resolution professional.
  (vi) Assets subject to the determination of ownership by a court or authority;
  (vii) To perform such other duties as may be specified by the Board.

Note: Here the term "assets" shall not include the following, namely:—
(a) Assets owned by a 3rd party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
(b) Assets of any Indian or foreign subsidiary of the corporate debtor; and
(c) Such other assets notified by the CG in consultation with any financial sector regulator.

19. Personnel to extend cooperation to interim resolution professional.
(1) The personnel of the corporate debtor, its promoters or any other person associated with the management of the corporate debtor shall extend all assistance and cooperation to the interim resolution professional as may be required by him in managing the affairs of the corporate debtor.
(2) Where any personnel of the corporate debtor, its promoter or any other person required to assist or cooperate with the interim resolution professional does not assist or cooperate, the interim resolution professional may make an application to the AA for necessary directions.
(3) The AA, on receiving an application, shall by an order, direct such personnel or other person to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

20. Management of operations of corporate debtors as going concerns
(1) The interim resolution professional shall make every endeavor to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.
(2) The interim resolution professional shall have the authority—
  (a) To appoint accountants, legal or other professionals as may be necessary;
  (b) To enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) To raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) To issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) To take all such actions as are necessary to keep the corporate debtor as a going concern.

21. Committee of creditors

(1) The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor: Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

(3) Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

(4) Where any person is a financial creditor as well as an operational creditor,—

(a) Such person shall be a financial creditor to the extent of the financial debt owed by the corporate debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;

(b) Such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate debtor to such creditor.

(5) Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.

(6) Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility or issued as securities provide for a single trustee or agent to act for all financial creditors, each financial creditor may—

(a) Authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;

(b) Represent himself in the committee of creditors to the extent of his voting share;

(c) Appoint an insolvency professional (other than the resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or

(d) Exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.

(7) The Board may specify the manner of determining the voting share in respect of financial debts issued as securities.

(8) All decisions of the committee of creditors shall be taken by a vote of not less than 75% of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and comprise of such persons to exercise such functions in such manner as may be specified by the Board.

(9) The committee of creditors shall have the right to require the resolution professional to furnish any financial information in relation to the corporate debtor at any time during the **CIR process.**

(10) The resolution professional shall make available any financial information so required by the committee of creditors **within 7 days** of such requisition.

22. Appointment of resolution professional.

(1) The first meeting of the committee of creditors shall be held **within 7 days** of the constitution of the committee of creditors.

(2) The committee of creditors may, in the first meeting, by a majority vote of **not less than 75%** of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

(3) Where the committee of creditors resolves—

a. To continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and **AA**; or

b. To replace the interim resolution professional, it shall file an application before **AA** for the appointment of the proposed resolution professional.

(4) The **AA** shall forward the name of the resolution professional proposed to the **BOD** for its confirmation and shall make such appointment after confirmation by the Board.

(5) Where the Board does not confirm the name of the proposed resolution professional **within 10 days** of the receipt of the name of the proposed resolution professional, AA shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

23. Resolution professional to conduct CIR process.

(1) Subject to section 27, the resolution professional shall conduct the **entire CIR process** and manage the operations of the corporate debtor during the process period.

(2) The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional under this Chapter.

(3) In case of any appointment of a resolution professional u/s 22(4), the interim resolution professional shall provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional.

24. Meeting of committee of creditors.

(1) The members of the committee of creditors may meet in person or by such electronic means as may be specified.

(2) All meetings of the committee of creditors shall be conducted by the resolution professional.

(3) The resolution professional shall give notice of each meeting of the committee of creditors to—

(a) Members of Committee of creditors;

(b) Members of the suspended BOD or the partners of the corporate persons, as the case may be;

(c) Operational creditors or their representatives if the amount of their aggregate dues is **not less than 10% of the debt**.

(4) The directors, partners and one representative of operational creditors, may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings:

Provided that the absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

(5) Any creditor who is a member of the committee of creditors may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee of creditors:
Provided that the fees payable to such insolvency professional representing any individual creditor will be borne by such creditor
(6) Each creditor shall vote in accordance with the voting share assigned to him based on the financial debts owed to such creditor.
(7) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.
(8) The meetings of the committee of creditors shall be conducted in such manner as may be specified.

25. Duties of resolution professional.

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.
(2) **The resolution professional shall undertake the following actions, namely:—**
(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;
(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;
(c) Raise interim finances subject to the approval of the committee of creditors;
(d) Appoint accountants, legal or other professionals in the manner as specified by Board;
(e) Maintain an updated list of claims;
(f) Convene and attend all meetings of the committee of creditors;
(g) Prepare the information memorandum;
(h) Invite prospective lenders, investors, and any other persons to put forward resolution plans;
(i) present all resolution plans at the meetings of the committee of creditors;
(j) File application for avoidance of transactions in accordance with Chapter III, if any; and
(k) Such other actions as may be specified by the Board.

26. Application for avoidance of transactions not to affect proceedings.

The filing of an avoidance application u/s 25(2)(j) by the resolution professional shall not affect the proceedings of the CIR process.

27. Replacement of resolution professional by committee of creditors.

(1) Where, at any time during CIR process, the committee of creditors is of the opinion that a resolution professional is required to be replaced; it may replace him with another resolution professional.
(2) The committee of creditors may, at a meeting, by a vote of 75% of voting shares, propose to replace the resolution professional appointed with another resolution professional.
(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to **AA**.
(4) The **AA** shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed.
(5) Where any disciplinary proceedings are pending against the proposed resolution professional, the resolution professional shall continue till the appointment of another resolution professional.

28. Preparation of information memorandum.

(1) Notwithstanding anything contained in any other law for the time being in force, the resolution professional, during the corporate insolvency resolution process, shall not take any of the following actions without the prior approval of the committee of creditors namely:—

(a) Raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;

(b) Create any security interest over the assets of the corporate debtor;

(c) Change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;

(d) Record any change in the ownership interest of the corporate debtor;

(e) Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;

(f) Undertake any related party transaction;

(g) Amend any constitutional documents of the corporate debtor;

(h) Delegate its authority to any other person;

(i) Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;

(j) Make any change in the management of the corporate debtor or its subsidiary;

(k) Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;

(l) Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or

(m) Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

(2) The resolution professional shall convene a meeting of the committee of creditors and seek the vote of the creditors prior to taking any of the actions.

(3) No action shall be approved by the committee of creditors unless approved by a vote of 75% of the voting shares.

(4) Where any action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void.

(5) The committee of creditors may report the actions of the resolution professional to the Board for taking necessary actions against him under this Code.

29. relevant information in physical and electronic form, provided such resolution applicant undertakes—

(1) The resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

(2) The resolution professional shall provide to the resolution applicant access to all Approval of committee of creditors for certain actions.

(a) To comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) To protect any intellectual property of the corporate debtor it may have access to; and

(c) Not to share relevant information with third parties unless clauses (*a*) and (*b*) of this sub-section are complied with.

Note:
Here **"Relevant information"** means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

Insertion of New section 29A (w.e.f. 23/11/17)
A person shall not be eligible to submit a Resolution plan, if such person, or any other person acting jointly or in concert with such person –

a) Is an undischarged insolvent
b) Is a wilful defaulter as per RBI guidelines
c) Has an NPA account or is managing the NPA account of corporate debtor and at least one year has not elapsed from date of such classification till the date of commencement of the CIRP of corporate Debtor.
Provided that if he makes payment of all overdue amounts with interest thereon and charges relating to NPA accounts before submission of resolution plan.
d) Is convicted of offence punishable with imprisonment ≥ 2 years
e) Is disqualified to act as director under co. act 2013.
f) Is prohibited by SEBI from trading in securities or accessing the securities market
g) Has been a promoter or in management or control of corporate debtor, in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place AND in respect of which AA has made an order under IBC.
h) Has executed an enforceable guarantee in favour of creditor of corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under IBC.
i) Has been subject to any of above disability under any law outside India.
j) Has a connected person not eligible under above clauses.

Here connected person means
i) A person who is promoter or in management or control of the resolution applicant OR
ii) A person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan. OR
iii) The holding co., subsidiary co., associate co., OR related party of above persons.
Except
a) SCB
b) ARC under SARFAESI 2002
c) AIF registered with SEBI.

30. Submission of resolution plan.

(1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
- *(a)* Provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;
- *(b)* Provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor;
- *(c)* Provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
- *(d)* The implementation and supervision of the resolution plan;
- *(e)* Does not contravene any of the provisions of the law for the time being in force;
- *(f)* Conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions.

(4) The committee of creditors may approve a resolution plan by a vote of **not less than 75%** of voting share of the financial creditors, **after considering its feasibility and viability and such other requirements as may be prescribed by IBBI.**

Provided that committee of creditors shall not approve the plan, submitted before commencement of IBC (Amendment)Ordinance 2017, if resolution applicant is ineligible u/s 29A and may require the Resolution Professional to invite a fresh Resolution Plan.

Provided further that if applicant is ineligible u/s 29A(c), he shall be allowed up to 30 days to make payment of overdue amounts.

However, the above time period shall not be taken as extension of period to complete the CIRP u/s 12(3). (w.e.f. 23/11/17)

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered.

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the **AA**.

31. Approval of resolution plan.

(1) If the **AA** is satisfied that the resolution plan as approved by the committee of creditors meets the requirements of section 30(2), it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where **AA** is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (*1*), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (*1*),—
- *(a)* The moratorium order passed by AA u/s 14 shall cease to have effect; and
- *(b)* The resolution professional shall forward all records relating to the conduct of **CIR process** and the resolution plan to the Board to be recorded on its database.

32. Appeal

Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in section 61(3).

33. Initiation of liquidation.

(1) Where AA, —

(a) Before the expiry of the **CIR process** period or the maximum period permitted for completion of the **CIR process** or the fast track CIR process, as the case may be, does not receive a resolution plan; or

(b) Rejects the resolution plan for the non-compliance of the requirements specified therein, it shall—

(i) Pass an order requiring the corporate debtor to be liquidated in the prescribed manner;

(ii) Issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) Require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the CIR process but before confirmation of resolution plan, intimates the AA of the decision of the committee of creditors to liquidate the corporate debtor, the AA shall pass a liquidation order.

(3) Where the resolution plan approved by **the AA** is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the **AA** for a liquidation order.

(4) On receipt of an application, if AA determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order.

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:
Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of AA.

(6) The above provisions shall not apply to legal proceedings in relation to such transactions as may be notified by **CG** in consultation with any financial sector regulator.

(7) The order for liquidation shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

34. Appointment of liquidator and fee to be paid.

(1) Where AA passes an order for liquidation of the corporate debtor u/s 33, the resolution professional appointed for the CIR process under Chapter II shall act as the liquidator for the purposes of liquidation unless replaced by AA.

(2) On the appointment of a liquidator under this section, all powers of the board of directors, KMP and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.

(3) The personnel of the corporate debtor shall extend all assistance and cooperation to the liquidator as may be required by him in managing the affairs of the corporate debtor and provisions of sec 19 shall apply in relation to voluntary liquidation process as they apply in relation to liquidation process with the substitution of references to the liquidator for references to the interim resolution professional.

(4) AA shall by order replace the resolution professional, if—

(a) The resolution plan submitted by the resolution professional was rejected for failure to meet the requirements of section 30(2); or

(b) The Board recommends the replacement of a resolution professional to AA for reasons to be recorded in writing.

(5) AA may direct the Board to propose the name of another insolvency professional to be appointed as a liquidator.
(6) The Board shall propose the name of another insolvency professional **within 10 days** of the direction issued by AA.
(7) AA shall, on receipt of the proposal of the Board for the appointment of an insolvency professional as liquidator, by an order appoint such insolvency professional as the liquidator.
(8) An insolvency professional proposed to be appointed as a liquidator shall charge such fee for the conduct of the liquidation proceedings and in such proportion to the value of the liquidation estate assets, as may be specified by the Board.
(9) The fees for the conduct of the liquidation proceedings shall be paid to the liquidator from the proceeds of the liquidation estate u/s 53.

35. Powers and duties of liquidator.

(1) Subject to the directions of AA, the liquidator shall have the following powers and duties, namely :—
(a) To verify claims of all the creditors;
(b) To take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
(c) To evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;
(d) To take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;
(e) To carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary;
(f) Subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified;
Provided that the liquidator shall not sell the immovable and movable property or actionable claim of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant. (w.e.f. 23/11/17)
(g) To draw, accept, make and endorse any negotiable instruments including bill of exchange, Hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;
(h) To take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;
(i) To obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;
(j) To invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of on behalf of the corporate debtor;
(l) To investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;
(m) To take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;
(n) To apply to AA for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and
(o) To perform such other functions as may be specified by the Board.

(2) The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds u/s 53:
Provided that any such consultation shall not be binding on the liquidator:
Provided further that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

36. Liquidation estate.

(1) For the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.
(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.
(3) The liquidation estate shall comprise all liquidation estate assets which shall include the following:—
(a) Any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
(b) Assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
(c) Tangible assets, whether movable or immovable;
(d) Intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
(e) Assets subject to the determination of ownership by the court or authority;
(f) Any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
(g) Any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
(h) Any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
(i) All proceeds of liquidation as and when they are realized.

(4) The **following shall not be included** in the liquidation estate assets and shall not be used for recovery in the liquidation: —

(a) Assets owned by a third party which are in possession of the corporate debtor, including—
  i. Assets held in trust for any 3rd party;
  ii. Bailment contracts;
  iii. All sums due to any workman or employee from the provident fund, pension fund and gratuity fund;
  iv. Other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
  v. Other notified assets;

(b) Assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) Personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) Assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) Any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

37. Powers of liquidator to access information.

(1) Notwithstanding anything contained in any other law for the time being in force, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources, namely: —
  (a) An information utility;
  (b) Credit information systems regulated under any law for the time being in force;
  (c) Any agency of the Central, State or Local Government including any registration authorities;
  (d) Information systems for financial and non-financial liabilities regulated under any law for the time being in force;
  (e) Information systems for securities and assets posted as security interest regulated under any law for the time being in force;
  (f) Any database maintained by the Board; and
  (g) Any other source as may be specified by the Board.

(2) The creditors may require the liquidator to provide them any financial information relating to the corporate debtor in such manner as may be specified.

(3) The liquidator shall provide information referred to in sub-section (2) to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information.

38. Consolidation of claims.

(1) The liquidator shall receive or collect the claims of creditors **within 30 days** from the date of the commencement of the liquidation process.

(2) A financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility:
Provided that where the information relating to the claim is not recorded in the information utility, the financial creditor may submit the claim in the same manner as provided for the submission of claims for the operational creditor.

(3) An operational creditor may submit a claim to the liquidator in such form and in such manner and along with such supporting documents required to prove the claim as may be specified by the Board.
(4) A creditor who is partly a financial creditor and partly an operational creditor shall submit claims to the liquidator to the extent of his financial debt and to the extent of his operational debt.
(5) A creditor may withdraw or vary his claim under this section **within 14 days** of its submission.

39. Verification of claims.
(*1*) The liquidator shall verify the claims submitted under section 38 within such time as specified by the Board.
(*2*) The liquidator may require any creditor or the corporate debtor or any other person to produce any other document or evidence which he thinks necessary for the purpose of verifying the whole or any part of the claim.

40. Admission or rejection of claims.
(1) The liquidator may, after verification of claims, either admit or reject the claim, in whole or in part, as the case may be:
Provided that where the liquidator rejects a claim, he shall record in writing the reasons for such rejection.
(2) The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor **within 7 days** of such admission or rejection of claims.

41. Determination of valuation of claims.
The liquidator shall determine the value of claims admitted in such manner as may be specified by the Board.

42. Appeal against the decision of liquidator.
A creditor may appeal to AA against the decision of the liquidator rejecting the claims **within 14 days** of the receipt of such decision.

43. Preferential transactions and relevant time.
(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in prescribed manner to any specified persons, he shall apply to AA for avoidance of preferential transactions and for, one or more of the orders.
(2) A corporate debtor shall be deemed to have given a preference, if—
(a) There is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and
(b) The transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made.
(3) A preference shall not include the following transfers—
(a) Transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;
(b) Any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

i. Such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

ii. Such transfer was registered with an information utility **on or before 30 days** after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

New value→ Money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if—

(a) It is given to a related party (other than by reason only of being an employee), during the period of 2 years preceding the insolvency commencement date; or

(b) A preference is given to a person other than a related party during the period of 1 year preceding the insolvency commencement date.

44. Orders in case of preferential transactions.

AA, may, on an application made by the resolution professional or liquidator, by an order:

i. Require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

ii. Require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

iii. Release or discharge (in whole or in part) of any security interest created by the corporate debtor;

iv. Require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as AA may direct;

v. Direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as AA deems appropriate;

vi. Direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

vii. Direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:

Provided that an order under this section shall not—

(a) Affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;

(b) Require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Please Note:

1. Where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, —
   i. Had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;
   ii. Is a related party, it shall be presumed that the interest was acquired or the benefit was received otherwise than in good faith unless the contrary is shown.
2. A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the **CIR process** has been made.

45. Avoidance of undervalued transactions.

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section *2* of section 43 determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to AA to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—
   (a) Makes a gift to a person; or
   (b) Enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

46. Relevant period for avoidable transactions.

(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—
   i. such transaction was made with any person within the period of one year preceding the insolvency commencement date; or
   ii. such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

(2) AA may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.

47. Application by creditor in cases of undervalued transactions.

(1) Where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to AA, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to AA to declare such transactions void and reverse their effect in accordance with this Chapter.

(2) Where AA, after examination of the application made under sub-section (*1*), is satisfied that—
(a) Undervalued transactions had occurred; and
(b) Liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to AA,
It shall pass an order—
   (a) Restoring the position as it existed before such transactions and reversing the effects thereof;
   (b) Requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

48. Order in cases of undervalued transactions.

The order of AA may provide for the following: —

(a) Require any property transferred as part of the transaction, to be vested in the corporate debtor;

(b) Release or discharge (in whole or in part) any security interest granted by the corporate debtor;

(c) Require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as AA may direct; or

(d) Require the payment of such consideration for the transaction as may be determined by an independent expert.

49. Transactions defrauding creditors.

Where the corporate debtor has entered into an undervalued transaction and AA is satisfied that such transaction was deliberately entered into by such corporate debtor—

(a) For keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or

(b) In order to adversely affect the interests of such a person in relation to the claim,

AA shall make an order—

i. Restoring the position as it existed before such transaction as if the transaction had not been entered into; and

ii. Protecting the interests of persons who are victims of such transactions:

Provided that an order under this section—

(a) Shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

(b) Shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

50. Extortionate credit transactions.

(1) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period **within 2 years** preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to AA if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

(2) The Board may specify the circumstances in which a transaction which shall be covered under sub-section (*1*).

Note: any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

51. Orders of Adjudicating Authority in respect of extortionate credit transactions

Where AA after examining the application, is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order—

(a) Restore the position as it existed prior to such transaction;

(b) set aside the whole or part of the debt created on account of the extortionate credit transaction;

(c) modify the terms of the transaction;
(d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or
(e) Require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

52. Secured Creditors in liquidation process

(1) A secured creditor in the liquidation proceedings may—
(a) Relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator; or
(b) Realize its security interest in the specified manner.
(2) Where the secured creditor realizes security interest, he shall inform the liquidator of such security interest and identify the asset subject to such security interest to be realised.
(3) Before any security interest is realised by the secured creditor, the liquidator shall verify such security interest and permit the secured creditor to realize only such security interest, the existence of which may be proved either—
(a) by the records of such security interest maintained by an information utility; or
(b) by such other means as may be specified by the Board.
(4) A secured creditor may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised and to the secured creditor and apply the proceeds to recover the debts due to it.
(5) If in the course of realising a secured asset, any secured creditor faces resistance from the corporate debtor or any person connected therewith in taking possession of, selling or otherwise disposing off the security, the secured creditor may make an application to AA to facilitate the secured creditor to realise such security interest in accordance with law for the time being in force.
(6) AA, on the receipt of an application from a secured creditor may pass such order as may be necessary to permit a secured creditor to realise security interest in accordance with law for the time being in force.
(7) Where the enforcement of the security interest yields an amount by way of proceeds which is in excess of the debts due to the secured creditor, the secured creditor shall—
(a) Account to the liquidator for such surplus; and
(b) Tender to the liquidator any surplus funds received from the enforcement of such secured assets.
(8) The amount of insolvency resolution process costs, due from secured creditors who realise their security interests in the manner provided in this section, shall be deducted from the proceeds of any realisation by such secured creditors, and they shall transfer such amounts to the liquidator to be included in the liquidation estate.
(9) Where the proceeds of the realisation of the secured assets are not adequate to repay debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator.

53. Distribution of Assets

(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: —
(a) the insolvency resolution process costs and the liquidation costs paid in full;
(b) the following debts which shall rank equally between and among the following: —

i. workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

ii. Debts owed to a secured creditor in the event such secured creditor has relinquished security;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: —

i. any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

ii. debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) Equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Please Note

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

54. Dissolution of Corporate Debtor

(1) Where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to AA for the dissolution of such corporate debtor.

(2) AA shall on application filed by the liquidator under sub-section (*1*) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(3) A copy of an order under sub-section (*2*) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered.

WINDING UP

Modes of winding up [Sec 270]

The provisions of Part I shall apply to the winding up of a company by the NCLT under this Act

Winding up by the Tribunal

Circumstances in which company may be wound up by Tribunal [Sec 271]

***(1)* A company may, on a petition u/s 272, be wound up by the NCLT,—**

a. By passing a Special Resolution that company should be wound up by the NCLT;
b. Acting against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
c. If on an application of ROC or any other person authorised by the CG by notification, NCLT is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
d. If the company has made a default in filing with ROC its financial statements or annual returns for immediately preceding 5 consecutive financial years; or
e. Just and equitable grounds.

***(2)* A company shall be deemed to be unable to pay its debts,—**

(a) If a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding **Rs. 1 Lakh** then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum **within 21 days** after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;

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

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

Petition for winding up [Sec 272]

(1) A petition to the NCLT for the winding up of a company shall be presented by—
(a) Company;
(b) Contributories;
(c) Creditors
(d) ROC;
(e) Any person authorised by the CG in that behalf; or
(f) For the cases u/s 271(1) (c), by the CG or a SG.

(2) A contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that he may be the holder of fully paid-up shares, or that the company may have no assets at all or may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities, and shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for **at least 6 months** during the **18 months immediately** before the commencement of the winding up or have devolved on him through the death of a former holder.

(3) The ROC shall be entitled to present a petition, except on the grounds specified in clause (a), or clause (e) of that sub-section:

But after taking previous approval of CG and CG shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

(4) A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by **a statement of affairs** in such form and in such manner as may be prescribed.

(5) A copy of the petition shall also be filed with the ROC and the ROC shall, without prejudice to any other provisions, submit his views to the Tribunal **within 60 days** of receipt of such petition.

Powers of Tribunal [Sec 273]

(1) On receipt of a petition, NCLT may pass any of the following orders, namely:—

a. Dismiss it, with or without costs;
b. Make any interim order as it thinks fit;
c. Appoint a P**rovisional liquidator** of the company till the making of a winding up order;
d. Make an order for the winding up of the company with or without costs; or
e. Any other order as it thinks fit:

Provided that order shall be made **within 90 days** from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator, the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

Direction for filing statement of affairs [Sec 274]

(1) If petition is filed by any person other than the company, the Tribunal shall, if satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a statement of its affairs **within 30 days** of the order in such form and in such manner as may be prescribed:

However a further period of 30 days may be provided by NCLT in a situation of contingency or special circumstances:

NCLT may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

(2) If company, fails to file the statement of affairs, right to oppose the petition shall be forfeit and directors and officers in default, shall be liable for punishment.

(3) The directors and other officers of the company, shall, within 30 days of such order, submit, at the cost of the company, the audited books of account up to the date of the order, to liquidator specified by the Tribunal.

(4) Punishment→ Imprisonment up to **6 months OR** Fine → Min - Rs. 25,000 up to **Rs. 5 Lakh**, **OR** with both.

(5) The complaint may be filed in this behalf before the Special Court by ROC, provisional liquidator, Company Liquidator or any authorised person.

Company Liquidators and their appointments [Sec 275]

(1) The Tribunal shall appoint an Official Liquidator or a liquidator from the panel maintained, as the Company Liquidator.
(2) The provisional liquidator or the Company Liquidator, as the case may be, shall be appointed by the Tribunal from amongst the Insolvency Professional registered under the IBC 2016.
(3) Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator.
(4) The terms and conditions of appointment of a provisional liquidator or Company Liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company.
(5) On appointment, such liquidator shall file **a declaration within 7 days** from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.
(6) The Tribunal may appoint a provisional liquidator, if any, appointed u/s 273(1)(c), as the Company Liquidator for the conduct of the proceedings for the winding up of the company.

Removal and replacement of liquidator [Sec 276]

(1) The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on any of the following grounds, namely:—
a. Misconduct;
b. Fraud or misfeasance;
c. Professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;
d. Inability to act as provisional liquidator or as the case may be, Company Liquidator;
e. Conflict of interest or lack of independence during the term of his appointment that would justify removal.

(2) In the event of death, resignation or removal of the PL/CL, the Tribunal may transfer the work assigned to another Company Liquidator for reasons to be recorded in writing.
(3) If liquidator is responsible for causing any loss or damage to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his or its powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.
(4) Before Passing an Order Tribunal shall, provide a reasonable opportunity of being heard to the provisional liquidator or, as the case may be, Company Liquidator.

Intimation to Company Liquidator, provisional liquidator and ROC [Sec 277]

(1) On appointment of provisional liquidator or winding up order, NCLT shall, **within 7 days** from the date of passing of the order, cause intimation thereof to be sent to the Company Liquidator or provisional liquidator, as the case may be, and the ROC.
(2) On receipt of the copy of order, the ROC shall record it and notify in the Official Gazette that such an order has been made and in case of a listed company, the **ROC** shall also intimate, to the SE where the securities of company are listed.

(3) The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.

(4) **Within 3 weeks** from the date order, the Company Liquidator shall make an application to the Tribunal for constitution of a **winding up committee** to assist and monitor the progress of liquidation proceedings by the Company Liquidator in carrying out the function and such winding up committee shall comprise of the following persons, namely:—

i. Official Liquidator attached to the Tribunal;
ii. Nominee of secured creditors; and
iii. A professional nominated by the Tribunal.

(5) The Company Liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—

i. Taking over assets;
ii. Examination of the statement of affairs;
iii. Recovery of property, cash or any other assets of the company including benefits derived there from;
iv. Review of audit reports and accounts of the company;
v. Sale of assets;
vi. Finalisation of list of creditors and contributories;
vii. Compromise, abandonment and settlement of claims;
viii. Payment of dividends, if any; and
ix. Any other function, as the Tribunal may direct from time to time.

(6) The Company Liquidator shall place a report along with minutes of the meetings of the committee before NCLT on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal.

(7) The Company Liquidator shall prepare the draft final report for consideration and approval of the winding up committee.

(8) The final report so approved by the winding up committee shall be submitted by the Company Liquidator before the Tribunal for passing of a dissolution order in respect of the company.

Effect of winding up order [Sec 278]

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories

Stay of suits, etc., on winding up order [Sec 279]

(1) When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:
Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within 60 days.

(2) The above Provisions shall not apply to any proceeding pending in appeal before the Supreme Court or a High Court.

Jurisdiction of Tribunal [Sec 280]

The Tribunal shall, have jurisdiction to entertain, or dispose of,—

a. any suit or proceeding by or against the company;
b. any claim made by or against the company, including claims by or against any of its branches in India;
c. any application made u/s 233;
d. any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company,

Whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.

Submission of report by Company Liquidator [Sec 281]

(1) The liquidator shall, within 60 days from the order, submit to the Tribunal, a report containing the following particulars, namely:—
   a. The nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any.
      Note:→ Valuation of the assets shall be obtained from registered valuer for this purpose;
   b. Amount of capital issued, subscribed and paid-up;
   c. The existing and contingent liabilities of the company including details of its creditors, stating separately the amount of secured and unsecured debts, and particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;
   d. The debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;
   e. Guarantees, if any, extended by the company;
   f. List of contributories and dues, if any, payable by them and details of any unpaid call;
   g. Details of trademarks and intellectual properties, if any, owned by the company;
   h. Details of subsisting contracts, joint ventures and collaborations, if any;
   i. Details of holding and subsidiary companies, if any;
   j. Details of legal cases filed by or against the company; and
   k. Any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

(2) The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.

(3) The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.

(4) The Company Liquidator may also, if he thinks fit, make any further report or reports.

(5) Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts there from on payment of the prescribed fees.

Directions of Tribunal on report of Company Liquidator [Sec 282]

(1) The Tribunal shall fix a time limit within which the entire proceedings shall be completed and the company be dissolved:

However, Tribunal may, if it is of the opinion, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved.

(2) The Tribunal may, on examination of the CL reports and after hearing all parties, order sale of the company as a going concern or its assets or part thereof:

Provided that the NCLT may, appoint a sale committee comprising such creditors, promoters and officers of the company as the NCLT may decide to assist CL in sale.

(3) If it is found that a fraud has been committed in respect of the company, Tribunal shall, without prejudice to the process of winding up, **order for investigation u/s 210**, and on consideration of the report of such investigation it may pass order and give directions u/s 339 to 342 or direct the Company Liquidator to **file a criminal complaint** against persons who were involved in the commission of fraud.

(4) The Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company.

(5) The Tribunal may pass such other order or give such other directions as it considers fit.

Custody of company's properties [Sec 283]

(1) The Company Liquidator or the provisional liquidator, as the case may be, shall forthwith take into his or its custody or control all the property, effects and actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company.

(2) All the property and effects of the company shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company.

(3) The Tribunal may require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company, to pay, deliver, surrender or transfer forthwith, or within such time as the Tribunal directs, to the Company Liquidator, any money, property or books and papers in his custody or under his control to which the company is or appears to be entitled.

Promoters, directors, etc., to cooperate with Company Liquidator [Sec 284]

(1) The promoters, directors, officers and Past or Present employees, shall cooperate with Company Liquidator in discharge of his functions and duties.

(2) If any person fails to discharge his obligations, he shall be punishable with imprisonment up to 6 months or with fine up to Rs. 50,000, or with both.

Settlement of list of contributories and application of assets [Sec 285]

(1) As soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories, cause rectification of register of members in all cases where rectification is required in pursuance of this Act and shall cause the assets of the company to be applied for the discharge of its liability:

Provided that where it appears to NCLT that it would not be necessary to make calls on or adjust the rights of contributories, the Tribunal may dispense with the settlement of a list of contributories.

(2) In settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.

(3) While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—

a. a person who has been a member shall not be liable to contribute if he has ceased to be a member for the **preceding 1 year** or more before the commencement of the winding up;
b. A person who has been a member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;
c. No person who has been a member shall be liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;
d. in the case of a company limited by shares, no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;
e. in the case of a company limited by guarantee, no contribution shall be required from any person, who is or has been a member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up but if the company has a share capital, such member shall be liable to contribute to the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

Obligations of directors and managers [Sec 286]

In the case of a limited company, any person who is or has been a director or manager, whose liability is unlimited under the provisions of this Act, shall, in addition to his liability, if any, to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of winding up, a member of an unlimited company:

Provided that —

a. a person who has been a director or manager shall not be liable to make such further contribution, if he has ceased to hold office for a year or upwards before the commencement of the winding up;
b. a person who has been a director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;
c. Subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Tribunal deems it necessary to require the contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

Advisory committee [Sec 287]

(1) The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.

(2) The advisory committee appointed by the Tribunal shall consist of not more than twelve members, being creditors and contributories of the company or such other persons in such proportion as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct.
(3) The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee.
(4) The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.
(5) The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed.
(6) The meeting of advisory committee shall be chaired by the Company Liquidator.

Submission of periodical reports to Tribunal [Sec 288]

(1) The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed.
(2) The Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit.

Power of Tribunal on application for stay of winding up [Sec 289] Omitted by IBC 2016

Powers and duties of Company Liquidator[Sec 290]

(1) Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power—

a. To carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
b. To do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company‘s seal;
c. To sell the immovable and movable property and actionable claims of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;
d. To sell the whole of the undertaking of the company as a going concern;
e. To raise any money required on the security of the assets of the company;
f. To institute or defend any suit, prosecution or other legal proceeding, civil or criminal, in the name and on behalf of the company;
g. To invite and settle claim of creditors, employees or any other claimant and distribute sale proceeds in accordance with priorities established under this Act;
h. To inspect the records and returns of the company on the files of the Registrar or any other authority;
i. To prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

j. To draw, accept, make and endorse any negotiable instruments including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
k. To take out, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;
l. To obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;
m. To take all such actions, steps, or to sign, execute and verify any paper, deed, document, application, petition, affidavit, bond or instrument as may be necessary,—
   i. for winding up of the company;
   ii. for distribution of assets;
   iii. in discharge of his duties and obligations and functions as Company Liquidator; and
   iv. To apply to the Tribunal for such orders or directions as may be necessary for the winding up of the company.

(2) The exercise of power by the Company Liquidator under sub-section 1 shall be subject to the overall control of the Tribunal.
(3) Notwithstanding the provisions of sub-section (1), the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

Provision for professional assistance to Company Liquidator [Sec 291]

(1) The Company Liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners or such other professionals on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act.

(2) Any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

Exercise and control of Company Liquidator‘s powers [Sec 292]

(1) Subject to the provisions of this Act, the Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by the resolution of the creditors or contributories at any general meeting or by the advisory committee.
(2) Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee.
(3) The Company Liquidator—
   a. May summon meetings of the creditors or contributories, whenever he thinks fit, for the purpose of ascertaining their wishes; and

b. Shall summon such meetings at such times, as the creditors or contributories, as the case may be, may, by resolution, direct, or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories, as the case may be.

(4) Any person aggrieved by any act or decision of the Company Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances.

Books to be kept by Co. Liquidator[Sec 293]

(1) The co. Liquidator shall keep proper books in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed.

(2) Any creditor or contributory may, subject to the control of the Tribunal, inspect any such books, personally or through his agent.

Audit of Company Liquidator's accounts [Sec 294]

(1) The Company Liquidator shall maintain proper and regular books of account including accounts of receipts and payments made by him in such form and manner as may be prescribed.

(2) The Company Liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed.

(3) The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company Liquidator shall furnish to the Tribunal with such vouchers and information as the Tribunal may require, and the Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company Liquidator.

(4) When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested.

(5) Where an account referred to in sub-section (4) relates to a Government company, the Company Liquidator shall forward a copy thereof—

a. to the Central Government, if that Government is a member of the Government company; or
b. to any State Government, if that Government is a member of the Government company; or
c. to the Central Government and any State Government, if both the Governments are members of the Government company.

(6) The Company Liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory:

Provided that the Tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit.