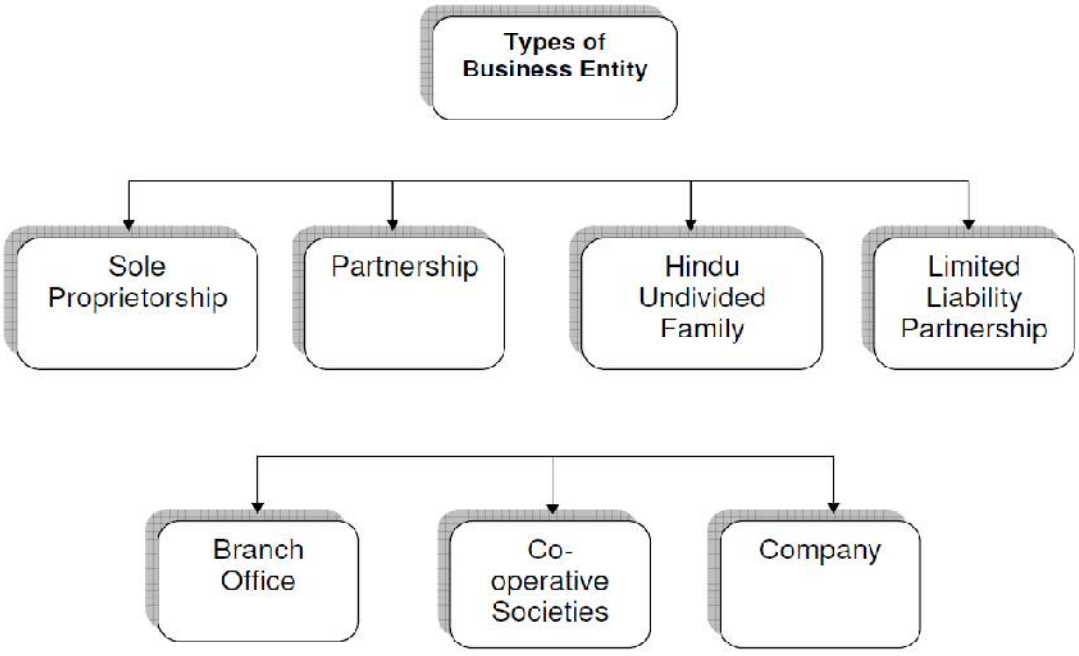
CHAPTER 1 -CHOICE OF BUSINESS ORGANISATION

INTRODUCTION

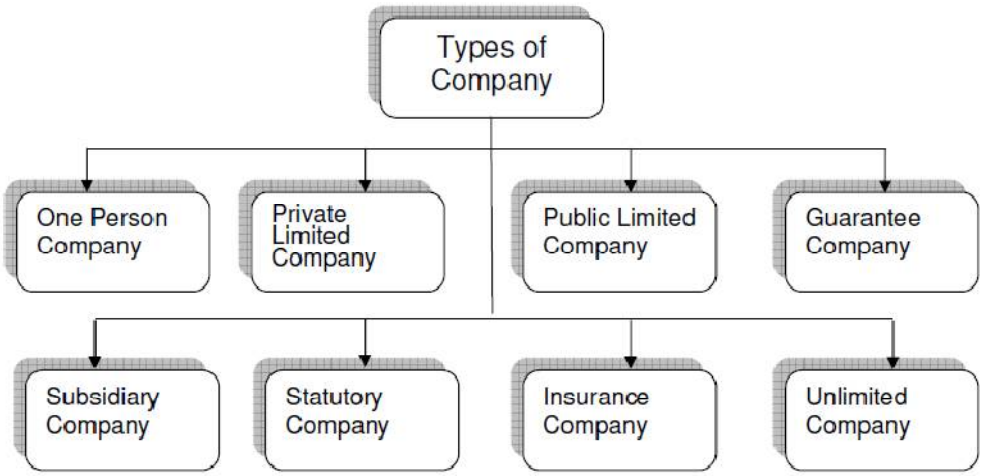
It refers to all those steps that need to be undertaken for establishing and maintaining relationship between men, material, and machinery to carry on the business efficiently for earning profits.

Following are the various types of Business Entities which can be used for establishing any business, however, the choice will depend on various parameters, which we will discuss later in this chapter



- The main types of business entities in India are:
  - ✓ Sole Proprietorship, Partnership, Hindu Undivided Family (HUF) Business, Limited Liability Partnership (LLP), Co-operative Societies, Branch Office
  - ✓ Company which may be any kind of company including oneperson company (OPC), private limited company, public limited company, guarantee company, subsidiary company, statutory company, insurance company or unlimited company.
  - ✓ Further, Company formed under section 8 of the Companies Act, 2013 or under section 25 of the earlier Companies Act of 1956 is a non-profit business entity.
  - ✓ There can also be Association of Persons (AOP) and Body of Individuals (BOI), Corporation, Co-operative Society, Trust etc.

- Types of Companies: Under the CA, 2013, various categories of the Company have been defined which can be set up for carrying on the operations of the Company.



Why to make a Choice?

- The right choice of the form of the business is very crucial because it determines the power, control, risk and responsibility of the entrepreneur as well as the division of profits and losses.

- The selection of a suitable form of business organisation is an important entrepreneurial decision because it influences the success and growth of a business — e.g., it determines the division or distribution of profits, the risk associated with business, and so on.

- Once a form of business organisation is chosen, it is very difficult to switch over to another form because it needs the winding up, dissolution of the existing organisation which may be treated as a case which is raised by oneself to face with the complex issues and procedures which ultimately results into the waste of time, effort and money. Further, closure of business will entail loss of business opportunity, capital and employment.

- The form of business organisation must be chosen after giving the due thought and consideration in respect of all the sides of the glorious coin of each form of business entity and its suitability to the business ideas of an entrepreneur.

- The different forms of organisationstructure differ from each other in respect of division of profit, control, risk, legal formalities, flexibility, etc.

Factors to be considered

I. Nature of Business Activity

- In small tradingbusinesses, professions, and rendering of personal services, sole-proprietorship is predominant. E.g. small retail shops, medicine stores etc.

  As an alternative, OPC can be formed if the owner wished to provide a legal entity status to his business

- Thepartnership is suitable in all those cases where sole proprietorship is suitable, provided the business is to becarried on a slightly bigger scale with help of one or more partner (owner). E.g. trading, consulting agencies, hotels, small manufacturing etc.

  As an alternative, LLP can be formed by the partners, wherein the liability of the partners would be limited and will also provide a legal entity status to the business

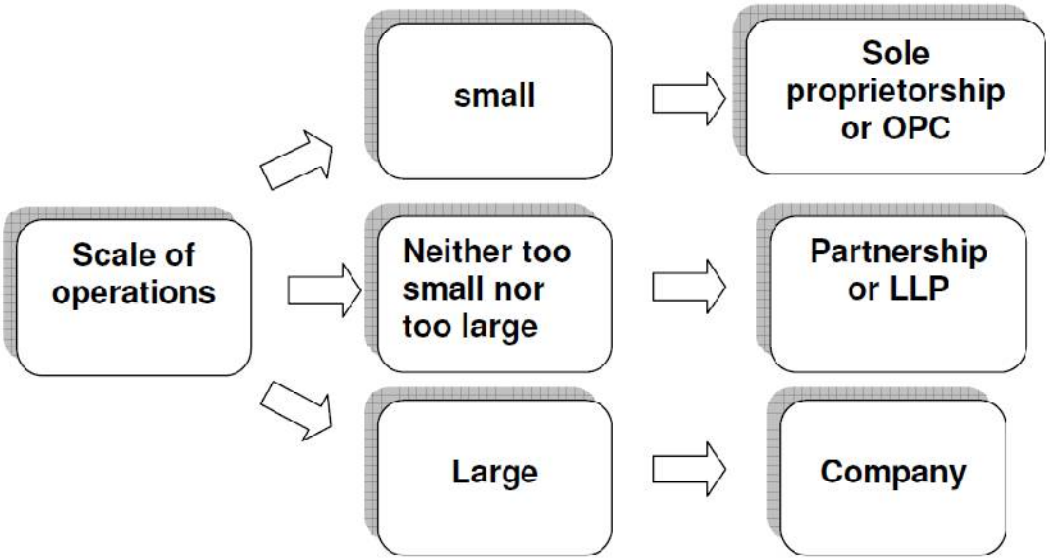
- In case if the owner wishes to start a business with large capital, then it is always advisable to have a business in the form of a limited Company, as it will provide a veil between the promoters and company's business.

II. Scale of Operations

- 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;

- In case of large scale of operations, the company form is advantageous.



III. Capital requirement

- Enterprises requiring heavy investment (like iron and steel plants, large scale infrastructure projects, etc.) should be organised as companies. Depending on the capital required, they can be set up as public companies and in some cases, may be in the form of listed companies by raising money from the public and being listed on the stock exchanges.

- Enterprises requiring small investment (like retail business stores, personal service enterprises, etc.) can be best organised as sole proprietorships or even as Partnerships. Apart from the initial capital required to start a business, the future

capital requirements—to meet modernisation, expansion, and diversification plans — also affect the choice of form of organisation.

- In sole proprietorship, the owner may raise additional capital by borrowing, by purchasing on credit, and by investing additional amounts himself. Banks and suppliers, however, will look closely at the proprietor's individual financial resources before sanctioning any loans or advances.

- Partnerships can often raise funds with greater ease, since the resources and credit of all partners are combined in a single enterprise.

- Companies are usually best able to attract capital because investors are assured that their liability will be limited, their operations are in public domain in the transparent manner, easily accessible and the ownership can be transferred to other investors.

IV. Managerial ability

- Sole proprietor didn't have expertise in all functional areas of business and 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. However, this may sometimes lead to conflicts due to differences of opinion.

- Company form of organization is a better alternative if the operations are large, complex in nature and require professional management at various levels.

V. Degree of Control and Management

- In Sole proprietor and OPC, the control is completely centralized with the owner/sole member

- In Partnership/LLP, the management and control is distributed among the members vide Partnership/LLP Agreement

- In a Company, the management and control lies with the Directors, who are appointed by the shareholders (owners) of the Company.

VI. Degree of risk and liability

- In Sole proprietorship, the sole proprietor is solely liable for all acts and liabilities of the business

- In partnership, partners are individually and jointly liable for all their acts and liabilities

- In case of OPC/LLP/Company, the liability of owners is limited

VII. Stability of Business

- Companies and LLP have the most stability due to its feature of perpetual succession and separate legal entity. Members may come and go but the business continues.

- Sole proprietorship is the least stable form as it depends upon an individual.

VIII. Flexibility of Administration

- Means the ease with which internal organization can be formed or changed
- Sole Proprietor and Partnership firms have an advantage of carrying out the business most administratively.
- Companies have rigid structure and thus are less flexible

IX. Division of Profit

- One of the most important factor considered while setting up a business
- If this the criteria for forming an organization, then the most preferred way is setting up Sole Proprietorship
- In Partnership, the profits are divisible among the partners in the ratio as agreed between them in Partnership deed and thus is the preferred way of organization where the owners want to distribute the profit
- In case of Companies, the profit is distributed among the members and depends upon the discretion of the Board as well as the profitability of the Company.

X. Costs, Procedure and Government regulations

- Sole Proprietorship are the easiest and cheapest way of starting the business. There is no government regulation and the owner need to acquire the basic approvals like GST, license etc. for setting up the business.
- Partnerships are also simple as it requires an agreement (though even the written agreements are not compulsory). Dissolution of partnership is also simple.
- Company is the most complicated and regulated form of doing any business. The expenditure of incorporating a Company is also quite high as compared to other forms. Winding up is again a cumbersome and costly process.

XI. Tax Implication

- Plays an important role while setting up any business
- **Sole Proprietorship:**IT rates are similar to what an individual is paying.
- **Partnership firms including LLP** are liable to pay tax @30%. If the income exceeds Rs. 1 crore, then an additional surcharge of 12% on the amount of tax. Further, they also need to pay education cess @2% and secondary & higher education cess @1% on the amount of tax. Partnership firms are also required to pay alternate minimum tax at the rate of 18.5% of “adjusted total income”.
- **Company:** Net Profit of a domestic company is taxable @ 30%. However, tax rate is 25% if turnover or gross receipt of the company does not exceed Rs. 50 crore. In addition, there is:

(a) Surcharge @ 7% of tax where total income exceeds Rs. 1 crore and below Rs. 10 Crores and 12%of tax where total income exceeds Rs. 10 crores and

(b) Education Cess@ 2% of tax plus surcharge

(c) Secondary and Higher Education Cess@ 1% of income tax and surcharge.

- **Co-operative Society:**The tax rate is:

- @10% for taxable income uptoRs. 10,000,
- @20% for taxable income between Rs. 10,000 to Rs. 20,000 and
- @30% for taxable income above Rs. 20,000.

In addition, there is:

(a) Surcharge @ 12% of tax where total income exceeds Rs. 1 crore;

(b) Education Cess@ 2% of tax plus surcharge

(c) Secondary and Higher Education Cess@ 1% of income tax and surcharge.

XII. Geographical Mobility

- For dealing in local market/ a seasonal or perishable product/ to cater a specific city or locality, then sole proprietorship or partnership form ofbusiness may be suitable.
- If it is proposed to market the product or service all over India (which may also entailproviding customer support services), a company form of organisation may be preferred.

XIII. Transferability of Ownership

- *Sole Proprietorship:* Single man doing the business and hence there is no scope for transferability of ownership.
- *Partnership*: Ownership can be changed if the existing partner decided to quit.
- *Company*: Shares are freely transferable from one person/entity to another person/entity.

XIV. Managerial Needs

- If business caters to more areas, then there is definitely a need to look into various aspects of the business, wherein the Company is the best option. However, where the concerns are small, a sole proprietorship will also serve the purpose.

XV. Secrecy

- In Sole proprietorship the secrecy is at its supreme level. However, as we move into other forms or organization, the level started to come down. In case of Company, the

Company's data is accessible on MCA website. Further, as per various provisions of CA, 2013 and SEBI, a Company needs to disclose its various information and document to the authority(s), which would also be available on the public domain.

XVI. 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.

Following is the quick look into the legal implications for the major business types in India:

Legal Details	**Business Types**			
	Proprietorship	**Partnership**	**LLP**	**Company**
Registration	No formal registration is required	Registration is optional	Has to be registered under LLP Act	Has to be registered under CA, 2013
Legal Status	Not recognized as separate entity	Not recognized as separate entity and Partners are personally liable for defaults	Separate Entity	Separate Entity
Liability of member	Unlimited	Unlimited	Limited	Limited
No. of members required	Can have only 1 member	Minimum 2	Minimum 2	OPC: 1 Pvt.: 2 Public: 7
Transferability	Not Transferable	Not Transferable	Transferable	Transferable
Taxation	Taxed as Individual	Slabs provided under IT Act	Slabs provided under IT Act	Slabs provided under IT Act
Annual Statutory meetings	No such requirement	No such requirement	No such requirement	Required
Annual Filings	Only Income Tax return is compulsory	Only Income Tax return is compulsory	Must file Annual statement, Annual Return and IT Return	Annual Accounts, Annual return and IT return
Existence	Dependent on Proprietor	Dependent on existence of Partners. Can be dissolved at will also	Existence not dependent upon Partners. Can be wound up as per LLP Act	Existence not dependent upon Partners. Can be wound up as per CA, 2013
Foreign Ownership	Not allowed	Not allowed	Allowed with certain restrictions from RBI	Allowed with certain restrictions from RBI

CHAPTER 2 - TYPES OF COMPANIES

The Companies Act, 2013 provides for the companies that can be promoted and registered under the Act. The types of companies which may be registered under the Act are:

(a) Private Companies

(b) One Person Company (to be formed as private limited)

(c) Public Companies

(d) Producer Companies [The Companies Act, 2013 do not make any provisions for producer company. The provisions of the Companies Act, 1956 will continue to apply until special Act is enacted for producer company.]

SECTION 2(68) - PRIVATE COMPANY

A private company means a company, which has a minimum paid-up capital as may be prescribed, and by its articles:

(a) **Restricts** the right to transfer its shares

(b) **Limits** the number of its members to 200 excluding past and present employee

(c) **Prohibits** any invitation to the public to subscribe for any securities

A private company may issue debentures to any number of persons. The only condition being that an invitation to the public to subscribe for debentures is prohibited.

The words **'Private Ltd.'** must be added at theend of its name by a **private limited** company.

Deposits: A private company can only accept deposit from its members and not from public.

No. of Members [Section 3(1)]

A private company may be formed for any lawful purpose by two or more persons, by subscribing their names to a memorandum and complying with the requirements in respect of registration.

No. of Directors [Section 149(1)]

A private company shall have a minimum 2 directors. The only 2 members may also be the 2 directors of the private company.

Special privileges and exemptions of private companies

The Companies Act, 2013 confers certain privileges on private companies. Such companies are also exempted from complying with quite a few provisions of the Act. The basic rationale behind this is that since the private limited companies are restrained from inviting capital from the public, not much public interest is involved in their affairs as compared to public limited companies. Some of the special privileges and exemptions of private companies are as follows:

Sections	Nature of Exemption/Privileges
Section 67(2)	Financial assistance can be given forpurchase of or subscribing to its own shares or shares in its holding company.
Section 121(1)	Need not prepare a report on the Annual General Meeting.
Section 134(3)(p)	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.
Section 149(1)	Private company need not have more than two directors.
Section 149(4)	Need not appoint Independent directors on its Board.
Section 152(6)	A proportion of directors need not retire every year.
Section 164(3)	Additional grounds for disqualification for appointment as a director may be specified by the company in its articles.
Section 165(1)	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 or subsidiary company of a public company.
Section 167(4)	Additional grounds for vacation of office of a director may be provided in the Articles.
Section 190(4)	The provisions relating to contract of employment with managing or whole-time directors does not apply to a private company.
Section 197(1)	Total managerial remuneration payable by a private company, to its directors, including managing director andwhole-time director, and its manager in respect of any financial year may exceed 11% of the net profits.

Special obligations of a private company

A private company owes certain special obligations as compared to a public company, which are as follows:

(1) **Annual Return [Section 92]:** While filing its annual return with the ROC, a private company must also send a certificate stating that the company has not issued any invitation to the public to subscribe for its shares or debentures and that the number of members of the company does not exceeds 200& the excess comprises wholly of persons who are excluded while reckoning the number of 200.

(2) The Company continued to be a Private Company during the financial year.

Consequences of Alteration of the AoA of private company

As per proviso to section 14(1), where a company being a private company alters its articles in such amanner that they no longer include the restrictions and limitations which are required to be included in thearticles of a private company under section 2(68), the company shall, as from the date of such alteration,cease to be a private company. In such a case, it shall be treated as a public company from the date ofalteration of its articles.

Characteristics of Private Limited Company

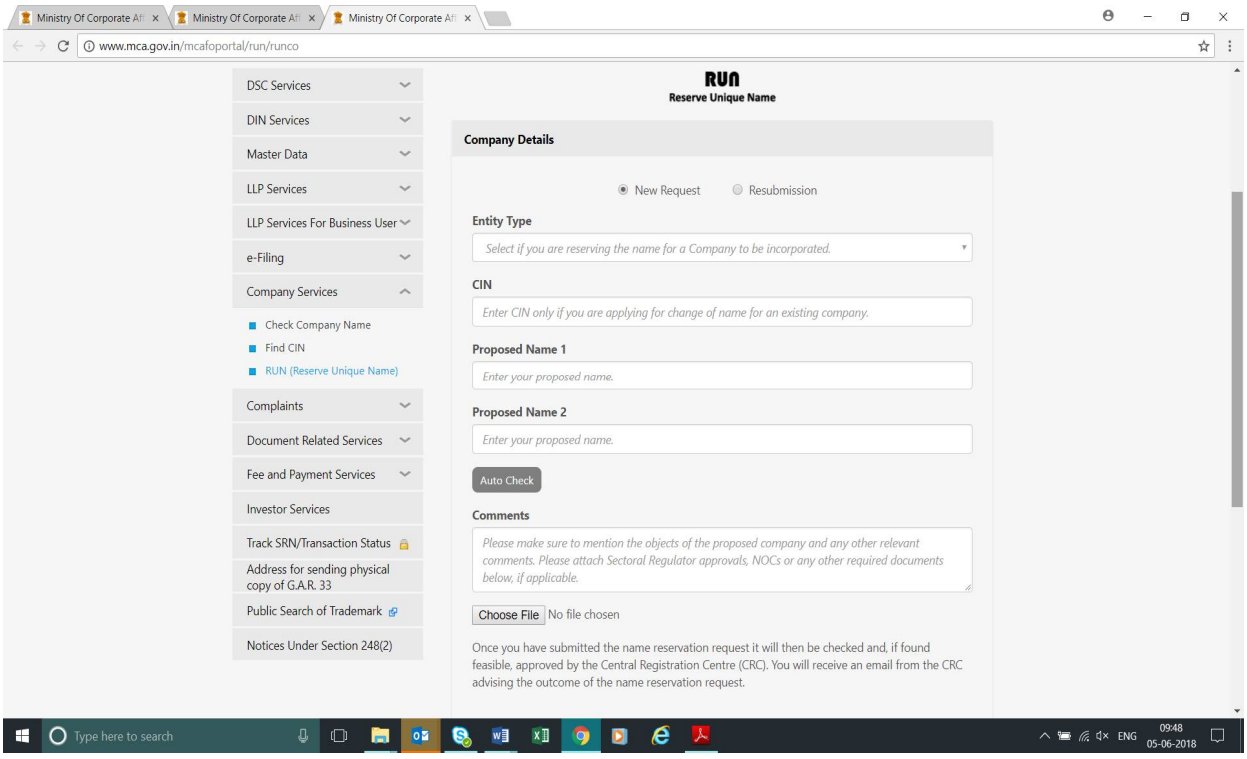
- Minimum 2 members and maximum 200 members (excluding present and ex-employees and Joint holders)
- Minimum 2 Directors, maximum 15 directors.
- The words ‘Private’ must be added at the end of name (i.e. ABC Private Limited)

- Paid-up capital: There is no minimum capital requirement
- Restriction on transfer of shares
- Prohibition on invitation to public for subscribing the securities of the Company
- All other characteristics of a Company

INCORPORATION OF A PRIVATE LIMITED COMPANY

Step 1: Name Approval

- For the purpose, the applicant need to login on MCA website and click on "RUN" in MCA services.
- "RUN" (Reserve Unique Name) form is to be submitted online and can't be downloaded
- Fill-up the form and submit the same with MCA (maximum 2 names are allowed)
- Payment of fees (No DSC is required for submitting this form with MCA)
- The name will be available for 20 days from the date of approval.



Step 2: Preparation of Documents

- **INC-9**- Affidavit / declaration by first subscriber(s) and director(s)(on duly authorized Stamp

Papers).

- **DIR-2**- Declaration from first Directors along with Copy of Proof of Identity and residential address.
- **NOC** from the owner of the property.
- Correspondence address and e-mail id of the Company should be available
- Details of first subscribers needs to be mentioned in the form and a proof of identity (preferably DIN) should be mentioned therein.
- All the Subscribers should have Digital Signature.

Step 3: Fill the information in the Form

Once all the above mentioned documents/ information are available. Applicant has to fill the information inthe e-form **"SPICe" (INC-32)**.*SPICe means Simplified Proforma for Incorporating Company Electronically*

- All the items marked with asterisk (*) should be filled-up in the form.
- Maximum details of subscribers in the form can be 7. In case of more subscribers, physically signed MOA & AOA shall be attached in the Form.
- Details of Directors to be filled up (DIN need to be entered and rest of the information is Prefill)
- Maximum 3 directors are allowed for filing application of allotment of DIN while incorporating a Company.
- Person can apply the Name also in this form.
- By affixation of DSC of the subscriber on the INC-33 (e-moa) date of signing will be appear automatically by the form.
- Applying for PAN / TAN will be compulsory for all fresh incorporation applications filed in the new version of the SPICe form.

Step 4: Preparation of MOA and AOA

After proper filing of SPICe form applicant has to download the e-form INC-33 (MOA) and INC-34 (AOA) formthe MCA site. After downloading of forms, fill all the information in the forms as per requirement of Table A to Jof Schedule I.

After completely filing of the form affix DSC of all the subscribers and professional on subscriber sheet of theMOA & AOA.

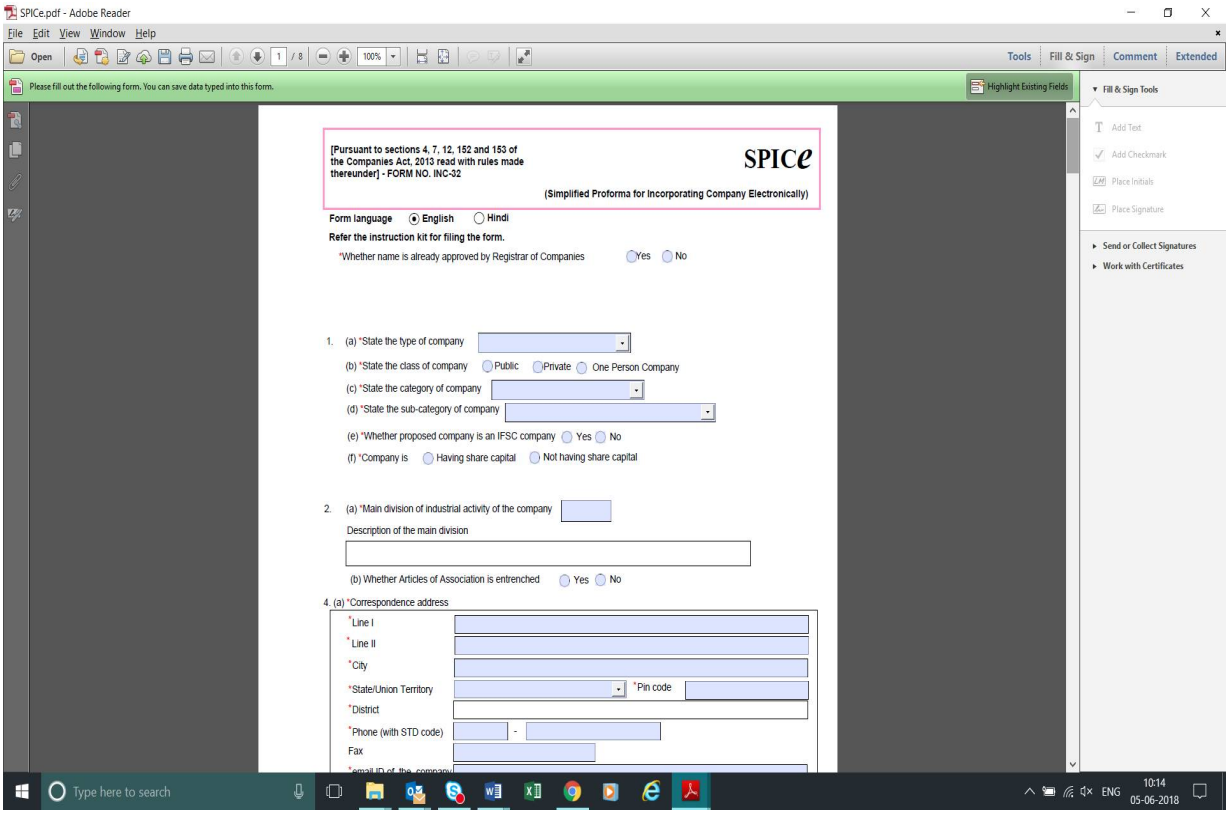
Step 5: Fill details of PAN & TAN

It is mandatory to mention the details of PAN & TAN in the Incorporation Form INC-32. Link to find out ofArea Code to file PAN & TAN are given in Help Kit of SPICE Form.

Step 6: Submission of INC 32 (SPICe), 33, 34

Once all the 3 forms ready with the applicant, upload all three documentas Linked form on MCA website andmake the payment of the same.

Incorporation certificate shall be generating with CIN, PAN & TAN.



PUBLIC COMPANY[SECTION 2(71)]:

A public company means a company which:

(a) is not a private company;

(b) has a minimum paid-up capital as may be prescribed (no such capital has been prescribed as per law).

However, a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company even where such subsidiary company continues to be a private company in its articles.(This means, if private company is subsidiary of public company then it will be treated as public company)

Characteristics of Public Limited Company

- Minimum 7 members and no limit on maximum members
- Minimum 3 Directors, maximum 15 directors.

- The words 'Limited' must be added at the end of name (i.e. ABC Limited)
- Paid-up capital: There is no minimum capital requirement
- All other characteristics of a Company

INCORPORATION OF A PUBLIC LIMITED COMPANY

Any 7 or more persons can incorporate a public limited company. The following steps are involved for registration and incorporation of the company.

Prohibition of certain names [Section 4(2) &**(3)]:** The name stated in the memorandum of association shall not:

(a) be identical with or resemble too nearly to the name of an existing company registered under the Act or any previous company law or*(if identical name is to be used, then one need to take NoC from the existing Company to do so and the same needs to be filed with RoC also)*

(b) be such that its use by the company -

(i) will constitute an offence under any law for the time being in force or
(ii) is undesirable in the opinion of the Central Government.

A company shall not be registered with a name which contains -

(a) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central or State Government, or any local authority, corporation or body constituted by the Central or State Government or

(b) Such word or expression which requires previous approval of the Central Government.

Application for availability of name of company [Section 4(4)]: A person may make an application, in Form No. INC 1 and accompanied by prescribed fee to the Registrar for the reservation of a name set out in the application as-

(a) the name of the proposed company or

(b) the name to which the company proposes to change its name. [Rule 9]

Reservation of name by ROC [Section 4(5) (i)]: Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a **period of 20 days**(earlier 60 days) from the date of the Approval (if name is reserved by an existing Company, its 60 days' from the date of approval)

In Form No, INC 1, six names are required to be given (in order of preference). The ROC shall ordinarily furnish the information by way of letter within 14 days of receipt of the application whether name is available or not.

Preparation of MOA & AOA: MOA & AOA are the two important documents which must be prepared by the promoters and are required to be filed with the ROC at the time of registration.

Power of Attorney: The promoters may appoint professional like Company Secretary to carry out the

work of incorporation of company in such case promoter are required to execute a Power of Attorney on a non-judicial stamp paper authorizing CS to take all the necessary steps for the incorporation of company.

Declaration from the professional [Section 7 (1)(b)]: A declaration by an advocated CA, CMA or CS and by a person named in the articles as a director, manager or secretary of the company is required to be filed in Form No. INC 8 stating that all the requirements of the Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with. [Rule 14]

Declaration from the subscribers to the Memorandum [Section 7 (1) (c)]: An affidavit in Form No. INC 9 is required to be filed by each of the subscribers to the memorandum and persons named as the first directors stating that:

- He is not convicted for any offence relating to promotion, formation or management of any company or

- He has not been found guilty of any fraud or misfeasance or of any breach of duty during the preceding 5 years

- All the documents filed for registration of the company with the ROC contain information that is correct, complete and true. [Rule 15]

Furnishing verification of Registered Office [Section 12): A company shall have registered office from the 30th day of its incorporation. The company can furnish to the Registrar verification of registered office within 30 days of incorporation in Form No. INC 22. {Earlier the timeline was 15 days from Incorporation. Changed under Companies Amendment Act, 2017
}

Particulars of subscribers [Section 7 (1)(e)]: The particulars of name, surname or family name, residential address, nationality and other particulars of every subscriber to the memorandum along with proof of identity has to be filed in Form No. INC 10. [Rule 16]

Particulars of first directors along with their consent to act as directors [Section 7 (1) (f)]: The particulars of the first directors of the company, their names, surnames or family names, DIN, residential address, nationality and other particulars including proof ofidentity has to be filed in Form No. DIR 12. [Rule 17]

Particulars of interests of first directors in other firms or bodies corporate [Section 7 (1)(g)]:The particulars of the interests of first directors in other firms or bodies corporate along with their consent to act as directors of the company has to befiled in **Form No. DIR 12. [Rule 17]**

Issue of Certificate of Incorporation by Registrar [Section 7(2)] and allotment of Corporate Identity Number (CIN): The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in **Form No. INC 11** to the effect that the proposed company is incorporated under this Act. [Rule 18]

Effect of Registration [Section 9]: From the date of incorporation mentioned in the certificate of incorporation, subscribers to the memorandum become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company having perpetual succession *and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

** Deleted by. Companies (Amendment) Act, 2015*

Distinction between: Public Company & Private Company

Following are the main points of distinction between public and private company:

Points	Public Company	Private Company
Meaning	The minimum number of persons required to form a public company is 7 and no restriction on maximumnumber of members.	The minimum requirement is only of 2 persons and the maximum limit is of 200 persons.
No. of directors	It must have at least 3 directors.	It must have at least 2 directors.
Subscription for shares & debenture	A public company can invite the general public to subscribe the shares or debentures of the company.	A private company is prohibited by its Articles to subscribe the shares or debentures of the company.
Transfer of shares	Shares of public companies are freely transferable.	In. a private company, transferability of shares is restricted by Articles.
Special privileges	There are no special privileges enjoyed by a public company.	A private company enjoys some special privileges under the Companies Act, 2013.
Managerial remuneration	In case of public-company total managerial remuneration cannot exceed 11% of the net profits.	In case of private company, no such restriction on remuneration applies.

SECTION 2(62) - ONE PERSON COMPANY

One Person Company means a company which has **only one person as a member**.

Directors: A One Person Company shall have a **minimum of one director**. Therefore, a One Person Company will be registered as a private company with one member and one director.

In case of OPC an individual being its member shall be deemed to be its first director until a director or directors are duly appointed by the member in accordance with the provisions of that section. [Section 152(1)]

Type of OPC [Section 3(2)]: An OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company.

Rule 3 of Companies (Incorporation) Rules, 2014 relating to One Person Company make the following provision:

(1) Only a natural person who is an Indian citizen and resident in India-

(a) shall be eligible to incorporate a OPC

(b) shall be a nominee for the sole member of a OPC.

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

(2) One person can incorporate only one OPC or become nominee in one OPC.

(3) Where a natural person, being member in OPC becomes a member in another OPC by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria within a period of 180 days.

(4) Minor cannot become member or nominee of the OPC or can hold sharewith beneficial

interest.

(5) OPC cannot be incorporated or converted into a Section 8 company. [i.e. non-profit making company]

(6) OPC cannot carry out Non-Banking Financial Investmentactivities including investment in securities of anybody corporate.

(7) OPC can convert voluntarily into any kind of company after 2 yearsfrom the date of incorporation of OPC, except where paid-up share capital is increased beyond Rs. 50 lakhsor its average annual turnover during the relevant period exceeds Rs. 2 Crore. OPC need to file INC-5 within 60 days of exceeding the limit.

Contract by One Person Company [Section 193]: Where OPC enters into a contract with the sole member who is also the director, the company shall ensure that the terms of the contract or offer are recorded in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. If the contract is in writing no recording is required.

However, above said provision shall not apply to contracts entered into by the OPC in the ordinary course of its business.

The company shall inform the ROC about every contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors within a period of 15 days of the date of approval by the Board of Directors

Privileges of a One Person Company

The privileges and exemptions enjoyed by a one person company or its advantages over other companies are as follows:

Sections	Nature of Exemption/Privileges
Section 2(40)	The financial statement, with respect to One Person Company, may not include the cash flow statement.
Section 67(2)	Financial assistance can be taken by the member from the OPC for purchase of or subscribing to its own shares.
Section 92(1)	The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words, it need not be signed by a company secretary in practice.
Section 96(1)	Need not hold annual general meeting.
Section 121(1)	Need not prepare a report on Annual General Meeting.
Section 122(1)	The provisions of Section 98 and Sections 100 to 111 shall not apply to a One Person Company.
Section 122(3)	For any business which is required to be transacted at an annual general meeting or Other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution

	is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the dale of the meeting for all the purposes under this Act.
Section 122(4)	Where there is only one director on the Board of Director of a One Person Company and any business is required to be transacted at the meeting of the Board of Directors of the company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all purposes under this Act.
Section 134(1)	Financial statement and Board's report can be signed only by one director
Section 134(3)(p)	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.
Section 134(4)	In case of a One Person Company, Board's report shall mean only a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.
Section 137(1) (Third proviso)	File a copy of the financial Statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.
Section 149(1)	One person company need not to have more than one director on its Board.
Section 149(4)	Need not to appoint Independent directors on its Board.
Section 152(6)	Retirement by rotation is not applicable.
Section 164(3)	Additional grounds for disqualification for appointment as a director may be specified by way of articles.
Section 165(1)	Restrictive provisionsregarding total number of directorships which a person may hold in a public company do not include directorships held in One Person company which are neither holding nor subsidiary company of a public company.
Section 167(4)	Additional grounds for vacation of office of a director may be provided in the Articles.
Section 173(5)	It is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days. For an OPC having only 1 director, the provisions of section 173 (Meetings of board) and section 174 (Quorum for meetings of Board) will not apply.

Section 190(4)	The provisions relating to contract of employment with managing or whole-time directors does not apply to a One Person Company.
Section 197(1)	Total managerial remuneration payable by a one person company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed 11% of the net profits.

Benefits of One Person Company

The concept of One Person Company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, access to market, limited liability, and legal protection available to companies.

Prior to the new Companies Act, 2013 coming in to effect, at least two shareholders were required to start a company. But now the concept of OPC would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery.Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now the OPC would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure. Further, the amount of compliance by a one person company is much lesser in terms of filing returns, balance sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

NIDHI / MUTUAL BENEFIT COMPANY *{AMENDED BY COMPANIES AMENDMENT ACT, 2017}*

- "Nidhi" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

- The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification—

    (a) shall not apply to any Nidhi or Mutual Benefit Society; or

    (b) shall apply to any Nidhi or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification.

The primary object of Nidhis is to carry on the business of accepting deposits and lending money to member-borrowers only against jewels, etc., and mortgage of property. For over a century Nidhis, with theobjective of cultivating the habit of thrift, generally promoted by public spirited men drawn from affluent localpersons, lawyers and professionals like auditors, educationists, etc., including retired persons. The area ofoperation was local – within municipalities and panchayats. Some Nidhison account of their financial andadministrative strength opened branches within the respective revenue district and even outside. Theprinciple of mutual benefit has been to pool the savings from members and lend only to members and neverhave dealing with Non-members. Nidhis were not expected to engage themselves in the business of ChitFund, hire purchase, insurance or in any other business including investments in shares or debentures. Asstated these Nidhis do their business only with Members. Such Members are only individuals. BodiesCorporate or Trusts are never to be admitted as Members.

As per section 406 of the Companies Act, 2013, “Nidhi” means a company which has been incorporated as aNidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving depositsfrom, and lending to, its members only, for their mutual benefit, and

which complies with such rules as areprescribed by the Central Government for regulation of such class of companies.

Incorporation of Nidhi Company

(1) A Nidhi to be incorporated under the Companies Act, 2013 shall be a public company and shallhave a minimum paid up equity share capital of five lakh rupees.

(2) Nidhi company shall not issue preference shares.

(3) If preference shares had been issued by a Nidhi before the commencement of the Companies Act,2013, such preference shares shall be redeemed in accordance with the terms of issue of suchshares.

(4) No Nidhi shall have any object in its Memorandum of Association other than the object of cultivatingthe habit of thrift and savings amongst its members, receiving deposits from, and lending to, itsmembers only, for their mutual benefit.

(5) Every Companyincorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of itsname.

Other Provisions applicable to Nidhi Company

(1) Every Nidhi shall, **within a period of one year from the commencement of these rules (1st April, 2014)**, ensure that ithas—

(a) Not less than 200 members;

(b) Net Owned Funds of Rs. 10 lakhor more;

(c) Unencumbered term deposits of not less than 10% of the outstanding deposits asspecified in rule 14; and

(d) Ratio of Net Owned Funds to deposits of not more than 1:20.

(2) Within 90 days from the close of the 1st FY after its incorporation Nidhi shall file a return of statutory compliances in Form NDH-1 along with RoC duly certified by a PCS/PCA/PCWA.

Every Nidhi company is required file half yearly return with theRegistrar in Form NDH-3 along with fee within 30 days from the conclusion of each half year duly certified by a PCS/PCA/PCWA.

(3) General Restrictions on Nidhi

No Nidhi Company shall:

a) Carry on the business of

- Chit Fund,
- Hire Purchase Finance,
- Leasing Finance,
- Insurance or Acquisition of Securities issued by anybody corporate;

b) Issue

- Preference Shares,
- Debentures or
- Any Other Debt Instrument by any name or in any form whatsoever;

c) Open any Current Account with its members;

d) 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 SR in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over Nidhi;

e) Carry on any business other than the business of borrowing or lending in its own name;

f) Accept Deposits from or lend to any person, other than its members;

g) Pledge any of the assets lodged by its members as security;

h) Take Deposits from or lend money to anybody corporate;

i) Enter into any Partnership Arrangement in its borrowing or lending activities;

j) Issue or cause to be issued any advertisement in any form for soliciting deposit;

k) Pay any brokerage or incentive for mobilizing deposits from members or for deployment of funds or the granting loans.

(4) Membership

a) A Nidhi shall not admit a body corporate or trust as a member.

b) Shall ensure that its membership is not reduced to less than 200 members at any time.

c) A minor shall not be admitted as a member of Nidhi.

But deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

(5) Share capital and allotment

a) Every Nidhi shall issue equity shares of the nominal value of not less than Rs.10/- each.

b) No service charge shall be levied for issue of shares.

c) Every Nidhi shall allot to each deposit holder at least a minimum of 10 equity shares or shares equivalent to Rs.100/-.

(6) Acceptance of deposits

a) The fixed deposits shall be accepted for a minimum period of 6 months and a maximum period of 60 months.

b) Recurring deposits shall be accepted for a minimum period of 12 months and a maximum period of 60 months.

c) Interest for fixed and recurring deposits shall be at a rate not exceeding the maximum rate of interest prescribed by RBI which the NBFC can pay on their public deposits.

d) Every Nidhi shall invest and continue to keep invested, in unencumbered term deposits with a scheduled commercial bank or post office deposits in its own name an amount which shall not be less than 10% of the deposits outstanding at the close of the business on the last working day of the second preceding month.

e) In case of unforeseen commitments, temporary withdrawal may be permitted with the prior approval of the Regional Director for the purpose of repayment to depositors, subject to such conditions and time limit which may be specified by the Regional Director to ensure restoration of the prescribed limit of 10%

(7) Loan

a) A Nidhi shall provide loans only to its members. The loans given to a member shall be subject to the following limits:

- Rs.2,00,000/- where the total amount of deposits from members is less than Rs.2 crores;
- Rs.7,50,000/- where the total amount of deposits from its members more than Rs.2 crores but less than Rs.20 crores;
- Rs.12,00,000/- where the total amount of deposits from its members is more than Rs.25 crores but less than Rs.50 crores;
- Rs.15,00,000/- where the total amount of deposits from its members is more than Rs.50 crores.

b) A Nidhi shall give loans to its members only against the following securities:

- Gold, silver and jewellery – repayment period should not exceed 1 year
- Immovable Property - the loan shall not exceed 50% of the value of the property offered as security and the period of repayment of such loan shall not exceed 7 years.
- Fixed deposit receipts, National Savings Certificates and other Government securities and insurance policies – Maturity dates shall not fall beyond 1 year or loan period, whichever is earlier

The rate of interest to be charged on any loan shall not exceed 7.5% above the highest rate of interest offered on deposits by Nidhi and shall be calculated on reducing balance method.

(8) Dividend

A Nidhi shall not declare dividend exceeding 25% orSuch higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions-

- An equal amount is transferred to General Reserve;
- There has been no default in repayment of matured deposits and interest; and
- It has complied with all the rules as applicable to Nidhis.

(9) Director

- The director shall be a member of Nidhi.
- He shall hold office for a term up to 10 consecutive years on the Board.
- He shall be eligible for re-appointment only after cooling off period of 2 years ceasing to be a director.
- Where the tenure of any director in any case had already been extended by the Central Government it shall terminate on expiry of such extended tenure.
- The person to be appointed as a Director shall comply with the requirements of Section 152(4) of the Act and shall not have been disqualified as provided in Section 164 of the Act.

(10) Auditor

- The tenure of Auditor is five consecutive years.
- No auditor or audit firm as auditor shall be appointed for more than two terms of five consecutive years.
- The auditor shall be eligible for subsequent appointment after the expiration of two years from the completion of his term.
- The Auditor of the company shall furnish a certificate every year to the effect that the company has complied with all the provisions contained in the rules and such certificate shall be annexed to the audit report and in case of non-compliance, he shall specifically state the rules which have not been complied with.

(11) Power to enforce – RoC/RD

- RoC may call for such information or returns from Nidhi as he deems necessary and may engage in the services of Chartered Accountants, Company Secretaries in practice, Cost Accountants or any firm thereof from time to time for assisting him in the discharge of his duties.
- RD may appoint a Special Officer to take over the management of Nidhi in case the Nidhi has violated these rules or has failed to function in terms of the Memorandum and Articles of Association.

PRODUCER COMPANY

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

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 consistingof 46 new Sections from 581A to 581ZT.

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

Some of the objects defined under Section 581B are given herein below:

- production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit
- processing including preserving, drying, distilling, brewing, venting, canning and packaging of produce of its Members
- providing education on the mutual assistance principles to its Members and others
- rendering technical services, consultancy services, training, research and development and all other
- activities for the promotion of the interests of its Members
- insurance of producers or their primary produce
- financing of procurement, processing, marketing or other activities

Every producer company shall deal primarily with the produce of its active members for carrying out any of its specified objects. This means there is an obligation on the producer company to deal primarily with the active members in conducting its activities.

FOREIGN COMPANY [SECTION 2(42)]

Foreign company means any company or body corporate incorporated outside India which -

(a) Has a place ofbusiness in India whether by itself or through an agent, physically or through electronic mode,**and**

(b) conducts any business activity in India in any other manner.

Sections 379 to 393 of the Act deal with foreign companies.

(1) *Application of Act to foreign companies [Section 379]:* If 50% or more paid-up share capital of the foreign company is held by Indian citizens or bodies corporate incorporated in India, such company shall comply with prescribed provisions of the Act as notified by the Central Government.

(2) *Documents to be delivered to ROC by foreign companies [Section 380]:* Every foreign company which establishes a place of business in India must within 30 days of the establishment of such place of business, file with the ROC for registration:

(a) A certified copy of MOA and AOA of the company. (If it is not in the English language, a certified translation in the English language has to be filed)

(b) The full address of the registered or principal office of the company.

(c) A list of the directors and secretary,

(d) The name and address of persons resident in India who are authorized to accept any notices or other documents required to be served on the company.

(e) The full address of principal place of business in India.

(f) Particulars of opening and closing of a place of business in India on earlier occasions.

(g) Declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad.

(h) Any other prescribed information.

(3) *Accounts of foreign company [Section 381]:* Foreign Company has to maintain books of account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.

(4) *Display of name of foreign company [Section 382]:* Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents.

(5) *Branch Office of a Foreign Company:*

- ✓ The permission to set-up a BO has to be obtained by the RBI under the FEMA, 1999 provisions.
- ✓ The Applications are to be made in form FNC and are considered by the RBI under two routes determined by the degree of Foreign Direct Investment (FDI):

  • *The Reserve Bank Route:* taken when the principal business of the foreign company falls undersectors where 100% FDI is permissible.

  • *The Government Route:* when the sectors do not permit 100% FDI investment. The RBI considersapplications under this in consultation with the Ministry of Finance of India.

- ✓ The RBI has a few other considerations:

  • *Track Record:* For a BO a company will require a profit making track record in the immediatelypreceding 5 financial years in the home country.

  • *Net Worth:* "a total of paid-up capital and free reserves, less intangible assets as per the latestAudited Balance Sheet or Account Statement Certified by a Certified Public Accountant or anyRegistered Accounts Practitioner". The net worth has to be equal to or more than USD 100,000.

- ✓ The application by the foreign company has to be made through a designated AD Category-I alongwith the prescribed documents.

- ✓ The BO hence, once approved by the RBI, will be allotted a Unique Identification Number (UIN).

- ✓ Once the offices have been set up, the BO must also obtain a Permanent Account Number (PAN) from the Income Tax Authorities.

- ✓ This should be reported in the Annual Activity Certificate (AAC) that the BO is required to present at the end of each ear to show that the activities are undertaking in the permitted categories only.

- ✓ Section 382 of the Companies Act, 2013, states that the company has to 'conspicuously' exhibit outside the office, the company's name and the specify country it was incorporated in. The name must be in English Language and in the local language of the area where the office is set-up.

- ✓ If the members of the company have limited liability, then the same has to be specified with the name of the company outside the office and also mentioned in all the broachers, prospectus and any other circulars generated by the company.

- ✓ Funding of BO by foreign company:

  - **Equity Share Capital:** in the usual way Indian companies are financed.

  - **Preference Share Capital:** such convertible preference shares, *compulsorily* convertible into equity shares areregarded as Foreign Direct Investment (FDI).

  - **Debentures and Borrowings:** there can be redeemable, convertible or non-convertible. Companies can issuedebentures, bonds and other debt securities. These also, when convertible into equity shares, are treated asFDI.

- ✓ Activities:

  - These BOs represent the parent company and usually undertake the same activities as the latter.

  - The profits from these are easily remittable from India, subject to the taxes applicable.

  - They are permitted by the RBI to undertake the following activities, as listed in the Master Circular:

1. Export / Import of goods.

2. Rendering professional or consultancy services.

3. Carrying out research work, in areas in which the parent company is engaged.

4. Promoting technical or financial collaborations between Indian companies and parent orOverseas group company.

6. Representing the parent company in India and acting as buying / selling agent in India.

7. Rendering services in information technology and development of software in India.

8. Rendering technical support to the products supplied by parent/group companies.

9. Foreign airline / shipping company.

CHAPTER 3 – CHARTER DOCUMENTS OF COMPANIES – PART I

Memorandum [Section 2 (56)]:

Memorandum means memorandum of association of a company as originally framed or altered from time to time in pursuance of any previous companies law or the Companies Act, 2013.

MOA is a document which sets out the constitution of the company and is therefore the foundation on which the structure of the company is based. It defines the scope of the company's activities and its relations with the outside world. The first step in the formation of a company is to prepare a document called the Memorandum of Association.

Form of MOA [Section 4(6)]: The memorandum of association should be in any one of the Forms specified in Tables A, B, C, D & E of Schedule I to the Companies Act 2013, as may be applicable in relation to the type of company proposed to be incorporated.

Table	Type of company
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 company not having share capital
Table E	Unlimited company having share capital

Section 4(1): Contents of Memorandum

Requirements with respect to memorandums[Section 4(1)]: MOA of a company have the following clauses:

(1) **Name Clause:** This clause states the name of the company which is approved by the ROC. The memorandum of a company shall state the name of the company with the last word "Limited" in the case of a public limited company, or the last words "Private Limited" in the case of a private limited company. However, Section 8 companies are not required to state at the end of their name words 'Ltd.' or 'Private Ltd.'

(2) **Situation Clause:** Itstates the name of the State in which the registered office of the company is to be situated.

(3) **Objects Clause:** It states the objects of which the company proposed to be incorporated and any matter considered necessary in furtherance thereof. As per Section 4(1)(c) of the Act, 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. The purpose of the Objects clause is to enable the persons dealing with the Company to know its permitted range of activities. The acts beyond its ambit are ultra vires and hence void. Even the entire body of shareholders can't ratify such acts. Although express powers are necessary, a Company may do anything which is incidental to and consequential upon the powers specified and the acts will not be ultra vires.

The memorandum of association of a company is its charter defining the objects of its existence andoperations. As pointed out in Cotman v. Brougham 1918 AC 514, its purpose

is 'to enable the shareholders,creditors and those dealing with the company to know what is the permitted range of the enterprise.

(4) **Liability Clause:** This clause states the nature of liability that the members of the company incur, whether the liability shall be limited by shares or by guarantee or unlimited.

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

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

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

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

(5) **Capital Clause:** Itstates the amount of capital with which the company is proposed to be registered, the number and value of shares into which the capital is to be divided.

The shares into whichthe capital is divided must be of fixed value, which is commonly known as the nominal value of the share.The capital is variously described as "nominal", "authorised" or "registered".

The usual way to state the capital in the memorandum is: "Thecapital of the company is Rs. 10,00,000 divided into 1,00,000 equity shares of Rs.10 each".

If there are both equity and preference shares, then the division of the capital is to be shown under these twoheads. A company is not authorised to issue capital beyond its authorised/nominal/registered capital.

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

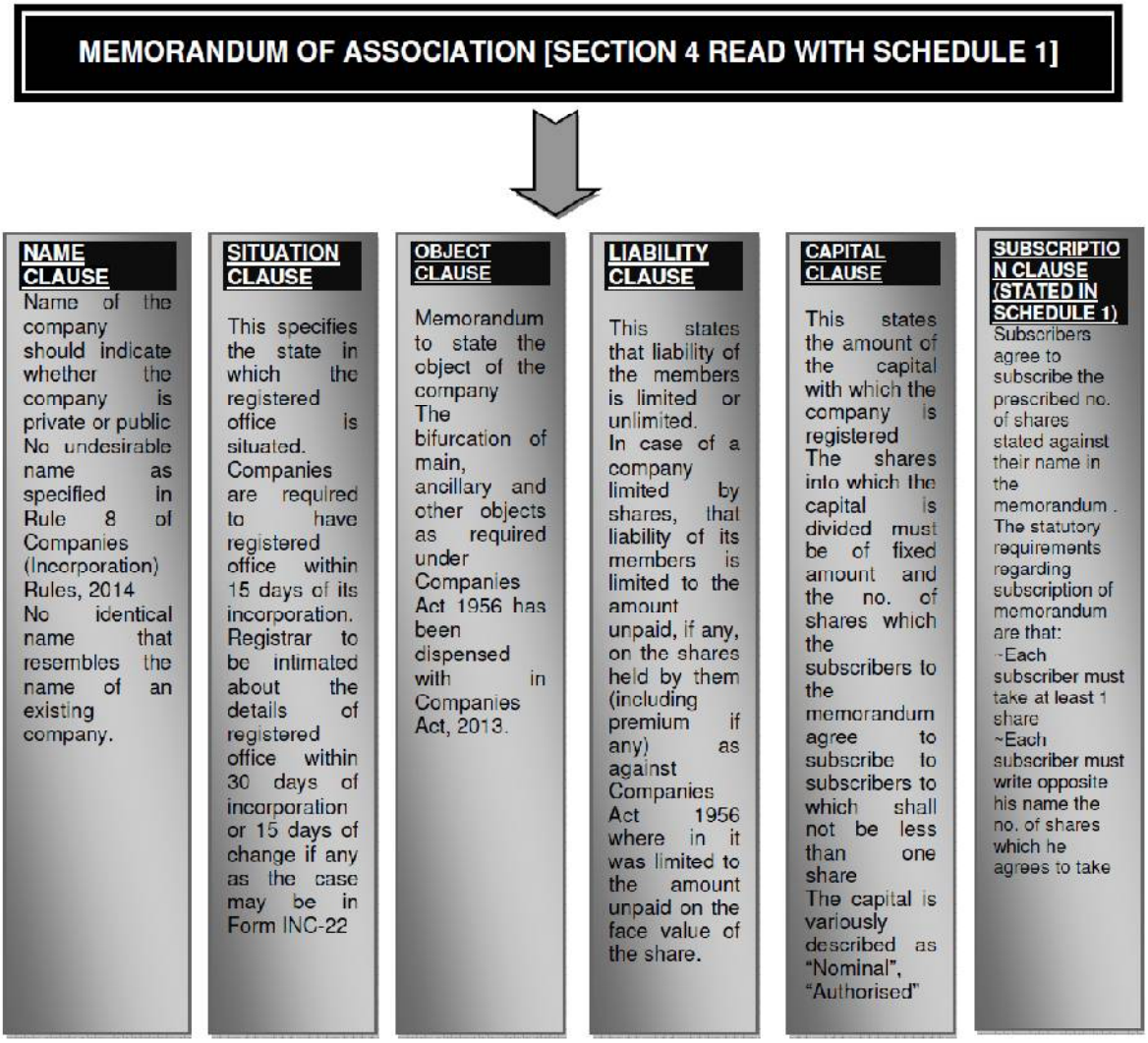
According to Section 60 of the Act, if the amount of the authorised capital (nominal capital), of the companyis stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall alsocontain a statement in an equally prominent position and in equally conspicuous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

(6) **Subscription Clause:** The memorandum at last contains a subscriber's declaration that they desire to be formed into acompany and signed in the presence of at least one witness.

The subscribers to the memorandum declare: "We, the several persons whose names and addresses aresubscribed below, are desirous of being formed into a company in pursuance of this memorandum ofassociation, and we respectively agree to take the number of shares in the capital of the company setopposite our respective names". Then follow the names, addresses, description, occupations of thesubscribers, and the number of shares each subscriber has agreed to take and their signatures attested by awitness.

The statutory requirements regarding subscription of memorandum are that:

- each subscriber must take at least one share;
- each subscriber must write opposite his name the number of shares which he agrees to take. [Section4(1)(e))]



Act to override memorandum, articles, etc. [Section 6]: Any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of the Act, become or be void, as the case may be.

The memorandum must be printed, divided into paragraphs, numbered consecutively.

Provision of Companies Act, 2013 relating to "Name of Company"

A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known.

The company may adopt any suitable name provided it is not undesirable.

Prohibition of certain names [Section 4(2) &**(3)]:** The name stated in the memorandum of association shall not:

(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(b) be such that its use by the company -

(i) will constitute an offence under any law for the time being in force; or
(ii) is undesirable in the opinion of the Central Government.

A company shall not be registered with a name which contains -

(a) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central or State Government, or any local authority, corporation or body constituted by the Central or State Government or

(b) Such word or expression which requires previous approval of the Central Government.

A company is not allowed to use a name which is prohibited under the Emblems & Names. (Prevention of Improper Use) Act, 1950.

Application for availability of name of company [Section 4(4)]: A person may make an application, in **Form No. INC 1** 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. [Rule 9]

Reservation of name by ROC[Section 4(5)(i)]: Upon receipt of an application, the Registrar 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 the approval *{As per Companies Amendment Act, 2017. Earlier it was 60 days}*.

In **Form No.INC** 1, six names are required to be given. The ROC shall ordinarily furnish the information by way of letter within 14 days of receipt of the application whether name is available or not.

Such name shall be available for adoption by the promoters for a period of 3 months from the date of intimation by the ROC.

Provisions relating to rectification of name of company under the Companies Act, 2013

Rectification of name of company [Section 16(1)(a)]: If by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company, the Central Government may on application of existing company direct the second company to change its name. The second company shall change its name within a period of **3 months** from the issue of the above direction by passing an **ordinary resolution.**

Rectification of name in case of infringement of a registered trademark [Section 16(1)(b)]: The Central Government has a power to order rectification of name where it constitutes an infringement of a registered trade mark.

Sometime a name of particular company may be similar or identical to a particular registered trademark. In such case the proprietor of the registered trademark may make an application to the Central Government for an order for rectification of name of a company whose name is similar or identical with proprietor of registered trademark. Such application must be made within 3 years from the date on which the registration of the company with offensive name comes to the notice of the registered trademark owner.

Judicial Views:

♦ In the case of Atlas Cycles (Haryana) Ltd. v. Atlas Products Pvt. Ltd. [146 (2008) DLT 274 (DB)[use of thebrand 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.

♦ Mere similarity of name is not in itself enough to give a right to an injunction. The law does not give a person a right to prevent the use of a name by another person. In the case of companies, however, registration will be refused only if there is likelihood of deception or confusion. [D. W. Boulay vs D.W. Boulay (1868) LR 2 (PC)]

♦ A person cannot be permitted to name a company even after his personal name if that name resembles the name of an existing company. [K.G. Khosla Compressors Ltd. vs. Khosla Extractions Ltd. (1986) 1 Comp LJ 211: AIR 1986 Del 181]

Publication of name of company [Section 12(3)]: The name of the company and the address of its registered office must be painted or displayed outside every office or place at which its business is carried on, in a conspicuous position and in legible letters in English and in the language in general use in that locality.

The name must also be engraved on the company's common seal, if any.

Further, the name of the company and the address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any must be mentioned in legible characters in all business letters, in all its bill heads, letter papers and in all its notices and other official publications, as well as in all negotiable instruments and other prescribed documents

However, where a company has changed its name or names during the **last 2 years,** it shall paint or display or print, as the case may be, along with its name, the former name or names so changed during the last two years as required above.

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

Registered office of company [Section 12(1)]: The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein.

Within 30 days of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent.

The company must also furnish to the Registrar verification of its registered office within a period of 30 days of its incorporation in Form No. INC-22.

Signing of Memorandum

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

(1) Shall be signed by each subscriber to thememorandum, who shall add his name, address, description and occupation, if any, in the presence of atleast one witness who shall attest the signature and shall likewise sign and add his name, address,description and occupation, if any and the witness shall state that "I witness to subscriber/subscriber(s), whohas/have subscribed and signed in my presence (date and place to be given); further I have verified his ortheir Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars asfilled in"

(2) Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark whichshall be described as such by the person, writing for him, who shall place the name of the subscriber againstor below the mark and authenticate it by his own signature and he shall also write against the name of thesubscriber, the number of shares taken by him.Such person shall also read and explain the contents of the memorandum and articles of association tothe subscriber and make an endorsement to that effect on the memorandum and articles of association.

(3) Where the subscriber to the memorandum is a body corporate, the memorandum and articles ofassociation shall be signed by director, officer or employee of the body corporate duly authorized in thisbehalf by a resolution of the board of directors of the body corporate and where the subscriber is a LimitedLiability Partnership, it shall be signed by a partner of the Limited Liability Partnership, duly authorized by aresolution approved by all the partners of the Limited Liability Partnership:

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

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

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

(b) in a country which is a party to the Hague Apostille Convention, 1961, his signatures and addresson the memorandum and articles of association and proof of identity shall be notarized before theNotary (Public) of the country of his origin and be duly apostillised in accordance with the said Hague Convention *(there are around 114 countries which are part of this Convention. It specifies the modalities through which a document issued in one of the signatory countries can be certified for legal purposes in all the other signatory states)*.

(c) in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention,1961, his signatures and address on the memorandum and articles of association and proof ofidentity, shall be notarized before the Notary (Public) of such country and the certificate of theNotary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalfunder section 3 of the Diplomatic and Consular Officers (Oaths and

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

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

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

ARTICLES [SECTION 2 (5)]:

Articles means the articles of association of a company as originally framed oras altered from time to time orapplied in pursuance of any previous company law or of this Act.It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

The articles regulate the internal management of the affairs of the company by way of defining the powers ofits officers and establishing a contract between the company and the members and between the membersinter se.

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the waysin which the objects of the company are to be carried out and can be framed and altered by the members.But they must keep within the limits marked out by the memorandum and the Companies Act.

Tables F, G, H, I & J of Schedule Ito the Companies Act, 2013 specifies certain model Articles.

Table	**Type of company**
Table F	Company limited by shares.
Table G	Company limited by guarantee having share capital
Table H	Company limited by guarantee not having share capital
Table I	Unlimited company having share capital
Table J	Unlimited company not having share capital

The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum.

The articles must not contain anything illegal or ultra vires the memorandum, nor should it be contrary to the provisions of the Companies Act, 2013.

Contents of Articles: The articles set out the rules and regulations framed by the company for its own working. The articles generally contains the provisions related with following matters:

- ✓ Exclusion wholly or in part of Table F.
- ✓ Adoption of preliminary contracts.
- ✓ Number and value of shares.
- ✓ Issue of preference shares.
- ✓ Allotment of shares.
- ✓ Calls on shares.
- ✓ Lien on shares.
- ✓ Transfer and transmission of shares.
- ✓ Nomination.

- ✓ Forfeiture of shares.
- ✓ Alteration of capital.
- ✓ Buy back.
- ✓ Share certificates.
- ✓ Dematerialization.
- ✓ Voting rights and proxies.
- ✓ Meetings and rules regarding committees.
- ✓ Directors, their appointment and delegations of powers.
- ✓ Nominee directors
- ✓ Issue of Debentures and stocks
- ✓ Audit committee
- ✓ Managing director, Whole-time director, Manager, Secretary
- ✓ Additional directors
- ✓ Seal
- ✓ Remuneration of directors
- ✓ General meetings
- ✓ Directors meetings
- ✓ Borrowing powers
- ✓ Dividends and reserves
- ✓ Accounts, and audit
- ✓ Winding up
- ✓ Indemnity
- ✓ Capitalization of reserves

Entrenchment Provisions

The Companies Act, 2013 recognizes an interesting concept of entrenchment. The entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of greater conditions or restrictions than those prescribed under the Act. (such as obtaining a 100% consent)

This provision acts as a protection to the minority shareholders. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

Thus, by making entrenchment provisions the article may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. **[Section 5(3)]**

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

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

Where the articles contain the provisions for entrenchment, the company shall give notice to the ROC of such provisions.

Registration of Articles

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

Consistency with CA, 2013 and MoA

- ✓ A Company can include any additional matters in its Articles, as may be considered necessary for its management.
- ✓ AoA should not contain any provisions contravening the provisions of MoA and the CA, 2013 in any manner. Any such provision shall be null and void.

➲ DOCTRINE OF ULTRA VIRES

The doctrine of ultra vires was first enunciated by the House, of Lords in a classic case, **Ashbury Railway Carriage & Iron Co. Ltd. vs. Riche (1875) LR 7 HL 653**

The general rule is that an act which is ultra vires the company is incapable ratification. An act which is intra vires the company may be ratified by the company in proper form. The rule is meant to protect shareholders and the creditors of the company.

Effects of ultra vires transactions**:**

i. **Void ab initio:**The ultra vires acts are null and void ah initio. The company is not bound by these acts. Even the company cannot sue or be sued upon. Ultra vires contracts are void ab initio and hence cannot become intra vires by reason of estoppel or ratification.

ii. **Injunction:** The members can get an injunction to restrain the company wherein ultra vires act has been or is about to be undertake.

iii. **Personal liability of directors:** It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted, to purposes foreign to company's memorandum, the director will be personally liable to replace it. [Jehangir R. Modi vs. ShamjiLadha 1866-674 Bom. HCR (1855)]

iv. Where a company's money has been used ultra vires to acquire some property, the company's right over such property is held secure and the company will be the right party to protect the property. This is because, though the property has been acquired for some ultra vires object it represents the money of the company.

v. Ultra vires borrowing does not create the relationship of creditor and debtor.

Ashbury Carriage Co. vs. **Riche** (1875) LR 7 HL 653: In this case, the objects of the company as stated in the objects clause of its memorandum, were "to make and sell, or lend on hire railway carriages and wagons, and all kinds of railway plaint, fittings, machinery and rolling stock to carry on the business of mechanical engineers and general contractors to purchase and sell as merchants timber, coal, metal or other materials; and to buy and sell any materials on commissions or as agents." The directors of the company entered into a contract with Riches for financing a construction of a railway line in Belgium. The contract was ratified by all the members of the company, but later on it Was repudiated by the company. Riche sued the company for breach of contract.

Issue: Whether the contract was valid and if not, whether it could be ratified by the members of the company?

Decision: The House of Lords has held that an ultra vires act or contract is void in its inception because the company had not the capacity to make it and since the company lacks the capacity to make such contract, how it can have capacity to ratify it. If the shareholders are permitted to ratify an ultra vires act or contract, it will be nothing but permitting them to the very thing which they are prohibited from doing. The House of Lords has expressed the view that a company incorporated under the Companies Act has power to do only those things" which are authorized by its objects clause of its memorandum and anything not so authorized (expressly or impliedly) is ultra vires the company and cannot be ratified or made effective even by the unanimous agreement of the members.

InLakshmanaswamiMudaliar v. LIC, (1963) 33 Com Cases 420, 430 (SC): The doctrine of ultra vires was upheld. In this case; the directors of the company were authorized to make payments towards any charitable or any benevolent object, or for any general public or useful object. In accordance with shareholders resolution the directors paid Rs. 2 lakhs to a trust formed for the purpose of promoting technical arid business knowledge.

The company's business having been taken over by LIC, it had no business left of its own. The SC held that the payment was ultra vires the company. Directors could not spend company's money on any charitable or general objects. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. It is pertinent to add that the powers vested in the Board of directors e.g., power to borrow money, is not an object of company. The powers must be exercised to promote the company’s objects: Charity is allowed only to the extent to which it is necessary in the reasonable management of the affairs of the company.

It was held that there must be proximate connection between the gift and the company's business interest. Thus, gifts to foster research relevant to the company's activities and payments to widows of ex-employees on the footing that such payments encourage persons to enter the employment of the company have been upheld as valid and intra vires.

An ultra vires borrowing does not create a relationship of a debtor and creditor. In a case, a company hadaccepted deposits from outsiders which was outside the scope of the Memorandum. When the company wasordered to be wound up, a question was raised whether the depositors were creditors of the company andwhether the contributories could be asked to contribute towards payment of deposits. The Court held that therelationship between the company and the depositors was not that of debtor and creditor. But if the lenderhad lent the amount for discharging lawful expenses, he may recover the amount.

➲ DOCTRINE OF CONSTRUCTIVE NOTICE

The memorandum and articles, when registered, become public documents and can be inspected by anyone on payment of. nominal fee. Therefore, every person who contemplates entering into a contract with a company has the means of ascertaining and is consequently presumed to know, not only the exact powers of the company but also the extent to which these powers have been delegated to the directors, and of any limitations placed upon the exercise of these powers.

In other words, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. In fact he is regarded not only as having read those documents but also, as having understood them according to their proper meaning. Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company.

Example: If the articles provide that a bill of exchange to be effective must be signed by two directors, a person dealing with the company must see that it is so signed; otherwise he cannot claim under it.

In another case, the articles required that all documents should be signed by the managing director,secretary and the working director on behalf of the company. A deed of mortgage was executed by thesecretary and the working director only and the Court held that no claim would lie under such a deed. TheCourt said that the mortgagee should have consulted the articles before the deed was executed. Therefore,even though the mortgagee may have acted in good faith and the money borrowed applied for the purposeof the company, the mortgage was nevertheless invalid [KotlaVenkataswamy v. Rammurthy, AIR 1934 Mad579]. The doctrine of indoor management protects third parties who are entitled to an assurance that all theprocedural aspects of a transaction are carried out.

➲ DOCTRINE OF INDOOR MANAGEMENT

The principal of indoor management operates to protect the outsiders against the company. According to this doctrine, as laid down in **Royal British Bank vs. Turquand** (1856) 119 E.R. 886, persons contracting with a company are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see that the company carries out its own internal regulations.

Exceptions to the doctrine of indoor management: The doctrine of indoor management is subject to certain exceptions. In other words, relief on the ground of "indoor management" cannot be claimed by an outsider dealing with the company in the following circumstances:

(1) Where the outsider had knowledge of irregularity:

The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowing that the directors do not have the authority to make the transaction but still enters into it, cannot seek protection under the rule of indoor management.

The articles of a company empowered the directors to borrow up to £ 1,000 only. They could, however, exceed the limit of £ 1,000 with the consent of the company in general meeting. Without such consent having been obtained, they borrowed £3,500 from one of the directors who took debentures. The company refused to pay the amount. Held that, the debentures were good to the extent of £ 1;000 only because the director had notice or was deemed to have the notice of the internal irregularity. [Howard vs. Patent Ivory Co: (38 Ch. D 156)]

(2) No knowledge of memorandum & articles:

The doctrine of indoor management cannot be invoked in favour of a person who did not consult the memorandum and articles and thus did not rely on them.

T was a director in the company. He, purporting to act on behalf of the company, entered into a contract with the Rama Corporation and took a cheque from the latter. The articles of the company did provide; that the directors could delegate their powers to one of them. But Rama Corporation people had never read the articles. Later, it was found that the directors of the company did not delegate their powers to T. The Plaintiff relied "on the rule of indoor management. Held, they could not because they even did not know, that power could be delegated. [Rama Corporation vs. Proved Tin & General Investment Co., (1952)1 All ER 554]

(3) Forgery:

The rule of indoor management does not extend to transactions involving forgery or to transactions which are otherwise void or illegal ab initio. In the case of forgery it is not that there is absence of free consent but there is no consent at all. The person whose signatures have been forged is not

even aware of the transaction and the question of his consent being free or otherwise does not arise. Consequently, it is not that the title of the person is defective but there is no title at all.

Where the secretary of a company forged signatures of two of the directors required under the articles on a share certificate and issued certificate without authority, the applicants were refused registration as members of the company. The certificate was held to be nullity and the holder of the certificate was not allowed to take advantage of the doctrine of indoor management. [Rouben vs. Great Fingal Consolidated (1906) AC 439]

(4) Negligence:

The doctrine of indoor management do not rewards those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry, he is estopped from relying on the Rule.

A person who was a sole director and principal shareholder of a company paid into his own account cheques drawn in favour of the company. Held, that, the bank should have made inquiries as to the power of the director. The bank was put upon an enquiry and was accordingly not entitled to rely upon the ostensible authority of director. [Al Underwood vs. Benk of Liverpool (1924) I KB 775]

An accountant of a company transferred some property of a company in favour of Anand Behari. On an action brought by him for breach of contract, the Court held the transfer to be void. It was observed that the power of transferring immovable property of the company could not be considered within the apparent authority of an accountant. [B. Anand Behari Lal vs. Dinshaw& Co. (Bankers) Ltd. AIR 1942 Oudh 417]

(5). The doctrine of indoor management does not apply where the question is in regard to thevery existence of an agency. In VarkeySouriar v. Keraleeya Banking Co. Ltd. (1957) 27 Com Cases591 (Ker.), the Kerala High Court held that the 'doctrine of indoor management' cannot apply wherethe question is not one as to scope of the power exercised by an apparent agent of a company butis with regard to the very existence of the agency.

(6). This Doctrine is also not applicable where a pre-condition is required to be fulfilled before company itselfcan exercise a particular power. In other words, the act done is not merely ultra vires the directors/officersbut ultra vires the company itself — Pacific Coast Coal Mines v. Arbuthnot (1917) AC 607.

Distinguish between: Doctrine of constructive notice & doctrine of indoormanagement

The following are the main points of distinction between doctrine of constructive notice & doctrine of indoor management:

Points	Doctrine of Constructive Notice	Doctrine of Indoor Management
Meaning	According to this doctrine, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles.	According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed.
To whom protects	It protects the company against the outsider.	It protects outsider against the company.
Affairs	It is confined to the external position and affairs of the company.	It is confined to the internal position and affairs of the company.
Reason	The memorandum and articles of association of the company are public	The internal affairs need not be registered. They are not open to public

	documents. They must be registered with the ROC. These are open to public and third parties to access.	and third parties.
Effect	It operates as an estoppel against the outsider.	It mitigates the effects of the "Doctrine of Constructive Notice"

➲ DOCTRINE OF ALTER EGO

An alter ego is an alternate personality. 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 thatthey may be held personally liable for their actions when they have acted fraudulently or unjustly.

The House of Lords has held that the default of the managing director who is the directing mind and will of the company, would be attributed to him and he be held for the wrong doing of the company. [LennardsCarying Co. vs Asiatic Petroleum Co.]

A corporation is considered the alter ego of its stockholders, directors, or officers when it is used merely for the transaction of their personal business for which they want immunity from individual liability.

A parent corporation is the alter ego of a subsidiary corporation if it controls and directs its activities so that it will have limited liability for its wrongful acts.

The alter ego doctrine is also known as the instrumentality rule because the corporation becomes an instrument for the personal advantage of its parent corporation, stockholders, directors, or officers. When a Court applies it, the Court is said to pierce the corporate veil.

LEGAL EFFECT OF THE MEMORANDUM AND ARTICLES

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

a. **Members bound to the company:** The memorandum arid articles constitute a contract binding the members of the company. The members, as members; are bound to the company. Each member must, therefore, observe the provisions of the memorandum and articles. Each member is bound by the covenants of the memorandum as originally made and as altered from time to time.

b. **Company bound to the members:** Since the articles constitute a contract binding the company to its members in their capacity as members, a member can bring an action against the company for infringement by it of the memorandum or articles. Further, the company is bound to individual members in respect of their ordinary rights as members, e.g. the right to receive share certificate or to receive notice of general meeting, etc.

c. **Member bound to member:** As between the members inter se each member is bound by the articles to the other members but that does not mean the memorandum and articles create an express contract among the members of the company. Thus, a member of a company has no right to bring a suit to enforce the articles in his own name against any other member or members. It is the company alone which can sue the offender so as to protect the aggrieved member it is in this way that the rights of members inter se are regulated. A shareholder may, however, sue in his own name to restrain another, or others from doing fraudulent or ultra vires acts.

d. **Company not bound to outsiders:** The term outsider signifies a person who is not a member of the company even if he is a director, of or solicitor to the company. As between outsiders and the company, neither the memorandum nor the articles would give any contractual rights to outsiders against the company.

Alteration of Memorandum of Association – Section 13

A company may, by a **special resolution** and after complying with the specified procedure, alter the provisions of its memorandum. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a nullity.

The memorandum of association of a company may be altered in the following respects:

- ♦ By changing its name
- ♦ By altering the State in which the registered office is to be situated
- ♦ By altering its objects
- ♦ By altering its share capital
- ♦ By reorganizing its share capital
- ♦ By reducing its capital

A company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company.

No alteration made under this section shall have any effect until it has been registered.

A. Alteration of name clause [Section 13(1) & (2)]

The name of the company, can be altered by **a special resolution and with the approval of the Central Government in writing.**

Approval of the Central Government is not necessary if the change relates to the addition or deletion of the word 'Private' tothe name of the company consequent to the conversion of a private company into a public company and vice versa.

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

Rule 29 of Companies (Incorporation) Rules, 2014:

(1) The change of name shall not be allowed to a company which has defaulted in filing its annual returns or financial statements or which has defaulted in repayment of matured deposits or debentures or interest thereon. Provided that change will be allowed upon making the above non-compliance good.

(2) An application shall be filed in Form No. INC 24 along with the fee for change in the name of the company anda new certificate of incorporation in Form No. INC 25 shall be issued to the company consequent upon change of name.

Effect of Change: The change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it, and any legal proceedings which might have

been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.

In case oflisted companies which decide to change their names shall be required to comply with the following conditions:

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

2. At least 50% of its total revenue in the preceding 1 year period should have been accounted for by the new activity suggested by the new name, or, the amount invested in the new activity/project (Fixed Assets + Advances + Work in Progress) is at least 50% of the assets of the company. The advances shall include only those extended to contractors and suppliers towards execution of project, specific to new activity as reflected in the new name. To confirm the compliance, the company have to submit auditor's certificate to the exchange.

3. The new name along with the old name shall be disclosed through the web sites of the respective stock exchanges where the company is listed for a continuous period of one year, from the date of the last name change.

B. Alteration of Registered Office

- **Within the local limits of same town**.

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 a **board resolution**. A notice of the change is required to be given to the Registrar in Form INC-22 within 30 days of such change This does not involve alteration of memorandum.

- **From one city to another city within the same State**.

[Section 12(5)]: If the registered office is to be shifted from one city, (own or village to another city, town or village within the same State, a **special resolution**has to be passed in the general meeting of the company.

A notice of the change is required to be given to the Registrar **in Form No. INC 22,** within **30 days** of such change along with Form No. **MGT 14** for special resolution passed. This does not involve alteration of memorandum.

In case the company is eligible for conducting business through postal ballot any change in place of registeredoffice outside the local limits of any city, town or village the same shall be transacted only by means of votingthrough a Postal Ballot [Rule 22 of Companies (Management and Administration) Rules, 2014.

- **Within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC [Proviso to Section 12(5)]:** Currently Maharashtra and Tamil Nadu have two RoC's

For changing registered office form one city to another city within the same State but located in the jurisdiction of another ROC, confirmation by the **Regional Director** will be necessary.

The Regional Director, after hearing the parties shall pass necessary orders within a period of **30 days from the receipt of the application**. Thereafter; the company concerned shall file acopy 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.**[Section 12(6)]**

Procedure for shifting ofregistered office within the same State [Rule 28 of Companies (Incorporation) Rules 2014]:

(1) Approval from Board of Directors and also from shareholders through Special Resolution.

(2) An application seeking confirmation for shifting the registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC, shall be filed by the company with the Regional Director in **Form No. INC 23.**

(3) The company shall, before one month of filing application with the Regional Director for the change of registered office-

(a) Publish a notice in a daily English newspaper & local language newspaper and

(b) Serve notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within 21 days of the date of publication of notice

Additionally, **Form No. MGT-14** is to be filed with the ROC towards special resolution.

- **From one State to another State**

[Section 13 (4)]: The change of registered office from one State to another State involves alteration of memorandum, and the change can be effected by a **special resolution** of the company which must be **confirmed** by the **Central Government** on an application made to it.

The Central Government shall dispose of the application within a period of 60 days. Before passing order the Central Government may satisfy itself that the alteration has the consent of the creditors, debenture holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge. **[Section 13(5)]**

Filing of documents [Section 13(6) & (7)]: When registered office is shifted from one state to another State, following documents are required to be filed with ROC:

♦ A copy of special resolution

♦ Order passed by the Central Government

The Registrar of the State where the registered office is being shifted will issue a fresh certificate of incorporation indicating the alteration.

Procedure to change of Registered office from one State to another State [Rule 30 of Companies (Incorporation) Rules, 2014):

(1) An application shallbe filed with the Central Government in **Form No. INC 23** along with the fee and shall be accompanied by the following documents, namely:

- Copy of the MOA & AOA

- Copy of the notice of general meeting along with Explanatory Statement
- Copy of the special resolution
- Copy of the minutes of the general meeting
- An affidavit verifying the application
- List of creditors and debenture holders entitled to object to the application
- An affidavit verifying the list of creditors
- Document relating to payment of application fee
- Copy of board resolution or Power of Attorney or the executed Vakalatnama
- Copy of RBI where the Company is NBFC

(2) A list of creditors and debenture holders is also required to be attached to the application alongwith Names, address and amount due to each such creditor and debenture holder.

The applicant company shall file an affidavit/signed by the Company Secretary of the company and not less than 2 directors one of whom shall be a managing director to the effect that list of creditors and debenture holders is correct and all necessary material particulars are stated therein.

(3) There shall also be attached to the application an affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government.

(4) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company. Any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment not exceeding Rs. 10 per page.

(5) There shall also be attachedto the application a copy of the acknowledgement of service of a copy of the application with complete annexure to the Registrar and Chief Secretary of the State Government where the registered office is situated at the time of filing the application.

(6) The company shall at least 14 days before the date of hearing-

(a) Advertise the application in the **Form No. INC 26** in an English newspaper and vernacular (local language) newspaper

(b) Serve individual notice on each debenture holder and creditor of the company by registered post

(c) Serve a notice together with the copy of the application to the HOC and SEBI and to the regulatory body by registered post.

(7) TheCentral Government may make an order confirming the alteration on such terms and conditions, as it thinks fit, and may make such order as to costs as it thinks proper.

The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in Form No. INC 28 along with the fee as with the Registrar of both States within 30days from the date of receipt of certified copy of the order. [Rule 31]

➲ **Can the State Government oppose shifting of the registered office contending that they would be deprived of the revenue?**

Central Government may direct notice to be served on the State if it is of the view that the interest of

the State will be affected by the alteration. Where the alteration is affected by changing the registered office from one State to another State, the loss of revenue in one State would be accompanied by increase in revenue in the other and in such a case the interest of a particular State ought not to be considered but it is the interest of the country as a whole which should be considered.

The decision to shift the registered office of the company to another state being a domestic matter rests with shareholders and the company is the best judge of how to run its business more economically, efficiently or conveniently, even though it would result in loss of revenue to the State. [Satyashree Balaji Wires & Cables (P) Ltd. Re. (2006) 71 CLA 231 (CLB)]

A company was allowed to shift its registered office from Bihar to West Bengal in spite of the fact that Bihar Government had granted lease of land for the company's factory on the condition that it would not shift its registered office. The CLB also, held that interest free loans, sales tax, electricity and other subsidies would have no bearing on the shifting. [Usha Beltron Re, (2000) 27 SCL 124]

- **Can employee have right to object in case of shifting of registered office from one stale to another?**

It was held that employees union, which was a registered body, would have the legal standing to appear before the Court and oppose the application on the ground that their interests would be likely to be prejudicially affected if the resolution for shifting the registered office of the company from one state to another is confirmed by the Court. However, the employees union cannot oppose on the ground that there would be loss of revenue or unemployment in the State or that the meeting at which the special resolution was passed was not itself valid. [Bharat Commerce & Industries Ltd. Re. 0973) 43 Com Cases 162 (Cal.)]

If the shifting of the registered office was in accordance with a scheme approved by the BIFR, it was held that the workers had no right of objection because their continuation in the company's employment was ensured unless, of course, a worker preferred voluntary retirement.
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A different dimension to the employees right can be seen in the case of Kwality Ice Creams (India) P Ltd. Re. (2009) 91 SCI 231. In that case, the company's petition for carrying its registered office from West Bengal to Delhi was opposed by two employees of the head office on the ground that their action against the company would be prejudiced. The CLB said that the facility for litigation is not a valid ground to stall shifting. There was no restraint order from any Court against the proposed shifting. The CLB allowed shifting subject to the condition that the interest of none of the employees at the registered office would be prejudiced by retrenchment or otherwise.

C. Change of Object clause

As perSection 13 (1), a company can change its objects by passing a **Special resolution**. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of 30 days from the date of filing of the special resolution.

Further in case of a listed company or other Companies where Postal Ballot applies, the special resolution for alteration in the objects clause needs to be passed through Postal Ballot in terms of Section 110.

Restriction on change of object clause [Section 13 (8)]: A company is prohibited from changing object clause if has any unutilized amount raised through issue of prospectus. However, it can change the object clause if it passed special resolution and comply with the following conditions:

(i) The prescribed details in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) where the registered office of the company is situated and shall also be placed on the website of the company.

(ii) The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders in accordance with regulations specified by the SEBI.

D. Alteration of Liability Clause

According to Section 13 (1) a company may, by a **special resolution** and after complying with the procedure specified, alter the provisions of its memorandum. It means that a company can change the liability clause of its MOA by passing a special resolution. A company shall, in relation to any alteration of its memorandum/file with the Registrar the special resolution passed by the company in form MGT-14 within 30 days of passing such resolution.

E. Alteration of Capital Clause

A limited company having a share capital may make the following types of alterations in its memorandum by an **ordinary resolution**, if so authorized by its articles, at its general meeting to:

(i) Increase its authorized share capital

(ii) Consolidate and divide all or any of its share capital into shares of a larger denomination

(iii) Convert its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination

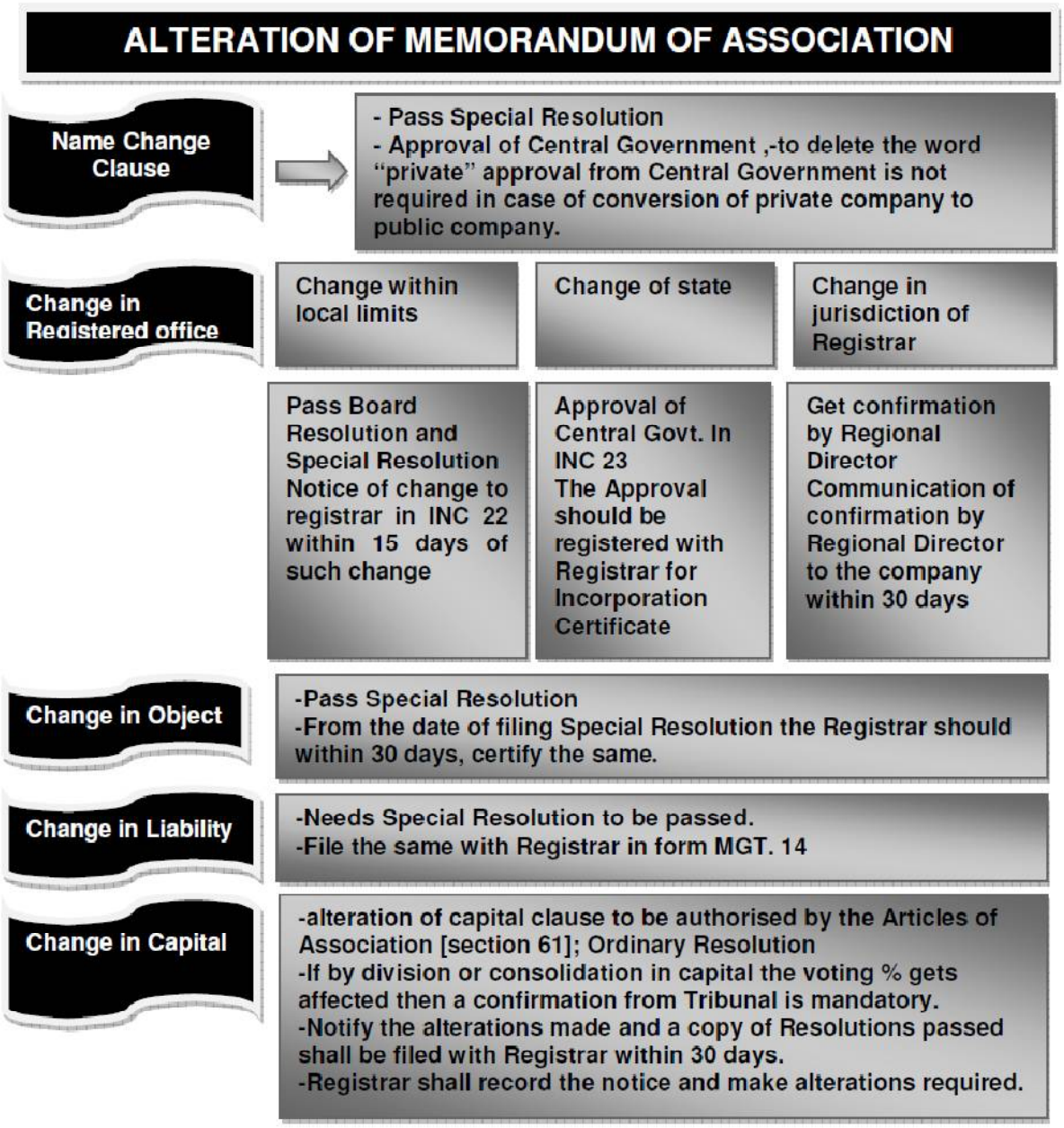
(iv) Sub-divide its shares into shares of smaller amount

(v) Cancel shares which have not been taken or agreed to be taken by any person

All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders.

Notice to be given to Registrar for alteration of share capital [Section 641]: These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of passing of the resolution along with an altered memorandum. The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both. It must be noted that cancelation of shares in does not amount to reduction of sharecapital.

Where acompany alters its share capital as per Section 61, the notice of such alteration, increase shall be filed by the company with the Registrar in Form No. SH. 7 [Rule 16, Companies (Share Capital & Debentures) Rules, 2014]



ALTERATION OF ARTICLES [SECTION 14]: Subject to the provisions of the Act and the conditions contained in its memorandum, a company may alter its articles by passing a **special resolution**.

Every alteration of the articles shall be filed with the ROC, together with a printed copy of the altered articles, within a period of 15 days who shall register the same. [Section 14(2)]

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

Limitation on alteration of articles: The right to alter the articles is so important that a company cannot in any manner, either by express provisions in the Articles or by Independent Contract, deprive itself of the powers to alter its articles. A company can exercise the power alter the article subject to certain limitations. These are:

(1) The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.

(2) The alteration must not be inconsistent with any provisions of the Companies Act, 2013 or any other statute.

(3) The Articles must not include anything which is illegal or opposed to public policy.

(4) The alteration must be bona fide for the benefit of the company as a whole.

(5) The alteration must not constitute a fraud on the minority by a majority.

(6) Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing.

(7) By effecting alteration in its articles, a company cannot defeat escape from its contractual obligation with any person.

(8) The Article cannot be altered so as to have retrospective effects.

(9) Alteration in AoA to be noted in all the copies.

- *Section 8 Company can't alter its AoA except with the prior approval of the Central Government.*

Distinguish between: Memorandum of Association & Article of Association

Following are the main points of distinction between MOA & AOA:

Points	Memorandum of Association	Article of Association
Meaning	MOA is the charter of the company and defines the fundamental conditions and objects for which the company is granted incorporation.	AOA are the rules and regulations framed to govern (he internal management of the company.
Scope	MOA cannot include any clause contrary to the provisions of the Companies Act.	The AOA are subsidiary both or the Companies Act and the MOA.
Relation	The MOA generally defines the relation between the company and the outsiders.	The AOA regulate the relationship between the company ant! its members and between the members infer se.
Alteration	Clauses of the memorandum cannot be easily altered. They can only be altered in accordance with the mode prescribed by the Act. In some of the cases, alteration requires the permission of the Central Government or the Court.	In the case of AOA, members have a right to alter the articles by a special resolution Generally there is no needto obtain the permission of the Court or the Central Government for alteration of the articles.
Ratification	Acts done by a company beyond the scope of the MOA are absolutely void and ultra vires andcannot be ratified even by unanimous vote of all the shareholders.	The acts of the directors beyond the articles can be ratifiedby the shareholders.

Questions

Question 1Abha Ltd. was incorporated on 15th March, 2012. A company with identical name and similar objects was incorporated on 5th August, 2013. On account of similarity of name, Abha Ltd., i.e., the company which was previously registered, filed a petition on 15th April, 2014 with the Central Government seeking issue of direction for change of name by the later company so that its business interest is protected. On 16th August, 2014, the Central Government sent an order to the later company to change its name. Examine the aforesaid case and the validity of the order of the Central Government.

Ans.: According to the **Section 16(1)(a),** if by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company/the Central Government may direct the company to change its name. The company shall change its name within a period of **3 months** from the issue of the above direction after passing an **ordinary resolution.**

Thus, Abha Ltd. (first registered company) can make an application to Central Government to direct second company to change its name. Second company shall change its name within a period of **3 months** from the issue of the above direction by passing an **ordinary resolution**

Question 2 "The article of association play a subordinate role to the memorandum of association". Comment.

Ans.: The articles of association of a company are its by-laws or rule? and regulations that govern the management of its internal affairs and the conduct of its business. The articles a very important role in the affairs of a company.

It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association.

The articles play a part subsidiary to the MOA. They accept the MOA as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made.

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company. But the Articles of Association of a company are not law and do not have the force of law. Any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in toto.

Question 3: Can company insert provision in articles as regards expulsion of a member?

Ans.: If there is a provision in the Articles empowering the directors of the company to expel any member of the company under any of the given conditions, then such a provision shall be ' totally inconsistent with the provisions of Section 6 of the Act. It is opposed to the fundamental principles of

the company's jurisprudence and is ultra vires of the company: [(Circular No. 32 of 1975) dated 01.11.1975]

But the Stock exchanges, registered under the provisions of the Companies Act, can carry such a provision in its Articles. The regulation of stock exchanges is mainly governed by Securities Contracts (Regulation) Act, 1956 and SEBI Act, 1992 which are Special Acts. Hence, the Articles of Stock Exchange may provide for additional matters as per SCR Act; which may not be possible for inclusion in the Articles of a company, as per the provisions of the Companies Act. [Madras Stock Exchange Ltd. v. S.S.R. Raikumar (2003) 116 Com Cases 214 (Mal.)]

Question 4: The alteration of article of association must not constitute a fraud on the minority by a majority. Comment.

Ans.: The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad. In other words, an alteration to the articles must not discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage over the latter. [All India Railway Mens Benefit Fund vs. JanmdarBaleswarnath Bali (1945) 15 Com. Cases 142 (Nag.))

Question 5: The Articles of a public company clearly stated that Mr. A will be the solicitor of the company. The Company in its general meeting of the shareholders resolved unanimously to appoint Mr. B in place of A as the solicitor of the company by altering the articles of association. Examine, whether the company can do so? State the reasons clearly.

Ans.: The memorandum and articles 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.

The company may by special resolution alter its articles. In the given problem the company has changed its articles by passing resolution unanimously and therefore the company can change its articles. The provision of memorandum and articles will bind the members but in the capacity of a member only and even amember may be treated as an outsider. Therefore, a member cannot enforce the provisions of articles for his benefit in some other capacity than that of a member. In the given case, A will not succeed and the company is empowered to appoint B as asolicitor of the company and may change the articles accordingly.

Question 6: With the approval of the Board, an amount of Rs. 50 Crore was spent by Speed Jet Ltd., in producing a commercial film, not covered under its objects clause. The film was a complete flop and the company lost an amount of Rs. 40 Crore. Some of the members of the company objected to such investments not covered by the objects clause of the company. They filed a suit making the directors personally responsible and to make good the loss. Will they succeed? Support your answer with reasons.

Ans.: An act whichis ultra vires is void, and does not bind the company. Neither the company nor the other contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes foreign to company's memorandum, the director willbe personally liable to replace it. In Jehangir R. Modi v. ShamjiLadha (1867) 4 Bom OC 185, the Bombay High Court held that a shareholder can maintain an action against the directors to compel them to restore to the company's funds that have by them been employed in transactions that directors have no authority to enter into.

Thus, members of the Speed Jet Ltd. will succeed in their claim making directors personally responsible and to make good the loss.

Question 7: The object clause of the Memorandum of Association of RST Ltd. authorizes it to publish and sell text-books for students. The company, however, entered into an agreement with Q to supply 100 laptops worth Rs. 5 lakhs for resale purposes. Subsequently, the company refused to make payment on the ground that the transaction was ultra vires the company. Examine the validity of the company's refusal of payment to Q under the provisions of the Companies Act, 2013

Ans.: The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon. Ultra vires contracts are void ab initio and hence not enforceable or capable of ratification. Thus, the acts beyond the powers of a company are ultra vires and void and cannot be ratified even though every member of the company may given his consent. The objects clause therefore is of fundamental importance to the shareholder, creditors and others.

In the given problem RST Ltd. is authorized to publish and sell textbooks for students. It has no power to enter into an agreement with Q to supply 100 laptops. Such act can never be treated as express or implied power of the company, Q is deemed to be aware of the lack of powers of RST Ltd. In the light of above, Q cannot enforce the agreement or liability against RST Ltd. Hence, the refusal of the company for the payment to Q is valid.

CHAPTER 3 – ALTERATION OF CHARTER DOCUMENTS – PART II

ALTERATION OF MEMORANDUM OF ASSOCIATION – SECTION 13

A company may, by a **special resolution** and after complying with the specified procedure, alter the provisions of its memorandum. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a nullity.

The memorandum of association of a company may be altered in the following respects:

- By changing its name
- By altering the State in which the registered office is to be situated
- By altering its objects
- By altering its share capital
- By reorganizing its share capital
- By reducing its capital

A company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company.

No alteration made under this section shall have any effect until it has been registered.

A. Alteration of name clause [Section 13(1) & (2)]

✓ Alteration of Name of the Company can be effected by any of the following 3 methods:

a) Conversion of Private Company to Public Company

b) Conversion of Public Company to Private Company

c) Conversion of Name from ABC Limited to XYZ Limited

✓ The name of the company, can be altered by **a special resolution and with the approval of the Central Government in writing [for pt. c) above]**

✓ Approval of the Central Government is **not necessary** if the change relates to the addition or deletion of the word 'Private' to the name of the company consequent to the conversion of a private company into a public company and vice versa **[for pt. a) and b) above]**.

✓ When any change in the name of a company is made, the Registrar shall enter the new name in the register of companies in place of the old name and *issue a fresh certificate of incorporation with, the new name*. The change in the name shall be complete and effective only on the issue of such a certificate.

- ✓ *Circumstances where Name Change is not allowed:*The change of name shall not be allowed to a company which has *defaulted in filing its annual returns or financial statements* or which has *defaulted in repayment of matured deposits or debentures or interest* thereon. Provided that change will be allowed upon making the above non-compliance good.

- ✓ An application shall be filed in Form No. INC 24 along with the fee for change in the name of the company anda new certificate of incorporation in Form No. INC 25 shall be issued to the company consequent upon change of name.

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

- ✓ **In case oflisted companies** which decide to change their names shall be required to comply with the following conditions:

    a) A time period of **at least 1 year** should have elapsed from the **last** name change.

    b) At least **50% of its total revenue** in the preceding **1 year** period should have been accounted for by the **new activity** suggested by the new name, **or**, the amount **invested** in the new activity/project (Fixed Assets + Advances + Work in Progress) is at least **50**% of the assets of the company. The advances shall include only those extended to contractors and suppliers towards execution of project, specific to new activity as reflected in the new name. To confirm the compliance, the company have to submit auditor's certificate to the exchange.

    c) The new name along with the old name shall be **disclosed** through the web sites of the respective stock exchanges where the company is listed for a **continuous period of 1 year**, from the date of the last name change.

- ✓ **Procedure of Name Change (for unlisted Company):**

    a) Issue Notice of Board Meeting as per CA, 2013 and SS-1 alongwith the Agenda item specifically containing an item on the Name Change alongwith a brief note and relevant documents for the Board of Directors.

    b) During the BM, pass the resolution approving the name changes subject to CG approval (if applicable). Resolution should also give an authority to BOD/CS to do all acts as may be necessary for the same.

    c) Check the name availability at MCA website and fill form “RUN” for the same

    d) Once, RoC approval comes for Name availability, call another BM and pass the resolution for change of Name and calling an EGM for the same.

    e) Issue notice for conducting EGM and in the meeting, pass the SR approving the name change

    f) File MGT-14 within 30 days of EGM (for SR) alongwith prescribed attachments.

    g) File INC-24 for change of Name with RoC alongwith prescribed attachments.

    h) Upon RoC approval, INC 25 will be issued by the RoC (new COI)

i) Make changes in the letter heads and inform all concerned persons.

j) Make change in the Common Seal, if applicable

B. Alteration of Registered Office

- **Within the local limits of same town**.

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 a **Board Resolution**. A notice of the change is required to be given to the Registrar in Form INC-22 within 30 days of such change This does not involve alteration of memorandum.

- **From one city to another city within the same State**.

[Section 12(5)]: If the registered office is to be shifted from one city, (own or village to another city, town or village within the same State, a **Special Resolution**has to be passed in the general meeting of the company.

A notice of the change is required to be given to the Registrar **in Form No. INC 22,** within **30 days** of such change along with Form No. **MGT 14** for special resolution passed. This does not involve alteration of memorandum.

In case the company is eligible for conducting business through postal ballot any change in place of registered office outside the local limits of any city, town or village the same shall be transacted only by means of voting through a Postal Ballot [Rule 22 of Companies (Management and Administration) Rules, 2014].

- **Within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC [Proviso to Section 12(5)]:** *Currently Maharashtra and Tamil Nadu have two RoC's*

For changing registered office form one city to another city within the same State but located in the jurisdiction of another ROC, after passing a **Special Resolution**confirmation by the **Regional Director** will be necessary.

- ✓ The **Regional Director**, after hearing the parties shall pass necessary orders within a period of **30 days from the receipt of the application**.
- ✓ Thereafter; the company concerned shall **file**acopy 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.

Procedure for shifting ofregistered office within the same State [Rule 28 of Companies (Incorporation) Rules 2014]:

(1) Approval from Board of Directors and also from shareholders through Special Resolution.

(2) An application seeking confirmation for shifting the registered office within the same State from the jurisdiction of one ROC to the jurisdiction of another ROC, shall be filed by the

company with the Regional Director in **Form No. INC 23.**

(3) The company shall, before one month of filing application with the Regional Director for the change of registered office-

(a) Publish a notice in a daily English newspaper & local language newspaper and

(b) Serve notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within 21 days of the date of publication of notice

Additionally, **Form No. MGT-14** is to be filed with the ROC towards special resolution.

- **From one State to another State**

The change of registered office from one State to another State involves alteration of memorandum, and the change can be effected by a **Special Resolution** of the company which must be **confirmed** by the **Central Government** on an application made to it.

- ✓ The Central Government shall dispose of the application within a period of **60** days.
- ✓ Before passing order the Central Government may satisfy itself that the alteration has the **consent** of the creditors, debenture holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge.

Filing of documents: When registered office is shifted from one state to another State, following documents are required to be filed with ROC:

- ✓ A copy of special resolution
- ✓ Order passed by the Central Government

The Registrar of the State where the registered office is being shifted will issue a fresh certificate of incorporation indicating the alteration.

Procedure to change of Registered office from one State to another State [Rule 30 of Companies (Incorporation) Rules, 2014):

(1) An application shallbe filed with the Central Government in **Form No. INC 23** along with the fee and shall be accompanied by the following documents, namely:

- o Copy of the MOA & AOA
- o Copy of the notice of general meeting along with Explanatory Statement
- o Copy of the special resolution
- o Copy of the minutes of the general meeting
- o An affidavit verifying the application
- o List of creditors and debenture holders entitled to object to the application
- o An affidavit verifying the list of creditors
- o Document relating to payment of application fee

- Copy of board resolution or Power of Attorney or the executed Vakalatnama
- Copy of RBI where the Company is NBFC

(2) A list of creditors and debenture holders is also required to be attached to the application alongwith Names, address and amount due to each such creditor and debenture holder.

The applicant company shall file an affidavit/signed by the Company Secretary of the company and not less than 2 directors one of whom shall be a managing director to the effect that list of creditors and debenture holders is correct and all necessary material particulars are stated therein.

(3) There shall also be attached to the application an affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government.

(4) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company. Any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment not exceeding Rs. 10 per page.

(5) There shall also be attachedto the application a copy of the acknowledgement of service of a copy of the application with complete annexure to the Registrar and Chief Secretary of the State Government where the registered office is situated at the time of filing the application.

(6) The company shall not more than 30 days before the date of filing of application in Form No. INC 23:

(a) Advertise the application in the **Form No. INC 26** in an English newspaper and vernacular (local language) newspaper

(b) Serve individual notice on each debenture holder and creditor of the company by registered post

(c) Serve a notice together with the copy of the application to the ROC and SEBI and to the regulatory body by registered post.

(7) Alongwith the application in INC 23, a Company shall also attach a copy of the advertisement and objections received, if any, in response to the same.

(8) If no objection is received, CG may pass an order without any hearing within 15 days of the receipt of application.

(9) Where objection has been received, CG shall hold a hearing to achieve a consensus and shall pass the order within 60 days of receipt of application.

(10) The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in Form No. INC 28 along with the fee as with the Registrar of both States within 30days from the date of receipt of certified copy of the order. [Rule 31]

➲ **Can the State Government oppose shifting of the registered office contending that they would be deprived of the revenue?**

Central Government may direct notice to be served on the State if it is of the view that the interest of

the State will be affected by the alteration. Where the alteration is affected by changing the registered office from one State to another State, the loss of revenue in one State would be accompanied by increase in revenue in the other and in such a case the interest of a particular State ought not to be considered but it is the interest of the country as a whole which should be considered.

The decision to shift the registered office of the company to another state being a domestic matter rests with shareholders and the company is the best judge of how to run its business more economically, efficiently or conveniently, even though it would result in loss of revenue to the State. [Satyashree Balaji Wires & Cables (P) Ltd. Re. (2006) 71 CLA 231 (CLB)]

A company was allowed to shift its registered office from Bihar to West Bengal in spite of the fact that Bihar Government had granted lease of land for the company's factory on the condition that it would not shift its registered office. The CLB also, held that interest free loans, sales tax, electricity and other subsidies would have no bearing on the shifting. [Usha Beltron Re, (2000) 27 SCL 124]

- **Can employee have right to object in case of shifting of registered office from one stale to another?**

It was held that employees union, which was a registered body, would have the legal standing to appear before the Court and oppose the application on the ground that their interests would be likely to be prejudicially affected if the resolution for shifting the registered office of the company from one state to another is confirmed by the Court. However, the employees union cannot oppose on the ground that there would be loss of revenue or unemployment in the State or that the meeting at which the special resolution was passed was not itself valid. [Bharat Commerce & Industries Ltd. Re. 0973) 43 Com Cases 162 (Cal.)]

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A different dimension to the employees right can be seen in the case of Kwality Ice Creams (India) P Ltd. Re. (2009) 91 SCI 231. In that case, the company's petition for carrying its registered office from West Bengal to Delhi was opposed by two employees of the head office on the ground that their action against the company would be prejudiced. The CLB said that the facility for litigation is not a valid ground to stall shifting. There was no restraint order from any Court against the proposed shifting. The CLB allowed shifting subject to the condition that the interest of none of the employees at the registered office would be prejudiced by retrenchment or otherwise.

C. Change of Object clause

As perSection 13 (1), a company can change its objects by passing a **Special resolution**. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of 30 days from the date of filing of the special resolution.

Further in case of a listed company or other Companies **where Postal Ballot applies**, the special resolution for alteration in the objects clause needs to be passed through Postal Ballot in terms of Section 110.

Restriction on change of object clause [Section 13 (8)]: A company is prohibited from changing object clause if has any unutilized amount raised through issue of prospectus. However, it can change the object clause if it passed special resolution and comply with the following conditions:

(i) The prescribed details in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) where the registered office of the company is situated and shall also be placed on the website of the company.

(ii) The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders in accordance with regulations specified by the SEBI.

Procedure of Change of Objects Clause (for unlisted Company):

a) Issue Notice of Board Meeting as per CA, 2013 and SS-1 alongwith the Agenda item specifically containing an item on the Name Change alongwith a brief note and relevant documents for the Board of Directors.

b) During the BM, pass the resolution approving the changes in the Objects Clause of the Company and also provide an authority to BOD/CS to do all acts as may be necessary for the same. Also pass the resolution for calling the EGM of the Company to take shareholders' approval.

c) Issue notice for conducting EGM and in the meeting, pass the SR approving the change of Objects.

d) File MGT-14 within 30 days of EGM (for SR) alongwith prescribed attachments. It should also contain new Objects Clause for approval.

D. Alteration of Liability Clause

According to Section 13 (1) a company may, by a **special resolution** and after complying with the procedure specified, alter the provisions of its memorandum. It means that a company can change the liability clause of its MOA by passing a special resolution. A company shall, in relation to any alteration of its memorandum/file with the Registrar the special resolution passed by the company in form MGT-14 within 30 days of passing such resolution.

E. Alteration of Capital Clause

A limited company having a share capital may make the following types of alterations in its memorandum by an **ordinary resolution**, if so authorized by its articles, at its general meeting to:

i. Increase its authorized share capital

ii. Consolidate and divide all or any of its share capital into shares of a larger denomination

iii. Convert its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination

iv. Sub-divide its shares into shares of smaller amount

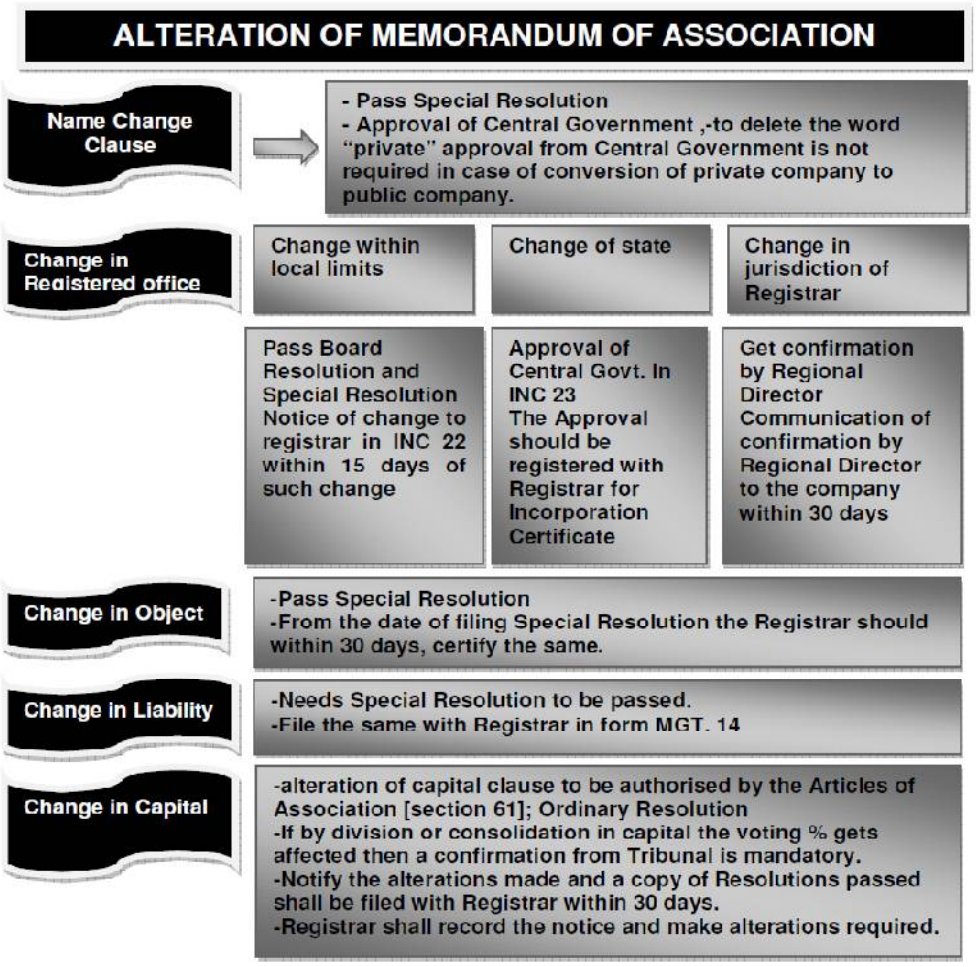
v. Cancel shares which have not been taken or agreed to be taken by any person

All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders.

Notice to be given to Registrar for alteration of share capital [Section 641]: These alterations

are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of passing of the resolution along with an altered memorandum. The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both. It must be noted that cancelation of shares in does not amount to reduction of sharecapital.

Where acompany alters its share capital as per Section 61, the notice of such alteration, increase shall be filed by the company with the Registrar in Form No. SH. 7 [Rule 16, Companies (Share Capital & Debentures) Rules, 2014]



ALTERATION OF ARTICLES [SECTION 14]:

Subject to the provisions of the Act and the conditions contained in its memorandum, a company may alter its articles by passing a **special resolution**.

Every alteration of the articles shall be filed with the ROC, together with a printed copy of the altered articles, within a period of 15 days who shall register the same. [Section 14(2)]

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

Limitation on alteration of articles: The right to alter the articles is so important that a company cannot in any manner, either by express provisions in the Articles or by Independent Contract, deprive itself of the powers to alter its articles. A company can exercise the power alter the article subject to certain limitations. These are:

(1) The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.

(2) The alteration must not be inconsistent with any provisions of the Companies Act, 2013 or any other statute.

(3) The Articles must not include anything which is illegal or opposed to public policy.

(4) The alteration must be bona fide for the benefit of the company as a whole.

(5) The alteration must not constitute a fraud on the minority by a majority.

(6) Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing.

(7) By effecting alteration in its articles, a company cannot defeat escape from its contractual obligation with any person.

(8) The Article cannot be altered so as to have retrospective effects.

(9) Alteration in AoA to be noted in all the copies.

- *Section 8 Company can't alter its AoA except with the prior approval of the Central Government.*

Distinguish between: Memorandum of Association & Article of Association

Following are the main points of distinction between MOA & AOA:

Points	Memorandum of Association	Article of Association
Meaning	MOA is the charter of the company and defines the fundamental conditions and objects for which the company is granted incorporation.	AOA are the rules and regulations framed to govern (he internal management of the company.
Scope	MOA cannot include any clause contrary to the provisions of the Companies Act.	The AOA are subsidiary both or the Companies Act and the MOA.
Relation	The MOA generally defines the relation between the company and the outsiders.	The AOA regulate the relationship between the company ant! its members and between the members infer se.
Alteration	Clauses of the memorandum cannot be easily altered. They can only be altered in accordance with the mode prescribed by the Act. In some of the cases, alteration requires the permission of the Central Government or the Court.	In the case of AOA, members have a right to alter the articles by a special resolution Generally there is no needto obtain the permission of the Court or the Central Government for alteration of the articles.
Ratification	Acts done by a company beyond the scope of the MOA are absolutely void	The acts of the directors beyond the articles can be ratifiedby the

	and ultra vires andcannot be ratified even by unanimous vote of all the shareholders.	shareholders.

ALTERATION OF MOA/AOA SHOULD BE NOTED IN EACH COPY

Questions

Question 1Abha Ltd. was incorporated on 15th March, 2012. A company with identical name and similar objects was incorporated on 5th August, 2013. On account of similarity of name, Abha Ltd., i.e., the company which was previously registered, filed a petition on 15th April, 2014 with the Central Government seeking issue of direction for change of name by the later company so that its business interest is protected. On 16th August, 2014, the Central Government sent an order to the later company to change its name. Examine the aforesaid case and the validity of the order of the Central Government.

Ans.: According to the **Section 16(1)(a),** if by inadvertence or otherwise a name has been registered which is identical to or too nearly resembles the name of an existing company/the Central Government may direct the company to change its name. The company shall change its name within a period of **3 months** from the issue of the above direction after passing an **ordinary resolution.**

Thus, Abha Ltd. (first registered company) can make an application to Central Government to direct second company to change its name. Second company shall change its name within a period of **3 months** from the issue of the above direction by passing an **ordinary resolution**

Question 2 "The article of association play a subordinate role to the memorandum of association". Comment.

Ans.: The articles of association of a company are its by-laws or rule? and regulations that govern the management of its internal affairs and the conduct of its business. The articles a very important role in the affairs of a company.

It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association.

The articles play a part subsidiary to the MOA. They accept the MOA as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made.

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company. But the Articles of Association of a company are not law and do not have the force of law. Any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in toto.

Question 3: Can company insert provision in articles as regards expulsion of a member?

Ans.: If there is a provision in the Articles empowering the directors of the company to expel any member of the company under any of the given conditions, then such a provision shall be ' totally inconsistent with the provisions of Section 6 of the Act. It is opposed to the fundamental principles of the company's jurisprudence and is ultra vires of the company: [(Circular No. 32 of 1975) dated 01.11.1975]

But the Stock exchanges, registered under the provisions of the Companies Act, can carry such a provision in its Articles. The regulation of stock exchanges is mainly governed by Securities Contracts (Regulation) Act, 1956 and SEBI Act, 1992 which are Special Acts. Hence, the Articles of Stock Exchange may provide for additional matters as per SCR Act; which may not be possible for inclusion in the Articles of a company, as per the provisions of the Companies Act. [Madras Stock Exchange Ltd. v. S.S.R. Raikumar (2003) 116 Com Cases 214 (Mal.)]

Question 4: The alteration of article of association must not constitute a fraud on the minority by a majority. Comment.

Ans.: The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad. In other words, an alteration to the articles must not discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage over the latter. [All India Railway Mens Benefit Fund vs. JanmdarBaleswarnath Bali (1945) 15 Com. Cases 142 (Nag.))

Question 5: The Articles of a public company clearly stated that Mr. A will be the solicitor of the company. The Company in its general meeting of the shareholders resolved unanimously to appoint Mr. B in place of A as the solicitor of the company by altering the articles of association. Examine, whether the company can do so? State the reasons clearly.

Ans.: The memorandum and articles 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.

The company may by special resolution alter its articles. In the given problem the company has changed its articles by passing resolution unanimously and therefore the company can change its articles. The provision of memorandum and articles will bind the members but in the capacity of a member only and even amember may be treated as an outsider. Therefore, a member cannot enforce the provisions of articles for his benefit in some other capacity than that of a member. In the given case, A will not succeed and the company is empowered to appoint B as asolicitor of the company and may change the articles accordingly.

Question 6: With the approval of the Board, an amount of Rs. 50 Crore was spent by Speed Jet Ltd., in producing a commercial film, not covered under its objects clause. The film was a complete flop and the company lost an amount of Rs. 40 Crore. Some of the members of the company objected to such investments not covered by the objects clause of the company. They filed a suit making the directors personally responsible and to make good the loss. Will they succeed? Support your answer with reasons.

Ans.: An act whichis ultra vires is void, and does not bind the company. Neither the company nor the other contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes foreign to company's

memorandum, the director willbe personally liable to replace it. In Jehangir R. Modi v. ShamjiLadha (1867) 4 Bom OC 185, the Bombay High Court held that a shareholder can maintain an action against the directors to compel them to restore to the company's funds that have by them been employed in transactions that directors have no authority to enter into.

Thus, members of the Speed Jet Ltd. will succeed in their claim making directors personally responsible and to make good the loss.

Question 7: The object clause of the Memorandum of Association of RST Ltd. authorizes it to publish and sell text-books for students. The company, however, entered into an agreement with Q to supply 100 laptops worth Rs. 5 lakhs for resale purposes. Subsequently, the company refused to make payment on the ground that the transaction was ultra vires the company. Examine the validity of the company's refusal of payment to Q under the provisions of the Companies Act, 2013

Ans.: The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon. Ultra vires contracts are void ab initio and hence not enforceable or capable of ratification. Thus, the acts beyond the powers of a company are ultra vires and void and cannot be ratified even though every member of the company may given his consent. The objects clause therefore is of fundamental importance to the shareholder, creditors and others.

In the given problem RST Ltd. is authorized to publish and sell textbooks for students. It has no power to enter into an agreement with Q to supply 100 laptops. Such act can never be treated as express or implied power of the company, Q is deemed to be aware of the lack of powers of RST Ltd. In the light of above, Q cannot enforce the agreement or liability against RST Ltd. Hence, the refusal of the company for the payment to Q is valid.

CHAPTER 4 – LEGAL STATUS OF REGISTERED COMPANY

Company [Section 2(20)]

The word 'company' is derived from Latin word (Cum = with or together; Panis = bread), and it originally referred to an association of persons who took their meals together. A company is a corporate body and a legal person having status and personality distinct from the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The incorporated company owes its existence either to a Special Act of Parliament or to company legislation.

The public corporations like Life Insurance Corporation of India and Damodar Valley Corporation have been brought into existence through Special Acts of Parliament, whereas companies like Tata Iron & Steel Co. Ltd., Reliance Industries Ltd. have been formed under the Company Legislation.

Section 2(20)
Company
Company means a company incorporated under the Companies Act, 2013 or under any previous company law.

Characteristics of company

(1) Corporate Personality: The Company is vested with a corporate personality quite distinct from individuals who are its members. Being a separate legal entity it bears it's own name and acts under a corporate name. It has aseal of its own. Its assets are separate and distinct from those of its member. It is also a different 'person' from the members who compose it. As such it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the agents of the company and so they cannot bind it by their acts.

(2) Separate Legal Entity: By registration under the Companies Act, 2013 a company becomes vested with corporate personality, which is independent and distinct from its members. [Salomon vs. Salomon & Co. Ltd. (1897) A.C. 22], [Lee vs. Lee's Air Farnning Ltd. (1961) A.C. 12 (P.C.)]

(3) Limited Liability: Most of the companies formed are companies limited by shares. Thus, liability is limited up to unpaid amount of shares.

In case of a company limited by guarantee, the liability of members is limited to a specified amount mentioned in the memorandum.

(4) Perpetual Succession: An incorporated company never dies. It is wound up as per law. A company, being a separate legal person is unaffected by death of any member and remains the same entity, despite total change in the membership. A company's life is determined by the terms of its MOA. It may be perpetual or it may continue for a specified time to carry on a

task or object as laid down in the MOA. Thus, the membership of a company may keep changing from time to time, but that does not affect its continuity.
Professor L.C.B. Gower rightly mentions, "Members may come and go, but the company can go on forever. During the war all the members of one private company, while in general meeting, were killed by a bomb, but the company survived - not even a hydrogen bomb could have destroyed it".

(5) Separate Property: A company is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed off. No member can claim himself to be the owner of the company's property during its existence or in its winding-up.

(6) Transferability of Shares: The shares are said to be movable property and freely transferable, so that no shareholder is permanently wedded to a company. As the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles.

(7) Common Seal: On incorporation, a company acquires legal entity with perpetual succession and a common seal, if any. Since the company has no physical existence, all contracts entered into by its agents may be under the seal of the company. The Common Seal acts as the official signature of a company. The name of the company must be engraved on its common seal. A rubber stamp does not serve the purpose. [As per Companies (Amendment) Act, 2015 affixation of common seal is no longer compulsory.]

(8) Capacity to sue and be sued: A company being a body corporate, can sue and be sued in its own name. The company may bring an action against anyone in its own name. A company's right to sue arises when some loss is caused to the company.

(9) Contractual Rights: A company, being a separate legal entity different from its members, can enter into contracts for the conduct of the business in its own name.

(10) Limitation of Action: A company cannot go beyond the power stated in the Memorandum of Association (MOA). The MOA of the company regulates the powers and fixes the objects of the company and provides the base upon which the entire structure of the company rests. The actions and objects of the company are limited within the scope of its Memorandum of Association.

(11) Separate Management: Shareholder of the company are the owners but the company is administered and managed by its managerial personnel hence there is separate management from ownership.

(12) Termination of existence: A company is an artificial person, hence does not die a natural death. It is created by law and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up.

✌ Landmark Judgements to understand that the Company is a Corporate Personality and is distinct from its members

Salomon vs. Salomon & Co. Ltd. (1897) A.C. 22:
Salomon incorporated a company to take over his personal business of manufacturing shoes and boots. The seven subscribers to the memorandum Were all his family members, each taking only one share. The Board of Directors composed of Salomon as Managing Director and his four sons. The business was transferred to the company at 40,000 pounds. Salomon took 20,000 shares of 1 pound each and debenture worth 10,000 pounds. Within a year the company came to be wound up

and the state if affairs was like this:
Assets: £ 6,000,
Liabilities: Debenture creditors - £ 10,000 pounds
Unsecured creditors - £ 7,000.

It was argued on behalf of the unsecured creditors that, though the company was incorporated, it never had an independent existence. It was Salomon himself trading under another name, but the House of Lords held Salomon & Co. Ltd. must be regarded as a separate person from Salomon.

Lee vs. Lee's Air farming Ltd. (1961) A.C. 12 (P.C.):
Lee formed a company with a share capital of £ 3,000 of which £ 2,999 was held by Lee. He was also the sole governing director. Lee was a qualified pilot also and was appointed as the chief pilot of the company under the articles and drew a salary for the same. While flying the company's plane he was killed in an accident. As the workers of the company were insured, workers were entitled for compensation on death or injury. The question was while holding the position of sole-governing director, could Lee also be an employee of the company. It was held that if the company was a legal entity, there was no reason to change the validity of any contractual obligations which were created between the company and the deceased. The contract could not be avoided merely because Lee was the agent of the company in its negotiations. Accordingly, Lee was an employee of the company and, therefore, entitled to the claim of compensation.

SMALL COMPANY [SECTION 2(85)]

Small company means a private company:

(i) Paid up share capital of which does not exceed Rs. 50 lakhor such higher amount as may be prescribed which shall not be more than *Rs. 10 Crore(as per Companies Amendment Bill, 2017, the limit has been increased from Rs. 5 crore to Rs. 10 crore)*or

(ii) Turnover of which as per profit and loss account for the immediately preceding financial year does not exceed Rs. 2 Crore or such higher amount as may be prescribed which shall not be more than *Rs. 100 Crore(as per Companies Amendment Bill, 2017, the limit has been increased to Rs. 100 crore. Earlier it was Rs. 20 crore)*

Nothing in this definition shall apply to: (This means following companies cannot be small companies)

(a) Holding or a subsidiary company
(b) Company registered u/s 8 or
(c) Company or body corporate governed by any Special Act.

Privileges of a Small Company

Few of the Privileges of small companies are as follows:

Sections	Nature of Exemption/Privileges
Section 2(40)	The financial statement, with respect to Small Company may not include the cash flow statement.
Section 67(2)	Financial assistance can be given for purchase of or subscribing to its own shares or shares in its holding company.
Section 92(1)	The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words, it need not be signed by the company secretary in practice.
Section	Need not prepare a report on Annual General Meeting.

121(1)	
Section 134(3) (P)	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.
Section 149(1)	Small company need not have more than two directors in its Board.
Section 149(4)	Need not appoint Independent directors on its Board
Section 152(6)	A proportion of directors need not to retire every year.
Section 164(3)	Additional grounds for disqualification for appointment as a director may be specified in the articles.
Section 173(5)	It is required to hold at least one meeting of the Board of Directors in each half of acalendar year and the gap between the two meetings should not be less than ninety days.
Section 197(1)	Total managerial remuneration payable by a small company, to its directors, includingmanaging director and whole-time director, and its manager in respect of any financial yearmay exceed eleven per cent. of the net profits

HOLDING & SUBSIDIARY COMPANY

Holding and Subsidiary companies are relative terms. A company is a holding company of another if the other is its subsidiary.

Holding Company [Section 2(46)]: Holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies.

As per Companies Amendment Act, 2017, for the purpose of this Section, Company shall include 'Body Corporate".

Subsidiary Company [Section 2(87)]: Subsidiary company in relation to any other company (that is to say the holding company), means a company in which the holding company -

(a) Controls the composition of the Board of Directors or

(b) Exercises or controls more than 50% of the *total Voting Power{as per Companies Amendment Act, 2017. Earlier it was Total Share Capital}* either at its own or together with one or more of its subsidiary companies

However, prescribed class or classes of holding companies shall not have layers of subsidiaries beyond the prescribed limit.

For the above purpose:

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression "company" includes any body corporate;

(d) "layer" in relation to a holding company means its subsidiary or subsidiaries.

Subsidiary company not to hold shares in its holding company [Section 19]: Subsidiary company shall not either by itself or through its nominees hold shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Therefore, no company shall hold any interest in its holding company.

Exceptions: Infollowing circumstances, a subsidiary can hold the shares of its holding company:

(a) Where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company.

(b) Where the subsidiary company holds such shares as a trustee.

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

However, the subsidiary company referred above shall have voting right only in respect of the shares held by it as a legal representative or as atrustee.

Other Provisions:

- ✓ The Consolidated Financial Statement of holding company is required to disclose prescribed details about subsidiary companies, associate companies and JV.
- ✓ If a Company has one or more subsidiaries, associate companies and JV, it shall, prepare a consolidated financial statement of the company and of all the subsidiaries, associate companies and JV in the same form and manner as that of its own.
- ✓ This Statement is in addition to the separate financial statement of the holding company (which is referred to as 'Standalone Financial Statements'). The consolidated financial statement shall also be placed before the AGM of the holding company along with the laying of its own financial statement.
- ✓ Balance sheet of holding company shall specifically disclose investments in the subsidiaries.
- ✓ Profit and Loss account of Holding company shall disclose:

  (a) Dividends from subsidiary Companies
  (b) Provisions for losses of subsidiary Companies

- ✓ Every Company having a subsidiary or subsidiaries has to submit consolidated financial statements in addition to its own 'financial statements' to Registrar of Companies within 30 days from the date of Annual General Meeting along with the prescribed fees.
- ✓ The Company is required to place separate audited accounts in respect of each of its subsidiary on its website, if any, and provide a copy of separate audited financial statements in respect of each of its subsidiary, to any shareholder of the Company, who asks for it

  - ✓ A subsidiary company cannot be a small company
  - ✓ A subsidiary of a government company is treated as government company
  - ✓ A subsidiary company is treated as related party

- ✓ A company which is subsidiary of a public company, shall be deemed to be a public company

- ✓ The Auditor of the holding company can access records of its subsidiary (including its associates and joint ventures) for the purpose of consolidation of its financial statements

ASSOCIATE COMPANY [SECTION 2(6)]

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

"Significant Influence" means control of at least 20% of total voting power, or control of or participation in business decisions under an Agreement.

"Joint Venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

Further, as per Section2(76), Related party includes 'Associate Company'. Hence, contract with Associate Company will require disclosure/approval/entry in statutory register as is applicable to contract with a related party.

DORMANT COMPANY/ INACTIVE COMPANY (SECTION 455)

The Companies Act, 2013 has recognized a new set of companies called as dormant companies.

Dormant Company: Dormant Company means any of the following type of company:

(a) A company which has been formed and registered for a future project or to hold an asset or intellectual property and has no significant accounting transaction.

(b) Inactive company.

Such company may make an application to the Registrar in Form MSC-1 under the Companies (Miscellaneous) Rules, 2014 for obtaining the status of a dormant company.

Inactive Company means a company:

- Which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 financial years or

- Has not filed financial statements and annual returns during the last 2 financial years

Significant Accounting Transaction: It means any transaction other than-

(a) Payment of fees to the ROC.
(b) Payments made by it to fulfill the requirements of Companies Act or any other law.
(c) Allotment of shares.
(d) Payments for maintenance of its office and records.

Other important provisions applicable to dormant company are as follows:

(1) The Registrar on consideration of the application shall allow the status of a dormant

company to the applicant and issue a certificate Form MSC-2. [Section 455(2)]

(2) The Registrar shall maintain a register of dormant companies on its web-site 'www.mca.gov.in'. [Section 455(3)]

(3) If a company has not filed financial statements or annual returns for 2 financial years consecutively, the Registrar shall issue a notice to that company and enter the name of the company in the register of dormant companies. [Section 455(4)]

(4) A dormant company shall have a minimum number, of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of OPC The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies. [Section 455(5)] & [Rule 6]

(5) A dormant company shall file a "Return of Dormant Company" position duly audited by a chartered accountant in practice in Form MSC-3 within a period of 30 days from the end of each financial year. [Section 455(5)] & [Rule 7]

(6) A dormant company may become an active company by making application in Form MSC-4. [Section 455(5)] & [Rule 8]

(7) The Registrar 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. [Section 455(6)]

Privileges of a Dormant Company

The privileges and exemptions enjoyed by a dormant company or its advantages over other companies are as follows:

Sections	Nature of Exemption/Privileges
Section 2(40)	The financial statement with respect to a dormant company, may no! include the cash flow statement.
Section 173(5)	It is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days.

GOVERNMENT COMPANY [SECTION 2(45)]

Government Company means any company in *which not less than 51% of the paid-up share capital* is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

Special Privileges:

- ✓ Provisions related with declaration of beneficial interest and investigation of ownership of shares is not applicable
- ✓ AGM can be called at any place as may be approved by the CG
- ✓ Declaration of dividends out of Accumulated Profits is not applicable
- ✓ Deposit of dividend in a scheduled bank within five days from the date of declaration doesn't apply in case of Govt. Company

- ✓ A Government Company can have more than 15 directors, without passing any SR in this regard

Judicial Views:

- ✓ Notwithstanding all the pervasive control of the Government, the Government company is neither a government department nor a government establishment. [Hindustan Steel Works Construction Co. Ltd. vs State of Kerala (1998) 2 CLJ 383]

- ✓ Since employees of Government companies are not Government servants, they have no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay scales should be met by the Government. It is the responsibility of the company to pay them the salaries. [A. K. Bindal vs. Union of India (2003) 114 Com Cases 590 (SC)]

CHAPTER 5 – FORMATION OF LLP

INTRODUCTION

- Limited Liability Partnership (LLP) is an incorporated partnership formed and registered under the Limited Liability Partnership Act, 2008 ('The Act') *with limited liability and perpetual succession*.

- LLP is viewed as an *alternative corporate business* vehicle that provides the benefits of limited liability but allows its partners the flexibility of organizing their *internal structure as a partnership* based on a mutually arrived agreement.

- The LLP form would enable entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements.

SALIENT FEATURES OF LLP

- LLP is a body corporate and a legal entity separate from its partners.
- LLP has a perpetual succession.
- Mutual rights and duties of partners of an LLP inter-se and those of the LLP and its partners shall be governed by an *Agreement* between partners or between the LLP.
- LLP is a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP which may be tangible or intangible in nature or both tangible and intangible in nature.
- No partner would be liable on account of independent or unauthorized acts of other partners or their misconduct.
- Every LLP shall have at least 2 partners and shall also have at least 2 individuals as Designated Partners, of whom at least one shall be resident in India.
- LLP shall maintain annual accounts reflecting true and lair view or its state of affairs.
- A statement of accounts and solvency shall be filed by every LLP with the ROC every year.
- Accounts of LLPs shall also be audited.
- Indian Partnership Act, 1932 shall not be applicable to LLPs.

ADVANTAGES OF LLP

- ✓ LLP is easy to form and the process is less complicated and less time consuming.
- ✓ Liability of Partners is limited
- ✓ Carries a distinct feature of Perpetual Succession.
- ✓ Easy of transfer the ownership in LLP

- ✓ In the case of LLP, there is no mandatory audit required. The audit is required only in those cases where the turnover of the company exceeds Rs 40 lakhs and where the contribution exceeds Rs 25 lakhs.

- ✓ An LLP is much easier and cheaper to run than a private limited company as there are just three compliances per year.

- ✓ Not only is it easy to start, it is also easier to wind-up an LLP, as compared to a private limited company.

DISADVANTAGES OF LLP

- ✓ LLPs are small form of business and cannot get its shares listed in any stock exchange through initial public offerings.

- ✓ 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.

- ✓ A LLP must file its Annual Returns, Financial Statements etc. to the Registrar of LLPs annually. Which become public document once filed with Registrar of LLPs and may be inspected by general public including competitors by paying some fees to the Registrar of LLPs.

- ✓ Limited Liability Partnerships 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.

INCORPORATION OF LLP

Step 1: Obtain *DIN*: Every applicant who would become designated partner in LLP should have DIN, which can be taken online from MCA website by paying a fees of Rs. 100/-

Step 2: Take *DSC* of the applicant(s) from the designated center for the purpose of digital signatures

Step 3: Check and apply for *Name Availability* of LLP (Form 1). While applying the name all the provisions as referred in the "Name Clause" of MOA should be taken into consideration.

Step 4: Within 90 days of name approval, Partners should file the documents for incorporation of LLP

Step 5: Apply *incorporation in Form 2* alongwith the prescribed documents like address proof, consent of partners etc.

Step 6: Within 30 days of incorporation, *LLP Agreement* need to be filed in Form 3 with RoC

For a LLP to be incorporated-

(a) 2 or more persons associated for carrying on a lawful business with a view to profit shall subscribe their names to an incorporation document.

(b) The incorporation document shall be filed in prescribed manner and with prescribed fees, with the ROC of the State in which the registered office of the LLP is to be situated and

(c) There shall be filed along with the incorporation document, a statement in the prescribed form, made by either an advocate, or a CS or CA or CWA, who is engaged in the formation of the LLP and by anyone who subscribed his name to the incorporation document, that all the requirement of the Act and the rules made there under have been complied with, in respect of incorporation and matters precedent and incidental thereto

LLP AGREEMENT

- LLP agreement means any written agreement between the partners of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP.
- LLP Agreement is required to be file with RoC within 30 days of incorporation in Form 3
- Any change in the Agreement shall also be required to be filed with RoC
- Should be printed on non-judicial Stamp paper of requisite value, depending upon the state of registration and the amount of Capital contribution.
- All partners should sign the agreement at the bottom of all pages.
- 2 witnesses should sign the agreement at the end of the document.
- Few Clauses, that should be part of LLP Agreement: Name of LLP, Registered office of LLP, Business of LLP, Capital contribution, profit sharing ratio, rights & duties of Designated Partners, Provisions related with admission, expulsion, resignation and retirement of Partners, Remuneration & interest to be paid on capital contribution, meetings, dispute resolution etc.
- LLP Agreement can only be altered by passing a resolution approving the changes. Form 3 needs to be filed with RoC within 30 days of resolution. If the change is due to change in Partner, then Form 4 also needs to be filed together with Form 3.

CHANGE IN NAME OF LLP

- An application for the said purpose needs to be submitted with MCA with 6 names preference (in order of preference).
- Provisions related with “Name Clause” of MOA needs to be complied with.
- Alongwith the application, please attach a) consent of all partners for change of name, b) copy of LLP agreement, and c) copy of registration certificate.
- After the name is approved, file form LLP-5 with RoC within 30 days
- RoC after considering the same, will issue a new registration certificate.

REGISTERED OFFICE OF LLP AND CHANGE THEREIN

(1) Every LLP shall have a registered office to which all communication and notices may be addressed and where they shall be received.

(2) LLP may change its registered office from one place to another by following the procedure as laid down in the *limited liability partnership agreement*. Where the limited liability partnership

agreement does not provide for such procedure, consent of **all partners** shall be required for changing the place of registered office of limited liability partnership to another place.

Provided that where the change in place of registered office is from one state to another state, the limited liability partnership having secured creditors shall also obtain consent of such **secured creditors**.

(3) Form 15 (of LLP) needs to be filed within 30 days of passing the resolution

ANNUAL COMPLIANCES OF LLP

(1) Filing of Annual Return:

- Prescribed form is Form 11
- To be filed within 60 days of closure of FY
- If annual turnover exceeds Rs. 5 crore or capital contribution exceeds Rs. 50 lakhs, it should also be accompanied with a certificate from PCS

(2) Filing of Statement of accounts of Financial Statements:

- Prescribed form is LLP Form 8
- To be filed by October 30 every year
- If annual turnover exceeds Rs. 40 lakhs or capital contribution exceeds Rs. 25 lakhs, the accounts need to be audited by a qualified CA
- Penalty: Rs. 100 per day

(3) Filing of Income Tax Returns:

- Maintenance of accounts is mandatory for every LLP
- Every LLP should close its FY on March 31st of every year
- Due Date:
    - September 30 - if accounts need to be audited
    - November 30 – if Form 3CEB need to be submitted (for certain International/ Domestic transactions)
    - July 31 – In any other case

Distinguish between LLP and Partnership

Points	Limited Liability Partnership	Partnership
Meaning	Limited liability partnership means a partnership formed and registered under Limited Liability Partnership Act, 2008.	Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all
Separate legal entity	LLP is a separate legal entity and therefore, can be sued or it can sue others without involving the partners.	A partnership firm is not distinct from the several persons who compose it

Liability of partners	The partners of a LLP would have limited liability i.e. they would not be liable beyond the money contributed by them.	Partners of a firm would have unlimited liability.
Effect of retirement or death	The retirement or death of a partner would not dissolve the LLP.	The death or retirement of a partner would dissolve the partnership firm.
Formation	LLP is formed by an incorporation document and an LLP agreement, thus, giving it legality.	A partnership can be formed either orally or by a deed of agreement whether registered or not
Maximum partners	There shall not be any upper limit on number of partners in an LLP.	Registered or unregistered Partnership can't have more than 20 partners.
Perpetual succession	A LLP has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the LLP.	The death or insolvency of a partner dissolves the firm, unless otherwise provided.
Business with partners	A partner of LLP in his separate capacity as a legal person can do business with the LLP since the LLP is a separate legal entity by itself.	Whereas an individual partner would not be able to conduct business transaction with the partnership firm of which he is a partner.

Distinguish between: LLP and Company

Points	**Limited Liability Partnership**	**Company**
Meaning	LLP means a partnership formed and registered under Limited Liability Partnership Act, 2008.	Company means a company, incorporated under the Companies Act, 2013 or under any previous company law.
Governing Law	LLP is governed by the Limited Liability Partnership Act, 2008.	Companies are governed by the Companies Act, 2013 and various Rules made there under.
Internal rules & regulation	Internal rules and regulation of LLP are governed by the LLP agreement.	Internal rules and regulation of the companies are governed by the MOA & AOA.
Meetings	In the LLP Act, there is no stipulation for meeting of partners either periodically or compulsory at the year end.	Every company must hold AGM every year. Every company must hold 4 board meetings and gap between two meetings should not be more than 3 months.
Business	In LLP, each partner has the authority to do so unless expressly prohibited by the partnership terms.	In case of a company no individual director can conduct the business of the company
Remuneration	There are no provisions in the LLP Act, 2008 regulating the remuneration payable to designated partners.	The Companies Act, 2013 regulates the remuneration payable to directors.
Borrowing power	There are no restrictions on the borrowing powers on the LLP.	There are restrictions on borrowings power on the companies.
Accounts	The LLP can choose to maintain the accounts on cash basis/accrual basis.	Companies have to keep their accounts on accrual basis.
Audit	The audit of LLP is not compulsory if the capital contributed does not exceed Rs.25 lakhs or if the turnover does not exceed. Rs. 40 lakhs.	Audit of a company is compulsory.
Cost Audit	Cost audit is not applicable for LLPs.	Certain companies are required to do cost

		audit also.
Company Secretary	The appointment of Company Secretaries is not provided in the LLP Act, 2008.	Certain companies are required to appoint Company Secretary.

PARTNER AND DESIGNATED PARTNER

Partner, in relation to a LLP, means any person who becomes a partner in the LLP in accordance with the LLP agreement.

- Every LLP shall have at least 2 partners.
- If at any time the number of partners of a LLP is reduced below 2 and the business of the LLP is carried by the remaining one partner even after 6 months from the reduction of number below 2, the remaining Partner shall be liable personally for the obligations of the LLP incurred after 6 months.
- There is no upper limit on number of partners in an LLP.

Designated partner means any partner designated as such pursuant to Section 7.

- Every LLP shall have atleast 2 designated partners who are individuals and at least 1 of them shall be a resident in India.
- Any individual or body corporate may be a partner in limited liability partnership. A HUF or its Karta cannot become partner or designated partner in LLP
- An individual shall not be capable of becoming a partner of a limited liability partnership, 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.
- In case of a LLP in which all the partners are body corporates, at least 2 partners shall nominate their respective individuals who are to act as "designated partners" and one of the nominees shall be a resident of India.
- Every designated partner, shall intimate his consent to become a designated partner to the limited liability partnership and DPIN in Form 9 and the LLP shall intimate such DPIN to Registrar in Form 4.
- Every designated partner shall obtain a Designated Partner Identification Number (DPIN) from the Central Government. As per the clarification from MCA, now even DIN can be used for the purpose of DPIN.

Liabilities of Designated partners

(a) Responsible for the doing of all acts, matters and things as are required to be done by the LLP in respect of compliance of the provisions of the Act including filing of any document, return, statement and the reports, maintenance of books and accounts etc., and

(b) Liable to all penalties imposed on LLP for any contravention of those provisions.

(c) A LLP need to appoint a designated partner within 30 days of a vacancy arising for any reason. However, it no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

CHAPTER 6 – DIFFERENT FORMS OF BUSINESS ORGANISATIONS & ITS REGULATIONS

SOLE PROPRIETORSHIP

- The sole proprietorship is a form of business that is owned, managed and controlled by an individual.
- Proprietor 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.

Advantages

- ✓ A sole proprietorship business is easy to form where no legal formality involved in setting up this type of organization
- ✓ In sole proprietary organisation, all the decisions relating to business operations are taken by one person, which makes functioning of business simple and easy.
- ✓ The sole proprietor is the only person to whom the profits belong.
- ✓ The sole proprietorship is generally organized for small-scale business and also enjoys some sops from the Government
- ✓ Management is inexpensive as its been managed by a single person

Disadvantages

- ✓ Limitation of management skills
- ✓ 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
- ✓ Unlimited Liability
- ✓ Lack of continuity: A sole proprietary organization 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.

Procedure for setting up

- ✓ No agreement is required

- ✓ Depending upon the nature of activity, various registrations under different statues like Shop & Establishment Act, GST Registration, Small scale Industry etc. needs to be taken

PARTNERSHIP

- ➢ It's 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
- ➢ A partnership firm can be formed with a minimum of 2 partners and it can have a maximum of 50 partners.
- ➢ Rights, obligations and powers of the Partners are part of the Partnership Deed
- ➢ Partners are entitled to share the profits/(loss) in accordance with the Profit sharing ratio as mentioned in the Partnership Deed
- ➢ Liabilities of the Partners are unlimited
- ➢ Registration of firm is not compulsory
- ➢ Partnerships may be a) at-will, b) for a particular venture/event (known as Particular Partnership) and c) for a fixed duration
- ➢ Partners may be a) Active, b) Sleeping/Dormant, c) Nominal (don't have any interest in the firm but just lend their name in the firm), d) Holding out (where a person by his words/conduct holds out to others that he is a partner in a firm)
- ➢ Minor, though can't become a Partner, but may be admitted to the benefits of a Partnership firm

Advantages

- ✓ Easy to form as the expenses are less and only an Agreement is required.
- ✓ Pooling of financial resources helps the firm to expand its business
- ✓ Pooling of managerial skills as different partners can deal with different dept.
- ✓ Balanced decisions as before any major decision, all Partners discuss and agrees on the same
- ✓ Liabilities are shared among the Partners.

Disadvantages

- ✓ Uncertainty of existence: As the death, retirement, bankruptcy of any partner can close the business
- ✓ Partner is liable for acts of other partners, which discourages many persons to join as Partners.
- ✓ Risk of disharmony among Partners

- ✓ Doesn't enjoy much confidence of banks and financial institutions while providing financial assistance

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. It has the force of law and is designed to guide the partners in the conduct of the business. It is helpful in preventing disputes and disagreements over the role of each partner in the business and the benefits which are due to them. Key ingredients of Partnership Deed are Capital contribution, duties, powers and obligations of partners, dispute resolution etc.

Procedure for setting up

- ✓ Governed by Indian Partnership Act, 1932
- ✓ Registration is not compulsory however, unregistered firms have its own disadvantages.
- ✓ Application for registration should be signed by all Partners and should also include details about the office, business etc. of the firm
- ✓ Alongwith the application in Form 1, please attach a) Partnership deed, b) proof of owning/lease of office and c) affidavit certifying the details.
- ✓ Fees for setting up Partnership firm is a State matter and thus the amount varies from state to state.
- ✓ Registrar of Firms will evaluate the application and the documents filed alongwith the application and will issue Certificate of Registration thereafter.
- ✓ Post registration, firm needs to get registered with "Income Tax Authorities" and also applies for PAN and GST in its own name

HINDU UNDIVIDED FAMILY (HUF)

- ➢ Found in India only
- ➢ Business is controlled by Hindu law and not by Partnership Act
- ➢ Membership is acquired by birth or marriage and not by any other means
- ➢ The business of the Joint Hindu Family is controlled and managed by one person who is called 'Karta' (senior most male member of the family), whose decision is final
- ➢ 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.
- ➢ Except the Karta, the liability of all other members is limited to their shares in the business.
- ➢ Minor can be part of HUF
- ➢ Can be dissolved only with approval of ALL members of the family.
- ➢ Hindus, Buddhists, Jains and Sikhs can form HUFs.

- HUF usually has assets which come as a gift, a will, or ancestral property, or property acquired from the sale of joint family property or property contributed to the common pool by members of HUF.
- Under Income Tax Act, HUF is a separate entity and attracts the same tax slab as applies to individuals
- One can't transfer his/her own asset in HUF

Advantages

- ✓ Easy to start as it requires no agreement or legal formalities
- ✓ Efficient Management: All decisions are centralised to Karta of the family
- ✓ Prompt decision: Karta not required to consult anyone to take any decision
- ✓ Due to natural love and affection among the members, the running of business becomes smooth

Disadvantages

- ✓ Family must be unified for smooth running of business
- ✓ After a property gets apportioned to an HUF, every coparcener has equal right to it. So it is not transferrable and should be sold only if all the members agree to it. Partition of HUF land has often led to clashes and court cases.
- ✓ Financial assistance from banks/financial institutions are limited

Procedure for setting up

- ✓ Create a HUF Deed (optional) on stamp paper containing all the details of its members, Karta, address, sources of funds. The name of the HUF is generally known by the name of his Karta like Raman Kumar HUF
- ✓ Obtain PAN card of HUF and open a separate bank account in the name of the HUF.
- ✓ Registration of HUF Deed Registration is not compulsory, however, unregistered firms have its own disadvantages.

MULTI STATE CO-OPERATIVE SOCIETY (MSCS)

- Governed by Multi State Cooperative Societies Act, 2002
- MSCS can be of several types viz. farming cooperative society, credit cooperative society, dairy farm cooperative society etc.
- As per MSCS Act, Multi state co-operative society is a body corporate with limited liability
- Annual auditing by recognized auditors is mandatory.

- Their main objects shall be serving the interests of members in more than one state and their bye-laws shall provide for social and economic betterment of their members through self-help and mutual aid in accordance with co-operative principles

Advantages

- ✓ Provides loans to the poor at reasonable rates
- ✓ Can function PAN India by setting up various branches in different states.
- ✓ Low Compliance Cost as regulatory filing is minimum

Disadvantages

- ✓ Funds available with MCSC are limited
- ✓ Over reliance on Government for funding
- ✓ Lack of managerial skills. As the managing committee is formed from the elected members, there is a possibility of lack of required qualification, skills etc. at members' end.

Procedure for setting up

- ✓ Application in Form 1 to be filed with Central Registrar of Co-operative Societies alongwith prescribed documents like bank certificate confirming the bank balance, purpose/scheme for setting up MCSC, 4 copies of bye-laws, proposed area of operation (initially only 2 contagious states with list of atleast 50 members from each State).
- ✓ For societies having objects related to thrift and credit and for multi-purpose societies certain additional documents are required to be submitted.

CHAPTER 7 – FORMATION & REGISTRATION OF NGOs

SECTION 8 COMPANY

Features

- ✓ Section 8 Companies are incorporated with the purpose of promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object
- ✓ Profits, if any, or other income is applied for promoting only the objects of the company and shall not be distributed among its members.
- ✓ Such a company is a non-profit body and is akin to a NGO.
- ✓ The name of the Company can be incorporated without using the word "Limited" or "Private Limited" as the case may be.
- ✓ It is exempted from stamp duty registration.
- ✓ A One Person Company cannot function as a Section 8 Company.
- ✓ Many privileges and exemptions are available to such a company and they are exempted from various sections of the CA, 2013.

Few Exemptions

- ✓ Appointment of CS is not mandatory
- ✓ For calling AGMs, notice period of 14 days is sufficient.
- ✓ No compulsion on maintaining the minutes of the meetings, unless required in their AoA
- ✓ Appointment of ID is not mandatory
- ✓ Not required to constitute NRC and SRC

Formation/Incorporation

1. **DSC/ DIN -** To obtain a Digital Signature Certificate (DSC) and Director Identification Number (DIN) for all the proposed Directors of the Company if they don't have the same.

2. **Name Approval –** Should fill-up "RUN" and apply for the name. The name once approved by the authority is valid for 20 days. Please take note that the name of the Section 8 company shall include any of the following word i.e. Foundation, Forum, Association, Federation, Chambers, Confederation, Council, Electoral Trust and the like etc. in accordance with Rule 8(7) of the Companies (Incorporation) Rules, 2014.

3. **MOA and AOA -** After obtaining name approval, MOA and AOA is to be drafted and then filed with the RoC along with other documents in e-Form INC 12 for the issuance of license under section 8 of the Companies Act, 2013.The subscription pages of MOA and AOA company shall be signed by each subscriber to the memorandum who shall mention his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any.

4. **Form INC-12** (Application for License u/s 8) - File form INC-12 for the issuance of license under section 8 of the Companies Act, 2013 along with the following attachments:

- INC-13 Memorandum of Association and Article of Association.
- INC-14 by an Advocate/PCS/PCA/PCWA stating that the MOA/AOA are prepared in accordance with Section 8 and all the other provisions in relation thereto have been complied with.
- INC-15 Declaration by each Subscriber to MOA (On Non- judicial stamp paper of Rs. 100/- and duly notarized).
- Estimated statement of Income & Expenditure for Next three years and it should be signed the proposed Promoters.
- List of proposed Promoters and Directors of the Company.
- After the approval of Form INC 12, a license under Section 8 of the Companies Act, 2013 is issued in Form INC-16.

5. **Filing of Incorporation Forms on MCA Portal:** The following forms are required to be filed with the RoC after issuance of the license:

A. **Form No. INC – 7** (Application for incorporation of the Company) along with the following attachments:

- Memorandum of association
- Articles of Association
- Declaration in Form No. INC-8
- An affidavit from each of the subscriber to the memorandum in Form No.INC-9
- Proof of residential address of Subscribers
- Specimen Signature in Form No. INC-10
- Proof of Identity of Subscribers
- NOC in case there is a change in the promoters after name approval.
- PAN card (in case of Indian national)
- CTC of resolution/ board resolution authorising to subscribe to MOA
- Optional attachment, if any

B. **Form No. INC – 22** (notice of situation of registered office) along with the following attachments:

- Conveyance/Lease Deed/ Rent Agreement (Proof of ownership)
- Electricity Bill Not older than 2 months.
- No Objection Certificate on the letter head of promoter for using the premises.

C. **Form No. DIR – 12** (appointment of directors of the company) along with the following

attachments:

- DIR-2 (consent to act as Directors)
- Affidavit by the Directors for Not accepting Deposits (On Non- judicial stamp paper of Rs. 100/- and duly notarized).
- INC-9 Declaration by each Subscriber to Memorandum of Association (On Non-judicial stamp paper of Rs. 100/- and duly notarized).

6. **Certificate of Incorporation-** If the Concerned ROC is satisfied with the incorporation forms, a Certificate of Incorporation is issued by the Registrar of Companies along with a unique Company Identification Number (CIN).

Please note that incorporation can also be done through SPICe

TRUST

Features

- ✓ Governed by Indian Trust Act, 1882
- ✓ In general parlance, 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").
- ✓ **Types of Trusts:**
  - Public Trust: Classified as Charitable and Religious Trusts, which are governed by various statues viz. Bombay Public Trust Act, 1950, Charitable and Religious Trust Act, 1920 etc. They are entitled to all Tax benefits
  - Private Trusts: which are regulated by Indian Trust Act, 1882
- ✓ **Who can create Trust:** By any of the following:
  - Every person competent to contract
  - Company
  - Association of Persons
  - HUF
  - A Woman
  - By and on behalf of Minor with the permission of a principal civil court of original jurisdiction
- ✓ **Who can be Trustee:** Any person who is competent to contract
- ✓ Various exemptions have been given to the Trusts under the Income Tax Act, 1961 (Section 10, 11, 12)

Formation/Incorporation

Before registration of a trust, the following aspects have to be decided:

(a) Name of the trust

(b) Address of the trust

(c) Objects of the trust (charitable or Religious)

(d) One settler of the trust

(e) Two trustees of the trust

(f) Property of the trust-movable or immovable property (normally a small amount of cash/cheque is given to be the initial property of the trust, in order to save on the stamp duty).

Step 1: Creation of a Trust Deed:

Trust Deed should inter-alia contains the following details:

a) Name of the Settlor/Author
b) Name of the Trustee
c) Name of the Beneficiary
d) Name of the Trust
e) Place of Registered address
f) Property, which will be part of the Trust
g) Objects and purpose of the Trust
h) Rights and duties of Trustee and Beneficiary
i) Mode and method of determination of Trust

Step 2: Printing on Stamp Papers

Trust Deed should be printed on Stamp Paper, depending upon the rate prevailing in the State

Step 3: Signatures

Once the Trust Deed is finalised, the same needs to be signed by the Settlor, Trustee, Witnesses and should also have their photographs

Step 4: Registration

At the sub-registrar office. Settlor, Author and Witnesses must be personally present at the time of registration. At the time of Registration, a photocopy of the deed should also be submitted with all signatures.

After registration, sub-registrar will retain the photocopy and original will be handed over.

SOCIETY

Features

- ✓ It 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.

Purposes – Section 20 of the Societies Registration Act, 1860

- ✓ Charitable societies,
- ✓ Military orphan funds or societies established at the several presidencies of India,
- ✓ Promotion of science, literature, or the fine arts for instruction, the diffusion (circulation) of useful knowledge,
- ✓ The diffusion of political education,
- ✓ the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public
- ✓ public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

Advantages

- ✓ 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

- ✓ Tax exemption extended to societies may apply to public trusts only to the extent the Income Tax department accepts their activities as being charitable.
- ✓ The concept of equity investment or ownership is virtually absent; hence, it is not attractive for commercial investors interested in microfinance and large scale funding
- ✓ 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. Hence, legally speaking, they are not allowed to collect savings from their clients; and

Benefits of registration of Society

- ➢ 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

- Opening bank accounts and transaction of business.

Audit

Every society should get its accounts audited once a year by duly qualified auditor and have balance sheet prepared by him.

Litigations

As every society is a legal entity distinct from its members, it is capable of filing suits against any person or any member. Similarly, suits can also be filed against the society.

Formation/Incorporation

- Minimum 7 members are required for formation of Society
- MoA of the Society should be prepared inter-alia containing the objects of the Society
- Registration to be done at Registrar of Societies

Step 1: Selection of Name: Should not be identical with existing name and should not suggest any patronage to State/Central Govt.

Step 2: Preparation of MOA & AOA: MoA should contain the objects of the Society with complete details (names, address, designations and occupations) of all members. AoA should contain the bye-laws of the Society and should clearly mention rules & regulations of the Society, its members, dispute resolution, ways of dissolution etc.

Step 3: Copies of PAN card and address proof are required of all subscribers during registration of the Society

Step 4: All the above-mentioned documents alongwith declaration by the President, that he is willing and competent to hold such position, should be submitted with Registrar of Societies.

CHAPTER 8 – FINANCIAL SERVICES ORGANISATION & ITS REGISTRATION PROCESS

INTRODUCTION

Over the years, Non-Banking Finance Companies (NBFC's), Housing Finance Companies (HFC's), Asset Reconstruction Companies (ARC's), Micro Finance Institutions (MFI's) and Nidhi Companies have played a dominant role in mobilisation and disbursal of funds. With the advent of mobile technology and vast strides made by the country in the field of information technology, Payment Banks has emerged as a new model of banks conceptualised by the Reserve Bank of India (RBI).

NON BANKING FINANCIAL COMPANY (NBFC)

- ✓ NBFC is a company registered under the Companies Act, 2013 (or any earlier enactments)
- ✓ **Business:** 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
- ✓ **Business 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.
- ✓ 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)*.
- ✓ **Financial activity of NBFC means?** 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.

NBFCs are doing functions similar to banks. What is difference between banks & NBFCs?

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.

Is it necessary that every NBFC should be registered with RBI?

In terms of Section 45-IA of the RBI Act, 1934, *no NBFC* can commence or carry on business of a non-banking financial institution without:

a) obtaining a certificate of registration from the Bank, and
b) without having a Net Owned Funds of Rs. 2 crore

However, certain categories of NBFCs which are regulated by other regulators are exempted from the requirement of registration with RBI viz. Venture Capital Fund, Merchant Banking companies, Insurance Company, Housing Finance Companies etc.

Different types/categories of NBFCs

I. **Asset Finance Company (AFC)**: Whose principal business is financing of real/physical Assets supporting economic activity like automobiles, tractors, machines, generator sets etc.

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):** Whose principal business is acquisition of securities

III. **Loan Company (LC):** Whose principal business is providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an AFC.

IV. **Infrastructure Finance Company (IFC):** 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 d) and a CRAR of 15% (CRAR is acronym for capital to risk weighted asset ratio, a standard metric to measure balance sheet strength of banks).

V. **Systemically Important Core Investment Company (CIC-ND-SI):** CIC-ND-SI is an NBFC carrying on the business of *acquisition of sharesand securities* which satisfies the following conditions: -

(a) it holds not less than *90% of its Total Assets* in the form of investment in equity shares, preference shares, debt or loans in group companies;

(b) its investments in the *equity shares* (including instruments compulsorily convertible into equity shares within a period not exceeding 10 years from the date of issue) in group companies constitutes not less than *60% of its Total Assets*;

(c) it *does not trade* in its investments in shares, debt or loans in group companies except through block sale for the purpose of dilution or disinvestment;

(d) it *does not carry on any other financial activity* referred to in Section 45I(c) and 45I(f) of the RBI act, 1934 except investment in bank deposits, money market instruments, government securities, loans to and investments in debt issuances of group companies or guarantees issued on behalf of group companies.

(e) Its *asset size is Rs. 100 crore* or above and

(f) It *accepts public funds*

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 of 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 does not exceed Rs. 50,000 in the first cycle and Rs. 1,00,000 in subsequent cycles;

c. total indebtedness of the borrower does not exceed Rs. 1,00,000;

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

e. loan to be extended without collateral;

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

g. 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 is a financial transaction and a type of debtor finance in which a business sells its accounts receivable (i.e., invoices) to a third party (called a factor) at a discount]

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 crore.

X. **NBFC- Non-Operative Financial Holding Company (NOFHC)**: 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. [Promoter / promoter groups will be permitted to set up a new bank only through 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.]

Advantages/Benefits

I. **Competitive Interest Rates:** Interest rates offered by NBFC's are wither same or lower than the rates offered by the banks, which helps in lower EMI.

II. **Quick Processing:** Loan process time in case of NBFCs are much lesser than that of banks, which helps in quick processing and disbursement.

III. **Less regulated:** Rules & Regulation are less stringent than the banks. NBFC's do not have statutory reserve ratios and can open branches at will.

IV. **Loans available for individuals with poor credit ratings:** NBFC provide loan facilities to individuals with poor ratings, however, higher rates of interest are charged in lieu of that. In case of banks, poor credit rating individuals are not given such facility

V. Most of the corporate sector prefers banks; however, retail sector chooses NBFCs over banks. Simple loans such are vehicle financing loans, gold loans, home loans and durable loans are offered by NBFCs and customer satisfaction ratio is high here

Incorporation of NBFC

I. Under the Companies Act:

NBFCs are the Companies incorporated under the CA, 2013, therefore, the procedure for their incorporation is similar to what we have for normal companies. However, minimum Authorised Share Capital of NBFCs should not be lower than Rs. 2 crore (net owned fund)

II. As per RBI:

For registration with RBI, following is the criteria:

(a) It should have minimum 1 director from NBFC background or senior Bankers as full-time director in the company

(b) Clean CIBIL records

(c) Understanding of NBFC / Finance business

Before commencement of business, NBFCs has to ensure that it has registration certificate from RBI and Net owned Funds of Rs. 2 crore.

Procedure for filing application with RBI

(1) Application is to be filed online (https://cosmos.rbi.org.in) and after online submission, physical copy alongwith necessary documents to be file with Regional office of RBI.
(2) For online submission, Company need to log-in to COSMOS application link and download the form. The form can be filled offline and after that need to be uploaded at COSMOS
(3) Post online submission, a Company Application Reference Number (CARN) will be allotted to the Company.
(4) Status of the application can be checked by entering CARN on RBI website.

HOUSING FINANCE COMPANY (HFC)

- ✓ It's a type of NBFC
- ✓ Primarily engaged in the business of providing home loans and other related products

- ✓ Regulated by National Housing Bank (NHB)
- ✓ Collateral securities are accepted for granting loans, which generally include the property against which the loan is taken
- ✓ Amount of loan depends upon the value of collateral
- ✓ HFC's do regular property valuation to understand how the property value is changing
- ✓ No Company can start business of housing finance without taking the registration certificate from NHB and having a net owned fund of Rs. 10 crore

Registration of HFC

- ✓ Normal registration under CA, 2013. Should clearly mention its main objects as "granting loan for housing etc." and should have minimum net owned fund of Rs. 10 crore
- ✓ Certification from NHB subject to following conditions:

(i) HFC is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;

(ii) 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;

(iii) General character of the management or the proposed management of the HFC shall not be prejudicial to the public interest or to the interests of its depositors;

(iv) HFC has adequate capital structure and earning prospects;

(v) Public interest shall be served by the grant of certificate of registration to the HFC to commence or carry on the business in India;

(vi) Grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country; and

(vii) Any other condition

Net Owned funds of HFC

Aggregate of PUC + FR – (Accumulated losses + deferred revenue expenditure + other intangible assets)

Less: (i) Investment in *shares* of its subsidiaries + companies in same group + other HFC; (ii) book value of *debentures, bonds, outstanding loans and advances and deposits with* subsidiaries and companies in same group [to the extent it exceeds 10% of (i)]

ASSET RECONSTRUCTION COMPANY (ARC)

- ✓ Registered under Section 3 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act, 2002.
- ✓ Regulated by RBI as a NBFC but has been exempted by RBI for various compliances

- ✓ It buys the Non-Performing Assets (NPAs) or bad assets from banks and financial institutions so that the latter can clean up their balance sheets or in other words, ARCs are in the business of buying bad loans from banks.
- ✓ ARCs clean up the balance sheets of banks when the latter sells these to the ARCs. This helps banks to concentrate in normal banking activities. Banks rather than going after the defaulters by wasting their time and effort, can sell the bad assets to the ARCs at a mutually agreed value.

Benefits

- ✓ Relieves banks from pain of bad loans and allow them to focus on their core business
- ✓ ARCs can maximise recovery value while minimizing costs
- ✓ Helps building industry expertise in loan resolution and restructuring management

Registration

- ✓ Normal registration as a Company under CA, 2013
- ✓ Registration certificate from RBI
- ✓ Shall start its business within 6 months from date of grant of registration
- ✓ Minimum Net owned funds of Rs. 100 crore

MICRO FINANCE INSTITUTIONS (MFI)

- ✓ The microfinance models are developed in order to cope with the financial challenges in financially backward areas.
- ✓ It offers financial services to low income populations or having unstable income.
- ✓ The size of loan is small and the repayment period is short. Generally, no collateral is required for such financing.
- ✓ It is regulated by RBI

Registration

- ✓ Normal registration as a Company under CA, 2013
- ✓ Registration certificate from RBI

NIDDHI COMPANIES – WE HAVE DISCUSSED IN DETAILS ABOUT THE SAME IN REVIOUS CHAPTERS

PAYMENT BANKS

- ✓ Conceptualised by RBI

- ✓ Can accept deposits upto Rs. 1 lakh per customer
- ✓ Can pay interest on these deposits like a saving bank account
- ✓ Can issue ATM cards, provide net banking, debit cards, 3rd party transfers etc.
- ✓ Objective: Widen the spread of payment and financial services to small business, low-income households etc. and to increase the penetration level of banking services to rural areas.
- ✓ Regulated by RBI. Need to incorporate a Company under CA, 2013 to start the business
- ✓ Minimum capital requirement is Rs. 100 crore and for 1st five years, the promoter stake should not be less than 40%.
- ✓ Majority of BOD should be ID, appointed as per RBI guidelines
- ✓ 25% branches must be in unbanked rural areas.
- ✓ Must use the term “Payment Bank” in its name
- ✓ Should be registered as “Public Limited Company” under CA, 2013.

CHAPTER 9 – START-UPS AND ITS REGISTRATION

INTRODUCTION

Startup India is a flagship initiative of the Government of India, intended to build a strong eco-system for *nurturing innovation* which will help to *drive sustainable economic growth and generate large scale employment opportunities*. The Government through this initiative aims to empower Startups to grow through innovation and design.

In order to meet the objectives of the initiative, Government of India announced the Action Plan that addresses all aspects of the Startup ecosystem on 16th January 2016. With this Action Plan the Government hopes to accelerate spreading of the Startup movement.

WHAT IS STARTUP?

A Startup is a young company that is just beginning to develop. Startups are usually small and initially financed and operated by a handful of founders or one individual. These companies offer a product or service that is not currently being offered elsewhere in the market, or that the founders believe is being offered in an inferior manner.

As per Section 2(40) of CA, 2013: Startup means a private company incorporated under the Companies Act, 2013 or previous laws **and**recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."

EVOLUTION OF STARTUPS

- ✓ Startup companies can come in all forms and sizes.
- ✓ Some of the critical tasks of Startups is:
  - build a co-founding **team** to secure key or complementary skills,
  - **technical** know-how,
  - **financial** resources, and
  - other elements to build the **product** for the target market.
- ✓ A Founders' **agreement** (agreement between the founders/promoters) 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 startup.
- ✓ 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.
- ✓ A company may **cease** to be a startup as it passes various **milestones**, 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.
- ✓ Given that startups operate in high-risk sectors it can also be **hard to attract investors** to support the product/service development or attract buyers.

STARTUP POLICY

- ✓ GOI has announced **'Startup India' initiative** for creating a conducive environment for startups in India.
- ✓ Various Ministries of GOI have initiated a number of activities for the purpose.
- ✓ The campaign was first announced by Prime Minister Narendra Modi in his 15 August 2015 address.
- ✓ Startup India campaign is based on an **action plan aimed at promoting bank financing for start-up ventures to boost entrepreneurship and encourage startups with jobs creation**.
- ✓ 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 crore**, and
  - (c) It is **working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property**
- ✓ 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.
- ✓ Any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'startup'.
- ✓ Further, **in order to obtain tax benefits** a startup so identified under the above definition shall be required to obtain a **certificate of an eligible business from the Inter-Ministerial Board of Certification** consisting of various ministries.
- ✓ An entity shall **cease** to be a startup on **completion of 5 years** from the date of its incorporation/registration **or** if its **turnover** for any previous year exceeds **Rs. 25 crore**.
- ✓ Few State Governments have also taken initiatives and launched startups policies for their states like West Bengal, Uttar Pradesh, Odisha, Rajasthan, Gujarat etc.

PROCESS FOR RECOGNITION OF STARTUP

- ✓ Startup must be formed with any of the following legal framework:
  - (i) Registered u/CA, 2013; or
  - (ii) Registered as Partnership firm
  - (iii) Registered as LLP
- ✓ Driven through Department of Industrial Policy & Promotion

- ✓ Required to submit a simple application with prescribed documents
- ✓ Upon submission of application, a recognition number will be issued
- ✓ Should be headquartered in India
- ✓ Should be incorporated less than 5 years ago and has an annual turnover of less than Rs. 25 crore

COMPLIANCE REGIME

To promote growth and help Indian economy, following benefits are given to entrepreneurs for startups

- **Simple Process:** GOI has launched a mobile APP and a website for easy registration of startups
- **Easy access to funds:** GOI has set up a Rs. 10,000 crores fund to provide funds to startups as Venture Capital.
- GOI is providing **guarantee** to banks and financial institutions for providing funds
- Startups will be **exempted from income tax for 3 years** provided they get a certification from Inter-Ministerial Board (IMB).
- Startups **can apply for government tenders**. They are exempted from the "prior experience/turnover" criteria applicable for normal companies answering to government tenders.
- Various **compliances have been simplified** for startups to save time and money. Startups shall be allowed to self-certify compliance (through the Startup mobile app) with 9 **labour** and 3 **environment laws**
- **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.
- In case of **exit**, a startup can close its business **within 90 days** from the date of application of winding up
- Provisions of Section 73 (a) to (e) (**Deposits**) shall not apply to Startups for 5 years
- Upper limit of Deposit has been increased to 35% from 25%
- Can issue ESOPs to Promoters, who are working as Employees
- Limit of Sweat Equity has been increased to 50% of PUC (from 25%)
- Allowed to hold atleast 1 BM in each half of Calendar year and a minimum gap of 90 days between 2 meetings

REGISTRATION PROCESS

- ✓ **Choosing the right structure:** Startups can be formed as Companies, Partnerships firms (registered) and LLPs. Entrepreneurs need to decide the structure that they need to adopt for carrying on the business.

- ✓ **Registration** under various laws like PAN, TAN, GST etc.

- ✓ **IP protection:** IPs developed/to be developed by startups needs to be registered with the authority in the name of the Entity and not in the name of the Promoters

- ✓ **Founders Equity:** 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. Founder shares should be always subject to vesting schedule – typically over a period of three to four years

- ✓ **Founder Agreements:** Should be entered between the founders of Startup and should have clear understanding between the founders on all key issues. Should also mention the responsibilities and operating structure

- ✓ **Employment contracts:** Means the appointment letters of the employees which should clearly states the clauses like confidentiality, non-compete clauses, non-solicitation clauses etc.

- ✓ **ESOP:** Clear ESOP policy wherein the vesting period should be defined.

- ✓ **3rd party agreements:** all agreements should be preceded by NDAs and thereafter the main agreements should have unambiguous clauses related with IPR rights, vesting of future IPR rights, indemnification, dispute resolution etc.

- ✓ **Investment structuring:** as a process an intention document detailing the structure of the transaction called the *term sheet* is executed followed by due diligence of the startup and execution of investment related definitive agreements.

FINANCIANG OPTIONS

- ✓ **Seed Capital:** As the name suggests it's the initial capital of the Startups. It typically flows from the Promoters, their friends or families. It is mainly required for the purpose of market research, product development and other initial stage operations. The paperwork involved in seed funding is relatively less and straightforward, compared to advanced rounds of funding.

- ✓ **Further Financing:** Further financing of Startups can be done through either Equity financing or Debt financing

A. FOLLOWING ARE THE VARIOUS OPTIONS OF <u>EQUITY FINANCING</u>:

(i) **Venture Capitalist/Private Equity**

- ➢ Often the first large investment a startup can expect to receive.
- ➢ Convertible instruments are usually the preferred option
- ➢ The investor and startup will normally enter into a non-binding offer based on the preliminary valuation of the startup usually followed with a financial, legal and technical due diligence on the startup as required by the investors.

(ii) **Angel Investors**

- Usually individuals/group of professionals, who are willing to invest
- Governed by SEBI regulations which states that the investee company:
  a) Should not be in existence for more than 3 years;
  b) Should be unlisted;
  c) Turnover should be less than Rs. 250 million;
  d) Not to be promoted or related with any Industrial group exceeding turnover of Rs. 3 billion;
  e) Deal size should be between Rs. 5 million and Rs. 50 million; and
  f) Investment should be held for atleast 3 years

(iii) **Series Funding**

It's a mechanism by which the shares are issued by the startups to its investors in tranches. Such tranches are known by the name of Series like Series A, Series B etc.

Following are the things that a Company/CS needs to take care while issuing the shares in Series:

- Investors generally looks at the financials, economies, product, management team, customer base etc. before putting any money in the Company. So, it is always advisable to ready with all such necessary details in advance in order to save time.
- Series funding is a time consuming time and generally takes around 7-8 months to complete. So, please consider a buffer of couple of months for receiving the funds
- Use your networking skills/PR skills to get the investors
- Ensure to do the market valuation of your business
- Engage professionals who would be able to advise you on the agreements and other legal complexities in the Series funding
- Before any funding, investors will carry out the due diligence of Company, which generally consists of your financials, statutory records, litigation matters, promoters/leadership team members background check etc. So, kindly arrange all these papers etc. in place

B. DEBT FINANCING

(i) Loans from Banks and Financial Institutions

Unlike Investors, Banks and FI do not ask for Board membership in the Company. However, the Company needs to pay interest on the loan taken, which will be an additional financial burden on the startup.

(ii) External Commercial Borrowings

Startups can also avail borrowings from non-resident lenders also. However, in such

cases, the Company needs to follow Automatic or Approval Route, as per RBI guidelines. Further, in case of ECB, there are restrictions on the usage of the availed facility also and the startup needs to comply with RBI regulations also.

(iii) CGTMSE Loans:

Under the Credit Guarantee Trust for Micro and Small Enterprises (CGTMSE) scheme launched by Ministry of Micro, Small & Medium Enterprises (MSME), Government of India to encourage entrepreneurs, 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 Regional Rural Banks, NSIC, NEDFi, and SIDBI, which have signed an agreement with the Credit Guarantee Trust.

C. OTHER MODES

(i) Crowd Funding

- ✓ As the name denotes it means “funding from the crowd”.
- ✓ Under Crowd funding, 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.
- ✓ SEBI in 2014, even rolled out a 'Consultation Paper on Crowd funding in India' proposing a framework in the form of Crowd funding to allow startups and SMEs to raise early stage capital in relatively small sums from a broad investor base. However, SEBI not issued any further regulations in this regard.

(ii) Incubators

- ✓ It precedes the Seed funding stage and helps the entrepreneur to develop a business idea.
- ✓ They generally seek initial equity in the projects and offers their office space, administrative support, legal compliance etc. to the entrepreneur.
- ✓ The incubation period can be 2-3 years.

(iii) MUDRA Banks

- ✓ It was launched by Prime Minister Narendra Modi on 8 April 2015.
- ✓ Micro Units Development and Refinance Agency Bank (or MUDRA Bank) is a public sector financial institution in India.
- ✓ It provides loans at low rates to micro-finance institutions and non-banking financial institutions which then provide credit to MSMEs.

- ✓ The bank will classify its clients into three categories and the maximum allowed loan sums will be based on the category:
  - ➢ Shishu: Allowed loans up to Rs. 50,000 (US$780)
  - ➢ Kishore: Allowed loans up to Rs. 5 lakh (US$7,800)
  - ➢ Tarun: Allowed loans up to Rs. 10 lakh (US$16,000)
- ✓ Those eligible to borrow from MUDRA bank are:
  - ➢ Small manufacturing unit
  - ➢ Shopkeepers
  - ➢ Fruit and vegetable vendors
  - ➢ Artisans
- ✓ The basic criteria of age should be 18 years old.
- ✓ Loan under the scheme of the Pradhan Mantri Mudra Bank Loan will be available if and only if it is for commercial and business purposes and not for personal purposes.
- ✓ This loan is for new business and is only applicable for small business owners.
- ✓ **Procedure for Loan:**
  - ➢ Beneficiary needs to select the business category under which he wishes to avail the loan (Shishu, Kishor or Tarun).
  - ➢ For the purpose, he can nearest Public/ Private sector bank where he can apply for business loan under PMMY (Pradhan Mantri Mudra Yojana).
  - ➢ Need to submit an application alongwith the prescribed documents for availing the loan.
  - ➢ No processing fee is charged and no collateral is taken.
  - ➢ Repayment period is upto 5 years.
  - ➢ Applicant should not be a defaulter to any Bank or financial institution.
  - ➢ After the loan has been sanctioned under MUDRA Yojana, the candidate will get a MUDRA Card, a card like the credit card which the candidate can use to buy business raw material, etc. Mudra Card will have a limit of 10% of the business loan (subject to Rs. 10,000 maximum).

CHAPTER 10 – JV COLLABORATION AND SPV

INTRODUCTION

- ✓ Joint Ventures (popularly known as "JV") can be defined as **"an enterprise in which two or more investors share ownership and control over property rights and operation".**
- ✓ The venture can be for one specific project only, or a continuing business relationship.
- ✓ The contributions to the JV are either in the form of money [capital], services, or physical asset(s), i.e. equipment or intellectual property [software, patents], etc., or a combination of all.
- ✓ Few examples of JVs are as follows:
  - ➢ **Vistara** is the brand name of Tata SIA Airlines Ltd, a JV between India's corporate giant Tata Sons and Singapore Airlines (SIA).
  - ➢ **Bharti AXA General Insurance Co Ltd** is a JV between India's leading business group Bharti Enterprises and insurance major from France, AXA.
  - ➢ **Mahindra-Renault**, founded in 2007 brings together India's largest automobile manufacturer Mahindra & Mahindra and world renowned vehicle maker, Renault SA of France.
  - ➢ **Sony Ericson** is a JV between two giants of electronic and communication industry.

ADVANTAGES OF JV

(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:** A JV with 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.

(iii) **Market Access:** 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 do 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.

(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, JV is the perfect solution.

(vii) **Flexible nature:** JV provide flexibility to each participant and the freedom to continue with their individual businesses. JV 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 JV

(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.

(ii) **Lack of equal involvement:** An equal involvement from all the JV 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:** JV can result in a frustrating experience and ultimately a failure if it lacks adequate planning and research.

(v) **Lack of clear communication:** JV 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 JV, 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 JV partner.

POINTS TO BE CONSIDERED WHILE ENTERING IN JV/IDENTIFICATION OF JV PARTNER

(a) JV Partner should **never be weak or untrustworthy partner**, as it would definitely lead to failure of the JV.

(b) Development of **Strong Joint Venture Relationship**: Partners must strive to develop JV relationships that are easy to maintain, financially profitable, intellectually rewarding, and long lasting. After a necessary period of negotiation and implementation, the Joint Venture relationship should grow well and quickly and painlessly.

(c) JV Partners must make sure that all the partners **have equal contribution** in the JV entity in terms of skills, intellectual resources, marketing resources, capital, and so on. Unbalanced or unequal contributions are never healthy for the success of a JV entity.

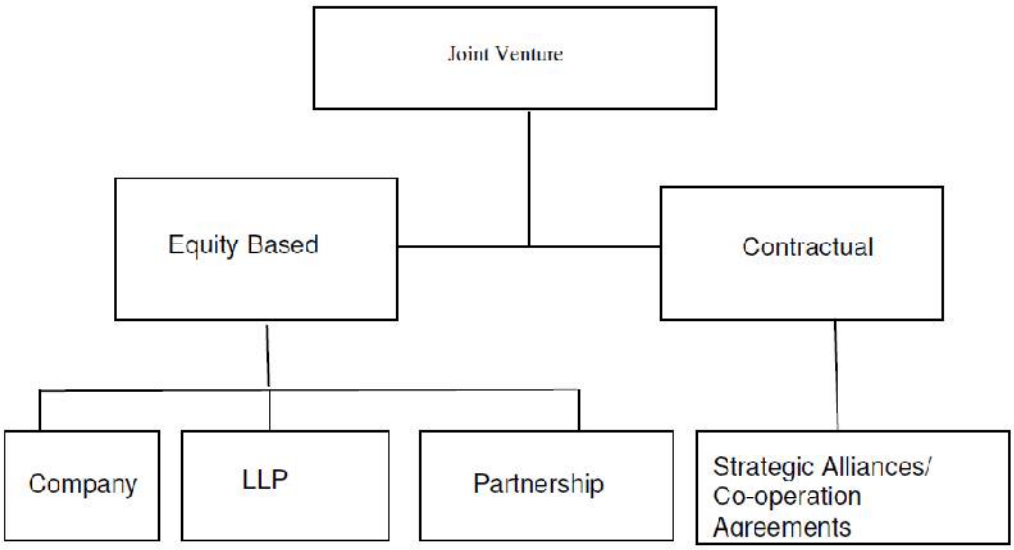
(d) The **agreement** between JV partners should be **in writing** and must **clearly define** all the **terms**, relates to rights and responsibilities of each partner. The language of the agreement must be simple and there should be no ambiguity, also there should be no clashing of

interest.

(e) It is essential that **limits and scope** of the venture should be **defined** in the **beginning** itself. At a later stage, once the trust amongst the partners is developed, the scope of JV can be increased with the mutual consent of all the partners.

(f) The partners in a JV must **clearly define the nature of the new venture** including the proposition to the customer, the channels and relationship management, the value chain, the structure and roles, investments, income, costs and payments, success factors and the timetable for delivery. A well-defined business model provides a base for the legal and financial frameworks.

FORMATION OF JV



Joint Ventures can be formed via two modes / methods:

(1) Equity Joint Venture

(2) Contractual Joint Venture

Equity Joint Venture – *Means formation of a new entity wherein both the Parties participate with their money, technical know-how etc.*

- ✓ The Equity JV is an arrangement whereby a **separate legal entity is created** in accordance with the agreement of two or more parties.
- ✓ The parties undertake to **provide moneyor other resources** as their contribution to the assets or other capital of that legal entity.
- ✓ The **newly created company**, thus, **becomes the owner of the resources contributed** by the parties to the JV arrangement. Each of the parties in turn becomes the owner of the company having equity in the company.

- ✓ The parties to a JV 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 profits **and losses of the jointly owned entity are distributed** among the parties according to the ratio of the capital contributions made by them.

Different set of entities, which can be formed under Equity JV

a) **Company**

b) **LLP**

c) **Venture Capital Fund**: such funds manage the money of investors who seek private equity stakes in startup and small to medium sized enterprises with strong growth potential.

d) **Trusts**: Trust can be used as a vehicle to make investments in different forms like Infrastructure Investment funds, Alternate Investment Funds etc.

Restrictions under FDI Policy of India

Following persons/entities have restrictions in making investments in JV through Equity financing route:

1. Citizen or entity of **Pakistan** can invest only **after approval of GOI**. 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 GOI**. 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 resolution by its Board of Directors followed by a special resolution to that effect by its General Body and subject to prior intimation to Reserve Bank of India. 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.

Contractual Joint Venture – *New entity is not created and the relationship between the parties is derived from Contract*

- ✓ The contractual JV 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 the other reasons.
- ✓ The two parties do not share ownership of the business entity but each of the two parties exercises some elements of control in the JV.
- ✓ The licensing agreement, know-how agreement, technical services or technical assistance agreement, franchise agreement and agreement covering all other commercial matters might even form annexes to the main joint venture agreement.

DOCUMENTS FOR JV

Finalization of a JV goes through many stages:

Stage 1: Familiarization stage: when the two partners generally attempt to know each other.

Stage 2: Engagement stage: when there is a level of commitment but still it is not very firm or long-term.

Stage 3: Final stage: when broad understanding has been reached on the terms of the Joint Venture.

Points to remember:

- ✓ At each stage, the documentation is different.
  - ➢ Memorandum of Understanding (MOU) is signed at the initial stage. The MOU is a brief document without much legal jargon. The MOU states the duties of both parties and lays down a road map for the future.
  - ➢ During the engagement phase, a Contractual Joint Venture may be envisaged. The parties are putting in relatively higher amount of resources at this stage. Hence, it is customary to have well-drafted legally binding contracts.
  - ➢ In the final stage, the parties entered into definitive agreement like JV Agreement, Shareholders' Agreement or LLP Partnership deed
- ✓ In a company, Articles of Association is a very important document. Companies Act, 2013 gives the promoters freedom to draft the articles as per their requirements. It is hence, advisable to devote time and attention to the Articles and not depend on a standard off the shelf draft, especially in case of a joint venture company where one of the partners is a foreign national /company.

ESSENTIAL COMPONENTS OF JV AGREEMENT

There is no legally prescribed format for entering into JV Agreement. However, following clauses should be part of every JV Agreement:

- ✓ **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)
- ✓ **Legalaspects**:

  (i) Amendments of the JV Agreement

  (ii) Duration of the JV

  (iii) Termination

  (iv) Dispute resolution by amicable consultation and/or Arbitration mechanism/Alternate form of Dispute Resolution

  (v) Confidentiality and Non-Disclosure Agreement

  (vi) Non- compete clause

  (vii) Indemnification

  (viii) Procedure for execution

SPECIAL PURPOSE VEHICLE (SPV)/ SPECIAL PURPOSE ENTITY (SPE)

- ✓ A Special Purpose Vehicle (SPV) or Special Purpose Entities (SPE) are generally formed for a 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.
- ✓ A SPVs/SPEs may be formed through limited partnerships, trusts, corporations, limited liability corporations or other entities.
- ✓ SPVs help companies securitize assets, create joint ventures, isolate corporate assets or perform other financial transactions.
- ✓ The main purpose of a SPV is to allow the parent company to make highly leveraged or speculative investments without endangering the entire company.
- ✓ SPVs can be used for acquiring assets indirectly for the purpose of tax saving

Thus, based on above meaning, we can conclude that a SPV is an entity which has distinct identity from its promoters or sponsors or constituents or shareholders.

Benefits of SPV/SPE

(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 unauthorized 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.

LLP as SPV/SPE

- ✓ A Limited Liability Partnership (LLP) Firm combines the simplicity of a partnership firm with the advantage of limited liability as available in the case of a company.
- ✓ Till November 2015, foreign companies were not allowed to invest in any form of structure except a company.
- ✓ Foreign Investment in some LLP firms has been allowed now.
- ✓ LLP firm as an SPV between a foreign company and an Indian company has the advantage of being easy to wind up after the purpose is over and the liability of the two partner companies is limited.
- ✓ Key advantages of using an LLP firm as an SPV as compared to a company are as follows:

    (a) Low cost of incorporation of an LLP

    (b) Flexibility of rules of management and governance based on Agreement between the contracting Partners.

    (c) Partners can be companies while management is by Designated Partners who are individuals. By this, there is divorce between ownership and management.

(d) Low annual maintenance cost

(e) There may not be any necessity of getting the accounts audited before the project takes off.

(f) An LLP firm does not have to pay Dividend Distribution Tax (DDT) on share of profits transferred to the Partners, which makes it tax efficient.

(g) Voluntary winding of an LLP firm which has no creditors is very easy and can be done without intervention of any court or tribunal.

(h) Investment in LLP Firms is permitted only in sectors in which 100% FDI is permitted through automatic route without any performance linked conditions.

ESSENTIAL COMPONENTS OF SHA/LLP PARTNERSHIP AGREEMENT

The SHA / PA is not a document for the government or the courts. SHA / PA is a working document and should be drafted with business essentials in focus.

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 rights, duties and responsibilities.

(vii) Persons responsible for managing finances, marketing, production, etc.

(viii) Dividend distribution policy

(ix) Term of office of the nominated directors, the manner of their appointment and changes among them.

(x) valuation of the company at the time of separation

(xi) Dispute resolution mechanism.

CHAPTER 11 – SETTING UP OF BUSINESS OUTSIDE INDIA & ISSUES RELATING THERETO

BRIEF HISTORY OF FOREIGN INVESTMENT

- ✓ India was a Closed Economy till 1991 wherein the focus was to increase and promote the local businesses but invite only those businesses which are critical to economy.
- ✓ After Independence that we need a strong Home grown Industrial and Entrepreneurial class to stay relevant in today's world. If India had opened up from the Day one, the British and the American companies might come in and never let our own people to develop big companies that were developed in those day.
- ✓ In 1991, IMF bailed out India from Trade Deficit whereby India pledged 67 tons of its Gold Reserves as collateral in exchange of $600m. The only condition of IMF was to open the Indian Economy to foreign Companies, which was agreed by India.
- ✓ Consequently, in 1992, India come up with its own Indian Overseas Investment policy by which an "Automatic Route" was provided to Indian Companies to make investment overseas subject to certain conditions.
- ✓ Another advantage of Overseas Investment Policy was to have access to new markets and technologies with a view to increase their competitiveness globally and help the country's export efforts.
- ✓ Thereafter, in 2000, GOI notified FEMA (Foreign Exchange Management Act) for **management** of Foreign Exchange **and not "Regulation"** unlike the earlier Act ("FERA").
- ✓ **Overseas Direct Investment** means investments, *either* under the *Automatic Route* or the *Approval Route*, by way of contribution to the capital or subscription to the Memorandum of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).
- ✓ As per the definition, an Overseas investment made by the Company is bifurcated into two categories viz. Automatic Route and Approval Route.

WHO ARE ELIGIBLE FOR MAKING OVERSEAS INVESTMENT?

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 Reserve Bank

WHAT ARE THE PROHIBITIONS FOR FOREIGN INVESTMENT?

A. Making investment (or financial commitment) 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 Reserve Bank*.

B. An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer *financial products linked to Indian Rupee* (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) *without the specific approval of the Reserve Bank*.

FEMA – A GUIDE TO MAKE FOREIGN INVESTMENT

- ✓ Provide power to RBI to specify, in consultation with GOI, the classes of permissible Capital Account Transactions (means transactions which alters the assets & liabilities outside India of an Indian resident)

- ✓ Limits up to which foreign exchange is admissible for such Capital Accounts Transactions.

- ✓ Provides power to RBI to prohibit, restrict or regulate various transactions by making Regulations.

AUTOMATIC ROUTE

- ✓ Under the Automatic Route, an Indian Party does not require any prior approval from the Reserve Bank for making overseas direct investments in a *JV/WOS* abroad.

- ✓ The Indian Party should approach an *Authorized Dealer Category – I bank* with an application in Form ODI and the prescribed enclosures / documents for effecting the remittances towards such investments.

- ✓ However, in case of investment in the financial services sector, prior approval is required from the regulatory authority concerned, both in India and abroad.

"*Joint Venture (JV)"/ "Wholly Owned Subsidiary (WOS)*" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party makes a direct investment. A foreign entity is termed as JV of the Indian Party when there are other foreign promoters holding the stake along with the Indian Party. In case of WOS entire capital is held by the one or more Indian Company

"*Authorised Dealer Category – I Banks*" means and includes all commercial banks registered under RBI Act with prime responsibility of dealing in Current Account and Capital Account Transactions in accordance with RB norms."

- ✓ The total financial commitment ("FC") of Indian Party in overseas JV/ WOS shall not exceed 400% of its net worth (as per the last audited Balance Sheet)

- ✓ FC made out of balances held in the EEFC (Exchange Earners Foreign Currency) account of the Indian party or out of funds raised through ADRs/GDRs will not be taken into consideration for the purpose of the aforesaid calculation

- ✓ Prior approval of RBI is required if the FC exceeds USD 1 Billion in a FY

- ✓ Overseas JV/ WOS shall carry out bonafide activity permitted as per the law of the host country
- ✓ Indian Party shall not be on the Reserve Bank's exporters' caution list / list of defaulters/ under investigation by the Directorate of Enforcement or any investigative agency or regulatory authority
- ✓ The Indian Party routes all the transactions relating to the investment in a JV/WOS through only one branch of an authorised dealer to be designated by the Indian Party
- ✓ For switching over to another AD, an application shall be made to RBI after obtaining an NOC from the existing AD.
- ✓ 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 / Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant.

METHODS OF FUNDING

- ✓ Withdrawal of foreign exchange from an AD bank in India;
- ✓ Swap of shares;
- ✓ Proceeds of ECBs/ FCCBs;
- ✓ Exchange of ADRs/GDRs;
- ✓ Balances held in EEFC account of the Indian Party; and
- ✓ Proceeds of foreign currency funds raised through ADR / GDR issues.

Further, general permission has been granted to persons resident in India for purchase/ acquisition of securities in the following manner:

(i) out of funds held in RFC account;

(ii) as bonus shares on existing holding of foreign currency shares; and

(iii) when not permanently resident in India, out of their foreign currency resources outside India

APPROVAL ROUTE

- ✓ Proposals not covered by the conditions under the automatic route require prior approval of the Reserve Bank for which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.
- ✓ The designated AD before forwarding the proposal should submit the Form ODI in the online OID application under approval route and the transaction number generated by the application should be mentioned in the letter.

- ✓ In case the proposal is approved, the AD bank should effect the remittance under advice to Reserve Bank so that the UIN (Unique Identification Number) is allotted.

Few examples of transactions under Approval Route:

- ✓ Overseas Investments in the energy and natural resources sector exceeding the prescribed limit of the net worth of the Indian companies as on the date of the last audited balance sheet;

- ✓ Corporate guarantee by the Indian Party to second and subsequent level of Step Down Subsidiary (SDS);

ISSUES TO BE CONSIDERED FOR CHOOSING LOCATION FOR INVESTMENT OUTSIDE INDIA

Geographical Location of the business

- ✓ Infrastructure (ports, airports, storage, specific storage types – such as cold-storage, secure storage)

- ✓ Access (transportation of goods, materials and personnel)

- ✓ Relevance to *supply-chain*: raw material sourcing, processing, despatch of finished produce)

- ✓ Availability of talent pool for productions (labour), services and management

Economic aspects

- ✓ Ease of doing business: entering, establishing, restructuring and closing the business, visa availability

- ✓ Cost of doing business: return on investment computations vis-à-vis comparable locations

- ✓ Laws relating to labour

- ✓ 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, TRC, etc.

Political Aspects

- ✓ Friendly country, MFN status

- ✓ Long-standing and established legislative precedents with companies going through regulatory recourse

- ✓ Their relations with nearing countries and neighbors and your country

Social Aspects

- ✓ Trade bodies, interaction between commercial entities of both nations

- ✓ Expatriate friendliness of the nation for relocating key employee personnel.

Technological aspects

- ✓ Intellectual property protection: create, maintain and extract IP at the location or provision thereof from another location to the nation with free entry and egress.

- ✓ Power, communication, telecom – 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. Value systems and institutions are also becoming increasingly important from a long term perspective, in order to have the support of stakeholders. Ultimately, any chosen business strategy has to be executed within the parameters of legal and regulatory compliances. At the same time it is necessary to factor in global tax costs and plan to the possible extent within the framework of law.

CHAPTER 12 – PROCEDURE FOR CONVERSION OF BUSINESS ENTITIES

CONVERSION OF PRIVATE INTO A PUBLIC COMPANY

- **Provisions for conversion of private company into a public company**

(1) A company may by passing a **special resolution** alter its MOA & AOA including alterations having the effect of converting a private company into a public company. [Section 14(1)]

(2) The company shall from the date of such alteration cease to be a private company.

(3) Any alteration in the Articles duly registered shall, subject to the provisions of the Act, be valid as if it were in the original Articles. [Section 14(3)]

- **Procedure for conversion of private company into a public company:**

The following procedure for conversion of a private company into a public company is applicable:

(i) **Convene a Board Meeting** to take necessary decision to fix the time, place and agenda for convening a General Meeting of members. For the purpose, we need to provide atleast 7 days' notice to the Directors alongwith the Agenda. Agenda should contain the resolutions for approval of change of name and also for the calling an EGM for taking approval of shareholders.

(ii) **EGM Notice:** Issue notice of atleast 21 clear days' of EGM to all the shareholders alongwith the explanatory statement giving details of the change of name.

(iii) **At the general meeting** of members, amend the name clause by removing the word 'Private' by passing a **special resolution**.

(iv) The general meeting must also pass a special resolution deleting from its articles the restricting clauses of a private company. Similarly, all other clause in the articles which do apply to a private company should be deleted and those which apply to public companies should be inserted such as increasing the number of shareholders to at least 7 and number of directors to at least 3. These resolutions will be passed clause by clause.

(v) File MGT-14 along with a copy of the revised MOA and AOA and the ROC will register the same.

(vi) File Form INC-27 for effecting the conversion of a Company from Private Limited to Public Limited. This also needs to be filed within 30 days of passing of SR.

(vii) RoC will scrutinize the forms and the attached documents and if found everything in order, will register the Conversion and issue a fresh certificate of incorporation.

CONVERSION OF PUBLIC COMPANY INTO PRIVATE COMPANY

- **Procedure for conversion of a Public Company into a Private Company.**

Provisions for conversion of a public company into a private company:

(1) A company may by passing a **special resolution** alter its MOA & AOA including alterations having the effect of converting a public company into a private company. [Section 14(1)]

(2) Resolution passed to convert a public company into a private company shall not take effect until it is approved by the **Tribunal**.

(3) An alteration of the Articles along with the copy of Tribunal's order shall be filed with the ROC, together with a copy of the altered Articles, within 15 days. On receipt of the above documents the ROC shall register the same: [Section 14(2)]

(4) Any alteration in the Articles duly registered shall be valid as if it were in the original Articles. [Section 14(3)]

Procedure for conversion of a public company into a private company:

(i) Convene a board meeting and pass the resolution for conversion of Company, change in AOA and MOA. Also, pass the resolution affixing the date of General Meeting wherein the approval of Shareholders needs to be taken.

(ii) In the general meeting, Special Resolution needs to be passed for conversion of Company and amendments in AOA and MOA of the Company. Ensure that all other clauses in the AoAwhich do apply to a private company should be added and those which apply to public companies should be deleted such as limiting the number of shareholders to 200. The resolutionshould also contain each clause in which amendment is done or deletion or insertion of new clause.

(iii) **NCLT:**

a) Application/Petition will be made to the Tribunal in **Form No. NCLT-1** within 3 months of passing of SR. Petition should have following particulars:

- The date of the Board meeting at which the proposal for alteration of Articles was approved;
- The date of the general meeting at which the proposed alteration was approved;
- State at which the registered office of the company was situated;
- Number of members in the company, number of members attended the meeting and number of members of voted for and against;
- Reason for conversion into a private company, effect of such conversion on shareholders, creditors, debenture holders and other related parties.
- Listed or unlisted public company;
- 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) and unlimited company.

b) Alongwith the Petition, the Company needs to file the **following documents**:

- **Details of Creditors and Debenture holders**, which should not be older

than 2 months. It should also have name, address, amount etc. of each creditor/debenture-holder. These details should be filed alongwith an Affidavit signed by CS and 2 Directors (1 should be MD) certifying the correctness of details.

- An **affidavitconfirming** the Publication of advertisement and sending of notices (atleast 14 days prior to date of hearing in prescribed format) to creditors and debenture-holders for NCLT hearing.

c) Publication and Service of **Application**:

The Company shall at least 14 days before the date of hearing advertise the petition in form NCLT 3A in atleast 1 newspaper in local language and 1 newspaper in English language having circulation in the district in which the Registered Office of the Company is situated.

Notice should also be send to CG/RoC/SEBI (listed co.) and other regulators atleast 14 days prior to date of hearing

d) During the **hearing**, NCLT will hear the objections of all parties and if found everything in order, shall approve the Conversion.

(iv) On receipt of the order, Company will file for INC 27 alongwith copy of Order within 15 days.

(v) On being satisfied, RoC will register the conversion and issue a new certificate of incorporation.

CONVERSION OF SECTION 8 COMPANY INTO ANY OTHER COMPANY

- ✓ A **Special Resolution** shall be passed in a general meeting of the members of the company for *approving the conversion of section 8 company* into any other kind of company.
- ✓ Notice of the general meeting of the company shall be dispatched with the explanatory statement alongwith the following details:
  - The date of incorporation of company;
  - The main object of the company mentioned in the memorandum of association of the company;
  - Reason to state that why the activities of the company cannot be carried on to achieve the object of the company;
  - If the main object of the company is proposed to be altered, the reason for such alteration in the object of the company and what would be the altered object.
  - Concessions enjoyed by the company, such as tax exemptions, approvals regarding receiving donations including foreign contribution, land and other immovable property. Details regarding the donations received by the company with conditions attached to their utilization;
  - Impact and the benefit of the conversion of the members.

- ✓ Certified true copy of the special resolution with the copy of the notice of the general meeting of the members shall be filed with the Registrar of Companies registrar of companies in form **MGT 14** along with the prescribed fees within 30 days of passing the resolution.

- ✓ An application shall be filed with **Regional Director** in **Form INC 18** along with the requisite fees and prescribed documents alongwith the proof of serving of notice to all authorities.

- ✓ Following other conditions necessary for the conversion of Section 8 company into any other kind of company as per Rule 22:

    - Within 1 week of submitting the application with RD, a Newspaper notice in Form INC 19 shall be published in the newspaper of the district where the registered office of the company is situated in vernacular language and one in the English newspaper having wide circulation and also on the website of the company

    - A copy of the newspaper notice alongwith the application submitted with RD shall be sent to Chief Commissioner of Income Tax, Charity Commissioner, Chief Secretary of the State or any other Authority. Authorities need to provide their representation within 60 days of receipt of application.

    - A declaration shall be given by the board of directors that no income of the company has been paid directly or indirectly to the persons who are or have been the members of the company or to any one or more of them or to any persons claiming through any one or more of them.

    - No Objection Certificate needs to be taken from all such authorities, wherein such organisation was registered.

    - A company is required to file its financial statement and annual returns up to the financial year preceding the application are submitted to the RD and other returns are required up to the date of submission of application. If the audited financials are more than 3 months' old, a statement of the financial position duly certified by CA made upto a date not preceding 30 days from the date of filing of application is also required.

    - A Certificate shall be attached with the application, which shall be obtained from professional "practicing Chartered Accountant or Company Secretary or Cost Accountant" certifying the conditions and rules related to the conversion of section 8 company into any other kind of company.

    - Regional Director may require the approval of the authority for such conversion from the applicant and may also obtain the report from the RoC.

    - On receipt of all documents and after being satisfied, RD may order the conversion of the Company with such conditions as it may deem fit.

    - After approval of RD, Company need to call any shareholders' meeting amending the AoA and MoA of the Company and file MGT 14 within 30 days thereof.

    - Company need to file Order of RD in INC 20 within 30 days of receipt of order alongwith amended copy of MoA and AoA.

    - On receipt of the documents, RoC will register the same and issue a fresh certificate of incorporation.

Note: Section 8 Company can't convert into OPC

CONVERSION OF COMPANY INTO LLP

- ✓ Any Private Company or unlisted Public Company may convert into LLP
- ✓ Call a Board Meeting and pass resolution for conversion
- ✓ File form LLP-1 for check availability of name of LLP and take approval of the same
- ✓ Prepare LLP Agreement (can be filed within 30 days of incorporation)
- ✓ File incorporation form i.e. Form 2 with RoC alongwith prescribed attachments viz. proof of registered office address, Consent of Partners and Appointment of Designated Partners with details.
- ✓ Filing of Form 18 with RoC with following prescribed attachments:
    - o Statement of shareholders.
    - o Incorporation Documents & Subscribers Statements in Form 2 filed electronically.
    - o Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.
    - o List of all the Secured creditors along with their consent to the conversion.
    - o Approval of the governing council (In case of professional private limited companies)
    - o NOC from Income Tax authorities and Copy of acknowledgement of latest income tax return.
    - o Approval from any other body/authority as may be required.
    - o Particulars of pending proceedings from any court/Tribunal etc.
- ✓ After all formalities and RoC being satisfied, a new Certificate of Registration of LLP will be issued

CONVERSION OF LLP INTO COMPANY

- ✓ There are no provisions under CA, 2013 for conversion of LLP into Company
- ✓ MCA vide notification dated May 31, 2016 has allowed such conversion

Process:

- ➢ Approval of Name: Majority of Partners need to give their consent for such conversion in a meeting of LLP called for the said purpose.
- ➢ Apply for 'Name' in INC-1. Approved name will be available for 60 days for starting the incorporation of the Company

- Attain DIN and DSC of all the proposed Directors.
- File form URC-1 for conversion of LLP into Company with following documents:
  - List and details of all members
  - List of first Directors with their details and an affidavit stating that they are not disqualified as per Section 164 to become Director
  - List of LLP partners and details of Designated Partners
  - Details of the proposed share capital
  - Consent or NOC from all creditors of LLP
  - Copy of newspaper advertisement (informing genral public about the proposed conversion) and statement of accounts (should not be older than 6 days from the date of filing duly certified by Auditor).
  - Proposed name of the Company
- Once RoC approves URC-1, prepare MoA and AoA of the Company
- File form SPICe alongwith URC-1, MOA/AOA, INC-9 (Affidavit by Subscribers) and DIR-2 (Consent of Directors)

Please ensure that minimum number of members and Directors should be there.

CONVERSION OF OPC INTO PRIVATE COMPANY

- ✓ *Conversion can be voluntary or compulsory. For Voluntary conversion, please note that an OPC can't convert within 2 years of its incorporation. Under Compulsory conversion, once Paid up share capital exceeds Rs. 50 lakhs or average turnover exceeds over Rs. 2 crore, then within 6 months from the date of breach, OPC needs to convert itself.*
- ✓ The OPC shall alter its MOA & AOA by passing a resolution to give effect to the conversion and to make necessary changes incidental thereto.

Process - Voluntary:

- Call a Board Meeting wherein the decision related with conversion of OPC will be approved
- In the said BM, pass the resolutions for (i) inducting new Directors, (ii) increasing the shareholders of the Company (shareholder can be increased either by allotment of new shares to new shareholder or by transfer of shares by existing shareholder to the new shareholder), (iii) alteration of MOA and AOA and (iv) calling shareholders' meeting approving the changes in MOA and AOA by passing SR
- In case of OPC it will be sufficient if the resolution is communicated by the member of the company and entered into the minutes books and 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.

- File INC 6 within 30 days of SR communicating to RoC about the changes
- On being satisfied of all documents, RoC will issue a fresh certificate of incorporation

- ✓ The OPC shall within period of 60 days from the date of conversion give a notice to the ROC in Form No. INC. 5 informing that if has ceased to be OPC and that it is now required to convert itself into a private or public company.
- ✓ OPC can get itself converted into a private or public company after increasing the minimum number of members and directors to 2 or minimum of 7 members and 2 or 3 directors and by maintaining the minimum paid-up capital as per requirements of the Act.

Process of conversion remain same for Compulsory conversion, however, an additional form INC-5 needs to be filed with RoC within 60 days from the day either of the threshold limit is crossed by OPC alongwith following attachments:

- ✓ CTC of Board Resolution
- ✓ Copy of latest Audited financials
- ✓ Certificate of Practicing CA where the threshold of Annual Turnover is crossed

In case of default of any of these provisions, OPC or any officer of OPC will be liable for fine which may extend to Rs. 10,000 and upto Rs. 1,000 per day for which the default continues

CONVERSION OF PRIVATE COMPANY INTO ONE PERSON COMPANY

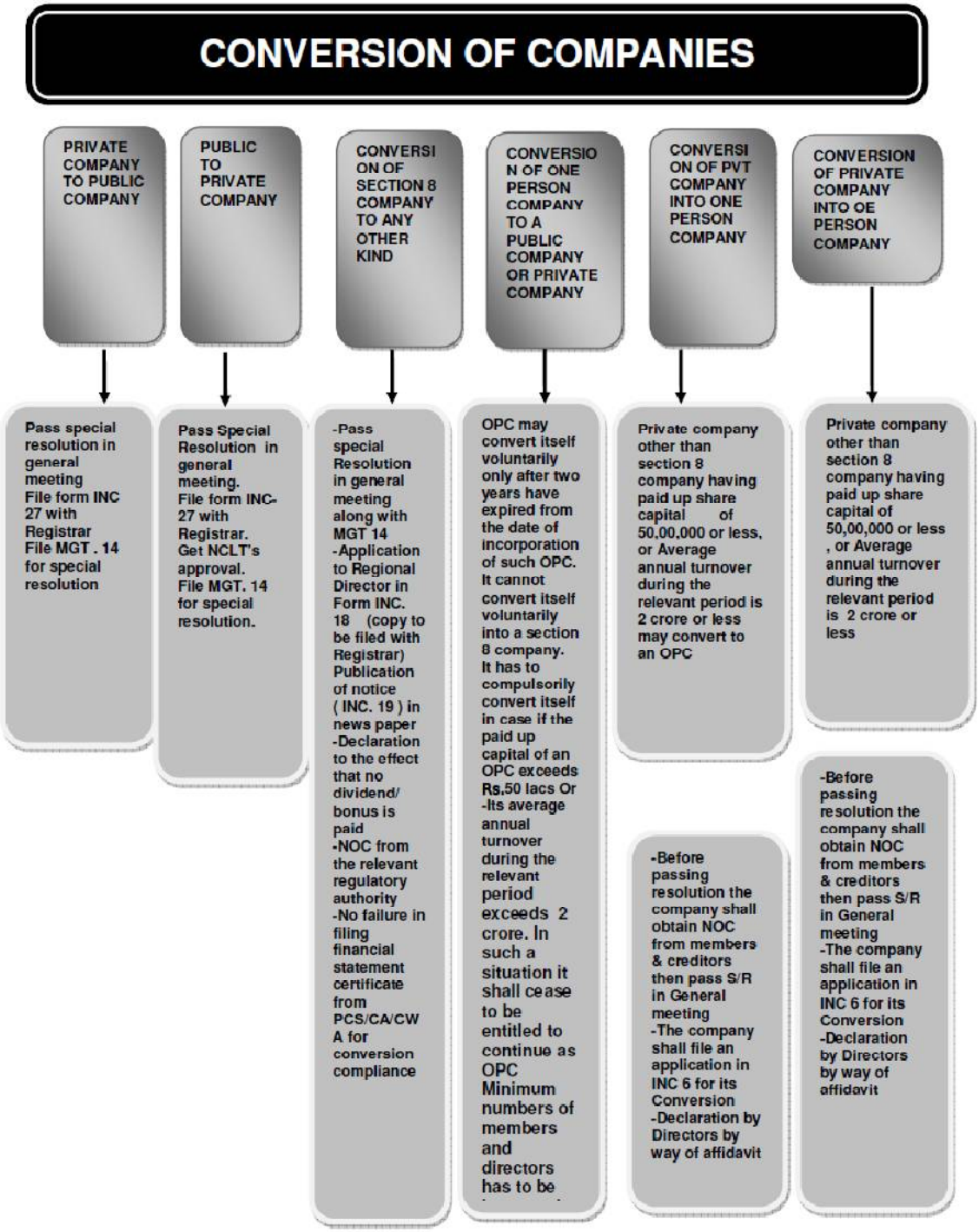
- ✓ A private company having paid up share capital of Rs. 50 lakhs or less or average annual turnover during the relevant period of Rs. 2 Crore or less may convert itself into OPC by passing a **special resolution** in the general meeting.
- ✓ Before passing such resolution, the company shall obtain **no objection** in writing from members and creditors.

Process:

- Call a Board Meeting and pass the resolutions related with (i) conversion of Company, (ii) Approve the Notice and explanatory statement of GM and (iii) fixation of day, date, time and venue of GM
- Send notice to all members atleast 21 clear days before the date of GM
- Convene the GM and pass the SR
- File form **MGT-14** within 30 days of passing the SR
- File Form **INC-6** for conversion of Private Company into OPC alongwith following documents:

- List of members and creditors
- Latest Financial Statements
- Copy of NOC of all creditors
- NOC of members
- Declaration by Directors that the Company is within the limit of Rs. 50 lakhs (paid up capital) and Rs. 2 crores (turnover)

➢ Upon being satisfied, RoC will issue a fresh Certificate of Incorporation.


CONVERSION OF COMPANIES
PRIVATE COMPANY TO PUBLIC COMPANY
PUBLIC TO PRIVATE COMPANY
CONVERSION OF SECTION 8 COMPANY TO ANY OTHER KIND
CONVERSION OF ONE PERSON COMPANY TO A PUBLIC COMPANY OR PRIVATE COMPANY
CONVERSION OF PVT COMPANY INTO ONE PERSON COMPANY
CONVERSION OF PRIVATE COMPANY INTO OE PERSON COMPANY
Pass special resolution in general meeting File form INC 27 with Registrar File MGT . 14 for special resolution
Pass Special Resolution in general meeting. File form INC-27 with Registrar. Get NCLT's approval. File MGT. 14 for special resolution.
-Pass special Resolution in general meeting along with MGT 14 -Application to Regional Director in Form INC. 18 (copy to be filed with Registrar) Publication of notice (INC. 19) in news paper -Declaration to the effect that no dividend/ bonus is paid -NOC from the relevant regulatory authority -No failure in filing financial statement certificate from PCS/CA/CWA for conversion compliance
OPC may convert itself voluntarily only after two years have expired from the date of incorporation of such OPC. It cannot convert itself voluntarily into a section 8 company. It has to compulsorily convert itself in case if the paid up capital of an OPC exceeds Rs.50 lacs Or -Its average annual turnover during the relevant period exceeds 2 crore. In such a situation it shall cease to be entitled to continue as OPC Minimum numbers of members and directors has to be
Private company other than section 8 company having paid up share capital of 50,00,000 or less, or Average annual turnover during the relevant period is 2 crore or less may convert to an OPC
-Before passing resolution the company shall obtain NOC from members & creditors then pass S/R in General meeting -The company shall file an application in INC 6 for its Conversion -Declaration by Directors by way of affidavit
Private company other than section 8 company having paid up share capital of 50,00,000 or less , or Average annual turnover during the relevant period is 2 crore or less
-Before passing resolution the company shall obtain NOC from members & creditors then pass S/R in General meeting -The company shall file an application in INC 6 for its Conversion -Declaration by Directors by way of affidavit

CHAPTER 14 – MAINTENANCE OF REGISTERS AND RECORDS

INTRODUCTION

- ✓ Every Company registered under the Companies Act is required to maintain some Statutory registers at the **Registered Office** of the Company.
- ✓ There are few Registers, which are to be maintained Permanently i.e. till the winding up of the Company and for some few years, as per the applicable provisions.
- ✓ Some Registers are required to be kept **open for inspection** by the Directors, Members, and other Persons.
- ✓ Company is also required to **provide extract/copies** of the Registers as and when desired by the shareholder upon payment/free, as per the AOA of the Company

Following Books and Registers are required to be kept by the Company:

- ✓ Register of **Members**. [Section 88(1)(a) and Rule 3 of Companies(Management and Administration)Rules, 2014] – **MGT 1**
- ✓ **Index** of Members [Section 88 (2) and Rule 6 of the Companies (Management and Administration) Rules, 2014]
- ✓ Register of **Debenture holders/Other Securities** [Section 88(1)(b) & (c) and Rule 4 of Companies (Management andAdministration) Rules, 2014] – **MGT 2**
- ✓ **Index** of Debenture holders [Section 88(2)]
- ✓ **Foreign** register. [Section 88 (4) and Rule 7 of Companies (Management and Administration) Rules, 2014] – **MGT 3**
- ✓ Register & Index of **Beneficial** Holder [Section 88(2)]
- ✓ Register of **Securities Bought Back**. [Section 68(9) and Rule 17(12) of companies (Share Capital andDebenture) Rules, 2014] - **SH 10**
- ✓ Register of **Deposits**. [Section 73 and Rule 14 Companies (Acceptance of Deposits) Rules, 2014]
- ✓ Register of **Charges**. [Section 85 and Rule 7 of Companies (Registration of Charges) Rules 2014] – **CHG 7**
- ✓ Register of **Renewed and Duplicate** Share Certificates. [Rule 6 of the Companies (Share Capital andDebentures) Rules, 2014] – **SH 2**
- ✓ Register of **Sweat Equity Shares**. [Section 54 and Rule 8(14) of Companies (Share Capital andDebenture) Rules, 2014] – **SH 3**
- ✓ Register of **ESOP**. [Section 62 and Rule 12(10) of Companies (Share Capital andDebenture) Rules, 2014] – **SH 6**

- ✓ Register of **Postal Ballot**. [Section 110 and Rule 22 of the Companies (Management andAdministration) Rules, 2014]

- ✓ Books containing **Minutes** of General Meeting and of Board and of Committees of Directors.[Section 118]

- ✓ Register of **Directors**/ **Key Managerial Personnel**. [Section 170(1)]

- ✓ Register of **Investments** in securities not held in company's name. [Section 18 and Rule 14 ofCompanies (Meetings of Board and its Powers) Rules, 2014] – **MBP 3**

- ✓ Register of **Loans, Guarantees** given and **Security** provided or making acquisition of securities (Section186(9) and Rule 12 Companies (Meetings of Boards and its Powers) Rules 2014] – **MBP 2**

- ✓ Register of **Contracts** with Companies/Firms in which directors are interested. [Section 189(5) and Rule16 of Companies (Meetings of Boards and its Powers) Rules, 2014] – **MBP 4**

- ✓ Company would be required to maintain Books of Accounts/Financial Statements for minimum 8 financial years for last date of filing.

- ✓ Company needs to maintain copies of all Annual Return for minimum 8 years from the date of last filing.

DOCUMENTS TO BE MAINTAINED PERMANENTLY

- ✓ All documents and forms related with incorporation of a Company
- ✓ Register of Renewed and Duplicate Share Certificates
- ✓ Share Certificate form - Disputed
- ✓ Register of Charges
- ✓ Register of Members and Index of Members
- ✓ Foreign Register of Members
- ✓ Minutes of Board Meeting/Committee/General Meeting
- ✓ Register of Loan, Guarantee and Security
- ✓ Register of Contracts

DOCUMENTS TO BE MAINTAINED FOR MINIMUM 8 YEARS

- ✓ Register of Deposits
- ✓ Instrument creating charge or modification
- ✓ Register of Debenture holder and other Securities
- ✓ Copies of all Annual Return
- ✓ All notices under Section 184 (disclosure of Interest by Director)
- ✓ Attendance sheet of Board/Committee
- ✓ Copies of Agenda, notice of Meetings
- ✓ Books of Accounts

CHAPTER 15 – IDENTIFYING LAWS APPLICABLE TO VARIOUS INDUSTRIES & THEIR INITIAL COMPLIANCES

INTRODUCTION

- ✓ 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.
- ✓ Each business type comes with its own set of legal requirements and regulations and businesses should pay special attention to them before incorporating the business.
- ✓ We have learnt about advantages and disadvantages of various types of business in the 1st chapter of the book. For a quick revision, following is the table:

Legal Details	**Business Types**			
	Proprietorship	**Partnership**	**LLP**	**Company**
Registration	No formal registration is required	Registration is optional	Has to be registered under LLP Act	Has to be registered under CA, 2013
Legal Status	Not recognized as separate entity	Not recognized as separate entity and Partners are personally liable for defaults	Separate Entity	Separate Entity
Liability of member	Unlimited	Unlimited	Limited	Limited
No. of members required	Can have only 1 member	Minimum 2	Minimum 2	OPC: 1 Pvt.: 2 Public: 7
Transferability	Not Transferable	Not Transferable	Transferable	Transferable
Taxation	Taxed as Individual	Slabs provided under IT Act	Slabs provided under IT Act	Slabs provided under IT Act
Annual Statutory meetings	No such requirement	No such requirement	No such requirement	Required
Annual Filings	Only Income Tax return is compulsory	Only Income Tax return is compulsory	Must file Annual statement, Annual Return and IT Return	Annual Accounts, Annual return and IT return
Existence	Dependent on Proprietor	Dependent on existence of Partners. Can be dissolved at will also	Existence not dependent upon Partners. Can be wound up as per LLP Act	Existence not dependent upon Partners. Can be wound up as per CA, 2013
Foreign Ownership	Not allowed	Not allowed	Allowed with certain restrictions from RBI	Allowed with certain restrictions from RBI

INCORPORATION OF COMPANY/ PROCEDURE FOR SETTING UP A COMPANY

Steps at a glance

1. DIN of the Directors
2. DSC of Directors
3. Arrangement of minimum members required to form a Company
4. Availability of Name
5. Preparation of MoA and AoA
6. Filing of forms and documents with RoC – Form SPICe – INC 32 with eMOA and eAOA
7. Filing of declaration from professional and person named as Director/Manager/Sect
8. *Declaration* from Subscribers of MoA and first named Directors *(As per Companies Amendment Act, 2017, the word "Affidavit" has been substituted with "Declaration")*
9. Receipt of COI from RoC
10. Within 30 days of incorporation – file registered address with RoC

In the Second Chapter of this book, we have already learnt in detail about the Incorporation of Companies.

CHECKLIST FOR INCORPORATION OF VARIOUS TYPES OF BUSINESS STRUCTURES

A. Company – OPC, Private Company, Public Company, Small Company

- ✓ Obtain DSC for all proposed Directors
- ✓ Obtain DIN for all proposed Directors
- ✓ Select suitable Company name and made an application to MCA
- ✓ Draft MOA/AOA
- ✓ Sign and file various incorporation documents alongwith MOA/AOA with MCA
- ✓ Payment of requisite fees
- ✓ Receipt of COI from RoC

B. LLP

- ✓ Obtain DSC for Designated Partners
- ✓ Obtain DIN for all proposed Partners
- ✓ Apply for suitable LLP Name in form LLP-1
- ✓ After name approval, file Form 2 and Form 18 to RoC for incorporation
- ✓ File LLP Agreement (Form 3) and Partners Details (Form 4)
- ✓ Registration Certificate will be issued by RoC

C. PARTNERSHIP FIRM

- ✓ File Form A for Registration for firm alongwith following documents:
  - ➢ Affidavit
  - ➢ Certified true copy of Partnership Deed
  - ➢ Ownership proof of business place/Lease Agreement of business place

D. SOLE PROPRIETORSHIP

- ✓ Decide on name of the business and ensure it doesn't match with existing business
- ✓ Obtain license and certifications under local laws

CHECKLIST FOR ANNUAL COMPLAINCE OF VARIOUS TYPES OF BUSINESS STRUCTURES

A. Company – OPC, Private Company, Public Company, Small Company

- ✓ Receipt of MBP-1 and DIR 8 from all Directors
- ✓ Holding of minimum Board Meetings as per the requirement (for OPC, Small Company and Dormant Company – atleast 1 meeting in 6 months with a minimum gap of 90 days between the 2 meetings. For normal Companies, atleast 4 Board Meetings with a maximum gap of 20 days between 2 meetings)
- ✓ Receipt of Annual Declaration from Independent Directors for compliance of 149(6) and Schedule IV
- ✓ Holding of AGM (in every Calendar year, maximum gap of 15 months between 2 AGMs and within 6 months from end of FY). Providing E-voting facility to shareholders (applicable on companies referred in Section 110)
- ✓ Approval of Annual Accounts and Directors' Report
- ✓ Appointment of Director in place of Retiring One
- ✓ Filling of AOC-4 (Financial Statements)
- ✓ Filing of MGT-7 (Annual Return)
- ✓ Filing of ADT-1 (when Auditor is Appointed/Re-appointed in AGM)
- ✓ Conducting Secretarial Audit for applicable Companies
- ✓ Compliances under SEBI (LODR) Regulations, 2015 (applicable for listed companies)
- ✓ Constitution of various Committees (in accordance with CA, 2013 and SEBI LODR)
- ✓ Expenditure of 2% of average net profit of last 3 financial years under CSR provisions
- ✓ Maintenance of Statutory Registers
- ✓ Annual deposit of prescribed amount to IEPF
- ✓ Filing of IT return
- ✓ Declaration of Independence from Independent Directors, wherever applicable

B. LLP

- ✓ Filing of Form 4 for change in Partner and Designated Partner
- ✓ Statement of Account and Solvency in Form 8
- ✓ Annual Return in Form 11

- ✓ Income Tax return
- ✓ Form 3 for any change/supplementary LLP Agreement

C. SOLE PROPRIETORSHIP

- ✓ IT return
- ✓ GST return
- ✓ Other, depending upon the registrations

D. PARTNERSHIP

- ✓ Change in name of firm/registered place/nature of business in form B
- ✓ Change of Partner in Form D

VARIOUS LICENSES AND COMPLIANCES UNDER APPLICABLE LAWS

1. Business Licenses

- Depending upon the nature of business
- Most common licenses are registration under Shop & Establishment Act, GST registration, PAN no. of Company/firm etc.
- Certain licenses are specific to sectors like for hotel industry license under Food Safety License etc.

2. Labour Laws

- As soon as you hired the people for your Company/Industry, you need to comply with various labour laws.
- Non-compliance of such laws may land your organization into legal soup
- Some of the most common labour laws are as follows:
  - The Industrial Dispute Act, 1947
  - The Factories Act, 1948
  - The Payment of Gratuity Act, 1972
  - The Contract Labour (Regulation & Abolition) Act, 1970
  - The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
  - The Employees' State Insurance Act, 1948.

3. Intellectual Property related laws

- Categorized into Patents, Trademarks, Copyrights, Design etc.

- Helps the organization to safeguard its special work

GLIMPSE OF THE MAJOR LEGISLATIONS APPLICABLE TO SPECIFIC INDUSTRIES

1. THE FACTORIES ACT, 1948

- This law is the umbrella legislation *enacted to regulate the working conditions in factories*. According to the Act, a 'factory' means "any premises including the precincts thereof :-

  (i) whereon 10 or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on with the aid of power,or is ordinarily so carried on; or

  (ii) whereon 20 or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on without the aid ofpower, or is ordinarily so carried on; but this does not include a mine subject to the operation of theMines Act, 1952, or a mobile unit belonging to the armed forces of the union, a railway running shedor a hotel, restaurant or eating place."

- The Act is 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 inspectors.

2. THE MINES ACT, 1952

- The Mines Act, 1952 contains provisions for measures relating to the health, safety and welfare of workers in the coal, metalliferous and oil mines.

- The term 'mine' means "any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes all borings, bore holes, oil wells and accessory crude conditioning plants, shafts, opencast workings, conveyors or aerial ropeways, planes, machinery works, railways, tramways, slidings, workshops, power stations, etc. or any premises connected with mining operations and near or in the mining area".

- 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.

3. THE SHOPS AND ESTABLISHMENTS ACT, 1953

- The Shops and Establishments Act, 1953 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 State Government can exempt, either permanently or for a specified period, any establishments from all or any provisions of this Act.

- The Act provides for compulsory registration of shop/ establishment within thirty days of commencement of work and all communications of closure of an establishment within 15 days from its closing.

- It also lays down the hours of work per day and week as well as the guidelines for spread-over, rest interval, opening and closing hours, closed days, national and religious holidays, overtime work, etc.

4. THE CONTRACT LABOUR (REGULATION & ABOLITION) ACT, 1970

- This Act is enacted to regulate employment of contract labourso as to place it at par with labour employed directly, with regard to the working conditions and certain other benefits.

- Contract labour refers to "the workers engaged by a contractor for the user enterprises".

- These workers are generally engaged in agricultural operations, plantation, construction industry, ports & docks, oil fields, factories, railways, shipping, airlines, road transport, etc.

- The Act is implemented both by the Centre and the State Governments.

- The Central Government has jurisdiction over establishments like railways, banks, mines etc. and the State Governments have jurisdiction over units located in that state.

Apart from the above mentioned laws, there is a plethora of laws which are applicable to Specific Industries. The sector-wise Indicative list could be seen as below:

S.N.	Sector	Applicable Laws
	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	• 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)	• Reserve Bank of India Act, 1934 • Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest 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 • Tokyo 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

CHAPTER 19 – DORMANT COMPANY

INTRODUCTION

- ✓ A company which is an inactive company in the records of the Registrar of Companies and which is not carrying out any business activity and has applied to the Registrar of Companies to change its status in the register of companies maintained by the Registrar of Companies from *"Active Company "to "Dormant company"*
- ✓ 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.
- ✓ Some Registers are required to be kept **open for inspection** by the Directors, Members, and other Persons.
- ✓ Company is also required to **provide extract/copies** of the Registers as and when desired by the shareholder upon payment/free, as per the AOA of the Company

DORMANT COMPANY

When 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 in form no. MSC. 1

"Inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last 2 financial years, or has not filed financial statements and annual returns during the last 2 financial years

"Significant Accounting Transaction" means any transaction other than

(a) payment of fees by a company to the Registrar;

(b) payment made by it to fulfill the requirements of this Act or any other law;

(c) allotment of shares to fulfil the requirements of this Act; and

(d) payments for maintenance of its office and records

- ➢ A Company may make an application in Form MSC-1 along with prescribed fees to RoC for obtaining the status of a Dormant Company after passing a SR 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)
- ➢ The Registrar 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.

- In case of a company which has not filed financial statements or annual returns two financial years consecutively, the Registrar may issue a notice to such company and enter the name of such company in the register maintained for dormant companies.

- A dormant company shall have a minimum number of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of OPC.

- A dormant company shall file an annual return indicating financial position duly audited by a PCA in Form MSC- 3 within a period of 30 days from the end of each financial year.

- Any Dormant Company who wish to become Active Company may file an Application in form MSC-4 alongwith return under MSC 3.

- After considering the application for restoration, RoC may issue a certificate in form MSC 5 allowing the status of an Active Company.

- If a Dormant Company remains dormant for consecutively 5 years, then RoC shall initiate the process of striking off the name.*Accordingly, a Company can remain as Dormant Company for maximum term of 5 years.*

Procedure

- Call a BM where the matter related with change in status of the Company from Active to Dormant needs to be approved. In the same BM, members will also approve calling of a General Meeting wherein the said matter will be proposed for the approval of the shareholders.

- Statement of Affairs need to be taken at the time of passing of resolution by Directors.

- In the GM, SR needs to be passed by the shareholders approving the change of status

- File MGT-14 within 30 days of passing SR

- After filing MGT-14, file form MSC-1 with RoC alongwith prescribed documents

- On being satisfied, RoC will issue certificate for change of status in form MSC-2

Following Companies can't become Dormant Company

RoC shall not grant the status of Dormant Company in following cases:

a) Inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

b) Prosecution has been initiated and pending against the company under any law;

c) The company is having any public deposits which are outstanding or the company is in default in payment thereof or interest thereon;

d) The company is 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 NOC from the lender and enclosing the same with Form MSC-1;

e) There is dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;

f) There are outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.;

g) The company has defaulted in the payment of workmen's dues;

h) Listed Company

Privileges of a Dormant Company

a) Need to have only 2 BM in a year with a gap of 90 days between 2 such meetings

b) Financial statements are not required to have Cash Flow Statement;

c) Provision of Rotation of Auditor is not applicable.

d) Dormant companies enjoy the advantages of lower statutory compliance cost as there are few statutory compliances applicable to dormant company as compared to active company

e) Dormant status is an advantage to promoters who want to hold an intellectual property or an asset under the corporate shield for its usage at a later stage.

Procedure to obtain status of Active Company

a) Application to be made to RoC in form MSC-4 alongwith copy of the Annual return

b) RoC, after considering the matter, shall issue a certificate in Form MSC-5 for change of status

When RoC can suo-moto change the status from Dormant to Active

a) Where a dormant company *does or omits to do any act* mentioned in the grounds in the application made for obtaining status of a dormant company and such act or omission *affects its status* of dormant company, the directors of such a company *are required to file* an application within 7 days from such event for obtaining the status of an active company.

b) If RoC found that the Company is working, then after providing an opportunity of being heard, RoC may change the status

CHAPTER 20 – STRIKE OFF & RESTORATION OF NAME OF COMPANY AND LLP

INTRODUCTION

Strike Off is a power given to the RoC where on satisfaction of certain conditions, RoC may, after following the prescribed procedure, strike off the names of Companies from the Register of Companies maintained by it. Upon Strike Off, the COI of the Company stands cancelled though the creditors still got the rights to claim their unrealized amount from their Directors etc. It's less time consuming and less expensive process then the Winding Up process.

Conditions for Strike Off?

- Company failed to commence its business within 1 year of incorporation, or
- Company is not carrying on any business or operations for immediately preceding 2 financial years and has not made the application for obtaining Dormant Company (defined at later stage in this chapter) status.

Who can initiate Strike Off?

Both RoC and Company can initiate the Strike Off process, after following prescribed procedure.

Strike off by RoC

- Provisions will not apply on Section 8 Companies
- Prior to Strike Off, RoC will issue a notice to Company and all Directors (in form STK-1) requesting them to make representation by sending them their representatives alongwith relevant documents within 30 days of receipt of notice.

Strike Off by the Company – Voluntary Strike Off

- Provisions will not apply on Section 8 Companies
- Prior Conditions – Extinguishing all liabilities and Special Resolution
- The Company shall also obtain the approval from regulatory authorities/bodies under which it was incorporated (like NBFC, Insurance Companies, Housing Finance Co. etc.).
- Company, thereafter, shall file application (in form STK-2) alongwith prescribed fees, with RoC for Strike Off its name, only on the 2 grounds as specified above

Process for Strike Off

- Upon receipt of the application/after representation from Company (where RoC issued notice for Strike Off), RoC serves a public notice in prescribed manner (generally in newspapers) and also in the Official Gazette for the information of General Public.
- Such notice also contains a time period by which the general public can approach the RoC with their comments/views.

- After expiry of the time period, unless some negative views are received, RoC will strike off the name of the Company and shall publish the same in the Official Gazette.

- Upon publication in the Official Gazette, the Company shall stand Strike Off.

- Before passing such order, RoC shall ensure that sufficient provisions have been made for payment of all liabilities and if necessary, undertakings may be obtained from the MD/ Director/other persons in-charge of the management.

In recent case of International Security Printers Private Limited vs Ro Delhi, NCLT has decided that sending of notice and giving an opportunity to the Company is pre requisite for strike off the name.

STEPS OF STRIKE OFF BY ROC

Step 1: Service of Notice in form STK-1. Should contain the reasons and to be send to all Directors

Step 2: Reply to Notice: Within 30 days by the Company

Step 3: Consideration of reply given by the Company

Step 4: Publication of Notice: on MCA website, published in official gazette and in 2 newspapers

Step 5: Intimation to Regulatory authorities: like IT, Excise, Service tax, IRDA, SEBI etc.

Step 6: Provision for realization of amount due: Necessary undertakings will be taken from Directors for any liability in future

Step 7: Notice for dissolution of Company: Co. shall stand dissolved after publication of dissolution notice in Official Gazette.

Following Companies can't make application for Strike Off, if any of the following condition has been met in *preceding 3 months* from the date of filing of application:

- has changed its name or shifted Regd. Office from one State to another.

- 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;

- 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;

- has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or

- is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

If during the pendency of the application for Strike Off, any of the above condition arise, the matter of strike off will immediately stop.

Fraudulent applications for Strike Off

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.

Following Categories of Companies can't be removed from Register of Companies:

- Listed Companies
- De-listed Companies (compulsory delisting)
- Vanishing Companies
- Inspections or Investigations has been ordered and action has yet to be taken or completed but prosecution is pending
- Any prosecution for an offence is pending in the Court
- Compounding applications pending with the authority
- Outstanding Deposits are there or where Company has defaulted in its repayment
- Pending Charges for satisfaction
- Section 8 Companies
- Notices for Inspection has been issued and reply is yet to be received or report under Section 208 is pending or where prosecution arising out of such inquiry is pending with the Court.

"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 Registrar of Companies and Stock Exchange for a consecutive period of 2 years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.

STATUS OF STRIKE OFF COMPANIES

If a company stands dissolved under section 248, it shall on and from the date mentioned in the notice cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.

The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under this section, continue and may be enforced as if the company had not been dissolved.

Appeal to NCLT (Tribunal) for Restoration of Name

- *Within 3 Years: Application by any person*

  Any person aggrieved by Order, may file an appeal to the Tribunal within 3 years from the date of order and if Tribunal is convinced that removal is made on the grounds other than specified then Tribunal may order restoration of the name of the Company. However, before such restoration, opportunity of being heard should be provided to the Company.

- *Within 3 years: By RoC*

  If RoC is satisfied that name was struck off inadvertently or on the basis of incorrect information, RoC may file an application with Tribunal within 3 years for restoration of name. Copy of Tribunal's order must be filed within 30 days with RoC and a new COI will be issued.

- *Within 20 years: By Company, Member, Creditor, Workman*

  If a Company, member, creditor, workman files an application, within 20 years from the order, with Tribunal stating that when name was struck, the Company was carrying on the business or otherwise, the Tribunal may issue order to restore the name of the Company and make all Directors and other persons in same position as it was earlier, as the name of the Company was not struck off.

Procedure for making an application to NLCT

- Application to be made in form NCLT 9
- Application should be accompanied with following documents:
  - Document and/or other evidence in support of the statement made in the application or appeal or petition, as are reasonably open to the petitioner(s);
  - Affidavit verifying the petition;
  - Evidence regarding payment of fee of INR 2,500/-
  - Memorandum of appearance with copy of the Board Resolution or the vakalatnama, as the case may be;
  - 3 copies of the petition; and
  - Any other documents in support of the case.
- A copy of the application shall be served on the RoC and on such other persons as the Tribunal may direct, not less than 14 days before the date fixed for hearing of the application.
- ROC may send his report to NCLT as to his comments and views on the restoration of the name of the company.
- NCLT after hearing all the parties, will pass an appropriate order for restoration of the name of the company in the register of company maintained by ROC.

- The company is required to file E-form INC-28 to the ROC within 30 days from the date of order of NCLT for the order passed by the NCLT.

- Thereafter, the Company is required to complete the pending filing of financial statements and annual returns with the ROC and other documents as may be directed by the NCLT.

LLP

Process for Strike Off is similar in case of LLP also. However, in case of LLP, the application to RoC to be made in **LLP form 24** alongwith the following documents:

(a) a statement of account disclosing 'Nil' assets and 'Nil' liabilities, certified by a Chartered Accountant in practice made up to a date not earlier than 30 days of the date of filing of Form 24.

(b) Copy of acknowledgement of latest Income tax return

(c) Copy of the initial LLP agreement, if entered into and not filed, along with changes thereof

(d) An affidavit signed by the designated partners, either jointly or severally, to the effect:

(i) that the LLP has *not commenced business* or where it commenced business, it *ceased* to carry on such business from {date};

(ii) that the LLP has *no liabilities* and *indemnifying* any liability that may arise even after striking off its name from the Register;

(iii) that the LLP has *not opened any Bank Account* and where it had opened, the said bank account has *since been closed* together with certificate(s) or statement from the respective bank demonstrating closure of Bank Account;

(iv) that the LLP has *not filed any Income-tax return* where it has not carried on any business since its incorporation, if applicable.

(e) Copy of Detailed Application- Mention full details of LLP plus reasons for closure

(f) Copy of Authority to Make the Application- Duly signed by all the Partners

Restoration of LLP Name

If an LLP, or any Partner or Creditor thereof, feels aggrieved by the LLP having been struck off the register, the *Tribunal*, on an application made by the:

- LLP; or
- Partner; or
- Creditor

before the expiry of 5 years from the *publication* in the *Official Gazette* of the notice aforesaid, may, if satisfied that the LLP was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the LLP be restored to the register, order the name of the LLP to be restored to the register; and the Tribunal may, by order, give such directions and make such provisions as seem just for placing the LLP and all other partners in the same position as nearly as may be as if the name of the LLP had not been struck off.

Process for filing application with Tribunal

1. An application is to be filed in form *NCLT 9*. Such an application should be accompanied by various documents proving that the LLP is active LLP and that the name of the LLP should be restored in the Register.

2. A copy of application or appeal is required to be send to Registrar concerned.

3. Registrar may send his report to NCLT as to his comments and views on the restoration of the name of the LLP

4. NCLT after hearing all the parties shall pass an appropriate for restoration of the name of the LLP in the register

CHAPTER 21 – CORPORATE INSOLVENCY RESOLUTION PROCESS – LIQUIDATION & WINDING UP: AN OVERVIEW

INTRODUCTION

- ✓ In this chapter we will learn about the concept of Insolvency of a Company and the main provisions of Insolvency & Bankruptcy Code, 2016 (IBC), which are applicable on CORPORATE DEBTORS where the minimum amount of default is Rs. 1 lakh.

- ✓ IBC provides legal framework for insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of these persons and balance the interests of all the stakeholders.

- ✓ Before this Code, there was no single law dealing with insolvency and bankruptcy in India.

- ✓ Liquidation of Companies was handled by the High Courts; Individual cases are dealt with under the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. The other laws which deal with issues include Sick Industrial Companies (Special Provisions) Act (SICA), 1985; Recovery of Debt Due to Banks and Financial Institution Acts, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 and Companies Act, 2013.

- ✓ The Code consolidates these insolvency laws to bring them under one umbrella.

DEFINITIONS

Corporate Debtor: Means a Company/LLP who owes some amount to any third person

Section 3(7) defines "corporate person" means a **company** as defined in clause (20) of section 2 of the Companies Act, 2013, a **LLP**, as defined in clause (n) of sub- section (1) of section 2 of the Limited Liability Partnership Act, 2008, or **any other person incorporated** with limited liability under any law for the time being in force but shall not include any financial service provider.

As per 2018 Amendment Act, now definition also includes (i) personal guarantors to Corporate Debtors, (ii) Partnership firms and Proprietorship firms and (iii) individuals other than personal guarantors.

Section 3(10) defines "creditor" means any person **to whom a debt is owed** and includes a *financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder*.

Section 5(8) defines "financial debt" as "a debt along with interest, if any, which is disbursed against the consideration for time value of money. Thus, **all lenders who have extended any kind of loans, guarantees or financial credit** are covered within its ambit.

Section 5(7) defines "financial creditor" means **any person to whom a financial debt is owed** and includes a person to whom such debt has been legally assigned or transferred to.

Section (21) defines "operational debt" means a **claim in respect of the provision of goods or services including employment** or a debt in respect of the repayment of dues arising under any

law for the time being in force and payable to the Central Government, any State Government or any local authority.

"Insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207. They are categorized into 2 broad categories depending upon their duties.

Snapshot of Insolvency and Bankruptcy Code 2016

- ✓ *The Code provides time bound insolvency resolution process i.e. 180 days after the process is initiated, plus a 90 days extension for resolving insolvency.*
- ✓ The Code also provides for FAST TRACK INSOLVENCY RESOLUTION PROCESS — 90 days after the process is initiated, plus a 45 days extension for resolving insolvency in fast track mode.
- ✓ The adjudicating authority under the IBC is "National Company Law Tribunal (NCLT)" for Corporate Debtors (Companies & LLPs) and the "Debt Recovery Tribunal (DRT)" for individuals and partnership firms.
- ✓ No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which NCLT, NCLAT, DRT and DRAT has jurisdiction under this Code.
- ✓ IBC 2016 provides for two categories of Creditors: Financial Creditors and Operational Creditors. The Code provides different process for recovery of debts by these creditors from the debtors.
- ✓ The IBC 2016 deals separately for Corporate Insolvency (Part II of the Code) and Individual and Partnership Bankruptcy (Part III of the Code)

Who can initiate Corporate Insolvency Resolution Process (CIRP)?

The following may initiate CIRP, where any corporate debtor commits a default:

- ✓ a Financial Creditor,
- ✓ an Operational Creditor or
- ✓ the Corporate Debtor itself (Voluntary Liquidation)

RESOLUTION PROCESS – IN CASE CIRP IS INITIATED BY FINANCIAL/ OPERATIONAL CREDITOR:

Process for filing the application/petition with NCLT is similar in case of both Financial Creditor and Operational Creditor. However, in case of Operational Creditor, prior notice is required to be given to the Corporate Debtor before filing the application with NCLT.

a) Process to be followed by Operational Creditor 'prior to filing of application with NCLT'

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.

The corporate debtor shall, within a period of 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.

If the Corporate Debtor is not able to provide the evidence for payment to Operational Creditor or in case of no reply within 10 days of notice (i.e. if the payment is not disputed), Operational Creditor may file an application with NCLT for CIRP. Filing formalities are mentioned in from pt. 2 under b).

b) Process of filing application/petition with NCLT by Financial Creditor/Operational Creditor

1. A Financial Creditor either by itself or jointly with other financial creditors may file an application for initiating CIRP against a corporate debtor before Adjudicating Authority (NCLT) when a default has occurred.

2. 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.

3. The Adjudicating Authority shall, within 14 days of the receipt of the application ascertain the existence of a default from the application and records submitted.

4. Where the Adjudicating Authority is satisfied that—

(a) a default has occurred and the application is complete and there are 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.

However, before rejecting the application, the Adjudicating Authority shall give a notice to the applicant to rectify the defect in his application within 7 days of receipt of such notice.

5. The CIRP shall commence from the date of admission of the application.

6. The Adjudicating Authority shall communicate the order to the financial creditors and the corporate debtor within 7 days of admission or rejection of such application, as the case may be.

From the above it is clear that a Financial Creditor can directly approach NCLT and the only condition that needs to be satisfied is that the creditor must show that the corporate debtor has defaulted in the payment of a due debt.

On the other hand, an Operational Creditor to succeed in initiating the resolution process, it must satisfy the adjudicating authority by demonstrating that it has served a notice and the same has not been disputed by the Corporate Debtor. The Hon'ble Supreme Court in **Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd** while interpreting the term 'dispute' as defined under IBC held that the adjudicating authority is only required to see if there is a bona fide dispute in existence and it is not allowed to examine the merits of such dispute. Therefore, if a debt is not admitted by the Corporate Debtor and is disputed, it is a sufficient ground to reject the insolvency application made by an Operational Creditor.

On the other hand, a financial creditor is allowed to initiate the resolution process even in case the debt is disputed by the corporate debtor.

Time Limit for conclusion of CIRP

- ✓ CIRP shall be completed within a period of **180 days** from the date of admission of the application to initiate such process.
- ✓ However, the time period can be extended wherein the Resolution Professional applies to NCLT for such extension, if instructed to do so by a resolution passed in meeting of COC with 75% approval.
- ✓ Upon receipt of extension application, if NCLT is convinced with the reasoning, period may be extended by maximum 90 days, however, such extension can't be granted more than once.

Moratorium - means 'delay or suspension of an activity or law'

Upon commencement of CIRP, NCLT shall declare Moratorium:

a. for the purposes of *institution of suits or continuation of pending suits* or proceedings against the corporate debtor including execution of any judgement, 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;

d. the recovery of any *property* by an owner or less or lessor where such property is occupied by or in the *possession of the corporate debtor*.

RESOLUTION PROFESSIONAL (RP) / INSOLVENCY PROFESSIONAL (IP)

Means the professionals registered as RP/TP with the Insolvency and Bankruptcy Board of India. Only the RP/IP can be involved in CIRP. They are broadly classified into two categories basis their responsibilities and duties:

1. *Interim Resolution Professional (IRP):* means the person, registered with IBC, who is designated with the following duties:

   (a) Make public announcement about the CIRP of the corporate debtor

   (b) Invite claims from creditors

   (c) On receipt of the claims, IRP shall verify the claims and make a list of accepted claims.

   (d) Get valuation of the corporate debtor done

   (e) Within 30 days of commencement of CIRP, IRP shall constitute Committee of Creditors (COC) which primarily consists of Financial Creditors.

   (f) IRP shall also prepare Information Memorandum containing the details of Corporate Debtor.

2. *Resolution Professional (RP):*Once the COC is formed, it shall hold its 1st meeting within 7 days of its constitution. In the said meeting, RP needs to be appointed, who will take over the charge from IRP. COC may appoint IRP as RP also or may replace him with any other Insolvency Professional. The RP shall act under the guidance and superintendence of COC.

Management of the affairs of Corporate Debtor by Interim Resolution Professional:

From the date of appointment of the IRP:

i. The management of the affairs of the Corporate Debtor shall vest in the interim resolution professional;

ii. The powers of the Board of Directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the Interim Resolution Professional;

iii. 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;

iv. The financial institution maintaining account of the corporate debtor shall act on the instruction of the interim resolution professional in relation to such accounts and furnish all information relation to the corporate debtor available with them to the interim resolution professional.

v. The Interim Resolution Professional shall manage the affairs of the Corporate Debtor on a going concern basis.

COMMITTEE OF CREDITORS

- ✓ IRP shall formulate COC within 30 days of his appointment.

- ✓ COC shall primarily consists of Financial Creditors
- ✓ RP will work under the guidance and superintendence of COC
- ✓ All decisions in COC will be taken with 75% majority
- ✓ Each member has voting share depending upon his %age in the total debt outstanding

RESOLUTION PLAN

- ✓ Objective of CIRP is to revive the Company and not shut down
- ✓ With this intent in mind, RP will invite proposals to revive the Corporate Debtor.
- ✓ These proposals are known as "resolution plans" and they can be submitted by ***any person*** who is interested in revival of the company.
- ✓ These plans include proposals to pay off the existing liabilities of the corporate debtor in part or in full and to restart its operations over a period of time.
- ✓ There are safeguards against a defaulting promoter submitting a resolution plan so that such defaulting promoter is not able to takeover a debt free company at lower cost by way of a resolution plan.
- ✓ Resolution Plan is submitted to RP, who in turn place it before the COC
- ✓ The plan approved by COC will be placed before NCLT for its approval
- ✓ Once NCLT approves the plan, Corporate Debtor will be out of CIRP

As per 2018 Insolvency Code: "Any person" has been defined

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 in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

(d) has been convicted for any offence punishable with imprisonment for two years or more;

(e) is disqualified to act as a director under the Companies Act, 2013;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

(h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code;

(i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) has a connected person not eligible under clauses (a) to (i).

Explanation: For the purposes of this clause, the expression "connected person" means—

(i) any person who is the promoter or in the management or control of the resolution applicant;

(ii) any 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 company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).

VOLUNTARY LIQUIDATION (by Corporate Debtor itself)

Voluntary liquidation means the Corporate Debtor itself approaches NCLT for sale of assets and payment of liabilities. Please note that liquidation is a process of selling off assets to pay off the liabilities and is succeeded by Dissolution. It is just a way of paying off your liabilities and generally adopted by Corporates to avoid litigations from its creditors. Corporates, who are under debt, can approach NCLT for starting CIRP and thereby the moratorium starts (all suits etc. will stay and no new suit can be filed against the Company).

Following is the process of Voluntary Liquidation:

Step I: Submission of declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person (declaration should be in Affidavit and should be accompanied with last 2 years audited financials, business operations of last 2 years, report by registered valuer, latest financial position);

Step II: Passing of **SR** approving the **proposal** of voluntary liquidation and **appointment** of liquidator (only Insolvency Professional), within 4 (four) weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of 2/3rd majority of creditors would also be required;

Step III: Public announcement inviting claims (should be in specified forms only) of all stakeholders, within 5 (five) days of passing SR, in newspaper as well as on website of the corporate person;

Step IV: Intimation to the ROC and Insolvency & Bankruptcy Board about the Approval, within 7 (seven) days of passing SR;

Step V: Preparation of preliminary report about the capital structure, estimates of assets and

liabilities, proposed plan of action etc., and submission of the same to the Company within 45 (forty-five) days of passing SR;

Step VI: Verification of claims by liquidator, within 30 (thirty) days form the last date for receipt of claims and preparation of list of stakeholders, within 45 (forty-five) days from the last date for receipt of claims;

Step VII: Opening of a bank account in the name of the Company followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the Company

Step VIII: Sale of assets, recovery of monies due to Company, realization of uncalled capital or unpaid capital contribution;

Step IX: Distribution of the proceeds from realization within 6 (six) months from the receipt of the amount to the stakeholders;

Step X: Submission of final report by the liquidator to the Company, ROC and the Board and application to NCLT for the dissolution;

Step XI: Submission of NCLT order regarding the dissolution, to the concerned ROC within 14 (fourteen) days of the receipt of order.

Liquidator should endeavor to complete the entire process within 12 months from the date of Commencement (i.e. date of submission of declaration to RoC by Directors)

ORDER OF PRIORITY OF PAYMENT TO CREDITORS – WATERFALL ARRANGEMENT

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:

(a) Insolvency resolution **process costs** and **liquidation costs** paid in full

(b) Following debts shall rank equally between and among the following:

(i) **Workmen's dues for the period of 24 months** preceding the liquidation commencement date

(ii) **Debts owed to secured creditor** in the event such secured creditor has relinquished security under section 52

(c) Wages and any unpaid dues **owed to employees** other than workmen **for the period of 12 months** preceding the liquidation commencement date

(d) Financial debts owed to **unsecured creditors**

(e) Following dues shall rank equally between and among the following:

(i) Any amount **due to the Central / State Government** including amount to be received on account of Consolidated Fund of India and Consolidated Fund of a State, if any, in respect of 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 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.

Any contractual arrangements between recipients above with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.

WINDING UP

Winding-up of a company is the last stage of putting an end to the life of a company when other revival strategies do not work. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members. If surplus is still left, it is distributed among the members in accordance with their rights.

A liquidator is appointed for administration of properties and he takes control of the company, collects its debts and finally distributes any surplus among the members in accordance with their rights.

Thus, winding-up is the process by which management of a company's affairs is taken out of its Directors' hands, its assets are realized by a liquidator and its debts are discharged out of proceeds of realization. Any surplus of assets which remains after such discharge is returned to its members or shareholders.

Distinguish between: Winding-up and Insolvency

Points	Winding-up	Insolvency
Meaning	Winding-up is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected/its debts are paid off put of the assets or, from contributions by its members. If surplus is still left, it is distributed among the members.	Insolvency is inability of a debtor to pay debts as they, fall due. A person is said to be insolvent when his liabilities exceeds his assets and against whom Court makes an order of adjudication.
Person	A company cannot be adjudged as insolvent.	Only individual can be adjudged as insolvent.
When	A company can be wound up even if is financially sound, e.g. voluntary winding-up.	A person can be adjudged insolvent only when he is unable to pay his liabilities.
Vesting of assets	In winding-up, the property remains vested in the company, but the administration is taken over by the liquidator.	In insolvency; proceedings, the assets of a person vested in Official Assignee or Official Receiver.
Effect of proceedings	After completion of winding-up proceedings, the company is dissolved.	After completion of insolvency proceedings, the insolvent person is discharged from all his liabilities.

Distinguish between: Winding-up and Dissolution

Points	Winding-up	Dissolution
Meaning	Winding-up is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets or from contributions by its members. If surplus is still left it is distributed among the members.	Dissolution brings an end to the company's legal existence.
Stags	Winding-up precedes the dissolution. In other words, first winding-up of state of affairs occurs and then company is dissolved.	Dissolution is the final stage which leads to corporate death of the company.
Effect	In winding-up, the assets are realized and liabilities are paid but, the corporate status of the company continues.	After dissolution the corporate status of the company does not continue.
Liquidator	The liquidator can present the company in winding-up proceedings.	Once the order of dissolution is made, the liquidator cannot represent the company
Proceedings	Any person can proceed against the company which is being wound-up.	No proceedings can be started against the company which has been dissolved.
Order of Court	Winding-up proceedings can be started without the intervention of Court.	Order of Court is essential for the dissolution of the company.

Modes of winding-up

A company may be wound up by any of the following modes:

1. By Tribunal i.e.**Compulsory** winding up
2. **Voluntary** winding up, which may be either:
   (a) Members voluntary winding up or
   (b) Creditors voluntary winding up

Under IBC Code, 2016, Voluntary Winding Up is now part of IBC and provisions of CA, 2013 are no longer applicable.

CIRCUMSTANCES IN WHICH COMPANY MAY BE WOUND UP BY TRIBUNAL / COMPULSORY TRIBUNAL

(a) By passing a SR

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

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately 5 consecutive financial years

(e) If the Tribunal is of the opinion that it is just and equitable that the Company should be wound up

Who can file the Application?

An application for the winding up of a company can be presented by following:

- Company itself
- Any contributory or contributories
- Registrar of companies (with previous sanction of CG)
- Any person authorized by the Central Government in that behalf
- In a case falling under Clause (b) of Section 271, by the CG/SG (cases where the Company has acted against integrity/sovereignty of the country).

In case where the application is not submitted by RoC, a copy of the application shall be submitted to RoC for its comments within 60 days of receipt.

Powers of Tribunal

On receipt of the application/petition, Tribunal has the following powers:

(a) dismiss it, with or without costs;

(b) make any interim order as it thinks fit;

(c) appoint a provisional 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 an order under this sub-section shall be made within 90 days from the date of presentation of the petition
- Provided further that before appointing a provisional liquidator under clause (c), 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.
- 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.

- Provisional Liquidator/Liquidator shall be appointed amongst the insolvency professionals registered under IBC, 2016.