Biju Patnaik Institute of IT and Management Studies, Bhubaneswar, Odisha

COMPANY LAW (I-MBA 4th Sem.)

Module-1 & Module-IV

Introduction

The Companies Act, 2013 (hereafter 'The Act') consolidates and amends the law relating to the companies in India and replaces the Companies Act, 1956 in phases, which is 56 years old. The new Act intends to improve corporate governance and to further strengthen regulations for the corporate sector with the introduction of key provisions as to;-

- Duties and Liabilities of Directors/Independent Directors,
- Auditor Rotation,
- Establishment of Serious Fraud Investigation Office (SFIO),
- Constitution of National Financial Reporting Authority (NFRA),
- Class Action Suit,
- Corporate Social Responsibility (CSR) etc.

The Companies Act, 2013 is administered by;-

- The Central Government through the Ministry of Corporate Affairs (MCA) and
- The Offices of Registrar of Companies,
- Official Liquidators,
- Public Trustee,
- Director of Inspection,
- National Company Law Tribunal (NCLT),
- National Company Law Appellate Tribunal (NCLAT), etc.

The Registrar of Companies (ROC) controls the task of incorporation of new companies and the administration of running companies.

Definition of company

"In terms of the Companies Act, 2013 'company' means a company incorporated under the Act, or under the previous company law" [Sec. 2(20)].

A company may be an incorporated company or a Corporation, or an unincorporated company. An incorporated company is a single and legal (artificial) person distinct from the individuals constituting it, whereas an unincorporated company, such as a partnership, is a mere collection or aggregation of individuals. Therefore, unlike a partnership, a company is a corporate body and a legal person having status and personality distinct and separate from that of the members constituting it.

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Characteristics/Advantages of company

1. Independent corporate existence

The outstanding feature of a company is its independent corporate existence. It is a distinct legal person existing independent of its members. By incorporation under the Act, the company is vested with a corporate personality which is distinct from the members who compose it.

A well-known illustration of this principle is the decision of the House of Lords in Salomon v. Salomon & Co. [(1898) AC 22].

2. Limited Liabilities

The privilege of limiting liability for business debts is one of the principal advantages of doing business under the corporate form of organization. Where the subscribers exercise the choice of registering the company with limited liability, the members' liability becomes limited or restricted to the nominal value of the shares taken by them or the amount guaranteed by them. No member is bound to contribute anything more than the nominal value of the shares held by him.

3. Perpetual successions

An incorporated company never dies. It is an entity with perpetual succession. Perpetual succession means that the membership of a company may keep changing from time to time, but that does not affect the company's continuity. The death or insolvency of individual members does not, in any way affect the corporate existence of the company "Members may come and go but the company can go on forever".

It continues to exist even if all its human members are dead. Even where during the war all the members of a private company, while in general meeting, were killed by a bomb, the company survived, not even a hydrogen bomb could have destroyed it. [K'9 Meat Supplies (Guildford) Ltd., Re 1966 (3) All. ER 320.]

4. Separate properties

A company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The company becomes the owner of its capital and assets. The shareholders are not the several or joint owners of the company's property. The company is the real person in which all its property is vested, and by which is controlled, managed and disposed of [Bacha F Guzdar v. C.I.T. AIR 1955 SC 74.]. The property is vested in the company as a body corporate, and no changes of individual membership affect the title. The property, however much, the shareholders may come and to remains vested in the company, and the company can convey, assign, mortgage, or otherwise deal with it irrespective of these mutations.

5 .Transferable Shares

When joint stock companies were established the great object was that their shares should be capable of being easily transferred. Accordingly, the Companies Act, 2013 in Section 44 declares: 'The shares or debentures or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company'. Thus incorporation enables a member to sell his shares in the open market and to get back his investment without having to withdraw the money from the company. This provides liquidity to the investor and stability to the company.

6. Common seal

Since the company has no physical existence, it must act through its agents and all such contracts entered into by its agents must be under the seal of the company. The common seal acts as the official signature of the company. Prior to the Companies (Amendment) Act, 2015 the common seal is a seal used by a corporation as the symbol of its incorporation and also a statutory requirement for a company. As a departure from this concept, the Companies (Amendment) Act, 2015 has deleted the requirement of having Common Seal compulsorily.

After this amendment, in case a company does not have a common seal, the authorization shall be made by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.

Classes of Companies

A company may be incorporated as a One Person Company (OPC) a new concept all together in the Companies Act, 2013, Private Company or a Public Company, depending upon the number of members joining it. Again it may either be an unlimited company, or may be limited by shares or by guarantee or by both. On the basis of control, companies can be classified as associate company, holding company and subsidiary company. Some other forms of classification of companies are: foreign company, Government Company, small company, dormant company, Nidhi Company and company formed for charitable objects.

Companies may be classified into various classes on the following basis:

1. On the Basis of Incorporation

(a) Statutory companies

These are the companies which are created by a special Act of the Legislature, e.g., the Reserve Bank of India, the State Bank of India, the Life Insurance Corporation, the Industrial Finance Corporation, the Unit trust of India and State Financial Corporations These are mostly concerned with public utilities, e.g. railways, tramways, gas and electricity companies and enterprises of national importance. The provisions of the Companies Act, 2013 do not apply to them unless the special act specifies such application. Banking Regulation Act, 1949 is a special legislation concerning banking companies.

(b) Registered companies

These are the companies which are formed and registered under the Companies Act, 2013, or were registered under any of the earlier Companies Acts.

2. On the basis of liability

(a) Company limited by shares

Section 2 (22) of the Companies Act, 2013, defines that when the liability of the members of a company is limited by its memorandum of association to the amount (if any) unpaid on the shares held by them, it is known as a company limited by shares. It thus implies that for meeting the debts of the company, the shareholder may be called upon to contribute only to the extent of the amount, which remains unpaid on his shareholdings. His separate property cannot be encompassed to meet the company's debt.

(b) Company limited by guarantee

Section 2 (21) of the Companies Act, 2013 defines it as the company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up. Thus, the liability of the member of a guarantee company is limited up to a stipulated sum mentioned in the memorandum. Members cannot be called upon to contribute beyond that stipulated sum.

(c) Unlimited company

Section 2 (92) of the Companies Act, 2013 defines unlimited company as a company not having any limit on the liability of its members. In such a company the liability of a member ceases when he ceases to be a member.
The liability of each member extends to the whole amount of the company's debts and liabilities but he will be entitled to claim contribution from other members.

3. On the basis of members

(a) One person company

(1) **The Concept of One Person Company (OPC)**

The concept of One Person Company (OPC) has now been introduced in India, through Section 2 (62) of Companies Act, 2013 thereby enabling Entrepreneur(s) carrying on the business in the Sole Proprietor form of business to enter into a Corporate Framework. Though this concept is new in India but it is already a part of many other countries like China, Australia, Pakistan and UK etc.

According to Section 2 (62) of the Companies Act, 2013 'One Person Company' means a company which has only one person as a member. A company formed under one person company may be either:

a) A company limited by shares, or
b) company limited by guarantee, or
c) An unlimited company.

One Person Company is a hybrid of Sole-Proprietor and Company form of business, and has been provided with concessional/relaxed requirements under the Act.

(2) **Features of One Person Company (OPC)**

a) Only One Shareholder: Only a natural person, who is an Indian citizen and resident in India, shall be eligible to incorporate a One Person Company.

b) Nominee for the Shareholder: The Shareholder shall nominate another person who shall become the shareholders in case of death/incapacity of the original shareholder. Such nominee shall give his/her consent and such consent for being appointed as the Nominee for the sole Shareholder. Only a natural person, who is an Indian citizen and resident in India, shall be a nominee for the sole member of a One Person Company.

c) Director: Must have a minimum of One Director, the Sole Shareholder can himself be the Sole Director. The Company may have a maximum number of 15 directors.

(b) Private Company [Section 2 (68)]

According to Section 2 (68) of Companies Act, 2013 a 'private company' means a company having a minimum paid-up share capital as may be prescribed, and which by its articles:

(1) Restricts the right to transfer its shares.

(2) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member;

Provided further that:

a) persons who are in the employment of the company, and

b) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members, and

(3) Prohibits any invitation to the public to subscribe for any securities of the company.

The Companies (Amendment) Act, 2015 has omitted 'of one lakh rupees or such higher paid-up share capital' from the definition of Private Company w.e.f. 25.05.2015. The impact of this amendment is that today one can have a company of paid up capital of mere ` Two (with each subscriber giving a rupee as subscription) for a private company and ` Seven for a public company.

(c) Public company [Section 2 (71)]

According to Section 2 (71) of Companies Act, 2013 a 'public company' means a company which:

(1) is not a private company.

(2) has a minimum paid-up share capital, as may be prescribed:

(3) Seven or more members are required to form the company.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

The Companies (Amendment) Act, 2015 has omitted "of five lakh rupees or such higher paid-up capital," from the definition of Public Company w.e.f. 25.05.2015.

(d) Small Company [Section 2 (85)]

According to Section 2 (85) of Companies Act, 2013 a ''small company'' means a company, other than a public company:

(1) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees. Or

(2) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to:

a) A holding company or a subsidiary company.
b) A company registered under Section 8, or
c) A company or body corporate governed by any special Act.
d) Some of the advantages enjoyed by the small companies are:
e) Holding of two board meetings instead of four – one each in the first and second half years and the gap between the two meetings should not be more than 90 days. (section 173(5))
f) Not required to give cash flow statements with the financial statements (section 2(40))

4 . On the basis of control

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

According to Section 2 (46) of the Companies Act, 2013 'holding company', in relation to one or more other companies, means a company of which such companies are subsidiary companies.

According to Section 2 (87) of the Companies Act, 2013 'subsidiary company' or 'subsidiary', in relation to any other company (that is to say the holding company), means a company in which the holding company :

(a) controls the composition of the Board of Directors, Or

(b) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

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

5. On the basis of Listing in the recognized Stock Exchange

(a) Listed company (also widely held)

According to Section 2 (52) of the Companies Act, 2013, a 'listed company' means a company which has any of its securities listed on any recognized stock exchange. Whereas the word securities as per the Section 2 (81) of the Companies Act, 2013 has been assigned the same meaning as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956.

(b) Unlisted company

Unlisted Company means company other than listed company.

6. Other types

Government Company

According to Section 2 (45) of the Companies Act, 2013, a 'Government company' means any company in which not less than fifty one per cent 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.

(a) Foreign Company

According to Section 2 (42) of the Companies Act, 2013, ‘foreign company’ means any company or body corporate incorporated outside India which:

(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode. &

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

(b) Associate Company

According to Section 2 (6) of the Companies Act, 2013, '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.

As per the Explanation given under the Section, the clause, 'significant influence' means control of at least twenty per cent of total share capital, or of business decisions under an agreement.

(c) Dormant company

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

'Significant accounting transaction' means any transaction other than:

(1) Payment of fees by a company to the Registrar.
(2) payments made by it to fulfil the requirements of this Act or any other law.
(3) allotment of shares to fulfil the requirements of this Act, and
(4) payments for maintenance of its office and records.
(5)

(d) Nidhi Companies

Company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift (cost cutting) and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefits and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. [Section 406 of the Companies Act, 2013]

(e) Public financial institutions

According to Section 2 (72) of the Companies Act, 2013 the following institutions are to be regarded as public financial institutions:

(1) The Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956.
(2) The Infrastructure Development Finance Company Limited,
(3) Specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002.
(4) Institutions notified by the Central Government under Section 4A (2) of the Companies Act, 1956 so repealed under Section 465 of this Act.
(5) Such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

Provided that no institution shall be so notified unless:

(a) it has been established or constituted by or under any Central or State Act. Or
(b) not less than fifty-one per cent of the paid-up share capital is held or controlled 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.

Conversion of Public Company into a Private Company

A public company can be converted into a private company by passing a special resolution, after altering its articles so as to include therein the restrictions contained in Section 2(68) of the Act. A special resolution passed to convert a public company into a private company is binding on dissenting shareholders provided it is bona fide, is in the interest of the company as a whole, and is consistent with the objects in the Memorandum of Association. Any alteration made in the articles to convert a public company into a private company shall take effect only with the approval of the Tribunal which shall make such order as it may deems fit.

Conversion of private company into public company

Similarly where a private company alters its articles by passing special resolution in such a manner that they no longer includes the restrictions and limitations which are required to be included in the articles of a private company, then such company shall cease to be a private company from the date of such alteration.

Filing with the registrar

Every alteration of the articles and a copy of the order of the Tribunal approving the alteration of articles in respect of conversion of public company into private company or private company into public company shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

Incorporation of Company

(a) Formation of company

Persons who form the company are known as promoters. It is they, who conceive the idea of forming the company. They take all necessary steps for its registration.

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company.

(1) Public Company: In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration.
(2) Private Company: In exactly the same way, 2 or more persons can form a private company.
(3) One person company (OPC): One person, where the company to be formed is to be One Person Company.

(b) Procedural aspects of incorporation of company

Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.

(1) Filing of the documents and information with the registrar: For the registration of the company following documents and information are required to be filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated:

- The memorandum and articles of the company duly signed by all the subscribers to the memorandum.
- A declaration by person who is engaged in the formation of the company (an advocate, a chartered accountant, cost accountant or company secretary in practice), and by a person named in the articles (director, manager or secretary of the company), that all the requirements of this Act and the rules

made there under in respect of registration and matters precedent or incidental thereto have been complied with.

- An affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles stating that:

1) he is not convicted of any offence in connection with the promotion, formation or management of any company, or
2) he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
3) and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.

- The address for correspondence till its registered office is established.

The particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.

The particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

Particulars provided in this provision shall be of the individual subscriber and not of the professional engaged in the incorporation of the company [The Companies (Incorporation) Rules, 2014].

>Issue of certificate of incorporation on registration: 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 the prescribed form to the effect that the proposed company is incorporated under this Act.

>Allotment of corporate identity number (CIN): On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

>Maintenance of copies of all documents and information: The company shall maintain and preserve at its registered office copies of all documents and information as originally filed, till its dissolution under this Act.

Formation of OPC

a) The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of the company.
b) The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
c) Such other person may be given the right to withdraw his consent
d) The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar

e) Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

f) Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year):

g) shall be eligible to incorporate a OPC.

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

No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.

i) No minor shall become member or nominee of the OPC or can hold share with beneficial interest.

j) Such Company cannot be incorporated or converted into a company under Section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the Rules 6 & 7 of the Companies (Incorporation) Rules, 2014.

k) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.

l) OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

m) If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

Effect of registration

According to Section 9 of the Companies Act, 2013, from the date of incorporation (mentioned in the certificate of incorporation), the subscribers to the memorandum and all other persons, who may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum. Such a registered Company shall be capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name.

From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from the incorporators and there comes into existence a binding contract between the company and its members as evidenced by the Memorandum and Articles of Association [Hari Nagar Sugar Mills Ltd. vs. S.S. Jhunjhunwala AIR 1961 SC 1669]. It has perpetual existence until it is dissolved by liquidation or struck out of the register. A shareholder, who buys shares, does not buy any interest in the property of the company but in certain cases a writ petition will be maintainable by a company or its shareholders.

A legal personality emerges from the moment of registration of a company and from that moment the persons subscribing to the Memorandum of Association and other persons joining as members are regarded as a body corporate or a corporation in aggregate and the legal person begins to function as an entity. A company on registration acquires a separate existence and the law recognises it as a legal person separate and distinct from its members [State Trading Corporation of India vs. Commercial Tax Officer AIR 1963 SC 1811].

It may be noted that under the provisions of the Act, a company may purchase shares of another company and thus become a controlling company. However, merely because a company purchases all shares of another company it will not serve as a means of putting an end to the corporate character of another company and each company is a separate juristic entity [Spencer & Co. Ltd. Madras vs. CWT Madras (1969) 39 Comp. Case 212].

(Differences between a Public Company and a Private company)

1. **Minimum number :** The minimum number of persons required to form a public company is 7. It is 2 in case of a private company.
2. **Maximum number :** There is no restriction on maximum number of members in a public company, whereas the maximum number cannot exceed 50 in a private company.
3. **Number of directors.** A public company must have at least 3 directors whereas a private company must have at least 2 directors .
4. **Restriction on appointment of directors**. In the case of a public company, the directors must file with the Register a consent to act as directors or sign an undertaking for their qualification shares. The directors or a private company need not do so (Sec 266)
5. **Restriction on invitation to subscribe for shares.** A public company invites the general public to subscribe for shares. A public company invites the general public to subscribe for the shares or the debentures of the company. A private company by its Articles prohibits invitation to public to subscribe for its shares.
6. **Name of the Company :** In a private company, the words "Private Limited" shall be added at the end of its name.
7. **Public subscription :** A private company cannot invite the public to purchase its shares or debentures. A public company may do so.
8. **Issue of prospectus :** Unlike a public company a private company is not expected to issue a prospectus or file a statement in lieu of prospectus with the Registrar before allotting shares.
9. **Transferability of Shares**. In a public company, the shares are freely transferable (Sec. 82). In a private company the right to transfer shares is restricted by Articles.
10. **Special Privileges.** A private company enjoys some special privileges. A public company enjoys no such privileges.
11. **Quorum.** If the Articles of a company do not provide for a larger quorum. 5 members personally present in the case of a public company are quorum for a meeting of the company. It is 2 in the case of a private company (Sec. 174)
12. **Managerial remuneration.** Total managerial remuneration in a public company cannot exceed 11 per cent of the net profits (Sec. 198). No such restriction applies to a private company.
13. **Commencement of business**. A private company may commence its business immediately after obtaining a certificate of incorporation. A public company cannot commence its business until it is granted a "Certificate of Commencement of business".

Special privileges of a Private Company

Unlike a private a public company is subject to a number of regulations and restrictions as per the requirements of Companies Act, 1956. It is done to safeguard the interests of investors/shareholders of the public company. These privileges can be studied as follows :
a) Special privileges of all companies. The following privileges are available to every private company, including a private company which is subsidiary of a public company or deemed to be a public company

1. A private company may be formed with only two persons as member. It may commence allotment of shares even before the minimum subscription is subscribed for.
2. It is not required to either issue a prospectus to the public of file statement in lieu of a prospectus.
3. Restrictions imposed on public companies regarding further issue of capital do not apply on private companies.
4. Provisions of Sections 114 and 115 relating to share warrants shall not apply to it. (Sec. 14)
5. It need not keep an index of members.
6. It can commence its business after obtaining a certificate of incorporation. A certificate of commencement of business is not required.
7. It need not hold statutory meeting or file a statutory report
8. Unless the articles provide for a larger number, only two persons personally present shall form the quorum in case of a private company, while at least five member personally present form the quorum in case of a public company .
9. A director is not required to file consent to act as such with the Registrar. Similarly, the provisions of the Act regarding undertaking to take up qualification shares and pay for them are not applicable to directors of a private companies
10. Provisions in Section 284 regarding removal of directors by the company in general meeting shall not apply to a life director appointed by a private company.
11. In case of a private company, poll can be demanded by one member if not more than seven members are present, and by two member if not more than seven member are present. In case of a public company, poll can be demanded by persons having not less than one-tenth of the total voting power in respect of the resolution or holding shares on which an aggregate sum of not less than fifty thousand rupees has been paid-up .It need not have more than two directors, while a public company must have

MEMORANDUM OF ASSOCIATION

The formation of a public company involves preparation and filing of several essential documents. Two of basic documents are:

1. Memorandum of Association
2. Articles of Association

The preparation of Memorandum of Association is the first step in the formation of a company. It is the main document of the company which defines its objects and lays down the fundamental conditions upon which alone the company is allowed to be formed. It is the charter of the company. Governs the relationship of the company with the outside world and defines the scope of its activities. Its purpose is to enable shareholders, creditors and those who deal with the company to know what exactly its permitted range of activities is. It enables these parties to know the purpose, for which their money is going to be used by the company and the nature and extent of risk they are undertaking in making investment. Memorandum of Association enable the parties dealing with the company to know with certainty as whether the contractual relation to which they intend to enter with the company is within the objects of the company.

Printing and signing of Memorandum (Sec. 15).

The memorandum of Association of a company shall be

(a) printed,

(b) divided into paragraphs numbered consecutively, and

(c) signed by prescribed number of subscribers (7 or more in the case of public company, two or more in the case of private company respectively). Each subscriber must sign for his/her name, address, description and occupation in the presence of at least one witness who shall attest the signature and shall likewise add his address, description and occupation, if any.

Contents of Memorandum

1. Name clause

I. Promoters of the company have to make an application to the registrar of Companies for the availability of name. The company can adopt any name if :

II. There is no other company registered under the same or under an identical name;

III. The name should not be considered undesirable and prohibited by the Central Government (Sec. 20). A name which misrepresents the public is prohibited by the Government under the Emblems & Names (Prevention of Improper use) Act, 1950 for example, Indian National Flag, name pictorial representation of Mahatma Gandhi and the Prime Minister of India, name and emblems of the U.N.O., and W.H.O., the official seal and Emblems of the Central Government and State Governments.

IV. Where the name of the company closely resembles the name of the company already registered, the Court may direct the change of the name of the company.

Once the name has been approved and the company has been registered, then

a) the name of the company with registered office shall be affixed on outside of the business premises;

b) if the liability of the members is limited the words “Limited” or “Private Limited” as the case may be, shall be added to the name;

Omission of the word ‘Limited’ makes the name incorrect. Where the word’ Limited” forms part of a company’s name, omission of this word shall make the name incorrect. If the company makes a contract without the use of the word “Limited”, the officers of the company who make the contract would be deemed to be personally liable The omission to use the word ‘Limited’ as part of the name of a company must have been deliberate and not merely accidental. Note the following case in this regard:

c) the name and address of the registered office shall be mentioned in all letterheads, business letters, notices and Common Seal of the Company. The name of a company is the symbol of its personal existence. The name should be properly and correctly mentioned. The Central Government may allow a company to drop the word "Limited" from its name.

2. Registered Office Clause

Memorandum of Association must state the name of the State in which the registered office of the company is to be situated. It will fix up the domicile of the company. Further, every company must have a registered office either from the day it begins to carry on business or within 30 days of its incorporation, whichever is earlier, to which all communications and notices may be addressed. Registered Office of a company is the place of its residence for the purpose of delivering or addressing any communication, service of any notice or process of court of law and for determining question of jurisdiction of courts in any action against the company. It is also the place for keeping statutory books of the company.

Notice of the situation of the registered office and every change shall be given to the Registrar within 30 days after the date of incorporation of the company or after the date of change. If default is made in complying with these requirements, the company and every officer of the company who is default shall be punishable with fine which may extend to Rs. 50 per during which the default continues.

3. Object Clause

This is the most important clause in the memorandum because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the company can exercise in order to achieve the object or objects. Stating the objects of the company in the Memorandum of Association is not a mere legal technicality but it is a necessity of great practical importance. It is essential that the public who purchase its shares should know clearly what are the objects for which they are paying.

In the case of companies which were in existence immediately before the commencement of the Companies (Amendment) Act. 1965, the object clause has simply to state the objects of the company. But in the case of a company to be registered after the amendment, the objects clause must state separately.

i) Main Objects: This sub-clause has to state the main objects to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of main objects.

ii) Other objects: This sub-clause shall state other objects which are not included in the above clause.

Further, in case of a non-trading company, whose objects are not confined to one state, the objects clause must mention specifically the States to whose territories the objects extend. (Sec. 13)

A company, which has a main object together with a number of subsidiary objects, cannot continue to pursue the subsidiary objects after the main object has come to an end.

i) The objects of the company must not be illegal, e.g. to carry on lottery business.

ii) The objects of the company must not be against the provisions of the Companies Act such as buying its own shares , declaring dividend out of capital etc. iii) The objects must not be against public, e.g. to carry on trade with an enemy country.

iii) The objects must be stated clearly and definitely. An ambiguous statement like "Company may take up any work which it deems profitable" is meaningless.

iv) The objects must be quite elaborate also. Note only the main objects but the subsidiary or incidental objects too should be stated.

The narrower the objects expressed in the memorandum, the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company.

4. Capital Clause

In case of a company having a share capital unless the company is an unlimited company, Memorandum shall also state the amount of share capital with which the company is to be registered and division thereof into shares of a fixed amount. The capital with which the company is registered is called the authorized or nominal share capital. The nominal capital is divided into classes of shares and their values are mentioned in the clause. The amount of nominal or authorized capital of the company would be normally, that which shall be required for the attainment of the main objects of the company. IN case of companies limited by guarantee, the amount promised by each member to be contributed by them in case of the winding up of the company is to be mentioned. No subscriber to the memorandum shall take less than one share. Each subscriber of the Memorandum shall write against his name the number of shares he takes.

5. Liability Clause

In the case of company limited by shares or by guarantee, Memorandum of Association must have a clause to the effect that the liability of the members is limited. It implies that a shareholder cannot be called upon to pay any time amount more then the unpaid portion on the shares held by him. He will no more be liable if once he has paid the full nominal value of the share.

The Memorandum of Association of a company limited by guarantee must further state that each member undertakes to contribute to the assets of the company if wound up, while he is a member or within one year after he ceased to be so, towards the debts and liabilities of the company as well as the costs and expenses of winding up and for the adjustment of the rights of the contributories among themselves not exceeding a specified amount.

Any alteration in the memorandum of association compelling a member to take up more shares, or which increases his liability, would be null and void. .

If a company carries on business for more than 6 months while the number of members is less than seven in the case of public company, and less than two in case of a private company, each member aware of this fact, is liable for all the debts contracted by the company after the period of 6 months has elapsed.

6. Association or Subscription Clause

In this clause, the subscribers declare that they desire to be formed into a company and agree to take shares stated against their names. No subscriber will take less than one share. The memorandum has to be subscribed to by at least seven persons in the case of a public company and by at least two persons in the case of a private company. The signature of each subscriber must be attested by at least one witness who cannot be any of the subscribers. Each subscriber and his witness shall add his address ,description and occupation, if any. This clause generally runs in this form : “we, the several person whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of the number of shares in the capital of the company, set opposite of our respective name”.
After registration, no subscriber to the memorandum can withdraw his subscription on any ground.

Alteration of Association

Alteration of Memorandum of association involves compliance with detailed formalities and prescribed procedure. Alternations to the extent necessary for simple and fair working of the company would be permitted. Alterations should not be prejudicial to the members or creditors of the company and should not have the effect of increasing the liability of the members and the creditors.
Contents of the Memorandum of association can be altered as under :

1. Change of name

A company may change its name by special resolution and with the approval of the Central Government signified in writing. However, no such approval shall be required where the only change in the name of the company is the addition there to or the deletion there from, of the word “Private”, consequent on the conversion of a public company into a private company or of a private company into a public company. By ordinary resolution. If through inadvertence or otherwise, a company is registered by a name which, in the opinion of the Central Government, is identical with or too nearly resembles the name of an existing company, it may change its name by an ordinary resolution and with the previous approval of the Central Government signified in writing.

Registration of change of name. Within 30 days passing of the resolution, a copy of the order of the Central Government’s approval shall also be field with the Registrar within 3 months of the order. The Registrar shall enter the new name in the Register of Companies in place of the former name and shall issue a fresh certificate of incorporation with the necessary alterations. The change of name shall be complete and effective only on the issue of such certificate. The Registrar shall also make the necessary alteration in the company’s memorandum of association
The change of name shall not affect any right or obligations of the company or render defective any legal proceeding by or against it. (Sec. 23).

2. Change of Registered Office

This may involve:

a) Change of registered office from one place to another place in the same city, town or village. In this case, a notices is to be give within 30 days after the date of change to the Registrar who shall record the same.

b) Change of registered office from one town to another town in the same State. In this case, a special resolution is required to be passed at a general meeting of the shareholders and a copy of it is to be filed with the Registrar within 30 days. The within 30 days of the removal of the office. A notice has to be given to the Registrar of the new location of the office.

c) Change of Registered Office from one State to another State .
Section 17 of the Act deals with the change of place of registered office form one State to another State. According to it, a company may alter the provision of its memorandum so as to change the place of its registered office from one State to another State for certain purposes referred to in Sec 17(1) of the Act. In addition the following steps will be taken.

Special Resolution

For effecting this change a special resolution must be passed and a copy there of must be filed with the Registrar within thirty days. Special resolution must be passed in a duly convened meeting.

Confirmation by Central Government

The alteration shall not take effect unless the resolution is confirmed by the Central Government.
The Central Government before confirming or refusing to confirm the change will consider primarily the interests of the company and its shareholders and also whether the change is bonafide and not against the public interest. The Central Government may then issue the confirmation order on such terms and conditions as it may think fit.

3. Alteration of the Object Clause

The Company may alter its objects on any of the grounds (I) to (vii) mentioned in Section 17 of the Act.
The alteration shall be effective only after it is approved by special resolution of the members in general meeting with the Companies Amendment Act, 1996, for alteration of the objects clause in Memorandum of Associations sanction of Central Government is dispensed with.

Limits of alteration of the Object Clause

The limits imposed upon the power of alteration are substantive and procedural. Substantive limits are provided by Section 17 which provides that a company may change its objects only in so far as the alteration is necessary for any of the following purposes:

i) to enable the company to carry on its business more economically or more effectively;
ii) to enable the company to attain its main purpose by new or improved means;
iii) to enlarge or change the local area of the company's operation
iv) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company;

Alterations in the objects are to be confined within the above limits for otherwise alteration in excess of the above limitations shall be void.

A company shall file with the registrar a special resolution within one month from the date of such resolution together with a printed copy of the memorandum as altered. Registrar shall register the same and certify the registration. [Sec. 18].

Effect of non-Registration with Registrar

Any alteration, if not registered shall have no effect. If the documents required to be filed with the Registrar are not filed within one month, such alteration and the order of the Central Government and all proceedings connected therewith shall at the expiry of such period become void and inoperative. The Central Government may, on sufficient cause show, revive the order on application made within a further period of one month [Sec. 19]

4. Alteration of Capital Clause

The procedure for the alteration of share capital and the power to make such alteration are generally provided in the Articles of Association If the procedure and power are not given in the Articles of Associational, the company must change the articles of association by passing a special resolution. If the alteration is authorized by the Articles, the following changes in share capital may take place :

1. Alteration of share capital [Section 94-95]
2. Reduction of capital [Section 100-105]
3. Reserve share capital or reserve liability [Section 99]
4. Variation of the rights of shareholders [Section 106-107]
5. Reorganization of capital [Section 390-391]

5. Alteration of Liability Clause

Ordinarily the liability clause cannot be altered so as to make the liability of members unlimited. And the liability of the members cannot be increased without their consent. It lays down that a member cannot by changing the memorandum or articles, be made to take more shares or to pay more the shares already taken unless he agrees to do so in writing either before or after the change.

A company, if authorized by its Articles, may alter its memorandum to make the liability directors or manager unlimited by passing a special resolution.

ARTICLES OF ASSOCIATION

Every company is required to file Articles of Association along with the Memorandum of Association with the Registrar at the time of its registration. Companies Act defines ‘Articles as Articles of Association of a company as originally framed or as altered from time to time in pursuance of any previous companies Acts. They also include, so far as they apply to the company, those in the Table A in Schedule I annexed to the Act or corresponding provisions in earlier Acts.

Articles of Association are the rules, regulations and bye-laws for governing the internal affairs of the company. They may be described as the internal regulation of the company governing its management and embodying the powers of the directors and officers of the company as well as the powers of the shareholders. They lay down the mode and the manner in which the business of the company is to be conducted.

In framing Articles of Association care must be taken to see that regulations framed do not go beyond the powers of the company itself as contemplated by the Memorandum of Association nor should they be such as would violate any of the requirements of the companies Act, itself. All clauses in the Articles ultra vires the Memorandum or the Act shall be null and void.

Article of Association are to be printed, divided into paragraphs, serially numbered and signed by each subscriber to Memorandum with the address, description and occupation. Each subscriber shall sign in the presence of at least one witness who shall attest the signatures and also mention his own address and occupation.

Contents of Articles of Association Articles generally contain provision relating to the following matters;

(1)the exclusion, whole or in part of Table A;
(2) share capital different classes of shares of shareholders and variations of these rights
(3)execution or adoption of preliminary agreements, if any;
(4)allotment of shares;
(5)lien on shares
(6)calls on shares;
(7)forfeiture of shares;
(8)issue of share certificates;
(9)issue of share warrants; of shares; transmission of shares;
(10) alteration of share capital; borrowing power of the company;
(11) rules regarding meetings;
(12) voting rights of members;
(13) notice to members;
(14) dividends and reserves;
(15) accounts and audit;
(16) arbitration provision, if any;
   a. directors, their appointment and remuneration;
   b. the appointment and reappointment of the managing director, manager and secretary;
(17) fixing limits of the number of directors
(18) payment of interest out of capital; common seal; and
(19) Winding up.

Model form of Articles

Different model forms of memorandum of association and Articles of Association of various types of companies are specified in Schedule I to the Act. The schedule is divided into following tables.

Table A deals with regulations for management of a company limited by shares.

Table B contains a model form of Memorandum of Association of a company limited by shares.

Table C gives model forms of Memorandum and Articles of Association of a company limited by guarantee and not having a share capital.

Table D gives model forms of Memorandum and Articles of Association of a company limited by guarantee and having a share capital. The Articles of such a company contain in addition to the information about the number of members with which the company proposes to be registered, all other provisions of Table A.

Table E contains the model forms of memorandum and Articles of Association of an unlimited company. A Public Company may have its own Article of Association.

Alteration of Articles

Company law 2013 grant power to every company to alter its articles whenever it desires by passing a special resolution and filing a copy of altered Articles with the Registrar. An alteration is not invalid simply because it changes the company's constitution. Thus. A company was allowed by changing articles to issue preference shares when its memorandum was silent on the point.

. **Distinctions between Memorandum of Association and Articles of Association**

Memorandum of Association	Articles of Association
It is character of company indicating nature of business & capital. It also defines the company's relationship with outside world	They are the regulation for the internal management of the company and are subsidiary to the memorandum.
It defines the scope of the activities of the company, or the area beyond which the actions of the company cannot go.	They are the rules for carrying out the objects of The company as set out in the Memorandum.
It, being the charter of the company, is the supreme Document.	They are subordinate to the Memorandum. If there is a conflict between the Articles and the Memorandum, the act of the company
Any act of the company which is ultra vires the Memorandum is wholly void and cannot be ratified even by the whole body of shareholders.	Any act of the company which is ultra vires the Memorandum is wholly void and cannot be ratified even by the whole body of shareholders.
Every company must have its own Memorandum	A company limited by Shares need not have Articles of its own. In such A case, Table A Applies.
There are strict restrictions on its alteration.	They can be altered by a special resolution, to

Some of the conditions of incorporation contained in it cannot be altered except with the sanction of the Central Government.	any extent, provided they do not conflict with the Memorandum and the Companies Act.

Doctrine of Ultra Vires

Objects clause is contained in the memorandum of association and sets out the powers of the directors in running the company. Traditionally, each power of the company had to be enumerated, which resulted in detailed statements as to the powers of the company. Companies are now able to use the phrase 'to carry on the business of a general commercial company' rather than use exhaustive lists of enumerated powers.

The Introduction to Doctrine of Ultra Vires

The object clause of the memorandum of the company contains the object for which the company is formed. An act of the company must not be beyond the object clause otherwise it will be ultra vires and therefore, void and cannot be ratified even if all the member wish to ratify. This is called the doctrine of ultra vires. The expression “ultra vires" consists of two words: ‘ultra’ and ‘vires’. ‘Ultra’ means beyond and ‘Vires’ means powers. Thus, the expression ultra vires means an act beyond the powers. Here the expression ultra vires is used to indicate an act of the company, which is beyond the powers conferred on the company by the objects clause of its memorandum. An ultra vires act is void and cannot be ratified even if all the directors wish to ratify it. Sometimes the expression ultra vires is used to describe the situation when the directors of a company have exceeded the powers delegated to them. Where accompany exceeds its power as conferred on it by the objects clause of its memorandum, it’s not bound by it because it lacks legal capacity to incur responsibility for the action, but when the directors of a company have exceeded the powers delegated to them. This use must be avoided for it is apt to cause confusion between two entirely distinct legal principles. Consequently, here are restricting the meaning of ultra vires objects clause of the company’s memorandum.

Protection of Creditors and Investors

Doctrine of ultra vires has been developed to protect the investors and creditors of the company. This doctrine prevents a company to employ the money of the investors for a purpose other than those stated in the objects clause of its memorandum. Thus, the investors and the company may be assured by this rule that their investment will not be employed for the objects or activities which they did not have in contemplation at the time of investing their money in the company. It enables the investors to know the objects in which their money is to be employed. This doctrine protects the creditors of the company by ensuring them that the funds of the company to which they must look for payment are not dissipated in unauthorized activities. The wrongful application of the company’s assets may result in the insolvency of the company, a situation when the creditors of the company cannot be paid. This doctrine prevents the wrongful application of the company’s assets likely to result in the insolvency of the company and thereby protects creditors. Besides the doctrine of ultra vires prevents directors from departing the object for which the company has been formed and, thus, puts a check over the activities of the directions. It enables the directors to know within what lines of business they are authorized to act .

Lifting of the 'Corporate Veil'

It means looking behind the company as a legal person and paying regard to its corporate identity and find out the real life behind the company. In such circumstances, the Courts ignore the company as legal entity and verify directly with the management of company by members or managers, thus, the corporate veil may be said to have been lifted. Only in appropriate circumstances, the Courts are willing to lift the corporate veil and that too, when questions of control are involved.

The following are the cases where company law disregards the principle of corporate personality or the principle that the company is a legal entity distinct and separate from its shareholders or members:

(a) In the law relating to trading with the enemy where the test of control is adopted.
(b) In certain matters concerning the law of taxes, duties and stamps particularly where question of the controlling interest is in issue.
(c) Where companies form other companies as their subsidiaries to act as their agent. The application of the doctrine may operate in favor of such companies depending upon the facts of a particular case. Suppose, a company acquires a partnership concern and registers it as a company, which becomes subsidiary of the acquiring company. In an action for compulsory acquisition of the business premises of the subsidiary, it was held that the parent company (which through itself and nominees held all the shares) was entitled to compensation, maintain action for the same . Where the courts find that there is avoidance of welfare legislation, it will be free to lift the corporate veil.
(d) The Courts invariably lift the corporate veil or a disregard the corporate personality of a company to protect the public policy and prevent transactions contrary to public policy.
(e) Under the law relating to exchange control. The courts pierce the corporate veil in quasi-criminal cases in order to look behind the legal person and punish the real persons who have violated the law.
(f) Where the use of an incorporated company is being made to avoid legal obligations, the Court may disregard the legal personality of the company and proceed on the assumption as if no company existed.

DOCTRIN OF CONSTRUCTIVE NOTICE OR DOCTRINE OF INDOOR MANAGEMENTS

The Memorandum and Articles of a company are registered with the Registrar. These are the public documents and open to public inspection,. Every person contracting with the company must acquaint himself with their contents and must make sure that his contract is in accordance with them; otherwise he cannot sue the company.

On registration the memorandum and articles of association become public documents. These documents are available for public inspection either in the office of the company or in the office of the Registrar of Companies on payment of one rupee for each inspection and can be copied (Sec. 610).

Every person, who, deals with the company, whether shareholder or an outsider is presumed to have read the memorandum and articles of association of the company and is deemed to know the contents of these document. Therefore, the knowledge of these documents and their contents is known as the constructive notice of memorandum and articles of association.

It is presumed that persons dealing with the company have not only read these documents but they have also understood their proper meaning.
Where a person deals with the company in a manner, which is inconsistent with the provisions of memorandum or articles, or enters into a transaction which is beyond the powers of the company, shall be personally liable to bear the consequences regarding such dealings.

MANAGEMENT OF COMPANY

Concept of Director

The Board of directors of a company is a nucleus, selected according to the procedure prescribed in the Act and the Articles of Association. Members of the Board of directors are known as directors, who unless especially authorised by the Board of directors of the Company, do not possess any power of management of the affairs of the company. Acting collectively as a Board of directors, they can exercise all the powers of the company except those, which are prescribed by the Act to be specifically exercised by the company in general meeting.

The directors of a company are its eyes, ears, brain, hands, nerves and other essential limbs, upon whose efficient functioning depends the success of the company. The directors formulate policies and establish organizational set up for implementing those policies and to achieve the objectives is contained in the Memorandum, muster resources for achieving the company objectives and control, guide, direct and manage the affairs of the company

Position of Director

The position that the directors occupy in a corporate enterprise is not easy to explain. They are professional men hired by the company to direct its affairs. Yet they are not the servants of the company. They are rather the officers of the company. 'A director is not a servant of any master. He cannot be described as a servant of the company or of anyone’. 'A director is in fact a director or controller of the company’s affairs’. A director may, however, work as an employee in a different capacity.

Company to have Board of Directors (Section 149)

This section provides for the provisions for companies to have a duly constituted Board of Directors. According to this section:

Number of Directors

According to section 149 (1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of individuals as directors and shall have:

Minimum number of directors

---in the case of Public company - 3,
---in the case of Private Company - 2, and
---in case of One person company (OPC) – 1

Maximum number of directors

: If the company wants to appoint more than 15 directors, it can do so after passing a special resolution. [Every special resolution is required to be filed in form No. MGT – 14 as per Section 117(3)(a)].

As per the Notification G.S.R. 463(E) dated 5th June, 2015, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Government Company.

Women director

At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. [Second proviso to section 149(1)]

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director:

--every listed company.
--Every other public company having;--

Paid–up share capital of one hundred crore rupees or more; or
Turnover of three hundred crore rupees or more.

A company shall comply with such provisions within **a period of six months** from the date of its incorporation.

Further, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than **immediate next Board meeting or three months from the date of such vacancy whichever is later.**

Independents Director

Every listed public company shall have at least one-third of the total number of directors as independent directors [Section 149(4)].

According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2directors as independent directors?

----the Public Companies having paid up share capital of ` 10 crore or more, or
----the Public Companies having turnover of ` 100 crore or more, or

----the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding ` 50 crore.

Additional Director [Section 161 (1)]

Section 161(1) of the Companies Act, 2013 provides for appointment of additional director. According to this section:

---The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.

----A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.

---Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Alternate Director [Section 161 (2)]

Section 161(2) of the Companies Act, 2013 provides for appointment of Alternate director. According to this section:

---The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person to act as an alternate director in place of another director (original director) during his absence for a period of not less than 3 months from India.

---A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.

Nominee Director [Section 161 (3)]

Section 161(3) of the Companies Act, 2013 provides for appointment of Nominee director. According to this section:
Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

Director in Casual Vacancy [Section 161 (4)]

Section 161 (4) of the Companies Act, 2013 provides for appointment of director in casual vacancy. According to this section:

--In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board.

--Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

Appointment of Directors elected by Small shareholders (Section 151)

According to section 151 of the Companies Act, 2013:

---A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed.

---Here, "Small Shareholders" means a shareholder holding shares of nominal value of not more than ` 20,000 or such other sum as may be prescribed.

Appointment of Directors (Section 152)

Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. [Section 152 (1)]

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

--Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting. [Section 152 (2)].

--No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154. [Section 152 (3)].

--Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) and a declaration that he is not disqualified to become a director under this Act. [Section 152 (4)].

----A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within 30 days of his appointment in Form DIR-12 along with the fee as prescribed [Section 152 (5)].

Retirement by rotation [Section 152 (6)]

Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall:

----be persons whose period of office is liable to determination by retirement of directors by rotation, and

---be appointed by the company in general meeting.

----The remaining directors in the case of any such company shall also be appointed by the company in general meeting.

----At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

---The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall be determined by lot.

----At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

For the purposes of the above provisions: total number of directors shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

Removal of Directors (Section 169)

Section 169 of the Companies Act, 2013 came into force partially 4 from 1st April, 2014 which provides the provisions for removal of directors. According to this section:

---A company may, by ordinary resolution, remove a director before the expiry of the period of his office after giving him a reasonable opportunity of being heard. [Section 169(1)].

----It is further provided that the directors appointed on the principle of proportional representation under section 163 cannot be removed by an ordinary resolution as aforesaid. {Proviso to section 169(1)].

---A special notice shall be required of any resolution, to remove a director under section 169 or to appoint somebody in place of a director so removed, at the meeting at which he is removed. [Section 169 (2)].

On receipt of the notice of a resolution to remove a director under section 169, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled tbeheard on the resolution at the meeting. [Section 169(3)].

---The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall be determined by lot.

----At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

For the purposes of the above provisions: total number of directors shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

--On receipt of the notice of a resolution to remove a director under section 169, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting. [Section 169(3)].

--The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given under section 169(2). [Section 169(5)].

--A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed. [Section 169(6)].

--If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy in accordance with the provisions of this Act provided that the director who was so removed from office shall not be reappointed as a director .[Section 169(7)].

---Nothing in this section shall be taken to deprive a person removed under this section of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or terms of his appointment as director or of any appointment terminating with that as a director.[Section 169(8)(a)].

Duties of directors (section 166)

Duties of directors has been defined in the company Law for the first time under section 166 of the Companies Act, 2013.The following duties have been prescribed for a director under the said section:

1. He shall act in accordance with the articles of the company, subject to the provisions of this Act.
2. He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, and the community and for the protection of environment.
3. He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
4. He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
5. He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
6. He shall not assign his office and if any assignment so made, it shall be void.

If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than ` 1, 00,000 but which may extend to ` 5, 00,000.

Liabilities of directors

The liabilities of the directors may be grouped under certain heads for convenience of consideration and discussion. They are:

1 Liability to outsiders

Directors of a company may personally become liable to outside parties in the following cases:

A-When they enter into contracts on behalf of the company:

- if the contracts are ultra vires the company;
- if they act outside the scope of their own authority;
- if they act in their own name and not for and on behalf of the company;
- When they issue a prospectus; in violation of the provisions of the Companies Act, 2013 and the SEBI (ICDR) Regulations which contains mis-statements(s).
- When they are found guilty of fraud.
- When they allot shares in an irregular manner.
- When the Court orders that the directors are personally liable for all or any of the debts or liabilities of the company for fraudulent trading on the part of the company.

2 Liability to the company

The directors are liable to the company in the following cases:

- When they are negligent in the performance of their duty as directors and the company suffers loss, etc.
- When they commit an act which is ultra vires their powers or ultra vires the company.
- When any illegal act or breach of trust is committed by them.

3 Liability to the shareholders

The position of the directors in respect of the company's properties and the rights conferred upon them to be exercised as directors is that of **a trustee**.

- If they commit any breach of trust or indulge in wrongful uses of their rights and the company suffers loss, they have to make good the loss.
- Similarly, if shareholders suffer loss due to the negligence of the directors they are personally liable for the loss.

4 -Liability for statutory defaulter and violation

Under the Companies Act, 2013 the directors are required to ensure compliance with the several provisions of the Act and penalties have been prescribed for defaults and/or non-compliance. The directors are liable for consequences.

Meetings of company

1-Board meeting

Section 173 of the Act provides for Meetings of Board. According to this section:

Frequency of Board Meetings [Section 173 (1)]

First Board meeting: Every company shall hold the first meeting of the

- Board of Directors within 30 days of the date of its Incorporation.

Subsequent Board meetings: Every company shall hold minimum of 4 meetings every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government may by notification, direct that these provisions will not apply in relation to any class or descriptions of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

Exceptions:

---A one person company, small company and dormant company shall be deemed to have complied with the provisions of section 173, if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.

--Provided that, a one person company in which there is only one director on its Board of Directors shall not be required to hold at least one Board meeting in each half of a calendar year. Thus, it is exempt from following the provisions of section 173(5).

Participation in Board meeting [Section 173 (2)]

(a) Sub section (2) of section 173 allows directors to attend Board meetings:

1-in person, or,
2-through video conferencing, or,
3-other audio visual means as may be prescribed.

(b) Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

(c) Matters not to be dealt with in a meeting through video conferencing or other audio-visual means:-
The following matters shall not be dealt with in any meeting held through video conferencing or other audiovisual means, as provided in Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014:

1-the approval of annual financial statements;
2-the approval of the Board's report;
3-the approval of the prospectus;
4-the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any to be approved by the Board; and
the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover

Notice of the Meeting [Section 173 (3)]

According to section 173(3), every board meeting shall be called by giving at least 7 days notice in writing to all the directors at their registered address (whether in India or outside India). The notice may be sent by hand delivery or by post or by electronic means.

Provided that a meeting of the Board of Directors may be called on a shorter notice (than 7 days)

--in order to transact an urgent business, subject to the condition that at least one independent director, if any, shall be present at the meeting.

---If no independent director is present at such a meeting of the Board then the decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Penalty for failure to give notice [Section 173(4)]

The Act under section 173(4) has prescribed a penalty of ` 25,000 on every officer of the Company whose duty is to give notice under this section and who has failed to do so.

Quorum for meetings of Board (Section 174)

A quorum is the minimum number of qualified persons who must attend in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been properly held unless the quorum was present at that meeting.

Rules of quorum

--The companies covered under section 8 of the Act shall constitute quorum for the Board meeting, either eight members or 25% of its total strength whichever is less. Provided that quorum shall not be less than two members.

--The provisions of section 174 are not applicable to one Person Company in which there is only one director on its Board of directors.

--For the purpose of calculating quorum, any fraction of a number shall be rounded off as one.

--Total strength shall not include directors whose places are vacant.

---Quorum shall be present throughout the meeting.

Meetings of Members:

These are meetings where the members / shareholders of the company meet and discuss various matters. Member's meetings are of the following types:-

A. Statutory Meeting:

A public company limited by shares or a guarantee company having share capital is required to hold a statutory meeting. Such a statutory meeting is held only once in the lifetime of the company. Such a meeting must be held within a period of not less than one month or within a period not more than six months from the date on which it is entitled to commence business i.e. it obtains certificate of commencement of business. In a statutory meeting, the following matters only can be discussed:-

-- Floatation of shares / debentures by the company

-- Modification to contracts mentioned in the prospectus

A notice of at least 21 days before the meeting must be given to members unless consent is accorded to a shorter notice by members, holding not less than 95% of voting rights in the company.

A statutory meeting may be adjourned from time to time by the members present at the meeting.

The Board of Directors must prepare and send to every member a report called the "Statutory Report" at least 21 days before the day on which the meeting is to be held. But if all the members entitled to attend and vote at the meeting agree, the report could be forwarded later also.
The report should be certified as correct by at least two directors, one of whom must be the managing director, where there is one, and must also be certified as correct by the auditors of the company with respect to the shares allotted by the company, the cash received in respect of such shares and the receipts and payments of the company.
A certified copy of the report must be sent to the Registrar for registration immediately after copies have been sent to the members of the company.

B. Annual General Meeting

Annual General Meeting must be held by every type of company, public or private, limited by shares or by guarantee, with or without share capital or unlimited company, once a year. Every company must in each year hold an annual general meeting. Not more than 15 months must elapse between two annual general meetings. However, a company may hold its first annual general meeting within 18 months from the date of its incorporation. In such a case, it need not hold any annual general meeting in the year of its incorporation as well as in the following year only.

In the case there is any difficulty in holding any annual general meeting (except the first annual meeting), the Registrar may, for any special reasons shown, grant an extension of time for holding the meeting by a period not exceeding 3 months provided the application for the purpose is made before the due date of the annual general meeting..

A notice of at least 21 days before the meeting must be given to members of company. The notice must state that the meeting is an annual general meeting. The time, date and place of the meeting must be mentioned in the notice.

C. Extraordinary General Meeting on Requisition:

The members of a company have the right to require the calling of an extraordinary general meeting by the directors. The board of directors of a company must call an extraordinary general meeting if required to do so by the following number of members:-
--members of the company holding at the date of making the demand for an EGM not less than one-tenth of such of the voting rights in regard to the matter to be discussed at the meeting ; or
-- if the company has no share capital, the members representing not less than one-tenth of the total voting rights at that date in regard to the said matter.
--A requisition is required to be submitted by member intend to call EGM .
The requisition must state the objects of the meetings and must be signed by the requisitioning members.

--The requisition must be deposited at the company's registered office. When the requisition is deposited at the registered office of the company, the directors should within 21 days, move to call a meeting and the meeting should be actually be held within 45 days from the date of the lodgement of the requisition. If the directors fail to call and hold the meeting as aforesaid

D. CLASS MEETINGS

Class meetings are the meetings of the shareholders and thecreditors. Class meetings are held to pass resolutions which will bind only the members of the particular class concerned. It can be done with the consent of the holders of 3/4 of the issued shares of that class in a separate meeting of that class of holders. Class meetings can only be attended by the members of that class. Whenever it is necessary to alter or change the rights or privileges of a class as provided by the Articles, a class meeting must be called.

Resolutions

A resolution is a legally binding decision made by limited company directors or shareholders. If a majority vote is achieved in favour of the decision, a resolution is 'passed'. Shareholders can pass resolutions or special resolutions at general meetings, or they can pass written resolutions. All ordinary types of collective decisions of directors are simply referred to as 'resolutions'. These decisions can be made at board meetings or in writing.

Types of resolutions

There are 3 types of resolutions available to limited company shareholders:

- **Ordinary resolutions**– Passed by a simple majority of shareholders' votes. Used for all matters, unless the Companies Act, the articles of association, and/or a shareholders' agreement stipulates the need for a special resolution. The majority of ordinary resolutions must be filed with Companies House.
- **Special resolutions**– Passed by a 75% majority of shareholders' votes at a general meeting. Used for extraordinary matters that cannot be passed by an ordinary resolution.
- **Written resolutions**– Used when a general meeting is not required to pass an ordinary resolution or special resolution. Any written ordinary resolution must be passed by a simple majority of shareholders' votes; written special resolutions require a 75% majority vote. Shareholders must sign a written resolution to cast their votes.

What decisions require an ordinary resolution?

An ordinary resolution is passed if a simple majority (above 50%) of the votes cast are in favour of the resolution. This type of resolution can be used by shareholders and directors for all day-to-day matters, such as:

- Appointing and removing directors.
- Appointing and removing secretaries.
- Matters pertaining to directors' employment contracts.
- Amending directors' powers.
- Approving dividend payments.
- Authorizing directors' loans.
- Authorizing the transfer of shares.

The types of decisions that company directors can make will depend on the powers they are granted by the shareholders. Their rights and powers will be outlined in the articles of association and shareholders' agreement.

What decisions require special resolution?

In the context of limited companies, a special resolution is a motion or proposal that requires approval of at least 75% of shareholder votes. This kind of resolution is reserved for important and rare decisions, such as:

- Changing a company name.
- Reducing share capital.
- Allotting more shares.
- Issuing different share classes.
- Altering the articles of association.
- Removing pre-emption rights.
- Re-registering a company.
- Changing a private company to a public company, or vice versa.
- Winding up a company by members' voluntary liquidation.

The Companies Act 2006 specifies the types of decisions requiring a special resolution. Where no type of resolution is specified, shareholders may pass an ordinary resolution with a simple majority of 50.01% of the votes.

How to pass a special resolution

IN order to pass a special resolution, 14 days' notice must be given to all shareholders (members) about the proposed resolution and its intention, unless the Articles states otherwise. If a general meeting is held, a vote will be taken by a show of hands or using a poll. Alternatively, these decisions can be passed by written resolution. If 75% of the shareholders agree to pass a proposed resolution, the decision is legally binding in accordance with the Companies Act 2006.

Special resolutions must be delivered to Companies House by post within 15 days of being passed. A copy must also be given to all shareholders and the company auditor. Furthermore, a company must keep a copy of all resolutions at its registered office address or SAIL address for a minimum period of 10 years.

CORPORATE WINDING UP AND DISSOLUTION

The Companies Act, 2013, provides various strategies to deal with such business failures such as arrangement, reconstruction, amalgamation and winding-up. Winding-up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

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

-By National Company Law Tribunal (the Tribunal).

-Voluntary winding up

Circumstances in which company may be wound up by Tribunal (Section 271)

Grounds on which a Company may be wound up by the Tribunal A company under Section 271(1) may be wound up by the tribunal if:

- if the company is unable to pay its debts.
- if the company has, by special resolution, resolved that the company be wound up by the Tribunal.
- 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. –
- if the Tribunal has ordered the winding up of the company under Chapter XIX(i.e., Revival and Rehabilitation of Sick Companies).
- if on an application made by the Registrar or any other person authorized 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.
- if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years, or
- if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Petition for winding up (Section 272)

An application for the winding up of a company has to be made by way of petition to the Court. A petition may be presented under Section 272 by any of the following persons:

- **i** the company, or
- **ii** Any creditor or creditors, including any contingent or prospective creditor or creditors.
- **iii** Any contributory or contributories.
- **iv** All or any of the parties specified above in clauses (a), (b), (c) together (e) the Registrar.
- **v** Any person authorized by the Central Government in that behalf.
- **vi** By the Central Government or State Government in case falling under clause (c) of Section 271 (1) i.e., Company acing against the interest of the sovereignty and integrity of India.

Final Meeting and dissolution (Section 318)

Section 318 (1) states that as soon as the affairs of a company are fully wound up, the Company Liquidator shall prepare a report of the winding up showing that the property and assets of the company have been disposed of and its debt fully discharged or discharged to the satisfaction of the creditors and thereafter call a general meeting of the company for the purpose of laying the final winding up accounts before it and giving any explanation there for.

VOLUNTARY WINDING UP (SECTION 304 TO 323)

Circumstances in which a company may be wound up voluntarily (Section

As per Section 304 (1), a company may be wound up voluntarily:

if the company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period for its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company should be dissolved, or

if the company passes a special resolution that the company be wound up voluntarily.

Procedures for voluntary winding -up

- Declaration of Solvency in case of proposal to wind up voluntarily (Section 305)
- Meeting of Creditors (Section 306)
- As per Section 306 (1) the company shall call a meeting of its creditors either on the same day on which resolution is passed for winding up or on the next day and serve a notice of such meeting by registered post to the creditors.
- The declaration by affidavit to be made by directors or
- In case the company has more than two director , they have to make a full inquiry in to affair of company and give opinion that the company has no debt and it will be able to pay it's debt in full from the proceeds of asset sold.
- Commencement of voluntary winding up (Section 308)

voluntary winding up shall be deemed to commence on the date of passing of the resolution for voluntary winding up or resolution on the expiry of period fixed by its articles or on occurrence of any event in respect of which the articles provide that the company should be dissolved.

- Publication of resolution

when a company has passed a resolution for voluntary winding up and a resolution is passed, it shall within fourteen days of the passing of the resolution give notice of the resolution by advertisement in the Official Gazette and also in a newspaper which is in circulation in the district where the registered office or the principal office of the company is situate.

- Appointment of Company Liquidator (Section 310)

The company in its general meeting, where a resolution of voluntary winding up is passed, shall appoint a liquidator under Section 310, the manner specified in that Section and submit copy of resolution to Registrar.

- Final Meeting and dissolution (Section 318)

Section 318 (1) states that as soon as the affairs of a company are fully wound up, the Company Liquidator shall prepare a report of the winding up showing that the property and assets of the company have been disposed of and its debt fully discharged or discharged to the satisfaction of the creditors and thereafter call a general meeting of the company for the purpose of laying the final winding up accounts before it and giving any explanation there for

PROSPECTUS (Companies Act 2013)

A company needs capital to finance its activites.Public company meet the requirement of finance by raising deposit and issuing share and Debenture to public by issue of prospectus

Clause (70) of Section 2 of this Bill define "prospectus" means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.
Section 26 deals with matters to be stated in prospectus.S-45

MATTERS TO BE STATED IN PROSPECTUS (SECTION 26):

A prospectus may be issued by or behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company.

Information in Prospectus:

Every prospectus shall state following information:-

i. names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed; details about underwriting of the issue .
ii. dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;
iii. a statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner.
iv. details about underwriting of the issue;
v. consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed;
vi. the authority for the issue and the details of the resolution passed there for;
vii. procedure and time schedule for allotment and issue of securities;
viii. capital structure of the company in the prescribed manner;
ix. main objects of public offer, terms of the present issue and such other particulars as may be prescribe
x. main objects and present business of the company and its location, schedule of implementation of the project;
xi. Particulars relating to—

1-management perception of risk factors specific to the project.
2-gestation period of the project;
3-extent of progress made in the project;

4-deadlines for completion of the project; and

5-any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company.

xii. minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;

xiii. details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and

xiv. Disclosures in such manner as may be prescribed about sources of promoter's contribution.S-52

Reports with Prospectus:

Every prospectus shall set out following reports for the purpose of financial information:

I. Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed;

II. Reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed. Where company has not completed five financial years than such report for all financial years is required.S-54

III. Reports made in the prescribed manner by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up, being a date not more than one hundred and eighty days before the issue of the prospectus. Where company has not completed five financial years than such report for all financial years is required.

IV. Reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly.

Declaration of Compliance:

Every prospectus shall make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under.

Delivery of Prospectus with Registrar:

A copy of prospectus shall be delivered to the Registrar for registration signed by every person who is named as a director or proposed director of the company or by his duly authorised attorney on or before the date of its publication and only then it shall be issued by or on behalf of a company or in relation to an intended company

Statement of an Expert:

A statement made by an expert shall be included only if expert is or was engaged or interested in the formation or promotion or management of the company and has given his written consent to the issue of the prospectus. Such consent of expert must not be withdrawn by him before the delivery of prospectus to the Registrar for registration and a statement to that effect shall be included in the prospectus.

Every prospectus issued shall state that a copy has been delivered to the Registrar and specify attached documents.

The registrar shall register a prospectus if all requirements has been complied with and the prospectus is accompanied by the consent in writing of all the person named in the prospectus.

Prospectus shall not be valid if it is issued more than ninety days after the date on which a copy thereof delivered to the Registrar.

separate prospectus for each act of offering for a certain period.

Under the Act any class or classes of companies, as the Securities and Exchange Board (SEBI) may provide by regulations in this behalf, may file a shelf prospectus with the Registrar. Such prospectus is to be submitted at the stage of the first offer of securities which shall indicate a period not exceeding one year as the period of validity of such prospectus.

The validity period shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

Types of prospectus

1--SHELF PROSPECTUS :- Shelf Prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. In simple terms Shelf Prospectus is a single prospectus for multiple public. Issuer is permitted to offer and sell securities to the public without a separate prospectus for each act of offering for a certain period.

Under the Act any class or classes of companies, as the Securities and Exchange Board (SEBI) may provide by regulations in this behalf, may file a shelf prospectus with the Registrar. Such prospectus is to be submitted at the stage of the first offer of securities which shall indicate a period not exceeding one year as the period of validity of such prospectus.

The validity period shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

2--RED HERRING PROSPECTUS :- Red herring Prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein.

In simple terms a red herring prospectus contains most of the information pertaining to the company's operations and prospects, but does not include key details of the issue such as its price and the number of shares offered.

According to section 32 a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus.
Such company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer. A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.
Upon the closing of the offer of securities under this section, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board

3--ABRIDGED PROSPECTUS:-- According to section 2(1) of the Act "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. Prospectus and Allotment of Securities 21 Section 33 of the Act provides that no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus. A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him.S-60

4--DEEM TO BE PROSPECTUS;-Public Offer includes or an offer for sale (OFS) of securities to the public by an existing shareholder, through issue of a prospectus. Under section 25 of the Act where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all purposes, be deemed to be a prospectus issued by the company.
In simple terms any document by which the offer or sale of shares or debentures to public is made shall for all purposes be treated as prospectus. The document "Offer for sale" is an invitation to the general public to purchase the shares of a company through an intermediary, such as an issuing house or a merchant bank.
The penal provisions provide that a company which makes any default in complying with the provisions shall be liable to a penalty of fifty thousand rupees for each default.

SHARE CAPITAL
Availability of capital can be one of the major constraints in setting up or expanding a business because of limited pool of resources of the promoters of a company.
To overcome this constraint, a promoter can raise money from public by issuing shares of the company. The funds raised in lieu of the shares is called share capital.
There are two types of shares in the share capital viz. preference shares and equity or ordinary shares.
Though many promoters and investors contribute varying sums to the Company's capital yet, there is no separate Capital account for each investor or promoter. Hence, there is a single consolidated Capital Account which is called the *Share Capital Account*.

Types of Share Capital

There are various terms used in connection with the share capital of the company. They are as follows:

1-Authorized / Registered / Nominal Capital

This is the Maximum Capital which the company can raise in its life time. This is mentioned in the Memorandum of the Association of the Company. This is also called as Registered Capital or Nominal Capital.

2-Issued Capital

This is the part of the Authorised Capital which is issued to the public for Subscription. The act of creating new issued shares is called issuance, allocation or allotment. After allotment, a subscriber becomes a shareholder. The number of issued shares is a subset of the total authorized shares and
Shares authorized = Shares issued + Shares unissued

3-Subscribed Capital

The issued Capital may not be fully subscribed by the public. Subscribed Capital is that part of issued Capital which has been taken off by the public i.e. the capital for which applications are received from the public. So, it is a part of the Issued Capital as follows:
Issued Capital = Subscribed Capital + Unsubscribed Capital.
This can be understood by an example. If we say that 15000 shares of Rs. 100 each are offered to the public and public applies only for 12000 shares, then the Issued Capital would be Rs. 15 Lakh and Subscribed Capital would be Rs. 12 Lakh

4--Shares Outstanding

once the shares have been issued and purchased by investors and are held by them, they are called Shares Outstanding. These outstanding shares have rights and represent ownership in the corporation by the person that holds the shares.

5--Treasury Shares

The unsubscribed capital is also known as Treasury shares, which are shares held by the corporation itself and have no exercisable rights. Shares outstanding plus treasury shares together amount to the number of issued shares.

6-Called – up Capital

The Company may not need to receive the entire amount of capital of capital at once. It may call up only part of the subscribed capital as and when needed in instalments. Thus, the called – up Capital is the part of „subscribed capital which the company has actually called upon the shareholders to pay. Called – up Capital includes the amount paid by the shareholder from time to time on application, on allotment, on various calls such as First Call, Second Call, and Final Call etc.

The remaining part of subscribe capital not yet called up is known as Uncalled Capital. The Uncalled Capital may be converted, by passing a special resolution, into Reserve Capital; Reserve Capital can be called up only in case of winding up of the company, to meet the liabilities arising then.

7-Paid-up Capital

The Called-up Capital may not be fully paid. Some Shareholders may pay only part of the amount required to be paid or may not pay at all. Paid-up Capital is the part of called-up capital which is actually paid by the shareholders. The remaining part indicates the default in payment of calls by some shareholders, known as Calls in Arrears. Thus,

Paid-up Capital = Called-up Capital – Calls in Arrears.

8-Reserve Capital:

As mentioned above, the company by special resolution may determine that a portion of the uncalled capital shall not be called up, except in the event of the winding up of the company. This part is called Reserved Capital. It is kept reserved for the Creditors in case of the winding up of the company.

ALLOTMENT OF SHARE

When a company issue a prospectus inviting the public to subscribe for the shares of a company, it is merely an invitation rather than 2 an offer. An application for shares is an offer by the prospective shareholders to take the shares of the company. Such offers are made on application forms supplied by the company. When an application is accepted, it is called allotment. Allotment is the acceptance by the company of the offer made by the applicant.

Allotment results in a binding contract between the parties. Allotment of shares was explained by the Supreme Court as "the appropriation, out of the previously unappropriated capital of the company, of a certain number of shares to a person. It is only after allotment that shares come into existence. Reissue of forfeited shares is not an allotment'.

GENERAL PRINCIPLES REGARDING ALLOTMENT

The provisions of the law of contract regarding the acceptance of an offer apply to the allotment of shares by a company. The general principles relating to the allotment of shares are as follows :

1. **Proper Authority-** Allotment must be made by a resolution of the Board of Directors or by a committee authorised to allot shares on behalf of the Board if permitted by the articles.
2. **Absolute and unconditional** -The allotment must be absolute and unconditional.
3. **Within a reasonable time** .--The allotment must be made within a reasonable time after the receipt of the application. Otherwise the applicant shall not be bound to accept it.
4. **Must be communicated** --The allotment must be communicated to the person making the application so that it is legally complete. Communication need not be in a particular form unless the articles of the company provide otherwise. Whatever is the mode of communication, it must be made to the applicant or his agent who is duly authorised to receive it. In case of postal communication, allotment is complete as soon as the letter of allotment is posted even though it is never received
5. **Revocation of the offer**-- An offer to take shares can be revoked at any time before the allotment is communicated. In the same way, the allotment can be withdrawn by the company before it is communicated completely to the applicant.

5 (B) of Act implies , When public offer is made In the case of public company offering shares or debentures to the public for subscription, the provisions relating to allotment may be discussed under the following three heads :

1. First allotment of shares.
2. Subsequent allotment of shares.
3. Allotment of debentures.

The Companies Act, imposes the following restrictions which must be complied with by a public company which offers shares to the public for the first time :

(i) Registration of prospectus : The company must deliver a copy of the prospectus to the Registrar for registration on or before the date of its publication signed by directors or his authorised agent.

(II) Minimum subscription:

Allotment shall be made of any share capital of the company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount has been subscribed and the sum payable on application for such amount has been paid to or received by the company. [

The amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash. A company making any rights or public issue of shares, debentures etc. must receive a minimum of 90 per cent subscription against the entire issue before making an allotment of shares or debentures to the public.

If the amount of minimum subscription is not received within 120 days of the issue of the prospectus, all amounts received from the applicants shall be refunded to them immediately without interest.

However, if the refund is not made within 130 days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay the money with interest @ 6% p.a. for the delayed period.

Money: The amount payable on application for each share shall not be less than 5% of the nominal amount of the share [Sec.69(3)]. SEBI guidelines prescribe that in the case of mega issues (exceeding Rs. 500 crore), the amount payable with the application on allotment or any one call should not exceed 25% of the value of shares. All moneys received from the applicants for shares shall be deposited and kept deposited in a scheduled bank.

No allotment shall be made until the beginning of the 5th day after a date on which the prospectus is issued or such later time as may be specified in the prospectus. This day is known as the 'opening of the subscription list'.

A company may proceed to allot shares soon after the opening of the subscription list. In case of listed shares, however, the subscription list must be kept open for at least 3 days under the rules of recognised stock exchanges. The prospectus generally states the time when the subscription lists will be closed.

The allotment of shares in contravention of these provisions is valid. But the company and every officer who is in default shall be liable to a fine upto Rs. 5,000 [Section 72(3)].

Shares and debentures to be dealt on a stock exchange :

Where a prospectus states that an application has been, or will be, made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, the allotment made under such prospectus be void :

(i) if the permission has not been applied for before the 10th day after the issue of the prospectus, or

(ii) if permission has not been granted by the stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription list. If the allotment becomes void, the company must forthwith repay without interest all moneys received from applicants in pursuance of the prospectus and if any such money is not repaid within 8 days after the company becomes liable to repay it, the directors shall be jointly and severally liable to repay that money with interest between 4 to 15% per annum from the expiry of the eighth day .

TRANSFER AND TRANSMISSION OF SHARES.

Transfer of Shares --The shares in a company are movable property and they can be transferred in the manner provided by the articles of the company.

(iii) A private company with a share capital, by its very nature as provided by company Act restricts the right of transfer in shares by its articles.

Transfer of shares is less strict in a public company. In a public company, every shareholder has right to transfer his shares to any person without the consent of other shareholders subject to such express restrictions as are found in the articles of the company. A transfer of share is valid if it is not forbidden under the articles of the company,

Procedures for transfer of share

-shares can be transferred by a person whose name appears in the register of members and who is the holder thereof. As per company act, legal representative of a deceased member, although not a member at the time of transfer, can also transfer shares. Shares may be transferred by executing an instrument of transfer (called the 'transfer deed').

-The instrument of transfer must be in the prescribed form. Before it is signed by or on behalf of the transferor and before any entry is made therein, it shall be presented to the prescribed authority which shall stamp or otherwise endorse on it the date of presentation.

-In case of Pending registration, the transferor is a trustee of the shares for the transferee. The transferor continues to be the holder of the shares until his name is struck off the register and that of the transferee substituted in its place. The transferor must pay over to the transferee any dividends or other rights which he may receive from the company after the date of the transfer deed.

-The application for transfer of shares may be made either by the transferor or the transferee.

-In case a company refuses to register the transfer of shares,
it must give notice to the transferor and the transferee within 2 months from the date of which the instrument of transfer was delivered, giving reasons for such refusal.

-The transferor or the transferee may prefer an appeal to the Central Government within 2 months of the receipt of such notice of refusal.
In case the notice of refusal has not been given by the company, the appeal must be filed within 4 months from the date on which the instrument of transfer was delivered to the company.

-On its appeal, the Central Government must give an opportunity to the company, the transferor and the transferee to make their representation before issuing any order. If the refusal of the company seems to be unjustified, the Central Government may issue an order to the company to register the transfer.
Issue of new share certificate

On the approval of the transfer, the company shall cancel the old share certificate and issue a new one made out in the name of the transferee. Normally, it is done by making an endorsement on the back of the share certificate. The transfer when registered has retrospective effect from the time when the transfer was first made. It should be noted that the seller of the shares is not bound to procure registration and the share certificate or the letter of allotment.

On the other hand, if the articles contain a clause empowering the directors to reject the transfer, the directors can reject such transfer but subject to the following conditions:

(a) Refusal must be exercised within a reasonable time. Refusal must be exercised by the board and not by one of the directors.
(b) Power must be exercised by the directors in the interest of the company as a whole and not in the interest of a section of shareholders.
(c) The court cannot compel the directors to supply the reasons of rejection but if supplied can examine and if reasons are inadequate can reject the order of the directors.

For rejection, the conditions given in the articles must be followed.

(a) Where partly paid up shares are being transferred to a minor incapable of entering into a contract.
(b) When the transferor is a debtor of the company and the company has lien on such shares.
(c) When the transferor has not paid the due call money.
(d) Where the instrument of transfer is incomplete, irregular and defective and not properly stamped.

(e) On any other reasons which are just and equitable and are in the general interest of the company

The following are the grounds on which the board may refuse registration of transfer :

-If partly paid up shares are being transferred and transferee is known to be financially incapable of paying balance calls.

Forged Transfer

A forged document never has any legal effect. If a forged transfer is lodged with the company for registration, the position of the parties affected is as follows : 16

(i) If the true owner has been removed from the register, he can compel the company to replace him.

(ii) If the company has issued a new certificate to the so called transferee, it can not deny his title to the shares, the certificate stops it (the company) from doing so.

(iii) The person lodging the transfer must indemnify the company against loss by forgery.

Transmission of shares—

When a registered shareholder dies or becomes bankrupt his share are transmitted to his legal representative or the Official Assignee or Receiver, This is called transmission of shares.

It takes place when a registered shareholder

(a) dies or (b) becomes bankrupt.

Transmission of death : When a registered shareholder dies, his shares vest in his legal representative. If they wish, they may ask the company to register them as the holder of these shares and for this purpose no instrument of transfer is required and the company is bound to accept the probate of will or letters of administration as sufficient evidence of the title to those shares. When they are registered as the holder of these shares and their names are put on the company's register of members, they become personally liable on the shares. Thus if the shares are not fully paid, they will be liab

Transmission on bankruptcy :

If a registered shareholder is adjudged an insolvent, his shares vest in the Official Assignee or Receiver who may either get himself registered as the holder of the these shares or transfer them to another person. The Official Assignee or Receiver can also disclaim the shares if they contain liability. Usually the articles of the company contain provisions relating to the transmission of shares

DIVIDEND

Maximisation of shareholders wealth is one of the objectives of any business. Dividend in literal terms means the profit of a company which is not retained in the business and is distributed among the shareholders in proportion to the amount paid up on the shares held by them.

Meaning of Dividend

The term ‘dividend’ has been defined under Section 2(35) of the Companies Act, 2013. The term “Dividend” includes any interim dividend. It is an inclusive and not an exhaustive definition. According to the generally accepted definition, “dividend” means the profit of a company, which is not retained in the business and is distributed among the shareholders in proportion to the amount paid-up on the shares held by them.

Dividends are usually payable for a financial year after the final accounts are ready and the amount of distributable profit is available.

Dividend for a financial year of the company (which is called 'final dividend') are payable only if it is declared by the company at its annual general meeting on the recommendation of the Board of directors. Sometimes dividends are also paid by the Board of directors between two annual general meetings without declaring them at an annual general meeting (which is called 'interim dividend').

The companies having license under Section 8 of the Act [Formation of companies with charitable objects etc.,] are prohibited by their constitution from paying any dividend to its members. They apply the profits in promoting the objects of the company.

Declaration of Dividend [Section 123]

According to Section 123 (1) of the Act dividend can be paid by a company:

A-out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or

B-out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both.

C-out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:-

- Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:
- Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:
- Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves.

The above proviso shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any state government or Governments or by the Central Government and one or more State Governments. [Insert

Further stipulations under the rules:

(a) For declaration of dividend out of accumulated profits, the Ministry of Corporate Affairs has provided Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014. Thereby, when there is inadequacy or absence of profits in any year, a company may declare dividend out of free reserves. However, the following conditions shall be fulfilled before declaring dividend out of reserves:

1-The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year: However, this rule will not apply if a company has not declared any dividend in each of the three preceding financial year. ed vide Notification dated 5th June, 2015] .
2-The total amount to be drawn from such accumulated profits shall not exceed one tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement. Therefore, the total amount that can be drawn from the accumulated profits is Less than or equal to 1/10th of the Paid up share capital and free reserves.

The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

3-The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

[Note: "No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company of the current year, inserted by the Companies (Declaration and Payment of Dividend) Amendment Rules, 2014" has been deleted vide Notification no. GSR 441(E) dated 29th

Depositing of amount of dividend
In terms of section 123(4), the amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.

This sub- section shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any state government or Governments or by the Central Government and one or more State Governments.
May 2015.] .
Interim Dividend

According to section 2(35), 'dividend' includes any interim dividend. According to section 123(3), the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

The Board of directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a separate bank account within five days from the date of declaration of such dividend.

Payment of dividend [123(5]

According to Section 123 (5) of the Act:

Dividends are payable in cash. Dividends that are payable to the shareholder in cash may be paid by cheque or warrant or in any electronic mode.

Dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.

Nothing in sub-section 5 of section 123, shall prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company.

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Punishment for failure to distribute dividends (Section 127)

Section 127 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for punishment for failure to distribute dividend on time. According to this section:

1. Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years.
2. He shall also be liable for a fine which shall not be less than ` 1,000 rupees for every day during which such default continues.
3. The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues

However, the following are the exceptions under which no offence shall be deemed to have been committed:

a) Where the dividend could not be paid by reason of the operation of any law.
b) Where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him.
c) Where there is a dispute regarding the right to receive the dividend.
d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, or
e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company

Revocation of declared dividend:

Ordinarily, a dividend once declared at Annual General Meeting, cannot be revoked, except, with the consent of the shareholders, for a declaration of dividend creates a debt to the shareholders in whose favour it is declared.

If a dividend is declared and the amount is paid or credited to the shareholders as dividend, the character of the credit or payment as dividend cannot be altered by a subsequent resolution.

UNPAID AND UNCLAIMED DIVIDEND - TREATMENT AND TRANSFER TO INVESTOR 'EDUCATION AND PROTECTION FUND"

(a) Investor Education and Protection Fund (IEPF) has been set-up under Section 205C of the Companies Act, 1956 by way of the Companies (Amendment) Act, 1999. As per the Act, the following amounts which have remained unclaimed and unpaid for a period of seven years from the date they became due for payment shall be credited to the IEPF:

1. Unpaid dividend accounts of the companies.
2. The application moneys received and due for refund.
3. Matured deposits.
4. The interest accrued in the amounts referred to in clauses (1) to (3).
5. Matured debentures.
6. Grants and donations by the Central Govt., State Govt., companies or any other institutions.
7. The interest or other income received out of the investments made from the

Loan, investment and Borrowing

The word 'Investments' in common parlance would include any property or right in which money or capital is invested. However, in the present context the term 'Investments' is used in a limited sense to mean the investment of money in shares, stock, debentures, or other securities.

The power to invest the funds of the company is the prerogative of the Board of Directors. This power is derived by the Board under Section 179 of the Companies Act, 2013. However, the Act contains provisions for restrictions on investments that a company can make and loans it can provide. Moreover, giving corporate guarantee or security is also as good as giving a loan, because the person to whom guarantee or security is given can decide to enforce the guarantee or security in certain conditions and in such a situation, the company will have to pay the amount

The Companies Act, 2013 (Act) has come up with a change in the concept of 'Loan and Investment by Company.

-The new Act provides that inter-corporate investments not to be made through more than two layers of investment companies.

-The 2013 Act states that companies can make investments only through two layers of investment companies subject to exceptions which includes company incorporated outside India.

LIMITS FOR LOANS /GUARANTEE/SECURITY/INVESTMENT [SEC-186(2)]

In pursuant to provisions of Section 186(2) of the Act, no company shall directly or indirectly

– give any loan to any person or other body corporate,

– give any guarantee or provide security in connection with a loan to any other body corporate or person and

– acquire by way of subscription, purchase or otherwise, the securities of any other body corporate exceeding 60% of its paid-up share capital plus free reserves plus securities premium account or 100% of its free reserves plus securities premium account, whichever is more.

APPROVAL OF BOARD AND PUBLIC FINANCIAL INSTITUTION [SECTION 185(5)]

-In pursuant to provisions of Section 186(5) of the Act, every company shall take consent of all the directors present at the board meeting before making any investment, giving loan and guarantee and providing security.

-In case of company has already taken loan etc., from any Public Financial Institutions, then it is mandatory to take prior approval from such Public Financial Institution.

Exception: Provided that prior approval of Public Financial Institution shall not be required where the aggregate loan, investment, guarantee and security proposed is within the limits as specified under section 186(2) and there is no default in repayment of loan instalments or interest thereon to the Public Financials Institution**.**

COMPANIES REGISTERED UNDER SECURITIES EXCHANGE BOARD OF INDIA (SEBI)

[SECTION 186(6)] Section 186(6) of the Act provides that those Companies which are registered under Section 12 of SEBI Act, 1992 and covered under such class or classes of companies which may be notified by the Central Government in consultation with the Securities and Exchange Board, shall/ can take inter-corporate loans or deposits exceeding the prescribed limit and shall furnish details of loans or deposit in their financial statements.

RATE OF INTEREST ON LOAN [SECTION 186 (7)] No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

NO LOAN BY DEFAULTER COMPANY [SECTION 186 (8)]

No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting

REGISTER OF LOAN

[SECTION 186 (9 and 10)] Section 186(9) of the Act mandates every Company to maintain a register which shall contain particulars of loan or guarantee given or security provided or investment made. Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in Form MBP 2 and entered therein separately, the particulars of loan and guarantee given, securities provided and acquisitions made as aforesaid. This register shall be kept at registered office of the company and the register shall be preserved permanently and shall be kept in the custody of company secretary of the company or any person authorized by the Board for the purpose.

MEANING OF INVESTMENT:

The following will be counted as "investments"

--Subscription or purchase of share warrants

– Subscription or purchase of debentures bonds or similar debt securities The following will not be counted as investments

– Making of loans or advances

– Any other financial transactions such as leases, purchase of receivables, or other credit facilities

PROCEDURES INVOLVED IN MAKING LOAN, GIVING GUARANTEE AND PROVIDING SECURITY

Following procedures may be adopted by the company while giving loan to any other body corporate, providing guarantee or security in connection with a loan or acquisition by way of subscription, purchase the securities of any other body corporate.

1. It is to be kept in mind that a company can give any loan or give any guarantee or provide security and acquire securities of any Body corporate through Board resolution up to 60% of its paid up capital, free reserves and security premium account or 100% of its free reserves and security premium whichever is more.

2. On the basis of aforesaid conditions and requirements of the company meeting of Board of Directors is to be convened after giving proper notice and proposals of giving loan or giving guarantee or providing security etc. are to be discussed.
3. No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting. For specimen of Board resolution, please refer Annexure-II and III given at the end of this chapter.
4. It is to be checked whether there is any existing loan from any public financial institution, If so, prior approval of that public financial institution is also required for any subsequent loan from any other source. However, prior approval of Public Financial Institution shall not be required where the aggregate loan, investment, guarantee and security proposed is within the limits as specified under section 186(2) and there is no default in repayment of loan or interest thereon to the Public Financials Institution.
5. After deciding the source of fund and quantum of requirement, the Board may authorize one of the directors of the company or any other person to apply for the concerned public financial institutions for approval.
6. Arrange to convene a general meeting of shareholders after giving proper notice and to pass special resolution therein, where the giving of any loan or guarantee or providing any security or the acquisition exceeds the limits specified i.e 60% of its paid up capital, free reserves and security premium account or 100% of its reserves and security premium whichever is more. For specimen of special resolution, please refer Annexure-IV given at the end of this chapter.
7. File the copy of special resolution in Form No. MGT-14 along with the fee as provided in Companies (Registration of offices and fees) Rules, 2014 with the Registrar within 30 days of passing the resolution. Necessary documents are required to be attached as per the requirements of the form.
8. Registers are to be maintained in Form MBP-2 by every company giving loan or giving guarantee or providing security or making an acquisition shall, from the date of its registration and the particulars of loan and guarantee given, securities provided and acquisition are to be entered therein.
9. Entries in the register shall be made chronologically in respect of each such transaction of making such loan or giving guarantee or providing security or making acquisition.
10. It is to be ensured that no loan shall be given at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government security closest to the tenor of the loan.
11. The company shall disclose to the members in the financial statement the full particulars of the loans given, investment made or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.
12. Scrutinize the repayment history of the company with regards to repayment of any deposits or interest thereon. No company which is in default in the repayment of any deposits or in payment

of interest thereon shall give any loan or give any guarantee or provide any security or make any investment through acquisition of another company till such default is subsisting.

COMPROMISE, ARRANGEMENT AND AMALGAMETION COMPROMISE

It is process of mutual accommodation in which each party gives up something valuable, but without any party abandoning its claim or resorting to confrontation, hostilities or litigation.

POWER TO COMPROMISE AND ARRANGEMENT (SECTION 230):

A compromise or arrangement may be –

(a) Between a company and its creditors or any class of them; or

(b) Between a company and its members or any class of them.

The Tribunal, on the application **(i)** of the company, or **(ii)** of the creditors, or **(iii)** of the members of the company **(iv)** of the liquidator of company under liquidation, may order the meeting to be called, in the manner directed by the tribunal among;-

A) Creditors or class of creditors, or
B) of the members or class of members, the manner directed by the Tribunal

Mode of submission of application to C L T

The applicant shall disclose to the tribunal by affidavit –

(a) all material fact relating to the company;

1--latest financial position of the company;

2--the latest auditor's report on the accounts of the company; and

3--the pendency of any investigation or proceedings against the company;

(b) Reduction of share capital of the company, if any, included in the compromise or arrangement; (clear special mention on types of share,nos of shares to be reduced, nominal value of shares)

(c) Any scheme of corporate debt restructuring consented to by not less than seventy – five percent of the secured creditors in value, including –

1. A creditor's responsibility statement in the prescribed form;
2. Safeguards for the protection of other secured and unsecured creditors;
3. Report by the auditor that the fund requirement of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;
4. Where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

5. A valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable of the company by a registered valuer.

Notice of the Meeting:

The notice for a meeting called in pursuance of an order of the Tribunal, shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture – holders of the company. The notice shall be send individually at the registered address with the company. The notice shall be accompanied by –

(a) a statement disclosing the details of the compromise or arrangement;
(b) a copy of valuation report, if any;
(c) explaining effect of the scheme on the creditors, key managerial personnel, promoters and non – promoters members and debenture – holders;
(d) explaining effect of the scheme on any material interests of the directors of the company or the debenture trustees; and
(e) such other prescribed matters.

The notice shall also be placed on the website of the company. In case of a listed company, the notice shall also be sent to the Securities and Exchange Boards of India and stock exchanges for placing on their web – site. The Notice shall also be published in newspapers

Effect of the Scheme:

Where;-

i) majority of persons representing three – fourth in value of the creditors or class of creditors or members or class of members agree to compromise or arrangement and
ii) sanctioned by the Tribunal by an order; the scheme shall be binding on the company;
iii) Filing of Order:

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

AMALGAMATION AND RECONSTRUCTION

What is Amalgamation?

Amalgamation is defined as the combination of one or more companies into a new entity.

It includes:

--Two or more companies join to form a new company

---Absorption or blending of one by the other

Thereby, amalgamation includes absorption.

Generally, Amalgamation is done

-- between two or more companies engaged in the same line of activity or has some synergy in their operations.

--Again the companies may also combine for diversification of activities or for expansion of services.

RECONSTRUCTION;-

It occurs when a company transfers whole of its undertaking and property to a new company under an arrangement by which the shareholders of old company are entitled to receive some shares or other similar intrest in new company . A reconstruction is effected to bring about material alteration of the rights of class of shareholders or creditors.

Procedures to be fallowed for amalgamation

1. Approval of scheme by holder of three fourth in value of shares.
2. The scheme shall be sanctioned by the company law tribunal.
3. The transfer of the undertaking, property and liability of Transferor Company to Transferee Company.
4. The dissolution, without winding up, of Transferor Company.
5. The allotment or appropriation by transferee company of any shares, debentures, policies or other like interest in that company which are to be allotted under the contract.
6. Provision to be made for any person who dissent from the compromise or arrangements.
7. A certified copy of tribunal order to be filed with registrar within thirty days after making an order by tribunal.

Protection of minority shareholders from mismanagement and oppression

In the day-to-day working of a company,

Certain decisions need to be taken regarding the management of the company and these decisions are generally taken by the majority members.

In this process of decision-making, there may arise certain occasions wherein the interests of the majority shareholders may come in conflict with that of the minority shareholders.

In such a case, if the decisions taken, are not in the larger interest of the company as a whole, but only caters to the interest of one particular group, the minority group whose interest may have been violated can raise its voice against such an action.

The protection of minority shareholders within the domain of corporate activity constitutes one of the most difficult problems facing modern company law. The aim must be to strike a balance between the effective control of the company and the interest of the small individual shareholders.

"A proper balance of the rights of majority and minority shareholders is essential for the smooth functioning of the company."

It is only right to expect that in matters of a company, any decisions that are taken are done so in keeping with principles of natural justice and fair play. In case of failure to do so, it is important that the interest of minority shareholders be protected. **–**

Protection of Minority Rights and shareholders remedies

The rule of supremacy of the majority is subject to certain exceptions and thus, minority shareholders are not left helpless, but they are protected by:

--the common law. and

--the provisions of the Companies Act, 2013.

1--Actions by Shareholders in Common Law

In all these cases an individual member may sue for declaration that

--- the a resolution is void, or

---for an injunction to restrain the company from passing it.

A) The rule of majority will not apply in the following cases.

1. **Ultra Vires Acts**

   Where the directors representing the majority of shareholders perform an illegal or ultra vires act for the company, an individual shareholder has right to bring an action

2. **Fraud on Minority**

   Where an act done by the majority amounts to a fraud on the minority. an action can be brought by an individual shareholder.

3. **Wrongdoers in Control**

   If the wrongdoers are in control of the company, the minority shareholders' representative action for fraud on the minority will be entertained by the court

4. **Resolution requiring Special Majority but is passed by a simple majority**

   An individual shareholder has the right of action to restrain the company from acting on a special resolution to which the insufficient notice is served

5. **Personal Actions**

   An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election'.

   Where the candidature of a shareholder for directorship is rejected by the Chairman, it is an individual wrong in respect of which a suit is maintainable.

6. **Breach of Duty**

   The minority shareholder may bring an action against the company, where although there is no fraud, there is a breach of duty by directors and majority shareholders to the detriment of the company.

7. **Prevention of Oppression and Mismanagement**

The minority shareholders are empowered to bring action with a view to preventing the majority from oppression and mismanagement.

B-Statutory Remedies under the Companies Act

Though the shareholders' democracy is supreme, the Companies Act, 1956 & 2013 and the decided cases suggest that the majority shall not be allowed to act in an unfair, fraudulent, or oppressive way against the interests of the minority shareholders. Further, under Section 163 of the Companies Act, 2013 a company may adopt principle of proportional representation.

The Companies Act, 2013, extends protection to minority by granting various rights to minority shareholders such as filing petition to company law tribunal .

Module-II

NEGOTIABLE INSTRUMENT ACT

The Negotiable Instruments Act was enacted, in India, in 1881.

Prior to its enactment, the provision of the English Negotiable Instrument Act were applicable in India, and the present Act is also based on the English Act with certain modifications. It extends to the whole of India except the State of Jammu and Kashmir. The Act operates subject to the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934.

Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments such as

A -promissory note,

B- bill of exchange and

C-cheque,

But it does not exclude the possibility of any other instruments

Which satisfy following two conditions of negotiability.

1. the instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade;
2. the person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name.

As such, documents like share warrants payable to bearer, debentures payable to bearer and dividend warrants are a negotiable instruments. But the money orders and postal orders, deposit receipts, share certificates, bill of lading, dock warrant are not negotiable instruments.

CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

A negotiable instrument has the following characteristics:

1. **Property**: The prossessor of the negotiable instrument is presumed to be the owner of the property contained therein. The property in a negotiable instrument can be transferred without any formality.
2. **Title**: The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument
3. **Presumptions**: Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid underit. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.
4. **Prompt payment**: A negotiable instrument enables the holder to expect prompt payment because a dishonor means the ruin of the credit of all persons who are parties to the instrument.

PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENT

Sections 118 and 119 of the Negotiable Instrument Act lay down certain presumptions which the court presumes in regard to negotiable instruments. In other words these presumptions need not be proved as they are presumed to exist in every negotiable instrument. Until the contrary is proved the following presumptions shall be made in case of all negotiable instruments:

--Consideration: It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is presumed.

--Date: Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.

--Time of acceptance: Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.

--Time of transfer: Unless the contrary is presumed it shall be presumed that every transfer of a negotiable instrument was made before its maturity.

--Order of endorsement: Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

---Stamp: Unless the contrary is proved, it shall be presumed that promissory note, bill of exchange or cheque was duly stamped.

---Holder in due course: Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith. But if the instrument was obtained from its lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course.

--Proof of protest: Section 119 lays down that in a suit upon an instrument which has been dishonoured, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

TYPES OF NEGOTIABLE INSTRUMENT

Section 13 of the Negotiable Instruments Act states that a negotiable instrument is a negotiable instruments recognised by statute **.It is of two type:**

A) Negotiable instrument recognised by statute

--- (i) Promissory notes **(ii)** Bills of exchange **(iii)** Cheques.

B) Negotiable instruments recognised by usage or custom are:

I. Hundis
II. Share warrants
III. Dividend warrants
IV. Bankers draft
V. Circular notes
VI. Debentures of Bombay Port Trust
VII. Railway receipts (ix) Delivery orders.

Promissory notes

Section 4 of the Act defines, "A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments."

Essential elements

An instrument to be a promissory note must possess the following elements:

--It must be in writing: A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

---It must certainly an express promise or clear understanding to pay: There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

--Promise to pay must be unconditional: A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

--It should be signed by the maker: The person who promise to pay must sign the instrument even though it might have been written by the promisor himself.

There are no restrictions regarding the form or place of signatures in the instrument.

i. It may be in any part of the instrument.
ii. It may be in pencil or ink, a thumb mark or initials.
iii. The pronote can be signed by the authorised agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

--The maker must be certain: The note self must show clearly who is the person agreeing to undertake the liability to pay the amount. In case two or more persons promise to pay, they may bind themselves jointly or jointly and severally, but their liability cannot be in the alternative.

---The payee must be certain: The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation.

--The promise should be to pay money and money only: Money means legal tender money and not old and rare coins.

A promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

--The amount should be certain: One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount.

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--The amount should be certain: One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount.

Parties to a Promissory Note

Maker. He is the person who promises to pay the amount stated in the note. He is the debtor.

Payee. He is the person to whom the amount is payable i.e. the creditor.

Holder. He is the payee or the person to whom the note might have been indorsed.

The indorser and indorsee (the same as in the case of a bill).

2 bill of exchange

Section 5 of the Act defines, "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument".

A bill of exchange, therefore, is a written acknowledgement of the debt, written by the creditor and accepted by the debtor. There are usually three parties to a bill of exchange drawer, acceptor or drawee and payee. Drawer himself may be the payee.

Essential conditions of a bill of exchange

It must be in writing.

It must be signed by the drawer.

The drawer, drawee and payee must be certain.

The sum payable must also be certain.

It should be properly stamped.

It must contain an express order to pay money and money alone.

Parties to bill of exchange

Drawer: The maker of a bill of exchange is called the

'drawer'.

Drawee: The person directed to pay the money by the drawer is called the 'drawee',

Acceptor: After a drawee of a bill has signed his assent upon the bill and delivered the same, he is called the ' acceptor'.

Payee: The person named in the instrument, to whom or to whose order the money is directed to be paid by the instrument is called the 'payee'.

Indorser: When the holder transfers or indorses the instrument to anyone else, the holder becomes the 'indorser'.

Indorsee: The person to whom the bill is indorsed is called an 'indorsee'.

Holder: A person who is legally entitled to the possession of the negotiable instrument in his own name and to receive the amount thereof, is called a 'holder'. He is

Cheques

Section 6 of the Act defines "A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand".

A cheque is bill of exchange with two more qualifications, namely, (i) it is always drawn on a specified banker, and (ii) it is always payable on demand. Consequently, all cheque are bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

Parties to a Cheque

Drawer. He is the person who draws the cheque, i.e., the depositor of money in the bank.

Drawee. It is the drawer's banker on whom the cheque has been drawn.

Payee- who receives payment of cheque.

Distinction between bill of exchange and Promissory Note

1--Number of parties:

(PN) In a promissory note there are only two parties – the maker (debtor) and the payee (creditor).

(BE)In a bill of exchange, there are three parties; drawer, drawee and payee; although any two out of the three may be filled by one and the same person,

2--Payment to the maker:

(PN) A promissory note cannot be made payable the maker himself,

(BE) while in a bill of exchange to the drawer and payee or drawee and payee may be same person.

3-Unconditional promise:

(PN)A promissory note contains an unconditional promise by the maker to pay to the payee or his order,

(BE) whereas in a bill of exchange, there is an unconditional order to the drawee to pay according to the direction of the drawer.

4-Prior acceptance:

(PN) A note is presented for payment without any prior acceptance by the maker.

(BE) A bill of exchange is payable after sight must be accepted by the drawee or someone else on his behalf, before it can be presented for payment.

5-Primary or absolute liability:

(PN) The liability of the maker of a promissory note is primary and absolute,

(BE) but the liability of the drawer of a bill of exchange is secondary and conditional

6-Relation:

(PN)The maker of the promissory note stands in immediate relation with the payee,

(BE)while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.

7-Protest for dishonour:

(BE) Foreign bill of exchange must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn, (PN) but no such protest is needed in the case of a promissory note.

8-Notice of dishonour:

(BE)When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate indorsers,

(PN) but no such notice need be given in the case of a note.

Discharge of negotiable instruments

An instrument is said to be discharged when all right and action under it are completely extinguished and when it ceases to be negotiable

Discharge in relation to negotiable instrument is used in two sense-

(1)-Discharge of instrument.

(2)-Discharge of one or more parties from liability threon.

a)Discharge by an instrument

- 1-By payment in due course
- 2-By party primarily liable becoming holder
- 3-By express waiver
- 4-By cancellation
- 5- By discharge as simple contract

b) Discharge of a party or parties

A party or parties to a negotiable instrument is\are discharged in any one following ways;

1-- By payment-When payment on an instrument is made in due course , both the instrument and parties to it are discharged.

2--By cancellation-When the holder of negotiable instrument or his agent cancels the name of party on instrument with an intent discharge him,such parties and all subsequent parties are discharged from liability to holder

3--By release-Where the the holder of negotiable instrument releases any party to instrument by any method other than cancellation, the party so released is discharged from liability.

4--By allowing drawee more than forty eight hours--If the holder of bills of exchange allows the drawee more than forty eight hours exclusive of public holiday ,to consider whether to accept the same, all previous parties not consenting to such allowance, are thereby discharged from liability to such holder.

5--By non presentment of cheque;- Where cheque is not presented by holder for payment within reasonable time, drawer is discharged from liability.

DISHONOUR OF A NEGOTIABLE INSTRUMENT

A negotiable instrument can be dishonored either by non acceptance or by non-payment. A cheque and a promissory note can only be dishonored by non-payment but a bill of exchange can be dishonored either by non-acceptance or by non-payment.

1-Dishonour by non-payment (Section 92)

1. A bill after being accepted has got to be presented for payment on the date of its maturity. If the acceptor fails to make payment when it is due .
2. The bill is dishonoured by non-payment. In the case of a promissory note if the maker fails to make payment on the due date the note is dishonoured by non-payment.
3. A cheque is dishonoured by non-payment as soon as a banker refuses to pay.
4. An instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid

2-Dishonor by non-acceptance (Section 91)

-A bill of exchange can be dishonored by non-acceptance in the following ways:

1. If a bill is presented to the drawee for acceptance and he does not accept it within 48 hours from the time of presentment for acceptance.
2. When the drawee is a fictitious person or if he cannot be traced after reasonable search.
3. When the drawee is incompetent to contract, the bill is treated as dishonored.
4. When a bill is accepted with a qualified acceptance,
5. When the drawee has either become insolvent or is dead.
6. When presentment for acceptance is excused and the bill is not accepted.

Holder in due course

Holder in Due Course is a legal term to describe the person who has received a negotiable instrument in good-faith and is unaware of any prior claim, or that there is a defect in the title of the person who negotiated it.

For example;

*****A third-party check is a holder in due course.

- Holder in Due Course is called protected holder or bona fide holder for value.
- So Holder in Due Course means;

If payment is not made on a negotiable instrument when it is due, the holder can use the court system to enforce the instrument.

- Various parties, including both signers and non-signers, may be liable for it
- Accommodation parties (i.e., guarantors) can also be held liable

Holder of NI

The holder of a negotiable instrument means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

A person is called the holder of a negotiable instrument if the following conditions are satisfied:

--He must be entitled to the possession of the instrument in his own name and under a legal title.

--He must be entitled to receive or recover the amount from the parties concerned in his own name

Module-III

Insurance Contract:

(Elements and Clauses Insurance Contract)

Insurance may be defined as a contract between two parties whereby one party called insurer undertakes, in exchange for a fixed sum called premiums, to pay the other party called insured a fixed amount of money on the happening of a certain event.

The insurance, thus, is a contract whereby

1. Certain sum. called premium, is charged in consideration
2. Against the said consideration, a large sum is guaranteed to be paid by the insurer who received the premium
3. The payment will be made in a certain definite sum. I.e., I lose or the policy amount whichever may be, and
4. The payment is made only upon a contingency

Elements of Insurance Contract can be classified into two sections;

1. The elements of general contract and
2. The elements of special contract relating to insurance:

Elements of Insurance Contract

The insurance contract involves:

(A) The elements of the general contract,

(B) The element of special contract relating to insurance.

The general contract Act says that all agreements are the contract if they are made by free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and which are not at this moment declared to be void"

The special contract of insurance involves principles such as:

(1) Insurable interest,**(2)** Utmost good faith,**(3)** Indemnity,**(4)** Subrogation, warrantie **(5)**Proximate cause,**(6)** Assignment, and nomination**,(7)** The return of premium.

<u>Elements of Insurance contract</u>

<u>=Insurable Interest</u>

For an insurance contract to be valid, the insured must possess an insurable interest in the subject matter of insurance.

The insurable interest is the pecuniary interest whereby the policy-holder is benefited by the existence of the subject-matter and is prejudiced death or damage of the subject- matter. The essentials of a valid insurable interest are the following:

1. There must be a subject-matter to be insured.

2. The policy-holder should have a monetary relationship with the subject-matter.
3. The relationship between the policy-holders and the subject-matter should be recognized by law. In other words, there should not be any illegal relationship between the policy-holder and the subject-matter to be insured.
4. The financial relationship between the policy-holder and subject-matter should be such that the policy-holder is economically benefited by the survival or existence of the subject-matter and or will suffer economic loss at the death or existence of subject-matter.

=Utmost Good Faith

The doctrine of disclosing all material facts is embodied in the important principle 'utmost good faith' which applies to all forms of insurance.

Both parties to the insurance contract must be of the same mind (ad idem) at time of contract. There should not be any misrepresentation, non-disclosure or fraud concerning the material.

In case of insurance contract the legal maxim 'Caveat Emptor" (let the buyer beware) do not prevail,

But in the insurance contract, the seller, i.e., the insurer will also have to disclose all the material facts.

An insurance contract is a contract of uberrimae fidei, i.e., of absolute good faith both parties of the contract must disclose all the material facts .

= Principle of Indemnity

As a rule, all insurance contracts except personal insurance are contracts of indemnity.

According to this principle, the insurer undertakes to put the insured, in the event of loss, in the same position that he occupied immediately before the happening of the event insured against, in the certain form of insurance, the principle of indemnity is modified to apply.

For example, in marine or fire insurance, sometimes, certain profit margin which would have earned in the absence of the event, is also included in the loss. In a true sense of the indemnity, the insured is not entitled to make a profit of his loss.

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For example, in marine or fire insurance, sometimes, certain profit margin which would have earned in the absence of the event, is also included in the loss. In a true sense of the indemnity, the insured is not entitled to make a profit of his loss.

=Doctrine of Subrogation

The doctrine of subrogation refers to the right of the insurer to stand in the place of the insured, after the settlement of a claim, in so far as the insured's right of recovery from an alternative source is involved.

If the insured is in a position to recover the loss in full or in part from a third party due to whose negligence the loss may have been precipitated, his right of recovery is subrogated to the insurer on settlement of the claim. The insurers, after that, recover the claim from the third party. The right of subrogation may be exercised by the insurer before payment of loss.

=Proximate Cause

The rule; is that immediate and not the remote cause is to be regarded. The maxim is “sed causa proximo non-remold-spectator”; see the proximate cause and not, the distant cause.

The real cause must be seen while payment of the loss. If the real cause of loss is insured, the insurer is liable to compensate the loss; otherwise, the insurer may not be responsible for a loss.

Proximate cause is not a device to avoid the trouble of discovering the real ease or the common sense cause.

=Insurable Interest

For an insurance contract to be valid, the insured must possess an insurable interest in the subject matter of insurance.

The insurable interest is the pecuniary interest whereby the policy-holder is benefited by the existence of the subject-matter and is prejudiced death or damage of the subject- matter. The essentials of a valid insurable interest are the following:

1. There must be a subject-matter to be insured.
2. The policy-holder should have a monetary relationship with the subject-matter.
3. The relationship between the policy-holders and the subject-matter should be recognized by law. In other words, there should not be any illegal relationship between the policy-holder and the subject-matter to be insured.
4. The financial relationship between the policy-holder and subject-matter should be such that the policy-holder is economically benefited by the survival or existence of the subject-matter and or will suffer economic loss at the death or existence of the subject-matter.

=Mitigation of lose

In event of mishap to insured property , the assured must take all necessary steps as may be reasonable for the purpose of averting or minimizing the lose.He must act as an uninsured prudent person will act under similar circumstances in his own case.

=Principle of contribution

Where there is two or more insurances on same risk, principle of contribution applies as between insurers. The aim of contribution is to distribute the actual amount of lose among different insurers who are liable for same risk under different policies in respect of same subject matter. In case of lose, any one insurance company may pay to assured the full amount of lose covered by policy. Having paid this amount, he is entitled to contribution from his coinsurers in proportion to amount which each has undertaken to pay in case of lose of the same subject matter.

PREMIUM

Premium is consideration paid by the assured to insurer for risk undertaken by the latter. It is usually paid in cash. It is determine by insurer taking in to account average losses and contribution it receive in form of premium. Besides taking in to account special circumstances affecting risk in particular case, the insured also keeps a margin for its overhead and other expenses and profit.

Return of Premium

Ordinarily, the premium once paid cannot be refunded. However, in the following cases, the refund is allowed.

1) By Agreement in the Policy

The assured may pay a full premium while affecting the insurance but it may be agreed to return it wholly or partly in the happening of certain events. For example, special packing may reduce the risk.

2) For Reasons of Equity premium is returned on fallowing ground

A- Non-attachment of risk: Where the subject-matter insured or part thereof, has never been imperiled. For example,in case of term insurance with returnable premium, if death does not occur to policy holder during the period of insurance, premium is returned on this ground.

B-The undeclared balance on open policy: The policy may be canceled after necessary scrutiny and premium paid on application for insurance may be returned for short interest, provided there was no further interest in the policy.

C- Payment of Premium is apportionable. The apportioned part of the consideration is refundable when a part of policy interest is not involved. For example, insurance may be taken for a voyage in stages, each stage being rated separately. In such a case if some stages are not completed the premium relating to the incomplete stage is returnable.

D- Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable provided the policy was not attached by way of wagering**.**

E- Unreasonable delay in commencing the voyage may also entitle the insurer to cancel the insurance by returning the premium.

F- Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable.

Reinsurance

Every insurer has a limit to risk that he can undertake. If at any time any profitable venture comes his way, he may insure it even if the risk involved is beyond his capacity.

Then ,in order to safeguard his own interest, he may insure the same risk either wholly or partially with other insurer. This is called Reinsurance.

The reason for reinsurance is spreading the risk .Reinsurance can be resorted to in all kinds of insurance.

The insurer has insurable intrest in subject matter insured to the extent of amount insured by him because contract of reinsurance is also contract of indemnity.

The reinsurers are liable to pay the amount of lose to original insurer only if original insurer has paid the amount to assured.

MEANING OF FIRE INSURANCE

The term fire in a fire insurance is interpreted in the literal and popular sense. There is fire when something burns. In other words fire means visible flames or actual ignition. Simmering/ smoldering is not considered fire in Fire Insurance. Fire produces heat and light but either of them alone is not fire. Lightening is not a fire but if it ignites something, the damage may be due to fire.

The following are the items which can be burnt/ damaged through fire: ‰ Buildings ‰ Electrical installation in buildings ‰ Contents of buildings such as machinery, plant and equipments, accessories, etc. ‰ Goods (raw materials, in–process, semi–finished, finished, packing materials, etc.) in factories, godowns etc.. ‰ Goods in the open ‰ Furniture, fixture and fittings ‰ Pipelines (including contents) located inside or outside the compound, etc.

The owner of abovementioned properties can insure against fire damage through fire insurance policy.

FEATURES OF FIRE INSURANCE:

1. Offer & Acceptance :)
2. Payment of Premium: Module).
3. Contract of Indeminity
4. Utmost Good Faith
5. Insurable intrest
6. contribution
7. period of insurance
8. Deliberate Act:
9. claim

Marine insurance

A contract of marine insurance is a contract whereby an insurer undertakes to indemnify the assured against marine loses.

Marine loses includes;-

1. Marine adventure
2. Marine perils.

Marine adventure

There is marine adventure when-

When any ship, goods or movable property is exposed to maritime dengers.

When earning, acquisition of freight, passage money, profit, security of loan is endangered by the exposure of insurable property to marine danger.

Any liability to third may be incurred by owner of insurable property by reason of mareine perils.

Maritime peril.

Maritime perils means the peril(danger) consequent on or incidental to, navigation of sea. It includes: **(a)** peril of the sea **(b)** fire **(c)** war perils **(d)** pirates **(e)** capture **(f)** seizure and jettison

Clauses of marine insurance

--Hull Clauses

These clauses are mainly framed for marine insurances on vessels and are incorporated in hull policies. The clauses may be about losses resulting from collision, standing, general average, etc..

--Cargo Clauses

These clauses are used in the insurance of goods and are incorporated in cargo policies. Use clauses describe the nature, extent; and scope of the insurance and define comprehensive conditions and restrictions.

, **--Freight Clauses**

The clauses are framed in connection with the loss of freight due to maritime perils which may be insured for a period or a voyage. A person who paid the freight in advance and the person who will receive the freight on completion of the voyage are interested in covering the risk.

Life insurance

life insurance is a contract by which the insurer, in consideration of payment of certain sum, called premium , undertakes to pay a certain sum of money on the death of the person whose life is insured or on expire of certain period, which ever is earlier.

Exception to life insurance;

A-Surrender value

B-loan on policy

C-Assignment

Law of carriage

In the commercial life of any country, the need for carrying goods from one place to another cannot be overemphasised. Also, goods are to be moved from one country to another. For these purposes, a contract of carriage is to be entered into. The persons, organisations or associations which carry goods are known as carriers. Goods may be carried by land (including inland waterways), sea or air. Accordingly, the law relating to carrying of goods is contained in the following enactments:

1. **In case of carriage of goods by land:**
    (i) The Railways Act, 1989.

(ii) The Carriers Act, 1865.

2. **In case of carriage of goods by sea:**
    I. The (Indian) Bills of Landing Act, 1856.
    II. The Carriage of Goods by Sea Act, 1925.
    III. The Merchant Shipping Act, 1958.
    IV. The Marine Insurance Act, 1963.
3. **In the case of carriage of goods by air:**
    (I) The Carriage by Air Act - 1972.

Contract Carriage

Definition of a Contract of Carriage. A contract of carriage of goods is a contract of bailment for reward, or locatio operis faciends. However, the contract of bailment is modified by the different statutes mentioned above in the case of carriage of goods by land, sea or air.

Classification of Carriers.

Generally speaking carriers are classified into

(i) common carriers,
(ii) private carriers and
(iii) Gratuitous carrier

1--Common Carriers.

The Carriers Act, 1865 defines a common carrier as any individual, firm or company (other than the government, who or which transports goods as a business, for money, from place to place, over land or inland waterways, for all persons (consignors) without any discrimination between them. Provided;

(i)the freight chargeable by him is paid to him;
(ii) there is accommodation on his conveyance; and

(iii) there is nothing objectionable or illegal about the carrying of goods of a particular consignor.

If, in spite of the above conditions being satisfied, a carrier reserves to himself the right to accept or reject an offer, he is not a common carrier. It is worth noting that the Carriers Act, 1865 covers only common carriers of goods and not passengers.

2--Private Carriers- A private carrier is one who does not transport goods from one place to another regularly; he may engage in some casual jobs of carrying goods for certain selected persons between certain terminals. In fact, he carries his own goods and that’s why he is known as a private carrier and not a common carrier.

3--Gratuitous Carrier. When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge.

Carriage of Goods by Land

A.The Carriers Act, 1865. This Act defines the term "common carrier" and provides for his rights, duties and liabilitie

Rights of a Common Carrier.

His rights are:

- **(i)** He is entitled to the settled remuneration and in case no remuneration was settled, to a reasonable remuneration.
- **(ii)** He has a right to refuse to carry goods under certain circumstances (as enumerated under the duties of a common carrier).
- **(iii)** He has a lien on the goods for his remuneration. He can refuse to deliver them until his charges are paid.
- **(iv)** If the consignee refuses to take delivery of the goods, when tendered, the common carrier has a right, to deal with the goods as he thinks reasonable and prudent under the circumstances.
- **(v)** He has a right to recover reasonable expenses incurred by him as a result of the consignee's refusal to take delivery. After giving notice to the consignee, the common carrier may even sell perishable goods.
- **(vi)** He can recover damages from the consignor if the goods are dangerous or are loosely packed and the carrier suffers injury therefrom.
- **(vii)** He can limit his liability subject to the provisions of the Carriers Act

Duties of a Common Carrier.

His duties are:

1. A common carrier is bound to carry goods of all persons who choose to employ him. He can, however, refuse to carry goods under the following circumstances:
   - a) if there is no accommodation in the carriage;
   - **b)** if the person employing him is not willing to pay reasonable charges for the carriage of goods;
   - **c)** if the goods are such which he is not accustomed to cany;
   - **d)** if the goods are to be carried over a route which is not his regular route;
   - **e)** if the goods are-dangerous and as such subjecting him to extraordinary risk;
   - **f)** if the consignor refuses to disclose the nature of the goods to be carried; and
   - **g)** if the goods are not properly packed. If a carrier refuses to carry the goods of a person for any reason other than those mentioned above, he may be held liable for damages. **2**. He must carry the goods over the usual and customary route and take all reasonable precautions for their safe carriage. He must not deviate from the usual route unless rendered necessary by exceptional circumstances. **3.** He must deliver the goods at the agreed time and if no time had been fixed, within a reasonable time. **4**. At Common Law, he is an insurer of the goods in the sense that he warrants to carry the goods safely and securely.

Liabilities of a Common Carrier:

The liability of a common carrier of goods is laid down in the Carriers Act, 1865. For this purpose, the Act has classified the goods into two categories:

(i) Scheduled goods and

(ii)non-scheduled goods.

The scheduled goods are those which are enumerated in a Schedule to the Act. They are valuable articles like gold, silver, precious stones and pearls, bills and hundis, currency and bank notes, glass, china silk, articles of ivory, time pieces, musical and scientific instruments, etc. All other goods are non-scheduled.

For scheduled articles exceeding Rs. 100 in value, the carrier is liable for loss and damage only:

(i) if the value and the description of the goods are disclosed by the consignor to the carrier; or

(ii) if the loss or damage is due to a criminal act of the carrier, his agent or servant.

The carrier can charge extra for carrying scheduled articles, but he cannot limit his statutory liability by any special agreement.

As regards non-scheduled articles, a common carrier can limit his liability by special agreement with the consignor. But even in this Section case he will be liable under 8 of the Act .

Carriage of Goods by sea

A contract to carry goods by sea is called the "contract of affreightment" and the consideration or charges paid for the carriage is called the "freight".

A contract of affreightment may take either of the two forms, namely—

(I)A charter party, where an entire ship, or a principal part of a ship is placed at the disposal of merchant (known as a charterer); or

(ii)A bill of lading where the goods are to be carried in a general ship and the person consigning the goods is known as a shipper.

In both these contracts, the ship owner (the carrier) undertakes the responsibility of carrying the goods of a consignor (i.e., either the charterer or the shipper) safely and securely to the destination

A contract of affreightment— whether in the form of a charter party or a bill of lading — is governed by the (Indian) Bills of Lading Act, 1856 and the Carriage of Goods by Sea Act, 1925.

Conditions Contained in a Contract of Carriage by Sea.

The terms included in a contract of carriage by sea are of two kinds. These are:
(i) Express terms, and **(ii)** Implied terms.

Express terms are those which the parties have specifically agreed to and embodied in the contract.

Implied terms are those which law implies in every contract of carriage by sea unless excluded specifically. :

There are four Implied warranty . They are;

(i)Implied warranty of seaworthiness.- The ship owner, when he enters into a charter party for a voyage,it is impliedly warrants that the ship is seaworthy. This is an assurance by the ship owner, at the time of entering into the charter party, that;

(a) The ship is fit to encounter the ordinary perils of navigation during voyage and

(b) To carry the specific cargo.

This warranty of seaworthiness extends only to (a) seaworthiness at the time of sailing and (b) 'fitness at the time of loading the cargo. Once the ship has sailed or the goods are on board, this warranty ceases to operate. But in case the voyage is divided into stages, the ship must be seaworthy at the commencement of each voyage.

(ii) Implied warranty of commencement of voyage. Another implied warranty is that the ship shall be ready to commence the voyage and shall carry out the same with all reasonable dispatch and diligence.

(iii) Non-deviation of voyage. Also there is an implied condition that there shall be no unnecessary deviation. Deviation means the going off from the settled or the usual or customary course of voyage between the two termini.

(iv) Shipper not to ship dangerous goods. The shipper (i.e., the consignor of goods in case the charterer undertakes to carry goods of others under bills of lading) shall not ship dangerous goods. If the shipper ships dangerous goods and if on account of it the charterer suffers any damage, he can recover it from the shipper.

Bill of Lading. A bill of lading is a document acknowledging the shipment of goods, signed by or on behalf of the carrier and containing the terms and conditions on which it has been agreed to carry the goods. It is a quasi-negotiable instrument. It is a document of title and can be transferred by endorsement and delivery. It is generally used for the carriage of goods on a general ship, i.e., a ship which is used for the carriage of the goods of several merchants who wish to have them conveyed by her and which is not employed for the carriage of a charterer's goods only

Carriage by air

The law relating to carriage of goods and passengers across international border is regulated in India by the carriage by air act-1972

Documents of carriage

When passenger and goods are carried by air , the following documents are issued;

Passenger ticket

For carriage of passenger, the carrier must deliver a passenger ticket which must contain the following particulars-

- The place and date issue
- The place of departure and place of destination.
- The agreed stopping places.
- The name and address of carrier
- Statement that the carriage is subject to rules relatin to laiability

Passenger ticket constitutes conclusion and condition of the contract of carriage.

Baggage check and luggage ticket

The carrier must deliver a baggage check and luggage ticket for carriage of luggage other than small personal object of which the passenger takes charge himself.

Airway bill or air consignment note

Goods carried by air must be covered by an air way bill or air consignment note. The air way bill is must be made out by cosignor in three original parts. The carrier sign acceptance of goods and his signature must be stamped.