**UNIT V Company law**

**Structure**

**5. 1: Introduction to Company and types of company**

**5.2: Formation and incorporation of company**

**5.3 : Documents: Prospectus, MOA and AOA**

**5.4: Directors: Appointment, qualifications, disqua;ifications**

**5.5: Meetings: AGM, EGM, Class Meetings**

**5.6: Winding up of a company**

**5.7: summary**

**5.8 : key terms**

**5.9 : Text questions**

**5.10: Further readings**

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**Learning Objectives**:

* To learn the company and types of company
* To study the term corporate veil and its exceptions
* To understand the process of incorporation of company
* To learn the MOA, AOA and Prospectus
* To learn the Meetings and its types
* To learn the management of company: Directors and KMP
* To study the share capital and its types
* To study the process of winding up of companies

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**5. 1: Introduction to Company and types of company**

 Company Law in India, is the cherished child of the English parents. Our various Companies Acts have been modeled on the English Acts. Following the enactment of the Joint Stock Companies Act, 1844 in England, the first Companies Act was passed in India in 1850. The Indian Companies Act, 1866, the Indian Companies Act, 1882, the Companies Act, 1913, and the Companies Act, 1956 was earlier law passed in India. Every Companies Act introduced new concepts. Like, before Amending Act of 1857 there was not concept of limited liability which is now a fundamental concept of the companies law. The Companies Act, 2013 received the assent of the President on August 29, 2013 and was notified in the Gazette of India on 30.08.2013. The Companies Act 2013 introduced new concepts supporting enhanced disclosure, accountability, better board governance, better facilitation of business and so on. It includes associate company, one person company, small company, dormant company, independent director, women director, resident director, special court, secretarial standards, secretarial audit, class action, registered valuers, rotation of auditors, vigil mechanism, corporate social responsibility, E-voting etc.

**5.1.1: MEANING AND DEFINITION OF A COMPANY**

The word ‘company’ is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together. In the leisurely past, merchants took advantage of festive gatherings, to discuss business matters. Nowadays, the company form of organization has assumed great importance. When they firms their business relations they form a company. In popular parlance, a company or firm denotes an association of likeminded persons formed for the purpose of carrying on some business or undertaking. A company under law is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word ‘corporation’ is derived from the Latin term ‘corpus’ which means ‘body’. Accordingly, ‘corporation’ is a legal person created by a process other than natural birth. As a legal person, a corporate is capable of enjoying many rights and incurring many liabilities of a natural person.

An incorporated company owes its existence either to a Special Act of Parliament or to company law. Public corporations like Life Insurance Corporation of India, SBI etc., have been brought into existence through special Acts of Parliament, whereas companies like Tata Steel Ltd., Reliance Industries Limited have been formed under the Company law i.e. Companies Act, 1956 which is replaced by the Companies Act, 2013. In the legal sense, a company is an association of both natural and artificial persons and is incorporated under the existing law of a country. In terms of the Companies Act, 2013 **a “company” means a company incorporated under this Act or under any previous company law [Section 2(20)].**

 In common law, a company is a “legal person” or “legal entity” separate from, and capable of surviving beyond the lives of its members. A company is rather a legal device for the attainment of social and economic end. It is, therefore, a combined political, social, economic and legal institution. Lord Justice Lindley has defined a company as “an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business and who share the profit and loss arising there from. The common stock so contributed is denoted in money and is the capital of the company. The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital stock to which each member has contributed entitled is his “share”. The shares are always transferable although the right to transfer them may be restricted.”

**5.1.2: NATURE AND CHARACTERISTICS OF A COMPANY**

**(i) Corporate personality:** A company incorporated under the Act is vested with a corporate personality so it bears its own name, acts under name, may has a seal of its own and its assets are separate and distinct from those of its members. It is a different ‘person’ from the members who compose it. Therefore it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its shareholders are its notional owners and do not own anything in it except ownership of shares issued and they can be its creditors simultaneously. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. In the c**ase of Salomon v. Salomon and Co. Ltd., (1897) A.C. 22,** The above case has clearly established the principle that once a company has been validly constituted under the Companies Act, it becomes a legal person distinct from its members and for this purpose it is immaterial whether any member holds a large or small proportion of the shares, and whether he holds those shares as beneficially or as a mere trustee. In the case, Salomon had, for some years, carried on a prosperous business as a leather merchant and boot manufacturer. He formed a limited company consisting of himself, his wife, his daughter and his four sons as the shareholders, all of whom subscribed to 1 share each so that the actual cash paid as capital was £7. Salomon sold his business (which was perfectly solvent at that time), to the Company formed by him for the sum of £38,782. The company’s nominal capital was £40,000 in £1 shares. In part payment of the purchase money for the business sold to the company, debentures of the amount of £10,000 secured by a floating charge on the company’s assets were issued to Salomon, who also applied for and received an allotment of 20,000 £ 1 fully paid shares. The remaining amount of £8,782 was paid to Salomon in cash. Salomon was the managing director and two of his sons were other directors. The company soon ran into difficulties and the debenture holders appointed a receiver and the company went into liquidation. The total assets of the company amounted to £6050, its liabilities were £10,000 secured by debentures, £8,000 owing to unsecured trade creditors, who claimed the whole of the company’s assets, viz., £6,050, on the ground that, as the company was a mere ‘alias’ or agent for Salomon, they were entitled to payment of their debts in priority to debentures. They further pleaded that Salomon, as a principal beneficiary, was ultimately responsible for the debts incurred by his agent or trustee on his behalf. Their Lordships of the House of Lords observed the company is a different person altogether from the subscribers of the memorandum; and though it may be that after incorporation the business is precisely the same as before, the same persons are managers, and the same hands receive the profits, the company is not, in law, their agent or trustee. The statute enacts nothing as to the extent or degree of interest, which may, be held by each of the seven or as to the proportion of interest, or influence possessed by one or majority of the shareholders over others. There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertakings, or that they should have a mind or will of their own, or that there should be anything like a balance of power in the constitution of company.”

**(ii) Company as an artificial person:** A Company is an artificial person created by law. It is not a human being but it acts through human beings. It is considered as a legal person who can enter into contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law. It is capable of enjoying rights and being subject to duties.

**(iii) Company is not a citizen:** The company, though a legal person, is not a citizen under the Citizenship Act, 1955 or the Constitution of India. In State Trading Corporation of India Ltd. v. C.T.O., A.I.R. 1963 S.C. 1811, the Supreme Court held that the State Trading Corporation though a legal person, was not a citizen and can act only through natural persons. Nevertheless, it is to be noted that certain fundamental rights enshrined in the Constitution for protection of “person”, e.g., right to equality (Article 14) etc. are also available to company.

**(iv) Company has Nationality and Residence:** Though it is established through judicial decisions that a company cannot be a citizen, yet it has nationality, domicile and residence. In Gasque v. Inland Revenue Commissioners, (1940) 2 K.B. 88, Macnaghten. J. held that a limited company is capable of having a domicile and its domicile is the place of its registration and that domicile clings to it throughout its existence. He observed, it was suggested that a body corporate has no domicile. It is quite true that a body corporate cannot have a domicile in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicile and nationality can be given to a body corporate.

**(v) Limited Liability:** “The privilege of limited liability for business debts is one of the principal advantages of doing business under the corporate form of organisation.” The company, being a separate person, is the owner of its assets and bound by its liabilities. The liability of a member as shareholder, extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. This means that the liability of a member is limited. For example, if A holds shares of the total nominal value of 1,000 and has already paid Rs.500/- (or 50% of the value) as part payment at the time of allotment, he cannot be called upon to pay more than Rs. 500/-, the amount remaining unpaid on his shares. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

**(vi) Perpetual Succession:** An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and it remains the same entity, despite total change in the membership. Perpetual succession, means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. The membership of an incorporated company may change either because one shareholder has sold/transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act. Thus, perpetual succession denotes the ability of a company to maintain its existence by the succession of new individuals who step into the shoes of those who cease to be members of the company.

**(vii) Separate Property:** A company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed off. Their Lordships of the Madras High Court in R.F. Perumal v. H. John Deavin, A.I.R. 1960 Mad. 43 held that “no member can claim himself to be the owner of the company’s property during its existence or in its winding-up”. A member does not even have an insurable interest in the property of the company. **Mrs. Bacha F. Guzdar v. The Commissioner of Income Tax, Bombay, A.I.R. 1955 S.C. 74,** The Supreme Court in this case held that, though the income of a tea company is entitled to be exempted from Income-tax up to 60% being partly agricultural, the same income when received by a shareholder in the form of dividend cannot be regarded as agricultural income for the assessment of income-tax. I

**(viii) Transferability of Shares:** The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint stock companies were established, the object was that their shares should be capable of being easily transferred. Section 44 of the Companies Act, 2013 enunciates the principle by providing that the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles. If the articles do not provide anything for the transfer of shares and the Regulations contained in Table “F” in Schedule I to the Companies Act, 2013, are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property.

**(ix) Capacity to Sue and Be Sued:** A company being a body corporate, can sue and be sued in its own name. To sue, means to institute legal proceedings against (a person) or to bring a suit in a court of law. All legal proceedings against the company are to be instituted in its name. Similarly, the company may bring an action against anyone in its own name. A company’s right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. Hence, the company is entitled to sue for damages in libel or slander as the case may be [Floating Services Ltd. v. MV San Fransceco Dipaloa (2004) 52 SCL 762 (Guj)]. A company, as a person distinct from its members, may even sue one of its own members.

**(x)Contractual Rights:** A company, being a legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A shareholder cannot enforce a contract made by his company; he is neither a party to the contract, nor be entitled to the benefit derived from of it, as a company is not a trustee for its shareholders. Likewise, a shareholder cannot be sued on contracts made by his company. The distinction between a company and its members is not confined to the rules of privity but permeates the whole law of contract. Thus, if a director fails to disclose a breach of his duties towards his company, and in consequence a shareholder is induced to enter into a contract with the director on behalf of the company which he would not have entered into had there been disclosure, the shareholder cannot rescind the contract.

**(xi)Limitation of Action:** A company cannot go beyond the power stated in its Memorandum of Association. The Memorandum of Association of the company regulates the powers and fixes the objects of the company and provides the edifice upon which the entire structure of the company rests. The actions and objects of the company are limited within the scope of its Memorandum of Association. In order to enable it to carry out its actions without such restrictions and limitations in most cases, sufficient powers are granted in the Memorandum of Association. But once the powers have been laid down, it cannot go beyond such powers unless the Memorandum of Association, itself altered prior to doing so.

**(xii) Separate Management:** The members may derive profits without being burdened with the management of the company. They do not have effective and intimate control over its working and they elect their representatives as Directors on the Board of Directors of the company to conduct corporate functions through managerial personnel employed by them. In other words, the company is administered and managed by its managerial personnel.

**(xiii) Voluntary Association for Profit:** A company is a voluntary association for profit. It is formed for the accomplishment of some stated goals and whatsoever profit is gained is divided among its shareholders or saved for the future expansion of the company. Only a Section 8 company can be formed with no profit motive.

**(xiv) Termination of Existence:** A company, being an artificial juridical person, does not die a natural death. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up. However, to avoid winding up, sometimes companies adopt strategies like reorganization, reconstruction and amalgamation.

**Distinction between Partnership Firm and Company**

The principal points of distinction between a partnership firm and a company are as follows:

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| **Partnership Firm** | **Company** |
| A partnership firm is not distinct from the several persons who form the partnership. | A company is a distinct legal person. |
| In a partnership, the property of the firm is the property of the individuals comprising it. | In a company, it belongs to the company and not to the individuals who are its members. |
| Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. | The creditors of a company can proceed only against the company and not against its members. |
| Partners are the agents of the firm. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm’s business. | Members of a company are not its agents. A member of a company cannot dispose of the property and incur liabilities in the course of the company’s business. |
| A partner cannot contract with his firm. | A member can contract with his company. |
| A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners. | A company’s share can ordinarily be transferred |
| A partner’s liability is always unlimited. | The liability of shareholder may be limited either by shares or a guarantee. |
| The death or insolvency of a partner dissolves the firm, unless otherwise provided. | A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company. |
| The accounts of a firm are audited at the discretion of the partners. | A company is required to have its accounts audited annually by a chartered accountant. |
| A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement among the partners. | A company, being a creation of law, can only be dissolved as laid down by law. |

**Distinction between Limited Liability Partnership (LLP) and a Company**

LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name. LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.

Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner’s wrongful business decisions or misconduct. LLP is a body corporate and a legal entity separate from its partners, having perpetual succession**.** LLP form is a form of business model which :(i) is organized and operates on the basis of an agreement**.**(ii) provides flexibility without imposing detailed legal and procedural requirements (iii) enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner.

A basic difference between an LLP and a company lies in that the internal governance structure of a company is regulated by statute (i.e. Companies Act) whereas for an LLP it would be by a contractual agreement between partners.

The management-ownership divide inherent in a company is not there in a limited liability partnership. LLP have more flexibility as compared to a company. LLP have lesser compliance requirements as compared to a company.

**5.1.3: DOCTRINE OF LIFTING OF OR PIERCING THE CORPORATE VEIL**

A Company is a person created by law, having a distinct entity. This principles referred as Veil of Incorporation. however, If the veil is used as a mask of fraud, then the courts will lift the veil and look at the persons behind the company.The separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. The Court will break through the corporate shell and apply the principle/doctrine of what is called as “lifting of or piercing the corporate veil”. The Court will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company. The corporate veil can be lifted under following circumstances:

**A: Statutory Recognition of Lifting of Corporate Veil**

The Companies Act, 2013 itself contains some provisions [Sections 7(7), 251(1) and 339] which lift the corporate veil to reach the real forces of action. Section 7(7) deals with punishment for incorporation of company by furnishing false information; Section 251(1) deals with liability for making fraudulent application for removal of name of company from the register of companies and Section 339 deals with liability for fraudulent conduct of business during the course of winding up.

**B: Lifting of Corporate Veil under Judicial Interpretation:** Lifting or piercing the corporate veil means ignoring the separate identity of a company. Disregarding the corporate personality and looking behind the real persons who are in the control of the company. These cases are given below:

**1. Enemy character of Co.:** Daimler Co. Ltd vs. Continental tyre & Rubber Co. Ltd, German company incorporated as England Company for the purpose of selling tyres made in Germany. During First World War, Co. started recovering its debts. Court held this as trading with an enemy.

**2. Prevention of Fraud or improper Conduct: Gilford Motor Co. Ltd. Vs. Horne:**a) H a former employee of ‘G’ was subject to not solicit its customers. H incorporated a company to solicited customers of 'G'. The court passed an injunction order.

**3. Protection of Revenue. In the case of** Sir Din Shaw Maneckjee Petit Vs CIT, D was enjoying large profit and income in the form of interest and dividend Formed four new private companies and transferred interest income to them Returned income to ‘D’ in the form of pretended loan. D and all the four companies were treated as one.

**4. Avoidance of welfare legislation:** In the case of **Workmen Employed in Associated Rubber Industries ltd.** A subsidiary Co. was formed wholly by the Holding company only to receive dividends from shares transferred. Court held that the new company was formed to reduce the bonus to workmen.

**5. Company acting as agent of the shareholders** In the case of F.G.FILMS LTD. An American company produced a film in India, actually in the name of a British company. The sensor board refused to register the film as a British film.

**6. Subsidiary acting as an agent: In**  the case of **Merchandise transport limited vs british transport commission,** As the transport co. would not get licences on its own name, it formed a subsidiary co. Court held that both are same & application was rejected.

**7. Experience of directors is experience of the company: in the case of** Progressive Aluminum Ltd, prospectus stated that the company has vast experience. In fact only directors of the company had vast experience. It was held that the experience of the directors is the experience of the company.

**8. To protect the public policy**

**9. In quasi criminal cases**

**5.1.4 Types of Companies:** There are following types of companies :

* **One-person company**: The 2013 Act introduces a new type of entity ‘one-person company’ (OPC). An OPC means a company with only one person as its member (section 3(1)).
* **Small company**: A small company has been defined as a company, other than a public company. The 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 ten crore rupees; and turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees. It is providedthat nothing in this clause shall apply to a holding company or a subsidiary company, a company registered under section 8; or a company or body corporate governed by any special Act.
* **Dormant company**: A company formed and registered under this 2013 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 for obtaining the status of a dormant company.(Section 455)
* **Nidhi company**: Nidhi Company means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.(section 406).
* **Company Limited by Shares**” means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.
* **Unlimited Companies**: Means a company not having any limit on the liability of its members The liability of each member extends to the whole amount of the company's liabilities. It may or may not have share capital. Articles must state the amount of share capital and the amount of each share Unlimited liability of members is towards creditors only, not towards company. It may alter or reduce its share capital without any restriction.
* “**Private Company**” means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, restricts the right to transfer its shares, except in case of One Person Company, limits the number of its members to two hundred. It is 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. It is provided further that persons who are in the employment of the company; and 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 prohibits any invitation to the public to subscribe for any securities of the company.
* “**Public Company**” means a company which is not a private company and has a minimum paid-up share capital , as may be prescribed. It is 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;
* “**Holding Company**”, in relation to one or more other companies, means a company of which such companies are subsidiary companies.
* “**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 which controls the composition of the Board of Directors; or exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.
* “**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. For the purpose of this clause, the expression “significant influence” means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement; the expression “joint venture” means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.
* “**Body Corporate**” or “**Corporation**” includes a company incorporated outside India, but does not include a co-operative society registered under any law relating to co-operative societies; and any other body corporate, which the Central Government may, by notification, specify in this behalf.
* “**Foreign Company**” means any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode; and conducts any business activity in India in any other manner.
* “**Listed Company**” means a company which has any of its securities listed on any recognised stock exchange;
* “**Government Company**” means any company in which not less than fifty-one percent 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.
* “**Banking Company**” means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949.
* “**Financial Institution**” includes a scheduled bank, and any other financial institution defined or notified under the Reserve Bank of India Act, 1934.

**5.1.5: Association not for profits Or Non profit oriented companies (sec 8):**

The section 8 provide registration of an association not for profit can be done with the central government permission. It must be registered with limited liability without using "Limited"/ "Private Limited". It can be registered for conditions for grant of license for promoting commerce, art, religion etc. It prohibits payment of any dividend. The license is subject to other conditions as think fit by central government. It can't alter its objects clause in MOA without the approval of central government. The Central government may also grant exemption for other provisions. The central government may revoke if objects clause changed without the approval of the central government. on revocation, the registrar shall add the word "Limited" or "Pvt. Ltd". Before a licence is revoked, the central government shall give an opportunity of being heard to such company.

**Advantages of Section 8 companies are** that they need not pay stamp duty. A partnership firm can be a member. The company secretary need not be a qualified company secretary. It may hold it’s AGM on a public holiday. For any meeting 4 days notice is sufficient. The books of accounts need to be preserved for 4 years only. It need not have the minimum paid capital

**5.2: FORMATION AND INCORPORATION OF COMPANIES**

Section 3(1) states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is to be a public company. Two or more persons, where the company to be formed is to be a private company; or one person, where the company to be formed is to be One Person Company that is to say, a private company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration. There are following stages of formation of company:

1. Promoter and promotion of company
2. preparation of documents like MOA, AOA and prospectus
3. Declaration form
4. Filing application along with requisite fee with ROC

**5.2.1 (A) PROMOTION & INCORPORATION OF A COMPANY**

Promoter means a person named as such in a prospectus or is identified by the company in the annual return and has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act. Not in professional capacity.

**Fiduciary position of a promoter:** Until a Company gets incorporated, Promoter stands in a fiduciary capacity. The term Fiduciary means position of trust. If we discuss the legal position of promoter then he is neither an agent nor trustee as company is not in existence. The duties of a promoter are given below:

a) Not to make any profit at the expense of the company

b) To give benefit of negotiations to the company

c) To make a full disclosure of interest or profit: Promoter fails to disclosure-co. may sue for damages & recover secret profit made. Law does not prohibit. If full disclosure is made, the profit is permissible.

d) Not to make unfair use of position.

**Remuneration of promoter:** Promoter has no right if there is no express contract for remuneration. If there is an express contract, the remuneration can be received in one of the following ways:

a) Sell his own property at a profit provided he makes a disclosure of it.

b) Option to buy shares at a lesser price.

c) Commission on the shares sold.

d) Fixed sum.

**Remedies available to the company against the promoter:** If the promoter fails to disclose any secret profits made by him then the members who join the company on his offer may:

a) Cancel the contract or

b) Retain the property & pay not more than what the promoter actually paid for purchase of it.

c) Claim damages for violation of duty of disclosure.

**Pre-Incorporation Contracts:** These are the contracts entered by promoters on behalf company before its existence. According to the law, there must be two parties to a contract. But before incorporation, it is not an entity. Hence, contract never binds the company. It cannot ratify the contract the only option is to enter into a new contract. In case of adoption of contract, It will not create a contract between the company and the other person. The principle of constructive notice provide that person entering into a contract is presumed to have knowledge Memorandum, Articles. Person who enters into a pre incorporation contract with the promoters does at his own risk. The sec 70 of the Indian Contract Act, 1872 clearly states that where a person lawfully does anything for another person without intending to do gratuitously compensation must be paid for enjoyment of benefits. The promoters are personally liable. But exception is, if the agreement provides that promoter liability shall cease if company adopts the contract and if either party may rescind the contract.

**5.2.2Procedure for incorporation:** The procedure for incorporation of company is given below:

**(A)The name of company:**  The first step is get the name for the proposed company. The basicrequirement for the reservation of the name of the company to make an application to the ROC for the reservation of a name with three names in order of preferences. The name applied should not be same or similar to any existing company or any prohibited name. Registrar reserve the name for a period of 60 days from the date of the application. After reservation of name it is found that name was applied by furnishing wrong information if the company has not been incorporated reserved name shall be cancelled or if the company has been incorporated. The Registrar of companies (ROC) may either direct to change or striking off the name or make a petition for winding up of the company.

 After getting the name approved file documents with fee. Registrar Issue of certificate of incorporation on registration. Registrar shall allot a corporate identity number (CIN) from date of incorporation. Company shall maintain and preserve at registered office copies of all documents till dissolution. If furnishing of false or incorrect information or suppression of material fact: shall be liable for action. Company incorporated by furnishing false information or suppressing facts. The tribunal may pass such orders for regulation of the management for liability of the members as unlimited; or removal of the name or pass the winding up order for the company.

**5.2.2.1 Documents to be filed with Registrar at the time of registration**

For the registration of the company, following are the documents need to be submitted with the ROC for registration:

a) The memorandum of Association and Articles of Association duly signed by all the subscribers. The prospectus of the company.

b) a declaration that all the requirements of this Act and the rules complied with.

c) affidavit from each of the subscribers / first directors that he is not convicted of any offence in connection with the promotion etc. He has not been found guilty of any fraud or misfeasance and all the documents filed with the Registrar correct and complete.

d) Address for correspondence with the company

e) particulars of every subscriber to MOA.

f) particulars of first directors of the company.

g) particulars of the interests of the persons mentioned in the articles as the first directors.

h) Duly filled application for registration of company along with prescribed fee.

**5.2.2.2 Effect of Registration of a company**

 From the date of incorporation, subscribers MOA become members of the company, It shall be a body corporate. The company is capable of exercising all the functions of an incorporated company. It have perpetual succession and a common seal. It shall have power to acquire, hold and dispose of property etc in own name. It becomes a legal person separate from the incorporators and binding contract between the company and its members. A shareholder, who buys shares, does not buy any interest in the property of the company. Merely because a company purchases all the shares of another company will not put an end to corporate character of another company. As juristic person company has separate and distinct existence from its members.

**Time of issue of Certificate of Securities:**  Under Section 56(4), every company, unless prohibited by any provision of law or any order of any Court, Tribunal or other authority must deliver the certificates of all securities allotted, transferred or transmitted within a period of two months from the date of incorporation, in the case of subscribers to the memorandum and within a period of two months from the date of allotment, in the case of any allotment of any of its shares. Further, within a period of one month from the date of receipt by the company of the instrument of transfer or, as the case may be, of the intimation of transmission, in the case of a transfer or transmission of securities. Within a period of six months from the date of allotment in the case of any allotment of debenture. However, where the securities are dealt with in a depository, the company shall intimate the details of allotment of securities to depository immediately on allotment of such securities. Where any default is made in complying with the above provisions, the company shall be punishable with fine which shall not be less than Rs 25,000 but which may extend to Rs. 5 Lakhs and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs 10,000 but which may extend to Rs.1,00,000.

**Pre incorporation Contract :?????????**

**Provisional Contracts: ???????**

**5.3 : Documents: Prospectus, MOA and AOA**

**5.3.1: PROSPECTUS:**

**Meaning of prospectus:** Any document described or issued as prospectus and includes A red herring prospectus or Shelf prospectus or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate. A document called will have three important conditions are Invitation to the public in written form, made by or on behalf of the company and application constitutes an offer by the subscriber on its acceptance by the company binding contract comes into existence. The prospectus help the investors to decide whether or not they should subscribe securities and information in the prospectus is vital and any misstatements may result in huge losses.

**Different modes of issue of securities by a Company:** There are following modes of issue of securities by a company:

**(a) Public company -**

a) Through prospectus in public offer or Private placement or

b) Through a rights issue or a bonus issue.

C) Public offer includes initial public offer (IPO) or Further public offer (FPO)or an offer for sale.

**(b) Private company** -

a) By way of rights issue or bonus issue; or

b) By private placement.

**A) Private Placement:** offer to a select group of persons through issue of a private placement offer letter and by fulfillment of the conditions specified. The offer shall be made maximum to 50 persons or such highernumber as may be prescribed, in a financial year. It does not include- Qualified institutional buyers and employees stock options. Offer is treated as “Public offer” if  Offer/ invitation made to more than 50 or such higher prescribed number of persons or On non-compliance of conditions of private placement.

**Procedure for private placement:** It is applicable for Private and Public companies. The following are the conditions through which invitation can be made:

a) May make private placement through issue of a private placement offer letter.

b) Shall be made maximum to 50 persons or such higher as may be prescribed, in a financial year

c) No fresh offer or invitation shall be made unless- allotments completed, or invitation has been

withdrawn, or Abandoned by the company.

d) All monies shall be paid by cheque or demand draft or other banking channels not by cash.

e) shall allot its securities within 60 days from the date of receipt of the application money.

f) Monies received shall be kept in a separate bank account and shall be utilised only for – adjustment against allotment of securities; or the repayment of monies if unable to allot securities.

g) Offers shall be made only to persons whose names are recorded by the company prior to the

invitation complete information about such offer shall be filed with the Registrar within 30 days.

h) shall not publish any advertisements or utilise any media to inform large public about such offer.

i) File with the Registrar a return of allotment.

**Penalties:** Default in allotment of securities:

a) not able to allot within 60 days, it shall repay the application money within 15 days and

b) If fails to repay that money with interest @ of 12 % per annum from the expiry of 60th day.

Persons liable for Penalty are Company, Promoters, Directors upto amount involved in the offer or invitation, or 2 crore Rupees Whichever is higher. Company shall also refund within a period of 30 days of the order.

**Limitations on private placement as per Rules**

a) Previously approved by a Special Resolution, for each of the Offers or Invitations.

b) The explanatory statement shall disclose the basis or justification for the price.

c) For non- convertible debentures SR is sufficient only once in a year for all the offers.

d) Not more than 200 persons in the aggregate in a financial year excluding QIB and ESOPs.

e) The value of such offer or invitation per person shall be with an investment size of not less than20,000 rupees of face value of the securities.

f) Payment to be made for subscription shall be made from the bank account of the person

subscribing and the company shall keep the record of the same.

**When prospectus is not required to be issued**

a) Bona fide invitation to a person to enter into an underwriting agreement

b) Private placement

c) Rights issue or a bonus issue

d) Issue of shares or debentures which are in all respects uniform with shares or debentures

previously issued

e) Sweat equity shares

f) Employees Stock Option Scheme

**5.3.1.3: Requirements as to registration of prospectus**

**1. Deliver to ROC [Sec 26(4) of the Companies Act, 2013]:** No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, a copy has been delivered to the Registrar for registration. The same shall be signed by every person who is named therein as a director or proposed director of the company or by his duly authorised attorney.

**2. Prospectus to state the delivery of copy and documents to the registrar [Sec 26(6) of the Companies Act, 2013]:** Every prospectus issued shall, on the face of it state that a copy has been delivered for registration to the Registrar, and specify any documents required to be attached to the copy so delivered or refer to statements included in the prospectus which specify these documents.

**3. No registration of prospectus [Sec 26(7) of the Companies Act, 2013]:** The Registrar shall not register a prospectus unless the requirements of this section with respect to its registration are complied with, and the prospectus is accompanied by the consent in writing of all the persons named in the prospectus.

**4. Consent of expert [Sec 26(5) of the Companies Act, 2013]:** If the prospectus includes a statement made by an expert, it shall also include consent in writing of that expert. It should also state that the consent given has not been withdrawn before delivery of prospectus to the registrar. The expert should not be a person who is connected with the formation or management of the company.

**5. Time period for the issue of prospectus [Sec 26(8) of the Companies Act, 2013]:** No prospectus shall be valid if it is issued more than 90 days after the date on which a copy thereof is delivered to the Registrar.

**6. Approval by various agencies**: As per SEBI (Issue of Capital and Disclosure Requirements)Regulations, the draft prospectus has to be approved by various agencies before it is filed with ROC such as all the lead managers to the issue, (who must be authorised by SEBI). Each of the stock exchange where the shares are listed / proposed to be listed, Lead financial institution underwriting the issue (if applicable, Authorised by SEBI).

**7. Vetting by SEBI**: The draft prospectus is vetted by SEBI to ensure adequacy of disclosures. However, vetting by SEBI does not amount to approval of prospectus. SEBI does not take any responsibility for the correctness of the statements made or opinions expressed in the prospectus.

8**. Penalty [Sec 26(9) of the Companies Act, 2013]:** The penalty for contravention of the this section is that company Fine varying from 50,000 rupees to 3 lakh rupees, every person liable shall be given imprisonment up to 3 years or Fine varying from 50,000 rupees to 3 lakh rupees or With both.

**5.3.1.4: Contents of the prospectus**: Prospectus shall be dated and signed and shall have following information:

a) Names & addresses of registered office and the other persons (like company secretary etc.)

b) Dates of the opening and closing of the issue

c) Details of separate bank account

d) Details of the underwriters and the amount underwritten by them

e) Consent of directors, auditors, bankers to the issue, expert’s

f) Authority for the issue and resolution details

g) Procedure and time schedule for allotment

h) Capital structure of the company

i) Main objects of public offer

j) Main objects and present business of the company

k) Other particulars relating to management view of risk factors, gestation period, extent of progress, deadlines for completion, any litigation or legal action pending

l) Minimum subscription

m) Details of directors

**2. Set out the reports** will include the reports by the auditors of the company, Reports relating to profits and losses for each of the five financial years and reports about the business or transaction to which the proceeds are to be applied.

**Procedure for variation in terms of contract or objects in prospectus**

1. A company shall pass special resolution (in case of listed co’s through postal ballot).

2. Notice shall also be published in the newspapers indicating clearly reason for such variation.

3. The dissenting shareholders shall be given an exit offer by promoters or controlling shareholders

**Offer of sale of shares:** Members of a company may propose in consultation with the Board to offer their holdings. Offer of sale document be deemed to be a prospectus and all laws and rules shall apply. Members shall collectively authorize the company whose shares are offered for sale to the public and they shall reimburse the company all expenses incurred by it.

**Issue of securities in dematerialized form:** In case of public offer, every company making public offer; and such other class or classes of public companies prescribed shall issue the securities only in dematerialized form. In case of other companies: May convert their securities into dematerialized form.

**Abridged prospectus**. It means a memorandum containing such salient features specified by the SEBI. Every form of application issued shall be accompanied by an abridged prospectus. The objective of abridged prospectus is to reduce the cost of issue. A copy of the prospectus shall be furnished to any person on demand. The Penalty for Company Rs.50000 for each default. However, the exception are when company entered into an underwriting agreement with respect to such securities, or Securities are not offered to the public.

**Powers of SEBI to regulate issue and transfer of securities, etc**

1.According to section 127, The Provisions relating to Prospectus, allotment, share capital and debenture are for listed companies, companies which intend to get listed administered by SEBI and in any other case Administered by Central Government (MCA).

2. Powers relating to all other matters shall be exercised by Central Government, the Tribunal or the Registrar.

**5.3.1.5: Mis-statement or Misleading statement in prospectus** **or Golden Rule for prospectus**

 In case, any prospectus has any misleading or mis statement in the prospectus, in the form and context or in prospectus some material matter is omitted to mislead. It present the whole picture of the company. It must disclose all material facts truly, honestly and accurately. All facts influence decisions must be disclosed. No fact should be omitted . The such mis statement or omission may lead to criminal and civil liability. The persons who invested in the company based mis-statement or omission or by such action then they may file the suit for damages or any other action may be taken U/s 34 or 35 or 36.

**Remedies available to a person deceived by a false and misleading prospectus**

(a) Remedies against the company as per general law of contracts: Rescission of the contract as contract is based on the utmost good faith, voidable at the option of the aggrieved party. Subscriber can file a suit against the company to rescind the contract. The following conditions must be followed:

1. It should be a material fact
2. They should be induced to take the shares
3. The shareholder relied on the statement
4. The omission was misleading
5. those acting on behalf of the company acted fraudulently and were authorised to act on its behalf
6. suffered a loss or damage
7. the proceeding for rescission was started as soon as the allottee came to know the fact.

**(b) Damages for deceit:**

* The allottee may recover damages from the company for any loss he may have suffered if he was induced to take shares based on a fraudulent misrepresentation of material facts.
* The allottee cannot, however, both retain the shares and get damages against the company.

**Liabilities for misstatements in prospectus**

**A. Criminal liability for misstatements in prospectus:** The misstatement in prospectus means any misleading statement in the form and context and certain material matter included or omitted to mislead.

* Punishment for the misstatement: Every person who authorizes the issue shall be liable, imprisonment not be less than 6 months but up to 10 years and fine not be less than the amount involved in the fraud, but up to 3 times the amount.
* fraud involves public interest, imprisonment shall not be less than 3 years.
* Exception to criminal punishment are statement or omission was immaterial, or he had reasonable grounds to believe that it is true.

**B. Civil liability for misstatements in prospectus :** The person has subscribed on prospectus, which is misleading and has sustained any loss, Persons liable for the misstatement include are director, authorized himself to be named in prospectus as a director, promoter, authorised the issue of the prospectus and the expert. The punishment is that every person shall be liable to pay compensation to every person who has sustained such loss or damage and for fraudulently inducing persons to invest money. However, the exception to civil punishment are having consented and withdrew his consent before the issue of the prospectus, and wasissued without his authority or consent; or issued without his knowledge or consent, and on becoming aware gave public notice.

**Expert and his liabilities:** An Expert includes an engineer, a valuer, a chartered accountant, a company secretary, a cost accountant and any other person who has the power or authority to issue a certificate. He must be unconnected with the formation or management of the company. A report be included subject to given his written consent and not withdrawn before delivery to ROC & statement appears in the prospectus that he has not withdrawn the same. An expert will be liable for civil liability for misstatements in prospectus. The expert shall not be liable if he has given his consent and he withdrew before delivery for registration or prospectus was issued without his knowledge and gave a reasonable public notice. He is liable in the capacity of an expert and not for any other statement. He has no criminal Liability

* **Persons who fraudulently induces persons:** Persons who fraudulently induces persons to invest money by making statement which is false, deceptive etc. to enter into any agreement for acquiring, disposing of, subscribing for, or underwriting securities; or any agreement, the purpose of which is to secure a profit to any of the parties, Any agreement for obtaining credit facilities from any bank or financial institution. He shall be punishable for fraud.
* **Personation for acquisition of securities:** Any person who making of an application in a fictitious name for securities, multiple applications to a company in different names or induces company to allot, or register any transfer to him, or to any other in a fictitious name. Such person shall be liable for action under the companies Act. The amount received through disgorgement or disposal of securities shall be credited to the Investor Education and Protection Fund.

**Deemed prospectus:**  The deemed prospectus is issued when offer for sale to public made within 6 months of allotment or agreement to allot or whole consideration not received by the company when offer to the public was made. The effect of deemed prospectus include all enactments and rules of law shall apply on the company. Liability in respect of mis-statement in prospectus shall apply to deemed prospectus. Deemed that the persons by whom the offer to the public is made as directors.

**Contents of deemed prospectus**: It shall contain matters as specified in the companies Act, 2013. The net consideration received or to be received by the company. The time and place for inspection of contract. The deemed prospectus shall be signed by directors of the company, in case of a company, In case of firm, by not less one-half of the partners in the firm.

**Shelf Prospectus:** "shelf prospectus" means a prospectus under which one or more issues are made over a certain period without the issue of a further prospectus.It shall commence from the date of opening of the first offer of securities under that prospectus.No further issue of prospectus for a period of one year. It apply to class or classes of companies, as the SEBI may provide. Filing of shelf prospectus is required at the stage of first offer only no further prospectus is required.

**Filing of information memorandum with the registrar:** prior to every subsequent offer information memorandum shall be filed with ROC, which shall contain the details of new charges created, Changes in the financial position, and Such other changes as may be prescribed. If any changes made in shelf prospectus, company shall intimate to the persons who paid money in advance and company shall refund all the monies received as subscription within 15 days thereof if they desire to withdraw.

**Prospectus = Information Memorandum+ Shelf Prospectus**

**Red herring prospectus:** It means a prospectus which does not include complete particulars of the quantum or price. Company may issue a red herring prospectus prior to the issue of a prospectus. The company shall file it with the Registrar at least 3 days prior to the opening of the subscription list and the offer. A red herring prospectus shall carry the same obligations of 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, the prospectus shall be filed with the registrar and the SEBI which shall state the total capital raised, closing price, any other details as were not included.

**Statement in lieu of Prospectus:** The Statement in Lieu of Prospectus is a document filed with the Registrar of the Companies (ROC) when the company has not issued prospectus to the public for inviting them to subscribe for shares. The statement must contain the signatures of all the directors or their agents authorized in writing. It is similar to a prospectus but contains brief information. The Statement in Lieu of Prospectus needs to be filed with the registrar if the company does not issues prospectus or the company issued prospectus but because minimum subscription has not been received the company has not proceeded for the allotment of shares.

**5.3. 2: MEMORANDUM OF ASSOCIATION**

**Memorandum of Association**: Memorandum of Association (MOA) is the Charter (Constitution) of the company. It is the main document of the company and no company can be incorporated without MOA. It not only define what a company can do and but also what it cannot do. The main object of the MOA is for the Shareholders / loan providers can know the purpose for which the funds are going to be used, Persons dealing can know whether the contractual relation is within its objects. It shall be on the prescribed form as provided in the companies Act 2013. The MOA shall be divided into paragraphs and numbered consecutively, signed and at least 1witness attest the signature of the subscribers.

**5.3. 2.1:CONTENTS OF MEMORANDUM OF ASSOCIATION**

There are 6 clauses in MOA. These are discussed in detailed below:

**NAME CLAUSE:** The name shall not be identical with to the name of an existing company. It shall not be undesirable in the opinion of the central government. Name shall not give impression that the company is connected with, or having patronage of central government, State government or not prohibited by the names and emblems Act. Every company shall paint or affix its name, and the address of its registered office. It shall have its name engraved in legible characters on its seal. It will have its name printed on hundies, promissory notes, bills of exchange etc. Injunction will be given if identical name is adopted. Existing company can apply to the CG for stopping the new company from using such name. In case of a Public company the word “Limited” and in case of a Private company the words “Private Limited” . Application for name approval to be made in INC 1.Name of the company to indicate private or public**.** No use of name that will constitute an offence. No undesirable name as specified in Rule 8 of Companies (incorporation) Rules**.** No identical name that resembles the name of an existing company

* **In case of OPC**: The words ‘‘One Person Company’’ shall be mentioned in brackets below. Now all the companies are allotted a Corporate Identity Number (CIN) in addition to the name.

**REGISTERED OFFICE / SITUATION CLAUSE / LOCATION CLAUSE:** Every company shall furnish registered office within a period of 30 days of its incorporation. Registered Office is significant that company shall not commence business unless it has registered office. On and from the 15th day of its incorporation shall have a registered office for receiving all communications and notices. The nationality of a company is determined by the place of its registered office. It determine the jurisdiction of the Court. Company shall Paint or affix its name and address of its registered office at every place business is carried on. It shall get its name, address and CIN printed on all its business letters, bill heads etc. This specifies the state in which the registered office is situated Companies to have registered office within 15 days of incorporation. Registrar to be intimated about the details of registered office within 30 days of incorporation or 15 days of change if any as the case may be inform INC.22.

**OBJECTS CLAUSE:** It is the most important clause in MOA. It sets the boundary for company to operate. It cannot undertake any activity not specified. Members/creditors can know the purpose to which their money can be applied. Persons dealing with the company can know the extent of the company’s powers from it. The company may choose any objects. However company should not be illegal or against to public interest. E.g.: Gambling. It can’t be against Act. It shall have objects and matters necessary for progress, Powers (Eg Borrowing powers) of company. Any provision contained in any of the above mentioned document, shall be void, to the extent to which it is inconsistent to the provisions of this Act. Memorandum to state the object of the company proposed to be incorporated. The bifurcation of main, ancillary and other objects as required under Companies Act 1956 has been dispensed within Companies Act 2013.

**LIABILITY CLAUSE:** It explain the liability of each member of the company in case of winding up. It states the limits to the liability of members. In case the company Limited by Shares, the liability of a shareholder will be the unpaid amount of the share. In case of the company Limited by guarantee, without share capital, the liability of the shareholder will be the amount guaranteed by him. In case the company limited by Guarantee having share capital, the liability of the shareholder will be the amount guaranteed by him and the unpaid value of the share. In case of unlimited Company, the liability clause is not mandatory absence of this clause means liability is unlimited. This states that liability of the members is limited or unlimited. In case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them (including premium if any) as against Companies Act 1956 where in it was limited to the amount unpaid on the face value of the share.

**CAPITAL CLAUSE:**  The capital clause of the company shall have the authorised capital of the company and the number and nominal value of shares, The number of shares agreed to subscribe (Min 1 share). In case of OPC, the name of the nominee, the promoters will decide the amount of subscription, Stamp duty and Registration fee is payable on the basis of authorised capital. There is no maximum limit to the amount. However the company with no share capital is not required to have the capital clause. This must state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed amount and the no. of shares which the subscribers to the memorandum agree to subscribe the subscribers to which shall not be less than one share. The capital is variously described as “Nominal”, “Authorised”

**ASSOCIATION / SUBSRIPTION CLAUSE:** The MOA shall be signed by at least 2 and 7 subscribers in case of private & public companies respectively. Each signature shall be attested by at least 1 witness. Every subscriber is deemed to be a member. A subscriber cannot repudiate his liability on the ground of misrepresentation in prospectus. Subscribers agree to subscribe the prescribed no of shares stated against their name in the memorandum. The statutory requirements regarding subscription of memorandum are that: - Each subscriber must take at least 1 share. – Each subscriber write opposite his name the no. of shares which he agreed to take.

**5.3. 2.2: Alteration of Memorandum of Association**

The Memorandum of Association is a document which sets out the constitution of the company and is the foundation on which the structure of the company stands. It defines as well as confines the powers of the company. If the company enters into contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be ultra vires the company and hence void. However, the Companies Act, 2013 shall override the provisions in the memorandum of a company, if the latter contains anything contrary to the provisions in the Act. The alteration means and includes the making of additions, omissions and substitutions in the existing points of the Memorandum of Association and in different clauses of it. The memorandum of association of a company may be altered by changing its name, altering it in regard to the State in which the registered office is to be situated or its objects, altering or reorganizing its share capital, reducing its capital or making the liability of the directors unlimited. The procedure for making any alteration will require of passing the special resolution and complying with the procedure specified in the Act. The memorandum of association of a company may be altered by changing its name, regard to the state in which the registered office is to be situated, By altering its objects, By altering its share capital, By reorganizing its share capital or reducing its capital. The alteration procedure for each clause is given below:

**(a) Alteration of “Name Clause”:** Any company which wants to alter its name need to Pass Special Resolution in general meeting and the approval of Central Government is required. In order to delete the word “private” approval from central Government is not required in case of conversion of private company to public company. The copy of altered MOA, special resolution and copy of approval of central government shall be filed with the ROC within the prescribed time.

**(b) Alteration of “Registered Office Clause” of MOA:**  The alteration in registered office clause can be in different ways such as Change within local limits, Change in jurisdiction of registrar and Change of state. The procedure for alteration under different conditions is given below:

**1. Change within the same city, town or village** - The company need to Pass Board Resolution and Special resolution in general meeting of company. Notice of change has to be submitted to registrar on form INC 22 within 15 days of such change.

**2. From one state to another state**: The company need to get approval of Central Government in INC 23 . Central Government must satisfy that the alteration has the consent of the creditors, debenture-holders etc or adequate security has been provided for such discharge. The Approval should be registered with Registrar for Incorporation Certificate. Order of the Central Government shall be filed with the Registrar of each of the States. RoC shall issue a fresh certificate of incorporation indicating the alteration.

**3. From one city, town or village to another involves change in jurisdiction of ROC:** The company shall pass a special resolution and to get confirmation by Regional Director Communication of confirmation by Regional Director to the company within 30 days. Company should file the confirmation with the Registrar within 60 days. The RoC must certify within 30 days and certificate shall be the conclusive evidence

**(c)Alteration of “Objects” clause:** The procedure for alteration in the object clause by passing a special resolution in general meeting and file a copy of Special Resolution with the Registrar who shall within a period of 30 days. Such resolution shall also be published in the newspapers and shall also be placed on the website and the dissenting shareholders shall be given an opportunity to exit.

**(d) Alteration of “Liability Clause”:** The alteration in the liability clause of memorandum can be done by passing the special resolution and should be filed with the Registrar of Companies. It does not affect any debts, liabilities etc. incurred before alteration. Unlimited company to provide for reserve share capital on conversion into limited company. In case company increase the nominal amount of its share capital then provide a specified portion which shall be called only at the time of winding up.

**(e) Alteration of “Capital Clause” of MOA:** Section 61 provide that in case of alteration of capital clause is authorized by the Articles of Association than by passing the ordinary resolution, capital can be altered. If the division or consolidation in capital and if the voting % gets affected then a confirmation from Tribunal is mandatory. The company shall notify the alterations made and a copy of Resolutions passed shall be filed with Registrar within 30 days. The registrar shall record the notice and make alterations required. The alteration in capital clause include increase its authorized capital, consolidate existing shares, convert fully paid-up shares into stock, sub-divide its shares and cancel shares which have not been taken.

**5.3. 3: Articles of Association**

Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this act. It also includes the regulations contained in Tables F to J in Schedule 1 of this Act, in so far as they apply to the company. The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles. The memorandum lays down the scope and powers of the company and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members.

**5.3. 3.1: Articles of association of a company:** The articles of association of a company are its rules and regulations, which are framed to manage its internal affairs. The articles of association has significant position in the company functioning and documentation because articles provide the manner in which the objects are to be carried out. It is business document regulates the domestic management of a company and bye-laws of the company. 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.

**5.3. 3.2: Contents and model of articles of association:**

 Articles generally contain provision relating to the following matters; (1) the exclusion, whole or in part of Table A; (ii) share capital different classes of shares of shareholders and variations of these rights (iii) execution or adoption of preliminary agreements, if any; (iv) allotment of shares; (v) lien on shares (vi) calls on shares; (vii**)** forfeiture of shares; (viii) issue of share certificates; (ix) issue of share warrants; (x) transfer of shares; (xi) transmission of shares; (xii) alteration of share capital; (xiii) borrowing power of the company; (xiv) rules regarding meetings; (xv) voting rights of members; (xvi) notice to members; (xvii) dividends and reserves; (xviii) accounts and audit; (xix) arbitration provision, if any; (xx) directors, their appointment and remuneration; (xxi) the appointment and reappointment of the managing director, manager and secretary; (xxii) fixing limits of the number of directors (xxiii) payment of interest out of capital; (xxiv) common seal; and (xxv) winding up.

**Main points in content**

a) Contain the regulations for management of the company.

b) The articles may contain provisions for entrenchment (to protect something) and entrenchment shall only be made either on formation of a company or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

c) In case company does not have its articles of association or they are silent on any provision, then company may adopt all or any of the regulations contained in the model articles given in companies Act 2013.

**5.3. 3.3: Alteration of Articles of Association and its limitations**

A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Any alteration so made shall be as valid as it originally contained in the articles.

The alteration in the Article of association can be done in the following manner:

1. The company need to pass Special resolution in general meeting to give effect to the changes in article of association.

2. Alteration to include conversion of private company into a public company vice versa

3. Where a private company removes restrictions, from the date of such alteration cease to be a

private company

4. Conversion public company to private requires approval of the Tribunal (CG for time being)

5. Shall file with the Registrar copy of the altered articles within 15 days

6. Altered articles are valid as if it were originally contained in the articles.

7. Every alteration made in articles of a company shall be noted in every copy of the articles

8. A company cannot deprive itself of these powers (Andrews vs. Gas Meter Co).

**5.3. 3.4 Limitations to alteration:**

There are following limitations for making the alteration in AOA:

* The alteration must not exceed the powers given by MOA
* It must not be against any provisions of the Companies Act.
* It must not be against to any provisions of any other law
* The alteration shall not be illegal or opposed to public interest.
* It must be for the benefit of the company as a whole.
* The alteration must not be against to an order of the court.
* The articles should not be in fraud on minority
* For converting a Public Co. into a Private Co., the approval of the C.G. is necessary.

**Difference between MOA vs AOA**

1. MOA explain that company **o**bject clause state the purposes for which the Co. has been established where as AOA Manner in which the objects are to be carried out.

**2. MOA** contents in total it contains 6 clauses.**AOA** contains many rules and regulations.

**3. MOA** are the most important document equivalent to the ‘Constitution’ where as **AOA** is equivalent to ‘bye-laws’.

4. It is provided that the objects which are Ultravires the MOA is fully void and cannot be ratified. However, ultra vires the Articles but within MOA can be confirmed by the share holders of the company.

5. MOA can’t include any clause contrary to the provisions of the companies Act. Whereas AOA can’t include any clause contrary tothe provisions of the Act & MOA.

**5.3. 3.5: Binding effects of MOA & AOA**

 The MOA and AOA has binding effect on the company, members and person dealing with company. These effect can be explained as below:

**1. Between the members and the company**: MOA and AOA constitute a contract between the members and the company and members are bound to the company under a statutory contract. In the case of Borland’s Trustee VS. Steel bros & co. ltd, AOA states member’s shares should be sold only to other member. Held, Trustee was bound by Articles, as Shares were purchased in terms of AOA of the Company.

**2. Between the company and the members**: One of the opinions is that it binds in the same way as its members are and another opinion is that the company is not wholly bound. It is bound to the extent to prevent any breach of the article as to rights of a member.

**3. Between the members inter-se:** No express agreement yet each and every member of the company is bound by the Memorandum and the Articles. The articles can’t regulate the rights arising out of commercial contract.

**4. Between the company and the outsiders:** MOA and AOA do not constitute a contract between the company and outsiders. Neither the company nor the members are bound by the Articles to outsiders.

**5.3.4: Doctrine of constructive notice**

The Doctrine of Constructive notice explain that MOA & AOA are Public documents person dealing with company is assumed as read the M&A. Person dealing cannot argue that he is not aware of the provisions of the M&A. It operates in favour of the company and against the person who failed to enquire. In the case of KOTLA VENKATA SWAMY VS. RAM MURTHY’S CASE, Articles require deeds signed by the MD, Secretary and Director. Plaintiff accepted deed of mortgage signed by the secretary and a working director only. It was held that the plaintiff could not claim anything under this deed.

**5.3.5: Doctrine of Indoor Management (Or) Turquand rule.**

This doctrine is an exception to the doctrine of constructive notice. Persons presumed to have read the M&A and to see that the proposed dealing is not inconsistent therewith but they need not do more. They can presume that all this was done regularly Royal British bank Vs. Turquand, Directors were authorized to borrow on bonds by obtaining approval of shareholders Directors issued a bond to ‘T’ without such approval. It was held, that ‘T’ could sue the company on the strength of the bond.

**Conditions for applicability of Doctrine of Indoor Management:**

a) The person dealing with the company must have the knowledge of the MOA and AOA

b) The person dealing with the company must not have the knowledge of irregularity.

c) The person dealing with the company must not be put upon an enquiry.

d) There must be some procedural or internal irregularity.

e) There must not be any ultra-vires act or illegality.

**Exceptions of Doctrine of Indoor Management:**

a) Acts done in the name of the company are void ab initio,

b) Cannot apply to forgery which must be regarded as nullity.

c) If an officer of a company makes a contract with a third party and if such act of the officer falls outside his ordinary authority

d) Person dealing with the company acted negligently

**5.3.6: Doctrine of ultra vires & its effects**

 Memorandum of association is considered to be the constitution of the company. It sets out the internal and external scope and area of company’s operation along with its objectives, powers, scope. A company is authorized to do only that much which is within the scope of the powers provided to it by the memorandum. A company can also do anything which is incidental to the main objects provided by the memorandum. Anything which is beyond the objects authorized by the memorandum is an ultra-vires act. The doctrine of ultra-vires first time originated in the classic case of **Ashbury Railway Carriage and Iron Co. Ltd. v. Riche**, (1878) L.R. 7 H.L. 653, which was decided by the House of Lords. In this case the company and M/s. Riche entered into a contract where the company agreed to finance construction of a railway line. Later on, directors repudiated the contract on the ground of its being ultra-vires of the memorandum of the company. Riche filed a suit demanding damages from the company. According to Riche, the words “general contracts” in the objects clause of the company meant any kind of contract. Thus, according to Riche, the company had all the powers and authority to enter and perform such kind of contracts. Later, the majority of the shareholders of the company ratified the contract.  However, directors of the company still refused to perform the contract as according to them the act was ultra-vires and the shareholders of the company cannot ratify any ultra-vires act.

When the matter went to the House of Lords, it was held that the contract was ultra-vires the memorandum of the company, and, thus, null and void. Term “general contracts” was interpreted in connection with preceding words mechanical engineers, and it was held that here this term only meant any such contracts as related to mechanical engineers and not to include every kind of contract. They also stated that even if every shareholder of the company would have ratified this act, then also it had been null and void as it was ultra-vires the memorandum of the company. Memorandum of the company cannot be amended retrospectively, and any ultra-vires act cannot be ratified.

**Purpose of the doctrine of ultra-vires:** This doctrine assures the creditors and the shareholders of the company that the funds of the company will be utilized only for the purpose specified in the memorandum of the company. In this manner, investors of the company can get assured that their money will not be utilized for a purpose which is not specified at the time of investment. If the assets of the company are wrongfully applied, then it may result into the insolvency of the company, which in turn means that creditors of the company will not be paid. This doctrine helps to prevent such kind of situation. This doctrine draws a clear line beyond which directors of the company are not authorized to act. It puts a check on the activities of the directors and prevents them from departing from the objective of the company.

**Difference between an Ultra-Vires and an Illegal act:** An ultra-vires act is entirely different from an illegal act. People often mistakenly use them as a synonym to each other, while they are not. Anything which is beyond the objectives of the company as specified in the memorandum of the company is ultra-vires. However, anything which is an offense or draws civil liabilities or is prohibited by law is illegal. Anything which is ultra-vires, may or may not be illegal, but both of such acts are void-ab-initio.

**The doctrine of ultra-vires in Companies Act, 2013**: Section 4 (1)(c) of the Companies Act, 2013, states that all the objects for which incorporation of the company is proposed any other matter which is considered necessary in its furtherance should be stated in the memorandum of the company. Whereas Section 245 (1) (b) of the Act provides to the members and depositors a right to file a application before the tribunal if they have reason to believe that the conduct of the affairs of the company is conducted in a manner which is prejudicial to the interest of the company or its members or depositors, to restrain the company from committing anything which can be considered as a breach of the provisions of the company’s memorandum or articles.

### Basic principles regarding the doctrine

1. Shareholders cannot ratify an ultra-vires transaction or act even if they wish to do so.
2. Where one party has entirely performed his part of the contract, reliance on the defense of the ultra-vires was usually precluded in the doctrine of estoppel.
3. Where both the parties have entirely performed the contract, then it cannot be attacked on the basis of this doctrine.
4. Any of the parties can raise the defense of ultra-vires.
5. If a contract has been partially performed but the performance was insufficient to bring the doctrine of estoppel into the action, a suit can be brought for the recovery of the benefits conferred.
6. If an agent of the corporation commits any default or tort within the scope of his employment, the company cannot defend it from its consequences by saying that the act was ultra-vires.

## Exceptions to the doctrine

1. Any act which is done irregularly, but otherwise it is intra-vires the company, can be validated by the shareholders of the company by giving their consent.
2. Any act which is outside the authority of the directors of the company but otherwise it is intra-vires the company can be ratified by the shareholder of the company.
3. If the company acquires property in a manner which is ultra-vires of the contract, the right of the company over such property will still be secured.
4. Any incidental or consequential effect of the ultra-vires act will not be invalid unless the Companies Act expressly prohibits it.
5. If any act is deemed to be within the authority of the company by the Company’s Act, then they will not be considered as ultra-vires even if they are not expressly stated in the memorandum.
6. Articles of association can be altered with retrospective effect to validate an act which is ultra-vires of articles.

## Types of ultra-vires acts and when can an ultra-vires act be ratified: Ultra-vires acts can be generally of four types:

* Acts which are ultra-vires to the Companies Act.
* Acts which are ultra-vires to the Memorandum of the company.
* Acts which are ultra-vires to the Articles of the company but intra-vires the company.
* Acts which are ultra-vires to the directors of the company but intra-vires the company.

**Acts which are ultra-vires to the Companies Act:** Any act or contract which is entered by the company which is ultra-vires the Companies Act, is void-ab-initio, even if memorandum or articles of the company authorized it. Such act cannot be ratified in any situation. Similarly, some acts are deemed to be intra-vires for the company even if they are not mentioned in the memorandum or articles because the Companies Act authorizes them.

**Acts which are ultra-vires to the memorandum of the company:** An act is called ultra-vires the memorandum of the company if, it is done beyond the powers provided by the memorandum to the company. If a part of the act or contract is within the authority provided by the memorandum and remaining part is beyond the authority, and both the parts can be separated. Then only that part which is beyond the powers is considered as ultra-vires, and the part which is within the authority is considered as intra-vires. However, if they cannot be separated then whole contract or act will be considered as ultra-vires and hence, void. Such acts cannot be ratified even by shareholders as they are void-ab-initio.

**Acts which are ultra-vires to the Articles but intra-vires to the memorandum:** All the acts or contracts which are made or done beyond the powers provided by the articles but are within the powers and authority given by the memorandum are called ultra-vires the articles but intra-vires the memorandum. Such acts and contracts can be ratified by the shareholders (even retrospectively) by making alterations in the articles to that effect.

### Acts which are ultra-vires to the directors but intra-vires to the company: All the acts or contracts which are made by the directors beyond the powers provided to them are called acts ultra-vires the directors but intra-vires the company. The company can ratify such acts and then they will be binding.

## Effects of ultra vires Transactions (Doctrine of Ultra Vires)

1. **Void ab initio:** The ultra vires acts are null and void ab initio. These acts are not binding on the company. Neither the company can sue, nor it can be sued for such acts.[Ashbury Railway Carriage and Iron Company v. Riche ].
2. Estoppel or ratification cannot convert an ultra-vires act into an intra-vires act.
3. **Injunction:** when there is a possibility that company has taken or is about to undertake an ultra-vires act, the members can restrain it from doing so by getting an injunction from the court. [***Attorney General v. Gr. Eastern Rly. Co., (1880) 5 A.C. 473***].
4. **Personal liability of Directors**: The directors have a duty to ensure that all corporate capital of the company is used for a legitimate purpose only. If such funds are diverted for a purpose which is not authorized by the memorandum of the company, it will attract a personal liability for the directors.

**Criminal Liability:** Criminal action can also be taken in case of a deliberate misapplication or fraud. However, there is a small line between an act which is ultra-vires the directors and acts which are ultra-vires the memorandum. If the company has authority to do anything as per the memorandum of the company, then an act which is done by the directors beyond their powers can also be ratified by the shareholders, but not otherwise. If any property is purchased with the money of the company, then the company will have full rights and authority over such property even if it is purchased in an ultra-vire manner.

## Effects of an act which is Ultra Vires – on borrowings

 Any borrowing which is made by an act which is ultra-vires will be void-ab-initio. It will not bind the company and company and outsiders cannot get them enforced in a court. Members of the company have power and right to prevent the company from making such ultra-vires borrowings by bringing injunctions against the company. If the borrowed funds of the company are used for any ultra-vires purpose, then directors of the company will be personally liable to make good such act. If the company acquires any property from such funds, the company will have full right to such property. No estoppel or ratification can convert an ultra-vires borrowings into an intra-vires borrowings, as such acts are void from the very beginning. As no debtor and creditor relationship is created in ultra-vires borrowings only a remedy in rem and not in personam is available.

**5.4: Directors**

 A company is an artificial person in the eyes of law which is incorporated to do certain things which are given in the MOA of company. It cannot function of its own, in order to enable a company to achieve its objects as enshrined in the objects clause of its Memorandum of Association, it has necessarily to depend upon some agency, known as Board of directors. 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 authorized 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 formulate policies and establish organisational 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.

**5.4.1:Definition of director, maximum, minimum number of directors**

 Section 2(34) of the Act prescribed that “director” means a director appointed to the Board of a company. Section 2(10), defined that “Board of Directors” or “Board”, in relation to a company, means the collective body of the directors of the company. The term ‘Board of Directors’ means a body duly constituted to direct, control and supervise the affairs of a company. As per Section 149, the Board of Directors of every company shall consist of individual only. Thus, no body corporate, association or firm shall be appointed as director. Section 166 of Companies Act, 2013, prohibits assignment of office of director to any other person. Any assignment of office made by a director shall be void.

**Minimum/Maximum Number of Directors in a Company:** Section 149(1) requires that every public company shall have minimum 3 directors and 2 in the case of a private company, and one director in the case of a One Person Company. A company can appoint maximum 15 fifteen directors. A company may appoint more than fifteen directors after passing a special resolution in general meeting and approval of Central Government is not required. The restriction of maximum number of directors shall not apply to section 8 companies.

**Number of directorships [Section 165]:** A person cannot hold more than 20 directorships, including any alternate directorship However, a person cannot be a director of more than 10 public companies or subsidiary company of a public company. Alternate directorship shall also be included while calculating the directorship of 20 companies. Section 8 company will not be counted for the purpose of maximum number of Directorship. If a person accepts an appointment as a director in contravention of this , he shall be punished with fine which shall not be less than five thousand rupees but which may extend to twenty five thousand rupees for every day after the first day during which the contravention continues.

**Indian Resident Director :** Section 149 (3) provide that every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year. In case of a newly incorporated company the requirement shall apply at the end of the financial year in which it is incorporated.

**Woman Director:** Section 149(1) provide that every listed company, every public company having paid–up share capital of one hundred crore rupees or more; or turnover of three hundred crore rupees or more shall appoint at least one woman director. The paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account. A company, which has been incorporated under the Act and is covered under provisions of section 149 shall comply with within a period of six months from the date of its incorporation. However 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.

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| --- |
| **Director elected by Small Shareholders:** According to section 151, every listed company may have one director elected by such small shareholders as explained under this Act. “Small shareholder” means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.  |

**Classification of directors ???????????**

**5.4.2:APPOINTMENT OF DIRECTORS:** Section 152 provide that first directors of companies are named in their articles and the number of directors and names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them. If they are not so named in the articles of a company, then subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. In the case of a One Person Company, an individual being a member shall be deemed to be its first director until the director(s) are duly appointed by the member in accordance with the provisions of Section 152. Section 152(1) is applicable to all companies, whether public or private. The other provisions for appointment of directors are:

1. Every director shall be appointed by the company in general meeting unless Act requires or specifies any other manner of appointment of directors.

2. Director Identification Number (DIN) is compulsory for appointment of director of a company.

3. Every person proposed to be appointed as a director shall furnish his Director Identification Number and a declaration that he is not disqualified to become a director under the Act.

4. A person appointed as a director shall on or before the appointment give his consent to hold the office of director in physical form DIR-2 i.e. Consent to act as a director of a company.

5. Company shall file Form DIR-12 along with the form DIR-2 as an attachment within 30 days of the appointment of a director and necessary fee.

6. The consent to act as director and intimation to Registrar is not required in case of section 8 company and where appointment of such director is done by the Central or State Government, as the case may be.

**5.4.2.1:Retirement by Rotation:** Section 152 provide that AOA provide for retirement of the all directors. If there is no provision in the article, then 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 by rotation and eligible to be reappointed at annual general meeting. ‘Total number of directors’ shall not include independent directors appointed on the Board of a company. Nominee directors appointed by a financial institution or by Central Government under section 408 shall not be included in the ‘total number of directors'. At the AGM of a public company 1/3rd of the retiring directors liable to retire by rotation shall retire from office in the order of their appointment as director in case appointed on same date, then on the basis of agreement among themselves or to be chosen by lot. The directors in Government Companies are not liable to retire by rotation.

**(a) Vacancy in case of retiring director:** At the AGM at which a director retires by rotation, the company may fill up the vacancy by appointing the retiring director or some other person thereto. If the vacancy of the retiring director is not so filled-up, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place. If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless a resolution for the re-appointment of such director has been put to the meeting and lost or expressed his unwillingness to be so re-appointed, or not qualified or disqualified for appointment, The appointment of directors to be voted individually is applicable to the case.

**Punishment:** If any individual or director of a company, contravenes any of the provisions of section 152, such individual or director of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first day during which the contravention continues.

**5.4.2.2:Appointment of Additional Director:** Section 161 provide that board of directors can appoint additional directors, if they are empowered by the articles of association. Regulation 66 of Table F authorizes the Board to appoint the additional directors. The number of directors and additional directors together shall not at any time exceed maximum strength fixed for the Board by the articles. Such additional directors hold office only up to the date of next annual general meeting; or last date on which the annual general meeting should have been held, whichever is earlier. If default is made in holding annual general meeting, the additional director shall vacate his office on the last day on which the annual general meeting ought to held. A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director. Section 161(1) of the Act applies to all companies, whether public or private.

**5.4.2.3:Appointment of Alternate Director:** Section 161(2) empowers the Board, if so authorized by its articles or by a resolution passed by the company in general meeting, to appoint a director to act in the absence of a original director during his absence for a period of not less than three months from India. If it is proposed to appoint an Alternate Director to an Independent Director, it must be ensured that the proposed appointee also satisfies the criteria of Independence as per section 149(6) of the Act. There is no condition that an alternate director shall be appointed only by passing a resolution at a Board meeting. Therefore, an alternate director can be appointed by passing a resolution by circulation. If the original director ceases to be a director by reason of death or vacation of office under section 167, the alternate director shall immediately cease to hold his office. The alternate director shall vacate his office when the original director in whose place he has been appointed returns to India.

**Managing director ????????????**

**Manager??????????????????**

**Unit 6:** Share Capital: Issue and allotment of shares, Buy Back of Shares, Right Issue, Book Building, Bonus Share, Demat System, Forfeiture and Surrender of Share, Provisions relating to Payment of Dividend, Investor’s Education and Protection Fund

**Unit-IV: Emerging Issues in Company Law:**

Concepts of Producer Company, One Person Company (OPC), Small Company, Associate Company, Postal Ballot, Audit Committee, Independent Director, Director Identity Number (DIN) Corporate Identity Number (CIN) MCA- 21, Online filing of Documents, Online Registration of Company, National Company Law Tribunal (NCLT), Corporate Governance, Clause 49, CSR, Insider Trading Rating Agencies

**Unit-V: Employees State Insurance Act, 1948**

Applicability of the Scheme, Definition: Personal Injury, Factory, Manufacturing Process, Wages,

partial and permanent Disablement. ESI Corporation of Dispute and Claims, Benefits.

**Unit-VI: Minimum Wages Act, 1948**

Objective and Applicability of the Act, Definitions: Employer; Wages; Employee; Fixing

Minimum Rates of Wages; Minimum Rate of Wages; Procedure for Fixing and Revising

Minimum Wages; Advisory Board; Central Advisory Board; Wages in Kind; Inspectors

**Unit-VII: Employee’s Compensation Act, 1923**

**Definition:** Dependent , Employer, partial and Total Disablement, Workmen, Injury, Accident,

Employer’s Liability for Compensation, Amount of Compensation, Contracting Commissioner.

**5.8: Key words**

**Annual General Meeting (section 96) :** Annual general meeting (AGM) is an important annual event where members get an opportunity to discuss the activities of the company. Section 96 provides that every company, other than a one person company is required to hold an annual general meeting every year.

**Articles of Association:** Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this act. It also includes the regulations contained in Tables F to J in Schedule 1 of this Act, in so far as they apply to the company.

**Abridged prospectus**. It means a memorandum containing such salient features specified by the SEBI. Every form of application issued shall be accompanied by an abridged prospectus. The objective of abridged prospectus is to reduce the cost of issue. A copy of the prospectus shall be furnished to any person on demand.

**Adjournment:** Adjournment means to defer or suspend the meeting to a future time, either at an appointed date or indefinitely or as decided by the members present at the scheduled meeting.

**Corporate Veil**: A Company is a person created by law, having a distinct entity. This principles referred as Veil of Incorporation. however, If the veil is used as a mask of fraud, then the courts will lift the veil and look at the persons behind the company.

**Special Resolution:** A resolution is a Special Resolution when it is intended to be passed as a special resolution. The votes cast in favour of such resolution by members who, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

**General Meeting:** Meeting of the members of the company with the board of directors. This may be Extra ordinary General Meeting or Annual General Meeting.

**Share Capital:** Funds raised by issuing shares in return for cash or other considerations. The amount of share capital a company can change over time because each time a business sells new shares to the public in exchange for cash, the amount of share capital will increase. Share capital can be composed of both common and preferred shares.

**Redemption of shares:** Where a company issues shares on terms stating that they can be bought back by the company. Not all shares can be redeemed, only those stated to be redeemable when they were issued. The payment for the shares must generally come from reserves of profit so that the capital of the company is preserved.

**Sweat Equity Shares:** Sweat equity shares mean equity shares issued by a company to its employees or directors at a discount or for consideration, other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

**Rights Issue:** Rights issue is an issue of capital to be offered to the existing shareholders of the company through a letter of offer.

**Bonus Shares:** When a company is prosperous and accumulates large distributable profits, it converts these accumulated profits into capital and divides the capital among the existing members in proportion to their entitlements. Members do not have to pay any amount for such shares. A company may, if its Articles provide, capitalize its profits by issuing fully-paid bonus shares

**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.

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

**Small Company:** small company means a company, other than a public company, 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 ten crore rupees; and turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

**Private Company**: means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, restricts the right to transfer its shares, except in case of One Person Company, limits the number of its members to two hundred. It is 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.

**Public Company**: means a company which is not a private company and has a minimum paid-up share capital , as may be prescribed. It is 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;

**Holding Company**: in relation to one or more other companies, means a company of which such companies are subsidiary companies.

**Subsidiary Company**: subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company which controls the composition of the Board of Directors; or exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

**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.

**Body Corporate: It** includes a company incorporated outside India, but does not include a co-operative society registered under any law relating to co-operative societies; and any other body corporate, which the Central Government may, by notification, specify in this behalf.

 **Foreign Company**: It means any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode; and conducts any business activity in India in any other manner.

**Listed Company**: means a company which has any of its securities listed on any recognised stock exchange.

**Government Company: It** means any company in which not less than fifty-one percent 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.

**Banking Company**: means a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949.

**Financial Institution**: includes a scheduled bank, and any other financial institution defined or notified under the Reserve Bank of India Act, 1934.

**Prospectus:** Any document described or issued as prospectus and includes A red herring prospectus or Shelf prospectus or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.

**Memorandum of Association**: Memorandum of Association (MOA) is the Charter (Constitution) of the company. It is the main document of the company and no company can be incorporated without MOA. It not only define what a company can do and but also what it cannot do.

**Directo**r: director” means a director appointed to the Board of a company.

**Extra Ordinary General Meeting: T**here are so many matters relating to the business of a company, which requires approval or consent of members in general meeting. It is always not possible for consideration of such matters to wait until the next annual general meeting.

**Class Meetings :** Meetings of members of a company fall into two broad divisions, namely, general meetings and class meetings. Class meetings are meeting of shareholders, holding a particular class of share which is held to pass resolution which will bind only the members of the class concerned.

**Ordinary Resolution:** A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting.

**Proxy:** Proxymeans an instrument in writing authorizing another person to attend on behalf of member. Every member entitled to attend and vote meeting are entitled to appoint a proxy. In case of company having no share capital cannot not apply for proxy unless articles provide otherwise.

**Minutes :** These are written record of business transacted at a meeting and contain a fair and correct summary of the proceedings. The section 118 provide that preparation of the minutes of the proceedings of meetings: every company shall cause minutes of the proceedings of every general meeting, resolution passed by postal ballot and meeting of its Board of Directors or committee to be prepared and signed within 30 days of the conclusion. Minutes shall contain a fair and correct summary of the proceedings there at.

**Winding up :** Winding up of a company is a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors.

**5.9 : Text questions**

1. **What is company ? Explain the features of a company.**
2. **Explain different types of companies and differentiate between public and private company.**
3. **What do you understand by the corporate veil and exceptions of it?**
4. **What is the process of incorporation of company and certificate of incorporation is the conclusive evidence of incorporation.**
5. **Who is promoter? Discuss his position and his liabilities.**
6. **What is prospectus? Explain its contents and golden rule of prospectus.**
7. **What is MOA and explain the different clauses of it?**
8. **What is the procedure for alteration in different clauses of MOA?**
9. **What is AOA and its contents? Explain the procedure of alteration in AOA.**
10. **What do you understand by the term director? How is he appointed?**
11. **What are the qualifications and disqualifications of Director?**
12. **You are required to explain the circumstances when director has to vacate his office.**
13. **What are the provisions of BOD meetings?**
14. **What is AGM? Explain the procedure for holding it.**
15. **Explain EGM and procedure for holding it.**
16. **Explain Agenda, Special and ordinary resolution, Proxy and minutes of meetings.**
17. **What is winding up of a company and is it different from dissolution?**
18. **What are the types of winding of company? Explain winding up by tribunal?**
19. **Who is liquidator ? Explain his powers and duties.**
20. **What is Share capital and explain the issue of shares on premium and dicount.**

**5.10: Further readings**

* J.P. Sharma, An Easy Approach to Company , Ane Books Pvt Ltd, New Delhi.
* Dagar Inderjeet, Agnihotri Anurag, Corporate Laws, Galgotia publishing company Delhi
* K.L.Malik, Industrial Laws and Labour Laws, Eastern Book company, Luckhnow.
* Companies Act and Corporate Laws, Bharat Laws House Pvt LTd, New Delhi.
* Company Law Digest, Bharat Law House Pvt Ltd, New Delhi.