Legal Aspects of Business

Unit- 4

The Companies Act

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Content

- Definition, characteristics and kinds of companies, steps in formation of company.
- Memorandum of association, articles of association and prospectus.
- Directors: appointment, power, duties and liabilities, meeting and resolutions: types of meetings. Auditor: appointment, rights and liabilities. Modes of winding up of a company

Company

Definition of a "Company"

- A company is a "corporation" - an artificial person created by law.
- A human being is a "natural" person.
- A company is a "legal" person.
- A company thus has legal rights and obligations in the same way that a natural person does.

According to Section 3(1) (i) and (ii) of the Companies Act 1956, a company means, “A company formed and registered under this Act or an existing company. An existing company means a company formed and registered under any of the former Companies Act. ”

The Act provides the procedure of forming and registering a company. Once registered or incorporated, a company becomes a ‘body corporate’.

A company may be defined as an incorporated association which is an artificial person having a separate legal entity, with a perpetual succession, a common seal, a common capital comprised of transferable shares and carrying limited liability.

The term 'body corporate', as defined in Sec. 34(2) of the Act, has the following characteristics:

- It is an association of persons,
- Each such person contributes some money,
- Money is contributed for some purpose
- It has a separate legal entity. It is an artificial person created by law.
- It has a perpetual succession, i.e., once formed it continues to exist until it is wound up by the legal procedure,
- It has a common seal, bearing it name
- The members of the association have as much liability at the time of its winding up as decided by them.

Advantages of Incorporation

- **Independent corporate existence-the** outstanding feature of a company is its independent corporate existence. By registration under the Companies Act, a company becomes vested with corporate personality, which is independent of, and distinct from its members. A company is a legal person.

- **Limited liability-** limitation of liability is another major advantage of incorporation. The company, being a separate entity, leading its own business life, the members are not liable for its debts. The liability of members is limited by shares; each member is bound to pay the nominal value of shares held by them and his liability ends there.

- **Perpetual succession-** An incorporated company never dies. Members may come and go, but the company will go on forever.
- **Common seal-** Since a company has no physical existence, it must act through its agents and all such contracts entered into by such agents must be under the seal of the company. The common seal acts as the official seal of the company.
- **Separate property-**The property of an incorporated company is vested in the corporate body. The company is capable of holding and enjoying property in its own name. No members, not even all the members, can claim ownership of any asset of company' assets.
- **Capacity for suits-** A company can sue and be sued in its own name. The names of managerial members need not b impleaded

Disadvantages of Incorporation

- **Lifting of corporate veil-** though for all purposes of law a company is regarded as a separate entity it is sometimes necessary to look at the persons behind the corporate veil.

- **Formality and expense-** Incorporation is a very expensive affair. It requires a number of formalities to be complied with both as to the formation and administration of affairs.

Types of Companies

Companies:

- (1) Unincorporated
- (2) Incorporated

(i) Chartered Companies

(ii) Statutory Companies

(iii) Registered Companies

(a) Companies limited by shares : Public & Private

(b) Companies Limited by Guarantee : Public & Private

(c)Unlimited Companies : Public & Private

- **Unincorporated Company**: This type describes a **company** that has not been legally registered as a **company** with the relevant state authorities. Unlike an incorporated **business**, which has an independent legal existence, **unincorporated companies** are not distinct from their owners.
- **Incorporated Company:** An **incorporated company** is a separate legal entity on its own, recognized by the law. These corporations can be identified with terms like 'Inc' or 'Limited' in their names. It becomes a corporate legal entity completely separate from its owners.

Chartered Companies: A form of trading **company** that developed from the European medieval trading guilds and was prominent in the late 16th and 17th centuries. The discovery by explorers of India and America stimulated individual merchants into forming groups, safeguarded by royal **charter** in order to monopolize trade.

These companies are established under a charter or a special order of a monarch or a king or a queen. ... Royal Chartered Company is another name of the chartered companies. Bank of England, East India Company, British Broadcasting Corporation (BBC), etc. are some examples of chartered companies.

In India, this form of organization does not exist now because there is no monarchy. Even in England, this method is rarely used now

Statutory Companies: In this case, a special law is passed to establish the company. This is done only in special cases when it is necessary to regulate the working of the company for some specific purposes. These are public enterprises brought into existence by a Special Act of the Parliament. The Act defines its powers and functions, rules and regulations governing its employees and its relationship with government departments.

Formerly used to incorporate public utilities such as **gas, electricity and railways.**

Registered Companies: Companies registered under the Companies Act, 1956 or the earlier Companies Acts are called registered companies. Such companies come into existence when they are registered under the Companies Act and a Certificate of Incorporation is granted to them by the Registrar.

Registration is the most commonly used means of forming a company and virtually the only method now used to form a trading company.

CA 1985, s.1(1): "Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability."

Companies limited by shares: The most common kind of registered company.

Members of the company take shares issued by the company. Each share is assigned a nominal value - the amount that must be paid to the company for the share. Members may also agree to pay an extra amount - called a premium.

When the company is registered, its memorandum must state the total nominal value of all the shares it is going to issue (called the registered capital, or nominal capital or authorized share capital).

Companies Limited by Guarantee: It is a registered company public or private, in which the liability of members is limited to such amounts as they may respectively undertake by the memorandum to contribute to the assets of the company in the events of its being wound up.

Members agree to contribute a specified amount to the company's assets in the event of the company being wound up. (Total amount payable by all members is called the "guarantee fund")

Members do not have to pay anything as long as company is a going concern - so company has no contributed capital. Companies limited by guarantee are not usually formed for business ventures.

A company limited by Guarantee is often referred to as a 'not for profit' or 'Charitable company', this refers to the fact the parties involved do not remove the profit from the company as shareholders can in a company limited by shares. Any profit made by the company is re-used for the good of the business

Unlimited Companies: A Company not having any limit on the liability of its members is termed as unlimited company.

Members have unlimited liability (If company is being wound up, members can be made to contribute to the company's assets without limit to enable it to pay its debts.)

Cannot be public companies.

Can be set up with or without a share capital

Private Company: According to Section 3(1)(iii) of the Companies (Amendment)Act,2000, a private company means a company which:

(a) has a minimum paid up capital of one lakh rupees or such higher amount as may be prescribed by the Government,

(b) has a minimum of 2 and maximum of members excluding employees;

(c) restricts the right of members to transfer its shares , if any;

(d) prohibits any invitation to the general public to subscribe for its shares or debentures;

(e) does not invite the public to subscribe to its deposits.

E.g.:- Ambika Industries Pvt. Ltd., Paras Pharmaceutical Pvt. Ltd. etc.

Public Company: According to Section 3(1)(iv) of the Companies (Amendment)Act,2000, a public company means a company which:

(a) is not a private company; and

(b) has a minimum paid up capital of five lakh rupees or such higher amount as may be prescribed by the Government.

E.g.:-Reliance Industries Ltd., Tata Iron & Steel Co. Ltd

BASIS FOR COMPARISON	Public Company	Private Company
Meaning	A public company is a company which is owned and traded publicly	A private company is a company which is owned and traded privately.
Minimum Members	7	2
Maximum Members	Unlimited	50
Minimum Directors	3	2
Suffix	Limited	Private Limited
Start of business	After receiving certificate of incorporation and certificate of commencement of business	After receiving certificate of incorporation
Statutory Meeting	Compulsory	Optional
Public subscription	Allowed	Not allowed
Transfer of shares	Free	Restricted

Some other Types

One Person Company (OPC):

- Section 2(62) of Companies Act defines a one-person company as a company that has only one person as to its member. Furthermore, members of a company are nothing but subscribers to its memorandum of association, or its shareholders. So, an OPC is effectively a company that has only one shareholder as its member.
- Such companies are generally created when there is only one founder/promoter for the business. Entrepreneurs whose businesses lie in early stages prefer to create OPCs instead of sole proprietorship business because of the several advantages that OPCs offer.

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Difference between OPC and Sole Proprietorship

OPC	Sole Proprietorship
Separate legal entity	Owner & entity is same personality
Limited Liability	Unlimited Liability
Debt-not the sole responsibility of the owner	Debt- sole responsibility of the owner
Finance-credit record of the company	Finance- credit history of the owner
Legal requirements- will need to register itself as such	Legal requirements- will not have to draw up proper declaring its status
Separate tax	Tax paid by the owner

Features of a One Person Company

- **Private company:** Section 3(1)(c) of the Companies Act says that a single person can form a company for any lawful purpose. It further describes OPCs as private companies.
- **Single-member:** OPCs can have only one member or shareholder, unlike other private companies.
- **Nominee:** A unique feature of OPCs that separates it from other kinds of companies is that the sole member of the company has to mention a nominee while registering the company.
- **No perpetual succession:** Since there is only one member in an OPC, his death will result in the nominee choosing or rejecting to become its sole member. This does not happen in other companies as they follow the concept of perpetual succession.
- **Minimum one director:** OPCs need to have minimum one person (the member) as director. They can have a maximum of 15 directors.
- **No minimum paid-up share capital:** Companies Act, 2013 has not prescribed any amount as minimum paid-up capital for OPCs.
- **Special privileges:** OPCs enjoy several privileges and exemptions under the Companies Act that other kinds of companies do not possess.

Small Company

- "**Small Company**" has been introduced for the first time by the Companies Act, 2013. The Act identifies some companies as small companies based on their capital and turnover position for the purpose of providing certain relief/exemptions to these companies. Most of the exemptions provided to a small company are same as that provided to a one person company. The Act also provides for a simplified scheme of arrangement between two small companies, without requiring the approval of Tribunal, i.e. with the approval of Central Government (Regional Director).

Section 2(85) defines a Small Company as

‘small company” means a company, other than a public company,—

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five Crore rupees; or

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

Provided that nothing in this Section shall apply to—

(A) a holding company or a subsidiary company;

(B) a company registered under Section 8; or

(C) a company or body corporate governed by any special Act;

Dormant Company

As per Section 455 of Companies Act, 2013

The word “Dormant” means inactive or inoperative. A dormant company is an excellent opportunity to start a company for a future project or hold an asset/intellectual property without having significant accounting transactions* On the other hand if a company has not filed its annual returns for two consecutive years then such a company will also be called as a dormant company.

*Significant accounting transactions would mean transactions other than the basic procedural transactions i.e. the payment of fees by a company to the Registrar and also payments to fulfill the requirements of this Act or any other law, allotment of shares to fulfill the requirements of this Act and payments for maintenance of its office and records.

Why dormant companies?

- Invest now shine later serves as a core policy of dormant companies. The companies are in a position to hold assets or intellectual property and use it later and why would they do this? Cost Advantage is the reason for it.
- Well, the restart is always better than a fresh start and dormant companies offer this advantage. So if a company chooses to take a backseat for a good reason then they can always restart when they want to, without further procedures subject to certain conditions.
- The longer you exist the greater you are valued. So as a dormant company, the company may not be active but it still has a status of a company in the eyes of law.

Examples

Company	RoC	Status
NCORE TECHNOLOGY PVT LTD	Hyderabad	Dormant
PRINECY LANDHOLDINGS PRIVATE LIMITED	Ernakulam	Dormant
GOOD LEAF TRADERS PRIVATE LIMITED	Cuttack	Dormant

Association not for profit

Not-for-Profit Organisations are the establishments that are for utilized for the welfare of the community and are set up as charitable associations which operate without any motive for profit. Their primary objective is to furnish service to a specific class or the public at the larger picture. Usually, they do not produce, buy or sell commodities and may not have credit transactions. Therefore, they need not manage many books of account (as the trading entities do) and Trading and Profit & Loss Account. The funds raised by such establishments are credited to the general fund or capital fund. The major sources of their income usually are subscriptions from their member's donations, income from investments, etc.,

Illegal association

- According to section 11 every association consisting of more than 10 persons in banking business and 20 in the case of any other business must either be registered as a company under the Companies Act or be formed according to the provisions of some other Indian Law. An association not so registered is an illegal association having no legal existence.
- An **illegal** association is an association of more than 20 persons (10 in case of banking business) which carries a business without being registered under any law.

Formation of company

STEPS, DOCUMENTS AND INFORMATION REQUIRED FOR INCORPORATION OF A COMPANY UNDER THE COMPANIES ACT, 2013

- Reservation of Company Name
- Drafting of MOA & AOA
- Application for Incorporation of Companies
- Documents to be filed for Incorporation
- Particulars of first directors of the company and their consent to act as such
- Notice of Situation of Registered Office
- Payment of Fee
- Certificate of incorporation

Reservation of Company Name

First, the applicants are required to apply for a name in Form No. INC-1. The fee for seeking a name approval is Rs.1000/- as prescribed and 60 days are allowed for incorporating the company. The name should not be undesirable i.e.; identical, resembling, restricted or prohibited.

Drafting of MOA & AOA

The memorandum (MOA) should be drafted keeping in mind the provisions of section 4 of The Companies Act, 2013 and objects should not be contrary to those as per Form No. INC-1. The Model MOA as prescribed in Table A to E of Schedule I of The Companies Act, 2013 can be adopted as applicable

- **Application for Incorporation of Companies** After obtaining availability of name (see sample name approval certificate, applicants should file Form No. INC-7 for other than OPC and in Form No. INC-2 (for OPC) with Jurisdictional Registrar of Companies (ROC) along with required information in attachments and along with prescribed fee.

Documents to be filed for Incorporation

Section-7 prescribes the various documents and information to be filed with RoC for registration of a new company as under:

(1) MoA and AoA duly signed and verified.
(2) Declaration by Professionals INC-08 .
(3) Declaration from Director, Manager or Secretary.
(4) Affidavit from each subscribers and first directors INC-09.
(5) The address for correspondence.
(6) Complete Details of Subscribers with proof of identity.
(7) Complete Details of first Directors with proof of identity.
(8) Particulars of interest of first directors in other firm/body corporate and NoC.

Particulars of first directors of the company and their consent to act as such

The particulars of first directors of the company and his interest in other firms or bodies corporate along with his consent (Form DIR.2) to act as director of the company shall be filed in Form No.DIR.12 along with the prescribed fee.

Notice of Situation of Registered Office

The particulars of the registered office of the company should be filed in Form No. INC-22.

Payment of Fee

While uploading various documents prescribed fee can be paid online including stamp duty for MoA

Certificate of incorporation

- After the RoC is satisfied that all documents and information which is required has been filed in the prescribed manner and along with prescribed fee, the Certificate of Incorporation shall be issued by the Registrar in Form No. INC-11
- Every company must have a registered office from the day it starts its business or within 30 days of getting the Certificate of Incorporation, whichever is earlier. Memorandum of Association must state the name of the State in which the registered office of the company is situated.
- This clause is important as it mentions the residence for the purpose of the communication with the company. It determines the jurisdiction of the company and also mentions the place where all the records of company are maintained. Where the company wants to change its registered office from one state to another then it can do so by passing a special resolution as well as by confirmation of Company Law Board

E-filing of documents/ on-line filing of documents

- The filing of forms (e -forms) with ROC can be done from one's home or office through the Internet. There is no need to visit the ROC's office for filing various documents.
- The payment of filing fees can also be made over the Internet through credit card/Internet banking without queuing up at the banks.
- The filing will be valid only when filing fee is paid.
- Pre -scrutiny of filled -up forms is done in the portals before final submission.
- Many of these e -forms require certification by CA/CWA/CS (in whole time practice). Certification must be done by signing digitally.
- DIN (Directors Identification Number) is compulsory for all directors.
- Every signatory of e -form must obtain DSC (Digital Signature Certificate).

The Process of e -filing

- Download a blank e -form from the MCA -21 portal.
- Fill up the e -form off line using software that is free and widely available.
- Optionally carry out electronic pre -scrutiny in which the system will verify whether the form has been completed in all respects.
- The form to be digitally signed by one or more signatories.
- Submit the e -form for processing to the MCA -21 portal.
- Make necessary payments to complete the transaction either at an authorized bank branch or through Internet banking.

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Advantages of e -filing

Advantages to Corporate and Professionals

- Documents can be filed without visiting the ROC office.
- There is no need to stand in long queues for filing documents or paying filing fees.
- Filing will be open on a 24 x 7 basis. This affords one the flexibility to do this work at one's convenience.
- Pre -scrutiny of forms filed will be done in the portals itself at the point of filing. So, once the form is filed, a need to interact with ROC personnel to rectify deficiencies in filings will be minimized to a great extent.
- Filing fees can be paid from the comforts of one's office/home using credit card/Internet banking.

Advantages to the Public

- To the public, the portal offers inspection of documents filed by companies on a 24 x 7 basis from the comforts of one's home/office.

Advantages to the Government:

- Better utilization of existing staff and space resources.
- The DIN (which is compulsory for all existing and prospective directors to obtain) will help enforce accountability of directors.
- Time and energy spent in accepting documents, filing them, corresponding with companies will be drastically reduced and channelized towards taking action against errant corporates.

Memorandum of association

One of the essentials for the registration of a company is memorandum of association (sec 33). It is the first step in the formation of a company. Its importance lies in the fact that it contains the fundamental clauses which have often been described as the conditions of the company's incorporation.

The Memorandum of Association or MOA of a company defines the constitution and the scope of powers of the company. In simple words, the MOA is the foundation on which the company is built.

Object of registering a Memorandum of Association or MOA

- The MOA of a company contains the object for which the company is formed. It identifies the scope of its operations and determines the boundaries it cannot cross.
- It is a public document according to Section 399 of the Companies Act, 2013. Hence, any person who enters into a contract with the company is expected to have knowledge of the MOA.
- It contains details about the powers and rights of the company.

Printing and signing of Memorandum (Sec. 15)

- It is mandatory for every company to print its Memorandum of Association and have it signed by each of its members. The address, occupation and shares held by each member of the company must also be mentioned in this charter.

- For the formation of a Private Limited Company, a minimum of 2 members are necessary. For a Public Company, it is 7. In case of a One Person Company, the nominee has to be stated in the Memorandum of Association as in case of death of the founding member or his incapacity to perform, the legal rights of the company will be transferred to him or her.

Contents of Memorandum

1. **Name Clause**

Promoters of the company have to make an application to the registrar of Companies for the availability of name.

The company can adopt any name if :

i) There is no other company registered under the same or under an identical name;

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

For a public limited company, the name of the company must have the word ‘Limited’ as the last word

For the private limited company, the name of the company must have the words ‘Private Limited’ as the last words.

This is not applicable to companies formed under Section 8 of the Act who must include one of the following words, as applicable:

a) Foundation
b) Forum
c) Association
d) Federation
e) Chambers
f) Confederation
g) Council
h) Electoral Trust, etc.

. Registered Office Clause

- It must specify the State in which the registered office of the company will be situated.
- Every company must have a registered office either from the day it begins to carry on business or within 30 days of its incorporation, whichever is earlier, to which all communications and notices may be addressed.
- Notice of the situation of the registered office and every change shall be given to the Registrar within 30 days after the date of incorporation of the company or after the date of change. If default is made in complying with these requirements, the company and every officer of the company who is default shall be punishable with fine which may extend to Rs. 50 per during which the default continues.

. Object Clause

- This is the most important clause in the memorandum because it not only shows the object or objects for which the company is formed but also determines the extent of the powers which the company can exercise in order to achieve the object or objects.
- In the case of companies which were in existence immediately before the commencement of the Companies (Amendment) Act. 1965, the object clause has simply to state the objects of the company. But in the case of a company to be registered after be amendment, the objects clause must state separately.

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

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

While drafting the objects clause of a company the following points should be kept in mind.

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

ii) The objects of the company must not be against the provisions of the Companies Act such as buying its own shares (Sec. 77), declaring dividend out of capital etc.

iii) The objects must not be against public, e.g. to carry on trade with an enemy country.

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

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

4. Capital Clause

- Every limited company having a share capital must state the amount of its share capital with which the company is proposed to be registered and the division thereof into shares of a fixed denomination, in this clause.
- It may be any amount running into crores of rupees but denomination of each share should be Rs. 10 or 100 in the case of equity shares and Rs. 100 in the case of preference shares.
- An unlimited company having a share capital is not required to have the capital clauses in its Memorandum of Association.

5. Liability Clause

- This clause of Memorandum of Association has to state the nature of liability that the members incur. In case of a company limited by shares, the members are liable only to the amount unpaid on the shares taken by them. In the case of company limited by guarantee the members are liable to the amount undertaken to be contributed by them to the assets of the company in the event of its winding up.
- Any alteration in the memorandum of association compelling a member to take up more shares, or which increases his liability, would be null and void. (Sec 38).
- If a company carries on business for more than 6 months while the number of members is less than seven in the case of public company, and less than two in case of a private company, each member aware of this fact, is liable for all the debts contracted by the company after the period of 6 months has elapsed. (Sec. 45).

6. Association or Subscription Clause

In this clause, the subscribers declare that they desire to be formed into a company and agree to take shares stated against their names. No subscriber will take less than one share. The memorandum has to be subscribed to by at least seven persons in the case of a public company and by at least two persons in the case of a private company. The signature of each subscriber must be attested by at least one witness who cannot be any of the subscribers.

Each subscriber and his witness shall add his address, description and occupation, if any. This clause generally runs in this form : “we, the several person whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of the number of shares in the capital of the company, set opposite of our respective name”. After registration, no subscriber to the memorandum can withdraw his subscription on any ground.

Alteration, Amendment & Change in Memorandum of Association under Companies Act 2013

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

1. **Change of name**

A company may change its name by special resolution and with the approval of the Central Government signified in writing . However, no such approval shall be required where the only change in the name of the company is the addition there to or the deletion there from, of the word “Private”, consequent on the conversion of a public company into a private company or of a private company into a public company. (Sec. 21)

2. Change of Registered Office

This may involve :

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

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

c) Change of Registered Office from one State to another State to another State.

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

- **Special Resolution**

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

- **Confirmation by Central Government**

The alteration shall not take effect unless the resolution is confirmed by the Central Government.

3. Alteration of the Object Clause

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

4. Alteration of Capital Clause

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

5. Alteration of Liability Clause

Ordinarily the liability clause cannot be altered so as to make the liability of members unlimited. Section 38 states that the liability of the members cannot be increased without their consent.

A company, if authorized by its Articles, may alter its memorandum to make the liability of its directors or manager unlimited by passing a special resolution. This rule applies to future appointees only. Such alteration will not effect the existing directors and manager unless they have accorded their consent in writing. [Section 323].

- Section 32 provides that a company registered as unlimited may register under this Act as a limited company. The registration of an unlimited company as a limited company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into by the company before such registration.

Conclusion

- A Memorandum of Association is a document of vital importance in the incorporation of a company. It should be drafted with utmost sincerity. To amend and alter the name of the organisation, the office of registration, object clause, the authorized share capital of the company and any other legal liabilities, the company is required to a follow a complicated legal procedure.
- All other social responsibilities and supporting activities and range of other related activities should also be clearly stated in the Memorandum of Association to provide flexibility to undertake new projects as and when the opportunities arise.

Articles of association

- Every company is required to file Articles of Association along with the Memorandum of Association with the Registrar at the time of its registration.
- 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.

- The Articles of Association (AoA) is a document that defines the purpose of a company and specifies the regulations for its operations. The document outlines how tasks should be accomplished within an organization, including the preparation and management of financial records, and the process of director appointments.
- In framing Articles of Association care must be taken to see that regulations framed do not go beyond the powers of the company it self 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.

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

Contents of Articles of Association

Articles generally contain provision relating to the following matters; (1) the exclusion, whole or in part of Table A; (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

Alteration of Articles

- Section 31 grant power to every company to alter its articles whenever it desires by passing a special resolution and filing a copy of altered Articles with the Registrar.
- Alteration of articles is much easier than memorandum as it can be altered by special resolution. However, there are various limitations under the Companies Act to the powers of the shareholders to alter the articles.
- In case of conversion of a public company into a private company, alteration in the articles would only be effective after approval of the Central Government [Section 31].
- Alteration of the articles shall not violate provisions of the Memorandum. It must be made bonafide the benefit of the company.
- Alteration must not contain anything illegal and shall not constitute fraud on the minority.

- Alteration in the articles increasing the liability of the members can be done only with the consent of the members.
- The Court may even restrain an alteration where is likely to cause a damage which cannot be adequately compensated in terms of money. Similarly, a company cannot by altering articles, justify a breach of contract. Any alteration so made shall be valid as if originally contained in the articles.
- Where a special resolution has been passed altering the articles or an alteration has been approved by the Central Government where required, a printed copy of the articles so altered shall be filed by the company with the Registrar of Companies within one month of the date of the passing of special resolution.

Doctrine of constructive notice

- The Memorandum and Articles of a company are registered with the Registrar. These are the public documents and open to public inspection,. Every person contracting with the company must acquaint himself with their contents and must make sure that his contract is in accordance with them, otherwise he cannot sue the company.
- On registration the memorandum and articles of association become public documents. These documents are available for public inspection either in the office of the company or in the office of the Registrar of Companies on payment of one rupee for each inspection and can be copied (Sec. 610).

- Every person who deals with the company, whether shareholder or an outsider is presumed to have read the memorandum and articles of association of the company and is deemed to know the contents of these document. Therefore, the knowledge of these documents and their contents is known as the constructive notice of memorandum and articles of association.
- It is presumed that persons dealing with the company have not only read these documents but they have also understood their proper meaning.
- Where a person deals with the company in a manner, which is inconsistent with the provisions of memorandum or articles, or enters into a transaction which is beyond the powers of the company, shall be personally liable to bear the consequences regarding such dealings.

Doctrine of Indoor Management

- The doctrine helps protect external members from the company. And indeed, states that it entitles the people to presume that internal proceedings are as per documents with the Registrar of Companies.
- According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.
- Shareholders, for example, need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings.

- The doctrine of indoor management is an exception to the earlier doctrine of constructive notice. It is important to note that the doctrine of constructive notice does not allow outsiders to have notice of the internal affairs of the company.
- In simple words, the doctrine of indoor management means that a company's indoor affairs are the company's problem.

Prospectus

A prospectus is a formal document that is required by and filed with the Securities and Exchange Commission (SEC) that provides details about an investment offering to the public. A prospectus is filed for offerings of stocks, bonds, and mutual funds. The document can help investors make more informed investment decisions because it contains a host of relevant information about the investment security.

Section 2(36) defines a prospectus an “any document described as issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting orders from the public for the subscription or purchase of any share in, or debentures of, a body corporate”.

- In simple words, a prospectus may be defined as an invitation to the public to subscribe to a company's shares or debentures.
- By virtue of the Amendment Act of 1974, any document inviting deposits from the public shall also come within the definition of prospectus.
- The word "Prospectus" means a document which invites deposits from the public or invites offers from the public to buy shares or debentures of the company.

A prospectus includes some of the following information:

- A brief summary of the company's background and financial information
- The name of the company issuing the stock
- The number of shares
- Type of securities being offered
- Whether an offering is public or private
- Names of the company's principals
- Names of the banks or financial companies performing the underwriting

Objects of Prospectus

- To bring to the notice of public that a new company has been formed.
- To preserve an authentic record of the terms of allotment on which the public have been invited to buy its shares or debentures.
- The secure that the directors of the company accept responsibility of the statement in the prospectus.

Characteristics Of Prospectus

- It is a document by which the company procures its share capital needed to carry on its activities.
- It is an invitation to a member of the public
- It includes any notice, circular, advertisement inviting deposits from the public.
- It must contain full and honest disclosures.

Requirements Regarding Issue of Prospectus

Issue after Incorporation

Section 55 of the Act permits the issue of prospectus in relation to an intended company. A prospectus may be issued by or on behalf of the company.

a) by a person interested or engaged in the formation company, or

b) through an offer for sale by a person to whom the company has allotted shares.

Dating of Prospectus

A prospectus issued by a company shall be dated and that date shall be taken as the date of publication of the prospectus (Section 55). Date of issue of the prospectus may be different from the date of publication.

Registration of Prospectus

A copy of every prospectus must be delivered to the Registrar for registration before it is issued to the public. Registration must be made on or before the date of its publication. The copy sent for registration must be signed by every person who is named in the prospectus as a director or proposed director of the company or by his agent authorized in writing. Where the prospectus is issued in more than one language, a copy of its as issued in each language should be delivered to the registrar. This copy must be accompanied with the following documents:

a) If the report of an expert is to be published, his written consent to such publication

b) a copy of every contract relating to the appointment and remuneration of managerial personnel;

c) a copy of every material contract unless it is entered in the ordinary course of business or two years before the date of the issue of prospectus;

d) a written statement relating to adjustments; if any, made by the auditors or accountants in their reports relating to profits and losses, assets and liabilities or the rates of dividends, etc.; and

e) written consent of auditors, legal advisers, attorney, solicitor, banker or broker of the company to act in that capacity.

- A copy of the prospectus along with specific documents must been field with the Registrar. The prospectus must be issued within ninety days of its registration. A prospectus issued after the said period shall be deemed to be a prospectus, a copy of which has not been delivered to the Registrar for registration. The company and every person who is knowingly a party to the issue of prospectus without registration shall be punishable with fine which may extend to five thousand rupees (Section 60).

Application Forms to be Accompanied with the Copy of Prospectus

Every from of application for subscribing the shares or debentures of a company shall not be issued unless it is accompanied by a copy of prospectus except when it is issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to shares or debentures or in relation to shares or debentures which were not offered to the public [(Section 56(3)].

Section 56(5) provides that the prospectus need not contain all the details required by the Act where the offer is made to exiting members or debenture holders of the company.

Mis-statement In The Prospectus

- A prospectus is an invitation to the public to subscribe to the shares or debentures of a company. Every person authorizing the issue of prospectus has a primary responsibility to seed that the prospectus contains the true state of affairs of the company and does not give any fraudulent picture to the public.
- People invest in the company on the basis of the information published in the prospectus. They have to be safeguarded against all wrongs or false statements in prospectus. Prospectus must give a full, accurate and a fair picture of material facts without concealing or omitting any relevant fact. This is known as the ‘Golden Rule’ for framing prospectus.

- The statements which do not qualify to the particulars mentioned in the prospectus or any information is intentionally and willfully concealed by the directors of the company, would be considered as mis-statement.

A statement included in a prospectus shall be deemed to be untrue, if

- The statement is misleading in the form and context in which it is included; and
- the omission from a prospectus of any matter is calculated to mislead (Section 65).

If there is any misstatement of a material fact in a prospectus as if the prospectus is wanting in any material fact, this may arise

1. **Civil Liability:** It means the liability to pay damages or compensation.
2. **Criminal Liability:** Criminal liability means the liability which improve punishment of imprisonment or fine or both.

1. Civil Liability

A person who has induced to subscribe for shares (or debentures) on the faith of a misleading prospects has remedies against the company, directors, promoters, and experts. Every person who is a director and promoter of the company, and who has authorized the issue of the prospectus [Section (2)].

a) Compensation

The above persons shall be liable to pay compensation to every person who subscribes for any shares or debentures for any loss or damage sustained by him by reason of any untrue statement included therein [Section 62(1)].

b) Recession of the Contract for Misrepresentation

Avoiding the contract is recession. Any person can apply to the court for recession of the contract if the statements on which he has taken the shares are false or caused by misrepresentation whether innocent or fraudulent.

The contract can be rescinded if the following conditions are satisfied:

1) The statement must be a material misrepresentation of fact
2) It must have induced the shareholder to take the shares.
3) The deceived shareholder is an allottee and he must have relied on the statement in the prospectus.
4) The omission of material fact must be misleading before recession is granted.
5) The proceedings for recession must be started as soon as the allottee comes to know of a misleading statement.

c) Damages for Deceit as Fraud

Any person induced to invest in the company by fraudulent statement in a prospectus can sue the company and person responsible for damages. The share should be first surrendered to company before the company is used for damages.

Fraud occurs when any statement is made without belief in the truth or carelessly. A statement made with knowledge that it is false, will constitute fraud or deceit.

d) Liability for non-compliance

A director or other person responsible shall be liable for damage for noncompliance with or contravention of any of the matters to be stated and reports to be set out in the prospectus as provided [by Section 56(41)].

e) Damages for Fraud under General Law

Any person responsible for the issue of prospectus may be held liable under the general law or under the Act for misstatements or fraud.

f) Penalty for Contravening Section 57 & 58

If any prospectus is issued is contravention of Section 57, (experts to be unconnected with formation or management of company), or Section 58 (expert's consent to issue of prospectus containing statement by him) the company and every person who is knowingly party to the issue thereof, shall be punishable with fine which may extend to Rs. 5,000/-.

g) Penalty for issuing the Prospectus without Registration

If a prospectus is issued without a copy of thereof being delivered to the Registrar, the company and every person who is knowingly a party to the issue of the prospectus shall be punishable with fine which may extent to Rs 5,000 [Section 60(5)].

2. Criminal Liability

Every person who authorized the issue of prospectus shall be punishable for untrue statement with imprisonment for a term which may extend to 2 years or with fine which may extend to Rs. 5,000/- or with both [Section 63(1)].

Penalty for Fraudulently inducing Persons to Invest Money [Section 68]

Any person who either knowingly or recklessly makes any statement, promises or forecast which is false, deceptive or misleading or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into;

- Any agreement with a view to acquiring, disposing of, subscribing for, or underwriting shares or debentures;
- An agreement to secure to any of the parties from the yield of shares or debentures; or by reference to fluctuation in the value of shares or debentures; shall be punishable for a term which may extend to 5 years of with fine which may extend to Rs. 10,000/- or with both.

Types of prospectus

According to Companies Act 2013, there are four types of a prospectus as per section 2 (70)

1. **Red-herring Prospectus :**
   - Name is inspired with fish
   - Red-herring means to distract from one point and to attract on other points
   - After filling draft prospectus, the company use the prospects to attract investors, that prospectus is known as Red-herring prospectus.
   - As per Section 32, two details does NOT be include : Quantum & Price

2. Abridged Prospectus : As per Section 2(1)

- Summary of Prospectus
- Original Prospectus usually contain **300-500 pages**, which is filed in SEBI.
- Investors need to read Abridged Prospectus before investing
- As per Section 33, Any company can NOT issue application for subscription WITHOUT Abridged Prospectus.

3. Shelf-Prospectus : Section 31

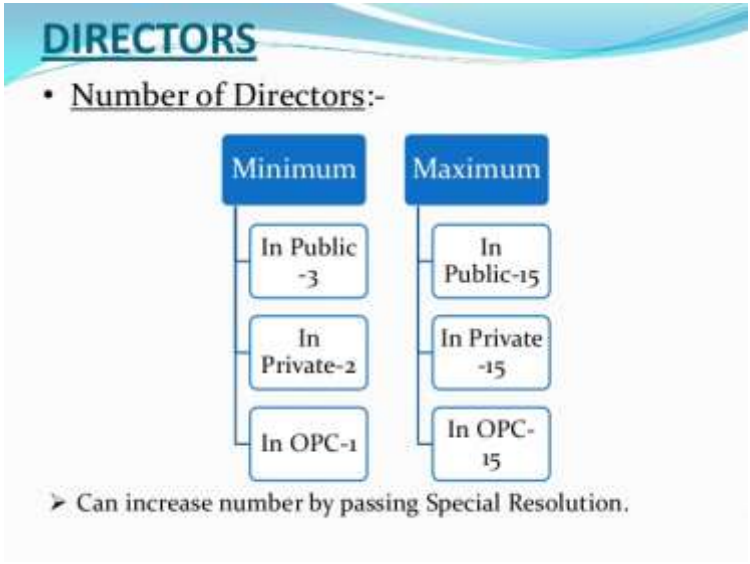
- Not for Every Company
- SEBI specified company/ institutions, who are in financial related works can issue
- Shelf means life, validity period
- Validity period is maximum 1 year
- After filling the Shelf-Prospectus, if company will have any material changes which is considerable, in this case, company will use Information Memorandum.
- Information Memorandum is a document to use the convey the change related information to investors

4. Deemed Prospectus: Section 26

- Deemed means to presume or assume
- Treat a document as a prospectus
- Example: There is a company; XYZ, which is not interested in SEBI. Now this company wants to issue shares to public without following SEBI guidelines.
- No guidelines of SEBI or Companies Act are applicable
- This company make an agreement with Issue House to issue the shares.
- Issue house is offering the shares of XYZ company to public.
- That document is Deemed Prospectus, and it will be of the company, not of Issue House

Directors

- Section 149(1) of the **Companies Act, 2013** requires that every **company** shall have a minimum number of 3 **directors** in the case of a **public company**, two **directors** 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 director is a person appointed to perform the duties and functions of director of a company in accordance with the provisions of the Companies Act, 2013.



Definition of Directors

- The directors are the persons elected by the shareholders to direct, conduct, manage or supervise the affairs of the company.
- The Companies Act does not precisely define the term ‘director’.
- But it has been defined under several sections of the Act, in the following manner:
- **According to Sec. 2 (13) of the Companies Act.,** “Director includes any person occupying the position of director by whatever name called.” This definition given by the Companies Act does not give the clear meaning of the word director, but it means that a person who performs the duties of a director will be deemed to be a director irrespective of the name by which he is called.
- According to Sec. 2(30), “A director is the officer of the company.”

Legal Position/Status of Directors

- The Act does not define the position/status of directors, and it is difficult to define the exact legal position of the directors of a company.
- Although, the directors have been referred as the trustees, or the managing partners of the company, but in real sense they are none of them. Directors may be considered as the agent, trustees or managing partner for a particular moment and for the particular purpose.

1. Position of Directors as Trustees

(i) Legally a director is not the trustee: Legally speaking, a director is not the trustee of the company. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into a contract for his principal i.e., for the company of which he is a director or for whom he is acting." From this point of view, directors are not the trustees of the company, because they are not the legal owners of the properties of the company.

(ii) Directors as trustees of the company's property and money:

Although the directors are not, properly speaking, the trustees, yet they are trustees of the company's money and property and they are bound to deal with capital under their control as a trust. They must act in good faith and exercise their powers in the interest and benefit of the company.

(iii) Directors as trustees to the powers entrusted to them: The directors are the trustees in respect of powers entrusted to them. They must exercise these powers bonafide and for the benefit of the company as a whole.

Examples of such powers are as follows:

- The power of employing the funds of the company;
- The power to declare dividend in the general meeting
- The power to make call;
- The power of forfeiting shares;
- The power of approving the transfer of shares;
- The power of accepting the surrender of shares;
- The power of issuing the unissued shares of the company and making allotments thereof.

(iv) Directors not as trustees to the shareholders: It should be noted that directors occupy a fiduciary relationship only in relation to the company and not in relation to an individual shareholder. They are not trustees for any particular shareholder.

(v) Directors not as trustees to the outsiders: The directors are not as trustees to other persons entering into any contract with the Company.

2. Position of Directors as Agents

- The company being an artificial person cannot manage its affairs itself but the management of the company is entrusted to some human agency known as directors.
- The directors must act in the name of the company and within the scope of their authority. If the directors enter into a contract which is beyond their powers but within the powers of the company, the company, like any other principal, may ratify it.
- Where the directors enter into a contract which is ultra virus the company, the company cannot ratify it and neither the company nor the directors are liable on it. However the directors may be held liable for breach of implied warranty of authority.

3. Position of Directors as Managing Partner

Directors have been described as the managing partners because, on the one hand, they are entrusted with management and control of the affairs of the company, and on the other hand, they are usually important shareholders of the company.

4. Position of Directors as Officers

Under Sec. 2 (30) of the Companies Act, the directors are the officers of the company. As officers, they may by held liable if the provisions of the Companies Act have not been fully complied with by them.

5. Position of Directors as Employees

The directors may be considered as the employees of the company also, because they work under a special contract of service with the company and are paid remuneration accordingly.

6. Position of Directors as Organs of the Company

Directors have also been treated, in judicial decisions, organs of the company for whose action the company is to be held liable just as a natural person is liable for the actions of his limbs.

In Bath vs. Standard Land Co., Neville J. stated, “The board of directors are the brain and the only brain of the company which is the body and the company can and does act only through them.”

Appointment of Directors

SECTION 152 OF THE COMPANIES ACT, 2013 – APPOINTMENT OF DIRECTOR

- An individual who is appointed or elected as the member of the board of Directors of a Company, who, along with the other directors, has the responsibility for determining and implementing the policies of the company.
- Director is an individual who directs, manages, oversees or controls the affairs of the Company.
- In public or a private company, a total of two-thirds of directors are appointed by the shareholders. The rest of the one-third remaining members are appointed with regard to guidelines prescribed in the Article of Association.

- In the case of a private company, their Article of Association can prescribe the method to appoint any and all directors. In case the Articles are silent, the directors must be appointed by the shareholders.
- Nominee directors will be appointed by third party authorities or the Government to tackle mismanagement and misconduct. The duties of directors are to act honestly, exercise reasonable care and skill while performing their duties on behalf of the organization.

Conditions for Appointing Directors

1. He or she should not have been sentenced to imprisonment for any period, or a fine.
2. He or she should have completed twenty-five (25) years of age, but be less than the age of seventy (70) years. However, this age limit is not applicable if the appointment is approved by a special resolution passed by the company in general meeting or the approval of the Central Government is obtained.
3. He or she should be a resident of India.

Meeting

- There in an old proverb that "Two heads are always better than one". When two or more than two persons come together to discuss matters of common interest, there is said to be a meeting.
- It follows that to constitute a meeting there must be two or more persons. Generally, the purpose of a meeting is to consider issues of common interests to its attendants.

- **Meeting:** Get together of individuals or persons with some plan is known as meeting.
- **Business meeting:** When two or more persons gathered as per given notice to discuss some business matters is known as business meetings.
- **Company meeting:** when the members of a company gathered at a certain time and place to discuss business affairs it is called company meeting.

KINDS OF MEETINGS

1. Meeting of Members
2. Meetings of the shareholders

(i) General meetings

a. Statutory meeting
b. Annual general meeting
c. Extraordinary general meeting

(ii) Class meetings

3. Meetings of the Directors

a. Board meetings
b. Committee meetings

4. Meetings of the Creditors

a. Meeting of Debenture-holders
b. Meeting of creditors and contributories at the time of liquidation of the company

Meetings of Members

- These meetings are general meetings as they are attended by all the members.
- The management of the company is undertaken through meetings of the company's shareholders where major decisions are to be taken. The meetings are usually called by directors, but may also be called by the shareholders. In case of default the Commission may call a meeting, either of its own accord or on the application of members.

Meetings of the shareholders :General meetings

STATUTORY MEETING

- Every public company limited by shares and every company limited by guarantee and having a share capital, shall, within a period of not less than one month nor more than six months from the date on which the company is entitled to commence business hold a general meeting of the members of the company. This meeting is called 'the statutory meeting'. [Sec. 165 (1)].
- Private companies, public companies limited by guarantee and not having a share capital and unlimited companies are not required to hold the statutory meeting.

Annual general meeting

Every company must in each year hold in addition to any other meeting a general meeting, as its annual general meeting and must specify the meeting as such in the notices calling it [Section 166 (1)]. The annual general meeting is to be held in addition to any other general meeting that might have been held in a year. It appears that holding of an annual general meeting in every calendar year is a statutory necessity. Calendar year is to be calculated from 1st January to 31st December and not twelve months from the date of incorporation of the company

Extraordinary general meeting

An extraordinary general meeting (EGM) refers to any shareholder meeting called by a company other than it's scheduled annual meeting. The extraordinary general meeting is utilized to deal with urgent matters that come up between annual shareholders' meetings.

Class meetings

Class meetings are the meetings of the shareholders and the creditors. Class meetings are held to pass resolutions which will bind only the members of the particular class concerned

Meetings of the Directors: Board Meetings

Board meetings are meetings at the highest level, i.e. a meeting where board members or their representatives are present. A company is not an actual entity but a legal one so it cannot take actions and make decisions. The board of directors act as agents through which the company takes actions as well as makes decisions.

The board of directors is the supreme authority in a company and they have the powers to take all major actions and decisions for the company. The board is also responsible for managing the affairs of the whole company.

For the effective functioning and management, it is imperative that board meetings be held at frequent intervals.

Committee Meeting

A committee consists of a named subgroup of people within an organization who come together to fill a predetermined function. A committee's work is described in its charter and is often conducted in a series of meetings.

Meetings of the Creditors: Meeting of Debenture Holders

The debenture holders of a particular class conduct these meeting. They are generally conducted when the company wants to vary the terms of security or to modify their rights or to vary the rate of interest payable etc. Rules and Regulations regarding the holding of the meetings of the debenture holders are either entered in the Trust Deed or endorsed on the Debenture Bond so that they are binding upon the holders of debentures and upon the company.

Meeting of creditors

Strictly speaking, these are not meetings of a company. They are held when the company proposes to make a scheme of arrangements with its creditors. Companies like individuals may sometimes find it necessary to compromise or make some arrangements with their creditors, In these circumstances, a meeting of the creditors is necessary.

Meeting of creditors and contributories at the time of liquidation of the company

Board Meeting through Video Conferencing under Companies Act 2013

As stated in Section 173(2) of Companies Act, 2013 read with Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means as may be prescribed, which are capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Matters which cannot be transacted through Video Conferencing

i. The approval of the annual financial statements;

ii. The approval of the Board's report;

iii. The approval of the prospectus;

iv. The approval of the matter relating to merger, demerger, acquisition and takeover

Auditor

Who is an Auditor?

Any individual trained to review and verify accounting data and recognized as a Chartered Accountant (CA) under the Chartered Accountant Act 1949 is deemed to be an auditor.

What is the purpose for the appointment of the Auditor?

The purpose of the auditors in the company is to protect the interests of the shareholders. The auditor is obligated by law to examine the accounts maintained by the directors and inform them of the true financial position of the company. Auditor gives his independent opinion to the owners or shareholders of the company to protect and keep the company in a safe financial condition.

Auditors' Appointment

How is the appointment of an Auditor for different kinds of Companies done?

Application for 1st Auditor post Incorporation

- **Non Government Company:** Appointed by the Board Of Directors. This has to be done within 30 days from the date of Registration. Appointment can also be done by Members at Extraordinary General Meeting within 90 days of information.
- **Listed/Specified Company:** Appointed by Board Of Directors. This has to be done within 30 days from the date of Registration. Appointment can also be done by Members at Extraordinary General Meeting within 90 days of the information.
- **Government Company:** Appointed by the Comptroller and Auditor General of India. This has to be done within 60 days from the date of Registration. Appointment can also be done by Board Of Directors within 30 days of incorporation. Members can also appoint at an Extraordinary General Meeting within 60 days of Information

Auditor at First AGM. The written consent and a certificate. Please note, the appointment shall be in accordance with the conditions laid down by the auditor.

- **Non Government Company:** The appointment is done by the members. He will hold office till the end of the 6th AGM.
- **Listed/Specified Company:** The appointment is done by the members for a maximum term of 5/10 consecutive years. Cooling off period of 5 years before next appointment will be there.
- **Government Company:** The appointment is done by the Comptroller and Auditor General of India. He should be appointed within 180 days from the 1st of April

Appointment of Subsequent Auditor

- **Non Government Company:** The appointment is done by the members and he will hold office till the conclusion of the 6th meeting.
- **Listed/Specified Company:** The appointment is done by the members for a Maximum term of 5/10 consecutive years.
- **Government Company:** The appointment is done by the Comptroller and Auditor General of India within 180 days from the 1st of April

Casual Vacancy due to resignation and other reasons

- **Non Government Company:** The appointment is by the members within 3 months of the recommendations of Board and he will hold office till the next AGM.
- **Government Company:** The appointment is done by the : -CAG (Comptroller and Auditor General) within 30 days OR BOD within the next 30 days

Retiring auditor may be reappointed at AGM if –

1. He is not disqualified for reappointment.
2. He has not given the company a notice in writing of his unwillingness to be re-appointed; and
3. A special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be reappointed.

Winding UP

- Winding up of a company is the process whereby its life is ended.
- Winding up is proceeding for the realization of the assets, the payment of creditors, and the distribution of the surplus, if any, among the shareholders, so that the company may be finally dissolved.
- Professor Govern in his book Principles of Modern Company Law has described the winding up of a company in the following words : "Winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. An administrator called a liquidator is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights."

- Thus winding up is the last stage in the life of a company. It means a proceeding by which a company is dissolved.
- Winding up should not be taken as if it is dissolution of a company. The winding up of a company precedes its dissolution. Prior to dissolution and after winding up, the legal entity of the company remains and it can be sued in a Court of law. On dissolution the company ceases to exist, its name is actually struck off from the Register of Companies by the Registrar and the fact is published in the official Gazette.

MODES OF WINDING UP

A company can be wound up in three ways :

1. Compulsory winding up by the Court;
2. Voluntary winding up :
   (i) Members' voluntary winding up;
   (ii) Creditors' voluntary winding up;
3. Voluntary winding up subject to the supervision of the Court [Sec. 425].

- **WINDING UP BY THE COURT**

A company may be wound up by an order of the Court. This is called compulsory winding up or winding up by the Court. Section 433 lays down the following grounds where a company may be wound up by the Court.

A petition for winding up may be presented to the Court on any of the grounds stated below

- Default in filing statutory report or holding statutory meeting
- Failure to commence business within one year or suspension of business for a whole year
- Reduction of membership below the minimum
- Company's inability to pay its debts

VOLUNTARY WINDING UP

Winding up by the creditors or members without any intervention of the Court is called 'voluntary winding up'. In voluntary winding up, the company and its creditors are left free to settle their affairs without going to the Court, although they may apply to the Court for directions or orders if and when necessary.

A company may be wound up voluntarily under the circumstances given hereunder :

- when the period fixed for the duration of the company by the articles has expired
- The company has passed a special resolution to wind up voluntarily.

- When a company has passed a resolution for voluntary winding up, it must within 14 days of the passing of the resolution gives notice of the resolution by advertisement in the official Gazette and also in some newspaper circulating in the district where the registered office of the company is situated.

Members' voluntary winding up

A members' voluntary winding up takes place only when the company is solvent. It is initiated by the members and is entirely managed by them. The liquidator is appointed by the members. No meeting of creditors is held and no committee of inspection is appointed. To obtain the benefit of this form of winding up, a declaration of solvency must be filed. (Section 488)

Creditors' Voluntary Winding up (Sections 500-509)

In creditors' voluntary winding up, it is the creditors who move the resolution for voluntary winding up of a company, and there is no solvency declaration made by the directors of the company. In other words, when a company is insolvent, that is, it is not able to pay its debts, it is the creditors' voluntary winding up.

WINDING UP SUBJECT TO SUPERVISION OF THE COURT

Voluntary winding up may be under the supervision of the Court. At any time after a company has passed a resolution for voluntary winding up, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court.