



INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERE TO

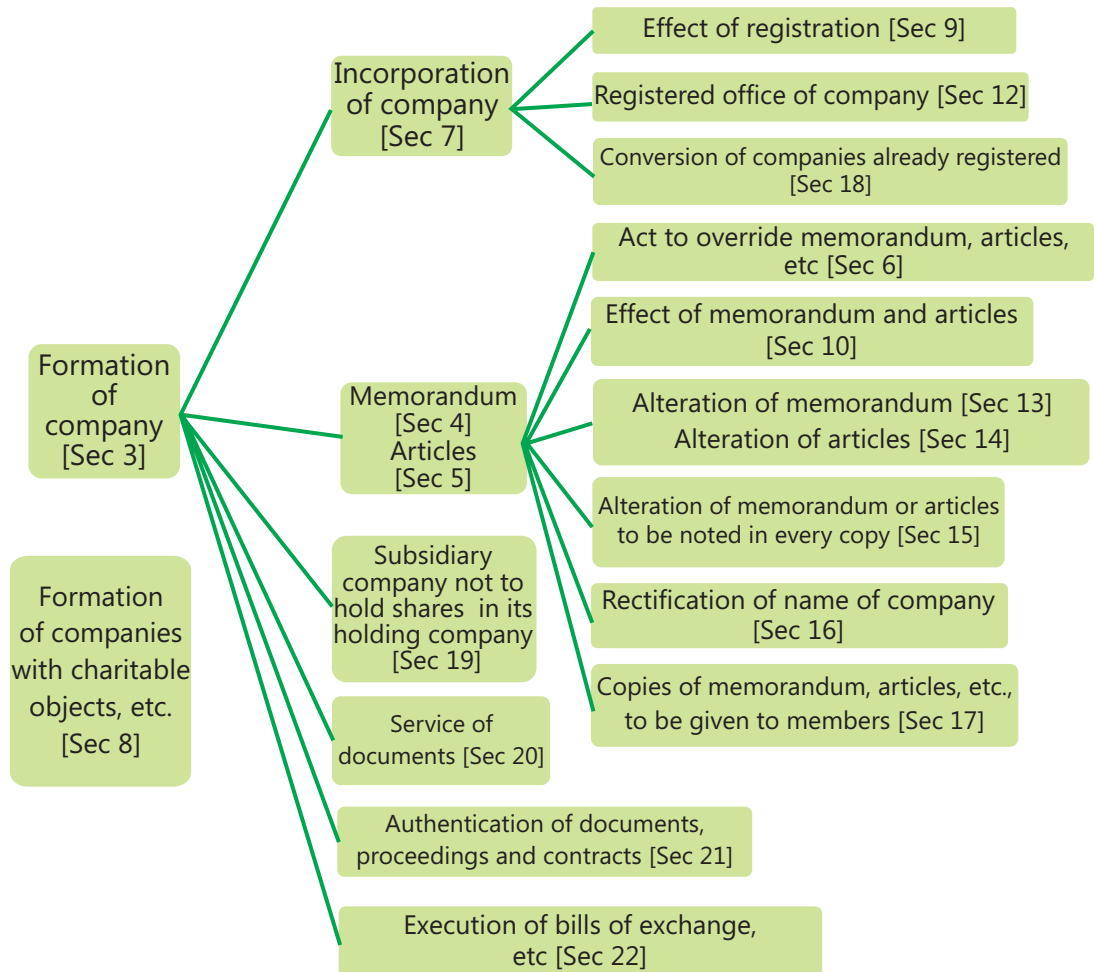


LEARNING OUTCOMES

At the end of this chapter, you will be able to:

- Explain the Formation & Incorporation of company and the formation of not for profit organization.
- Identify the need for Memorandum and Articles of Association and changes incidental thereto.
- Know the effect of registration.
- Explain and identify the concepts related to registered office of company.
- Know how the Service of documents is effected
- Know about Authentication of documents, proceedings and contracts and Execution of bills of exchange, etc.

CHAPTER OVERVIEW



1. INTRODUCTION

A company is a separate legal entity with perpetual succession for lawful purpose. Development of this concept is equally significant in economic terms as invention of steam engine is for the industrial revolution.

Persons who initiate promotion of a company are known as **promoters**. All persons who take steps for the registration of a company e.g., those associated with the preparation of a prospectus or in drawing up the Memorandum of Association of the company and assisting in its registration are regarded as promoters. It should, however, be noted that persons acting only in a professional capacity e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

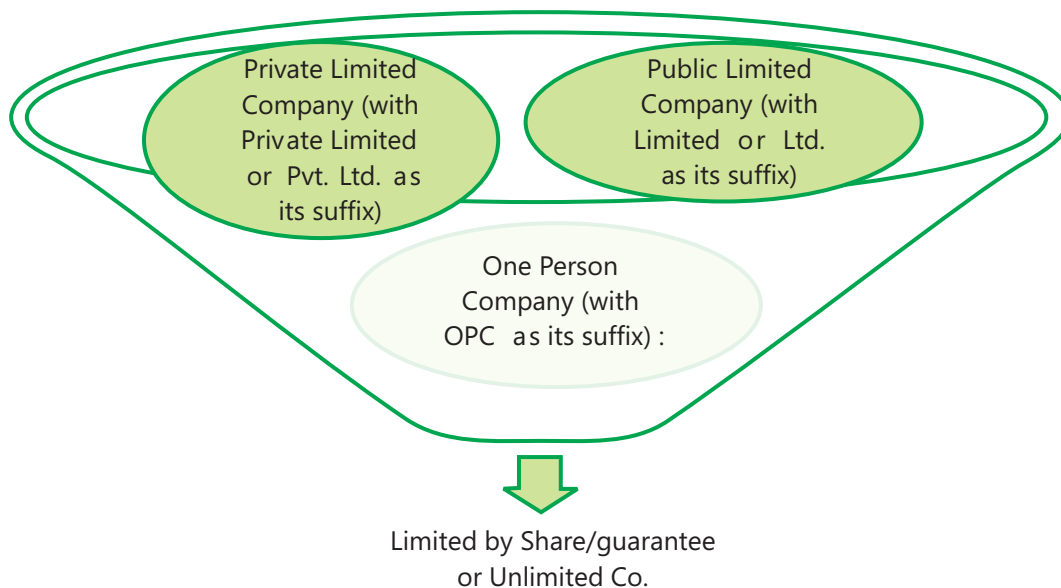
The Companies Act, 2013 defines the term "Promoter" under section 2(69) which means a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

However, a person who is acting merely in a professional, shall not be regarded as promoter, e.g., the solicitor, banker, accountant etc. are not regarded as promoters.

2. FORMATION OF COMPANY

Companies are broadly of below types :



The companies so formed could be with limited liability (by shares or guarantee) or with unlimited liability.

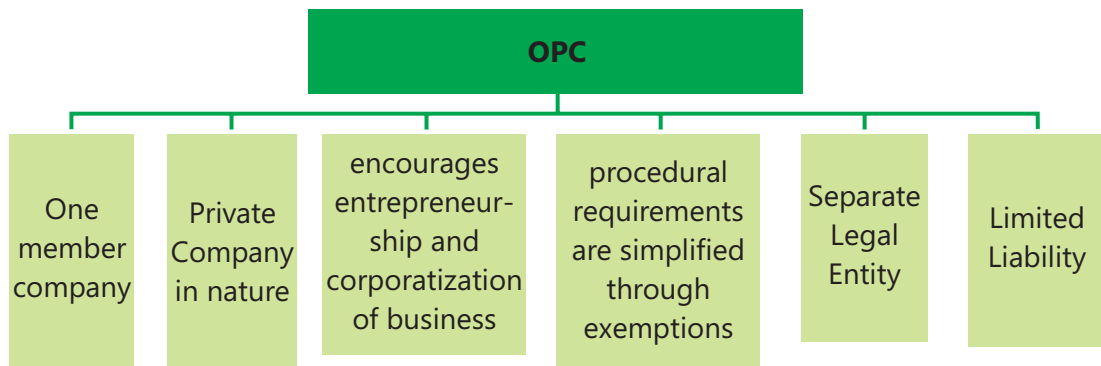
Note : For Government Companies, suffix "Pvt. Ltd / Ltd." not required (*Notification dated 5th June 2015*)

Section 3 of the Companies Act, 2013 deals with the basic requirement with respect to the constitution of the company. In the case of a public company with or without limited liability any 7 or more persons can form a company for any lawful purpose by subscribing their names to memorandum and complying with the requirements of this Act in respect of registration. In exactly the same way, 2 or more persons can form a private company and one person where company to be formed is one person company.

However, that one person need to specify the name of one nominee in the Memorandum of Association (MOA) who would take his place in case of his death or his incapacity to contract. The nominee could be changed as per the process and this will not attract process for alteration of the Memorandum of Association.

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

I. One person company (OPC)



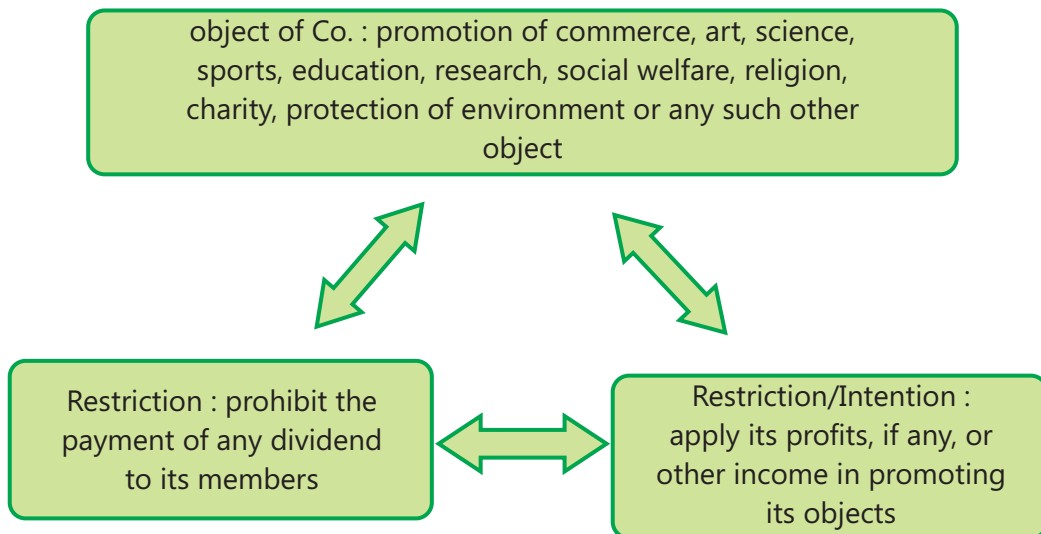
Law with respect to formation of OPC provides that—

- The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- Such other person may be given the right to withdraw his consent
- The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar
- Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- Only a natural person who is an Indian citizen and resident in India (person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year)-
 - shall be eligible to incorporate a OPC;
 - shall be a nominee for the sole member of a OPC.
- A natural person shall not be a member of more than a OPC at any point of time and the said person shall not be a nominee of more than a OPC.
- Where a natural person being member in OPC becomes member in another such company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria (as given in point above) within a period of 182 days.



- No minor shall become member or nominee of the OPC or can hold share with beneficial interest.
- Such Company cannot be incorporated or converted into a company under section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the rules 6 & 7 of the Chapter II.
- Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
- OPC cannot convert voluntarily into any kind of company unless two years have expired from the date of incorporation, except where the paid up share capital is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

II. Formation of companies with charitable objects, etc. [Section 8]



- 1. Object of formation of Section 8 Company :** Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc. Such company intends to apply its profit in promoting its objects and prohibiting the payment of any dividend to its members.
- 2. Power of Central government to issue the license :** This section allows the Central Government to register such person or association of persons as a company with limited liability without the addition of words 'Limited' or 'Private limited' to its name, by issuing licence on such conditions as it deems fit. The registrar shall on application register such person or association of persons as a company under this section.

'Where it is proved to the satisfaction of the Central Government that a limited company registered under this Act or under any previous company law has been formed with any of the objects and with the restrictions and prohibitions it may, by licence, allow the company to be registered under section subject 8 to such conditions as the Central Government deems fit and to change its name by omitting the word —Limited, or as the case may be, the words —Private Limited from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company'.

As per the *Notification S.O. 1353(E), dated 9th of July, 2014* : In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government hereby delegates to the ROC the power & functions vested in it under the section 8 (1), subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

3. **Privileges of limited Company** : On registration the company shall enjoy same privileges and obligations as of a limited company.
4. A **firm may be a member** of the company registered under section 8.
5. **Alteration of Memorandum and Articles** : A company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.
6. **Conversion into any other kind of Company** : A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.

7. Revocation of licence

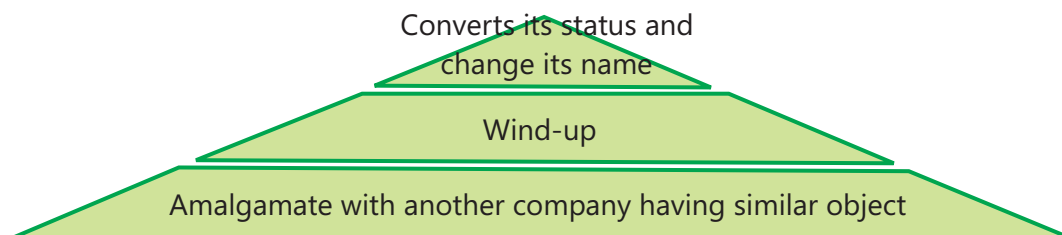
- (i) The Central Government may by order revoke the licence of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register. But before such revocation, the Central Government must give it a written notice of its intention to revoke the licence and opportunity to be heard in the matter.

Vide Notification S.O. 1352(E) dated 21st May, 2014 in exercise of powers conferred by Section 458 of the Companies Act, 2013, the Central Govt. has delegate to the Regional Directors, subject to the condition that the Central Govt. may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e.8(5)], if in its opinion, such course of action is necessary in the public interest.

- (ii) Where a licence is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable opportunity of being heard.

- (iii) Where a licence is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.
- (iv) If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to the Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016.
- (v) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.
- (vi) Thus, on revocation, Central Government may direct it to—



8. Penalty/ punishment in contravention : If a company makes any default in complying with any of the requirements laid down in this section, the company shall, be punishable with fine varying from ten lakh rupees to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine varying from twenty-five thousand rupees to twenty-five lakh rupees, or with both.

And where it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

9. Exceptions :

- (i) Can call its general meeting by giving a clear 14 days notice instead of 21 days.
- (ii) Requirement of minimum number of directors, independent directors etc. does not apply.
- (iii) Need not constitute Nomination and Remuneration Committee and Shareholders Relationship Committee.

Formation

- To promote Charitable objects

Application of profits

- To promote its objectives
- No payment of dividends out of profits

Type of Co.

- Limited Liability
- Without the addition of words "Ltd." or "Pvt Ltd."

How status is granted

- The CG can grant such status
- However, CG has delegated the power to grant licence to ROC

Revocation of licence

- If conditions of section 8 are contravened, or
- affairs of the company are conducted fraudulently, or prejudicial to public interest

Effect of revocation of licence

- Co. has to use words "Ltd." or "Pvt Ltd."



3. MEMORANDUM OF ASSOCIATION–MOA [SECTION 4]

As per **section 2(56)**—memorandum means the memorandum 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 is the base document for the formation of the company and alongwith the Articles of Association (AOA) is regarded as the Constitution of the Company.

The MOA and AOA, similar to other company agreements and resolutions is subject to the Companies Act, 2013 (Section 6) and the law of the land and therefore all its contents need to be in compliance of the Companies Act 2013 and other applicable legislations.

Section 4 of the Companies Act, 2013 seeks to provide for the requirements with respect to memorandum of a company.

I. Object of registering a memorandum of association :

- It contains the object for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.
- It enables shareholders, creditors and all those who deal with company to know what its powers are and what activities it can engage in.

A memorandum is a public document under Section 399 of the Companies Act, 2013. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.

- The shareholders must know the purposes for which his money can be used by the company and what risks he is taking in making the investment.

A company cannot depart from the provisions contained in the memorandum however imperative may be the necessity for the departure. It cannot enter into a contract or engage in any trade or business, which is beyond the power confessed on it by the memorandum. If it does so, it would be ultra vires the company and void.

II. The memorandum of a company shall state—

- (a) the **name of the company** with the last word “Limited” in the case of a public limited company, or the last words “Private Limited” in the case of a private limited company.¹

Exception: This clause is not applicable on the companies formed under section 8 of the Act.

- (b) the State in which **the registered office of the company** is to be situated;

- (c) the **objects** for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;²

1. In case of Specified IFSC Public Company and IFSC Private Company, name shall have the suffix, “International Financial Service compan” or “IFSC” as a part of its name.

2. Specified IFSC Public Company & IFSC Private company shall state its objects to do financial services activities as permitted under the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and any matter considered necessary in furtherance there of.

If any company has changed its activities which are not reflected in its name, it shall change its name in line with its activities within a period of six months from the change of activities after complying with all the provisions as applicable to change of name.

III. LIABILITY / CAPITAL CLAUSE :

- (a) This clause covers details on the liability of members of the company, whether limited or unlimited, and also state—
- ◆ **in the case of a company limited by shares**, that the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
 - ◆ **in the case of a company limited by guarantee**, the amount up to which each member undertakes to contribute—
 - to the **assets of the company in the event of its being wound-up** while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
 - to the **costs, charges and expenses of winding-up** and **for adjustment of the rights of the contributories** among themselves;
- (b) **in the case of a company having a share capital—**
- ◆ the **amount of share capital with which the company is to be registered** and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
 - ◆ the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;
- (c) The clause, in the case of **One Person Company**, covers the name of the person who, in the event of death of the subscriber, shall become the member of the company.

IV. NAME CLAUSE

Applying for the name of the company : The name stated in the memorandum shall not—

- (a) be **identical with or resemble too nearly** to the name of an existing company registered under this Act or any previous company law; or
- (b) be such that **its use by the company—**
- ◆ will **constitute an offence** under any law for the time being in force; or
 - ◆ **is undesirable** in the opinion of the Central Government.

As per the Notification S.O. 1353(E), dated 9th of July, 2014 : In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government has delegated to the ROC the power & functions vested in it under the this section[i.e. section 4(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

(c) Undesirable Names : A company shall not be registered with a name which contains—

(i) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(ii) such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

Clarification : *Vide General Circular No. 02/2014, dated 11.02.2014* a clarification was issued on the use of word 'National' in the names of Companies or LLP. According to which no company should be allowed to be registered with the word 'National' as part of its title unless it is a government company & the Central/State Government has a stake in it.

Similarly, the word 'Bank' may be allowed in the name of an entity only when such entity produces a 'No Objection Certificate' or 'Exchange' should be allowed in the name of a company only where 'No Objection Certificate' from SEBI in this regard is produced by the Promoters.

(d) Reservation of name :

Applying for name : A person may make an application, in such form and manner and accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as—

(i) the name of the proposed company; or

(ii) the name to which the company proposes to change its name.

Reserving the name : Upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of sixty days from the date of the application.

Cancelling name : Where after reservation of name, it is found that name was applied by furnishing wrong or incorrect information, then—

- (i) if the company has not been incorporated, the reserved name shall be cancelled and the person who has made the application shall be liable to a penalty which may extend to one lakh rupees;
- (ii) if the company has been incorporated, the Registrar may, after giving the company an opportunity of being heard—
 - (1) either direct the company to change its name within a period of 3 months, after passing an ordinary resolution;
 - (2) take action for striking off the name of the company from the register of companies; or
 - (3) make a petition for winding up of the company.

Circular : As per the *General Circular No.29/2014, dated 11th of July, 2014*, Government directed that while allotting names to Companies/Limited Liability Partnerships, the Registrar of Companies concerned should exercise due care to ensure that the names are not in contravention of the provisions of the *Emblems and Names (Prevention of Improper Use) Act, 1950*. It is necessary that Registrars are fully familiar with the provisions of the said Act.

Note : Rule 8—Undesirable Names of *the Companies (Incorporation) Rules, 2014*, determines whether a proposed name is identical with another or other rules which may be kept in mind while dealing with the Name clause of the MOA.

V. DOMICILE CLAUSE

The name of federal state is mentioned where the registered office is to be situated.

VI. OBJECTS CLAUSE

Covers the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

Doctrine of Ultra Vires

In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of ultra vires. As a result, an act which is ultra vires is void, and does not bind the company. Neither the company nor the contracting party can sue on it. The company cannot make it valid, even if every member assents to it.

The general rule is that an act which is ultra vires the company is incapable of ratification. An act which is intra vires the company but outside the authority of the directors may be ratified by the company in proper form [*Rajendra Nath Dutta v. Shilendra Nath Mukherjee, (1982) 52 Com Cases 293 (Cal.)*].

The rule is meant to protect shareholders and the creditors of the company. If the act is ultra vires (beyond the powers of) the directors only, the shareholders can ratify it. If it is ultra vires the articles of association, the company can alter its articles in the proper way.

The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, *Ashbury Railway Carriage and Iron Co. Ltd. v. Riche*, (1878) L.R. 7 H.L. 653.

The memorandum of the company in the said case defined its objects thus: "The objects for which the company is established are to make and sell, or lend or hire, railway plants..... to carry on the business of mechanical engineers and general contractors.....".

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, "That is a contract which we desire to make, which we authorise the directors to make", still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

However, the disadvantages of this doctrine outweigh its main advantage, namely to provide protection to the shareholders and creditors. Although it may be useful to members in restraining the activities of the directors, it is only a nuisance in so far as it prevents the company from changing its activities in a direction which is agreed by all. Again, the purpose of doctrine of ultravires has been defeated as now the object clause can be easily altered, by passing just a special resolution of the shareholders.

VII. SUBSCRIPTION CLAUSE

According to section 7(1)(a) there shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in such manner as may be prescribed in Rule 13 of *the Companies (Incorporation) Rules, 2014*.

VIII. Forms and schedule related to memorandum : The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

The MOA and AOA shall be in respective forms as provided in **Schedule I** to the Companies Act, 2013 :

TABLE-A	● MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES
TABLE-B	● MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING A SHARE CAPITAL
TABLE-C	● MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING SHARE CAPITAL
TABLE-D	● MEMORANDUM OF ASSOCIATION AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL
TABLE-E	● MEMORANDUM OF ASSOCIATION AN UNLIMITED COMPANY AND HAVING SHARE CAPITAL
TABLE-F	● ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY SHARES
TABLE-G	● ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND HAVING A SHARE CAPITAL
TABLE-H	● ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE AND NOT HAVING SHARE CAPITAL
TABLE-I	● ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND HAVING A SHARE CAPITAL
TABLE-J	● ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY AND NOT HAVING SHARE CAPITAL

IX. Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.



4. ARTICLES OF ASSOCIATION—AOA [SECTION 5]

As per **Section 2(5)**—articles means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

Section 5 of the Companies Act, 2013 seeks to provide the contents and model of articles of association. The section lays the following law—

(1) Contains regulations : The articles of a company shall contain the regulations for management of the company.

(2) **Inclusion of matters :** The articles shall also contain such matters, as are prescribed under the rules. However, a company may also include such additional matters in its articles as may be considered necessary for its management.

(3) **Entrenchment**

Contain provisions for entrenchment : The articles may contain provisions for entrenchment (to protect something) to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.

Manner of inclusion of the entrenchment provision : The provisions for 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.

Notice to the registrar of the entrenchment provision : Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

Example : If PQR Company subscribes by investing in XYZ, a Private Ltd. company in 10% terms, tomorrow if XYZ private limited approaches any Bank for a loan, the bank officials would read the Articles & would ask to get the consent of PQR Company. Now, if there is no entrenchment provision, then 'XYZ' may, after passing a special resolution remove the minority right and can borrow beyond the limit.

In order to control it, the entrenchment provisions are usually compelled by the minority to make the majority responsible and the minority in these provisions can get incorporated a clause saying that borrowing beyond a particular limit or issuances of shares is to be done only after the requisite consent of minority has been obtained.

(4) **Forms of articles :** The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

(5) **Model articles :** A company may adopt all or any of the regulations contained in the model articles applicable to such company.

(6) **Company registered after the commencement of this Act :** In case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

(7) **Section not apply on company registered under any previous company law :** Nothing in this section shall apply to the articles of a company registered under any previous company law, unless amended under this Act.

Doctrine of Indoor Management

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.

Stakeholders 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 in a regular manner.

The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management evolved around 150 years ago in the context of the doctrine of constructive notice. The role of doctrine of indoor management is opposed to of the role of doctrine of constructive notice. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a possible safeguard against the possibility of abusing the doctrine of constructive notice.

Basis for Doctrine of Indoor Management

1. What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.
2. If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice)

Knowledge of irregularity : In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

Negligence : If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances company does not make proper inquiry.

Forgery : The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.



5. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC. [SECTION 6]

According to section 6 of the Act,

‘Save as otherwise expressly provided in this Act—

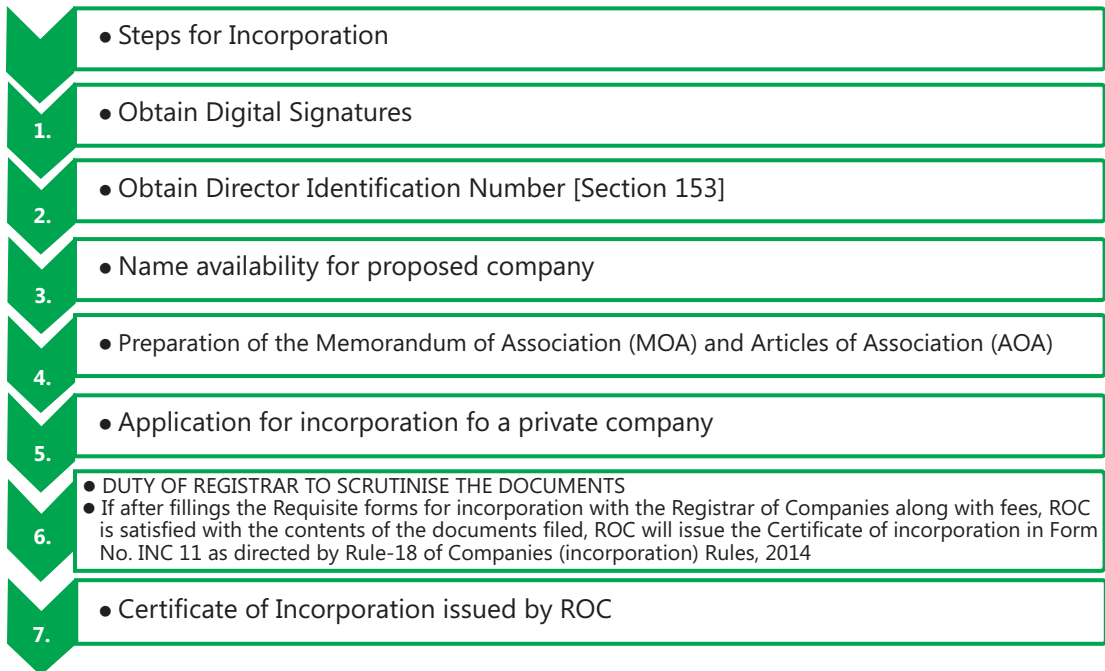
- (a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and
- (b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.’

In simple words, the provisions of this Act shall have overriding effect on provisions contained in memorandum or articles or in an agreement or in resolution passed by the company in the general meeting or by its board of directors, whether they are registered, executed or passed before or after the commencement of this Act.

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.

Incorporation by fraudulent action : According to section 7(6), without prejudice to the provisions of section 7(5) where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under clause (b) of sub-section (1) shall each be liable for action under section 447.

6. INCORPORATION OF COMPANY [SECTION 7]



I. INCORPORATION OF COMPANY : Section 7 of the Companies Act, 2013 provides for the procedure to be followed for incorporation of a company.

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

- the memorandum and articles of the company duly **signed by all the subscribers** to the memorandum.
- a **declaration by person who is engaged in the formation of the company** (an advocate, a chartered accountant, cost accountant or company secretary in practice), **and by a person named in the articles** (director, manager or secretary of the company), that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with.
- an **affidavit from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles** stating that—
 - ◆ he is not convicted of any offence in connection with the promotion, formation or management of any company, or

- ◆ he has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the last five years,
- ◆ and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;
- the **address for correspondence** till its registered office is established;
- the **particulars** (names, including surnames or family names, residential address, nationality) **of every subscriber** to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
- the **particulars** (names, including surnames or family names, the Director Identification Number, residential address, nationality) **of the persons mentioned in the articles as the subscribers to the Memorandum** and such other particulars including proof of identity as may be prescribed; and
- the particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed.

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

(2) Issue of certificate of incorporation on registration : The Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form to the effect that the proposed company is incorporated under this Act.

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

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

(5) Furnishing of false or incorrect information or suppression of material fact at the time of incorporation (i.e. during incorporation process) : If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud under section 447.

(6) Company already incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact (i.e. post Incorporation)

: where, at any time **after the incorporation of a company**, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration under this section shall each be liable for action for fraud under section 447.

(7) Order of the Tribunal* : Where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants—

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) direct that liability of the members shall be unlimited; or
- (c) direct removal of the name of the company from the register of companies; or
- (d) pass an order for the winding up of the company; or
- (e) pass such other orders as it may deem fit:

Provided that before making any order,—

- the company shall be given a reasonable opportunity of being heard in the matter; and
- the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

Simplified Proforma for Incorporating Company Electronically (SPICe)

The Ministry of Corporate Affairs has taken various initiatives for ease of business. In a step towards easy setting up of business, MCA has simplified the process of filing of forms for incorporation of a company through Simplified Proforma for incorporating company electronically.

II. EFFECT OF REGISTRATION : Section 9 of the Companies Act, 2013 provides for the effect of registration of a company.

* "Tribunal" means the National Company Law Tribunal (NCLT) constituted under section 408 of the Companies Act, 2013. The NCLT is a quasi-judicial body in India that adjudicates issues relating to companies in India. The NCLT was established under the Companies Act 2013 and was constituted on 1 June 2016.

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

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

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

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

As has been stated above, the law recognizes such a company as a juristic person separate and distinct from its members. The mere fact that the entire share capital has been contributed by the Central Government and all its shares are held by the President of India and other officers of the Central Government does not make any difference in the position of registered company and it does not make a company an agent either of the President or the Central Government [*Heavy Electrical Union vs. State of Bihar*].



7. EFFECT OF MEMORANDUM AND ARTICLES [SECTION 10]

(1) Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the memorandum and of the articles.

(2) All monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.



8. REGISTERED OFFICE OF COMPANY [SECTION 12]

A company is considered to be a separate legal entity from the members. Once a company gets incorporated, it is required to maintain a registered office. This is a physical office where the corporation will receive service of legal documents from ROC or in case of a lawsuit, etc.. This address cannot be a P.O. box but must be a physical location where someone is present, to receive service of legal documents during normal business hours. It could be different from a Head Office or Corporate office.

Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices letters etc. The domicile and the nationality of a company is determined by the place of its registered officer. This is also important for determining the jurisdiction of the court.

- (1) **Registered office :** From the 15th day of its incorporation and at all times thereafter a company shall have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.³
- (2) **Verification of registered office :** The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation.⁴
- (3) **Labeling of company :** Every company shall—
 - ◆ paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.
 - ◆ have its name engraved in legible characters on its seal, if any;
 - ◆ get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and

3. With the respected specified IFSC public & IFSC private companies, they shall have its registered office at the IFSC located in the approved multiservice SEZ setp under the SEZ Act, 2005 read with SEZ Rules, 2006.

4. In case of speciefied IFSC public & IFSC private company word "thirty days" will be read as "sixty days".

- ◆ have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed :
- (4) **Name change by the company** : Where a company has changed its name/s during the last two years, it shall paint or affix or print, along with its name, the former name or names so changed during the last two years.
 - (5) **In case of OPC** : The words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
 - (6) **Notice of change to registrar** : Notice of every change of the situation of the registered office, verified in the manner prescribed, after the date of incorporation of the company, shall be given to the Registrar within 15 days of the change, who shall record the same.⁵
 - (7) **Change by passing of special resolution** : The registered office of the company shall be changed only by passing of special resolution by a company—
 - ◆ in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company; and
 - ◆ in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.⁶
 - (8) **Change of registered office outside the jurisdiction of registrar** : Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to be confirmed by the Regional Director on an application made by the company.
 - (9) **Communication and filing of confirmation** : The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be—
 - ◆ communicated within 30 days from the date of receipt of application by the Regional Director to the company, and
 - ◆ the company shall file the confirmation with the Registrar within a period of 60 days of the date of confirmation who shall register the same, and
 - ◆ certify the registration within a period of thirty days from the date of filing of such confirmation.

5. In the case of specified IFSC public & IFSC private companies for the word "15 days" read as "60 days".

6. In case of specified IFSC public & IFSC private company registered office of the specified IFSC public & specified IFSC private company shall not change from one place to another within the International Financial Services Centre, except on the authority of a resolution passed by the board of directors. Provided that the specified IFSC public company and specified IFSC private company shall not change the place of its registered office to any other place outside the International Financial Service Centre.

- (10) Certificate, a conclusive evidence of compliance of requirements of this Act** : The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate.
- (11) In case of default** : If any default is made in complying with the requirements of this section, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.



9. ALTERATION OF MEMORANDUM [Section 13 & Section 15]

As per **Section 2(3)**—alter or —alteration includes the making of additions, omissions and substitutions.

I. Procedure of alteration of memorandum : Section 13 of the Companies Act, 2013 provides the provisions that deals with the alteration of the memorandum. The provision says that—

- (1) Alteration by special resolution** : Company may alter the provisions of its memorandum with the approval of the members by a special resolution.
- (2) Name change of the company** : Any change in the name of a company shall be effected only with the approval of the Central Government in writing:

Notification : *Notification S.O. 1353(E), dated 9th of July, 2014*. In exercise of powers conferred by Section 458 of the Companies Act, 2013 the Central Government hereby delegates to the ROC the power & functions vested in it under this section [i.e. section 13(2)] of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.

However, no such approval shall be necessary where the change in the name of the company is only the deletion therefrom, or addition thereto, of the word "Private", on the conversion of any one class of companies to another class in accordance with the provisions of the Act.

According to *the Companies (Incorporation) Rules, 2014* :

The change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon: Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

- (3) **Entry in register of companies :** On any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.
- (4) **Change in the registered office :** The alteration of the memorandum relating to the place of the registered office from one State to another shall not have any effect unless it is approved by the Central Government on an application in such form and manner as may be prescribed.
- (5) **Dispose of the application of change of place of the registered office :** The Central Government shall dispose of the application of change of place of the registered office within a period of 60 days.
Before passing of order, Central Government may satisfy itself that-
- ◆ the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
 - ◆ the sufficient provision has been made by the company either for the due discharge of all its debts and obligations, or
 - ◆ adequate security has been provided for such discharge.
- Vide Notification S.O. 1352(E) dated 21.05.2014* the Central Government has delegated to the Regional Director (RD) the power & functions vested in it under the following sections of the said Act, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under this section [i.e.13 (4) &(5)], if in its opinion, such course of action is necessary in the public interest.
- (6) **Filing with Registrar :** A company shall, in relation to any alteration of its memorandum, file with the Registrar—
- ◆ the special resolution passed by the company under sub-section (1);
 - ◆ the approval of the Central Government under sub-section (2), if the alteration involves any change in the name of the company.
- (7) **Filing of the certified copy of the order with the registrar of the states :** Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same.
- (8) **Issue of fresh certificate of incorporation :** The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.
- (9) **Change in the object of the company :** A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money

through prospectus unless a special resolution through postal ballot is passed by the company and—

- ◆ the details, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;
- ◆ the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

(10) Registrar to certify the registration on the alteration of the objects : The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of 30 days from the date of filing of the special resolution.

(11) Alteration to be registered : No alteration made under this section shall have any effect until it has been registered in accordance with the provisions of this section.

(12) Only member have a right to participate in the divisible profits of the company : Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

II. Alteration noted in every copy : Every alteration made in the memorandum or articles of a company shall be noted in every copy of the memorandum or articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the memorandum or articles issued without such alteration. **[Section 15]**

Provision of **Section 13** are summarise below :

MOA clause	Members' resolution	External approvals	Outcome	Applicability
Name Clause	Special resolution	Approval of Central Government and subject to Section 16	New incorporation certificate issued by ROC	Not applicable where only word "Private" is added or deleted on company class conversion

Domicile Clause	Special resolution	Approval of Central Government required only when registered office is changed from one state to another	The Central Government shall dispose of the application under sub-section (4) within a period of sixty days and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that the sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge.
Objects Clause	Special resolution	-	A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through

			<p>prospectus unless a special resolution is passed by the company and—</p> <p>(i) the details, as may be prescribed, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;</p> <p>(ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations</p>	
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			to be specified by the Securities and Exchange Board.	
Liability /Capital Clause	Special resolution	–	Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.	



10. RECTIFICATION OF NAME OF COMPANY [SECTION 16]

According to **Section 16**

(1) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which, —

- (a) in the opinion of the Central Government, is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;
- (b) on an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the Central Government within 3 years of incorporation or registration or change of name of the company, whether under this Act or any previous company

law, in the opinion of the Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of 6 months from the issue of such direction, after adopting an ordinary resolution for the purpose.

(2) Where a company changes its name or obtains a new name under sub-section (1), it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

(3) If a company makes default in complying with any direction given under sub-section (1), the company shall be punishable with fine of one thousand rupees for every day during which the default continues and every officer who is in default shall be punishable with fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

The above statutory provision can be summarized as below :

(1) Central government to issue direction : The Central Government is empowered to give direction to the company to rectify its name (Where the name is identical with or too nearly resembles the name by which a company in existence had been previously registered, or the name is identical with or too nearly resembling to a registered trade mark) within a period of 3 months or 6 months, as the case may be, from the issue of such direction by passing an ordinary resolution.

(2) Notice of change to the registrar : Where a company changes its name or obtains a new name, it shall within a period of 15 days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

(3) Default in compliance with the direction : If a company makes default in complying with any direction—

Liable person	Penalty/punishment
Company	Fine of 1,000 rupees for every day during which the default continues
Every Officer who is in default	Fine varying from 5,000 rupees to 1 lakh rupees.

Vide Notification S.O. 1352(E) dated 21.05.2014 the Central Government hereby delegated to the RD subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under this section, if in its opinion, such course of action is necessary in the public interest.



11. ALTERATION OF ARTICLES [SECTION 14 & SECTION 15]

I. Section 14 of the Companies Act, 2013, vests companies with power to alter or add to its articles. A company cannot divest itself of these powers [*Andrews vs. Gas Meter Co. [1897] 1 Ch. 161*]. Matters as to which the memorandum is silent can be dealt with by the alteration of article. Section 14 of the Companies Act, 2013 vests companies with power to alter or add to its articles. The law with respect to alteration of articles is as follows :

(1) Alteration by special resolution : Subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution alter its articles.

(2) Alteration to include conversion of companies : Alteration of articles include alterations having the effect of conversion of—

(a) a private company into a public company; or

(b) a public company into a private company:

Even where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, then such company shall, as from the date of such alteration, cease to be a private company :

However, any such alteration having the effect of conversion of a public company into a private company, then such conversion shall not take effect except with the approval of the Tribunal and make such order as it may deem fit.

(3) Filing of alteration with the registrar : Every alteration of the articles and a copy of the order of the Tribunal approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

(4) Any alteration made shall be valid : Any alteration of the articles registered as above shall, subject to the provisions of this Act, be valid as if it were originally contained in the articles.

II. Alteration noted in every copy : Every alteration made in articles of a company shall be noted in every copy of the articles, as the case may be. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the articles issued without such alteration. **[Section 15]**



12. COPIES OF MEMORANDUM, ARTICLES, ETC., TO BE GIVEN TO MEMBERS [SECTION 17]

According to section 17 every company on being so requested by a member, shall send copies of the following documents within seven days of the request on the payment of fees—

- (a) the memorandum;
- (b) the articles; and
- (c) every agreement and every resolution referred in section 117 (Resolutions and agreements to be filed), if and in so far as they have not been embodied in the memorandum or articles.

In case of **default**, the company and every officer who is in default shall be liable for each default, to a penalty of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.



13. CONVERSION OF COMPANIES ALREADY REGISTERED [SECTION 18]

According to Section 18 of the Companies Act, 2013, a company may convert itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

1. By alteration of memorandum and articles : A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.

2. File an application to the Registrar : Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company.

3. Issue a certificate of incorporation : After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.

4. No effect on the debts, liabilities etc. incurred before conversion : The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.



14. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY [SECTION 19]

As per **Section 19**

- (1) No company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void :

Provided that nothing in this sub-section shall apply to a case—

- (a) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or
- (b) where the subsidiary company holds such shares as a trustee; or
- (c) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company :

However, the subsidiary company referred to in the preceding proviso shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee, as referred to in clause (a) or clause (b) of the said proviso.

- (2) The reference in this section to the shares of a holding company which is a company limited by guarantee or an unlimited company, not having a share capital, shall be construed as a reference to the interest of its members, whatever be the form of interest.

Example : RPIP Ltd. has invested 51% in the shares of SSP Pvt. Ltd. on 31 March 2017. SSP Pvt. Ltd. have been holding 2% equity of RPIP Ltd since 2011. SSP Pvt. Ltd. cannot increase its equity beyond that 2% on or after 31 March 2017. However, it could continue to hold or reduce its initial 2% stake.



15. SERVICE OF DOCUMENTS [SECTION 20]

Section 20 of the Companies Act, 2013, provides the mode in which documents may be served on the company, on the members and also on the registrars.

Law with respect to the service of documents is as follows—

- (1) Serving of document to company :** A document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by-

- ◆ registered post, or

- ◆ speed post, or
- ◆ courier service, or
- ◆ leaving it at its registered office, or
- ◆ means of such electronic or other mode as may be prescribed:

However, where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

(2) Serving of document to registrar or member : Save as provided in this Act or the rules made thereunder for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by—

- ◆ Post, or
- ◆ registered post, or
- ◆ speed post, or
- ◆ courier, or
- ◆ by delivering at his office or address, or
- ◆ by such electronic or other mode as may be prescribed :

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Explanation—For the purposes of this section, the term “courier” means a person or agency which delivers the document and provides proof of its delivery.

Exemption—Section 20 (2) shall apply to a **Nidhi Company**, subject to the modification that in the case of a Nidhi, the document may be served only on members who hold shares of more than ₹ 1,000 in face value or more than 1%, of the total paid-up share capital of the Nidhis whichever is less.

For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi. [*Notification dated 5th June, 2015.*]

As per *the Companies (Incorporation) Rules, 2014*,

1. The term, “**electronic transmission**” means a communication that creates a record that is capable of retention, retrieval (recovery) and review, and which may thereafter be rendered into clearly legible tangible form. It may be made by—

- ◆ facsimile(duplicate) telecommunication or electronic mail, which the company or the officer has provided from time to time for sending communications,
- ◆ posting of an electronic message board or network that the company or the officer has designated for such communications, or
- ◆ other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person contending to send the transmission

2. In case of delivery by post, such service shall be deemed to have been effected—

- (i) in the case of a notice of a meeting, at the expiration of 48 hours after the letter containing the same is posted; and
- (ii) in any other case, at the time at which the letter would be delivered in the ordinary course of post.



16. AUTHENTICATION OF DOCUMENTS, PROCEEDINGS AND CONTRACTS [SECTION 21]

As per section 21 of the Companies Act, 2013, a document or proceeding requiring authentication by a company or contracts made by or on behalf of a company may be signed by—

- (i) any key managerial personnel, or
- (ii) an officer of the company duly authorised by the Board in this behalf.⁷

Authentication of documents, proceedings and contracts

As per Sec. 21 these may be signed by any "key managerial personnel" or an officer of the company duly authorised by the Board in this behalf.

As per Sec.2(51) key managerial personnel in relation to a company, means

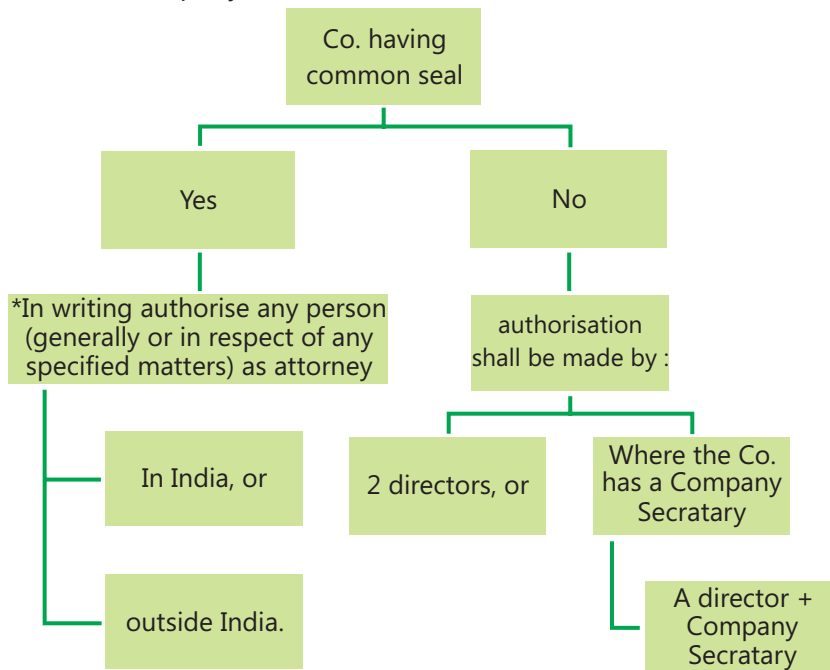
- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer; and
- (v) such other officer as may be prescribed;

7. In the case of specified IFSC public company and IFSC private company, for the word "An officer" read as "An officer or any other person".



17. EXECUTION OF BILLS OF EXCHANGE, ETC. [SECTION 22]

- (1) A bill of exchange, hundior promissory note shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company if made, accepted, drawn, or endorsed in the name of, or on behalf of or on account of, the company by any person acting under its authority, express or implied.
- (2) A company may, by writing under its common seal, if any, authorise any person, either generally or in respect of any specified matters, as its attorney to execute other deeds on its behalf in any place either in or outside India.
However, in case a company does not have a common seal, the above authorisation shall be made by 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary
- (3) A deed signed by such an attorney on behalf of the company and under his seal shall bind the company.



*It can be observed from above that a company may or may not have a common seal. If company decides to have a common seal then it has to affix the same for specified matters, execution of deeds on behalf of the company.



SUMMARY

- A company can be defined as an “artificial person”, invisible, intangible, created by or under law, with a distinct legal personality and perpetual succession. It is not affected by the death, insanity, or insolvency of an individual member
- The memorandum of association is the document that sets up the company and the articles of association set out how the company is run, governed and owned.
- Once an association becomes incorporated it acquires a new legal status – it becomes a legal entity in its own right, separate from the individual members.
- A company of any class may convert itself as a company of other class by alteration of its MOA and AOA



TEST YOUR KNOWLEDGE

Multiple Choice Questions

1. The minimum number of members in a private company and public company are
 - (a) Three and Seven respectively
 - (b) Two and seven respectively
 - (c) Two and nine respectively
 - (d) None of the above
2. Which one of the following is not the content of the Memorandum of Association?
 - (a) Name clause
 - (b) Registered office clause
 - (c) Objects clause
 - (d) Board of Directors clause
3. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of _____ from the date of filing of the special resolution.
 - (a) 30 days
 - (b) 60 days
 - (c) 90 days
 - (d) 6 months
4. Only a natural person who is an Indian citizen and who has stayed in India for a period of at least _____ days during the immediately preceding one calendar year shall be eligible to incorporate a OPC.

- (a) 180 days
 - (b) 181 days
 - (c) 182 days
 - (d) 183 days
5. A section 8 company can call its general meeting by giving a clear at least _____ notice.
- (a) 7 days
 - (b) 14 days
 - (c) 21 days
 - (d) 27 days

Answer to MCQs

1. (b)	2. (d)	3. (a)	4. (c)	5. (b)
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Question and Answer

Question 1

The Memorandum of Association of a company was signed by two adult members and by a guardian of the other five minor members, the guardian signing separately for each minor member. The Registrar registered the company and issued under his hand a Certificate of Incorporation. The plaintiff contended that (a) conditions of registration were not duly complied with, and (b) that there were no seven subscribers to the Memorandum. Will the Court uphold his contention?

Answer

Yes, (being a fundamental right under the Constitution of India to go for legal proceedings) the registration of the company can be challenged but it will not in any way affect or cancel the registration of the company and the Memorandum and Articles.

Section 10 (1) of the Companies Act, 2013 states that subject to the provisions of the Act, the Memorandum and Articles shall, when registered, bind the company and the members thereof, to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the Memorandum and of the Articles.

Question 2

The Directors of a company registered and incorporated in the name "Mars Textile India Ltd." desire to change the name of the company entitled "National Textiles and Industries Ltd." Advise as to what procedure is required to be followed under the Companies Act, 2013?

Answer

Change in the name of company : In the first instance, Mars Textile India Ltd., should ascertain from the Registrar of Companies whether the proposed name viz. National Textiles and Industries Ltd. is available or not. For this purpose, the company should file the prescribed Form No.INC.24 with the Registrar along with the necessary fees. The Registrar after examination will inform whether the new name is available or not for registration.

In case the name is available, the company has to pass a special resolution approving the change of name to National Textiles and Industries Ltd.

Thereafter the approval of the Central Government should be obtained as provided in Section 13(2) of the Companies Act, 2013. The power of Central Government in this regard has been delegated to the Registrar of Companies. Thus, the company has to file an application along with the prescribed filing fee for change of name. The change of name shall be complete and effective only on the issue of a fresh certificate of incorporation by the Registrar. The Registrar shall enter the new name in the Register in place of the former name¹³⁽³⁾. The change of name shall not affect any rights or obligations of the company and it shall not render defective any legal proceedings by or against it.

Question 3

XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Pune (State of Maharashtra). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.

Answer

The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Pune, does not result in the alteration of the Memorandum and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under section 12 (5) of the Act which deals with the registered office of company, the change in registered office from one town or city to another in the same state, must be approved by a special resolution of the company. Further, presuming that the Registrar will remain the same for the whole state of Maharashtra, there will be no need for the company to seek the confirmation to such change from the Regional Director.

Question 4

RSP Limited, with a limited liability of its members by guarantee of ₹10 lac to each member. The company increases the liability of the members from ₹ 10 lac to 15 lac by an alteration made in the liability clause of the Memorandum of Association. Referring to the provisions of the Companies Act, 2013 decide, whether the members of the company are liable for the increased liability.

Answer

The limitation of liability is an essential clause in the Memorandum and on registration of the company becomes binding on all present and future members.

The present question states that the liability of the members has been increased by the company without clarifying the mode. The company can act only through its Board of Directors or through its members. The Board of Directors do not have the authority to alter the clause; hence it means that the alteration was approved by the members at a general meeting. However, section 13 of the Act which deals with the alteration of the Memorandum does not provide for the alteration of its liability clause. Hence, the liability of members cannot be altered once the company is formed.

The alteration in the given question is therefore invalid.

Question 5

The Articles of Association of a Limited Company provided that 'X' shall be the Law Officer of the company and he shall not be removed except on the ground of proved misconduct. The company removed him even though he was not guilty of misconduct. Decide, whether company's action is valid?

Answer

Section 5 (1) of the Companies Act, 2013 states that the Articles of a company contain the regulations for the management of a company. Further section 5 (2) provides that the Articles of a company shall contain all matters that are prescribed under the Act and also such additional matters as may be considered necessary for the management of the company.

Removal of Law Officer : The Memorandum and Articles of Association of a company are binding upon company and its members and they are bound to observe all the provisions of memorandum and articles as if they have signed the same [Section 10(1)].

However, the company and members are not bound to outsiders in respect of anything contained in memorandum/articles by which such outsiders have been given any rights. This is based on the general rule of law that a stranger to a contract cannot acquire any right under the contract.

In this case, Articles conferred a right on 'X', the law officer that he shall not be removed except on the ground of proved misconduct. In view of the legal position explained above, 'X' cannot enforce the right conferred on him by the articles against the company. Hence the action taken by the company (i.e. removal of 'X' even though he was not guilty of misconduct) is valid.

However, by altering the Articles by a special resolution under section 14 of the Act and Mr. X can be removed.

