COMPANY LAW

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Preface

Company Law, also known as corporate law, is a body of legal principles and regulations that govern the formation, operation, and dissolution of companies. It provides the legal framework within which businesses are established and managed, ensuring that they operate in accordance with statutory requirements and ethical standards. Company Law covers various types of business entities, including corporations, partnerships, and limited liability companies, each with its own set of rights, obligations, and legal responsibilities.

Company Law defines the legal structure of companies, outlining the rights and duties of shareholders, directors, officers, and other stakeholders. It establishes the rules for the formation and registration of companies, including the requirements for creating corporate entities, issuing shares, and filing financial reports. Company Law also governs the internal management of companies, including the procedures for holding shareholder meetings, electing directors, and making corporate decisions.

A central aspect of Company Law is corporate governance, which refers to the system of rules, practices, and processes by which companies are directed and controlled. Corporate governance ensures that companies operate in the best interests of shareholders and stakeholders, promoting transparency, accountability, and integrity in corporate affairs. Company Law establishes the principles of corporate governance, including the duties and responsibilities of directors, the protection of minority shareholders' rights, and the disclosure of information to shareholders and the public.

Company Law protects the rights of shareholders and provides legal remedies for shareholders who believe their rights have been violated. Shareholders have

the right to participate in company decision-making, receive dividends, and inspect corporate records. Company Law also provides mechanisms for shareholders to enforce their rights, such as derivative actions, shareholder lawsuits, and the right to petition the courts for relief.

Company Law regulates corporate finance and securities offerings, ensuring that companies raise capital in compliance with legal and regulatory requirements. It governs the issuance and trading of securities, including stocks, bonds, and derivatives, and establishes rules for public offerings, private placements, and securities transactions. Company Law also regulates insider trading, market manipulation, and other fraudulent practices to protect investors and maintain market integrity.

Company Law governs mergers, acquisitions, and other corporate transactions, providing rules and procedures for companies seeking to combine or restructure their businesses. It establishes the legal framework for mergers, acquisitions, and divestitures, including the approval process, shareholder voting rights, and the treatment of minority shareholders. Company Law also regulates the conduct of corporate officers and directors in merger and acquisition transactions, ensuring that they act in the best interests of shareholders and stakeholders.

Compliance with Company Law is essential for companies to operate legally and ethically, avoiding legal liabilities and reputational damage. Company Law requires companies to comply with various legal and regulatory requirements, including financial reporting, tax filings, and corporate governance standards. It also promotes ethical behavior and corporate social responsibility, encouraging companies to act responsibly towards their shareholders, employees, customers, and the broader community.

In this preface, we embark on a journey through the intricacies of Company Law, exploring its foundational principles and practical applications in the realm of corporate governance and business regulation.

–Author

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Introduction

MEANING AND DEFINITION OF A COMPANY

Literally, the word 'company' means a group of persons associated for some common object such as business, charity, research, *etc.* Section 3(1)(i) of the Companies Act, 1956 defines a company as ''a company formed and registered under the Act or an existing company.'' This definition does not give a clear description of the word 'company.''

Haney has given a definition which contains the essential elements of a company. According to him, ''a company is an incorporated association which is an artificial person created by law, having a separate entity, with a perpetual succession and a common seal.'' Lord Justice Lindley has given a still comprehensive description by describing company as ''an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business and who share the profit or loss arising therefrom.

The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable although the right to transfer them is often more or less restricted.''

In the final analysis, a company may be described as an incorporated association, being an artificial person, having an independent legal entity with a perpetual succession, a common seal, a common capital comprised of transferable shares and carrying a limited liability.

DEFINITION OF COMPANY

The term 'company' implies an association of a number of persons for some general objector objects. In information, the purposes for which people may wish to associate are multifarious but the term 'company' is normally reserved for those associated for economic purpose *i.e.*, to carry on a business for gain.

Partnerships often describe themselves as 'A, B. C and Company'. Though this does not create the firm a company in the legal sense of the word, they at only indicating that there are other persons in the association,

In legal terminology, a company means a company incorporated or registered under the Companies Act, 1956 or under any of the, earlier companies Acts; Section 3(l) (i) of the Companies Act, 1956 states that a Company means a company shaped and registered under the Act or an existing Company. An existing Company means a Company shaped and registered under any of the previous Companies Acts. This definition, though, is not exhaustive because it does not reveal the c features of a Company.

A company is described a 'body corporate' because, as a consequence of incorporation, the big number of members who constitute the company are legally merged into one body which has a separate identity of its own. In its legal form, a company is an artificial person created through law. It has a separate identity self-governing of its members.

This artificial legal person is entitled to several rights and incurs several liabilities like any other ordinary human being.

A company has been defined through Lord Justice Lindley as follows: Esy a company is meant an association of several persons who contribute money or company's worth to a general stock and employs it in some trade or business, and who are the profit and loss (as the case may be) arising there from. The general stock s c contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are described members. The proportion of capital to which each member is entitled is his share. Shares are always transferable a through the right to transfer them is often more or less restricted."

Another good definition has been given through Chief Justice Marsh all. According to him, "a company is a person, artificial, invisible, intangible, and existing only in the eyes of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very subsistence."

According to Lord Haney, "A company is an incorporated association which is an artificial person created through law, having a separate entity, with a perpetual succession and a general seal."

From the definitions, it is clear that a company has a corporate and legal personality. It is an artificial person and exists only in the eyes of law. It has a self-governing legal entity, a general seal, and perpetual succession.

MAIN CHARACTERISTICS OF A COMPANY

On analyzing the several legal and juristic definitions of the term 'company' you will observe that a company shaped and registered under the Companies Act has sure special characteristics which distinguish it from the other forms of organisations. The main features of a company are as follows.

Creation of Law

A company is an association of persons who have agreed to form the company and become its members or shareholders with the substance of carrying on a lawful business for profit. It comes into subsistence when it is registered under the Companies Act.

Separate Legal Entity

In the eyes of law, a company shaped and registered under the Companies Act has a separate legal entity. After registration, the company is treated as an artificial person because in reality no such, natural person exists. It is invisible, intangible and without any physical or natural subsistence. Although a company is a legal person having a nationality/and domicile, it is not a citizen.

The legal status of a company has been aptly described through the Supreme Court of India in Tata Engineering & Locomotive Co, Ltd v. State of Bihar as follows:

- "The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and separate from those of its members; it can sure and is sued exclusively for its own purpose".

Even though the company lacks a physical subsistence, for purposes of law it is regarded as a self-governing legal person who has a personality of its own and is dissimilar from the members constituting the company. So, a company can enter into a contract with any member of the company. A person can own its shares and also be its creditor. A shareholder cannot be held liable for the acts and debts of the company even though he virtually holds the whole share capital. No member can either individually or jointly claim any ownership rights in the assets of the company throughout its subsistence or on its winding up. Likewise, creditors of the company are creditors of the company alone and they cannot take action against the members of the company.

Even where a single shareholder owns virtually the whole of its shares, the company is to be treated as a separate legal entity and is to be differentiated from such a shareholders. This can be understood better through referring to the case of Salomon vs. Salomon and Company Ltd. Mr. Salomon was running a shoe business in England. We shaped a company recognized as 'Soioman and Co. Ltd.' It consisted of Saloman himself, his wife, his four sons and a daughter. The shoes business of Mr. Saloman was sold to the company for £30,000.

Mr. Saloman received from the company purchase price in the form of £20,000 fully paid shares of £1 each and £10,000 in debentures which accepted a floating charge in excess of the assets of the company. One share off 1 each was subscribed for in cash through each member of Saloman's family. Saloman was the managing director of the company. Throughout the course of business, the company became liable for some unsecured loan.

The company ran into financial difficulties after some time and went into liquidation within a year. On winding up, the assets realized £6,000. The company owed £10,000 to Mr. Saloman and £7,000 to unsecured creditors. Therefore, after paying off the debenture holder (Mr. Saloman), nothing was left for unsecured creditors. The creditors claimed priority in excess of the debentures contending that Mr. Saloman and Saloman and Co. Ltd. were one and the similar person, the company was only a facade to defraud the innocent creditors. Mr. Saloman should not so, be treated as a secured creditor. The Mouse of Lords held that the company had been validly constituted and it had an self-governing subsistence separate from its members. So, Mr. Saloman was entitled to be paid his dues first as a secured creditor. It was observed that the business belonged to the company and not to Mr. Saloman. The company and Mr. Saloman enjoyed separate legal entities. The information that the members were from one single family had no bearing upon the validity of the company.

In T.R. Pratt (Bombay) Ltd. Vs E.D. Sasoon and Co. Ltd., it was observed that under the law, an incorporated company is a separate entity, and although all the shares may be practically controlled through one person, in law a company is a separate entity. Likewise in Abdul Haq v Das Mal, an employee sued a director of the company for the recovery of the amount of salary due to him. It was held that he could not succeed because the remedy lied against the company and not against the directors or members of the company.

As a consequence of separate legal entity, the company may enter into contracts with its members and vice-versa. Therefore, a shareholder can be the creditor of the company.

Limited Liability

A major advantage enjoyed through a company is that the liability of its members is limited. You will later on revise that on the foundation of liability, companies may be classified as:

- Companies limited through shares; and
- Companies limited through guarantee.

In the case of former the liability of every member of the company is limited to the amount of shares subscribed through him. If the member has paid full amount of the face value of the shares subscribed through him, his liability shall be nil and he cannot be asked to contribute anything more. Likewise, in the case of a company limited through guarantee, the liability of the members is limited upto the amount guaranteed through a member.

Company and its FormationCompany can never come to an end. You learnt that a company is the creation of law. It can also be brought to an end through the procedure of law.

Transferability of Shares

The shares of a public limited company are freely transferable. A shareholder can transfer his shares to any person without the consent of other members. Under the articles of association, even a public limited company can put sure restrictions on the transfer of shares but it cannot altogether stop it. A shareholder of a public limited company possessing fully paid up shares is at liberty to transfer his shares to anyone he likes in accordance with the manner provided for in the articles of association of the company. Though, a private limited company is required to put sure restrictions on transferability of its shares.

General Seal

In view of the information that a company is an artificial person and cannot sign its name on a contract, every company is required to have its own seal. The general seal of the company is of great importance. It acts as the official signature of the company. A metallic seal should be used. Every company necessity has a general seal with its name engraved on the similar. The seal acts as a substitute for the signature of the company. Any document which does not bear the general seal of the company is not binding on the company.

May Sue or be Sued

As juristic person, company can sue and be sued in its own name. This is so because a company has a separate legal subsistence. A company may enter into contracts and can enforce the contractual rights against others and it can be sued through others if it commits a breach of contract.

CHARACTERISTICS OF A COMPANY

On the basis of the definitions considered above, the following characteristics of the company may be deduced:

Incorporated Association: A company is required to be registered under the Companies Act. The minimum number of persons required to form a public and a private company is 7 and 2 respectively. These persons should subscribe their names to the memorandum and also comply with other legal requirements. It is compulsory for an association of more than 10 persons carrying on banking business, or more than 20 persons carrying on any other type of business, to be registered under the Companies Act as per Section 11. Failure to register will make it an illegal association.

On incorporation, a company becomes a body corporate or a corporation with perpetual succession and common seal.

Artificial Legal Person: A company is an artificial person in the sense that it is created by law and lacks the attributes possessed by natural persons. It is

invisible, intangible, immortal and exists only in the contemplation of law. Because of its artificial nature, it can operate through a board of directors consisting of individuals.

Separate Legal Entity: Legally a company is distinct from its members. The consequences of such separate legal existence are as follows:

(a) The Property of the company belongs to it and not to members or shareholders. It must be used for the benefit of the company as a whole and not for the personal benefit of any shareholders.
(b) No member can either individually or jointly claim any ownership rights in the assets of the company (*Bacha F. Guzdar vs. C.I.T. AIR 1955 S.C. 74*].
(c) An individual member cannot be held liable for the wrongful acts of the company even if he holds virtually the entire share capital.
(d) The members of the company can enter into contracts with the company.

The principle of separate legal entity was explained in *Saloman vs. Saloman & Co.* (1897) A.C. 32. In this case, Saloman sold his shoe business to a newly formed company namely Saloman & Co., for a sum of £30,000. The company consisted of his wife, one daughter and four sons, each of whom took one share worth £1. Saloman was given 20,000 fully-paid shares besides secured debentures worth £10,000 having a floating charge on company's assets. Saloman was the managing director of the company. A year later, the company become insolvent.

On winding up, the company had total assets of £6000. Its liabilities were: Saloman as secured debenture-holder: £10,000, and unsecured creditors worth £7000. The unsecured creditors claimed priority over Saloman's claim on the ground that 'Saloman and his company are one and the same thing.' The House of Lords unanimously observed that once the company was incorporated, it has a separate entity independent of its members. Though it may be that after incorporation, the business is precisely the same as before and the same hands receive the profits, the company cannot be equated with the members comprising it. Therefore, company was not the agent of Saloman.

Similar view has been taken in *Lee vs. Lee's Air Farming Ltd.*(1960)3. *All. E.R.* 420; *also in Flitcraft's Case* (1881).

Perpetual Succession: A company is a stable form of organisation and does not have any fixed span of life. Its continuance is not affected by the death, insolvency, mental or physical incapacity of its members. It is created by law and the law alone can dissolve it. Members may come and go but the company goes on for ever notwithstanding a total change in the composition of its members. A company is like a flowing river whose water keeps on changing yet the identity of the river remains the same.

Common Seal: Being an artificial entity, a company has to act through a collectivity of individuals called 'the board'. The board of directors is competent to exercise almost all the powers of a company on its behalf. In order to signify

company's consent to a contract or document, the board affixes the seal of the company on it. The common seal signifies common consent of all the members and is the official signature of the company.

Limited Liability: The main feature of a company is that the liability of its members is limited to the extent of amount unpaid on their shareholdings. In other words, no shareholder can be required to pay more than the nominal value of shares held by him (or the amount of guarantee, in case a person is a member of a guarantee company). However, this privilage has been curtailed by Sections 45, 542 and 147.

Transferability of Shares: The Shares of a public company are freely transferable without the persmission of the company but in a manner provided in the Articles. The right to transfer shares is a statutory right and cannot be taken away by making any provision to the contrary in the articles. However, a private company imposes restrictions on transfer as per Section 3(1)(iii).

Separate property: All the property of the company vests in it. The company can control, manage and hold the same in its own name. The members have no ownership rights in the company's property either individually or collectively. A shareholder does not even have an insurable right in the property of the company [*Macura vs. Northern Assurance Co. Ltd.* (1925)]. The creditors of the company can have a claim only against the property of the company and not against the property of individual members.

Capacity to Sue: A company being a legal person can enforce its rights through suits. By the same token, it can be sued for breach of its statutory rights.

ON-LINE REGISTRATION OF A COMPANY

Incorporating a company through Simplified Proforma for Incorporating Company electronically (SPICe -INC-32), with eMoA (INC-33), eAOA (INC-34), is the default option and most companies are required to be incorporated through SPICe only.

How can Foreign Companies Establish a Place of Business in India?

Any foreign company can establish its place of business in India by filing eForm FC-1 (Information to be filed by foreign company).

Note: The eForm needs to be digitally signed by authorized representative of the foreign company. There is no need to apply and obtain DIN for Directors of a foreign company. However, it is mandatory to register the DSC of the authorized representative of the foreign company via associate DSC service available at MCA portal.

COMPANY REGISTRATION

Private Limited Company is the most prevalent and popular type of corporate legal entity in India. Private limited company registration is governed by the Ministry of Corporate Affairs, Companies Act, 2013 and the Companies Incorporation Rules, 2014.

To register a private limited company, a minimum of two shareholders and two directors are required. A natural person can be both a director and shareholder, while a corporate legal entity can only be a shareholder. Further, foreign nationals, foreign corporate entities or NRIs are allowed to be Directors and/or Shareholders of a Company with Foreign Direct Investment, making it the preferred choice of entity for foreign promoters.

Unique features of a private limited company like limited liability protection to shareholders, ability to raise equity funds, separate legal entity status and perpetual existence make it the most recommended type of business entity for millions of small and medium sized businesses that are family owned or professionally managed.

India Filings is the market leader for services relating to company registration in India. IndiaFilings can help you register a private limited company, one person company, nidhi company, section 8 company, producer company or Indian subsidiary.

The average time taken to complete company formation is about 10 - 15 working days, subject to government processing time and client document submission. Get a free consultation for private limited company registration and business startup by scheduling an appointment with an IndiaFilings Advisor.

LEGAL POSITION OF PRE-INCORPORATION CONTRACTS

1. *Not binding on the company:* The company is not bound by pre-incorporation contracts even if it takes the benefit of work done in pursuance thereof nor can it be sued in respect thereof. [In re *English and Colonial Produce Co. Ltd.* (1906) 2 Ch. 435]
2. *Not binding on other party:* The company can't sue on pre-incorporation contracts *i.e.*, it can not take the benefit of a contract made on its behalf before its incorporation. [*Natal and Colonisation Co. Ltd.* vs. *V. Pauline Colliery Syndicate*]. Thus the company can neither sue nor be sued for enforcement of pre-incorporation contracts.
3. *No ratification:* The company can't ratify or adopt a pre-incorporation contract purported to have been made on its behalf even if it is for its benefit. For a valid ratification, a comp-any must be in existence and capable of entering into a contract.
4. *Personal Liability of Promoters:* The promoters are personally liable for a pre-incorporation contract unless a new contract embodying the terms of the old one is made afresh by the company after its incorporation. He can, however, exclude his liability by incorporating the following clause in his agreement with the other party:
   (a) That if the company makes a contract in terms of pre-incorporation contract, his liability shall cease, and
   (b) That, if the company does not do so within a certain period, either party shall have the right to rescind the contract.

Ratification under Sepcific Relief Act

Sections 15 (h) and 19 (e) of the Specific Relief Act have provided some relief in relation to pre-incorporation contracts. Their combined effect is that a pre-incorporation contract can be specifically preformed by or against the company provided:

(a) The contract is made for and on behalf of the company;
(b) Such a contract is warranted by the terms of the incorporation, and
(c) The company has accepted the contract and communicated its acceptance to the other party.

Whereas a private company becomes legally bound the moment it makes a fresh contract or ratifies a contract immediately after incorporation; a public company becomes bound only after getting the certificate of commencement of business.

NATIONAL COMPANY LAW TRIBUNAL

The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 (18 of 2013) w.e.f. 01st June 2016.

In the first phase the Ministry of Corporate Affairs have set up eleven Benches, one Principal Bench at New Delhi and ten Benches at New Delhi, Ahmadabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guahati, Hyderabad, Kolkata and Mumbai. These Benches were headed by the President and 16 Judicial Members and 09 Technical Members at different locations.Subsequently more members have joined and Benches at Cuttack, Jaipur, Kochi, Amravati, and Indore have been setup.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

The National Company Law Appellate Tribunal (NCLAT) is a tribunal which was formed by the Central Government of India under Section 410 of the Companies Act, 2013. The tribunal is responsible for hearing appeals from the orders of National Company Law Tribunal(s) (NCLT), starting on 1 June 2016.

The tribunal also hears appeals from orders issued by the Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC. It also hears appeals from any direction issued, decision made, or order passed by the Competition Commission of India (CCI). As per 2020, the Appellate Tribunal is headed by Chairperson Justice Bansi Lal Bhat.

Structure of NCLAT

The NCLAT includes a Chairperson, a judicial member, and a technical member. It consists of a total of not more than eleven members.

CONSTITUTIONALITY OF SPECIAL COURTS AND THEIR FUNCTIONING

A Special Court is a court with constrained purview, that manages a specific field of law as opposed to a specific regional ward. In India, Special Courts are

being arranged for different preliminaries for offenses relating to transactions in securities, atrocities against Scheduled Caste and Scheduled Tribes, expending narcotic drugs, infringement of the National Investigation Agency Act, corruption, *etc.* The apex court of India has additionally arranged 12 quick track uncommon courts to solely manage cases including with MLA/MPs.

Special Courts exist for both common and criminal debates. They do exclude the numerous managerial law courts that exist at both the bureaucratic and state government level; authoritative courts are viewed as a feature of the executive branch, as opposed to the legal branch. Be that as it may, a general-ward court that hears just explicit sorts of cases, for example, a landowner occupant part of a general purview preliminary court, is typically viewed as an extraordinary court.

The adjudicators who serve in Special Courts are shifted to the extraordinary courts. Most exceptional court judges acquire their situations through political decisions, as opposed to through the legitimacy determination.

Purpose of Special Courts

The concept of Special Courts is not a new phenomenon in the Indian criminal jurisprudence. The British government set up several Special Courts under different enactments but they were mainly aimed at suppressing the freedom movement of India. Those laws were draconian and were characterized by a denial of the substance of a free trial and provided a truncated procedure without any right of appeal to the High Court.

After Independence, different state governments in our country also set up Special Courts and passed different acts to deal with grave situations that arose immediately after partition and the Supreme Court held in several cases that the legislature is competent to create Special Courts, but it should not violate Article 14 of our Indian Constitution. The Criminal Law Amendment Act, 1908 contemplated setting up of Special Courts dealing with terrorist crimes. Special Courts were also created under the Criminal law Amendment Act, 1952 for the trial of the offenses of bribery and corruption, under Section 161-165 and 165-A of the Indian Penal Code, 1860.

A few such courts were made because of explicit episodes. For example, the 1992 protections trick prompted the Special Court (Trial of Offenses Relating to Transactions in Securities) Act, 1992. The largest number of Special Courts were made between the years 1982 and 1992.

Courts of Special Jurisdiction

Special jurisdiction is the Courts' jurisdiction over certain types of cases such as bankruptcy, claims against the government, probate, family matters, immigration, and customs, or limitations on courts' authority to try cases involving maximum amounts of money or value. Special jurisdiction is also known as limited jurisdiction.

In the U.S., federal courts are courts of limited jurisdiction. Federal district courts can hear a case only if it meets certain conditions. These courts spread

the court of appeals for the Armed Forces, the court of federal claims, the court of international trade, the court of appeals for veterans claims, the judicial panel on multidistrict litigation, and the tax court. Every one of these courts is answerable for taking care of explicit kinds of cases and have their own court rules. In India, the Supreme Court has original, appellate and advisory jurisdiction. The Supreme Court has special advisory jurisdiction which may explicitly be alluded to it by the President of India under Article 143 of the Indian Constitution.

Do Special Courts Exist in other Judicial Systems too Special Courts in the US

The judicial system of the United States has Special Courts which incorporate all courts of restricted and concentrated wards that are not courts of general purview or redrafting courts. An extraordinary court, by and large, tends to just one or a couple of zones of law or has explicitly characterized powers. Special Courts in the United States are created out of the English custom of taking care of various types of cases by setting up a wide range of unique courts. A large number of the Special Courts built up in the United States during pioneer times and not long after the Constitution was received have been abrogated, yet new Special Courts are still being formed, particularly at the state level. Uncommon courts currently handle most of the cases in the United States. Most of all cases acquired by a specific state ward go to extraordinary courts.

Special Courts in China

The Special Courts incorporate military courts, railroad courts, and sea courts. The military court that is set up inside the PLA is accountable for hearing criminal cases including servicemen. This is a generally shut framework. The railroad and transport courts manage criminal cases and financial debates identifying with rail routes and transportation.

Five sea courts have been built up by the Supreme People's Court at the port urban areas of Guangzhou, Shanghai, Qingdao, Tianjin, and Dalian. These courts have purview over oceanic cases and sea exchange instances of the main occurrence, including some other questions of this classification occurring among Chinese and remote residents, associations, and ventures. By and by, they have no locale over criminal cases and other common cases having a place with the standard courts. The higher individuals' court in the area where a sea court is found will have purview over interests against the judgment and requests of the sea court.

Special Courts in the UK

There are many Special Courts. These are frequently depicted as "councils" as opposed to courts, yet the distinction in the name is good for nothing. For instance, a business council is a below-average court of record for the purposes behind the law of contempt of court. Much of the time, there is a legal right of

offer from a council to a specific court or uncommonly composed investigative council. Without a particular interest court, the main cure from a choice of a council might be using a legal survey to the High Court, which will frequently be more constrained in scope than an intrigue.

Examples of Special Courts are:

- Employment tribunals (formerly industrial tribunals) with an appeal to the Employment Appeal Tribunal.
- The Employment Appeal Tribunal, which is a superior court of record, and therefore not subject to judicial review, appeals go to the Court of Appeal.
- The First-tier Tribunal and the Upper Tribunal established under the Tribunals, Courts and Enforcement Act, 2007 have absorbed the function of many pre-existing tribunals.

What is Special about the Special Courts

The governing body has presented Special Courts on numerous events through different laws, typically intending to empower brisk and proficient removal of cases. Yet, an assessment of the laws that require setting up of extraordinary courts contrasted with the genuine numbers that have been set up uncovers the degree to which reality and goal are crisscrossed.

A legal study stated that 764 Central laws ordered and revised somewhere in the range of 1950 and 2015, barring laws that were cancelled in this period or that may have been altered after 2015, were inspected to decide the recurrence of their event. These resolutions were viewed for just notices of 'extraordinary' or 'assigned' courts or judges, that is, courts or judges set up to guarantee compelling preliminary and that have forces of region or meetings courts. Gatherings like semi-legal bodies, councils, and commissions were avoided. It was discovered that three resolutions accommodated Special Courts between the years 1950 and 1981, while somewhere in the range of 1982 and 2015, 25 rules ordered the foundation of such courts.

The five-year time frame from 1982 to 1987 saw an unexplained spray in the number of laws making Special Courts. A comparative increment was seen somewhere in the range of 2012 and 2015. A few such courts were made in light of explicit episodes. For example, the 1992 protections trick prompted the Special Court (Trial of Offenses Relating to Transactions in Securities) Act, 1992. The biggest number of exceptional/assigned courts were made somewhere in the range of 1982 and 1992.

Notwithstanding, the reports uncover a lot of extensions to grow the zones of inquiry for research. For example, what is so unique about exceptional courts on the off chance that they just give an extra discussion to arrange cases? Is this reason despite everything served if existing courts are only assigned as unique courts with no new foundation being made? Would inferences be able to be drawn about the condition of the legal framework where uncommon courts have been acquainted by a method of alterations with parent laws? Is the

assembly observing the wellbeing of extraordinary courts and inspecting whether their unique expressed reason keeps on being served? These are questions that future examinations could investigate.

How do Special Court's function

The constitution of Special Courts and their functioning fall within the domain of the State and Union Territory Governments, who set up such courts as per their need and resources, in consultation with the High Courts following Section 14 of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) (PoA) Amendment Act, 2015.

The Act further engages a State Government to indicate for each region, a Court of Session to be a Special Court for the reason, in those Districts where less number of cases under this Act are recorded. In this way, the State-wise status of the constitution of such Courts isn't looked after midway. The 14th Finance Commission supported the proposition of the Union Government to reinforce the legal framework in States which included setting up 1800 Fast Track Courts at an expense of Rs. 4144 crore for cases including helpless and minimized areas of the general public.

Special Courts contrast from general-ward courts in a few different regards other than having an increasingly restricted purview. Cases are bound to be discarded without preliminary in extraordinary courts, and if there is a preliminary hearing, it is normally heard more quickly than in a court of a general locale. Exceptional courts, as a rule, don't adhere to the equivalent procedural guidelines that general-purview courts follow; regularly unique courts continue without the advantage or cost of lawyers or even law-prepared adjudicators.

The judges who serve in Special Courts are as different as the uncommon courts themselves. Most uncommon court judges get their situations through political decision, as opposed to through the legitimacy determination framework normal all in all purview courts. What's more, most unique court judges are not legal advisors.

Critical analysis of Re: The Special Courts Bill, 1978 (Special Courts case)

In Re The Special Courts Bill, 1978, the question referred to the supreme court under Article 143 for its advisory opinion was whether the Special Court's bill, 1978 proposing to set up Special Courts for the speedy trial of offences committed by the holders of high public offices during the emergency of 1975-1977 is Constitutionally valid.

The Supreme Court held that Parliament had legislative competence to enact the law under Entries Il-A of list Ill and Entry 77 of List 1. It also ruled that the classification made by the Bill was valid and it did not infringe Article 14 as it classified both "offenses" and class of offenders, the former concerning the period, and concerning the objective that it was imperative to decide such cases speedily and the latter concerning their status *i.e.*, holders of high public offices.

It was only when both these conditions existed the prosecution could be instituted in the Special Courts. The Court held that the offenses alleged to have been committed during the period of emergency constitute a class by themselves and so do the persons who have utilized the high public offices by them as a cover or opportunity to commit those "offences. Thus there was a close relationship between the basis of classification and the object of (speedier trial) of the Bill.

The court also held that apart from the requirement of Article 14 the law must also satisfy the requirement of Article 21 Which requires that the procedure provided for the trial of such offenders must be fair, just, and reasonable. The court found three procedural defects in the bill. Firstly there was no provision in the Bill for the Transfer of cases from one Special Court to another, secondly, the Bill empowered the Government to appoint retired High Court Judges to preside over a Special Court. Thirdly the judges were appointed by the Government only with the "consultation" of the Chief Justice of India and concurrence" Since all the three procedural. acceptable to the Government the court held that the Bill was constitutional. Later the Special Courts (Repeal) Act, 1982 (Act No 34 of 1982) repealed the Special Courts Act 1979 (Act 22 of 1979).

Difference between Special Courts and Constitutional Courts

Special Courts only hear cases in a very narrow jurisdiction and the judges serve for a specific term, while the constitutional court's main authority is to rule on whether laws that are challenged are unconstitutional, Example- whether they conflict with constitutionally established rights and freedoms.

Constitutional courts are established pursuant to Article III of the Constitution, which states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." These courts have only the powers specified in Article III. They can hear only cases or controversies; their judges hold office for life, as long as they are not guilty of judicial misconduct; and their judges' salary cannot be reduced while those judges serve in office.

In earlier times, legislative courts were the best means to bring justice into the territories. Territorial courts heard all kinds of cases that the constitutional courts could not hear, such as divorce cases. Once a territory became a state, cases that fell within the jurisdiction of the federal court would be transferred to the federal court established in the new state; all other cases would be heard in the courts of the newly created state.

Number of Special Courts set up to Try Cases

The center informed the Supreme Court that 12 Special Courts have been set up across 11 States exclusively to try sitting MPs and MLAs. Delhi has two such courts, while Andhra Pradesh, Telangana, Karnataka, Kerala, Tamil Nadu, Uttar Pradesh, Bihar, West Bengal, Maharashtra, and Madhya Pradesh have one each.

Six are meeting courts and five are authoritative courts. The Special Court in each State would have jurisdiction over the entire state while the two in Delhi would cover cases within the precincts of Delhi or "partly Delhi".

The Supreme Court requested that Special Courts be set up to quickly track the long-pending preliminaries of officials. These courts would dedicate themselves for the reason.

Does the Supreme Court Monitor the Work of the Special Courts

The Supreme Court in September 2018 chose to monitor Special Courts explicitly set up in states to quickly track criminal arguments against officials. A three-judge seat driven by Justice Ranjan Gogoi said that it would thus advance screen consistency of court requests to guarantee that the 12 courts work successfully. The move is a piece of SC's endeavour to tidy up the political framework and help those erroneously charged to challenge races with respect reestablished. The Supreme Court decision came after the law service educated it that 12 extraordinary courts have been set up in various states to give legislators a shot a need. The seat looked to know from state boss secretaries and high court enlistment centres general whether the courts were sufficient or more were required. The Supreme Court seat additionally looked to know the number of cases that would need to allude to uncommon courts. The data looked for would need to be put together by October 10.

The law service had in a prior affirmation told the Supreme Court that in states where the number of criminal bodies of evidence against MPs and MLAs was under 65, customary courts would attempt to quickly track them. Eleven states have set up 12 uncommon courts. There are two in Delhi and one each in Andhra Pradesh, Telangana, Karnataka, Kerala, Tamil Nadu, Uttar Pradesh, Bihar, West Bengal, Maharashtra, and Madhya Pradesh. The Supreme Court seat needs the courts to work adequately.

2

Formation of a Company

The process of formation of a company can be discussed under four broad headings:

1. Promotion;
2. Incorporation;
3. Capital subscription; and
4. Commencement of Business

The first two stages are connected with the formation of a private company and a public company not having any share capital. These can commence business immediately on incorporation. But a public company having a share capital has to pass through all the four stages before it can commence business.

PROMOTION

It is the first stage in the formation of company. It refers to all those steps which are taken to get a company going. Beginning with the discovery of an idea, it goes on to include preliminary investigation of the feasibility of that idea, assembling of business elements, provision of necessary funds, *etc.*

The Promoter

Despite frequent use of the term 'promoter' in several sections of Act, it has not been statutorily defined. Simply stated, he represents a person who undertakes to form a company with reference to a given object and brings it into actual existence.

As per Lord. J.Bowen, it is a term not of law but business usually summing up in a single word a number of business operations familiar to the

commercial world by which a company is brought into existence. He directs the solicitors to prepare the memorandum and other necessary documents for filing with the Registrar, chooses a name for the company, raises necessary funds, decide about the location of registered office, selects the persons who would be directors and so on. ''Thus, promoter is a person who brings the company into existence.'' The promoter may be an individual, a partnership firm or even a company. But everybody connected with the formation of company is not a promoter *e.g.*, professional advisors, surveyors, formation of company, engineers, *etc.*, [Section 62 (6)]. Whether or not a person is promoter depends on the facts of the case. Only those who wish to form a company and take necessary steps in that direction may be called 'promoters.'

The following persons are not promoters:

(i) A person who merely signs at the foot of the memorandum or provides money for the payment of preliminary expenses.

(ii) A person connected with the company in a professional capacity [Section 62 (6)].

(iii) Vendors of property who have received consideration in the form of shares.

LIABILITIES OF PROMOTERS

1. *Where he makes secret profits:* If he makes profits without making full disclosure, the company can have the following remedies against him:
   (a) The company may rescind the contract and recover the price paid except where third parties have acquired rights therein and it is not possible to restore the status quo ante, or
   (b) The company may recover the profits without claiming recission, or
   (c) The company may sue him for damages for breach of fiduciary duty.
2. Liabilities Under the Companies Act, 1956:
   (a) *Liability for mis-statements in the prospectus:* Under Section 62(1), the promoter is liable to compensate every person who subscribes for any shares or debentures on the faith of a prospectus which contains mis-statements and incurs a loss or damage. He shall be criminally liable under Section 63. He may also sued for failure to set our matters or reports as specified in Section 56.
   (b) *Liability for misfeasance or breach of trust [Section 543]:* In the course of winding up, on the application of the Official Liquidator the court may make a promoter liable for misfeasance committed in relation to the promotion of company.
   (c) *Liability to Public Examination [Section 478]:* Where a company is wound up by the court on the report of the Oofficial Liquidator that in his opinion a fraud has been committed by the promoters in relation to the company since its formation, the court may order public examination of his conduct and dealings.

PROMOTER'S REMUNERATION

Unless there is an express contract to that effect, the promoter has no right to claim any remuneration.

A company which has not been incorporated can not contract with a promoter to compensate him for his services because before incorporation a company does not have any contractual capacity. According to Section 149(4), a public company is not liable even for contracts made after incorporation because those are treated as provisional contracts until it secures the certificate to commence business.

The usual ways of remunerating a promoter are as follows:

(a) He may be paid a lumpsum either in cash or in the form of shares or debentures of the company.
(b) He may be given commission on the purchase price of the business taken over by the company.
(c) He may be inducted to the board of directors.
(d) He may sell his own property to the company at an inflated price.
(e) He may be given an option to buy the shares of the company at par when their market price is higher.

Where remuneration is paid to the promoter it must be disclosed in the prospectus of paid within 2 years preceding the date of prospectus.

PRE-INCORPORATION CONTRACTS [PRELIMINARY CONTRACT]

It is a contract made by the promoter/s on behalf of the company before its incorporation. The promoters make these contracts as agents or trustees of the company. Before incorporation, the company is a non-entity and lacks contractual capacity. Therefore, preliminary contracts are not binding on it. In other words, the company is not liable for the acts of promoters done before its incorporation.

PROMOTERS AND THEIR LEGAL POSITION

Meaning of a Promoter

The idea of carrying on a business which can be profitably undertaken is conceived either by a person or by a group of persons who are called promoters. After the idea is conceived, the promoters make detailed investigations to find out the weaknesses and strong points of the idea, to determine the amount of capital required and to estimate the operating expenses and probable income.

The term 'promoter' is a term of business and not of law. It has not been defined anywhere in the Act, but a number of judicial decisions have attempted to explain it.

According to L.J. Brown. "The term promoter is a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence."

According to Justice C. Cockburn. "Promoter is one who undertakes to form a company with reference to a given object and to set it going, and who takes the necessary steps to accomplish that purpose."

According to Palmer, "Company promoter is a person who originates a scheme for the formation of the company, has the memorandum and the articles prepared, executed and registered and finds the first directors, settles the terms of preliminary contracts and prospectus (if any) and makes arrangement for advertising and circulating the prospectus and placing the capital."

According to Guthmann and Dougall. "Promoter is the person who assembles the men, the money and the materials into a going concern."

From these definitions of promoter it is concluded that:

"Promoter is the person who originates the idea for formation of a company and gives the practical shape to that idea with the help of his own resources and with that of others."

A person cannot be held as promoter merely because he has signed at the foot of the Memorandum or that he has provided money for the payment of formation expenses.

The promoters, in fact, render a very useful service in the formation of the company. A promoter has been described as "a creator of wealth and an economic prophet." The promoters carry a considerable risk because if the idea sometimes goes wrong then the time and money spent by them will be a waste.

In the words of Henry E. Heagland, "A successful promoter is a creator of wealth. He is an economic prophet. He is able to visualise what does not yet exist and to organise business enterprise to make the products available to the using public."

A promoter may be an individual, a firm, an association of persons or even a company.

Functions of a Promoter

The Promoter Performs the following main functions:

1. To conceive an idea of forming a company and explore its possibilities.
2. To conduct the necessary negotiation for the purchase of business in case it is intended to purchase as existing business. In this context, the help of experts may be taken, if considered necessary.
3. To collect the requisite number of persons (*i.e.* seven in case of a public company and two in case of a private company) who can sign the 'Memorandum of Association' and 'Articles of Association' of the company and also agree to act as the first directors of the company.
4. *To decide about the following:*
   (i) The name of the Company,
   (ii) The location of its registered office,
   (iii) The amount and form of its share capital,
   (iv) The brokers or underwriters for capital issue, if necessary,
   (v) The bankers,

(vi) The auditors,
(vii) The legal advisers.

5. To get the Memorandum of Association (M/A) and Articles of Association (A/A) drafted and printed.
6. To make preliminary contracts with vendors, underwriters, *etc.*
7. To make arrangement for the preparation of prospectus, its filing, advertisement and issue of capital.
8. To arrange for the registration of company and obtain the certificate of incorporation.
9. To defray preliminary expenses.
10. To arrange the minimum subscription.

Legal Position of a Promoter

The promoter is neither a trustee nor an agent of the company because there is no company yet in existence. The correct way to describe his legal position is that he stands in a fiduciary position towards the company about to be formed. Lord Cairns has correctly stated the position of promoter in Erlanger V. New Semberero Phophate Co. "The promoters of a company stand undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company. They have the power of defining how and when and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation."

From the fiduciary position of promoters, the two important results follow:

(1) A promoter cannot be allowed to make any secret profits. If it is found that in any particular transaction of the company, he has obtained a secret profit for himself, he will be bound to refund the same to the company.
(2) The promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed. If he contracts to sell his own property to the company without making a full disclosure, the company may either repudiate/rescind the sale or affirm the contract and recover the profit made out of it by the promoter.

A promoter who wishes to sell his own property to the company must make a full disclosure of his interest.

The disclosure may be made:

(i) To an independent Board of Directors, or
(ii) In the articles of association of the company, or
(iii) In the prospectus, or
(iv) To the existing and intended shareholders directly.

If the promoter fails to discharge the obligation demanded of his fiduciary position the company may rescind the contract or may in the alternative choose to take advantage of the contract and sue the promoter for damages for breach of his duty to the company.

Secret profits on the sale of property can be recovered from a promoter only when the property was bought and sold to the company while he was acting as a promoter.

Rights of Promoter

The rights of promoters are enumerated as follows:

1. *Right of indemnity:* Where more than one person act as the promoters of the company, one promoter can claim against another promoter for the compensation and damages paid by him. Promoters are severally and jointly liable for any untrue statement given in the prospectus and for the secret profits.
2. *Right to receive the legitimate preliminary expenses:* A promoter is entitled to receive the legitimate preliminary expenses which he has incurred in the process of formation of the company such as cost of advertisement, fee of solicitor and surveyors. The right to receive the preliminary expenses is not a contractual right. It depends upon the discretion of the directors of the company. The claim for expenses should be supported by vouchers.
3. *Right to receive the remuneration:* A promoter has no right against the company for his remuneration unless there is a contract to that effect. In some cases, articles of the company provide for the directors paying a specified amount to promoters for their services but this does not give the promoters any contractual right to sue the company. This is simply an authority vested in the directors of the company.

However, the promoters are usually the directors, so that in practice the promoters will receive their remuneration.

The remuneration may be paid in any of the following ways:

(i) A commission may be paid to the promoter on the purchase price of the business or property taken over by the company through him.
(ii) The promoters may be granted by the company a lumpsum amount.
(iii) The promoters may be given fully or partly paid shares in consideration of their services rendered.
(iv) The promoter may be given a commission at a fixed rate on the shares sold.
(v) The promoter may purchase the business or other property and sell the same to the company at an inflated price. He must disclose this fact.
(vi) The promoters may take an option to subscribe within a fixed period for a certain portion of the company's unissued shares at par.

Whatever be the nature of remuneration, it must be disclosed in the prospectus if paid within the preceding two years from the date of prospectus.

Duties of Promoter

The duties of promoters are as follows:

1. To disclose the secret profit: The promoter should not make any secret profit. If he has made any secret profit, it is his duty to disclose all the money secretly obtained by way of profit. He is empowered to deduct the reasonable expenses incurred by him.

2. *To disclose all the material facts:* The promoter should disclose all the material facts. If a promoter contracts to sell the company a property without making a full disclosure, and the property was acquired by him at a time when he stood in a fiduciary position towards the company, the company may either repudiate the sale or affirm the contract and recover the profit made out of it by the promoters.
3. *The promoter must make good to the company what he has obtained as a trustee:* A promoters stands in fiduciary position towards the company. It is the duty of the promoter to make good to the company what he has obtained as trustee and not what he may get at any time.
4. *Duty to disclose private arrangements:* It is the duty of the promoter to disclose all the private arrangement resulting him profit by the promotion of the company.
5. *Duty of promoter against the future allottees:* When it is said the promoters stand in a fiduciary position towards the company then it does not mean that they stand in such relation only to the company or to the signatories of memorandums of company and they will also stand in this relation to the future allottees of the shares.

Liabilities of Promoter

The liabilities of promoters are given below:

1. *Liability to account in profit:* As we have already discussed that promoter stands in a fiduciary position to the company. The promoter is liable to account to the company for all secret profits made by him without full disclosure to the company. The company may adopt any one of the following two courses if the promoter fails to disclose the profit.
   (i) The company can sue the promoter for an amount of profit and recover the same with interest.
   (ii) The company can rescind the contract and can recover the money paid.
2. *Liability for mis-statement in the prospectus:* Section 62(1) holds the promoter liable to pay compensation to every person who subscribes for any share or debentures on the faith of the prospectus for any loss or damage sustained by reason of any untrue statement included in it. Sec. on 62 also provides certain grounds on which a promoter can avoid his liability. Similarly Sec. 63 provides for criminal liability for mis-statement in the prospectus and a promoter may also become liable under this section.
   The promoter may also be imprisoned for a term which may extend to two years or may be punished with the fine upto Rs. 5,000 for untrue statement in the prospectus. (Sec. 63).
3. *Personal liability:* The promoter is personally liable for all contracts made by him on behalf of the company until the contracts have been discharged or the company takes over the liability of the promoter.
   The death of promoter does not relieve him from liabilities.

4. *Liability at the time of winding up of the company:* In the course of winding up of the company, on an application made by the official liquidator, the court may make a promoter liable for misfeasance or breach of trust. (Sec. 543).

Further where fraud has been alleged by the liquidator against a promoter, the court may order for his public examination. (Sec. 478).

Preliminary Contracts/Pre-Incorporation Contracts Made by the Promoters

Preliminary contracts are those contracts which are made by the promoters with different parties on behalf of the company yet to be incorporated. Such contracts are generally entered into by promoters to acquire some property or right for and on behalf of the company to be formed.

The promoters enter into preliminary contracts, generally as agents or trustees of the company. Such contracts are not legally binding on the company because two consenting parties are necessary to a contract whereas the company is non-entity before incorporation.

The company has no legal existence until it is incorporated. It therefore follows:

1. That when, the company is registered, it is not bound by the preliminary contract.
2. That the company when registered cannot ratify the agreement. The company was not a principal with contractual capacity at the time of contract. A contract can be ratified only when it is made by an agent for a principal who is in existence and who is competent to contract at the time when the contract is made.
3. That if the agent undertook any liability under the agreement, he would be personally liable notwithstanding that he is described in the agreement as an agent and that the company may have attempted to ratify the agreement.
4. The company cannot enforce the preliminary agreement.

The preliminary contracts made by promoters generally provided that if the company adopts the agreement the promoter's liability shall cease and if the company does not adopt the agreement within a certain time either party may rescind the contract. In such a case promoter's liability would cease after the lapse of fixed time.

LEGAL POSITION OF PROMOTERS [OR DUTIES AND LIABILITIES OF PROMOTERS]

A promoter is neither a trustee nor an agent of the company which he promotes. In law, promoter occupies a fiduciary position towards the company to-be-formed [Lagunas Nitrate Co. vs. Lagunas Nitrate Syndicate (1899)]. A fiduciary position signifies a position of trust and confidence and imposes the following duties on him.

DUTIES OF PROMOTER

(i) *Not to make secret profits:* He must not make secret profits at the expense of the company. If he is discovered to have made any secret profit, he may be compelled to restore them to the company [*Gluckstein* vs. *Barnes*].

(ii) *To disclose the facts:* He must disclose all the facts relating to the property which he wants to sell to the company. The disclosure may be made to the following:

  (a) An independent and competent Board of Directors [*Erlanger* vs. *New Sombrero Phosphate Co.*]. This duty is not discharged if disclosure is made to a board whose directors are his nominees; or

  (b) The whole body of persons who are invited to become shareholders through a prospectus; or

  (c) In the articles of the company.

  If he sells the property to the company without making disclosure in the contract, the company may rescind the contract and require the promoter to return the price. Where recission is impossible, the promoters may be required to pay damages to the extent of undisclosed profits.

  However, the disclosure must be made in full [*Gluckstein* vs. *Barnes*]. A partial disclosure may at times be worse than a blatant lie.

(iii) He must *not make any unfair use of his position* and must avoid anything which has the appearance of undue influence or fraud.

(iv) *To disclose all private arrangements* which he makes with a view to make profits by promoting a company.

LEGAL POSITION

Promotion is the primary stage in any business in which an individual or a group of people conceive an idea an is put into practice with the help of his or their own resources, influence and skill.

The term generally refers to the sum total of all the activities connected with the formation of a company. The person who undertakes all these activities is known as the promoter.

Meaning and Definition of a Promoter

We have already noted that the person who take all necessary steps to create a company and set it going is known as a promoter. He takes an active part in the formation of a company.

The Promoter need not be an individual. A firm, a company or an association can be the promoter of a company. Even two or three persons can also act as the promoters of the same company.

Thus, any one can become the promoter of a company provided he performs all the acts necessary to the formation of a company. The question as to whether a person is a promoter or not, is not a question of law but a question of fact.

In this context, Bower, L.J., in Whaley Bridge Co. V. Green rightly observed as follows:

"It is not a term of law but of business operations familiar to the commercial world by which a company generally brought into existence".

Therefore, the Act does not define the term promoter. But a number of judicial decisions have tried to explain the term.

Definition of Haney: "Promoter is a person who conceives the idea, studies the prospects of the business critically, chalks out an attentative scheme of organisation, brings together the requisite men, materials, machinery, money and managerial ability and float the enterprise".

Functions of a Promoter

The definitions cited above clearly brings out the peculiar functions of a typical promoter. They are as follows:

1. *Promotion of an Idea:* It is the promoter who has to conceive the idea of forming a company. This is the first step towards the formation of a company.
2. *Detailed Investigation:* The promoter, after forming an idea should make a thorough and detailed investigation of the prospects of the business. It should be done with reference to the sources of supply, nature of demand, extent of competition, capital requirements of the present and future, *etc.* He can also take the help of technical experts.
3. *Verification:* The promoter should also verify whether the advises or comments or reports made by the experts are free from bias. He should also consult with other impartial and disinterested experts and should see whether the idea is commercially viable.
4. *Assembling:* After verification of the idea, the promoter should go ahead with the promotion of the projected company. He should find out the first directors and the subscribers to the Memorandum.
5. *Financing the Proposition:* The promoter, at this stage, has to prepare a plan setting out the mode of getting the necessary finance. He should arrange for finance to meet the preliminary expenses. He should negotiate with the vendors if it proposes to buy an existing business. He should also arrange for underwriting contracts. He should estimate the required capital and the availability of bank loan, *etc.*, and also the cost of raising the capital.
6. *Presentation of the Proposition:* Finally, after making necessary arrangements and modes of raising finance, he gets the necessary documents such as Memorandum, *etc.*, printed, filed with the Registrar and then arranges for their publication. He should take the aid of legal experts in preparing the documents and should see that the documents are strictly in accordance with the provisions of the Companies Act.

Who can be a Promoter?

Just like the companies Act does not define the term promoter, it does not specify who can act as promoter. Generally speaking, the first persons who are desirous of acquiring control over the affairs of a company are its promoters. They generally appoint themselves as the first directors. But even a company, firm or syndicate can act as a promoter.

In many cases, the vendor of the property or business which the company is to acquire, himself acts in the capacity of a promoter. Mere employees or contractors or a solicitor who prepares the documents are not promoters.

A person may become the promoter even after incorporation of the company if he does all the acts concerned with the raising of capital or publishing the prospectus.

Legal Position of the Promoter

The legal status of a promoter is incapable of precise statement because the law is very silent on this debatable question. Lindley, L.J., while describing his position in Wigpool Iron Ore Company's case rightly remarked that, "the promoter is not an agent for the company nor a trustee for it before its formation…..".

The reason is obvious. An agent can act only for an existing principal. As the company is not in existence at the time when the promoter started his work, he can't be considered as a trustee of the company. As such, a promoter stands in a fiduciary relation to it.

Promoters, being in a fiduciary position, may not make, either directly or indirectly, any profit at the expense of the company he promotes.

3

Meetings of the Company

KINDS OF MEETINGS

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 MEETINGS: When the members of a company gather at a certain time and place to discuss business affairs it is called company meeting.

KINDS OF MEETINGS: There are following types or kings of meeting in a company

Shareholders Meeting\Statutory (legal) Meeting:

Definition: Statutory meeting is the first meeting of the members of a public company. It is held once in the life of a public company. Statutory means legal so this meeting is totally based on law. Law enforced the company to call this meeting.

Occasion: This meeting must be held after 3 months, but before 6 months of obtaining the certificate of commencement of business.

Notice of Meeting: The directors will send a notice of the meeting to all the members of the company at least 21 days before the meeting. And also send statutory report to the shareholders.

Objectives of the Meeting: Following are the main objectives of the meeting.

i. *To win Confidence:* This meeting is called to win the confidence of the shareholders and try to increase their attention towards the company and try to create their interest in the development of the company.

ii. *To Provide Latest Information:* As it is the first meeting of the company and that is why its prime objective is to brief about the position of the company in the market and provide the information about the expected growth of the company and the industry.
iii. *To Discuss Statutory Report:* Another objective of this meeting is to discuss statutory report of the company. Statutory report contains following type of information;
    a. Details of the shares allotted
    b. Total number of shares issued
    c. Total receipts and total payments
    d. Cash received against shares allotted
    e. Names of the directors, CEO, secretary, auditors and legal advisors, *etc.*
iv. *To Discuss Future Plans:* This meeting is held to brief about the future plans of the company for example; about to increase the share capital, about to make new units of production, about to purchase some kind of securities, about to issue debentures against the borrowing, *etc.*
v. *To Inform About the Property:* Another purpose of this meeting is to inform the shareholders about the assets of the company and their value in terms of money in the market.
vi. *To Inform Where the Money Used:* It is also included in this meeting to inform the shareholders where the collected money from shares is used and where the future earnings will be used, *etc.*

Penalty: In default in filing statutory report and in holding the statutory meeting, every responsible officer and the company shall be liable to a fine.

Annual General Meeting: Definition: Every public company will hold Annual General Meeting of its members every year. This meeting is to be call and held by the directors of the company.

Occasion: The first annual general meeting must be held within 18 months from the date of its incorporation. The next meeting must be held once in every calendar year within 4 months after closing of its financial year. The interval between the two meetings must not exceed than 15 months.

Notice of the Meeting: The directors will send a notice of the meeting to all the members of the company at least 21 days before the meeting. It should also be published in newspaper.

Objectives of the Meeting: Following are the main objectives of this meeting

i. *To check Annual Accounts:* The first and the most important objective of this meeting is to check annual accounts of the company as well as check the growth of the company among the relevant industry.
ii. *Declaration of Dividend:* The shareholders and directors declare the dividend of the year with the mutual co-operation. They make decisions for the betterment of the company and for the betterment of the shareholders, *etc.*

iii. *Election of Directors:* Elections of the directors also held in this meeting, elected participant will lead the company up to the next annual general meetings.
iv. *Appointment of Auditor:* In this meeting the directors and shareholder with the mutual co-operation announced the name of the auditor and fixed the remuneration.

Penalty: If the company fails to hold this meeting the company and every officer of the company shall be liable to fine.

Extra Ordinary General Meeting: Definition: All general meetings other than annual general meeting and statutory meeting are known as Extra-Ordinary General Meetings. This meeting is held on the special occasions or you can say in the emergency situations when directors think that it necessary. For example; at the plan of merger etc

Occasion: This meeting is held on the special occasion and in the emergency situation.

Notice of the Meeting: The directors will send a notice of the meeting to all the members of the company at least 21 days before the meeting.

Objectives: Following are the main objectives of the Extra Ordinary General Meeting.

i. *Special Business:* In case of special business this meeting is held for example; a case of 10 billion rupees of export is at the door. In this case it can be called.
ii. *In Some Innovative Cases:* In some innovative cases this meeting can be called for example; an idea of launching a new product or launching a new setup, *etc.*

EXPLAIN THE DIFFERENT TYPES OF MEETINGS OF JOINT STOCK COMPANY

STATUTORY MEETING: it is the first meeting of a company shareholders. Its objective is to inform the shareholders about the affairs of the company Statutory meeting is held once only in the whole life of the company. Statutory meeting is held by every limited company. Meeting should be held within the prescribed period mentioned in the company ordinance. Following are the important features of statutory meeting.

1. *Objects of statutory meeting:*
   i. Its main purpose is t provide exact and latest information about the affairs of the company.
   ii. To win the confidence of the shareholders of the company.
   iii. To discuss the statutory report.
2. *Period of meeting:* Statutory meeting can be held after three months from the date of commencement. But there should be no delay more than six months.

3. *Notice:* Before this meeting 21 days notice must be given to each shareholders by the Secretary. A statutory report should also be enclosed with the notice.
4. *Call of meeting:* Only directors of the company are authorized call the statutory meeting.

STATUTORY REPORT: In the statutory report following information provided.

1. Total number of shares allotted.
2. Summary of cash received.
3. List of basic expenses of the company.
4. Detail of commission for the sale of shares, if any.
5. The particulars of that contract in which modification is being made.
6. The names and addresses of the company directors, auditors, managers and secretary.
7. The arrears if any due on calls from directors, or managing agents.

The directors of the company have to forward a statement report to each member at least 21 days before the day of meeting. Such report must be certified by not less than two directors. A copy of statutory report must be filed with registrar office after forwarding it to members. If a statutory meting is not held in time of statutory report is not submitted in time then any share holder can go to Court.

ANNUAL GENERAL MEETING:- Every company calls Annual general meeting of the shareholders. It is the open meeting of the shareholders in which various reports are submitted by the directors. Shareholders can criticize the policies of the directors and can suggest various measures to solve the problems of the company. There should be interval between the two annual meeting but more than 15 months.

Main characteristics of Annual general meeting:

1. Annual general meeting is held according the company ordinance.
2. It is the responsibility of company that it should call annual meeting.
3. First meeting should be held within 18 months from the date of incorporation.
4. The interval between the meetings should not be more than 15 months.
5. A notice of meeting should be served 21 days before the date of meeting.
6. This meeting will be called by the directors.
7. If directors fail to call the meeting in due period then penalty can be imposed on them.

Objects of annual general meeting:

1. Election of directors.
2. Appointment of auditors.
3. Declaration of dividends.
4. Fixation of directors, auditors and managing agents remuneration.
5. Shareholders can criticize the policies of the directors.

6. Directors submit reports about the management.
7. Shareholders can suggest measures.
8. Auditors report and balance sheet is presented in this meeting.

EXTRA ORDINARY GENERAL MEETING: If any problem is created suddenly which can not be postpone till the next annual meet is conducted to solve this problem.

Features of extra ordinary meeting:

1. *Time limit:* There is no prescribed time laid down in the articles for holding this meeting. It may be held from time to time.
2. *Right to call meeting:* A. Board of directors may call the meeting at any time. B. Share holders who have not less than 110 of the voting power can call the meeting.
3. *Notice:* To call the extra ordinary meeting 21 days notice is served.

Objects of extra ordinary meeting:

A. To issue the debentures.
B. To alter the Memorandum and Articles.
C. To alter the share capital of the company.
D. To solve the most important problems.

Procedure: The share holders have to submit their demand to the secretary of the company. He will arrange to call the meeting with the consultation of the directors. If the directors fail to hold this meeting with in 21 days. Then shareholders may call such meeting within 3 months. The expenses of the meeting will bear the company.

QUORUM

A quorum is the minimum number of members of a deliberative assembly (a body that uses parliamentary procedure, such as a legislature) necessary to conduct the business of that group. According to *Robert's Rules of Order Newly Revised*, the "requirement for a quorum is protection against totally unrepresentative action in the name of the body by an unduly small number of persons."

The term *quorum* is from a Middle English wording of the commission formerly issued to justices of the peace, derived from Latin *quorum*, "of whom", genitive plural of *qui* = "who". As a result, *quora* as plural of *quorum* is not a valid Latin formation.

NUMBER CONSTITUTING A QUORUM

The number of members that constitutes a quorum differs depending on the assembly and is usually provided for in that assembly's governing documents (for example, its constitution, charter, or bylaws).

The quorum may also be set by law. A quorum may be a majority, some number greater than a majority, or some number less than a majority. While a majority of members is often the quorum for legislative bodies, often ordinary societies (voluntary associations) will have a smaller quorum. *Robert's Rules*

provides that the quorum set in an organization's bylaws "should approximate the largest number that can be depended on to attend any meeting except in very bad weather or other extremely unfavourable conditions."

In the absence of such a provision in the bylaws of a society or assembly, what constitutes a quorum differs. *Robert's Rules* provides that in such a case, a quorum in an assembly "whose real membership can be accurately determined at any time—that is, in a body having an enrolled membership composed only of persons who maintain their status as members in a prescribed manner—the quorum is a majority of the entire membership, by the common parliamentary law." In the meetings of a convention, unless provided otherwise in the bylaws, a quorum is a majority of registered delegates, even if some have departed. In a mass meeting, or "in a regular or properly called meeting" of an organization whose bylaws do not prescribe a quorum and whose membership is loosely determined, such as many religious congregations or alumni associations, "there is no minimum number of members who must be present for the valid transaction of business, or —as it is usually expressed—the quorum consists of those who attend the meeting."

In a Committee of the Whole or its variants, a quorum is the same as the assembly unless otherwise provide in the assembly's bylaws or rules. In all other committees and boards, a quorum is a majority of the members of the board or committee unless the bylaws, the rule of the parent organization, or the motion establishing the particular committee provide otherwise. According to *Robert's Rules*, "a board or committee does not have the power to determine its quorum unless the bylaws so provide."

DETERMINATION OF A QUORUM AND ACTIONS THAT MAY BE TAKEN IN THE ABSENCE OF A QUORUM

Robert's Rules provides that "when the chair has called a meeting to order after finding that a quorum is present, the continued presence of a quorum is presumed unless the chair or a member notices that a quorum is no longer present." The chair has a duty to declare the absence of a quorum if he notices a quorum is no longer present, "at least before taking any vote or stating the question of any new motion—which he can no longer do except in connection with the permissible proceedings related to the absence of a quorum." Any member who notices the apparent absence of a quorum can make a point of order, but he should not interrupt another member who is speaking. Debate on an already-pending question can be allowed to continue after a quorum is no longer present until a member raises a point of order. Because it is difficult to determine exactly when a quorum was lost, points of order relating to the absence of a quorum are "generally not permitted to affect prior action; but upon clear and convincing proof, such a point of order can be given effect retrospectively by a ruling of the presiding officer, subject to appeal."

When quorum is not met, the ability of a deliberative assembly to change the status quo is seriously constrained. *Robert's Rules*provides that "in the absence

of a quorum, any business transacted is null and void," except for actions which can be legally taken: Tofix the time to which to adjourn, adjourn, recess, or take measures to obtain a quorum. Measures to obtain a quorum are treated asprivileged motions that take precedence over a motion to recess, are not in order when another has the floor, are not debatable, are amendable, require a majority vote, and can be reconsidered. An example of a measure to obtain a quorum is a motion that absent members be contacted during a recess.

These procedural actions are the only measures that can be legally taken; "the prohibition against transacting business in the absence of a quorum cannot be waived even by unanimous consent, and a notice cannot be validly given." *Robert's Rules* states that:

"If there is important business that should not be delayed, the meeting should fix the time for an adjourned meeting and then adjourn. Where an important opportunity would be lost unless acted upon immediately, the members present can, at their own risk, act in the emergency with the hope that their action will be ratified by a later meeting at which a quorum is present." If a committee of the whole finds itself without a quorum, it can do nothing but rise and report to the assembly, which can proceed as already described in this paragraph. A quasi committee of the whole or a meeting in informal consideration of a question can itself take any of the four actions permitted an assembly in the absence of a quorum, but a quasi committee of the whole is thereby ended.

The quorum requirement is enforced in several ways. *Robert's Rules* states that before the chair (presiding officer) calls a meeting to order, "it is his duty to determine, although he need not announce, that a quorum is present. If a quorum is not present, the chair waits until there is one, or until, after a reasonable time, there appears to be no prospect that a quorum will assemble." In that situation, the chair "calls the meeting to order and announces the absence of a quorum, and entertains a motion to adjourn or one of the other motions allowed, as described above." Meetings that are unable to transact business or lack of a quorum are considered meetings nevertheless ("if a quorum fails to appear at a regular or special meeting, "the inability to transact business does not detract from the fact that the society's rules requiring the meeting to be held were complied with and the meeting was convened—even though it had to adjourn immediately").

CALL OF THE HOUSE (COMPELLED ATTENDANCE)

The call of the house procedure may be used if necessary to obtain a quorum in legislatures and other assemblies that have the legal power to compel the attendance of their members. The procedure does not exist in ordinary societies, since voluntary associationshave no coercive power. The call of the house "is a motion that unexcused absent members be brought to the meeting under arrest." The call of the house procedure is governed by the rules of the assembly, which may provide that one-third, one-fifth, or some other number less than a majority present may order a call of the house by majority vote. Under *Robert's Rules*,

when a quorum is not present, the motion takes precedence over every motion except that to adjourn. But "if the rule allows the call to be moved while a quorum is actually present (for the purpose of obtaining a *greater* attendance), the motion at such times should rank only with questions of privilege, should require a majority vote for adoption, and, if rejected, may not be renewed while a quorum is present."

When a call of the house is ordered, *Robert's Rules* provides that the clerk should call the roll of members and then call the names of absentees, "in whose behalf explanations of absence can be made and excuses can be requested." Following this, the doors are locked and no member is permitted to leave, and "the sergeant-at-arms, chief of police, or other arresting officer is ordered to take into custody absentees who have not been excused from attendance and bring them before the house," done on warrant signed by the presiding officer and attested by the clerk. Once arrested members are brought in, "they are arraigned separately, their explanations are heard, and on motion, they can be excused with or without penalty in the form of a payment of a fee." A member may not vote or be recognized by the chair for any purpose until he has paid the fee assessed against him.

Once a call of the house has been ordered, "no motion is in order, even by unanimous consent, except motions relating to the call." However, motions to adjourn or dispense with further proceedings under the call can be entertained "after a quorum is present or the arresting officer reports that in his opinion a quorum cannot be entertained." Adjournment terminates the call of the house.

In the United States Senate, the procedure was used in the early morning hours of February 25, 1988. Senator Robert C. Byrd of West Virginia, then the Senate Majority Leader, moved a call of the house after the minority Republicans walked out in an attempt to deny the Senate a quorum after Senate aides began bring cots into the Senate cloakrooms in preparation for an all-night session over campaign finance reform for congressional elections. Byrd's motion was approved 45-3 and arrest warrants were signed for all 46 Republicans. Senate Sergeant-at-Arms Henry K. Giugni and his staff searched the Capitol's corridor and Senate office buildings for absent Senators, and after checking several empty offices, spotted Senator Steve Symms of Idaho, who fled down a hallway and escaped arrest. After a cleaning woman gave a tip that Senator Robert Packwood of Oregon was in his office, Giugni opened the door with a skeleton key. Packwood attempted to shove the door closed, but Giugni and two assistants pushed it open. Packwood was "carried feet-first into the Senate chamber by three plainclothes officers" and sustained bruised knuckles.

Prior to 1988, the last time the procedure had been used was during a 1942 filibuster over civil rights legislation. Southern senators had spent days filibustering legislation to end poll taxes used in the South to disenfranchise blacks and other low-income voters. Taking place just days after midterm elections had resulted in the loss of nine seats. Democratic Majority Leader Alben W. Barkley obtained an order on a Saturday session on November 14,

1942 directing Sergeant at Arms Chesley W. Jurney to round up the five Southern absentees to obtain a quorum. Jurney sent his Deputy Sergeant at Arms, J. Mark Trice, to the apartment of Senator Kenneth McKellarof Tennessee at the Mayflower Hotel. Then 73 years old and the third-most senior Senator, McKellar was later described by Senator Bill Frist in his book on Tennessee senators as an "extraordinarily shrewd man of husky dimensions with a long memory and a short fuse." Trice called from the lobby, but McKellar refused to answer his phone, so the deputy sergeant at arms walked up to the apartment and convinced the senator's maid to let him in:

When Trice explained that McKellar was urgently needed back at the Capitol, the 73-year-old legislator agreed to accompany him. As they approached the Senate wing, McKellar suddenly realized what was up. An aide later recalled, "His face grew redder and redder. By the time the car reached the Senate entrance, McKellar shot out and barreled through the corridors to find the source of his summons."

Barkley got his quorum, but McKellar got even. He later convinced President Franklin Roosevelt not to even considerBarkley's desire for a seat on the Supreme Court. Such a nomination, he promised, would never receive Senate approval.

When Senate Democrats convened the following January to elect officers, a party elder routinely nominated Sergeant at Arms Jurney for another term. McKellar countered with the nomination of a recently defeated Mississippi senator. An ally of McKellar strengthened the odds against Jurney's reelection by suggesting that he had been involved in financial irregularities. As the Democratic caucus opened an investigation, Jurney withdrew his candidacy.

While no documentation of "financial irregularities" survives, Jurney had the misfortune of being caught between a frustrated majority leader and an unforgiving filibuster leader. The poll tax issue continued to spark filibusters until finally put to rest in 1964 by the 24th Amendment to the U.S., Constitution.

QUORUM-BUSTING

The tactic of quorum-busting—causing a quorum to be prevented from meeting—has been used in legislative bodies by minorities seeking to block the adoption of some measure they oppose. Rules to discourage quorum-busting have been adopted by legislative bodies, such as the call of the house, outlined above.

Quorum-busting has been used for centuries. For instance, during his time in the state legislature, Abraham Lincoln leapt out of a first story window (the doors of the Capitol had been locked to prevent legislators from fleeing) in a failed attempt to prevent a quorum from being present.

A recent prominent example of quorum-busting occurred during the 2003 Texas redistricting, in which the majority Republicans in the Texas House of Representatives sought to carry out a controversial mid-decade congressional redistricting bill which would have favoured Republicans by displacing five Democratic U.S., Representatives from Texas (the Texas Five) from their

districts. The House Democrats, certain of defeat if a quorum were present, took a plane to the neighbouring state of Oklahoma to prevent a quorum from being present (and thus the passage of the bill). The group gained the nickname "the Killer Ds."

Similarly, the minority Democrats in the Texas Legislature's upper chamber, the Texas Senate, fled to New Mexico to prevent a quorum of the Senate to prevent a redistricting bill from being considered during a special session. The Texas Eleven stayed in New Mexico for 46 days before John Whitmire returned to Texas, creating a quorum. Because there was now no point in staying in New Mexico, the remaining ten members of the Texas Eleven returned to Texas to vote in opposition to the bill.

During the 2011 Wisconsin protests, fourteen Democratic members of the Wisconsin Senate went to Illinois in order to bust the necessary 20-member quorum. Democrats in the Indiana House of Representatives did the same in order to block another union-related bill, causing the legislative clock on the bill to expire. Travelling out of their state placed these legislators beyond the jurisdiction of state troopers who could compel them to return to the chamber.

DISAPPEARING QUORUM

The similar tactic of disappearing quorum (refusing to vote although physically present on the floor) was used by the minority to block votes in the United States House of Representatives until 1890.

The practice was shattered on January 29, 1890, when a resolution was brought to the House floor that concerned who should be seated from West Virginia's 4th congressional district: James M. Jackson, the Democrat, or Charles Brooks Smith, the Republican.

The Speaker of the House Thomas Brackett Reed put this question to the Members: "Will the House consider the resolution?" Theyeas and nays were demanded with a result of 162 yeas, 3 nays, and 163 not voting. Democrats, led by Charles Crisp (who succeeded Reed as Speaker in the next two Congresses), then declared that the absence of a quorum (179 Representatives) prevented the House from making decisions. As dictated by House rules for the suggestion of the absence of a quorum, Speaker Reed began an attendance roll call - but directed the Clerk of the House to record as present any Member who was then in the chamber, whether they answered the roll call or not.

Immediately, Reed's action produced an uproar in the House. Democrats shouted "Czar! Czar!", a title that stuck to Reed for the rest of his life. "Tyranny," "scandal," and "revolution" were some of the words used to describe Reed's action. Democrats "foamed with rage," wrote historian Barbara Tuchman.

A hundred of them were on their feet howling for recognition. 'Fighting Joe' Wheeler, the diminutive former Confederate cavalry general, unable to reach the front because of the crowded aisles, came down from the rear leaping from desk to desk as an ibex leaps from crag to crag. As the excitement grew wilder, the only Democrat not on his feet was a huge representative from Texas who sat

in his seat significantly whetting a bowie knife on his boot. Speaker Reed remained firm in the face of this parliamentary tumult and angry debate. He continued to count nonvoting legislators for quorum purposes, challenging protesters to deny their presence in the chamber. Reed even ordered the doors of the chamber locked when Democrats tried to exit; instead, Democrats began hiding under their desks, which left Reed undeterred in counting them. Finally, after five days of stridency, the contested election case was taken up and Republican Smith emerged the victor by a vote of 166 yeas, 0 nays, and 162 not voting. Then, on February 6, 1890, the Reed-led Rules Committee reported a new set of House rules. One of the new rules—Rule 15—established a new procedure for determining quorums (counting lawmakers in the chamber who had voted as well as those who did not vote).

On October 7, 1893, in the middle of a filibuster in the US Senate, the call went out for the yeas and nays. A large number of senators, however, failed to respond when the clerk called their names. The Senate's presiding officer noted that the needed majority of members had not voted, even though there were more than a sufficient number of senators seated in the chamber to make a quorum.

When the chair once again ordered the clerk to call the roll to determine if a quorum was present, a majority of members answered to their names. However, when the roll call on the pending measure occurred, the filibustering cohort refused to vote. In one 40-hour session, this tactic produced a succession of 39 quorum calls but only four recorded votes.

In 1897, seeking to overcome the quorum busting tactics, the Senate changed its rules to effectively end the practice. This reform, however, triggered a return to an earlier tactic by recalcitrant senators of merely staying away when votes were scheduled.

BY COUNTRY

AUSTRIA

In the National Council of Austria at least one third of the representatives must be present, so that they may decide on a simple law (participation quorum of 33.3%). At least half of the members must participate if a constitutional law should pass the parliament (participation quorum of 50% based on the total number of members). Over and above that, constitutional laws require the consent of at least two-thirds of the members present (quorum agreement of 66.6% based on the number of voting present).

AUSTRALIA

Sections 22 and 39 of the Constitution of Australia set the quorum for sittings of the House of Representatives and Senate at one-third of the whole number of MPs and senators, respectively, but Parliament is permitted to change the quorum for each House by ordinary legislation. In the House of Representatives, the

quorum was amended down to one-fifth by the House of Representatives (Quorum) Act 1989, which means the quorum of the current House of 150 MPs is 30 MPs. In the senate, the quorum was amended down to one-quarter by the Senate (Quorum) Act 1991, so 19 senators is a quorum. The quorum includes the occupant of the Chair and is not reduced by the death or resignation of a member or senator. If at the beginning of a sitting the quorum is not met, the bells are rung for five minutes and a count is then taken; if the quorum is still not met the sitting is adjourned until the next sitting day. During the sitting, any MP or senator may draw attention to the lack of quorum in which the bells are rung for four minutes, and if a quorum is still not met the sitting is adjourned.

Although quorum-busting is virtually unheard of in Australia, it is not unknown for parties to deliberately use quorum counts as a disruptive tactic and there have been some suggestions to enact rules to restrict this practice; however, this is very difficult due to the explicit mention of a quorum in the constitution. It is considered disorderly to call attention to quorum when one exists and members or senators who do so can be punished.

CANADA

In Canada, the Constitution Act, 1867 sets quorum for sittings of the House of Commons of Canada at 20 MPs. If a member calls for quorum to be counted and a first count shows there are fewer than 20 members, bells are rung to call in the members; if after 15 minutes there are still fewer than 20 members, the session is adjourned to the next sitting day; the members present sign a roll on the table of the house, and this list is included in the Journal of the House. There is no need for quorum when the attendance of the House is requested in the Senate of Canada, for example when Royal Assent is being given to bills.

GERMANY

In the German Bundestag at least half of the members (311 out of 622) must be present so that it is empowered to make resolutions. It is however common that fewer members are present, because they can still make effective decisions as long as no parliamentary group or 5% of the members of the parliament are complaining about the lack of quorum. This is in rare cases used by opposition parties to delay votes.

HONG KONG

Article 75 of the Basic Law of Hong Kong stipulates that the quorum required for the meetings of the Legislative Council of Hong Kong(LegCo) as “not less than one half of its members”. Since 1997 the quorum has been 30. Prior to 1997 transfer of sovereignty over Hong Kong, the quorum was set at 20.

The quorum for the panels, committees and subcommittees is, nevertheless, one-third or three members, whichever the greater, as according to the Rules of Procedure. The three standing committees, namely, the Finance Committee, the Public Accounts Committee and Committee on Members’ Interests, is

exceptional that the quorums are 9, 3 and 3 respectively. Quorum-busting was used at least twice since 1997. In 2005, when some pro-democracy members of the council paid a silent tribute to late leader of the People's Republic of China, Zhao Ziyang, against the Rules of Procedure, the president of the council suspended the meeting. When the meeting was recalled, pro-Beijing members refused to return to the chamber, forcing the meeting to be adjourned.

On 27 January 2010, when five pro-democracy members were intending to make their resignation speeches, pro-Beijing members of the council left the chamber as a sign of protest. One of the pro-Beijing members nevertheless stayed in the chamber to call for the quorum to be counted, effectively forcing the meeting to be adjourned. The resignation was intended as a *de facto* referendum across all fivegeographical constituencies of the territory, involving the entire electorate, which would not be officially recognised anyway. Most other factions, although against the move by these five Members, stayed in the chamber.

On 2 May 2012, when the Legco was debating a law change to bar resigning legislators to participate in by-elections in 6 months, effectively discouraging any more "de facto" referenda, some of the five pro-democracy members who resigned constantly issued quorum calls, espcially when they were making their resignation speeches intended for 2 years before. In the nine-hour meeting, 23 quorum calls were issued, taking up to 3 hours. When Legco reconvened on 3 May, it was adjourned for lack of quorum amid a boycott by the pan-democrats. The pro-government members drew a timetable to ensure a quorum, but it failed to prevent another lack of quorum.

Quorum-busting and attempts to thwart it are also a common feature during the annual motion debate related to the 1989 Tiananmen massacre moved by pro-democracy Members. The quorum is called to be counted from time to time by the pan-democrats, in order to force the pro-Beijing camp to keep some members in the chamber.

INDIA

Article 100 of the Constitution of India stipulates that at least 10% of total number of members of the House must be present to constitute the quorum to constitute a meeting of either House of Parliament. For example, if the House has total membership of 250, at least 25 members must be present for the House to proceed with its business.

If at anytime during a meeting of a House there is no quorum, the Chairman has to either adjourn the House or suspend it until there is a quorum.

TURKEY

According to article 96 of the Turkish Constitution, unless otherwise stipulated in the Constitution, the Turkish Grand National Assembly shall convene with at least, one-third of the total number of members (184 out of 550) and shall take decisions by an absolute majority of those present; however,

the quorum for decisions can, under no circumstances, be less than a quarter plus one of the total number of members. Before the constitutional referendum of 2007, there was a quorum of two-third required in the Turkish Parliament. The opposition parties used the quorum to deadlock the presidential election of 2007, making it impossible for the parliament to choose a president. As a result, the ruling AK party proposed a referendum to lower the quorum. Nearly seventy percent of the participants supported the constitutional changes.

UNITED KINGDOM

In the Parliament of the United Kingdom, the House of Commons has a quorum of 40 MPs, including the Speaker, out of 650 members of the House. There is no need for a quorum to be present at all times. Commons debates could theoretically continue even if just one MP and the Speaker were present. However, if a division is called and fewer than 40 MPs are present, then a decision on the business being considered is postponed and the House moves on to consider the next item of business. The quorum for votes on legislation in the House of Lords is 30, but just three of the 753 peers, including the Lord Speaker, are required to be present for a debate to take place.

Historically, the Quorum was a select group of the Justices of the Peace in each county in the Early Modern Britain. In theory, they were men experienced in law, but many of the Quorum were appointed because of their status. Some legislation required the involvement of a member of the Quorum, (*e.g.*, granting a licence to a badger). In practice, they increasingly were not qualified, as the proportion in the Quorum rose faster than proportion who were called to the bar or practising lawyers. By 1532, an average 45% of Justices of the Peace nationally were of the Quorum. In Somerset, the proportion rose from 52% in 1562 to 93% in 1636. By then, most of those not on the Quorum were new to the bench. Sometimes. Justices of the Peace were removed from the Quorum as a disciplinary measure less drastic than removal from the bench.

UNITED NATIONS

The large deliberative bodies of the United Nations (the General Assembly and Economic and Social Council, as well as their subsidiary organs) generally require the attendance of one-third of the membership (currently 65 states in the General Assembly and 18 in ECOSOC) to conduct most business, but a majority of members (currently 97 states in the General Assembly and 28 states in ECOSOC) in order to take any substantive decisions. The rules of the United Nations Security Council make no provisions for quorum, but nine votes are in all cases required to pass any substantive measure, effectively meaning that a meeting with fewer than nine members in attendance is pointless.

UNITED STATES

Article I, Section 5, Clause 1 of the United States Constitution provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of

its own Members, and a Majority of each shall constitute a Quorum to do Business..." Therefore in both the House of Representatives and the Senate a quorum is a simple majority of their respective members. The only exception is that stated in the Twelfth Amendment, which provides that in cases in which no candidate for President of the United States receives a majority in the Electoral College, the election is decided by the House of Representatives, in which case "a quorum for this purpose shall consist of a member or members from two-thirds of the states," and in cases in which no candidate for Vice President of the United States has been elected, the election is decided by the Senate, in which case "a quorum for the purpose shall consist of two-thirds of the whole number of Senators."

The Senate has the additional ordinary requirement in Rule VI of its Standing Rules that "A quorum shall consist of a majority of the Senators duly chosen and sworn."

The Internal Revenue Service requires that non-profit organizations that receive tax exemptionsunder Section 501(c)(3) have a quorum present at their required yearly meeting. If it is not, then not only can they not vote, but they must also have another meeting so that it then takes longer for them to make decisions.

COMPANY RESOLUTIONS

A resolution is the formal means by which decisions are made by a meeting of company members. There are two types of resolutions: ordinary and special. The *Corporations Act 2001* (the Corporations Act) requires many decisions that affect a company to be made by resolution, some of which must be by special resolution. In addition, the constitution of a company may also require that other decisions be made by either an ordinary resolution or a special resolution.

ANNUAL GENERAL MEETING [SECTION 166]

It is a regular meeting held every calender year to transact comapny's ordinary business. The principal object of the meeting is to inform the members of the progress made by the company during the year and to solicit their views about company's management.

Its holding is a statutory requirement irrespective whether accounts are ready or not, and whether company is a private or public limited and whether with or without share capital.

Legal Provisions Relating to Annual General Meeting

1. *The Fist AGM:* The AGM must be held once in each calendar year. The *First Annual General Meeting* must be held within 18 months of incorporation of the company. According to section 210, the first AGM must be held not later than nine months from the date of close of financial year.

No extension of time is permissible in this case. If the meeting is held within the prescribed period, the company need not hold any annual general meeting in the year of incorporation or in the following year [Proviso 1 to Section 166 (1)].

2. *The Subsequent annual general meeting* must be held within 6 months of the close of financial year but the interval between two meetings must not exceed 15 months. The period of 15 months may be extended to 18 months by the Registrar. There must be at least one meeting every calender year starting from 1st January upto 31st December. There should be as many AGMs as there are years. If the first AGM has been held within 18 months from the date of incorporation it need not hold another AGM in the year of incorporation or in the following year. A combine reading of section 166 and 210 suggests that the AGM should be held at the earliest of the three dates namely, six months after the close of the financial year, 15 months from the previous aGM and the last day of the next calendar year.
   The Registrar may, for any special reason, extend the time for holding the annual general meeting (other than the first) by not more than three months. However, delay in the completion of audit of accounts does not constitute a special reason justifying extension of general meeting. The better course shall be to hold the meeting, trans act the business other than accounts and then adjourn the meeting to a suitable date for considering the accounts.
3. *Time and Place of the meeting:* The Annual General Meeting must be held at the registered office of the company or at some other place in the same city, town or village in which the registered office of the company is located. The meeting shall be held during business hours on a day which is not a public holiday. The Central Government may exempt any class of companies from this provision subject to such conditions as it may impose.
4. Proper Authority: The Board of Directors is the proper authority to convene an AGM.
5. *Notice:* At least 21 days notice of the meeting in writing must be given. A shorter notice than 21 days may also be given if so agreed upon by all the members entitled to vote at the meeting [Section 177].
6. *Business Transacted at the Meeting:*
   Ordinary Business: According to Section 173, the meeting is held to transact the following ordinary business:
   (a) Consideration of annual accounts, balance sheet and reports of the board of directors and auditors;
   (b) Declaration of dividend;
   (c) Appointment of directors in place of those retiring;
   (d) Appointment and fixation of remuneration of auditors.

Special Business: Any business other than the ordinary business conducted at the annual general meeting is deemed to be special business. If any special

business is to be transacted at the meeting, the notice of the meeting shall contain a statement of the facts concerning each item of such business including the nature and extent of interest of every director and manager therein.

Consequences of Failure to Hold the Annual General Meeting

1. Any member of the company can apply to the Central Government for calling the meeting. At this, Central Government may call or direct the calling of the meeting or it may issue directions for calling the meeting. The directions may include that one member of the company present in person or by proxy shall be deemed to constitute the meeting [Section 167].
2. For failure to hold the annual general meeting or complying with the directions of central Government under section 167, the company and every officer in default shall be punishable with a fine which may extend to Rs.50000 and Rs.2500 per day after the first day for continuing default [Section 168].

EXTRAORDINARY GENERAL MEETING [SECTION 169]

Any meeting other than 'statutory meeting' and 'annual general meeting' of the company is known as 'extraordinary general meeting'. It is convened to conduct some urgent or special business which cannot be postponed till the next annual general meeting such as alteration of objects, reduction or reorganisation of capital, removal of auditors, *etc.* All business transacted at this meeting is called 'special business.'

Who may Call?

It may be called by the following:

(1) *By the directors:* The board may convene an extraordinary general meeting as and when it thinks fit by passing a board resolution for the purpose. The Board must give 21 days notice for holding the meeting.

(2) *By the directors on requisition* [Section 169]. The directors shall convene a general meeting provided:

(a) The requisition is signed by such number of members as hold at least 1/10 of the paid up capital and have a right to vote at the meeting in respect of that matter. If the company has not share capital, the requisition must be signed by such members as hold 1/10th of the total voting power.
The requisite number of members for requisitioning are needed, only at the time of deposit of requisition with the company

(b) It shall state the objects of the meeting be signed by the requisitionists and be deposited at the registered office of the company.
The directors shall move to call the meeting within 21 days from the receipt of a valid requisition. The meeting must actually be held within 45 days from the date of deposit of requisition.

Where the resolution proposed is a special resolution, it should be so described and the easlanatory statement be annexed to the notice as required by section 189 (2).

(3) *By the requisitionists themselves [Section 169(6)]:* If the directors fail to convene the meeting within the aforemen-tioned time limits, one or more of the requisitionists may proceed to call the meeting provided that:

(a) In the case of a company having share capital, they represent either the majority in the value of paid up capital, or atleast 1/10th of the paid up capital and having the right of voting, whichever is less: or

(b) In the case of company not having share capital, those representing not less than 1/10th of the total voting power if regard to the matter of the requistion.

The meeting must be held within 3 motnhs from the date of deposit of requisition. The meeting shall be called in the same manner as meetings are called by the Board. If the registered office is not made available for holding the meeting, it may be held elsewhere. But the requisitionists may claim from the company the reasonable expenses incurred by them in calling the meeting. The sums so paid may be deducted by the company out of the remuneration payable to directors.

(4) *By the Tribunal [Section 186]:* If for any reason, it is impracticable to call, hold or conduct an extraordinary general meeting, the Tribunal may, either of its own motion, or on the application of any director or member, order a meeting to be called, held and conducted as directed. It may also give such ancillary or consequential directions as it thinks expedient including a direction that one member present in person or proxy shall be deemed to constitute a meeting. A meeting held in pursuance of the Tribunal's orders shall be considered to be a meeting duly held and conducted.

An extraordinary meeting may be convened on a public holiday and at a place other than the registered office of the company.

CLASS MEETINGS [SECTION 106 AND 107]

Meetings of the different classes of shareholders are known as 'class meetings'. At such a meeting, only the shareholder of the particular class have the right to be present. These meetings are held whenever the company wants to alter, vary or affect the rights of a particular class. The matter must be approved by a special resolution passed at a separate meeting of that class.

4

Formation and Incorporation of Companies

ACCORDING TO MODE OF INCORPORATION

CHARTERED COMPANIES

These companies are incor-porated under a special charter granted by the monarch which defines the powers and nature of business of the company. The sovereign can annul the charter if the company fails to follow its terms. Examples of such comapnies are: the East India Company and the Bank of England. After independence, the Chartered Companies have ceased to exist in India.

Statutory Companies

These are the companies incor-porated under a Special Act passed by the central or state legislature. These are formed to undertake business of national importance. Instances of such companies are; the Reserve Bank of India, the Life Insurance Corporation, the Food Corporation of India, *etc.* These are governed by their respective Acts and need not have either the memorandum or articles of association or the word ‘‘Limited’’ as last part of their names. The audit of their accounts is conducted under the supervision of the Comptroller and Auditor General of India. Though a statutory company is governed by the Act constituting it yet the provisions of the Companies Act in so far as they are not inconsistent with the provisions of the Special Act shall also apply to it.

Registered Companies

A company formed by registration under the Companies Act, 1956 is known as a registered company. It also includes an existing company which had been formed and registered under any of the earlier Companies Acts.

INCORPORATION OR REGISTRATION

Steps in the Formation of a Company

1. *Preliminary Steps:*
   (a) Ascertain the availability of proposed name from the Registrar of Companies.
   (b) Prepare and get printed the Memorandum and Articles of Association and a draft copy of the prospectus.
   (c) Appoint underwriters, bankers, solicitors, auditors, and assemble the signatories to the Memorandum.
   (d) Get the Memorandum subscribed by the requisite number of persons (7 and 2 in the case of public company and private company respectively).
2. *Filling of Documents:* The following documents duly stamped and signed by the subscribers shall be filed with the Registrar of Companies of the State in which registered office of the company is to be situated:
   (a) The Memorandum of Association duly signed by the subcribers [Section 33(1) (a)].
   (b) The Articles of Association, if any, duly signed by the subscribers to the memorandum [Section 33(1) (a)].
   (c) The agreement which the company proposes to make with an individual for appointment as its managing or whole-time director, [Section 33(1)(c)].
   (d) The written consent of the directors to act as such and to take up qualification shares [Section 266]
   (e) A statutory declaration that all requirements of the Act in respect of registration have been complied with. It shall be signed by (i) an advocate of the Supreme or High Court, or (ii) an attorney or pleader entitled to appear before High Court, or (iii) a Company Secretary or a Chartered Accountant in whole time practice and engaged in the formation of the company, or (iv) a person named in the Articles as director, manager or secretary of the company [Section 33(2)].
   (f) The Address of the Registered Office within 30 days of incorporation.

Issue of ''Certificate of Incorporation'' [Section 33(3)]

(a) *Sertiny of documents:* The Registrar scrutinizes the documents filed with him. If they are found to be in order, he registers the company and issues a certificate of incorporation.

The certificate testifies that the company is duly incorporated and in the case of limited company, that the company is limited. On obtaining this certificate, the company becomes a body corporate with perpetual succession and common seal.

(b) Conclusiveness of certificate of incorporation [Section 35]

The certificate of incorporation is conclusive as to the following:

(i) That the company is duly registered and it has fulfilled all the requirements relating to registration.

(ii) That the date borne on the certificate is the date of birth of the company.

The certificate is conclusive even if it was legally impossible that the company could have been properly registered *e.g.*, where all the signatories to the memorandum are minors. [Rule in *Peel's Case*]. But the certificate would not validate the objects which are illegal. [*Bowman* vs. *Secular Society Ltd.*].

Once the company has been created, the only method to extinguish it is to resort to provisions of winding up. The certificate of incorporation even if irregular, cannot be cancelled.

3. *Effect of registration:* The effects of certificate of incorporation are: (i) the company becomes a distinct legal entity form the date mentioned in the certificate, (ii) it acquires perpetual succession, (iii) the Memorandum and articles become binding on the members, and (iv) the liability of members of a limited company becomes limited. (v) the private company can start business immediately on incorporation.

CAPITAL SUBSCRIPTION

A Private Company and a Public Company not having share capital can commence business immediately on incorporation. But a Public Company having share capital has to fulfil the following formalities:

(1) *Where a prospectus is issued [Section 149(1)]:* A public company issuing prospectus must file the following with the Registrar:

  (i) A copy of the prospectus.

  (ii) A statutory declaration verified by a director or secretary of the company to the effect that:

    (a) The directors have taken up and paid for the qualification shares in cash an amount equal to the amount payable by other subscribers on application and allotment,

    (b) The shares payable in cash have been allotted upto the amount of minimum subscription, and

    (c) That no money has become liable to refund by reason of the failure of the company to apply for or to obtain permission of the stock exchange to deal in its shares or debentures.

(2) *Where a Prospectus is not issued [Section 149 (2)]:* A company which does not issue a prospectus shall file the following documents:

  (a) A statement-in-lieu of prospectus, and

  (b) A statutory declaration verified by one of the directors or secretary of the company that every director has taken up and paid for the shares and amount equal to what is payable on application and allotment by other subscribers.

The following additional conditions also shall have to be fulfilled:

(i) Where the company is an existing company and it wants to take up an object other than that included in its object, it must pass a special resolution in the general meeting.

(ii) A special resolution of the general meeting is also needed where it wants to start a business included in the ''other objects clause''.

In both the cases, a declaration signed by one of the directors or secretary stating that the requirements as to special resolution have been complied with, must be filed with the Registrar.

Commencement of Business

On compliance with the above formalities, the Registrar issues a certificate that the company is entitled to commence business. The certificate is conclusive evidence that the company is so entitled [Section 149(3)]. Any contract made before securing this certificate shall be provisional only. If the company doesn't commence business within a year of its incorporation, it may be wound up by the Tribunal. [Section 433 (e)].

The company may also commence business by passing an ordinary resolution if the approval of the central government has been obtained for the same.

PRODUCER COMPANIES

Part IX—A inserted into the companies (Amendment) Act 2002 is designed to enable the incorporation of producer companies into private limited companies. The legislation relating to produces companies is spread over twelve chapters comprising of section 581-A to 581-21.

Meaning and Definition

According to section 581-A1), a 'producer company means is a body corporate having objects or activities specified in section 581-B and registered as a producer company under this Act'.

Eligibility

Only 'primary producers' conform producer companies. Such a producer may be an individual a producer company, or a cooperative or other society. But these must be 'producers' as defined in section 58A-A(K) *i.e.*, "any person engaged in any activity connected with or relatable to any primary produce". The expression 'primary produce' within the meaning of section 581A(J) may signify the following:

(i) Produce of farmers arising from agriculture including animal husbandry, horticulture, floriculture, pisciculture, viticulture, forestry, forest products, to vegetation, be raising, farming plantation products), or from any other primary activity or service which promotes the interest of farmers or consumers; or

(ii) Produce or persons engaged in handlooms handicraft and other cottage industries;

(iii) Any product resulting from any of the above activities including by products of such products, or
(iv) Any product resulting from an ancillary activity that would asset or promote any of the aforesaid activities or a anything ancillary thereto, or
(v) Any activity which is intended to increase the production of anything aforesaid or improve the quality thereof.

Objective of a Producer Company [Sec. 581B]

A producer company may be incorporated to pursue any of the following objectives:

(a) Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of members or import of goods or services for their benefit. These may be carried out by the producer company itself or through other institutes.
(b) Processing, preserving, drying, distilling, browning vinting, can ring and packaging the provide of its members.
(c) Manufacture, sale or supply of machinery, equipment, or consumable mainly to its members,
(d) Providing education on mutual assistance principles to its members and others;
(e) Preserving technical services, constancy services, training, research of and development and all other activities for the promotion of interests of its members.
(f) Generation, transmission and distribution of power, revita-lization of land and water resources, their use, conservation and communication, reliable is primary produce.
(g) Insurance of producers or their primary produce,
(h) Promoting techniques of mutuality and mutual assistance;
(i) Welfare measure or families for the benefit of members;
(j) Any other activity anullary or incidental to any of the above as may promote mutuality and mutual procurement, processing,
(k) Financing of procurement, processing, marketing or other activities specified in above clauses, including extending of credit facilities, or other financial services to its members.

PRODUCER COMPANY

Section 465(1) of the Companies Act, 2013 provides that the Companies Act, 1956 and the Registration of

Companies (Sikkim) Act, 1961 (hereafter in this section referred to as the repealed enactments) shall stand repealed.

However, proviso to section 465(1) provides that the provisions of Part IX A of the Companies Act, 1956 shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

In view of the above provision, Producer Companies are still governed by the Companies Act, 1956. Companies (Amendment) Act, 2002 had added a new Part IXA to the main Companies Act, 1956 consisting of 46 new Sections from 581A to 581ZT.

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

OBJECTS OF PRODUCER COMPANIES

In terms of Section 581B(1) of the Companies Act, 1956, the objects of a producer company registered under this Act may be all or any of the following matters:

(a) Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefit.
(b) Processing including preserving, drying, distilling, brewing, vinting, canning and packaging of the produce of its members.
(c) Manufacturing, sale or supply of machinery, equipment or consumables mainly to its members.
(d) Providing education on the mutual assistance principles to its members and others.
(e) Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its members.
(f) Generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce.
(g) Insurance of producers or their primary produce.
(h) Promoting techniques of mutuality and mutual assistance.
(i) Welfare measures or facilities for the benefit of the members as may be decided by the Board.
(j) Any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) above or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner.
(k) Financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) above, which include extending of credit facilities or any other financial services to its members. Further, under Section 581B(2) it has also been clarified that every producer company shall deal primarily with the produce of its active members for carrying out any of its objects specified above.

PRODUCER COMPANY IN INDIA

The concept of Producer Company in India was introduced to allow cooperatives to function as a corporate entity under the Ministry of Corporate Affairs.

In this chapter, we look at the procedure for registering a Producer Company in India, under the Companies Act, 2013.

Producer Company Overview

The Companies Act defines Producer as any person engaged in any activity connected with or relatable to any primary produce (Produce: "things that have been produced or grown, especially by farming").

A Producer Company is thus a body corporate having an object that is one or all of the following:

- Production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit.

Further, the Producer Company must deal primarily with the produce of its active Members and is allowed to carry on any of the following activities by itself or through other entities – on behalf of the members.

1. Processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members;
2. Manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;
3. Providing education on the mutual assistance principles to its Members and others;
4. Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;
5. Generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communication relatable to primary produce;
6. Insurance of producers or their primary produce;
7. Promoting techniques of mutuality and mutual assistance;
8. Welfare measures or facilities for the benefit of Members as may be decided by the Board;
9. Any other activity, ancillary or incidental to any of the activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner;
10. Financing of procurement, processing, marketing or other activities which include extending of credit facilities or any other financial services to its Members.

Producer Company Registration

To register a Producer Company in India, the following members in any of the combination is necessary:

- Ten or more individuals, each of them being a producer; or
- Two or more producer institutions; or
- A combination of ten or more individuals and producer institutions

The registration process for a Producer Company is then similar to that of a Private Limited Company. DSC and DIN must first be obtained for the proposed first Directors of the Producer Company. Once, DSC and DIN are obtained, application for name reservation can be filed with the Registrar of Companies (ROC). The name of a producer company must end with the words "Producer Limited Company". Once, name is approved by the ROC, application for incorporation can be filed in the prescribed format for incorporating the Producer Company.

If the Registrar is satisfied with the application for incorporation of Producer Company, then he/she will approve the same and issue Certificate of Incorporation. Once, a producer company is incorporated, it shall function similar to a private limited company subject to certain provisions. However, unlike a Private Limited Company, a Producer Company does not have a limit on the number of members. Further, though the name of a Producer Company ends with the words "Producer Limited Company", it shall under no circumstance become or be deemed to become a public limited company.

SMALL COMPANY

As recommended by the Dr. JJ Irani Committee, the concept of small companies has been introduced in the Companies, Act, 2013. The recommendation of the Irani committee in this regard was as under:

"The Committee sees no reason why small companies should suffer the consequences of regulation that may be designed to ensure balancing of interests of stakeholders of large, widely held corporates. Company law should enable simplified decision making procedures by relieving such companies from select statutory nternal administrative procedures. Such companies should also be subjected to reduced financial reporting and audit requirements and simplified capital maintenance regimes. Essentially the regime for small companies should enable them to achieve transparency at a low cost through simplified requirements. Such a framework may be applied to small companies through exemptions, consolidated in the form of a Schedule to the Act."

Small company is a new form of private company under the Companies Act, 2013. A classification of a private company into a small company is based on its size *i.e.*, paid up capital and turnover. In other words, such companies are small sized private companies.

As per section 2(85) "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 defintion 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;

The concept of "Small Company" has been introduced in the Companies Act, 2013. As per the act some companies are small companies based on their capital and turnover position for the purpose of providing certain relief/ exemptions to these companies.As this concept is introduced because they do not require more compliances as large private and public companies require

Nowdays most startups ill be small companies so it will be great relief to them as it will decrease their expenses and they will have less burden of compliances. Most of the exemptions provided to a small company are same as that provided to a one person company.

So as per above definition it can be concluded that:

(a) A company will be Small company if it fulfill the both criteria of having paid up share 50 lakh or less than it and having turnover 2 crore or less than it

(b) Further, as per the definition of a small company, concept of small company does not apply to holding and subsidiary companies Thus even though both the holding company and subsidiary company may fulfill the capital and turnover requirement of a small company, they will still fall outside the purview of small company and accordingly the benefits and exemptions which are available to a small company cannot be applied to a company which is holding or subsidiary company.

(c) A company formed as sec 8 company for Charitable In India and having capital and turnover as per small company cannot cover itself in status of small company

ADVANTAGES TO SMALL COMPANY

Annual Return-As per sec 92 annual return shall be signed by director if there is no company secretary

Board meeting-As per section 174 small company are giving exemption and if they have hold one meeting in each half of a calendar year and the gap between the two meetings does not exceed less than 90 days than they have complied with this section

Cash flow statement-As per sec 2(40) small companies are exempted to attach cash flow statement with their financial statement

Rotation of auditors-As per sec 139 and rule (companies audit and auditors rules 2014) small companies are not require to rotate auditors

As per sec 233 The Act also provides for a simplified scheme of a scheme of merger or amalgamation between two small companies, without requiring the

approval of Tribunal, *i.e.*, with the approval of Central Government(Regional director) if they have no objection. A small company can be incorporated with the same procedure as private companies are incorporated.

ASSOCIATE COMPANY

As per Section 2(6), "Associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation to section 2(6) provides that "significant influence" means control of at least twenty per cent. Of total share capital, or of business decisions under an agreement. To add more governance and transparency in the working of the company, the concept of associate company has been introduced. It will provide a more rational and objective framework of associate relationship between the companies.

Further, as per section 2 (76), Related party includes 'Associate Company'. Hence, contract with Associate Company will require disclosure/approval/entry in statutory register as is applicable to contract with a related party.

DORMANT COMPANY

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

As per section 455 (1) where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

Explanation appended to section 455(1) says that for the purposes of this section:

(i) "Inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

(ii) "Significant accounting transaction" means any transaction other than—
   (a) Payment of fees by a company to the Registrar;
   (b) Payments made by it to fulfil the requirements of this Act or any other law;
   (c) Allotment of shares to fulfil the requirements of this Act; and
   (d) payments for maintenance of its office and records.

As per section 455(2), the Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.

Section 455(3) provides that the Registrar shall maintain a register of dormant companies in such form as may be prescribed. According to section 455(4), in

case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies. Further a dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed. [Section 455(5)]

UNDERSTANDING THE CONCEPT OF DORMANT COMPANY

The idea of a dormant company is a newly introduced concept in the Companies Act 2013, previously absent in the 1956 Act. The Indian legislature seems to have borrowed it largely from the legal principles of company law applicable in the U.K., However, certain significant differences exist such as the duration of dormancy, *etc.* In line with India's investor-friendly policies, the provision regarding dormant companies can be seen in the light of promoting and facilitating the procedure of incorporation and functioning of a company.

What is a Dormant Company?

A dormant company is a company that has been registered under the Companies Act but is not carrying out any "significant accounting transaction."

As per Companies Act 2013, a company that has been formed and registered under the Act:

(a) For a future project *or* to hold an asset or intellectual property *and,*
(b) Has no significant accounting transaction, is permitted to make an application to the Registrar to obtain the status of a dormant company.

Why go for Dormant Status? What are its Benefits?

The immediate question that arises upon understanding the meaning of a dormant company is this – why would anyone create a company and register it only to get it declared as dormant? The main purpose of obtaining or retaining the dormant status of a company is so that the company retains its corporate status despite not carrying out any business.

The benefits derived from such a status may be summarized under the following heads:

1. *Protection of the Company Name:* The intellectual property that the dormant company holds includes trademark of the company name. The name of the company is protected so that others are prevented from trading under the name of the dormant company.
2. *Future Project:* A company may have been formed in preparation of a future project. This signifies the intention of the promoters to trade and therefore retain the domain name. A good example of this as stated in Ramaiya is a company that has obtained a lease of land but waiting further approvals before commencing the business. (p. 5755)

3. *Company History:* Although this is not a very significant benefit, by establishing a company that is initially dormant and later begins business, can claim to be have been well-established since its incorporation though it may have started its business much later. It helps a company to project a better image to prospective clients and/or creditors.

When to Apply for a Dormant Status?

As per Section 455 of the Companies Act, 2013, a company which has not been carrying out any business or has not had any significant accounting transaction may apply to the Registrar for granting of the status of a dormant company. The Explanation to the provision defines "significant accounting transaction" and "inactive company."

The relevant portion of the provision reads as follows:

"Explanation For the purposes of this section,

1. "Inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;
2. *"Significant Accounting Transaction" means any transaction other than:*
   - Payment of fees by a company to the Registrar;
   - Payments made by it to fulfil the requirements of this Act or any other law;
   - Allotment of shares to fulfil the requirements of this Act; and
   - Payments for maintenance of its office and records."

Therefore, if a company carries out any transaction that does not fall within the above-mentioned four heads, it stands the chance of losing its dormant status.

According to the renowned author Ramaiya, a newly incorporated company can also apply for the status of a dormant company if it has not carried out any business or operation since its inception, except for filing of returns with the Registrar of Companies or any other payments to comply with the conditions under Company Law or any other law.

How to get status of Dormant Company

The below-mentioned steps are followed while granting/acquiring a dormant status:

1. The Company must pass a Special Resolution in the general meeting of a company or notify its shareholders and obtain the consent of at least three-fourths of shareholders in value.
2. The Company must file an application through From MSC – 1 to the Ministry of Corporate Affairs and pay the prescribed fees under Companies (Registration Offices and Fees) Rules, 2014.

3. Upon satisfaction, the Registrar will issue the certificate of Dormant Company. (Note that the Registrar must be satisfied that the company fulfills the criteria laid down under Section 455 and the relevant Rules prior to granting of the certificate.)
4. The Registrar shall maintain a Register of Dormant Companies.

An existing company that has not had any significant accounting transaction or carried on any business for the last two years or has not filed its financial statements or annual returns in the last two financial years/last two years will be termed as an inactive company for the purpose of Section 455. Under the Act, the Registrar can declare a company as dormant upon suo moto action as well. The Act also empowers the Registrar to strike off the name of the company from the Register if it remains dormant for five consecutive years. This is different from the situation in U.K., where a company is permitted to remain dormant for an unlimited period of time. However, such a provision would invite trouble too and prone to be misused in India's corporate scenario that is gradually moving towards a more investor friendly economy.

What are the Conditions to be Fulfilled for Acquiring a Dormant Status?

The proviso to Rule 3 of Companies (Miscellaneous) Rules 2014 lays down several conditions that a company must fulfil before it can acquire the status of a dormant company.

The conditions laid down under the Rules are discussed below.

- No inspection, inquiry or investigation should have been ordered or taken up or carried out against the company.
- No prosecution should have been initiated and pending against the company under any law.
- The company should neither have any public deposits which are outstanding nor should it be in default in payment thereof or interest thereon.
- The company should not have any outstanding loan, whether secured or unsecured.
- There should be no dispute in the management or ownership of the company and a certificate in this regard should be enclosed with Form MSC-1.
- The company should not have any outstanding statutory taxes, dues, duties, *etc.*, payable to the Central Government or any State Government or local authorities, *etc.*
- The company should not have defaulted in the payment of workmen's dues.
- The securities of the company should not be listed on any stock exchange within or outside India.

Another requirement under the Companies (Miscellaneous) Rules 2014, Rule 6 is that that a dormant company should have a minimum number of 3 directors in case of a public company, 2 in case of private and one in case of a One Person Company.

What is the Procedure for Suo Moto Action by the Registrar?

Step 1: The Registrar must issue notice to the company that has not filed its financial statements for two consecutive years.

Step 2: The Registrar must record/enter the name of the company in the register of dormant companies.

Step 3: The Registrar shall strike off the name of a dormant company from the register of dormant companies maintained by him if the company fails to comply with the requirements of Section 455.

It is to be noted, nevertheless, that a dormant company is not exempt from conducting audit of its books of accounts, holding meetings or other compliances under the Companies Act, 2013.

Once Dormant, can it become Active Again?

Yes. The Act of 2013 provides for converting a dormant company into an active company, for which an application under Section 455(5) must be filed, seeking the status of an active company. The said application shall be made in Form MSC-4 together with the prescribed fees and also with a return in Form MSC-3 with respect to the financial year in which the application seeking active status is being filed. As per Rule 8 of the Companies (Miscellaneous) Rules 2014, the Registrar shall issue a certificate recognising the active status of the company under Form MSC-5.

In case the dormant company does or omits to do an act under the Grounds of application in Form MSC-1 (submitted while seeking dormant status), the directors have a duty under the Act to file an application under Rule 8(1) for obtaining active-company status, within 7 days of such an act or omission.

Besides this, the Registrar is empowered to take *suo moto* action in case he is satisfied that the dormant company has been functioning directly or indirectly. In such a case, he can initiate proceedings for enquiry under Section 206 of the Companies Act, 2013 and provide the company with reasonable opportunity of being heard.

If after such hearing, he finds that the company has been functioning, he has the power to remove the name of the company from the register of dormant companies and treat it as an active one.

OTHER TYPES OF COMPANIES

Foreign Company

As the name suggests, foreign company is owned by foreigners. An entity is registered as foreign company when foreign participation is shareholding increases to more than 50%.

Businesses registered outside India find it most accessible way to setup business in India. Such businesses are registered as Indian Subsidiary of foreign company.

Section 8 Company

It is registered as company under Section 8 of the Companies Act; hence, known as Section 8 Company. It is registered for charitable purpose and as non-profit organisation. Such company enjoys special status and certain exemption as it is registered as Section 8 Company. Let me bring this to your attention that for Section 8 Company Registration, special approval from respective authorities is required.

Producer Company

A producer company is basically a company registered to deal with the primary production of its active member related to farming. The main objective includes production to its selling and exporting also.

A producer company is registered with ten or more member being producers; or any two or more producer institutions; or its combination. Alike any other company, the liability of its members is limited to the extent of unpaid share capital by its members. The producer company is deemed to be a private limited company under this Act, however, the threshold of the number of members does not apply to same.

Small Company

Small Company is a special status given to registered companies. You are not required to incorporate a new company, but it is a status it derives because of its financial and other positions.

A company is said to be small company, if it follows below mentioned conditions:

- Not a Public Company
- Paid-up share capital: Not exceeding fifty lakh rupees
- Turnover: Not exceeding two crore rupees, as per profit and loss account for the immediately preceding financial year

Further, this does not apply to any holding or subsidiary company; Section 8 company; or a company governed by any special Act.

Small Companies enjoy certain exemptions under Companies Act, 2013 in terms of compliance.

Subsidiary Company

Referred as subsidiary, it is a company in which other company controls the composition of its Board of Directors or its more than 50% of voting powers. In case, where 100% voting powers are held by single holding company, the subsidiary is known as Wholly Owned Subsidiary (WOS) of the holding.

Holding Company

Holding company is a company having controlling power or majority of voting powers of another company (subsidiary as referred above). Holding company is also called as parent company.

DISADVANTAGES OF INCORPORATION OF JOINT STOCK COMPANIES

Excessive formalities and expenditure: The formation of a company involves compliance with several legal formalities. Preparation and filing of documents, engagement of professional management, holding of general meetings and various other compliances including audit of accounts entail expenditure. The non-compliance with any of the provisions of considerable Companies Act,1956 attracts penalties.

Separation of ownership and control: The share ownership of a company is scattered far and wide. Consequently, the members of the company cannot have an effective control on its working. They have to depend on the board for information about the day-to-day administration. In other words, the share-holders have a lax control on the management of the company.

Corporate scams: The device of joint stock company may be exploited by unscrupulous promoters to deceive the inves-ting public. There have been several instances of diversion of cor-porate funds for personal purposes by directors and/or promoters.

Company is not a citizen and cannot claim funda-mental rights: A company is a legal person having nationality and domicile but it is not regarded a citizen either under the Constitution of India or the Citizenship Act. As a consequence, it cannot enjoy the fundamental rights. Only natural persons can be recognized as citizens.

Though all the members of a company may be citizens of India, yet it will not make the concerned company an Indian citizen. (*State Trading Corporation of India Ltd.* vs. *C.T.O. AIR* 1963 SC 1811). Nonetheless, a company can claim the protection of all those constitutional rights which have been guaranteed to all the persons—whether citizens or not.

Overlooking of separate entity of the company under the doctrine of lifting of corporate veil: In case the corporate veil is lifted either under statutory provisions or judicial pronouncement, the company has to loose many of the advantages of incorporation.

BODY CORPORATE

Simply stated, the term 'body corporate', or 'corporation' applies to any entity which is incorporated under some statute and has the necessary characteristics set out earlier.

According to Section 2(7), the term 'body corporate' or 'corporation includes a company incorporated outside India but does not include:

(a) A corporate sole,
(b) A co-operative society registered under any law relating to co-operative societies,
(c) Any other body corporate (not being a company as defined in the Act) which the central government may by notification, specify in this behalf.

Thus, the term 'body corporate' and 'corporation' are wider than the term Company. These include, not only companies formed in India but also foreign comapnies, public financial Institutions defined in Section 4-A, nationalised banks and corporations formed under any Act of Parliament.

CORPORATION

A corporation can either be (*a*) *a corporation sole,* or (*b*) *corporation aggregate.*

(a) *Corporation Sole* consists of an individual who, besides enjoying a 'human personality' also enjoys 'corporate personality' by virtue of holding some public office of a perpetual nature such as a 'President', 'a Governor', *etc.* A corporation sole is not regarded to be a body corporate within the meaning of Companies Act and it can be the member of a company.

(b) *Corporation Aggregate* consists of a group of persons forming an association for a defined purpose *e.g.*, a limited company, municipal committee, *etc.* It represents a collection of many individuals unified in one body under a special denomination having perpetual succession, artificial personality besides the capacity of suing and of being sued.

INCORPORATION REGISTRATION OF PRODUCER COMPANY

According to section 5810, the following number and cate-gories of people or entities can form a producer company:

(i) Any ten or more individuals each of when is a producer;

(ii) Any two or more producer institutions which as per section 581A(M) have only producer(s) or producer company(ies) as its members and having any of the objects specified in section 581-B.

(iii) A combination of ten or more individuals and producer institutions.

It the Register is satisfied that all requirements connected with registration have been fulfilled the shall to them 30 days of receipt of documents for registration register them and issue a certificate of incorporation. On such registration, the company shall service a body corporate as if it were private limited company irrespective of the number of its members. The company can reimburse the costs associated with, promotion and registration with the crescent of members in the first general meeting.

Voting Rights of Members of Producer Companies [Sec 581-D]

Where only individual are members of a producer company, each members shall have a single vote irrespective or his shareholding or patronage.

Where only 'producer institutions' are members of a producer, the voting right of each shall be based on its participation in the business of the producer company in the previous year. But in the first year of registration, voting rights shall be on the basis of shareholding of each producer institution.

It membership of a producer company consists of individuals as well as producer institutions, each shall have a single vote. The Articles may provide for the conditions subject to which a member may continue to retain his membership and the manner in which a member shall exercise his voting rights.

A producer company may restrict the voting rights of active members in any general or special meeting if so authorized by the Articles of the company.

A person whole business interest is in conflict with that of the producer company can neither became a member nor continue to remain a member and in the latter case he may be removed from membership in accordance with the Articles.

Benefits to Members [Sec 581-E]

(a) *Distribution of withheld price:* To begin with a member can receive only such value for the produce or products pooled and supplied as the Board of the producer company may determine. The withhold portion of the price may be disbursed later in proportion to the produce supplied to the producer company during the financial year. Such disbursal may be in cash or kind or by allotment of equity shares.

(b) *Dividend and Bonus:* A member shall receive only a limited return on the share capital contributed by him. But he may be given patronage bonus out of the surplus remaining after making provision for payment of limited return and reserves. Such patronage bonus shall be in proportion to a member's participation in the business of producer company. It may be given in cash or by allotment of bonus shares in accordance with provision contained in section 581-z and as may be determined by the general meeting.

Contents of Memorandum of Producer Company: [Sec 581-E]

Following shall be contents of memorandum of a producer company:

1. The name of the company the last words whereof shall be producer company limited.
2. The state in which registered office of the company is situate.
3. The main objects of the company which shall be from amongst those specified in section 581 B.
4. Names and addresses of subscriber to the memorandum.
5. The amount of share capital with which the company is registered and the division thereof into shares of a fixed amount.
6. Names addresses and occupations of subscribes who shall out as first directors in accordance with section 581-J.
7. That liability members is limited.
8. Where objects of producer company are not confined to one state, the state to which is objects extend.

Articles of Association [Sec 581-G]

The articles of the producer company shall be registered and contain the following principles:

1. The members of the company shall be voluntary and available to these who wish to avail of the facilities or services of the company and are willing to accept the duties of membership,
2. Each member shall have single vote irrespective of shareholding,
3. An elected Board shall administer the company and be accountable to the members.
4. There should be limited return or capital
5. The surplus shall be used firstly to provide for the development of business of the company, and providing common facilities, and for distribution amongst members in proportion to their respective participation in business.
6. To provide for education of members, employees and others on the principle of mutuality and techniques of mutual assistance.
7. The company to actively cooperate with other similar companies as local national, or international level so as to best serve the interests of members and the communities it purports to serve.
8. The articles shall certain rules as to the following:—
   (a) Qualification for membership, conditions for to continuonce, and terms, conditions and procedure for transfer of shares;
   (b) Manner of ascertaining the patronage and voting rights based on patronage;
   (c) Manner of constitution of Board, its powers and duties; minimum and maximum member of directors, manner of election, appointment and retirement by notation, qualifications, term of office, conditions for election or co-option of directors, method of removal and filling up of vacancies, the manner and term of appointment of Chief Executive.
   (d) The election of Chairman and term of the officer, moves manner of voting at general or special. Meeting of members, circumstances in which the chairman may exercise a casting vote
   (e) The circumstances and the manner in which the withheld price is to be determined and distributed;
   (f) Manner of distribution of patronage bonus in cash or by issue of equity shares or both;
   (g) The contribution to be shared;
   (h) Matters relating to issue of bonus shares out of general reserves.
   (i) Sources of raising funds and limitation term on, restriction on use of such funds and extent of debt that may be contracted and condition thereof;

(j) Basis and manner of allotment of equity shares of the company is lie of the whole or part of sale proceeds of produce or products supplied by the members;
(k) Credit, loans or advances which may be granted to member and the continuous for the grant of the same;
(l) Right of member to obtain information relating to general business of the company.
(m) The basis and manner of distribution and disposal of funds available after meetings the abilities in the event of dissolution or dissolution of the producer company;
(n) Authorization for division, amalgamation merger, creation of subsidiaries, entering into joint ventures, *etc.*
(o) Laying of memorandum and articles of the company before special general meeting to be held within 90 days of its registration

Amendment of Memorandum [Sec 581 H]

A producer company cannot alter the conditions contained in the memorandum except in cases, by the mode and the extent to which provision has been made in the Act. The memorandum can be altered by passing a special resolution provided it is not in consistent with section 581-D, A copy of the amended memorandum together with a copy of the special resolution duly certified by two directors shall be filed with the Registrar with 30 days of its adoption. However, in the case of shifting of register office to another state, the certified copy of special resolution certified by two director shall be filed with both the Registrars, and the Registrar of the state from whose jurisdiction the office has been shifted shall forward to the other Registrar all documents relating to producer company. Moreover, the shifting of registered office shall to take place unless it is conformed by the Tribunal or petition.

Amendment of Articles [Sec 581-I]

The amendment of articles shall be proposed by not less than two-third of the elected directors or one-third of the members and adopted by the numbers by a special resolution. A copy of amended articles together with copy of special resolution duly certified by two directors of all be filed, with Registration 30 days from the date of its adoption.

5

Law Underlying the Concept of Sweat Equity Shares

This concept was first employed in the United States in a self-help housing project way back in 1937. In India, this got specially enacted in 2013 and is read (a) for listed public companies in conjunction with provisions of the SEBI (SBEB) Regulations and (b) for unlisted companies is read with Share Capital and Debenture Rules, 2014 apropos Rule 8. The reference to sweat equity shares was there under the Companies Act, 1956 as well. It has been fortified by Section 2(88) of the Companies Act, 2013 which defines the "Sweat equity shares" as equity shares that are issued by a company to its directors or employees at a markdown or for non-cash consideration, for sharing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever nomenclature the same may be called. The Know how could be by way of creation of intellectual property rights like patent, trademark, copyright or value additions key to the company.

Sweat equity shares can be issued under the Section 2(88) of the Companies Act, 2013, by a company that qualifies as beneath:

- Permanent personnel of the business house who are working in India or abroad from last one year
- Permanent workforces of the company's subsidiary or of a holding company of the same
- Full time Director of the Company

The scope of 'employees' and 'value addition' have also been defined and not left to interpretation on discretionary basis.

- Rule 8(1) of the Companies (Share Capital and Debentures) Rules, 2014 under the 'Explanation (i)' & (ii) paras defines 'Employee' and 'Value Addition'-
- Para (i) has been already defined in the preceding para as regards the definition of the term 'employee'. The term 'value addition' under Explanation (ii) to Rule 8(1) of the Companies (Share Capital and Debentures) Rules, 2014, is explained as expected economic profits derived by the company from a professional or a specialized domain expert for providing know-how or facilitating rights in the nature of intellectual property rights, by concerned person who is recipient of the sweat equity. Supposedly, it should not be for something against which the recipient has been compensated under contractual obligation by virtue of being on the rolls of the company.

Reasons behind Issuing Sweat Equity Shares

Having dealt with the concept of sweat equity shares in the aforesaid paras, let us look in further details at the various reasons why companies resort to issuing of sweat equity shares.

1. The first, foremost and widely held reason is that it is an opportunity or a medium for the company to attract and retain its employees by acknowledging and rewarding their contribution beyond pay package. This helps in retention strategy as with the incentive and also the compulsory lock-in period of three years, *i.e.*, non-transferable. It is a win-win situation for retention for the mentioned period to start with. Companies to retain employees and keep them motivated, often prefer employee stock options and sweat equity specially in their preliminary phases due to ambiguity, inability to pay industry prevailing salaries and unknown future growth path of the company. Moreover, the employees get the right to vote and receive dividends from the company as good financial/business sense for owning this type of share.
2. Sweat equity is direct allotment of shares at a discount, *i.e.*, the shares are immediately allotted to the employee and this feature holding of shares is often preferred over ESOPs (Employee Stock Option Plan) which is a right of the employee and not a obligation to him to buy some shares of the company at a pre-decided price to be allotted in the future thereby being dependent on price volatility of the shares.
3. A registered valuer assesses the value at a fair price for the sweat equity shares. He evaluates and determines the value of know-how, of value additions, of intellectual property rights or any consideration. As against know-how, the shares may be issued at a discounted price or even free. In other words, this can be issued even below face value. Sweat equity only enjoys this exception in the Act and thus meets the dual objective of employer in rewarding without significant financial outgo.
4. It is a way to reward beyond sitting fees for some independent directors who bring in out of box interventions which makes the company jump

an orbit and assume a growth trajectory not achievable by organic growth pathway. Sweat equity can be issued to an independent director to acknowledge their contribution and keep them interested and continuing in the engagement for repeat tenures.

5. Company can issue Sweat Equity shares after remaining in business for one year only and the reward mode can be part cash, part IPRs/ value addition and/or entirely non-cash consideration. So it is very effective during the initial years of stabilisation of the company floated as it gives flexibility and is less demanding on liquidity requirements and thus can be undertaken without rocking the boat.
6. No more than 15% of the existing paid-up equity share capital or INR 5 crore worth of share value, whichever is higher, is the ceiling beyond which sweat equity is not permitted to be issued. Moreover, 25% of the paid-up equity capital cannot be exceeded at any time at the time of issue of sweat equity. This ceiling helps to limit the risk exposure of the company. Further, pricing guidelines are well defined for Sweat Equity Shares and thus are again insulated from market driven price vagaries.

Also it will be in place to mention that a start-up company may issue sweat equity shares not beyond fifty percent of its paid up capital up to five years, from the date of its incorporation or registration as laid down in notification number GSR 180(E) dated 17th February, 2016 from DIPP (Department of Industrial Policy and Promotion), Ministry of Commerce and Industry, GOI.

Procedure to be Followed

The procedure to be followed for these shares to be issued are broadly as under:

1. The date of the proposal for issue of sweat equity shares has to be approved by the Board
2. The explanations or validation for the issue needs to be established
3. Under which category of shares are the sweat equity shares envisioned to be issued
4. The total number of sweat equity shares to be allotted
5. To whom such equity shares are being issued giving details of the class or classes of directors and/or employees
6. The basis of valuation and the main terms and conditions under which sweat equity shares are to be issued
7. The association of such person with the company mentioning the time period
8. The details of the directors or employees with names, relationship with the promoter are required before issue of the sweat equity shares to their crucial managerial employees
9. The price of sweat equity shares at which it proposed for issue
10. Any consideration to be received for the sweat equity including consideration other than cash, if any

11. In the event of the cap on managerial remuneration being breached by issuance of such sweat equity, the plans to deal with the same should be documented.
12. A confirmation that company shall follow all the pertinent accounting standards
13. Consequent to the issue of sweat equity shares, the dilution in Earning Per Share and validation that applicable accounting standards have been followed for calculating the EPS
14. Pass a special resolution after convening an Extra-General Meeting
15. Within 30 days of passing the special resolution, the resolution is to be filed in Form No. MGT-14 with MCA
16. Allot sweat equity shares to the employees in the meeting after calling the Board Meeting
17. For allotting sweat equity shares within 30 days of the Board passing the resolution and filing the same in Form No. PAS-3
18. The Company must pay the stamp duty on issuance of share certificate as per the prevailing relevant state law
19. The Company must issue Share Certificates to the allottees within 2 months of allotment.
20. The particulars of Sweat Equity Shares issued need to be maintained in a Register by the company in Form No. SH-3.
21. The Company Secretary or an authorised person by the board shall validate the entries in the register

The Board of Directors shall, inter alia, disclose the above details from (a) to (u), *i.e.*, complete details of issue of sweat equity shares in the Directors' Report for the year in which such shares are issued.

DEFINITION OF THE TERM 'SHARE'

A 'share' is the interest of a shareholder in a company. Though measured in terms of money, it is a bundle of rights and liabilities which entitles the holder not only to participate in the profits and assets but also to enjoy various contractual rights as well as the rights conferred by the Companies Act. A share is a fractional part of a company's capital and forms the basis of rights and interests of a subscriber in the company such as the right to dividend to vote to attend meetings, *etc.*

Section 2(46) of the Act defines a share as, ''a share in the capital of a company and includes stock except where a distinction between stock and share is expressed or implied.'' Though the definition is simple yet it is not exhaustive.

In substance, a share indicates the pecuniary interest of a shareholder in the capital of a company besides defining his rights and liabilities both under the Articles and the Companies Act.

Nature of 'Share'

According to Section 82, the share of any member shall be movable property transferable in the manner provided by the Articles of the company. But it is not

movable in the sense of a bale of cloth or a bag of wheat. Rather it is incorporeal in nature and consists merely of a bundle of rights and obligations. The holder of a share has a right which is enforceable by a legal action and evidenced by a document. Under Section 2(7) of the Sale of Goods Act, 1930 'stock' and 'shares' of a company are goods. They can be hypothicated and bequeathed. But a share is not transferable by mere delivery. It can be transferred in the manner provided in the Articles. Therefore share is both 'goods' and chose-in-action' (*i.e.,*a property which is not in immediate possession).

Stock

Meaning: The term stock occurs in the definition of a share given in Section 2(46). It means an aggregate of fully paid-up shares put together for convenience so that it can be divided and transferred into any fraction without regard to the original face value of shares. Such fractions may be transferred like shares. There can be no original issue of stock. Section 94(1) authorises a public company to convert its fully paid shares into stock by passing a resolution in the general meeting if its Articles contain a provision to that effect. Notice of such conversion must be given to the Registrar within 30 days [Section 95]. The stock can be reconverted into shares by an ordinary resolution if the articles so provide. The ROC must be informed of the conversion within 30 days of conversion.

KINDS OF SHARES

According to Section 86, public companies can issue two main types of shares namely; (1) Preference shares, and (2) Equity shares.

Preference Shares: These enjoy a preferential right in the matter of (*i*) payment of dividend, and (*ii*) repayment of capital on winding up [Sec.85(1)].

Its various types are described below:

(i) *Cumulative and Non-cumulative Preference Shares:* The comulative preference shares are those in which the arrears of dividend get accumulated and are carried over to the next year. On liquidation, the arrears of dividend are not payable unless Articles contain a provision to that effect or such dividend has been declared. But arrears of undeclared dividends are payable out of the surplus remaining after returning in full the preference and equity capital.
Non-cumulative preference shares are those in which arrears of dividend do not accumulate. The unpaid dividends get lapsed.

(ii) *'Participating' and 'Non-participating' Preference Shares:* The participating preference shares besides enjoying preferential dividend also participate in the surplus left for distribution among equity shares. Thus, they get two dividends —one fixed and the other a fluctuating one.
'Non-participating preference shares' are entitled only to a fixed rate of dividend.

(iii) '*Convertible' and 'Non-convertible' Preference Shares:* The 'convertibles' are those which can be converted into equity shares. Non-convertible preference shares have no right of conversion into equity shares.

(iv) *'Redeemable' and 'Irredeemable' Preference Shares:* A company limited by shares, if so authorised by its Articles, may issue redeemable preference shares as per Section 80. The capital received on them can be refunded as per the terms of issue either after a specified period or at the discretion of the company. Redemption is subject to following conditions:
   (a) The shares to be redeemed must be fully paid up.
   (b) Redemption may be made either out of ''Capital Redemption Reserve Account' or out of the proceeds of fresh issue made of this purpose.
   (c) The premium, if any, on redemption must be provided either out of profits or out of company's security premium account.
   (d) Where redemption is made out of profits, a sum equivalent to the nominal value of shares redeemed must be transferred to the Capital Redemption Reserve Account.
   (e) Notice of redemption must be given to the Registrar within 30 days of redemption [Section 95(1) (e)].

Section 80 provides that redemption is not to be taken as 'reduction of capital'. Moreover, the issue of new shares for the purpose of redemption shall not be treated as 'increase in capital' for stamp duty purposes provided redemption is made within one month of the fresh issue. Any contravention of this provision will make the company and every officer punishable with fine upto Rs.10000.

Prohibition of issue of Irredeemable Preference Shares [Sec.80(5)]

Companies (Amendment) Act, 1988 has provided that after the commencement of this amendment, no public company limited by shares shall issue irredemable preference shares or those redeemable after the expiry of 10 years from the date of the issue. All existing irredeemable or those redeemable not earlier than 10 years shall be compulsorily redeemed. If the company is not in a position to redeem, they shall be referred to as ''unredeemable preference shares''. In such a case, company can issue redeemable preference shares equal to the amount of unredeemed preference shares, with the consent of National Company Company Law Tribunal.

Equity Shares [Section 85(2)]: These are the shares other than preference shares. They do not enjoy preferential right in the matter of payment of dividend or repayment of capital. The rate of dividend is not fixed in their case. It is linked with the magnitude of profits and decision of the board. Equity shareholders carry normal voting rights in respect of resolutions placed before the general meeting. These are always irredeemable.

Deferred Shares—Known as 'founder shares', these are issued to the promoters in consideration of their services. They get fixed dividend but only after all other classes of shareholders have received their share. These carry disproportionate voting rights so that they can retain control by investing small amounts. A public company or a private company which is subsidiary of a public company is prohibited from issuing deferred shares [Section 86 and 88]. Only an independent private company can issue deferred shares [Sectin 90(2)].

RESTRICTION ON PUCHASE BY A COMPANY OF ITS OWN SHARES [SECTION 77]

No company limited by shares or guarantee and having share capital can purchase its own shares unless the capital of the company is reduced in pursuance of Section 100 to 104 or where shares are purchased for prevention of oppression and mismanagement under Section 402. However, an unlimited company is free from this restriction imposed by Section 77.

Restriction on financial assistance by a company for the purchase of its own shares—Section 77(2) further provides that no public company or a private company which is subsidiary of a public company shall give any financial assistance in the form of a loan, guarantee or security, for the purchase of its own shares or that of a holding company except in certain specified cases.

Exceptions: Section 77 does not effect the following:

(a) The lending of money by a banking company in the ordianry course of its business.

(b) The provision by a company of money for the purchase of fully paid shares in the company by trustees for and on behalf of employees of the company.

(c) The lending by the company to its employees other than directors to enable them to buy fully paid shares in the company to be held by them as beneficial owners. The amount of loan cannot exceed the employee's salary for a period of six months.

The above provisions do not prohibit financial assitance by a company for the purchase of shares in any of its subsidiaries except to the extent restricted by Sections 295 and 369; and the right of an independent private company to give financial assistance to any person whatsoever for purchasing shares in it.

The contravention of Seciton 77 by the company and its officers is punishable with fine which may extend to Rs.10000.

Prohibition for buy back in certain circumstances [Sec.77-B]: No company shall buy back (a) through any subsidiary company including its own, or (b) any investment companies or group of investment companies, or (c) if a default is subsisting in repayment of deposits or interest due thereon, or redemption of debentures or preference shares or payment of dividend, or repayment of any term loan or interest thereon to any financial institution or bank, or (d) if it has not complied with section 159 (filing of return), Sec.207 (repayment of dividend) within 30 days of declaration and Sec. 211 (preparation of Balance Sheet and P&L Account as per Sch. VI read with Sec.211).

POWER OF THE COMPANY TO PURCHASE ITS OWN SECURITIES (SEC.77-A)

Section 77-A, 77-AA and 77-B introduced by the Companies (Amendment) Act 2000 permits companies to purchase their own securities subject to certain conditions:

Rationale behind Buy Back

1. It will reduce the number of outstanding shares, improve the Earnings Per Share & push up the market price of shares.
2. It will help the company bring down its floating stock and prevent the hostile take over bids.
3. A cash rich company may buy back its shares as a means of better investment.
4. It is an instrument to improve shareholders' net worth.

However, buy back must be judiciously used else it may damage the interest of shareholders. For this reason, the buy back is governed by the provisions of SEBI Guidelines in the case of listed companies, and Central Government guidelines in the case of unlisted public company.

Requirements for Carrying Out Buy Back

Following are the provisions of the Act relating to buy back of shares.

1. Sources of Funds for Buy Back [Sec.77 A(1)]
   A company can buy back its shares or securities from:
   (i) Its free reserves; or
   (ii) Its securities premium account; or
   (iii) Proceeds of any shares or other specified securities.
   But no buy back of any shares or securities shall be made out of the proceeds of an earlier issue of the same kind of shares or securities.
2. Condition of buy back [Sec.77 A (2)]
   (i) Buy back must be authorised by the articles of association of the company;
   (ii) A special resolution of the general meeting must be passed in case buy back is over 10% of the company's paid up capital and free reserves. For a buy back of less than 10% of the PUC & free reserves, a simple Board resolution is sufficient,
   (iii) The buy back is less than 25 per cent of the total paid up capital and free reserves of the company provided that the buy back of *equity shares* in any financial year shall not exceed 25 per cent of its total paid up equity capital in that financial year:
   (iv) After such buyback the ratio of debt is not more than double its capital and free reserves:
   (v) All the shares/securities for buy back are fully paid up;
   (vi) The buy back of shares/securities listed on any recognised stock exchange is in accordance with the SEBI (Buy back of Securities) Regulations,1998.
   As regards unlisted shares/securities, the buyback should be in accordance with the Private Limited Company and Unlisted Public Company (Buyback of Securities) Rules 1999.

3. *Explanatory Statement [Sec. 77-A (3)]*
   The notice of the meeting at which special resolution for buyback is to be passed shall be accompanied by an explanatory statement stating.
   (a) Full and complete disclosure of all material facts;
   (b) The necessity for buy back,
   (c) Class of securities to be purchased,
   (d) The amount involved,
   (e) Time limit for completion of buy back.
4. *Methods of buy back [Sec.77-A(5)]:* These are:
   (a) From the existing security holders on a proportionate basis,
   (b) From the open market, or (c) from odd lots of a listed public company which is smaller than the number of shares which can be traded on a stock exchange in one transaction, or (d) purchasing securities issued to employees of the company under scheme of stock option or sweat equity.
5. *Declaration of Solvency:* Under section 77-A (6), after passing special resolution or Board resolution but before buying back, a declaration of solvency shall be filed with ROC & SEBI in the prescribed form verified by an affidavit signed by at least 2 directors, one of whom shall be the Managing Director of the company to the effect that the Board, on the basis of inquiry into the affairs of company, considers that company will be able to meet its liabilities and will not be declared insolvent within one year of date of declaration.
6. *Physical destruction of securities* bought back within 7 days of completion of buy back.
7. *Moratorium on fresh issue* within 24 months from buy back except issue of bonus shares or conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity.
8. *Maintenance of Register.* It shall record the securities purchased, the consideration paid, date of cancellation, *etc.*
9. *Filing of return with ROC & SEBI* within 30 days of completion of buy back.

UNDERWRITING COMMISSION AND BROKERAGE

Quite often, a company proposing to make a public issue, may make an agreement with an individual, firm or institution whereby the latter agrees to take up the unsubscribed share capital. The consideration for providing such service is known as 'underwriting commission'. The underwriting mechanism is adopted by the companies to ward off the risk of poor public response to share issue.The investing public gains confidence in the issuing company because underwriters undertake to underwrite an issue only when they are convinced of

its bonafide and capability of its management team. A broker, on the other hand, is a professional who acts as a connecting link between the company and the subscribers in consideration of a fees called 'brokerage'. Whereas, an under writer undertakes to subscribe for shares on default by the public, a broker simple secures subscription in consideration of brokerage.

Section 76 authorises a company to pay commission to any person in consideration of:

(i) His subscribing or agreeing to subscribe; or
(ii) His procuring or agreeing to procure subscription for any shares or debentures of a company offered to public for subscription.

Conditions for the Payment of Underwriting Commission etc.

1. Its payment must be authorised by the Articles.
2. The rate of commission shall not exceed 5 per cent on shares, and 2½ per cent on debentures of the price at which these are issued, or at the rate specified in the Articles, whichever is lesser.
3. The rate agreed to be paid shall be disclosed in the prospectus or statement-in-lieu of prospectus. The total amount paid and the protion of it which has been written off shall continue to be disclosed in the balance sheet till the whole of it is completely written off.
4. The number of shares/debentures underwritten must be indicated in the prospectus.
5. Copy of the contract for the payment of commission must be delivered to the Registrar alongwith the prospectus or statement-in-lieu of prospectus.

The above conditions are not applicable to the payment of brokerage. In other words, Section 76 does not affect the power of a company to pay lawful brokerage. But it must be disclosed in the prospectus.

ISSUE OF SECURITIES AT A PREMIUM [SEC.78]

The issue of shares at a premium means the issue of shares at a price higher than their face value. There are no legal restrictions on issuing shares at a premium. However, Section 78 regulates the disbursement of the amount of premium collected. *Firstly,* the amount of premium so received must be transferred to a separate account called the '*Securities Premium Account.'* This account is to be treated as share capital for reduction purposes.

Secondly, the share premium may be used only for the following purposes:

(i) To issue fully paid bonus shares to the members of the company.
(ii) To write off preliminary expenses.
(iii) To write off the expenses of, or the commission paid, or the discount allowed on any issue of shares/debentures of the company.
(iv) To provide for the premium payable on redemption of redeemable preference shares/debentures.

Where securities are issued at a premium for consideration other than cash, a sum equal to the amount of premium must be transferred to the securities premium account. It cannot be treated as profit and cannot be distributed as dividend. It cannot also be treated as a free reserve. It is in the nature of reserve capital.

Thirdly, the share premium account must be disclosed in the prospectus. It must not be used for purposes other than the above unless the formalities connected with reduction are observed.

Section 78 applies to all types of companies, public or private.

ISSUE OF SHARES AT A DISCOUNT (SECTION 79)

Issue of shares at a price less than their face value is known as issue at discount, Section 79 prescribes the following conditions for issue at a discount:

1. The shares to be issued at discount must beof a class already issued.
2. A minimum of one year must have elapsed since the company became entitled to commence business.
3. The issue must be authorised by an ordinary resolution of the company.
4. The resolution must specify the maximum rate of discount which in no case shall exceed 10% unless the National Company Tribunal Board agrees to a higher rate.
5. The shares must be issued within 2 months of the sanction of the Tribunal or within such extended time as the the Tribunal may allow.
6. Every prospectus relating to the issue of shares shall disclose the particulars of the discount allowed or the amount which has not been written off at the date of issue of prospectus.

The above restrictions do not apply to the issue of debentures since they are not a part of the capital fund of the companies. For contravention of Section 79, the company and every officer in default shall be liable to a fine upto Rs.500.

ISSUE OF SHARES AT A DISCOUNT

You have learnt that the share capital of a company is divided into shares of fixed face value. A company may issue shares at a price less than the face value of the share. In that case, it is termed as 'issue of shares at a discount'.

For instance.if a share of Rs. 10 is issued at Rs. 9 per share, it means that the share is issued at a discount of Re. 1. Usually, the issue of shares at a discount is discouraged and that is why the Companies Act has imposed strict restrictions on the issue of shares at a discount.

Section 79 of the Companies Act gives that a company may issue shares at a discount, if the following circumstances are satisfied:

- The shares offered at a discount necessity be of a class already issued *i.e.*, the first issue cannot be at a discount.
- At least one year necessity have elapsed since the company became entitled to commence issue. It means that in the first year of its working, shares cannot be issued at a discount.

- The issue necessity be authorized through an ordinary resolution passed in the common meeting of the company and this necessity be confirmed through the Company Law Board.
- The resolution necessity specify the maximum rate of discount which in no case shall exceed 10%. Though, a higher rate of discount may be allowed if the Company Law Board agrees to a higher rate.
- The shares necessity be issued within two months after getting the sanction of the Company Law Board or within such extended time as the Company Law Board may allow.
- Every prospectus shall contain particulars of the discount allowed on the issue of shares or so much of that discount as has not been written off on the date of issue of the prospectus.

Where the shares are issued at a discount in contravention of the above provisions, the company and every officer of the company responsible for the contravention are liable to a fine up to Rs. 50. Further, the allottees of such shares who allow themselves to be registered as members shall be required to pay the full value of their shares.

Issue Of Shares At A Premium

There can be cases when the company may issue shares at a price higher than the face value of the shares. This is termed as issuing the shares at a premium. For instance, when a share of Rs. 10 each is issued at Rs. 12 per share, it is an issue at a premium, the amount of premium being Rs. 2 per share. There is no restriction on the issue of shares at a premium; if the company's reputation is good then it can sell shares at a premium.

Though the Companies Act does not give for any circumstances for the issue of shares at a premium, it regulates the disbursement of the amount composed as premium. The premium amount cannot be treated as profits and as such it cannot be used for paying dividends. The premium amount necessity be transferred to a separate amount recognized as 'Share Premium Account'. Where the shares are issued at a premium for consideration other than cash, an amount equal to the amount of premium necessity be transferred to 'Share Premium Account'.

The amount of 'Share Premium Account' can be used only for the purposes specified under Section 78 of the Act. These purposes are:

- Issue of fully paid bonus shares to the members of the Company.
- Writing off the preliminary expenses of the company.
- Writing off the expenses, commission paid or discount allowed on the issue of the shares of the company.
- To give for the premium payable on the redemption of preference shares or debentures of the company.

The balance sheet of the company necessity disclose the amount of share premium, and if it has been disposed of, partly or wholly, it necessity also disclose the manner in which it has been disposed of. The share premium amount should not be treated as free reserves as it is in the nature of the capital reserve.

Share Certificate

A share certificate is a certificate issued through the company under its general seal specifying the shares held through any member and the amount paid on each 'Share. A share certificate is an proof of title of the allottee or transferee to the shares. It is a declaration that the person in whose name the certificate is made out and to whom it is, given is a shareholder in the company. Though, it should be remembered that it is not' a negotiable instrument,

The share certificate may be in any form, but a valid share certificate necessity have the following contents:

- Name of the company;
- Name and address of the shareholder;
- Number of shares held through him;
- Distinctive number of shares;
- Amount paid on each share;
- Date of issue;
- Share certificate number;
- Stamp;
- Signatures of two directors and the Secretary.

Every person whose name is entered as a member in the Register of members is entitled to receive one share certificate for all his share without payment. A share certificate is measured to the prima facie proof of the title of the member to the shares mentioned in the certificate.

Issue of Share Certificates

The Companies Act has laid down time limits within which the share certificate necessity be delivered. According to Section 113 of the Act, every company necessity deliver within three months of the date of allotment and within two months after the. date of registration of transfer, a share certificate to the allottee or transferee of shares. Though, in appropriate cases the Company Law Board may extend this era upto a further era of nine months.

If default is made in complying with these provisions, the company and every officer of the company who is in default shall be liable to fine uptoRs. 500 for every day throughout, which the default continues. If a company creates default in issuing the share certificate, the member can file a complaint with the Company Law Board. The CLB will then issue a notice to the company to create good the default. If the default is not made good within ten days of the service of the notice, the CLB may create an order directing the company and any officer of the company to create good the default within such time as may be specified in the order.

Effects of a Share Certificate

You have learnt that share certificate is prima facie proof of the title of the member to the shares specified therein. Following are the effects of a share certificate:

- *Proof of title:* When the share certificate is issued, the company is estopped from denying the title of the person to the shares whose name is mentioned in the certificate, provided that person has acquired the shares in good faith and under a genuine transfer for value. Though, it is not a conclusive proof of the title of the holder. If a person has obtained some shares on the foundation of a forged transfer, the company can refuse to register the transfer of shares. You should keep in mind that share certificate is only an proof of title and is not a document of title. It is not a negotiable instrument which can be transferred through mere delivery of the certificate.
- *Estoppel as to payment:* You know that the share certificate states the amount paid on them. A company is estopped from stating that the amount stated as having been paid on the shares has not been paid. For instance, if the share certificate states that the full amount on the shares has been paid, then the company is prevented from saying that the shares are not fully paid.

Duplicate Share Certificate

A certificate may be renewed or a duplicate of a certificate may be issued if such a certificate:

- Is proved to have been destroyed or lost; or
- Having been defaced, mutilated or torn, is surrendered to the Company.

The information of being a duplicate share certificate necessity be mentioned on the certificate. The company may charge a fee not exceeding Rs. 2 per certificate while issuing a duplicate one.

If a company renews a share certificate or issues a duplicate one with intent to defraud, then company shall be punishable with fine which may extend to Rs. 10,000 and very officer of the company who is in default shall be punishable with imprisonment for a term upto six months or with fine uptoRs. 10,000 or with both.

ALLOTMENT OF SHARES

Meaning of 'Allotment'

The term 'allotment' has not been defined in the Act. Broadly speaking, allotment is 'the appropriation of shares by the directors to a particular person.' By virtue of allotment, the applicant for share becomes the holder of unappropriated shares. A valid allotment creates a binding contract between the company and the shareholders.

Statutory Restrictions on Allotment

Allotment must conform to:

(1) Provisions of the Law of Contract, and
(2) Statutory Provisions of the Companies Act,1956.

1. *General Provisions of the Law of Contract:* Principles of law of contract relating to allotment are summarised below:
   (i) *Allotment by proper authority:* The allotment must be made by a proper authority *i.e.,* a resolution of the Board of Directors. The board may delegate this task to a board committee. But allotment by an irregularly constituted Board shall be prima facie invalid.
   (ii) It must be made within a *reasonable time.*
   (iii) It must be absolute and unconditional.
   (iv) It must be communicated to the applicant.
   (v) It must not be made in contravertion of any law.
2. *Statutory Provisions of the Companies Act, 1956:* The Companies Act, 1956 prescribes no restrictions on allotment of shares by private companies. But there are certain restrictions on the allotment of shares by public companies. These restrictions can been studied under the following two head:

(A) When no public offer is made.

(B) When a public offer is made.

[A] *When no public offer is made:* Where the public company is sure of raising its capital privately and does not invite the public for subscription, it has to comply with the restriction of Section 70. Accordingly, it cannot proceed to make a valid allotment unless at least 3 days before allotment, it has filed with the Registrar, a statement-in-lieu of prospectus signed by every person named as director/proposed director or his authorised agent.

[B] *When a public offer is made:* The legal requirements in case of public offer are as follows:

(I) First Allotment of Shares

Following are the legal restriction with regard to first allotment:

1. *Registration and Issue of Prospectus:* A copy of the prospectus must be filed with the Registrar [Section 60(1).
2. *Filing of Statement in law of prospecties: [Sec. 70]:* A public company which does not make a public offer an account of its being confident to raise capital through personal contacts must not allot any shares or debentures unless it registers a statement-in-lies of prospectus with the Registrar at least 3 days before such allotment. It shall be signed by every person who is name therein as director or proposed director.
3. *Initial offer of securities to be in dematerialised form (Sec.68-B):* If initial public offer of any security by a public company is for a sum of Rs.10 crore or more it shall be made only in a dematerialised form in compliance with Depositories Act,1996.
4. *Application Money:* The company must receive a minimum of 5% of the nominal value of share as *application money [Section* 69 (3)]. Under SEBI guidelines, the minimum amount of application money shall not

be less than 25 percent of the issue price. If public issue is at par, minimum application must be for 200 shares of face value of Rs.10.

5. *Minimum Subscriptin: A minimum of 90% subscription* closure of issue must be received in cash within 60 days of issue of prospectus. This is the amount which the directors consider sufficient to meet: (*a*) puchase price of property,(*b*) preliminary expenses, (*c*) underwriting commission, (d) repayment of borrowed money, (*e*) the working capital, and (*f*) other necessary expenditure.
   Refund: If company fails to raise the minimum subscription within 60 days of the issue of prospectus, all the monies received from applicants must be refunded forthwith. If the money is not repaid within next 10 days the company shall be liable to repay the money with interest @15 % p.a. [Section 69(5)].
6. *Deposit of Application Moneys in a Scheduled Bank:* The applcation moneys shall be deposited in a scheduled bank and kept therein unless *(a)* the certificate to commence business is obtained or *(b)* where such certificate has been obtained until the minimum subscription has been received by the company. [Section 69 (5)].
7. *Opening of Subscription List (Sec.72):* The company cannot proceed to allot shares until the beginning of the fifth day from the date of issue of prospectus or such later date as may be specified in the prospectus. This date is known as the 'date of opening of subscription list.' Its object is to give the investors sufficient time to decide, whether or not to make investment in the company.
   Moreover, if a notice has been given by some person liable under Section 62 (*i.e.,*promoters, directors or experts) excluding his liability, the allotment cannot be made until the beginning of 5th day after the date on which such public notice is given.
8. *Closing of subscription list:* The list may be kept open for any period. However, as per SEBI guidelines list must be kept open for a minimum of *3* working days.
9. *Permission of Stock Exchange for Listing the Securities [Section 73]:* The Amendment Act,1988 provides for compulsory listing of all public issues with recognised stock exchanges. The name of the stock exchange(s) where shares are sought to be listed shall be disclosed in the prospectus. Where the prospectus states that the application for listing has been made, any allotment made thereunder shall be void if permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of 10 weeks from the date of closing of the subscription list. But where the company has preferred an appeal against the decision of any recognised stock exchange under Section 22 of the Securities Contract (Regulation) Act,1956 such allotment shall not be void till the appeal has been disposed.

10. *Refund of application money:* Where the company did not apply for permission of stock exchange or the permission has been refused, the money received from the applicants must be repaid forthwith. On failure to refund within 8 days after becoming so liable, the company and its directors shall be jointly and severally liable to repay the money with interest at prescribed rates of interest keeping in view the period of delay. The default in returning the application money shall make the company and every officer of the company liable to fine extending Rs.50000. Failure to refund within 6 months from expiry of 8th day shall make the guilty officer liable to imprisonment upto one year besides the said fine.
11. *Return of Allotment [Section 75]:* Within 30 days of allotment of shares the company must file with the Registrar a return as to allotment containing the following particulars:
    (i) The number of nominal amount of shares allotted; the names, addresses and occupations of allottees, and the amount paid or due and payable on each share.
    (ii) Particulars about the shares (not being bonus shares) allotted for consideration other than cash.
    (iii) Particulars about bonus shares stating the number and nominal amount of such shares comprised in the allotment, and names addresses and occupations of allottes, and a copy of the resolution authorising the issue of such shares.
    (iv) Where shares have been issued at a discount, a copy of the resolution authorising such issue together with a copy of the permission of Central Government authorising such issue shall be filed with the Rejistrar. The order of the Central government shall be filed with the Registrar where rate of discount exceeds 10 per cent.

The return shall be dated and signed by a director or secretary. Non-compliance with Section 75 is punishable with a fine of Rs.5000 for everyday during which the default continues. But it will not affect the validity of the attotment.

II. Subsequent Allotment of Shares

The provisions relating to the First Allotment are applicable to subsequent allotment as well.

Irregular Allotment and Its Effect (Sec.71)

An allotment is said to be irregular in the following cases:

(i) If allotment is made without complying with the provisions relating to minimum subscription and application money.
(ii) Where a public company does not issue a prospectus and makes the allotment without filing a statemen-in-lieu of prospectus at least 3 days before allotment.

(iii) Where subscription list is opened before fifth day from the date of issue of prospectus.
(iv) Where a minimum of 5 percent of the nominal value of shares has not been received by way of application money.
(v) Where application money has not been kept in a scheduled bank.
(vi) Whee listing has not been made before 10 weeks from date of closure of subscription list or listing permission has been refused.

Effects of Irregular Allotment

1. *Contract Voidable [Section 71(1)]:* An irregular allotment is voidable at the option of the allottee within 2 months of the statutory meeting or within 2 months of allotment when no statutory meeting is held. There is no need to start any legal proceedings for this purpose. The option to avoid the allotment can be exercised even after the company has gone into liquidation.
2. *Liability of the Directors [Section 71(3)]:* The directors who wilfully authorised the making of irregular allotment shall be liable to compensate the company as well as the allottee for any loss or damage which they may have sustained provided the suit is filed within 2 years of the date of allotment.
3. *Allotment Void [Section 73(1)]:* Where it has been mentioned in the prospectus that application has been or will be made to a recognised stock exchange for getting the shares or debentures listed, the allotment shall be void if no listing application has been made or listing permission has not been granted within the prescribed time.
4. *Fine:* Every director who is knowingly responsible for the default shall be liable to fine upto Rs.50,000 when no offer to public is made and allotment has been made without depositing share application money in a separate bank account until the certificate to commence business is obtained and a fine upto Rs.10000 when no public offer is made and allotment has been made without filing with ROC ''the statement in lieu of prospectus'' at least 3 days before first allotment.

Summary of the Effects of Different Irregularities Relating to Allotment:

1. *Failure to register prospectus with Registrar is 560:* In such a case, the allotment is valid but the company and every person knowingly issuing a prospectus without its registration shall be liable to fine upto 50,000 rupees.
2. *Application money being less than 5 percent of nominal value of share [See 69(3)].* The allotment is voidable u/s 71(1). Every director who will fully anthorises the controvention shall be liable to pay damages to the company as well as the allottee. Morever, the company and every officer in default shall be liable to a fine extending to 5000 rupees [See 629A]

3. *Failure to obtain minimum subscription* [Sec 69(1)] It makes the allotment vowable u/s 71(1). It money received is not refunded within 10 days of expiry of 60 days from closure of issue, directors become liable to pay the money with interest @ 15 percent per annum [Sec 69(5) read with SEBI Guidelines]
4. *Failure to deposit application money in a scheduled bank* [Sec. 69(4)] The allotment is voidable u/s 71(1), Directors guilty of contravention are liable for dangers to the company and the allottees U/s 71(3).
5. *Failure to deliver statement-in-lien* of prospectus to the Registrar [Sec. 70] The allotment is voidable, Directors guilty of contravention shall have to pay damages to the company as well as allotties. The company and every director shall be punishable with fine up to 10,000 rupees.
6. *Non-compliance with time limits for opening the subscription list* [Sec. 72] Though the allotment remains valid yet the company and every officer. Who is in default shall be liable to fine upto 50,000 rupees u/S 72 (3).
7. *Refusal by the stock exchange to list the securities* (Sec. 73) If the stock exchanges either refuses or does not grant listing permission within 10 weeks from dose of subscription list, the company must refund the money in next 8 days else the directors shall have to repay the same with 15 percent perannum. It the refund is delayed beyond six months, the directors shall be liable to imprisonment upto one year.

CERTIFICATION OF TRANSFER (SPLITTING OF SHARES) (SEC.112)

Generally, a company issues only one share certificate for all the shares held by a member. In case, a shareholder wants to sell only a part of his shareholding or wants to transfer in favour of more than one transferee, he can lodge the share certificate with the company for certification. Certification is an endorsement by the company on the instrument of transfer that the share certificates relating to shares to be transferred have been lodged with the company. The transferor then delivers the certified instrument of transfer to the purchaser of shares. The company cancels the share certificate lodged with it and delivers the certified instrument of transfer to the purchaser. In due course, the company prepares two certificates—one for the shares sold and the other for the balance of shares which remain unsold. These certificates are thenexchanged for 'certification of transfer' and the 'balancing ticket.' It may however, be noted that certification is not obligatory on the part of the company. No fee can be charged for giving this facility.

FORGED TRANSFER

A instrument of transfer bearing forged signature of transferor *i.e.*, the rightful owner of shares, is known as forged transfer. A forged transfer is a nullity and void ab initio. It does not convey right of ownership on the transferee. If the

company registers such a transfer, the true owner can require the company to restore his name on the register of members & the company is bound to do so.

If the company has registered the transfer on the basis of forged instrument of transfer and issued a share certficate which the transferee sells to an innocent burger, the company can not deny the title of the innocent buyer. At the same time the title to shares of true owner too cannot be denied. If the company refuses to register an innocent buyer, he can claim damages on the ground that he has acted on the faith of share certificates issued by the company [*Balkis Consolidated Co. Ltd.* v. *Tamkinson* (1893)]. The company can recover the loss from the person who has procured registration though he may have acted in good faith.

Depository System

The concept of depository and dematerialisation has been introduced by the Depositories Act 1996. In this system, shares are held in an electronic form. Transfer of securities is effected through a book entry in the ledger of the depository without executing any transfer deed and without physical delivery of shares.

This is why, this is known as ''scripless trading''. To hold shares in electronic form, an account has to be opened with a depository participant. Physical Certificates are surrendered which the DP sends to the company for verification. On confirmation by the company, credit is given to client's account with the number of shares. This is called dematerialisation''. The client has the option to rematerilise his holding.

Meaning of 'depository'

Under the depositories Act 1996, a 'depository' must be registered as a 'company' under the companies Act, 1956 also with SFBI. Presently there are two depositories in India namely National Securities Depositories Ltd. and central Securities Depository Ltd. Each depository has several members known as 'depositary Participants (DPs). Under the SEBI Regulations, a banker, Stock broker, financial, institution, custodian can become depository participants. An investor descring to hold shares in an electronic form must open an account with one of the depository participants.

For *dematerialisation* of physical shares into electronic shares, the investor must surrender the shares to the depository participant which forwards them to the Registrars of the company. The Registrar replaces the name of beneficiary for that of the investor as registered owner of the beneficial owner of the securities in his books. The investor continues to enjoy all rights in respect of the demoteriolised shares. But shares in the depository cease to have distinctive numbers. The DP sends periodic statement of the investors holdings with him.

BLANK TRANSFER

A Blank transfer is said to occur when the instrument of transfer duly signed and completed by the transferor but without filling in the name of transferee is

delivered to the transferee alongwith the relevant share certificate. The stamp duty has to be paid by the last transfere who loopes the shares with the company for registration.

It facilitate the transfer of those shares merely by delivering the blank transfer deed and the relevance share certificates. There is no need to fill in a new transfer deed every time. If the buyer of shares wants to retain them, he can fill in his name and get himself registered with the company. Until such registration, the transferor continues to be the owner of those shares. But he remains a trustee for the dividends declared by the company. However, the transferee cannot prefer a claim against the company in the event of transferor's failure to pay the dividend.

A blank transfer can remain in circulation only for 12 months after its signing by the prescribed authority, or upto the time of closure of register of members by the company, whichever is later. The provision has been made to curb the abuse inherent in the system.

TYPES OF SHARE CAPITAL

- Authorised share capital is also referred to, at times, as registered capital. It is the total of the share capital which a limited company is allowed (authorised) to issue. It presents the upper boundary for the actually issued share capital.
- Shares authorised = Shares issued + Shares unissued
- Issued share capital is the total of the share capital issued (allocated) to shareholders. This may be less or equal to the authorised capital.
- Shares outstanding are those issued shares which are not treasury shares. These are all the shares held by the investors in the company.
- Treasury shares are those issued shares which are held by the issuing company itself, the usual result of a buyback.
- Shares issued = Shares outstanding + Treasury shares

Issued capital can be subdivided in another way, examining whether it has been paid for by investors:

- Subscribed capital is the portion of the issued capital, which has been subscribed by all the investors including the public. This may be less than the issued share capital as there may be capital for which no applications have been received yet ("unsubscribed capital").
- Called up share capital is the total amount of issued capital for which the shareholders are required to pay. This may be less than the subscribed capital as the company may ask shareholders to pay by instalments.
- Paid up share capital is the amount of share capital paid by the shareholders. This may be less than the called up capital as payments may be in instalments ("calls-in-arrears").

TRANSFERRING SHARES

Shares are items of property and, like any other property, can be sold or given away. The sale or gift will require a transfer of the shares. Shares were developed as a means of allowing a group of people to invest in a business project by buying shares of it.

To be an attractive investment, the shares had to be transferable, so that the investor could sell the shares to retrieve their value. So shares are presumed to be capable of transfer, even in a private company, unless the company has restricted the right to transfer them by a provision in its articles, or the shareholder has entered into a contract, such as a shareholders' agreement, not to transfer the shares.

- Transfer procedure
- Stamp duty
- Restrictions on transfer
- Model Articles provisions
- Table A provisions
- New statutory provisions under CA 2006

The standard form required to transfer shares is a 'stock transfer form', duly stamped with payment of stamp duty. A stock transfer from (in accordance with the Stock Transfer Act 1963) will be a proper instrument for the transfer of any shares in any company.

PROCEDURE

The shareholder (usually called 'the transferor') provides the transferee with a duly completed and signed stock transfer form and the share certificate in respect of the shares to be transferred. The transferee has the transfer stamped by paying the relevant amount of stamp duty and then sends the stock transfer form and the share certificate to the company. It is not lawful for a company to register a transfer of shares unless a proper instrument of transfer has been delivered to it, or the transfer is an exempt transfer within the Stock Transfer Act 1982. This applies notwithstanding anything in the company's articles.

The company decides whether to accept the transfer. This should be done by a resolution of the board unless the secretary has previously been authorised by the board to accept transfers.

The company must accept the transfer unless there is some provision in its articles which restricts transfers or gives the board a discretion to decline them. If a company refuses to register a transfer it shall within two months after the date on which the transfer was lodged with it, send to the transferee notice of the refusal.

If the transfer is accepted by the company, the company will make the necessary entries in the register of members (and, if the company keeps one, the register of transfers) and issues a share certificate to the transferee. The certificate must be available within two months after the date when the transfer was lodged.

The company keeps the stock transfer form and the old share certificate (which should have 'Cancelled' stamped or written across it so that it cannot be re-issued inadvertently). No form or notice is sent to Companies House.

If the transfer is for part only of the transferor's shareholding, the transferor will not wish to part with a share certificate for the larger number of shares. Either the transferor could request the company for split certificates or a "certificated transfer", a stock transfer form certificated by the company to the effect that the certificate has been lodged.

STAMP DUTY

Stamp duty is payable on the sale of shares at a rate of 50p per £100 or part thereof. It is payable on the full amount and is subject to a minimum amount of £5. There is no exempt band. If the shares are transferred for consideration below £1,000 or by way of a gift or settlement, exemption can be claimed by completing and signing the reverse of the form. Stamp duty is paid by taking or sending the form to the stamp office of the Inland Revenue.

RESTRICTION ON TRANSFER

These will depend on the company's articles. The Model Articles have a restriction, but Table A (from 1981) does not. In practice most private companies will want some control over the transfer of their shares.

Provisions vary from a simple power for the directors to decline any transfer (as found in the Model Articles) to pre-emption provisions, free transfers to family members and even provisions for enforced transfer in certain circumstances (*e.g.*, if the shareholder ceases to be a director). Having the right provisions in the articles can be vitally important. Company Law Solutions can advise and draft any required provisions.

MODEL ARTICLES PROVISIONS

Share Transfers

26. (1) Shares may be transferred by means of an instrument of transfer in any usual form or any other form approved by the directors, which is executed by or on behalf of the transferor.

(2) No fee may be charged for registering any instrument of transfer or other document relating to or affecting the title to any share.

(3) The company may retain any instrument of transfer which is registered.

(4) The transferor remains the holder of a share until the transferee's name is entered in the register of members as holder of it.

(5) The directors may refuse to register the transfer of a share, and if they do so, the instrument of transfer must be returned to the transferee with the notice of refusal unless they suspect that the proposed transfer may be fraudulent.

TABLE A PROVISIONS

Transfer of Shares

23. The instrument of transfer of a share may be in any usual form or in any other form which the directors may approve and shall be executed by or on behalf of the transferor and, unless the share is fully paid, by or on behalf of the transferee.
24. The directors may refuse to register the transfer of a share which is not fully paid to a person of whom they do not approve and they may refuse to register the transfer of a share on which the company has a lien. They may also refuse to register a transfer unless -
    (a) It is lodged at the office or at such other place as the directors may appoint and is accompanied by the certificate for the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer;
    (b) It is in respect of only one class of shares; and
    (c) It is in favour of not more than four transferees.
25. If the directors refuse to register the transfer of a share, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.
26. The registration of transfers of shares or of transfers of any class of shares may be suspended at such times and for such periods (not exceeding thirty days in any year) as the directors may determine.
27. No fee shall be charged for the registration of any instrument of transfer or other document relating to or affecting the title to any share.
28. The company shall be entitled to retain any instrument of transfer which is registered, but any instrument of transfer which the directors refuse to register shall be returned to the person lodging it when notice of the refusal is given.

Sec771, Companies Act 2006 provides a new procedure on transfer being lodged:

(1) When a transfer of shares in or debentures of a company has been lodged with the company, the company must either-
    (a) Register the transfer, or
    (b) Give the transferee notice of refusal to register the transfer, together with its reasons for the refusal, as soon as practicable and in any event within two months after the date on which the transfer is lodged with it.

(2) If the company refuses to register the transfer, it must provide the transferee with such further information about the reasons for the refusal as the transferee may reasonably request. This does not include copies of minutes of meetings of directors.

(5) This section does not apply-
    (a) In relation to a transfer of shares if the company has issued a share warrant in respect of the shares (see section 779);
    (b) In relation to the transmission of shares or debentures by operation of law.

The second most common restriction which is often included in articles is a pre-emption provision, *i.e.*, that shares must be offered to existing shareholders in proportion to their present holdings. Note that the statutory pre-emptive rights in CA 2006, sec561-577 apply only to allotments of shares. (See related topic: What are pre-emptive rights?)

There may be other provisions, *e.g.*, that shares are freely transferable to other members, or members of the family (defined) of the shareholder, but that other transfers may be refused by the directors. There can be provisions that a person who ceases to be a director has to transfer their shares.

SHARE TRANSMISSION

Share transmission is a mechanism by which the title to shares is devolved other than by transfer. This is typically applicable for:

- Devolution by death
- Succession
- Inheritance
- Bankruptcy
- Marriage

Ownership: on registration of the transmission of shares, the person entitled to transmission of shares becomes the shareholder of the company and is entitled to all rights and subject to all liabilities as such shareholder.

Method: while transfer of shares is brought about by delivery of a proper instrument of transfer (viz, transfer deed) duly stamped and executed, transmission of shares is done by forwarding the necessary documents (such as a notarised copy of death certificate) to the company.

LEGAL PROCESS

In the case of death, the surviving shareholders have to submit a request letter supported by an attested copy of the death certificate of the deceased shareholder and the relevant share certificates. The company's registrar and share transfer agent on receipt of the said documents will delete the name of deceased shareholder from its records and return the share certificates to the applicant/registered holder with necessary endorsement.

ISSUE OF SWEAT EQUITY SHARES

Notwithstanding anything contained in section 53, a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:

Comment:

(1) Except as provided in section 54, a company shall not issue shares at a discount.

(2) Any share issued by a company at a discount price shall be void. Notwithstanding anything contained in sub-sections (1) and (2), a company may issue shares at a discount to its creditors when its debt

is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent. per annum from the date of issue of such shares to the persons to whom such shares have been issued.

(a) The issue is authorised by a special resolution passed by the company;

(b) The resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;

(c) 3[Omitted]

(d) Where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with rules.

Comment:

(1) A company other than a listed company, which is not required to comply with the Securities and Exchange Board of India Regulations on sweat equity, shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called, unless the issue is authorised by a special resolution passed by the company in general meeting.

Explanation.- For the purposes of this rule:

(i) *The expressions ''Employee'' means:*

(a) A permanent employee of the company who has been working in India or outside India; or

(b) A director of the company, whether a whole time director or not; or

(c) An employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company;

(ii) The expression 'Value additions' means actual or anticipated economic benefits derived or to be derived by the company from

an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of an employee.

(2) The explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 shall contain the following particulars, namely:-
   (a) The date of the Board meeting at which the proposal for issue of sweat equity shares was approved;
   (b) The reasons or justification for the issue;
   (c) The class of shares under which sweat equity shares are intended to be issued;
   (d) The total number of shares to be issued as sweat equity;
   (e) The class or classes of directors or employees to whom such equity shares are to be issued;
   (f) The principal terms and conditions on which sweat equity shares are to be issued, including basis of valuation;
   (g) The time period of association of such person with the company;
   (h) The names of the directors or employees to whom the sweat equity shares will be issued and their relationship with the promoter or/and Key Managerial Personnel;
   (i) The price at which the sweat equity shares are proposed to be issued;
   (j) The consideration including consideration other than cash, if any to be received for the sweat equity;
   (k) The ceiling on managerial remuneration, if any, be breached by issuance of such sweat equity and how it is proposed to be dealt with;
   (l) A statement to the effect that the company shall conform to the applicable accounting standards; and
   (m) Diluted Earning Per Share pursuant to the issue of sweat equity shares, calculated in accordance with the applicable accounting standards.

(3) The special resolution authorising the issue of sweat equity shares shall be valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.

(4) The company shall not issue sweat equity shares for more than fifteen percent of the existing paid up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher:

Provided that the issuance of sweat equity shares in the Company shall not exceed twenty five percent, of the paid up equity capital of the Company at any time.

Provided further that a startup company, as defined in notification number GSR 180(E) dated 17th February, 2016 issued by the

Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of lndia, may issue sweat equity shares not exceeding fifty percent of its paid up capital upto five years from the date of its incorporation or registration.

(5) The sweat equity shares issued to directors or employees shall be locked in/non transferable for a period of three years from the date of allotment and the fact that the share certificates are under lock-in and the period of expiry of lock in shall be stamped in bold or mentioned in any other prominent manner on the share certificate.

(6) The sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation.

(7) The valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued, shall be carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with justification for such valuation.

(8) A copy of gist along with critical elements of the valuation report obtained under clause (6) and clause (7) shall be sent to the shareholders with the notice of the general meeting.

(9) Where sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect thereof obtained from the registered valuer, such non-cash consideration shall be treated in the following manner in the books of account of the company-

   (a) Where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or

   (b) Where clause (a) is not applicable, it shall be expensed as provided in the accounting standards.

(10) The amount of sweat equity shares issued shall be treated as part of managerial remuneration for the purposes of sections 197 and 198 of the Act, if the following conditions are fulfilled, namely.-

   (a) The sweat equity shares are issued to any director or manager; and

   (b) They are issued for consideration other than cash, which does not take the form of an asset which can be carried to the balance sheet of the company in accordance with the applicable accounting standards.

(11) In respect of sweat equity shares issued during an accounting period, the accounting value of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company, if the sweat equity shares are not issued pursuant to acquisition of an asset.

(12) If the shares are issued pursuant to acquisition of an asset, the value of the asset, as determined by the valuation report, shall be carried in the

balance sheet as per the Accounting Standards and such amount of the accounting value of the sweat equity shares that is in excess of the value of the asset acquired, as per the valuation report, shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

Explanation.: For the purposes of this sub-rule, it is hereby clarified that the Accounting value shall be the fair value of the sweat equity shares as determined by a registered valuer under sub-rule (6)

(13) The Board of Directors shall, inter alia, disclose in the Directors' Report for the year in which such shares are issued, the following details of issue of sweat equity shares namely:-

(a) The class of director or employee to whom sweat equity shares were issued;
(b) The class of shares issued as Sweat Equity Shares;
(c) The number of sweat equity shares issued to the directors, key managerial personnel or other employees showing separately the number of such shares issued to them, if any, for consideration other than cash and the individual names of allottees holding one percent or more of the issued share capital;
(d) The reasons or justification for the issue;
(e) The principal terms and conditions for issue of sweat equity shares, including pricing formula;
(f) The total number of shares arising as a result of issue of sweat equity shares;
(g) The percentage of the sweat equity shares of the total post issued and paid up share capital;
(h) The consideration (including consideration other than cash) received or benefit accrued to the company from the issue of sweat equity shares;
(i) The diluted Earnings Per Share (EPS) pursuant to issuance of sweat equity shares.

(l4) (a) The company shall maintain a Register of Sweat Equity Shares in Form No. SH.3 and shall forthwith enter therein the particulars of Sweat Equity Shares issued under section 54.

(b) The Register of Sweat Equity Shares shall be maintained at the registered office of the company or such other place as the Board may decide.
(c) The entries in the register shall be authenticated by the Company Secretary of the company or by any other person authorized by the Board for the purpose.

(2) The rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall rank pari passu with other equity shareholders.

Accounting Treatment

Where sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect thereof obtained from the registered valuer, such non-cash consideration shall be treated in the following manner in the books of account of the company:

(a) Where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or

(b) Where clause (a) is not applicable, it shall be expensed off as provided in the accounting standards.

In respect of sweat equity shares issued during an accounting period, the accounting value of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

FORFEITURE OF SHARES

It means 'the confiscation of the shares of a shareholder for non-payment of calls in respect thereof. But the articles of the company must authorise it to forfect a members shares if he fails to pay the calls within certain time after obey fall due. Such a provision is necessary because the effect of forfeiture is to deprive a person of his property.

Essentials of Valid Forfeiture

(i) *It must be in accordance with the articles:* Generally, for- feiture can be made for non-payment of calls but articles may provide for any other grounds [*Naresh Chander Sanyal* vs. *Calcutta Stock Exchange Association Ltd.* (1971) 41 Comp. Cas 51].

(ii) *Notice prior to forfeiture:* As per Art. 30 of Table A, the company must give a notice to the defaulting member requiring him to pay the unpaid call together with interest. A minimum of 14 days time must be given for payment. It must also state that in event of non-payment within the prescribed period, the shares will be liable to be forfeited. Any defect in the notice will make the forfeiture invalid.

(iii) *It must be made by means of a resolution of the Board of Directors* [Art.31 of Table A]. In the absence of such a resolution, the forfeiture shall be invalid.

(iv) The power of forfeiture must be exercised in good faith and for the benefit of the company and not that of directors. For instance, any forfeiture dose of the request of a shareholder to relieve him of his liability amounts to abuse of the power to forfeit and is a fraud on other shareholders and hence void..

Effects of Forfeiture

(i) *Termination of membership:* On forfeiture, the defaulting shareholder ceases to be a member of the company. But he continues to be liable to pay the money that is outstanding in respect of the forfeited shares.
(ii) *Cession of rights in respect of shares:* There is a cessation of all rights or interest in shares as well as any claim in respect of the amount paid up on the shares.
(iii) *Forfeited shares to become the property of the company:* These shares may be disposed terms is the board thinks fit.
(iv) *Subsistence of Liability:* Forefeiture does not relieve the member from being placed on the B-List of contributories. But he is liable to contribute only if *(a)* present members are unable to pay, and *(b)* winding up commences within one year of forfeiture.

Re-issue of Forfeited Shares

Forfeited shares becomes the property of the company. These may be re-issued or otherwise disposed of in such manner as the Board thinks fit. But the amount of discount on re-issued shares cannnot exceed the actual amount forfeited on these shares else it will amount to issue at a discount which is contrary to section 79. Re-issue may be done by means of resolution of the Board. The title of the holder will not be affected by any irregularity or invalidity in the forfeiture, sale or disposal. After re-issue, the new holder becomes a shareholder and his name is entered in the Register of Members. On forfeiture and sale of forfeited shares, the company can use the proceeds for discharging the liability for which forfeiture was effected (Naresh Chander Sanyal v. Calcutta Stock Exchange Association Ltd. AIR 1971 SC 422). Any premium earned on the resale of shares must be transferred to the share premium account. The re-issue of forferted shares does not amount to allotment. Therefore there is no need to fill a return with the Registrar in respect of re-issue of forferted shares.

Annulment of Forfeiture

The Board may annual the forfeiture at the request of the defaulting shareholder provided the request is made before sale or disposal and all the outstanding dues together with interest are paid. However the board must act bonafide and must pass a special resolution to that effect.

SHARE CERTIFICATE (SEC 113)

According to Section 84, a share certificate is ‘a document issued by the company under its common seal specifying the number of shares and the amount paid on each share’ Every person whose name appears in the register of members is entitled to one share certificate for his shares under Regulation 7(1) of Table A. A share certificate is however issued only in pursuance of a Board resolution its letter 2nd on surrender to the company of allotment.

Form & Contents of Share Certificate: The contents of a share certificate include the distinctive number of shares, name and particulars of the holder; nominal value of shares & the amount actually paid on them. The share certificate must be issued under the seal of the company and signed by two directors for their attorney and the secretary. One of the signing directors shall be the managing or whole time director of the composition of board so permits.

Time Limit for Issue of Share Certificate: Section 113 requires a company to complete and deliver the share certificate within three months of the allotment of shares or two months of the application for registration of transfer. On a default by the company, the allottee/transfere may give a notice to the company faits to act within 10 days of the notice, an application can be made to the National company Law tribunal to direct the company to issue the share certificate in accordance with the Act. In the case of securities dealt through depository the company must provide details of allotment to the depositor immediate in allotment.

A share certificate is issued under a resolution of the Board and bearing the seal of the company. But it is not a negotiable instrument. The ownership of shares can be transferred only by executing an instrument of transfer and the registration thereof with the company.

Legal effect of Share Certificate: Effects of issue of share certificate are as follows:

(i) *Estoppel as to title:* It is *prima facie* evidence of the title of a person to hold the shares. It is a declaration by the company to the world that the person named in the certificate is a shareholder in the company. The company is estopped from denying his title to the shares.

(ii) *Estoppel as to payment:* It prevents the company from denying the fact of payment certified thereon. But no such estoppel is available to the person who knows that statements in the certificates are not true.

Issue of Duplicate Certificates

A company may issue a duplicate certificate if (i) a certificate is proved to have been last or destroyed, (ii) or a multilated or torn certificate is surrendered to the company Penalty for wrongful renewal or issue of duplicate certificate is a fine extending to Rs.10000. A guilty officer shall be liable to imprisonment upto 6 months besides fine.

Share Warrant (Secs. 114 and 115)

A share warrant means ‘a document issued under the common seal of the company stating that the bearer is entitled to a specified number of shares.’ Whoever bears the document is the owner of the shares.

It can be issued only by a public company limited by shares if so authorised by its Articles and with the previous approval of the central Government in respect of its fully paid shares.

It is a negotiable instrument and can be transferred by mere delivery. There is no need to register its transfer with the company. According to Section 114, a share warrant can be issued subject to following conditions:

(i) There must be a provision in the articles for their issue.
(ii) Permission of the central government must be obtained for their issue.
(iii) The shares must be fully paid up.
(iv) These can be issued only by public companies limited by shares under its common seal.

6

Memorandum of Association and its Alteration

MEMORANDUM OF ASSOCIATION

The Memorandum of Association is the principal document of a company without which it cannot be registered. It is why the memorandum is also called the life-giving document. Since it contains the fundamental conditions on which a company has been registered, it is also described as the constitution or charter of the company. By laying down the objects and powers of the company, it regulates the external relationships of the com-pany.

DEFINITION

Section 2(28) of the Act defines a memorandum as 'the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company laws or of this Act.'' This definition does not throw any light on the scope, use and importance of the memorandum.

It would be better to define memorandum in terms of the purposes which it serves as follows:

1. It contains the fundamental conditions upon which alone the company is allowed to be incorporated.
2. Negatively speaking, it circumscribes the boundaries beyond which the objects of the company cannot go. Any act of the company beyond the scope of the memorandum is simply 'ultra vires.'

Lord MacMillan had rightly observed that the purpose of memorandum is to enable the shareholders, creditors and those who deal with the company to know the permitted range of the enterprise. [*Egyptian Salt and Soda Co. Ltd.* vs. *Port Said Salt Asscn Ltd.* (1931)].

Form of Memorandum

The memorandum shall be in a form given in Table B (for a company limited by shares), Table C (for a company limited by guarantee and not having share capital); Table D (for a company limited by guarantee and having a share capital), and Table E (for an unlimited company) as given in Schedule 1 of the Act or in a form as near to these tables as the circumstances warrant [Section 14].

Printing and Signing of Memorandum (Section 15)

The memorandum shall be printed, divided into paragraphs, numbered consecutively and signed by each subscriber in the presence of at least one attesting witness. One subscriber cannot attest another. Each subscriber as well the witness must add his address, description and occupation.

CONTENTS OF MEMORANDUM [SECTION 13]

The memorandum shall contain the following clauses:

1. *Name Clause:* The name of a company establishes its identity. Therefore every company must have a name. But the choice of name shall be subject to certain restrictions noted below:
   (a) It must not be identical with the name of another company.
   (b) It must not be undesirable in the opinion of the central government.
   (c) It must not have been prohibited under the Emblems and Names (Prevention of Improper Use) Act,1950. For instance, name of emblem of UNO & WHO, Indian National Flag, name and pictorial representation of Mahatma Gandhi and Indian Prime Minister can not be used.
   (d) The word 'Limited' or 'Private Limited' must form the last part of the name of every public company or private company limited by shares respectively.
   (e) The name alongwith the address of registered office shall be painted outside of every place and mentioned on all business letters, bill heads, negotiable instruments, etc. [Section 147].
2. *Registered Office Clause [Section 13 (1)(b)]:* It contains the name of the state in which Registered Office of the company is to be situated. The company must have a registered office either from the day it starts its business or within 30 days of incorporation, whichever is earlier. The notice of situation must be given to the Registrar within 30 days of incorporation [Section 146]. The registered office determines the domicile of the company.

3. *Objects Clause:* This clause contains the vires (objects) of the company. A company can not do any business other than these. It must be divided into two parts:
   (i) *The main objects* to be pursued by the company on its incorporation and the objects incidental or ancillary to the attainment of main objects.
   (ii) *Other objects i.e.*, the objects not included in the above [Section 13(1)(d)].
   It both defines and confines the activities of the company. It informs the share holders the pruposes to which their money will be used.
   In the case of non-trading companies, the objects clause shall also be mention the names of those states to whose territories the objects of the company shall extend.
   If a company wants to take up any business falling in the category of ''other objects,'' it must obtain the authority of a special resolution and file a copy thereof with the Registrar. An ordinary resolution will suffice where the company has taken the central government's permission before commencing the new business [Section 149].
4. *Liability Clause [Section 13 (2)]:* The memorandum of a company limited by shares or guarantee shall state that the liability of its member is limited to the amount unpaid on their shares or guarantee. A company registered with unlimited liability need not have this clause in the memorandum.
5. *Capital Clause [See. 13(4)]:* It states the amount of share capital of the company and its division into shares of fixed denomination. It is called to be the nominal or authorised capital of the company. Each subscriber must take at least one share and write the number of shares taken by him opposite his name.
6. *Association or Subscription Clause:* It contains a 'declaration of association' by the signatories to the memorandum that they wish to form an association. Each subscriber must take at least one share. Minimum number of subscribers of public and private company shall be 7 and 2 respectively.

PROSPECTUS AND MISSTATEMENT IN A PROSPECTUS UNDER COMPANY LAW

Prospectus

According to section 2(70) of the Companies Act, 2013 a prospectus is any law-related document outlining the financial securities for the sale to the investors

of the corporate which also includes any circular, notice, ads or document which acts as an invite to offers from the general public. And these invitations to offers must be for the purchase of any securities of a company. It is a legal document for the public and investors to buy and have the details of the features, prospects and the declaration of a financial product.

Company prospectus is released by the corporate to inform the investors or the public that various securities and instruments are available for them. Mutual funds, stocks, bonds and other types of investments are informed in these documents which have been offered by the company to the public.

Essentials Of A Document To Be Called Prospectus:

1. Invitation of subscription must be made to the public of share or debentures or inviting deposits by the document.
2. The invitation must be made to the public or the purchasers.
3. Such invitation must be invited by the company or on the behalf of the company.
4. The invitation must be associated with debentures, shares or such other instruments.

The Contents of a Prospectus

The detailed contents of a prospectus are given in Section 26 of the Companies Act, 2013. The prospectus must have the following contents:

1. The details of the corporate like name, its registered office address, its CIN number, and the objects of the company.
2. The details of the persons who sign the Memorandum and the particulars of the shareholding.
3. The details of the Directors of the company.
4. The minimum subscription amount that has been invited to the public share or debentures.
5. The details of the shares offered.
6. The amounts payable on the stages such as on application, then on allotment and on the further calls.
7. The details of the underwriters of the issue.
8. Details of the Auditors of the company and their reports of the profit and losses beard by the company.
9. The detailed procedure and time schedule for allotment and issue of securities.
10. The capital structure of the company.
11. The management perception of risk factors specific to the project.
12. The deadlines for the completion of the project.
13. The disclosures in such manner as may be prescribed about the sources of promoter's contribution.
14. Any litigation of legal action pending or taken by a Government Department or a statutory body.

Violation of Section 26 of this act

If a prospectus issued violates the provisions of section 26 of the Companies Act, 2013 then:

1. The company shall pay a fine not less than Rs.50000 which can be extended to Rs. 300000.
2. Imprisonment for a maximum term of three years or with a fine not less than Rs. 50000 and maximum of Rs. 300000 or with both can be imposed to every person of the company who is a party to the issue of the prospectus.

Prospectus Example

1. In the Initial Public Offerings, the prospectus notifies the shareholders about the company's future plans and their business model.
2. The objective of the product, fees, inclusions and exclusions are defined in the prospectus for the insurance and investment funds potential customers.
3. The prospectus for the Electronic Fund Transfer customers informs about the history, portfolio, fund's goal and various financial details.

TYPES OF PROSPECTUS

There are four types of prospectus according to the Companies Act, 2013. These are:

Deemed Prospectus

Section 25(1) of the Companies Act, 2013 defines the Deemed Prospectus. Deemed prospectus is a document from which the investors made an offer when the company allows or agrees to allot securities of the company. Any document offering sale of securities to the customers is a prospectus by the implication of law.

Red Herring Prospectus

All the information regarding the price of the securities offered and the number of securities to be issued isn't defined within the red herring prospectus. According to the Companies Act, the prospectus must be issued to the registrar a minimum of 3 days before the offer and also the subscription list opens by the company.

Shelf Prospectus

Section 31 of the Companies Act, 2013 defines the shelf prospectus. When a company offers one or more securities to the public or the customers then the shelf prospectus is issued. The validity period of the prospectus should not be more than a year and from the commencement of the first offer made its validity period starts. No prospectus is issued on the further offers.

Abridged Prospectus

It is a memorandum providing all the data given by the SEBI. It gives all the data to the investors for making further decisions. An organization must issue an abridged prospectus with the application form for the purchase of the securities.

Companies Required to Issue Prospectus

1. Every public listed company who wants to offer shares or debentures or other such instruments of the company to the public must issue a prospectus before offering the shares.
2. Every private company that was at first a private company but converts itself to a public company and wants to offer their shares or debentures to the public must first issue a prospectus.

Misstatement in a Prospectus

The prospectus is trusted by the members of the general public for subscribing or purchasing the securities and other instruments from the corporation and any misstatement by the prospectus can lead to punishment. Misstatement in a prospectus occurs when a untrue or misleading statement is included and issued in the prospectus. Any deletion and inclusion of any matter which misleads the public is also a misstatement under Section 34 of this Act. For instance, and statement which gives the incorrect location of the company's office is misstatement in the prospectus or any statement offering shares misleads the public is a misstatement in a prospectus.

Liability for Misstatement within the Prospectus

The one who gives the consent and signs the prospectus is to blame for any misstatement in a prospectus. The Managers, CS and also the Directors of the corporation are answerable for the same. However, mere signing won't result in liability for misstatement if the person who signed the prospectus is neither a Manager nor draws salary from that company. In the case, Sahara India Commercial Corporation Ltd., SEBI 31st October 2018, on behalf of the Director of the company, the Company Secretary signed the prospectus using their power of attorney and SEBI concluded that the CS wasn't chargeable for the misstatement within the prospectus as the Director of the corporate.

Misleading Representation

Misleading representation includes:

1. Any untrue statement
2. Statements implicating wrong impression
3. Mis-leading statements
4. Not disclosing true facts
5. Omission of data

Criminal Liability for Misstatement in Prospectus

When any statement within the prospectus includes misleading or untrue information is distributed then everyone who authorized the issue of the prospectus is liable under section 447 of the Companies Act.

Who may be Sued in Criminal Liability for any Misstatement in the Prospectus?

The people who can be sued are:

1. The company that issues the prospectus.
2. Every Director of the company.
3. Every person whose name appeared in the prospectus as a proposed Director of the company.
4. Every Promoter of the prospectus.
5. Every person who authorized the issue of the prospectus.
6. Any expert such as an engineer, a chartered accountant, a company secretary, a cost accountant, *etc.*)

Civil Liability for Misstatement

Section 62 of the Companies Act deals with civil liability and makes the actual person responsible to pay every single individual who has contributed for any share or debentures and could have grieved any damages by believing the prospectus where false and misleading information has been published. Every person and the company is liable who-

1. Is a director when the prospectus was issued
2. Named as the director or authorized himself or has agreed to become a director
3. The promoter of the corporation
4. Has authorized the issue of the prospectus

REMEDIES FOR MISSTATEMENTS IN PROSPECTUS

Remedies for Civil Liability

There are two remedies available against company:

1. *Revocation of the Contract:* The person who purchased the securities can cancel the contract. The money will be refunded to him, which he paid to the company.
2. *Damages for Fraud:* After revocation, the shareholders can claim damages from the company by filing a case in the court.

Remedies against the Directors, promoters and the authorized persons who issued the prospectus:

1. *Damages for misstatement:* Compensation will be given to the shareholders for the loss by the directors, promoters and the authorized persons.

2. *Damages for non-disclosure:* Fine of Rs. 50000 ad recovering the damages must be given by the people who mislead the purchasers from the one that is chargeable for the damages.

Remedies for Criminal Liability

1. Imprisonment up to 2 years or Rs. 50000 fine must beard by the people that mislead.
2. Person who knowingly issued a misstatement is punishable for imprisonment up to 5 years or with a fine Rs. 100000 or both.

REMEDIES FOR MISSTATEMENT IN PROSPECTUS | CIVIL, CRIMINAL, LAW OF CONTRACT

The prospectus is a document inviting the prospective investors to subscribe for the shares and debentures of a company.

Therefore, it should contain full and honest material facts and so no material fact should be concealed. But what are the remedies in case if there is a misstatement in the prospectus.

Remedies for Misstatement in Prospectus

If the prospectus contains a misleading statement, the liability of the company, the directors, promoters and others who authorized the issue can be classified into three kinds viz.,

1. Civil Liability,
2. Criminal Liability, and
3. Liability under the Law of Contract.

Civil Liability

An aggrieved shareholder who purchased shares by placing reliance on the misleading prospectus has:

a. Remedies against the company, and
b. Remedies against the directors, promoters and experts.

Remedies Against the Company

The aggrieved shareholder has two remedies against the company. They are:

i. Rescission of the Contract, and
ii. Damages for fraud.

Rescission of the Contract

The person who purchased shares on the basis of the prospectus containing misstatements can rescind the contract (cancel the contract). He is eligible for rescission whether the misstatement is made intentionally or unintentionally. He has to surrender his shares to the company. Then his name will be removed from the register of the members.

The money paid by him will be refunded by the company. The following are the conditions to be satisfied for claiming rescission:

1. There must be an untrue statement.
2. The misstatement must be material to the contract of issuing shares. It should not be a mere expression.
3. The shareholders must have relied on the untrue statement.
4. The statement must have induced the shareholder to purchase the shares.
5. The shareholder must apply for rescission within a reasonable time and before the liquidation of the company.
6. The shareholder should not have affirmed the contract for purchase of shares.

Damages for Fraud

After rescinding the contract, the aggrieved shareholder can claim damages from the company by filing a suit in the Court. He has to prove that the misstatement was made fraudulently.

Remedies against the Promoters, Directors, Experts, and Persons authorized the issue of the Prospectus

1. *Damages for Misstatement:* The directors, promoters, experts, and others who have authorized the issue of the prospectus are liable to compensate the aggrieved shareholder for the loss or damages he may have to incur because of the untrue statement.
2. *Damages for Non-disclosure of Material Facts:* If a material fact has been omitted from the prospectus, (a) the person responsible for the issue shall be fined up to Rs.50,000 and (b) the aggrieved can recover damages from the persons responsible for the issue.

Criminal Liability

1. If a prospectus contains any untrue statement, every person who authorized the issue are punishable with fine up to Rs.50,000 or with imprisonment up to 2 years or with both.
2. Anyone who fraudulently (knowingly) makes any misstatement in the prospectus to induce persons to invest money in the company is punishable with imprisonment up to 5 years or with fine up to Rs.1,00,000 or with both.

Liability under General Law of Contract

Under the general law, the aggrieved shareholder can recover damages from all or any of the persons responsible for the issue of the prospectus. The necessary thing is to prove that there is a fraudulent misstatement or non-disclosure.

Liability in Case of Open Market Purchase

One who purchased shares in the open market from any shareholder of the company (not relying on the prospectus) can't rescind the contract for the purchase of shares. The person who authorized the issue of prospectus cannot be held liable.

PROSPECTUS: SHELF AND RED HERRING PROSPECTUS, MISSTATEMENT IN PROSPECTUS

PROSPECTUS

The public companies invite subscriptions from the public by issuing a documents called ''prospectus''. To safeguard the interests of prospective investors, provisions have been made against the inclusion of misleading statements in the prospectus.

MEANING AND DEFINITION

Section 2(36) defines a prospectus as 'any document described or issued as a prospectus and includes any notice, circular, advertisement or other docuement inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of a body corporate'.

Ingredients of a Prospectus

(i) It is a document in writing.

(ii) It must contain an invitation. The invitation may be for subscription to (a) shares or debentures, or puchase thereof or, (*b*) deposits.

(iii) The invitation must be made to public. Whether or not an issue is made to the public is a matter of fact and depends on the circumstances of a particular case. The *prima facie* test of 'public offer' is whether the terms of offer or invitation are such that any person who so chooses can bring in money and apply for shares. If the answer is in the affirmative, it constitutes a public offer. On the other hand, if the offer can be accepted only by the person to whom it is made, it is not a public offer.

As regards the meaning of 'public,' the occurrence in Section 67(1) of the words ''any section of the public'' indicates that it may range from one to infinity.

In the following cases, however, an invitation or offer is not treated as made to the public if:

(a) It is not designed to secure subscription from persons other than those receiving the offer or invitation *e.g.*, offer of shares to existing shareholders;

(b) In the case of a domestic concern where offer is made to the kith and kin of those making the offer. [Section 67(3)].

(iv) It must be issued either by the company or someone on its behalf.

Offer For Sale—A Deemed Prospectus [Section 64]

Sometimes, a company may allot the whole of capital to an intermediary called a 'Issue House.' The issue house is generally a company or a firm whose main business is the handling of new issues. The issue house subsequently offers these shares to the public by means of a document.

Section 64 considers such a document to be a 'prospectus by implication' provided:

(a) The issue house offers those shares or debentures within six months of the allotment, or

(b) At the date of the offer, the whole of the consideration had not been received by the company.

In such a case, the liability of the company, its directors and promoters is the same as in direct issue of prospectus. Rather, the document issued by the issue house must give the following information:

(i) All the details required to be given in the prospectus.

(ii) Net consideratin received or to be received by the company in respect of the shares/debentures included in the offer,

(iii) Time and place at which the relevant contract can be inspected.

If the issue house is a company, the prospectus shall be signed by two of the directors. Of it is a parternship firm the prospectus shall be signed by half of the partners. Moreover, the persons making the offer for sale are deemed to be the directors of the company for the purpose of registration of the prospectus.

Abridged Prospectus Sec. 56(3)

The concept of abridged prospectus has been introduced by the companies (Amendment) Act, 2000. It means a memorandum containing such salient features of a prospectus accompanying the application form as are contained in Form 2-A, which includes: (a) General Information such as name, address/registered office, opening and closing matters which are extraneous to the contents of prospectus. The salient features required to be included in abridged prospectus.

Shelf Prospectus & Information Memorandum (Sec. 60-A, & Sec.60-B)

Shelf prospectus is a prospectus issued by a financial institution or a bank whose main object is financing for one or more issue of securities or class of securities specified in that prospectus. ''Financing'' for this purpose means making loans to, or subscribing in the capital of a private company industrial enterprise engaged in infrastructural financing or such other companies as the Central Government may notify.

A company having filed a shelf prospectus with the Registrar need not file prospectus afresh at every stage of offer of securities within the period of validity

of such prospectus. This is intended to help financial institutions avoid unnecessary repetitive work. A shelf-prospectus is valid for a period of one year from the date of opening of first issue of securities under that prospectus.

Information memorandum shall be issued to the public alongwith shelf-prospectus that has been filed at the time of first offer of securities. For subsequent offers, an up-dated information memorandum shall be filed. Such memorandum together with shelf-prospectus shall constitute the prospectus.

Section 60-B relates to issue of securities by public companies. It is discretionary for such companies to circulate information memorandum to the public prior to filing of prospectus.

According to Section 2(19B), information memorandum means a process undertaken prior to filing of prospectus by which a demand for the proposed issue of securities is to be elicited. This is intended to reduce the expenses of preparation and issue of prospectus but at the same time it provides upto date information about the issue.

Red-herring Prospectus: It is a prospectus which does not have complete particulars on the price and quantum of securities offered. It is filed alongwith information memorandum prior to the opening of subscription list and at least three days before the opening of offer.

Both the information memorandum and red-herring prospectus shall carry the same obligations as applicable to prospectus. Every variation between the information memorandum and re-herring prospectus shall be highlighted by the issuing company and intimated to the persons invited to subscribe to the issue of securities.

On the closure of offer, a final prospectus stating the total capital raised and the closing price of securities and any other details as were not included in the red-herring prospectus shall be filed in the case of listed company with SEBI and the ROC, and in any other case with only the ROC.

Rules Regarding the Issue of Prospectus

1. *Under the SEBI:* (Disclosure & Investor Protection) Guidelines, the draft prospectus must be filed with SEBI through an eligible merchant banker at least 21 days prior to its filing with the ROC. The copies of the draft prospectus shall also be filed with the stock exchanges where the issue is proposed to be listed. The changes suggested by SEBI shall be incorporated in the prospectus before filing it with the ROC.
2. *It must be dated [Section 55]:* The prospectus of the company must be dated. Unless the contrary is proved, the date given in the prospectus shall be taken to be the date of its publication. Generally, the date of filing of the prospectus with the Registrar is taken to be the date of its issue. The date of publication and the date of issue may differ.
3. *It must be registered* [*Section 60*]: Before its issue, a copy of the prospectus must be filed with the Registrar. Such a copy must be signed by every director in the case of an existing company, or the proposed

director of an intended company or their respective authorised agent. The copy for registration shall be accompanied with the following documents:

(a) Consent of the expert, if a report from him is published in the prospectus.
(b) A copy of every contract relating to the appointment and remuneration of managerial personnel.
(c) A copy of every material contract unless it has been made in the ordinary course of business, or more than two years before the date of prospectus.
(d) Written consent of all those persons whose names are mentioned in the prospectus as auditors, legal advisors, soclicitors, bankers, *etc.*
(e) Written statement by the persons making any report required by Part II of Schedule II relating to adjustments in the figures of profits or losses, and assets and liabilities, giving the reasons therefor.

4. *Terms of contracts mentioned in the prospectus* must not to be varied except with the previous approval of general meeting [Section 61].
5. *Application form for the purchase of shares* or deben-tures must be accompanied by abridged prospectus except in the following cases:
   (a) Where offer is made to existing shareholders or debentureholders;
   (b) Where offer is not made to public;
   (c) Where the shares are uniform in all respects with the shares already issued, and those shares are dealt in on a recognised stock exchange;
   (d) Where the invitation relates to the making of an underwriting agreement.
6. *Prohibition on applying in fictitious name (Sec.689).* Consequences of applying for shares in a fictitious name shall be prominently highlighted. It shall be prominently stated in every prospectus and application form that any person who makes an application in a fictitious name or otherwise induces the company to allot or register any transfer of shares therein to him or to any other person in a fictitious name, shall be punishable with imprisonment upto *five years.*
7. *Issue of prospectus.*The prospectus must be issued within 90 days of the delivery of a copy thereof to Registrar for registration. Otherwise it shall be deemed to be a prospectus, a copy whereof has not been delivered to the Registrar.

PROSPECTUS DEFINITION

The prospectus is a legal document for market participants and investors to pursue, detailing the features, prospects, and promise of a financial product.

It is mandated by the law to be supplied to prospective customers.

Prospectus Example

In an IPO, the prospectus tells potential shareholders about the company's plans and business model.

For insurance and investment fund customers, a prospectus lists out the objective of the product, inclusions, and exclusions, fees, *etc.*

For an ETF, a prospectus informs likely investors of the fund's goals, history, portfolio, fees and costs, and other financial details.

Prospectus and its Importance

The company provides prospectus with capital raising intention. Prospectus helps the investors to make a well-informed decision because of the prospectus all the required information of the securities which are offered to the public for sale.

Whenever the company issues the prospectus, the company must file it with the regulator. The prospectus includes the details of the company's business, financial statements.

1. To notify the public of the issue
2. To put the company on record with regards to the terms of the issue and allotment process
3. To establish accountability on the part of the directors and promoters of the company

Types of Prospectus

According to Companies Act 2013, there are four types of prospectus.

Deemed Prospectus – Deemed prospectus has mentioned under Companies Act, 2013 Section 25 (1).

When a company allows or agrees to allot any securities of the company, the document is considered as a deemed prospectus via which the offer is made to investors. Any document which offers the sale of securities to the public is deemed to be a prospectus by implication of law.

Red Herring Prospectus – Red herring prospectus does not contain all information about the prices of securities offered and the number of securities to be issued. According to the act, the firm should issue this prospectus to the registrar at least three before the opening of the offer and subscription list.

Shelf prospectus – Shelf prospectus is stated under section 31 of the Companies Act, 2013. Shelf prospectus is issued when a company or any public financial institution offers one or more securities to the public. A company shall provide a validity period of the prospectus, which should not be more than one year. The validity period starts with the commencement of the first offer. There is no need for a prospectus on further offers. The organization must provide an information memorandum when filing the shelf prospectus.

Abridged Prospectus – Abridged prospectus is a memorandum, containing all salient features of the prospectus as specified by SEBI. This type of prospectus

includes all the information in brief, which gives a summary to the investor to make further decisions. A company cannot issue an application form for the purchase of securities unless an abridged prospectus accompanies such a form.

CONTENTS OF PROSPECTUS (SECTION 56)

To provide for greater disclosure of information regarding the company and its management, the prospectus must give information about the project proposed to be undertaken by the company, financial performance of the company for the last five years and management perception of risk factors, *etc.* Its object is to enable the investors to take an informed decision on the investment. Following are the contents of prospectus:

PART I OF SCHEDULE II

I. *General Information:*
   (a) Name and address of the registered office of the company.
   (b) (i) Consent of the central government for the present issue and declaration of central government about non-responsibility for financial soundness For the correctness of statements.
      (ii) Letter of intent/industrial licence and declaration of the central government about non-responsibility for financial soundness or correctness of state- ments.
   (c) Names of Regional Stock Exchange and other stock exchanges where application has been made for listing of present issue.
   (d) Provisions of Section 68 A(1) of the Companies Act relating to punishment for fictitious applications.
   (e) Statement/declaration about refund of the issue if the minimum subscription of 90 per cent is not received within 90 days from closure of the issue.
   (f) Declaration about the issue of allotment letters/refunds within a period of 10 weeks and interest in case of any delay in refund at the prescribed rate under Section 73 (2) (2A).
   (g) Date of opening, closing and earliest closing of issue.
   (h) Name and address of auditors and lead manager, and trustees under debenture trust deed.
   (i) Whether rating from CRISIL or any rating agency has been obtained for the proposed debenture/perference share issue. If yes, the rating should be indicated.
   (j) Underwriters—their names and the amount underwirtten by them accompanied by a declaration by Board of Directors that the underwirters have sufficient resources to discharge their respective obligations.

II. *Capital Structure of the Company:*
   (a) Issued, subscribed and paid up capital.
   (b) Size of present issue giving separately the reservation for preferential allotment to promoters and others.

(c) *Paid up capital:*
  (i) After the present issue,
  (ii) After conversion of debentures (if applicable).

III. *Terms of the Present Issue:*
  (a) Authority for the issue, terms of payment and procedure and time schedule for allotment and issue of certificates.
  (b) How to apply, availability of forms, prospectus and mode of payment.
  (c) Special tax benefits to company and shareholders under the Income Tax Act, if any.

IV. *Particulars of the Issue:*
  (a) Objects of the issue.
  (b) Project cost.
  (c) Means of financing (including contribution of promoters).

V. *Company, Management and Project:*
  (a) History, main objects of the present business of the company.
  (b) Background of promoters, managing director/whole time director and names of nominees of institutions, if any, on the board of directors.
  (c) Location of the project.
  (d) Plant and machinery, technology, process, etc.
  (e) Collaboration, performance guarantee, if any, or assistance in marketing by the collaborators.
  (f) Infrastructure facilities for raw materials and utilities like water, electricity, etc.
  (g) Schedule of implementation of the project and progress made so far giving details of land acquisition, execution of civil works, installation of plant and machinery, trial production, date of commerical production, if any.
  (h) *The products:*
    (i) Nature of products—consumer/industrial and end-users.
    (ii) Existing licenced and installed capacity of the product, demand of the product—existing and estimated by a Government Authority or any other reliable institution —giving source of information.
    (iii) Approach to marketing and proposed marketing set up. Export possibilities and export obligations, if any. In case of company providing services, relevant information in regard to nature/ extent of services to be furnished.
  (i) Subsidiary of the company; if any.
  (j) Future prospects—Commencement of production, and the expected year when the company would be able to earn cash profits and net profits.
  (k) Stock market quotation of shares/debentures of the company; if any (high/low price in each of the last three years and monthly high/low price during the last six months).

VI. *Following particulars in regard to the company and other listed companies under the same management within the meaning of Section 370 (1B) which made any capital issue in the last three years:*
   (a) Name of the company.
   (b) Year of issue.
   (c) Type of issue (public/rights/composite).
   (d) Amount of issue.
   (e) Date of closure of issue.
   (f) Date of despatch of share/debenture certificate completed.
   (g) Date of completion of the project, where object of the issue was financing of project.
   (h) Rate of dividend paid.

VII. (a) *Outstanding litigation pertaining to:*
      (i) Matters likely to affect operation and finances of the company including disputed tax liabilities of any nature; and
      (ii) Criminal prosecution launched against the company and the directors for alleged offences under the enactments specified in Para I of Part I of Schedule XIII of the Companies Act, 1956.
   (b) Particulars of default, if any, in meeting statutory dues,institutional dues and towards instrument holders like debentures, fixed deposits and arrears on cumulative preference shares, *etc.* (Also give the same particulars about the companies promoted by the same private promoters and listed on stock exchanges).

VIII. Management perception of risk factors (e.g., sensitivity to foreign exchange rate fluctuations, difficulty in availability of raw materials or in marketing of product, cost/time overrun etc.).

PART II

A. General Information

1. Consent of directors, auditors, solicitors/advocates, managers to issue, registrar to issue, banker to the company and to the issue, and experts.
2. Expert opinion obtained, if any.
3. Change, if any, in directors and auditors during the last three years and reasons thereof.
4. Authority for the issue and details of resolution passed for the issue.
5. Procedure and time schedule for allotment and issue of certificates.
6. Names and addresses of the company secretary, legal adviser, lead managers, co-managers, auditors, bankers to the company, bankers and brokers to the issue.

B. Financial Information

The following report shall be given:

1. *Auditors' Report: It shall disclose:*
   (a) Profits and losses and assets and liabilities, and
   (b) The rate of the dividends, if any, paid by the company in respect of each class of shares in the company for each of the five financial years immediately preceding the issue of the prospectus; If no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of prospectus, be male a statement of that fact (accompanied by a statement of the accounts of the company in respect of that part of the said period upto a date not earlier than six months of the date of issue of prospectus indicating the profit and loss for that period and the assets and liabilities portion as at the end of that period together with a certificate from the auditors that such accounts have been examined and found correct by them. The statement may also indicate the nature of provision or adjustment made or yet to be made).
2. *If the company has no subsidiaries, the auditor's report shal disclose:*
   (a) The profit or losses of the company (distinguishing items of a non-recurring nature) for each of the five financial years immediately preceding the issue of the prospectus; and
   (b) Assets and liabilities of the company as to the last date to which the accounts of the company were made up.
3. *If the company has subsidiaries, the auditors' report shall disclose:*
   (a) *The company's profits or losses as provided by sub-clause (2) and in addition deal either:*
      (i) As a whole with the combined profits or losses of its subsidiaries so far as they concern members of the company; or
      (ii) Individually with the profits or losses of each subsidiary, so far as they concern members of the company; or, instead of dealing separately with the company's profits or losses, deal as a whole with the profits or losses of the company, and, so far as they concern members of the company, with the combined profits or losses of its subsidiaries; and
   (b) *Each comapny's assets and liabilities as provided by sub-clause* (2) *And in addition, deal either:*
      (i) As a whole with the combined assets and liabilities of its subsidiaries, with or without the company's assets and liabilities, or
      (ii) Individually with the assets and liabilities of each sub- sidiary; It shall indicate as repards the assets and liabilities of the subsidiaries, the allowance to be made for persons other than members of the company.

4. *Accountant's Report:* If the proceeds, of the issue of the shares or debentures or any part thereof is to be applied directly or indirectly in the purchase of any business or acquiring shares in another company which becomes its subsidiary a report made by an accountant (who shall be named in the prospectus) shall be set out in the prospectus disclosing:
   (a) The profits or losses of that business for each of the five financial years immediately preceding the issue of the prospectus; and
   (b) The assets and liabilities to that business at the last date to which the accounts of the business were made up being a date not more than one hundred and twenty days before the date of the issue.
   The Accountants' report shall:
   (a) Indicate how the profits or losses of the other body corporate dealt in the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have to be made, in relation to assets and liabilities so dealt with for holders of other shares, if the company had at all material times held the shares to be acquired; and
   (b) Where the other body corporate has subsidiaries, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner provided by sub-clause (2) above in relation to the company and its subsidiaries.
5. Principal terms of loan and assets charged as security.

C. Statutory and other Information

1. Minimum subscription.
2. Expenses of the issue giving separately the fee payable to:
   (a) Advisors.
   (b) Registrars to the issue.
   (c) Managers to the issue.
   (d) Trustees for the debentureholders.
3. Underwriting commission and brokerage.
4. Previous issue for cash.
5. Previous public or rights issue, if any, during last five years.
   (a) Date of Allotment, Date of Refunds, Date of listing on the stock exchange, and Closing Date.
   (b) If the issue is at premium or discount and the amount thereof.
   (c) The amount paid or payable by way of premium, if any, on each share which had been issued within the two years preceding the date of the prospectus or is to be issued, stating the dates or proposed dates of issue and, where some shares have been or are to be issued at a premium and other shares of the same class at a lower premium, or at par or at a discount, the reason for the differentiation and how any premium received have been or are to be disposed.

6. Commission or brokerage on previous issue.
7. Issue of shares otherwise than for cash.
8. Debentures and redeemable preference shares and other instruments issued by the company outstanding as on the date of prospectus and terms of issue.
9. Option to subscribe.
10. Purchase of property; Following details be given:
    (a) The names, addresses, descriptions and occupation of the vendors;
    (b) The amount paid or payable in cash, shares or debentures to the vendor and, where there is more than one separate vendor, or the company is sub-purchaser, the amount so paid or payable to each vendor, specifying separately the amount, if any, paid or payable for goodwill;
    (c) The nature of the title or interest in such property acquired or to be acquired by the company;
    (d) Short particulars of every transaction relating to the property completed within the two preceding years, in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter, or a director or proposed directer of the company had any interest, direct or indirect, specifying the date of the transaction and the name of the such promoter, director or proposed director and stating the amount payable by or to such vendor, promoter, director or proposed director in respect of the transaction.
    (ii) The property to which sub-clause (i) applies is a property purchased or acquired by the company or proposed to be so purchased or acquired, which is to be paid for wholly partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, other than property—
    (a) The contract for the purchase or acquisition whereof was entered into in the ordinary course of the company's business, the contract not being made in contemplation of the issue nor the issue in consequence of the contact; or
    (b) As respects which the amount of the purchase money is not material.
    (iii) For the purpose of this clause, where a vendor is a firm, the members of the firm shall not be treated as separate vendors.
    (iv) If the company proposes to acquire a business which has been carried on for less than three years, the length of time during which the business has been carried on.
11. (i) Details of directors, proposed directors, whole-time directors, their remuneration, appointment and remuneration of managing directors, interests of directors, their borrowing powers and qualification shares.

Any amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter or officers and consideration for payment of giving of the benefit.

(ii) *The dates, parties to, and general nature of:*

(a) Every contract appointing or fixing the remune-ration of a managing director or manager when-ever entered into, that is to say, whether within or more than, two years before the date of the prospectus;

(b) Every other material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of the prospectus.

A reasonable time and place at which any such contract or a copy thereof may be inspected.

(iii) *Full particulars of the nature and extent of the interest, if any, of every director or promoter:*

(a) In the promotion of the company; or

(b) In any property acquired by the company within two years of the date of the prospectus or proposed to be acquired by it.

Where the interest of such a director or promoter consists in being a member of a firm or company, the nature and extent of the interest of the firm or company, with a statement of all sums paid or agreed to be paid to him or to the firm or company in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm or company, in connection with the promotion of formation of the company:

12. Rights of members regarding voting, dividend, lien on shares and the process for modification of such rights and forfeiture of shares.
13. Restrictions, if any, on transfer and transmission of shares/debentures and on their consolidation/splitting.

ARTICLES OF ASSOCIATION AND ITS ALTERATION

ALTERATION OF MEMORANDUM

Section 16 provides that a company shall not alter the conditions contained in the memorandum except in cases, and in the mode, and to the extent for which express provision has been made in the Companies Act. Thus, alteration in memorandum must be done by adopting the prescribed procedure.

1. *Change of Name:*

(a) A company can change its name at anytime by passing a *special resolution* and obtaining the approval of the central government. But central government approval is not required if the only change is the

addition or deletion of the word 'private' consequent on conversion of public company into a private company or vice versa (Section 21).

(b) If through inadvertance or otherwise, a company is registered with a name which in the opinion of the central government is identical with the name of an existing company or is undesirable, the company may change the name by *an ordinary resolution and with prior written approval of the Central Government.*

The Central Government may give a direction to change the name within 12 months of first registration (or re-registration) and the company shall change its name within three months from the date of direction by *passing an ordinary resolution and with the previous written approval of the Central Government.*

Issue of fresh certificate of incorporation: Within 30 days of passing the resolution, a copy thereof shall be filed with the Registrar. The Registrar shall enter the new name in the Register of companies and issue fresh certificate of incorporation and make necessary changes in the memorandum.

2. *Change of Registered Office Clause [Section 17, 18, 146]:*

(i) *Where the change of registered office is from one place to another in the same city* [Section 146 (2)(b)].

For changing the office from one place to another within the same city, the company must pass a *Board resolution and file a copy thereof with the Registrar within 30 days.*

(ii) *Where the change of office is from one city to another within the same state [Section 146(2)(c)]:* To change office from one city to another in the same State, the company shall *pass a special resolution in the general meeting* and file a copy thereof with the Registrar within 30 days its passing. Section 17-A inserted by the Companies (Amendment) Act 2000 provides that shifting of registered office from the jurisdiction of one Registrar to that of another within the same state shall in addition to a special resolution under section, 146, also require the confirmation of Regional Director. For obtaining Regional Director's approval, an application shall be made in the prescribed form. The Regional Director shall communicate the confirmation or otherwise with four weeks. A certified copy of the confirmation order must be filed within 2 months with the ROC who shall transfer the record to the other ROC under whose jurisdiction the registered office is to be shifted. ROC shall issue the certificate of registration within one month of receipt of certified copy of the order. The notice of new address shall be given to ROC within 30 days of shifting.

(iii) *For change of registered office from one state to another:* It is subject to two major limitations viz., (a) Substantive Limits of Section 17 (1), and (b) Procedural Limits. These are described below:

(A) Substantive Limits [Section 17 (1)]

The company may be allowed to change its registered office or the objects clause only in the following circumstances:

(a) To carry on the business more economically or more efficiently.
(b) To attain the main purpose by new or improved means.
(c) To enlarge or change the local area of its operations.
(d) To carry on some business which under the existing circumstances may conveniently or advantageously be combined with the business of the company.
(e) To restrict or abandon any of the objects specified in the memorandum.
(f) To sell or dispose of the whole or any part of the undertaking.
(g) To amalgamate with any other company or body of persons.

(B) Procedural Limits

Firstly, the company must pass a special resolution in the general meeting and file a certified copy thereof with the ROC within 30 days of its passing.

Secondly, confirmation of the National Company Law Tribunal must be obtained by making a petition. Before giving its confirmation, the Tribunal must be satisfied that sufficient notice has been given to the creditors and other persons whose interest may be affected by the alteration. A notice of change shall be given to the Registrar so as to give him an opportunity to state his objections and suggestions. On being satisfied, the CLB may pass an order confirming the alteration on such terms and conditions as it thinks fit.

Thirdly, a certified copy of the Tribunal order together with a printed copy of the altered memorandum must be filed with Registrar of both states within three months of the order. The records of the company are their transferred to the state in which registered office has been shifted [Section 18].

The registration of Tribunals order must be made within 3 months else all proceedings connected with alteration shall become void. The Registrar of present state will send all records of the company to ROC of other state.

Lastly, the office is actually shifted and notice of new address given to the Registrar within 30 days of shifting.

3. *Change of Objects Clause:* The change of objects clause is subject to (*a*) Substantive Limits of Section 17(1), and (*b*) Procedural Limit of passing of special resolution, and filing a copy of special resolution with the Registrar within 3 months of passing. The ROC issues a certificate of registration within one month of filing of documents. If

the documents are not filed within 3 months of passing the resolution, the alteration and other proceedings shall become void. The Tribunal can, however, extend the time for filing of documents.

4. *Change of Liability Clause:* Without the written consent of a member, his liability cannot be increased (Section 38). But a company which is a club or association may alter its memorandum so as to increase the rate of recurring or periodical subscription by its members without seeking their consent. Similarly, the liability of directors, or managing director can be made unlimited by passing a special resolution, if the articles so permit and the concerned officer gives his written consent [Section 323]. A copy of the resolution shall be filed with the Registrar within 30 days of passing.

   An unlimited company may make the liability of its members limited by passing special resolution and obtaining Court's approval [Section 32].

5. *Change of Capital Clause:* A company limited by shares may if so authorised by its articles, change the capital clause in the following manner:
   (a) Increase in share capital by issuing new shares.
   (b) Consolidate the whole or any part of its share capital into shares of larger denomination.
   (c) Convert fully paid shares into stock and vice-versa.
   (d) Sub-divide the whole or any part of its share capital into shares of small amounts.
   (e) Cancel the shares which have not been taken up and reduce the shares to the extent of shares cancelled.

   The actual procedure of changing each of these is discussed in the chapter relating to ''share capital.''

ARTICLES OF ASSOCIATION

The Articles of Association rank next in importance to the memorandum. They lay down rules and regulations for internal management. They facilitate the carrying out of objects set out in the memorandum. As regards their contents, they resemble a partnership deed.

Section 2 (2) of the Act defines articles as ''articles of association of a company as originally framed or as altered from time to time in pursuance of this Act or any previous company law including so far as they apply to the company, the regulations contained in Table A in Schedule I annexed to this Act.''

The function of articles is to define the duties, rights and powers of governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on and also the manner in which internal regulations of the company may be altered.

Companies which must have their Own Articles [Section 26]

The following companies shall prepare their own articles and register them alongwith the memorandum: (*a*) Private limited companies. (*b*) Companies limited by gurantee, and (*c*) Unlimited companies.

The articles of a private company shall contain the three restrictions regarding: the number of members, transfer of shares, and invitation to public to subscribe to its share capital.

The articles of a guarantee company shall state the number of members with which the company is to be registered.

The articles of an unlimited company shall state both the number of members and the amount of share capital with which the company is to be registered [Section 27].

Form and Signature of Articles [Section 30]

The Articles shall be: (*a*) printed, (*b*) divided into paragraphs, and (*c*) signed by each subscriber to the memorandum who shall add his address, description and occupation if any, in the presence of at least one attesting witness who shall also give his address, description and occupation, *etc.*

Contents of Articles

The Articles usually deal with the following matters:

1. The extent to which Table A is applicable.
2. Share capital and rights attaching to different classes of shares.
3. *Rules relating to:*
   (*a*) allotment of shares, (*b*) issue of share certificates and warrants, (*c*) calls on shares, (*d*) transfer and transmission of shares, (*e*) forfeiture of shares,(*f*) alteration of share capital, (*g*) general meetings, (*h*) appointment and remuneration of managerial personal, (*i*) dividends, reserves and capitalisation of profits, (*j*) accounts and audit, (*k*) common seal of the company, (*l*) voting rights and and proxies, (*m*) winding up.
4. Adoption or execution of preliminary contracts.
5. Board meetings.
6. Payment of interest out of capital.

RELATIONSHIP BETWEEN MEMORANDUM AND ARTICLES

1. *Articles rank next after the memorandum:* Whereas the memorandum contains the fundamental conditions upon which the company is incorporated, the articles define the rules for governance of internal affairs.
2. *Articles are subordinate to the memorandum:* The articles are subordinate to and controlled by the memorandum. They cannot contain any provisions which are inconsistent with the memorandum. The memorandum lays down the boundaries beyond which the actions of the company cannot go.

3. *Articles may be used to explain the memorandum:* The articles may supplement the memorandum or explain any ambiguity therein. But they cannot extend or modify the provisions of the memorandum.
4. Articles cannot modify or control the terms of the memorandum.

Table. Distinction between Memorandum and Articles.

	Memorandum of Association		Articles of Association
1.	It contains the fundamental conditions upon which the company has been incorporated. It demarcates the boundaries beyond which the acts of the company cannot go.	1.	It contains rules and regulations for internal management of the company.
2.	It is the supreme document subordinate to the Act only.	2.	It is subordinate both to the Act and the memorandum.
3.	It is compulsory for every company to have its own memorandum and get it registered with the Registrar.	3.	A public company limited by shares need not have its own articles. Instead, it may adopt Table A in Schedule I of the Act.
4.	It defines the relationship between company and third parties.	4.	It defines relationship between (*a*) company and its members, and (*b*) the members *inter se.*
5.	Being the constitution of the company, it cannot be easily altered.	5.	It can be easily altered by passing a special resolution.
6.	An act of the company outside its memorandum is ultra vires and cannot be ratified even by the entire majority of shareholders.	6.	Anything beyond the scope of articles is irregular and can be ratified by the shareholders provided it is not inconsistent with the memorandum.
7.	Outsiders have no remedy against the company as regards ultra vires contracts.	7.	An outsider can enforce an act which is inconsistent with the articles provided he had no knowledge of the irregularity.

Binding Force or Legal effect of the Memorandum and Articles

According to Section 36, 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 each member. The legal effect of this provision is as follows:

1. *They bind the company to the members:* The company is bound to comply with provisions of these documents in its relations with the members. Any member may restrain the company from committing a breach thereof provided the right is claimed in the capacity of a member. For instance, an individual member can enforce his membership rights such as the right to vote, to receive notice of meeting, to recover dividend, *etc.* But a member cannot base his contractual rights on these documents.
2. *They bind the members to the company:* Each member of the company is bound to observe the provisions of those documents as if he has contracted to comply with them. In other words company can sue the members for enforcing these documents or for restraining them from their breach. However, Section 38 prohibits the company from altering these documents so as to increase the liability of a member or to require him to subscribe for more shares.
3. *They bind the members inter se:* Ordinarily, these documents do not constitute an express contract between the the members *inter se* because a member cannot sue another directly for any wrong done to the company or for enforcing any right accruing to the company. For any wrong done to the company, it is the company which can complain. However, a member may join hands with the company.
4. *They do not bind the company or the members to the outsiders:* These documents do not give a right to the outsiders (*i.e.*, the third parties) against the company or the members. It is based on the rule that a stranger to a contract cannot acquire any rights and liabilities under the contract. An outsider can acquire rights under the articles only if there is a special contract outside and independent of the articles Eley vs. Positive Govt. Security Life Ass.Co.(1876)1.In such a case, the articles become part of the contract.

ALTERATION OF ARTICLES

A company has the inherent statutory right to alter its articles vide Section 31. Being a statutory right, it cannot be taken away by any provision to the contrary in the articles or memorandum.

Procedure for Alteration (Sec.31)

A company may alter its articles by passing a special resolution and filing a copy thereof with the Registrar within 30 days of its passing. Moreover, a copy of the altered articles must be filed with the Registrar within 3 months of passing the resolution.

Limitations on Alteration

A company's power to alter its articles is subject to the following limitations:

(i) The alteration must not be inconsistent with the provisions of the Companies Act e.g., alteration of articles which deprives a member of his membership rights is invalid (Kinetic Engg. Ltd. vs. Sadhna Gadia (1992) 74 Comp. Cas 82 (CLB)].

(ii) The alteration must not be contrary to the conditions contained in the memorandum.
(iii) The alteration must not sanction anything illegal or contain anything against public policy.
(iv) The alteration must be made in good faith and for the benefit of the company as a whole. If it is so, it is immaterial that it puts hardship on minority [Sidebottom v. Kershaw, Lease & Co. (1920)1 Ch. 154.
(v) The alteration must always be made by special resolution. Even clerical errors in the articles should be corrected by special resolution.
(vi) The alteration must not be made with the intention of committing the breach of a contract with a third party (Allen vs. Gold Reefs of West Africa Ltd. I.L.R. 33 Mad.36).
(vii) *Approval of the central government is necessary for the following:*
  (a) For the conversion of a public company into a private company [Section 31].
  (b) For altering the provisions relating to the appointment or reappointment of a managing or whole time director or of a director not liable to retire by rotation (Sec.268 read with Schedule XIII).
(viii) The alteration must not be inconsistent with the alteration ordered by the Tribunal.
(x) The alteration must not constitute a fraud on minority otherwise it would be liable to be impeached.

It may be noted that alteration may be made with retrospective effect and that an alteration shall have effect as if it has been originally contained in the articles.

CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES

On registration, memorandum and articles become public documents and are open to inspection in the Registrar's office on payment of prescribed fee. Every person dealing with the company is deemed to know the contents of these documents [*Mahony* vs. *East Holyford Mining Co.* (1875)].

This is known as 'Constructive Notice of Memorandum and Articles.' The legal effect of this doctrine is that if a person deals with a company in a manner which is inconsistent with the provisions of these documents, he can not acquire any rights thereunder. It prevents an outsider from alleging that he did not know the contents of memorandum or articles of the company. Irrespective whether he has actually read them or not he is presumed to have read and understood them. [*Oak Bank Oil Co.* vs. *Crum* (1882)]. It is a negative doctrine in the sense that it cannot operate against the company. It operates only against the outider dealing with the company.

Therefore, it is the duty of every person dealing with the company to firstly inspect these documents and to ensure that it is within the powers of the company to enter the proposed contract.

COMPANY LAW

"Company Law" provides a comprehensive examination of the legal framework governing the establishment, operation, and dissolution of companies, making it an essential resource for students, legal professionals, and business owners alike. This authoritative text covers a wide range of topics relevant to company law, offering in-depth analysis and practical insights to help readers understand and navigate complex legal issues. The book begins by exploring the foundational principles of company law, including the formation and registration of companies, corporate governance structures, and the rights and duties of shareholders and directors. It then delves into more specialized areas such as mergers and acquisitions, corporate finance, insolvency, and corporate social responsibility. With its clear and accessible language, "Company Law" demystifies complex legal concepts and provides readers with a solid understanding of the legal framework governing corporate entities. It also examines recent developments and reforms in company law, ensuring that readers are up-to-date with the latest legal requirements and best practices. Whether used as a textbook in law schools or as a reference guide for practitioners, this book equips readers with the knowledge and tools needed to navigate the intricacies of company law and make informed decisions in a corporate context. It serves as an invaluable resource for anyone involved in the establishment, management, or regulation of companies.

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