Company Law

DEBSL102

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LOVELY PROFESSIONAL UNIVERSITY

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Unit 01: Introduction to Companies Act, 2013

CONTENTS

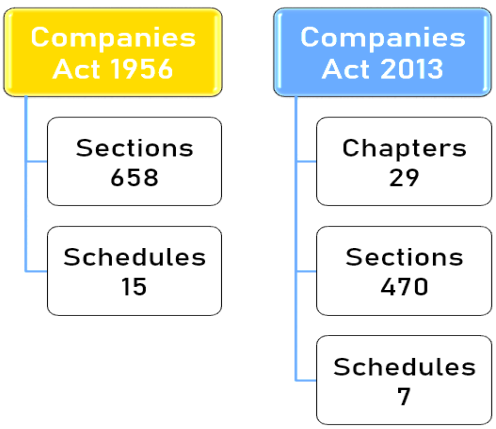
Objectives

After studying this unit, you will be able to:

i) Cognize the features of a company
ii) Comprehend the circumstances leading to lifting up of corporate veil
iii) Understand the difference between a company, partnership and limited liability partnership

Introduction

The Companies Act 2013 was introduced in India by the government to ease the process of doing business in India and improve the corporate governance. It makes a comprehensive provision to govern all the listed and unlisted companies of the country and empowers shareholders and highlights higher value for corporate Governance, thereby making the companies more accountable. It is an Act of the Parliament of India regulatingthe incorporation of a company, defines the responsibilities of a company and its directors and also discusses about the dissolution of a company. The Act replaced the Indian Companies Act 1956 partially after receiving the assent of the President of India on 29 August 2013.The Companies Act2013 is divided into 29 chapters in total, that contains 470 clauses as against 658 Sections in the previous act and has 7 schedules. It came into force on 12th September 2013 with only certain provisions of the Act notified.The entire chapter is written keeping in view the latest provisions of Companies Act 2013 as amended by the government from time to time.



Short title, extent, commencement and application. —

Short title

This Act may be called as Companies Act, 2013.

Extent of the Act

The act extends to the whole of India.

Application

The provisions of this Act shall apply to—

(a) companies incorporated under this Act or under any previous company law;

(b) insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 (4 of 1938) or the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999);

(c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949 (10 of 1949);

(d) companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003 (36 of 2003);

(e) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; and

(f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.

1.1 Definition of a Company

The term company in general means a group of persons associated together in achieving some common objective. However, it is not a legal definition of a company. It refers to as an association of persons incorporated under the existing law of a country. The legal definition of a company is covered under section 2(20) of the new companies act 2013 which states that:

"Company means a company under this Act or any previous company law"

This Act here means Companies Act 2013 and previous law means Companies Act 1956 or some earlier companies act.Eminent scholars and writers have defined the term in their own way. According to **Lord Justice Lindley** a company is"an association of many persons who contribute money or money's worth to a common stock, and employ it in a common trade or business, and whoshare the profit or loss arising there from". The common stock so contributed is denoted in money and is 'the capital' of the company. The persons who contribute to it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his 'share'. The member may sell his share in the company, thus, withdrawing himself and making someone else a member to whom he transfers shares. Thus, shares in a company are transferable. As a natural consequence of transferability of shares, the company has what is commonly known as perpetual succession. With the withdrawal or death of a member of a company, the latter does not come to an end. The life of the company is independent of the lives of the members of the company. Members may come and members may go, the company continues until it is dissolved.

Prof. Henry describes a company as "it is an artificial person, created by law, having a separate entity, with a perpetual succession and a common seal". So, one can conclude the important points that we can conclude from the definition that, Firstly, the members may sell their share in the company, thus, add someone else on their place as a member. This, implies that the shares in a company are transferable. Secondly, as a natural consequence of transferability of shares, the company has what is commonly known as perpetual succession. Any death or retirement of a member, does not affect corporate entity of the company. Note, this definition is not exhaustive as this section lays emphasis on incorporation and registration of a company. So, to know the exact meaning and characteristics of a company, we make a detailed discussion in the next section.

Characteristics of Company

A company may have the given characteristics:

1. **Incorporated Association:** A company gets created as it gets registered under the Companies Act. In fact, it comes into being from the date mentioned in its certificate of incorporation. This certificate acts just like a birth certificate of a company.Assume that there is an association, which is not registered, then it is deemed to be an illegal association. So, if today you get your company registered under Companies Act 2013, then it shall be termed as incorporated association.


Example: Suppose Raghu gets his ice-cream company incorporated in Nagpur, Maharashtra on 23rd August 2021. He ensured that all the provisions laid under Companies Act 2013 for getting his company registered are fully obeyed with. The registrar of companies released a certificate of incorporation to the company with date of 23rd August 2021. It is from this day on wards, the company shall be considered as an incorporated association.

2. **Separate Legal Entity:** The law considers a company as distinct (separate) from the people who constituted it. A company can own and deal in property and other such assets. Themoney and property of the company belongs to it only and obviously not to its members. The company is responsible to repay creditors dues only and get sued for its deeds. One point needs to be noted here, that is a company is not the agent or the trustee of the subscribers, it has its own distinct legal identity. It is not liable to pay personal debts of the members even if they hold substantial part of company share capital. Also, members of a company cannot be sued for actions performed by the company.


Case Study: To understand the concept better, let us consider a case situation of **'Salomon vs Salomon & Co. Ltd.'**

Issue: Mr. Salomon was a shoe manufacturer and his business was financially sound. He formed a company and name it as 'Salomon & Co. Ltd.' for taking over and carrying on earlier business. The members in this newly formed company were Mr. Salomon, his wife, four sons and a daughter. The members of board of directors were Salomon and his sons.Salomon transferred his previous business to newly formed company for 40,000 pounds. In payment of this consideration, he took 20,000 shares of 1 pound each and debentures of 10,000 pounds. These debentures implied that the company owed 10,000 pounds to Salomon and for repayment of this, a charge was created in his favor on assets of company. One share was given to each remaining member of Salomons' family.Due to trade depression, the company's business failed and it went into liquidation. On winding up assets of company were 6,000 pounds while its liabilities were 17,000 pounds(out of which 10,000 pounds belonged to Salomon as a secured creditor and remaining were due to unsecured creditors). After making payment to Salomon nothing was left to pay the unsecured creditor. The problem aroused when unsecured creditors filed a suit on grounds that the company had no separate entity. The company was sham. It was essentially an agent of Salomon, andtherefore, Salomon being the principal, was personally liable for its debt. And thus, they should be paid first. **Can we say that he should be made liable?**

Rule: Separate legal entity concept gets applicable in this case. The company is separate from Mr. Salomon.

Analysis: In the given case,Mr. Salomon was a secured creditor and hence entitled to get payment of his dues first.Since, company assets realized were just 6,000 pounds and amount lent by Mr. Salomon was 10,000 pounds, nothing was left to pay to unsecured creditors. If we see even Mr. Salomon did not receive all his money from company as it was into losses. Thus, the case got closed.

Conclusion: From the given case, it gets clear that a company formed and registered under Companies Act has a separate entity. It means, the company is not liable to pay personal debts of the members even if they hold substantial part of companys' share capital. Similarly, the members of a company cannot be sued for actions performed by the company.

3. **Limited Liability:** The term 'limited' means something which is defined or specific. It means an obligation to pay to creditors. A liability can be either limited or unlimited. Limited liability can be of two types namely limited by share and limited by guarantee. Liability limited by share refers to as a condition as per which shareholders are legally liable to pay the debts of a company only to the extent of the nominal value of their shares.

Example: Assume that the face value of a share in a company is ₹ 10 and the shareholder paid ₹ 8. In this case his liability to the company is for the remaining balance of ₹ 2 only and nothing more than that.

In case of a **company limited by guarantee.**It involves liability of members limited to such amount that they undertake to contribute to the assets of company at the time of winding up. Let us take an example.

Example: Suppose Mohan is a member of a company limited by shares. He guarantees that in the event of winding up of the company he would contribute ₹1,000 to the assets of company. In this case, liability of Mohan is limited to the extent of ₹ 1,000 only and not more than that.

Did you know? The amount of limited by guarantee is fixed in Memorandum of Association.

In case of an **unlimited liability**, the **legal liability** of the members or shareholders is **not limited**.It means that its members or shareholders have a joint and several non-limited obligations to meet any insufficiency in the assets of thecompany to enable settlement of any outstanding financial liability in the event of the company's formal liquidation.

Example: Assume that a company has a debt of Rs. 50 lakhsto pay and undergoes continuous losses. The official liquidator assesses that the assets of the company are Rs. 35 lakhs. The remaining amount of Rs. 15 lakhs shall be paid by the members or shareholders jointly and severally. It means their personal assets may also be used to pay off the debts of the company.

4. **Perpetual Succession:** A company has a continued existence. Unlike other non-registered business entities, a company is a stable business organization. Its life doesn't depend on the life of its shareholders, directors, or employees. Members may come and go but the company goes on forever. However, its life may be put to an end as per the procedure laid under the act.

Example: Mr and Mrs. Peterson get their chocolate manufacturing business registered as 'Peterson& Pvt. Ltd.' after complying the provisions laid under Companies Act. They also became the members of the company. One fateful night, due to bursting of cylinder, both die in factory along with 3 workers. In this example, even though all members (husband and wife) died yet the corporate existence of the company continues. It remains unaffected with their death.

5. **Common Seal:** A company as an artificial legal person has no body, mind or soul like human beings. Obviously, it cannot sign documents for itself. It acts through natural person who are called its directors.But having a legal personality, it can be bound by only those documents which bear its signature. Therefore, the law provides for the use of common seal, with the name of the company engraved on it, as a substitute for its signature. Any document bearing the common seal of the company will be legally binding on the company. Common seal is the official signature of the company. Under Companies Act 2013, a common seal was required for a Company to provide various authorizations and attestations on behalf of the Company. However, now as per latest amendments, the requirement for common seal is made optional. Now a company without any common seal, needs to authorize 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary to sign on its behalf.

Example: Alex and Jolly Pvt. Ltd. company does not have any common seal. It authorized Julie and Mosez as its directors to sign all contracts and other legal documents on its behalf. Any contract and legal document signed by both the directors shall be legally binding on the company.

6. **Transferability of Shares:** Shares in a company are freely transferable, subject to certain conditions, such that no share-holder is permanently or necessarily wedded to a company.

When a member transfers his shares to another person, the transferee steps into the shoes of the transferor and acquires all the rights of the transferor in respect of those shares.

Separate Property: A company is a distinct legal entity. It is capable of owning, enjoying and disposing of property in its own name. Even though, the capital and assets are contributed by the shareholders, they are not private and joint owners of property of the company. They cannot claim to be owner of the company's property during the existence of the company. A company is the real person in which all its property is vested and by which it is controlled, managed and disposed of.

Example: Samuel is a member of a liquor manufacturing company. He wants to run his own spa saloon. He needs a crane of his company for lifting the items to be used in construction of his spa saloon. The company can deny lending him the crane as he is asking it for personal use

Capacity to Sue: The term '**Sue'** means filing a case in court. This characteristic highlight that a company can sue or be sued in its own name as distinct from its members.

Maria was an employee in a local pharmaceutical company who resigned. She did not receive her 3 months' salary. She files a suit against the manager of the company for the delay as she had some previous personal grudges with him to settle. In such a situation, her application shall be rejected as the case should be in the name of company and not its manager.

1.2 Lifting or Piercing the Corporate Veil

Normally, the Courts consider a fictional veil (not a wall) between the company and its members. This means that a company is distinct from its members. Lifting of corporate veil means to separate the corporate personality of a company from the personalities of its shareholders'. This protects them from being personally liable for the debts and other obligations of the company. At times it may happen that the corporate personality of the company is used to commit frauds and improper or illegal acts. It is then required to Lift the corporate veil. Since an artificial person is not capable of doing anything illegal or fraudulent, the corporate veil might have to be removed to identify the persons who are really guilty.

Circumstances under which the corporate veil needs to be lifted:

1. **Protection of Revenue:** Tax planning may be legitimate provided it is within the framework of law. A Court may ignore the corporate entity of a company where it is used for evasion of tax.The given case analysis illustrates the point:

Case Study: Re Dishaw Maneckjee Petit, AIR 1927 Bom 371

Issue: Sir Dinshaw Petit got assessed for super-tax on an aggregate income of Rs. 11,35,302 arising in the previous year. In the year 1921 hehad formed four private companies to evade income-tax which he called family companies for convenience of reference, although in fact no other member of his family took any direct benefit thereunder. The names of these four companies were namely: Petit Limited; The Bombay Investment Company Limited; The Miscellaneous Investment Limited, and the Safe Securities Limited. Each of these companies took over a particular block of investments belonging to the assessee.The companies made investments and whenever interest and dividend income were received by the companies, he applied to the companies for loans, which were immediately granted, and he never repaid. The question arises as to whether the sums in dispute represent taxable income of the assessee under Sections 2 (15), 3, 6,12, 55, 56 and 58 of the Indian Income-tax Act, 1922?

Rule: Penetration of Corporate Veil needs to be done in case of evasion of tax.

Analysis: The alleged loans of the dividends year by year to the assessee, it appeared clear that it was the assessee who received those dividends in the first instance from the Maneckjee Company. There was no suggestion that the Maneckjee Company had been instructed to pay those dividends to the family company. Accordingly, the rest was merely a matter of book entries, viz., to credit the cash to the company and then to transfer it to the debit of the assessee's account. The actual cash which after all was the important thing was kept by the assessee throughout. And one startling circumstance was that beyond the accounts there was nothing in writing whatever to establish the alleged agreement for loan by the family company. Of the importance of that alleged agreement there could be no doubt that by it thefamily company practically bound itself hand and foot to do

no business, for its cash immediately on receipt was to be handed back to its vendor and promoter at a fixed rate of interest. And yet there was not even a minute on the subject.

Conclusion: In this case, the assessee wanted to avoid income-tax. Solely for this purpose, he formed four private companies, in all of which he was the majority shareholder. The companies made investments and whenever interest and dividend income were received by the companies, he applied to the companies for loans, which were immediately granted, and he never repaid. Hence, in this case the corporate veil of all the companies were lifted and the income of the companies were treated as if they were of Sir Dinshaw Maneckjee Petit.

2. Prevention of Fraud and improper conduct: The legal personality of a company may also be disregarded in the interest of justice where the machinery of company has been used for some fraudulent purpose like defrauding creditors or defeating or circumventing law.The given case analysis illustrates the point:

Case Study: Jones V Lipman [1962]

Issue: Mr. Lipmen contracted to sell a house with freehold title to Jones for £ 5,250.00. Before the completion of contract, his mind changed. He sold and transferred the land to some other company, in which he and a clerk were the sole directors and shareholders for £ 3,000,00. The company was set up for the sole purpose of receiving this land. An amount of $1,554.00 of the £3,000.00 were borrowed by the company from a bank and the remaining owing to Lipmen.**Can we say that the company of Lipmen as valid? What can the court do in such a situation?**

Rule: If a company is formed with a fraudulent motive, then the corporate veil may be lifted.

Analysis: No, the company is not valid in eyes of law as it is a sham. It was created to evade a pre-existing obligation.

Conclusion: The company was formed by Lipmen to avoid selling his house to Mr. Jones. Since, the very purpose of formation of company is void in the eyes of law, hence corporate veil may be lifted by the court to take adequate action against Mr. Lipmen. It can order to cancel or set aside the transfer and order Mr. Lipmen to convey the land to Mr. Jones.

3. Determine enemy character of a company: Sometimes, it becomes necessary to determine the character of a company in order to assess whether it has obtained any enemy character or not? A doubt may arise that the company is owned and controlled by the enemies of a country. In such cases, the court may lift the corporate veil and examine the character of persons who are in real control of affairs of a given company. This is so as trading with an enemy company is against public policy.The given case analysis illustrates the point:

Case Study: Daimler Co. Ltd. vs Continental Tyre Rubber Co. (1916)

Issue: A company was incorporated in England for selling tyres manufactured in Germany by a German company. Bulk of shares in English company were held by German company and remaining shares of this English company (except one) were held by Germans residing in Germany. Moreover, all directors of this English company were also Germans residing in Germany. Hence, the control of company was in the hands of Germans. During World War-I English company filed a case to recover trade debts. A question arises regarding the legal status of English company and whether it can recover its dues?

Rule: If a company is owned and controlled by the enemies of a country, the court may lift the corporate veil and examine the character of persons who are in real control of affairs of a given company.

Analysis: The company is not valid in the eyes of law. It is an alien company and making payment of debt to it would lead to trading with the enemy, and therefore the company cannot get its debts recovered.

Conclusion: The character of the company in the case is enemy and hence it may be denied from getting its dues clear.

4. **Where the company is Sham(cloak or hoax:** The term Sham means something false, fake, or fictitious that purports to be genuine. The court also lifts the veil where the company is cloak or hoax. The given case analysis illustrates the point:

Case Study: Gilford Motor Co. Ltd. v Horne, (1933)

Issue: An employee entered into an agreement that after his employment gets terminated, he shall not enter into a competing business or he should not solicit their customers by setting up his own business. After the defendant's service was terminated, he set up a company of the same business. His wife and another employee were the main shareholders and the directors of the company. Although it was in their name, he was the main controller of the business and the business solicited customers of the previous company.Can the company be considered as valid?

Rule: Where a company is sham, the court may lift the corporate veil.

Analysis:The company in this case was formed to avoid contractual obligation. The Court held that the formation of the new company was a mere cloak or sham to enable him to breach the agreement with the plaintiff.

Conclusion:Since, the formed company was a sham, hence the court lifted the corporate veil.

5. **Company avoiding legal obligations:** A court may disregard legal personality of the company and proceed as if no company existed if a company was formed to avoid legal obligation.The given case analysis explains the point:

Case Study: Workmen of Association Rubber Industries Ltd. v. Associated Rubber Industry Ltd.,

Issue: A company was earning handsome profits. This means that its liability to pay bonus was also high. To split profits and reduce its liability of paying dividend, it came up with a plan. It created a subsidiary company and transferred some of its investment and securities.

Rule: A court may disregard legal personality of the companyproceed as if no company existed, in case it was formed to avoid legal obligation.

Analysis: In the given case just to divert the profits, a fake company is created. This helped the company to split its profits and reduce its dividend payment liability.

Conclusion: The supreme court held that the purpose of creating the company was to reduce liability. Hence lifting the veil becomes important to protect the interest of workers.

6. **Company acting as an agent and trustee of the shareholders:** Sometimes a company may act as agent or trustee of its members or another company. In this case veil may be lifted to know the reality.So, that the persons for whom company is acting so becomes liable for acts of company.

Case Study: Re F.G (Films) Ltd [1953]

Issue: Adlabs, an American company produced a film in the name of Bonnet, a Britrish company to avoid certain technical difficulties. Bonnet compa/ny had 100 shares out of which 99 shares were held by Adlabs. All funds of Bonnet company to produce a film were provided by Adlabs. This movie was sought to be registered as an English company. The board of trade of films refused to register it as English film. A question arises whether the corporate veil should be lifted or not?

Rule:A company may act as agent or trustee of its members or another company. The veil may be lifted to know the reality.In this way the persons for whom company is acting so becomes liable for acts of company.

Analysis: In this case separate entity of Bonnet company was lifted and court considered it as acting as agent of Adlabs and asked it to register the film.

Conclusion: Separate entity of bonnet was lifted and court considered it to be acting as agent of Adlabs and asked to register the film

7. **Avoidance of Welfare Legislation:** There are large no. of welfare legislations like Payment of Bonus Act, Payment of GratuityAct and Provident Fund etc. In order to fix the liability for offences under welfare legislations, the court may lift the veil and determine the persons responsible for the defaults or offences. Sometimes a company may form a subsidiary to avoid or reduce liability under the welfare legislation, in such a situation corporate veil needs to be lifted.

8. **Protecting Public Policy:** The court invariably lift the corporate veil to protect the public policy and prevent transactions contrary to public policy. Thus, where there is a conflict with public policy, the courts ignore the form and consider the substance.

Case Study: Connors Bros v. Connors

A company was *de facto* under the control of a German. Germany was at war with England at that time. The company was not allowed to work as that would have meant giving money to the enemy's company. It was considered against public policy.

9. **Dummy Company**

In case a dummy company is formed to carry on personal business, corporate veil may be lifted.

Mr. Andrew was carrying a Jewellery business. He formed a company with himself and wife as the only members. No business took place. Only a bank account was opened in the name of company. It had no assets. Mr. Andrew carried on his business in same way as he was doing before the new company formulated. Mr. Bobby kept some Jewellery with Mr. Andrew for ornamentation which gets stolen. Mr. Bobby filed a case against Mr. Andrew. Mr. Andrew said the Jewellery was delivered to him as a managing director, so he cannot be held personally liable. The court ignored separate entity and Mr. Andrew was personally held liable for Jewellery entrusted to him.

B. Statutory exemptions

1. Holding and Subsidiary company relationship: A holding company has control over subsidiary company. A subsidiary company is the one on which control is exercised. Lifting the corporate veil of subsidiary company becomes essential in the given circumstances:

a. Where business, property, bank and other accounts, employees, management etc. of both companies intermingled.
b. Where business of two companies is not held separately to the public.
c. Where subsidiary is unable to meet its normal obligation.
d. Subsidiary is formed to get unfair advantage (divide profit, reduce tax liability or other liabilities of holding company)

Example: Supreme Court sets aside govt.'s decision on merger of subsidiary National Spot Exchange Ltd. (NESL) with Financial Technologies India Ltd. (FTIL)

The Supreme Court set aside the Central Government order on amalgamation of the over ₹5,600 crore scam-hit National Spot Exchange Ltd. (NSEL) with Financial Technologies India Ltd. (FTIL), now known as 63 Moons Technologies Ltd., as a violation of both the Constitution and the Companies Act. The Bombay High Court and the Supreme Court in particular analyzed in great detail as to whether it was 'essential' and in the 'public interest' to merge the two companies. In this case, the rights and interests of shareholders and creditors were not properly taken care off. The economic loss caused to them through an amalgamation would require assessment and payment of compensation to them.

The Supreme Court had concern on "Public interest" of 63,000 shareholders of FTIL, who were compelled by the merger to bear a huge liability, which would reduce the market value of their shares to nil. Asno compensation was provided to either the shareholders or creditors of FTIL for the economic loss caused by the amalgamation in breach of Section 396(3), it is clear that an important condition precedent to the passing of the final amalgamation order was not met. Hence, this deal could not happen.

2. **Failure to refund application money:** The directors of a company are jointly and severally liable to pay application money with interest if the company fails to refund application money of those applicants who have not been allotted shares within 130 days of date of issue of prospectus.

3. **Number of Member falling below Minimum Requirement as per Companies (Amendment) Act, 2017**: If at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is familiar of the fact that it is carrying on business with less than

seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued.

4. **Misdescription of company name:** Where an officer or agent of a company does any act or enters into a contract without fully or properly mentioning the company's' name and address of its registered office, he shall be personally liable. Thus, where a bill of exchange, hundi or promissory note is signed by an officer of a company or any other person on its behalf, without mentioning this fact that he is signing on behalf of the company, he is personally liable to the holder of the instrument unless the company has already paid the amount.

5. **Fraudulent Trading:** Sometimes in the course of winding up of a company it may appear that some business of the company has been carried on with intent to defraud creditors of the company, or any other person or for fraudulent purpose. In such a case, the court may declare that any persons who were knowingly parties to carrying on of the business in this way are personally liable without any limitation of liability for all or any of the debts or other liabilities of company as the court may direct. The court may do so on application of official liquidator, or the liquidator or any creditor of the company.

1.3 Company, Partnership and Limited Liability Partnership

A company refers to as an entity that is different and separate from its promoters, directors, members, and employees. In the eyes of law, it is an artificial person, which not capable of doing anything illegal or fraudulent.To carry out its activities it needs to be run by directors. It has a common seal, perpetual succession, separate property, limited liability and can sue or be sued in its name.

A partnership is a relationship between individuals who have agreed to share the profits of a business carried on by all or any one of them acting for all as stated in Section 4 of the Indian Partnership Act. Therefore, a partnership consists of three essential elements.

An agreement between two or more individuals.

The agreement to share the profits obtained from the business.

The business must be run by all or any of them representing the rest.

Limited Liability Partnership (LLP) concept was introduced in India in 2008. It has the characteristics of both the partnership firm and company. The Limited liability Partnership Act, 2008 regulates the LLP in India. To incorporate an LLP, minimum two partners are required. However, there is no upper limit on the maximum number of partners of an LLP. Among the partners, there should be a minimum of two designated partners who shall be individuals, and at least one of them should be resident in India. The rights and duties of designated partners are governed by the LLP agreement. They are directly responsible for the compliance of all the provisions of the LLP Act, 2008 and provisions specified in the LLP agreement.

Difference between company, partnership

1) Governing Act: Companies in India are governed by the Companies Act 2013 and Partnership by Partnership Act 1932.

2) Registration: It is compulsory for a company to get registered in accordance with the provisions laid under companies Act. For a partnership concern, registration is optional.

3) Legal Status: A company has a separate Legal Entity. However, a Partnership has no Separate Entity.

4) Naming of an Entity: If it is a company then in its name it must add suffix like Pvt Ltd /Ltd./ OPC. For Partnership any name as per the choice can be kept.

5) Liability: In case of a company it is limited whereas in Partnership form it is unlimited.

6) Transferability of Interest: In case of a company shares are Freely Transferable. But in Partnership, a partner cannot transfer a share without the consent of the partners.

7) Agents: Directors are the agents to company and not others. In case of Partnership, the partners are agents of the firm and other partners.

8) Power: A company can carry out only those objectives that are mentioned in its memorandum. A Partnership firm Can do anything that the Partners agree to do.

9) Creation: A company is created by law whereas a Partnership is created by agreement.

10) Perpetual Succession: A company has a perpetual succession. Its life doesn't depend on the life of its shareholders, directors, or employees. Members may come and go but the company goes on forever. A Partnership firm does not has any perpetual succession.

11) Minimum members: In order to incorporate or run a Public Company, minimum 7 members are required. In a private company, minimum 2 members are required. In case of Partnership, minimum 2 partners are needed.

12) Maximum members: A Private Company can have maximum 200 members. In a Public company, there is no such upper limit, indicating unlimited members can be there. In a Partnership concern, maximum 100 members can be there.

13) Maintenance of Books: It is mandatory in case of a company. These are to be maintained and audited by qualified auditors annually. There is no such compulsion by law in Partnership.

14) Chartered document: In a company is its Memorandum of Association and for a Partnership it is its Partnership Agreement/ deed.

15) Legal Formalities: While getting a company Incorporated, a Memorandum and Article of Association, Various e-forms and prescribed fee needs to submitted. Legal formalities while getting a Partnership firm Incorporated is Partnership deed, forms and affidavit, prescribed fee that a Firm has to submit.

16) Suing third party: A company as it has separate legal entity, it can sue other companies Whereas Only registered partnership firms can sue 3rd party.

17) Foreign Nationals in Indian business: In case of a company subject to certain laws it is possible to have foreign nationals as part of Indian business but not in case of a Partnership.

18) Ownership of assets: A company has separate property, independent from its members. Partners have joint ownership of all the assets.

19) Dissolution: A company is an entity created by law and is put to an end through it. So, this may take place voluntarily or by the order of National Company law Tribunal or under Insolvency Bankruptcy Code. In a partnership, it may take place by mutual agreement, insolvency, court order.

20) Annual filing with the Registrar: Annual statement of accounts, statement of solvency, annual return needs to be filed every year in a company. No return is to be filed for a Partnership Firm.

21. Digital signature: In case of a company it is required as e forms are filled electronically. For a partnership, there is no such requirement.

Difference between company and limited liability partnership

1. **Governing Act:** The act governing a company is Companies act, 2013; While Limited Liability Partnership is by Limited Liability Partnership Act, 2008.

2. **Motive:** The rationale behind starting a company can be for profit or service. A Limited Liability Partnership can be formed only for-profit motive.

3. **Chartered document:** In case of a company, it is the Memorandum of Association that defines its scope of operations. Whereas for a Limited Liability Partnership, it is the Limited Liability Partnership agreement only that defines its scope of operations.
4. **Common Seal:** A company must have its own official signature. However, it is optional for a Limited Liability Partnership to have its own common seal.
5. **Formalities for Incorporation:**To incorporate a company, legal formalities involve drafting a Memorandum of Association, Various e-forms, prescribed fee that needs to be submitted. Formalities for Incorporation of Limited Liability Partnership is basically its agreement, Various e-forms, prescribed fee to be submitted etc.
6. **Minimum members:** For the incorporation of a Public Company, minimum 7 members are needed. For a Private Company, there must be at least 2 members. For incorporating a One Person Company (OPC), at least 1 member is required.In case of a Limited Liability Partnership, Minimum number of Partners should be 2.
7. **Maximum Members:**There is no upper limit regarding the maximum number of members in a Public company. In case of a Private Company it is 200. However, there is no limit on maximum number of partners in Limited Liability Partnership.

8. **Liability of members:** In a company, it is generally limited to the amount stated in Memorandum of Association. In case of Limited Liability Partnership, it is Limited to the extent of their contribution.
9. **Death of a member:** In a company, the shares are transmitted to his/her legal heirs. In Limited Liability Partnership, Legal heirs cannot be partners but can get refund of contributed capital plus share in accumulated profits.
10. **Transferability of interest:** It is freely transferrable in case of a company. But in Limited Liability Partnership it is subject to terms and conditions laid under Limited Liability Partnership agreement.
11. **Voting rights:** In a company, as per number of shares held by the members, voting rights are decided.In Limited Liability Partnership as per the Limited Liability Partnership agreement it is decided.
12. **Admission as partner/member:** A person becomes member in a company by buying shares. A person is admitted as a partner according to the Limited Liability Partnership Act.
13. **Meetings:**In a company, a meeting must be conducted at proper time. However, due to pandemic situation, the Ministry of Corporate Affairs relaxed holding of Board Meeting through Video Conferencing for Restricted Matters. There is no such provision in a Limited Liability Partnership.
14. **Cessation as partner/member:** In a company the membership of company ends on selling the shares. A person ceases to exist as a partner as per the Limited Liability Partnership agreement OR by giving a prior 30 days' notice to the LLP.

o) Share certificate

A share certificate refers to a document which is issued by a company evidencing that a person named in such certificate is the owner of the shares of the Company as stated in the share certificate. Ownership is evidenced by Share Certificates in Company while it is evidenced by Limited Liability Partnership agreement.

p) Maintenance of minutes of a meeting

It is mandatory to hold different types of meetings for a company, so therefore its minutes need to be maintained or recorded. In a Limited Liability Partnership, it may decide to record meeting minutes.

q) Audit of accounts

Accounts to be audited annually as per The Companies Act,2013. Accounts need to be audited annually as per The Limited Liability Partnership Act,2008 in case its turnover exceeds 40 lacs or the capital contribution exceeds 25 lacs in any financial year.

15.Cost of formation: A High cost is involved, especially in case of public companies. A comparatively less cost is involved in a Limited Liability Partnership.

Difference between Partnership Firm and Limited Liability Partnership [LLP]

1. Governing Act: The law Governing a Partnership Firm is Partnership Act, 1932. Limited Liability Partnership is governed by Limited Liability Partnership Act, 2008.

2. **Registration:** Partnership Firm need not be registered. There is no such compulsion. But, it is compulsory for a Limited Liability Partnership [LLP] to be registered.
3. **Creation:** Creation of a Partnership Firm is as per the partnership Agreement. While for the latter it is by Law.
4. **Legal Status:** In case of a Partnership firm, Partners collectively form a 'Firm' which has no separate legal status. A Limited Liability Partnership has separate legal status apart from partners.
5. **Succession:** A Partnership Firm would cease to exist on change in partnership, unless otherwise provided in agreement. A Limited Liability Partnership would not be affected on change in partnership as it has a Perpetual Succession.
6. **Ownership of Assets:** A Partnership firm cannot own assets in its name; assets must be in name of Partners. A Limited Liability Partnership can own assets in its own name.
7. **Minor's Position:** Its' important to know that a Minor is referred to as someone under the age of 18. A minor can be admitted to benefits of Partnership firm. However, in the next case Law is silent on position of Minors.

1.4 Types of companies

A. Classification is on the basis of Incorporation: It can be of further two types, namely: Statutory and Registered. Statutory companies are created by a special act of legislature. For example: State Bank of India under State Bank of India Act 1955. These are mostly concerned with Public utilities.


Example: Railway and tramways

Gas & electricity companies and enterprises of national importance registered companies are those which were formed and registered under companies act 1956 and prior.

B. On basis of liability

Company with limited liability can be either companies limited by shares orCompanies limited by guarantee. Liability Limited by share is a condition as per which shareholders are legally liable to pay the debts of a company only to the extent of the nominal value of their shares.


Example: If the face value of a share in a company is ₹ 10 and the shareholder has paid ₹ 8, his liability to the company is for the remaining balance of ₹ 2 only and no more.

Companies limited by guarantee involves liability of members limited to such amount that they undertake to contribute to the assets of company at the time of winding up.


Example: Alex was a member of a company limited by shares. He guaranteed that in the event of winding up of the company he would contribute ₹1,000 to the assets of company. In this case, liability of Alex is limited to the extent of ₹ 1,000 only and not more than that.


Notes: This amount is fixed in Memorandum of Association.

Company with Unlimited Liability is a hybrid company (corporation) incorporated with or without a share capital and where the legal liability of the members or shareholders is not limited. It means that its members or shareholders have a joint and several non-limited obligations to meet any insufficiency in the assets of the company to enable settlement of any outstanding financial liability in the event of the company's formal liquidation.

C. On basis of number of members

It can be categorized as a Public or Private Company

Private Limited Company	Public Limited Company
Minimum Capital- NIL Right to transfer the shares: Restricted	Minimum Capital- NIL Right to transfer of shares are allowed
Minimum members 2 (Two), Maximum members 200 (Two Hundred)	Minimum members 7 (Seven), Maximum members No Limits
Public offer is not applicable and no requirement of dematerialization of securities	In case of public offer of securities, the securities have to be in Dematerialized Form
Listing of securities on Stock exchange Not Applicable	Securities offered in Public Offer, to be listed in Recognized Stock Exchanges

Quorum of Meetings Two members personally present	Quorum of Meetings Five in case of Members up to 1000; Fifteen in case of Members more than 1000 up to 5000; Thirty in case of Members exceed 5000.
No restriction on amount of managerial remuneration	Managerial Remuneration is restricted to 11% of Net profit (subject to conditions); OR at least Rs. 30 lakh p.a. depending upon paid up capital
Retire by rotation is not applicable	At least two-third of total number of directors be liable to retire by rotation and eligible of being re-appointed in AGM

D. Classification on basis of Control

On this basis, a company can be a holding or Subsidiary company. A holding company is a parent company designed to own or control other businesses. A subsidiary is owned or controlled by a parent company, but that parent company might not be a holding company.

A company is said to be the holding company if that particular company holds at least 50% of the other companies and has the authority to make management decisions, influences and controls the company's board of directors. A holding company may exist for the sole purpose of controlling and managing subsidiary companies.

E. Classification on basis of ownership

It can be a Government company or a Non-government company. A Government company is that in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments.

Example: Bharat Sanchar Nigam Limited: BSNL is a government owned telecommunications service provider

Non-government company's' or NGOs' are Organizations, which are independent of government involvement. NGOs are a subgroup of organizations founded by citizens, which include clubs and associations providing services to their members and others. These are are usually non-profit organizations, and many of them are active in humanitarianism or the social sciences.

F. Classification on basis of Nationality

a) Foreign company: It means any company or body corporate incorporated outside India which-

has a place of business in India whether by itself or through an agent ,physically or throughelectronic mode ; and

b) conducts any business activity in India in any other manner

IBM and Microsoft etc.

b) Domestic company: It refers to a company that is incorporated in and conducts business affairs in its own country. It can be public/private/OPC.

G. Other companies

a) Associate company

(1) A company will be treated as an Associate company of another company, if the former is having a significant influence that is a control of at least 20% of total *voting power*, or control of or participation in business decisions under an agreement.

or

(2) having influence over the latter's decision-making process under and agreement

or

(3) Both are Joint venture companies.

b) Small companies

''Small companies means a company, other than a public company which have :-

Paid up share capital of not more than 2 crore rupees andTurnover of which as per its last profit and loss account does not exceed 20 crore rupees.

Notes: 1. Threshold in small companies has increased to Paid up capital from 50 lakh to 2 crore rupees and

2. Annual turnover also been raised from 2 crore to 20 crore rupees.

3. It is beneficiary to more than 2 lakh companies in compliance required.

c) Dormant Company

A company not carrying any significant accounting transaction for a period of two years can apply to Registrar of company to get itself declared as dormant Company.

Example: Achiever metal private limited and jvk wires private limited

H. One-person company

It comprises a single person as a shareholder and can be contrasted with private companies. These companies get all the benefits of a private company such as they to have access to credits, bank loans, limited liability, legal protection, etc. Only a natural person who is an Indian citizen and whether resident in India or otherwise resident in India–

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company.

Explanation I. "– For the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of not less than 120 days (earlier one hundred and eighty-two days) during the immediately preceding financial year

Did you know? Who can form an OPC?

- Any individual who have stayed in India for at least 120 days in during the immediately preceding calendar year.
- Minor can neither incorporate OPC nor be entitled to hold shares of OPC beneficial interest.
- No minor shall become nominee of the One Person Company

Notes**:** Major changes after amendments are:

1. Non-resident individuals with entrepreneurial potential are now enabled to set up One Person Companies (OPC) with no paid-up capital and turnover restrictions, reducing registration timeline from 182 days to 120 days. Earlier only Indian resident citizens were permitted to set up OPCs
2. Removal of restriction of paid up capital and average annual turnover

I. Family company

A family-owned business may be defined as any business in which two or more family members are involved and the majority of ownership or control lies within a family.

J. Illegal Association

No association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company.

Summary

- On 29th August 2013, the Act got passed by the Parliament after receiving the assent of the President of India. It consolidated and amended the law relating to companies.
- In previous act there were 658 sections and 15 schedules and in Companies Act 2013 there are 29 chapters, 470 sections and 7 schedules.
- 98 different sections of the companies Act came into force with few changes like earlier private companies' maximum number of members were 50 and now it will be 200.
- A new term of "one-person company" is included in this act that will be a private company and with only 98 sections of the Act notified.
- A company is an incorporated association with a separate legal entity, limited liability, perpetual succession, common seal, transferability of shares, separate property and has a capacity to sue.

Keywords

- **The Central Government**: The Central Government is the supreme authority responsible for the
- administration of company law.
- **Perpetual Succession:** It refers to continuous succession of a corporation.Its life doesn't depend on the life of its shareholders, directors, or employees. Members may come and go but the company goes on forever.
- **Incorporated association:** A company formed and registered as per the provisions of Companies Act.
- **Common seal:** An official seal used by a company. Documents which need to be executed as deeds (as opposed to simple contracts), may be executed under the company's common seal.

Self Assessment

1. _____ does not have a separate legal entity?

A. Company
B. Partnership
C. Limited Liability Partnership
D. Partnership and Limited Liability Partnership

2. _____must be registered with the Registrar of Companies?

A. Company
B. Partnership
C. Limited Liability Partnership
D. Company and Limited Liability Partnership

3. The companies which are formed under special Act are called as .....
A. Chartered Companies
B. Statutory Companies
C. Registered Companies
D. None of these

4. Property of the company belongs to.....
A. Company
B. Shareholders
C. Members
D. Promoters

5. In the case of company, audit is.....
A. Optional
B. Situational
C. Compulsory
D. None of the above

6. In a Limited Liability Partnership, Minimum number of Partners should be____
A. 4
B. 3
C. 2
D. 1

7. Maximum number of partners that a Limited Liability Partnership can have is____
A. Two
B. Seven
C. Two Hundred
D. There is no such Limit is there

8. _____ a condition as per which shareholders are legally liable to pay the debts of a company only to the extent of the nominal value of their shares.

A. Limited by shares
B. Liability limited by guarantee
C. Unlimited Liability
D. Liability limited by directors

9. A company need not have a common seal, provided it has authorized:

A. 2 directors to sign documents on behalf of company
B. 2 directors or by a director and the Company Secretary
C. 1 director and 1 auditor to sign documents on behalf of company
D. 4 directors and 1 auditor to sign documents on behalf of company

10. A company has a _____ which states that a company is not liable to pay personal debts of the members even if they hold substantial part of company share capital.
A. Common Seal
B. Separate Legal Entity
C. Capacity to sue
D. Transferability of shares

11. A company not carrying any significant accounting transaction for a period of two years can apply to Registrar of company to get itself declared as :

A. Public company
B. Private company
C. Government company
D. Dormant Company

12. A Government company is that in which not less than ____ of the paid-up share capital is held by the Central Government.

A. 11%
B. 21%
C. 51%
D. 91%

13. Any individual who have stayed in India for at least ____ days in during the immediately preceding calendar year.

A. 100 days

B. 120 days

C. 130 days

D. 140 days

14. A Public Company having 1,0000 must ensure a quorum of ____members to hold a valid meeting.

A. 5

B. 10

C. 15

D. 20

15. In a Public companyat least ____of total number of directors be liable to retire by rotation and eligible of being re-appointed in AGM.

A. 1/3rd

B. 2/3rd

C. 4/5 th

D. 3/5th

Answers for self Assessment

1.	B	2.	D	3.	B	4.	A	5.	C.
6.	C	7.	D	8.	A	9.	B	10.	B
11.	D	12.	C	13.	B	14.	A	15.	B

Review Questions

1. Define a company. Explain the essential features of a company with a relevant example of each.
2. "A company is a legal entity distinct from its members." In what circumstances, the court may ignore this principle.
3. What is a corporate veil? When can the veil be pierced?
4. Discuss the difference between

a) Company and Partnership
b) Company and Limited Liability Partnership
c) Partnership and Limited Liability Partnership

5. Write short notes on:

a) Lifting up of Corporate Veil b) Perpetual Succession
b) Separate legal entity d) Common Seal

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company
2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://www.thehindu.com/business/Industry/nsel-ftil-merger-sc-sets-aside-govts-decision/article26996111.ece

https://www.barandbench.com/columns/supreme-court-rationale-setting-aside-merger-ftil-nsel

Unit 02: Incorporation of Company, 2013

CONTENTS

Objectives

After studying this unit, you will be able to:

i) comprehend the need of incorporation of a company

ii) understand the process of incorporating a company as per the provisions of Companies (Incorporation) Second Amendment Rules, 2021

iii) Comprehend the role of promoter in the incorporation of a company

Introduction

Incorporation is the procedure by which a business becomes formally recognized.A legally established firm becomes a separate legal entity from those who dedicate their money and time to operate it.The term "promotion" denotes to the first step in the process of launching a business.Such a person is better known as the 'promoter' of the entity.

2.1 Incorporation of a Company

A company can be formed for any lawful purpose by: i. seven or more persons, if the company is to be a public company; ii. two or more persons, if the company is to be a private company; or iii. one person, if the company is to be a One Person Company, that is to say, a private company, by subscribing their names or his name to amemorandum and complyingwith the requirements of this Act in respect of registration.

This can be performed by signing a memorandum in their or his name and complying with the registration requirements of this Act. The Ministry of Corporate Affairs (MCA) announced the release of a new form SPICe+ in January 2020 as part of the country's Ease of Doing Business policy. The new Spice Plus or Spice+ form has replaced the old Spice 32 form, indicating that it is being phased out.

Notes: Spice Plus, or Spice+, is a new form that has superseded the original Spice system.

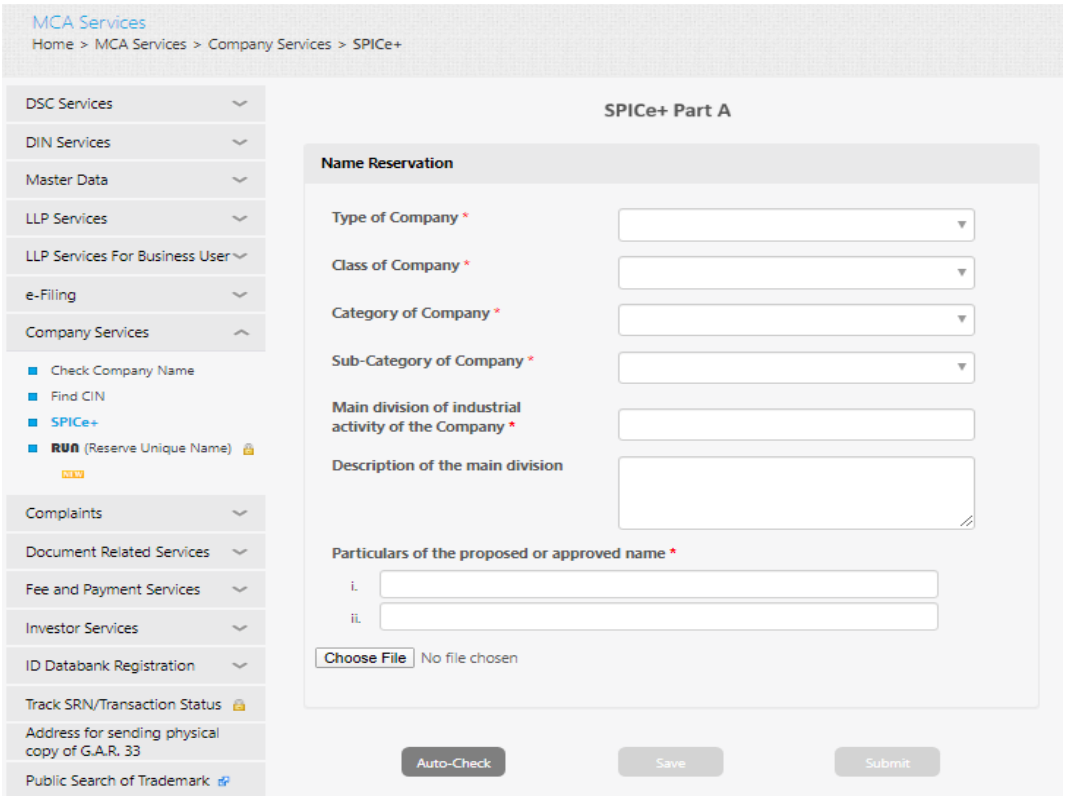
2.2 Process of Incorporation

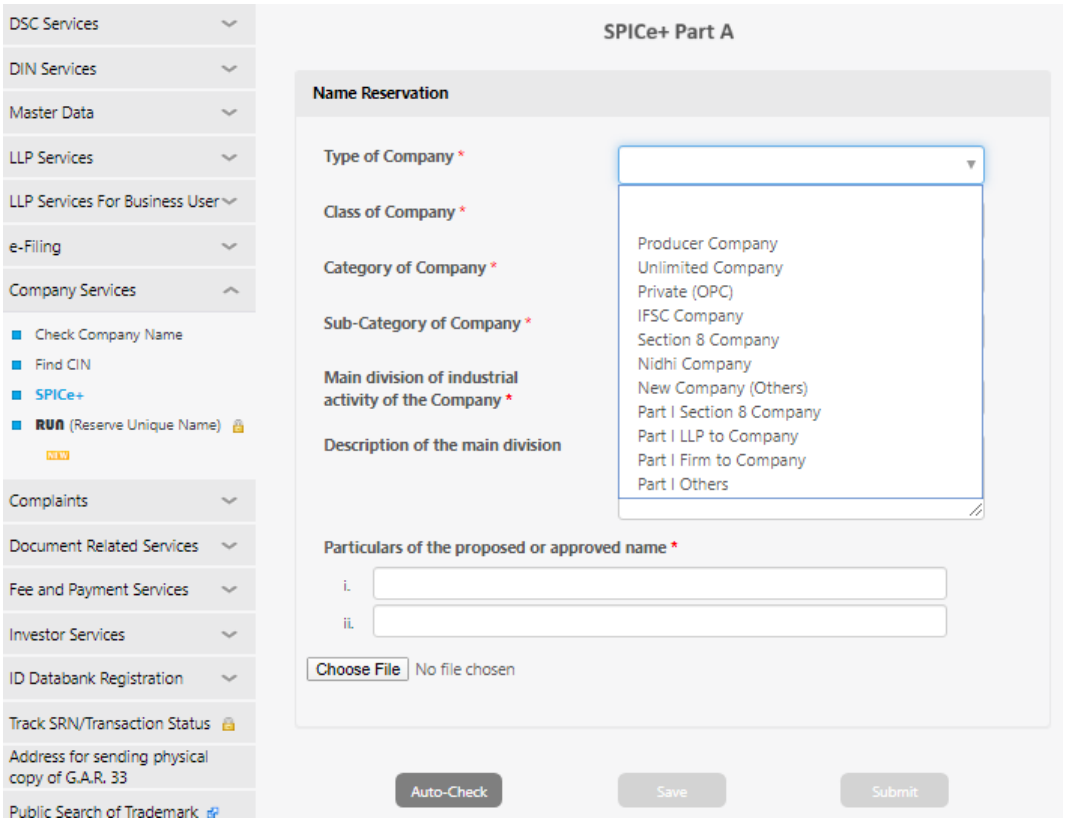
Step 1: Reserve name of company

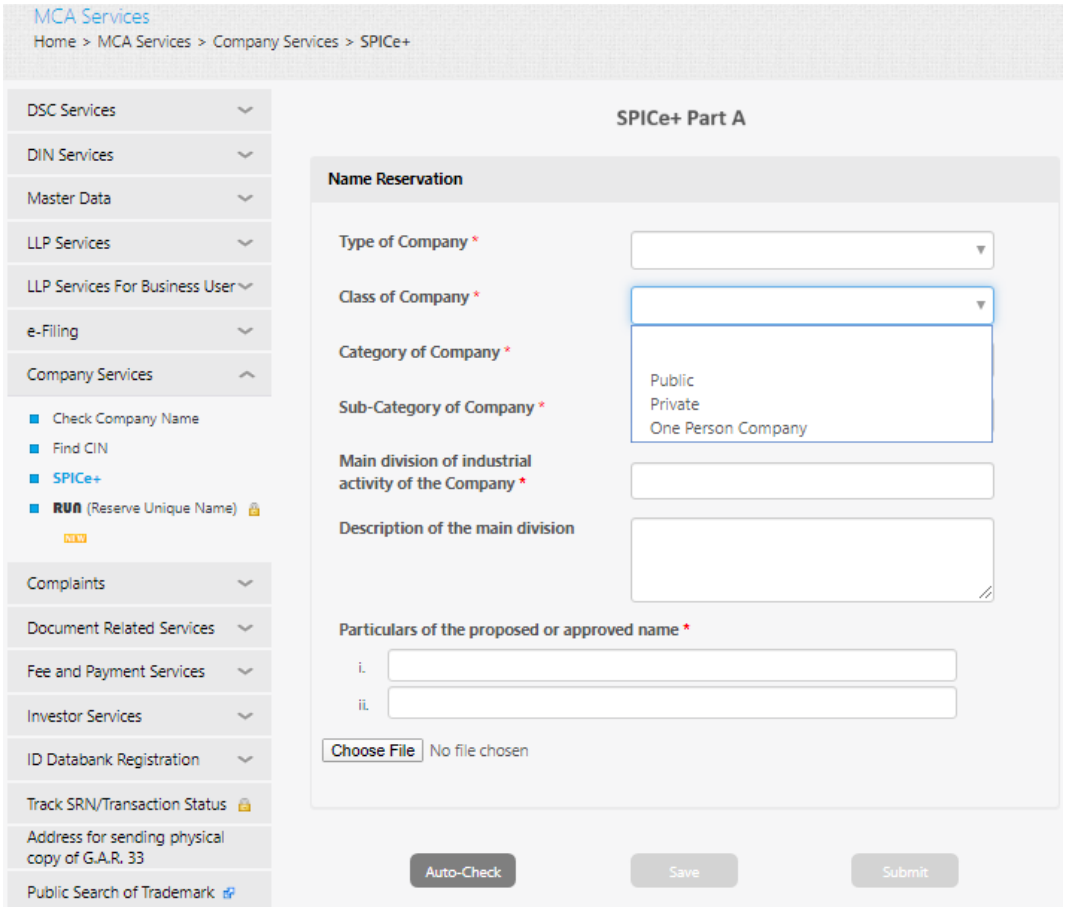
- A promoter may reserve the name for a new company by filling the Part A of SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus)

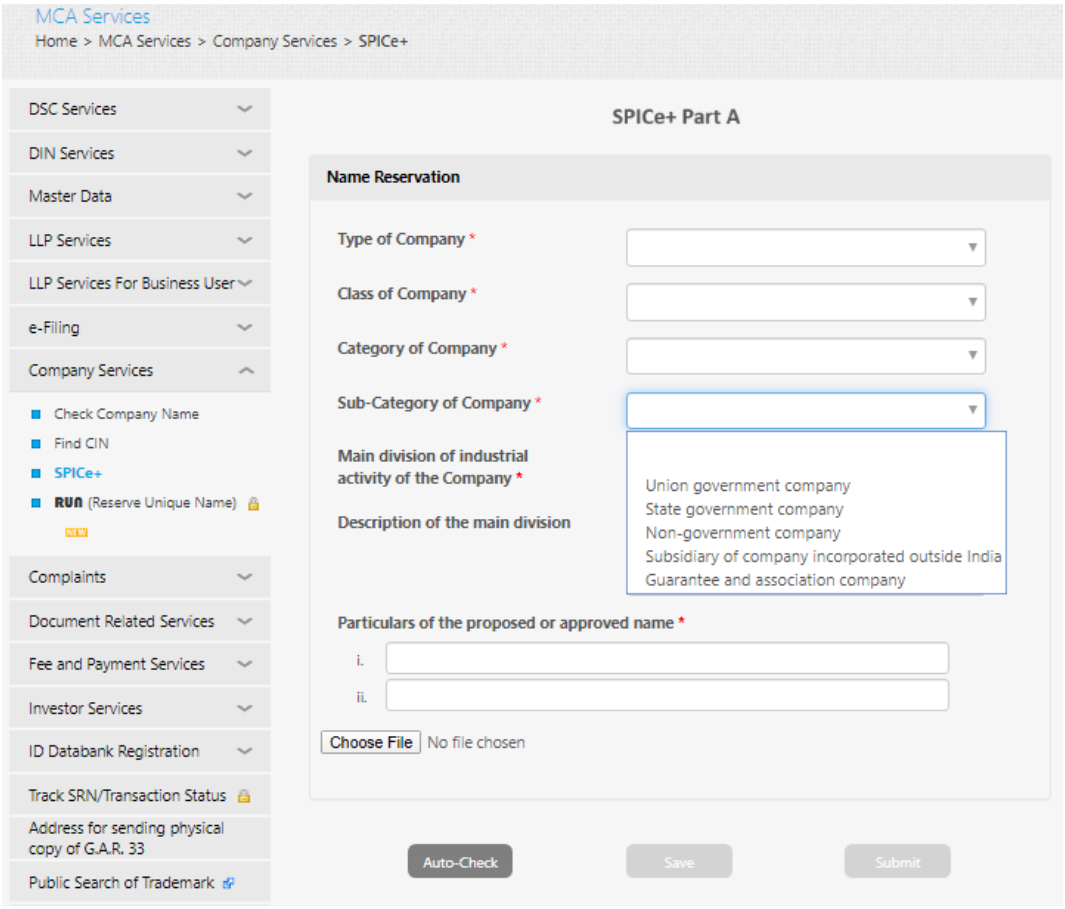
Notes: One has to fill the INC-32 form for the company registration.

From the 23rd of February 2020 onwards, the Reserve Unique Name, or 'RUN' form, started getting used for a 'change of name' of an existing company.A user must choose the sort of company he wants to form in Part A of the form (Producer, OPC, or Company Under Section 8). He can choose the class, category, and sub-category for the company. As the Ministry of Corporate Affairs' web portal is user-friendly, numerous types, classes, and sub-categories are already available as drop-down options when you click the drop-down button.Thereafter, the facts regarding the primary division of carrying out industrial activity must be supplied, as well as the suggested name of the company that is to be incorporated. The web form details are provided below:




DSC Services
DIN Services
Master Data
LLP Services
LLP Services For Business User
e-Filing
Company Services
Check Company Name
Find CIN
SPICe+
RUN (Reserve Unique Name)
Complaints
Document Related Services
Fee and Payment Services
Investor Services
ID Databank Registration
Track SRN/Transaction Status
Address for sending physical copy of G.A.R. 33
Public Search of Trademark
SPICe+ Part A
Name Reservation
Type of Company *
Class of Company *
Category of Company *
Sub-Category of Company *
Main division of industrial activity of the Company *
Description of the main division
Producer Company
Unlimited Company
Private (OPC)
IFSC Company
Section 8 Company
Nidhi Company
New Company (Others)
Part I Section 8 Company
Part I LLP to Company
Part I Firm to Company
Part I Others
Particulars of the proposed or approved name *
i.
ii.
Choose File
No file chosen
Auto-Check
Save
Submit


MCA Services
Home > MCA Services > Company Services > SPICe+
DSC Services
DIN Services
Master Data
LLP Services
LLP Services For Business User
e-Filing
Company Services
Check Company Name
Find CIN
SPICe+
RUN (Reserve Unique Name)
Complaints
Document Related Services
Fee and Payment Services
Investor Services
ID Databank Registration
Track SRN/Transaction Status
Address for sending physical copy of G.A.R. 33
Public Search of Trademark
SPICe+ Part A
Name Reservation
Type of Company *
Class of Company *
Category of Company *
Sub-Category of Company *
Main division of industrial activity of the Company *
Description of the main division
Public
Private
One Person Company
Particulars of the proposed or approved name *
i.
ii.
Choose File
No file chosen
Auto-Check
Save
Submit



The promoter must next click on the auto check option, which runs a first-level automatic review of the proposed company name against the Name Rules that we will explore in the Memorandum of Association chapter.

Step 2: Fill part B of form

The user (promoter) must now submit a name reservation form and continue with the incorporation process.After that, part B of the form becomes available, with several areas to fill out. Incorporation of a company, allotment of a DIN, mandatory issue of a PAN Number, TAN Number, EPFO registration, ESIC registration, Profession Tax registration, opening a bank account for the company, and assignment of GSTIN are the important services offered in Part B of SPICe+ (if so applied).In section B, the user must fill in essential company information such as where the company will be established, its correspondence address, and the names of all subscribers to the memorandum of association and initial directors. Also, mention the capital that will be used to start a new business.

After that, you must fill out the necessary information to obtain a Permanent Account Number and a Tax Deduction Account Number.Mandatory attachments must also be sent via the web.The user must click the submit button after filling out these details and performing a pre-scrutiny.After providing all of these details and completing a pre-scrutiny, the user must click the submit button.

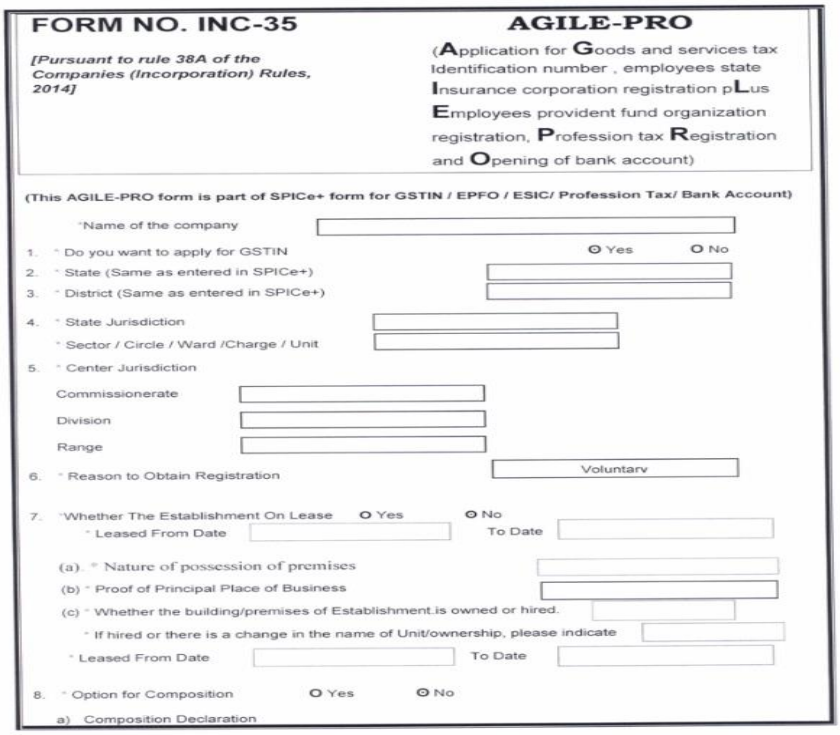
Once the online form has been successfully submitted, a push notice is received.Part B in PDF format can be used to apply a Digital Signature Certificate.

All relevant linked forms like AGILE PRO, eMOA and eAOA also gets enabled with this step.

Step 3: Fill AGILE-PRO –Web form

For registration with GSTN, ESIC, EPFO, Professional tax registration number, and Bank account number, a user (Promoter) must fill out the associated eForm with SPICe.

The following is an example of an AGILE-PRO-web form:



FORM NO. INC-35

[Pursuant to rule 38A of the Companies (Incorporation) Rules, 2014]

AGILE-PRO

(**A**pplication for **G**oods and services tax Identification number , employees state **I**nsurance corporation registration p**L**us **E**mployees provident fund organization registration, **P**rofession tax **R**egistration and **O**pening of bank account)

(This AGILE-PRO form is part of SPICe+ form for GSTIN / EPFO / ESIC/ Profession Tax/ Bank Account)

*Name of the company

1. * Do you want to apply for GSTIN — O Yes O No
2. * State (Same as entered in SPICe+)
3. * District (Same as entered in SPICe+)
4. * State Jurisdiction
   * Sector / Circle / Ward /Charge / Unit
5. * Center Jurisdiction
   Commissionerate
   Division
   Range
6. * Reason to Obtain Registration — Voluntary
7. *Whether The Establishment On Lease O Yes O No
   * Leased From Date — To Date
   (a) * Nature of possession of premises
   (b) * Proof of Principal Place of Business
   (c) * Whether the building/premises of Establishment is owned or hired.
   * If hired or there is a change in the name of Unit/ownership, please indicate
   * Leased From Date — To Date
8. * Option for Composition O Yes O No
   a) Composition Declaration

Step4: eMOA

Instead of a printed document, the Ministry of Corporate Affairs made it easier to prepare a Memorandum of Association in a soft format.The preparation of MOA is now governed by e-form INC-33.All that is required is to enter the company's items.

In this web form, digital signature certificates (DSC) are utilised instead of actual signatures.

There is no need for a witness signature because the DSC of the witness is attached in this scheme.

In case of incorporation of a company falling under section 8 of the Act, FORM No. INC-13 (Memorandum of Association) (spice plus) is to be used.

Step 5: eAOA

Using the e-Form INC-34 (spice plus) form, the article of association can now be drafted electronically.This web form is a streamlined proforma that includes pre-drafted Articles of Association clauses for incorporating businesses.The user must first pick the clauses that will be included in the Articles, then check to see if any are not appropriate or need to be changed, and then select them.The process of filing documents has been made much easier with the use of web forms.The FORM No. lNC-31 (Articles of Association) (spice plus) is to be utilised when forming a company under section 8 of the Act.

Step 6: Other attachments

While filling the web form of getting an entity registered, some documents also needs to be provided. The list of such documents includes:i) Memorandum of Association, ii) Articles of Association, iii) declaration by the first director(s) and subscriber(s), iv) office address proof, v) copy of utility bills, vi) copy of certificate of incorporation of foreign body corporate (if applicable), vii) a resolution passed by promoter company, viii) interest of first director(s) in other entities, ix) consent of Nominee (INC–3), x) proof of identity as well as residential address of subscribers, xi)

proof of identity as well as residential address of the nominee andxii) proof of identity and address of applicant I, II, III, optional attachments (if any) and attachments – Part A.


After SPICe+ has been entirely filled out with all pertinent information, it is converted to PDF format for affixing a Digital Signature Certificate (DSC).If the applicant wants to make any modifications to the information provided, he or she can do so and then generate an updated PDF to attach the digital signature certificate and upload it.

Step 7: Declaration by Professionals

SPICe + Form requires a professional's digital signature certificate, as well as their membership and certificate number, from a Company Secretary, Chartered Accountant, Advocate, or Cost Accountant.They must attest to the accuracy and completeness of the information submitted.

Step 8: Fee submission

The fee that an applicant needs to submit vary case to case.

Case I: In case a company having share capital

Nominal Share Capital	Fee applicable
Up to Rs. 15,00,000	NA
More than Rs. 15,00,000	Rs. 500

Case II: Company not having share capital

Number of members	Fee applicable
Up to 20 members	NA
More than 20 members	Rs. 500

Step 9: Submission of Form

After all of the essential information has been input correctly and all of the required documents have been attached, the application form is sent.If the Registrar of Companies (ROC) is satisfied after reviewing the application form, it will issue certification of incorporation.The Registrar will provide the firm a Certificate of Incorporation in Form No. INC-11 once the registration process is finished.

2.3 Certificate of Incorporation

A private limited company (Pvt Ltd) is one that does not sell its stock to the general public and always uses the suffix Pvt in its name.

A legal document or a legal permission to operate is required for such a firm to exist.

The procedure for forming a company is outlined in Section 7 of the Companies Act 2013, which specifies the Certificate of Incorporation (issued by the Ministry of Corporate Affairs or the State Government) as the last stage.It gives the company a legal identity as well as a licence.

The Registrar of Companies issues the certificate of incorporation whenever a promoter has completed the step-by-step procedure to have a company registered under the Companies Act 2013.A unique corporate identity number [CIN] will be assigned to the company by the registrar. The Corporate Identity Number, or Business CIN No., is a 21-digit alphanumeric code/number assigned to every company incorporated in India once the Registrar of Companies registers it. Following the creation of a company, the concerned ROC issues a certificate with the firm's approved name and a unique Corporate Identification Number (CIN No. or CIN Code). The date on which the certificate of incorporation bears the date of the company's birth, i.e. the day on which the business is formed.

Contents of Certificate of Incorporation

A private limited company's Certificate of Incorporation contains the following information:

- The company's full name and its abbreviated form.
- A declaration stating the corporate objective.
- The address of the registered office.
- Registered agent details for the given address.
- The number of shares that are authorized to be issued.
- Description of the different types of stock that can be issued, if there is more than one type.

Case Study: Moosa Goolam Arif v. Ebrahim GoolamAriff (1913):

Issue: Five of the seven people who signed a company's memorandum of association were minors.On the memorandum of association, the minors' guardians signed separate signatures for each minor.The certificate of incorporation was issued by the Registrar.The legality of the certificate of incorporation has been questioned.Is it possible to challenge the validity of certificate of incorporation?

Solution to the case

Rule: The legality of a certificate of incorporation might be contested if it was obtained by providing misleading and erroneous information while concealing material facts.

Analysis: The certificate serves as proof that all of the requirements of the Companies Act have been met.As a result, it is well understood that whenever a company is formed, the only way to put it out of business is to use the provisions of enactments that govern company winding up.Although the Registrar should not have issued the certificate, it was found to be conclusive for all purposes.

Conclusion: The validity of an incorporation certificate might be contested.Whatever the shortcomings in the formalities, the Certificate of Incorporation, once issued, serves as incontrovertible proof of the company's existence.

Example: Issue: On August 31, 2021, a promoter filed an online application with the Registrar of Companies in Haryana to register his toy firm, Jumanji Pvt. Ltd. (without share capital).The promoter's numerologist advised him to get a certificate of incorporation with a date of September 6, 2021.The registrar, on the other hand, issued the certificate of incorporation on September 4, 2021, which the firm received by mail on September 6, 2021.Meanwhile, on September 4, 2021, 'Jumanji Pvt. Ltd.' signed a contract with M/S Chandan Shaw & Co. for the purchase of supplies for its business on credit for Rs. 10,000. The items were provided on a 20-day credit basis by the seller.M/S Chandan Shaw & Co. claimed their money at the end of the credit period, but the company refused to pay them, claiming that it could only enter into authorised transactions starting September 6, 2021.Determine if M/S Chandan Shaw & Co. can collect funds from 'Jumanji Pvt. Ltd.'

Solution to the case

Rule: A certificate of incorporation certifies that an entity exists and is authorised to conduct business. Even though the corporation acquired the certificate on September 6th, 2021, the certificate date is September 4th.This means that the business can start operating as soon as it is formed.

Conclusion: The company was incorporated on September 4, 2021, which means it is now able to lawfully conduct business.Due to the fact that the products were purchased on credit, 'Jumanji Pvt. Ltd.' is obligated to repay M/S Chandan Shaw & Co.

Modification of Certificate of Incorporation

If the company wants to change its name after receiving the Certificate of Incorporation, it must first check for the availability of a new name.According to rule 29 of the Companies (Incorporation) Rules, 2014, it must hold an extraordinary general meeting (EGM), approve a special resolution, and apply to the Registrar for name approval.The Registrar will issue a new Certificate of Incorporation following approval.The Certificate of Incorporation, on the other hand, will not be changed if the company's address is changed.The company will have to fill out the necessary papers and verify that the company's master data is updated.Because the address on the Certificate of Incorporation is current as of the date of incorporation, no modifications can be made retroactively.

2.4 Certificate of commencement of Business

Before beginning any company or exercising any borrowing rights, all firms with a share capital must obtain a commencement of business certificate.According to the Companies (Amendment) Ordinance 2018, all companies registered on or after November 2, 2018 must file a declaration in form 20A within 180 days of the company's incorporation date in order to receive a certificate of commencement.

Notes: Declaration for Commencement of business is re-introduced (Companies (Amendment) Ordinance, 2018)

Did you know? :The following businesses are exempt from filing Form 20A:

- Companies formed before November 2, 2018 (i.e. before the Companies (Amendment) Ordinance, 2018 took effect).
- Companies formed after November 2, 2018 that do not have a share capital.

Did you know? : What is the effect of conclusiveness of the 'Certificates of Incorporation' and 'Commencement of Business'?

The Certificate of Incorporation is definitive evidence of a company's legal existence and legality of incorporation.Regardless of any registration flaws, the company becomes a legal commercial entity once a Certificate of Incorporation is granted.The printed Certificate of Incorporation makes a company as a legal entity with perpetual succession. After conclusiveness of the certificate of incorporation, the company can enter into valid contracts. Regardless of any deficiencies in the procedures, the Certificate of Incorporation, once issued, serves as incontrovertible evidence of the company's existence.The birth of a corporation cannot be called into doubt if it is registered with illegal objects.The only option is to close the company down.After getting a Certificate of Incorporation, a private company can immediately begin operations.

With a certificate of incorporation, a company can start operations after raising the necessary finances from friends, relatives, or through private agreement.A company, on the other hand, must complete two further phases in its formation.

The Consequences of Obtaining a Certificate of Business Start-Up -

The Registrar issues a Certificate of Commencement of Business, on finding the documents such as memorandum of association, articles of organization, and consent of Directors found satisfactory.This certificate provides as confirmation that the company is legally permitted to operate.The formation of a public corporation is complete after this certificate is issued, and the company can lawfully begin doing business.

2.5 Promoter

Definition of a Promoter

Promotion is a broad phrase that refers to the preliminary measures conducted in preparation for a company's registration and floating.The persons who assume the task of promotion are known as promoters, who can be individual, syndicate, association, partnership or company.

General definitions

The term "promoter" is a business term, not a legal term.Although it is not defined in the Act, a number of court rulings have sought to clarify it."A company promoter is a person who comes up with a scheme for the formation of a company, has the memorandum and articles prepared, executed, and registered, finds the first directors, settles the terms of preliminary contracts and prospectus (if any), and makes arrangements for advertising and circulating the prospectus and placing the capital," according to Palmer.A "Promoter is one who undertakes to organise a corporation with reference to a specified object and to set it starting, and who takes the required actions to accomplish that purpose," according to Justice Cockburn.

Guthmann and Dougall discusses that a promoter is someone who brings together the men, the money, and the resources to form a viable business.Section 2(69) defines the term'promoter' as follows-

(a) who has been recognised as such in a prospectus or by the company in the annual return referred to in section 92; or
(b) who has direct or indirect control over the affairs of the company as a shareholder, director, or otherwise;
or (c) in whose advice, directions, or instructions the company's Board of Directors is accustomed to act

A promoter's responsibilities include:

1. generating a business idea and founding a firm.

2. To research the idea and determine whether the firm's information is profitable or not.

3. To gather the required number of people for the formation of a company and select its first directors.

4. To finalize the contents of the company's memorandum and articles of organization, and to have these documents produced and printed, as well as to arrange for the company's registration.

5. To make significant business decisions, such as:

i. What will the company's name be?

ii. Where will it be registered (in which district and state)?

iii. What is the amount of capital to be introduced?

iv. How will the share capital be structured?

v. Who will act as the capital issue's broker or underwriter?

vi. Who is going to be your banking partner?

vii. Who will serve as the Auditor?

viii. Who shall be named as a legal adviser, and so forth.

ix. To draught and print the prospectus x. To enter into preliminary contracts

xi. To cover preliminary costs

xii. Obtaining a loan from a bank or other financial organization

xiii. To fulfil any other activities required for the formation of a corporation

xiv. To conduct negotiable transactions

It can be explained as follows:

a) Quasi-Trustee: The promoter's position is fiduciary in relation to the company he is promoting, and his status is quasi-legal.Because there is no trust or principal in existence at the time of his efforts, a promoter is neither a trustee nor an agent of the firm he promotes.

b) Fiduciary: A promoter owes a fiduciary duty to a proposed company that will be established soon.Because the corporate entity of the company does not exist until it is constituted in accordance with the rules of the Companies Act, the promoter is neither a trustee nor an agent of the company.Lord Cairns declared in the famous judgment of Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 that a company's promoters unquestionably occupy a fiduciary position.They are in charge of forming and shaping the company.They have the authority to determine how, when, in what form, and under what supervision it will come into being and begin to operate as a trading business.

Fiduciary Duty of a Promoter can be summarized as:

(i) Obligation not to make any secret profits: If a promoterearns any undisclosed profits, he owes it to the public to reveal all money obtained in this manner.

(ii) To provide the Company with a negotiating advantage.

(iii) To provide the Company an advantage in negotiations.

(iv) To make a complete disclosure of potential conflicts of interest:Assume that a promoter signs a contract to sell the firm a property that he acquired while serving in a fiduciary capacity for the company but never disclosed.In this case, the corporation has the option to either disclaim or cancel the sale.

(v) Not to make unfair use of positionRegarding Prospectus: A promoter must ensure that: -

1. A prospectus or a statement in lieu of a prospectus contains all relevant information.

2. A prospectus or statement in lieu of a prospectus contains no inaccurate or misleading statements.

3. The prospectus contains no substantial factual errors.

2.6 Rights of a promoter

1. Right of indemnity: When more than one individual acts as the company's promoters, one promoter can sue another promoter for the money and damages he paid. Promoters are jointly and severally accountable for any false statements made in the prospectus, as well as for any hidden gains.

2. Right to receive valid preliminary expenses: A promoter is entitled to collect genuine preliminary expenses incurred in the establishment of the company, such as advertising costs, solicitors' fees, and surveyors' fees.It depends upon the discretion of the directors of the company.

It is up to the company's board of directors to decide.

3. Claim to payment: Unless a contract specifies otherwise, a promoter has no right to remuneration from the company.Although the company's articles may provide for the directors to pay promoters a specific amount for their services, this does not provide the promoters any contractual right to sue the company.This is merely a power given to the company's directors.

Duties and Obligations of Promoter

1. To reveal the hidden profit: All concealed earnings made by the promoter without full disclosure to the firm must be reported to the corporation.It is his duty to disclose all the money secretly obtained by way of profit. The company may sue him for an amount of profit and recover the same with interest. It can also rescind the contract and recover the money so paid. However, he is empowered to deduct the reasonable expenses incurred by him.

2. To reveal all relevant information: All significant facts should be disclosed by the promoter.If a promoter agrees to sell the company a property without making a full disclosure and the property was acquired while he was in a fiduciary relationship with the company, the company may either reject the sale or affirm the contract and reclaim the promoters' profit.

3. Repayment of benefits received as a trustee:A promoter has a fiduciary responsibility to the company.It is the promoter's responsibility to repay the firm what he has obtained as trustee, not what he may obtain at any moment.

4. Duty to disclose private arrangements: It is the duty of the promoter to disclose all private arrangement resulting him profit by the promotion of the company.

5. Promoter's duty to future allottees: When the promoters are stated to be in a fiduciary relationship with the business, this does not indicate that they are just in this relationship with the company or with the signatories of the company's memorandums.They will likewise have this relationship with future share allottees.

Liabilities of Promoter:

The liabilities of promoters are given below:

1. Profit liability: A promoter owes the firm a fiduciary duty to account for all covert profits he makes without fully disclosing them to the company.If the promoter fails to report the profit, the corporation may take one of the two options below.

(i) The corporation has the right to sue the promoter for a profit and recover it with interest.
(ii) The company has the option to cancel the contract and receive a refund of the money paid.

2. Liability for omissions in the prospectus: Section 26 of the Companies Act of 2013 specifies the information that must be included in a prospectus.A promoter may be held accountable if the section's provisions are not followed.If a Promoter is found guilty of misrepresentation, he or she faces civil and criminal penalties.Criminal liability for misrepresentation is addressed under Section 34 of the Companies Act of 2013.Under Section 447 of the Act, a promoter who is at fault bears the same liability as a fraudster.A promoter may be held accountable under sections 34 and 35 for any untrue statement in a prospectus to a person who subscribes for shares or debentures on the basis of that prospectus.The promoter's culpability in such a case, however, would be restricted to the original share allotee and would not extend to subsequent allotters.

A person who commits fraud is subject to imprisonment for a period ranging from six months to 10 years, according to Section 447. Promoter is also liable to a fine, which can extend to three times the amount involved in the fraud. In cases where the fraud involves public interest, the term of imprisonment shall not be less than three years. Section 35 of the Companies Act provides for civil liability for misstatement in prospectus.

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 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: National Company Law Tribunal can make an order for examination of a Promoter just like any director or officer of a company, in a case where after winding up order, the liquidator states in his report that a fraud has been committed in promotion or formation of company.

Preliminary Contracts/Pre-Incorporation Contracts made by Promoters:

Preliminary contracts 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.

Case Study: Re English & Colonial Product Co. (1906) 2 ch. 435

Issue: Promoters of a proposed company appoint a solicitor to draft memorandum of association and article of association of company and get it registered. Accordingly, the solicitor filed a suit against the company for recovery of his service charges and expenses incurred by him.

Solution to the case

Rule: Company is not bound by Pre-incorporation Contracts entered into by the Promoter.

Analysis: In this case company was not held liable as the court observed that those expenses were incurred before it existed.

Conclusion:For the pre-incorporation contracts a company is not liable.

2. That the company when registered cannot ratify the agreement as it 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.

Case Study: Natal Land & Colonisation Co. v. Pauline C. Syndicate (1904) AC 120

Issue: Mr. A entered into a contract with B, who acted on behalf of a proposed syndicate. Under the contract Mr. A was to give a lease of coal mining rights to the syndicate. The syndicate was then registered as B & Co. On registration it asked for agreed mining rights, which Mr. A refused. The company filed a suit against Mr. A claiming that he should be ordered to give lease of mining rights to B & Co.

Solution to the case

Rule: A Company cannot enforce Pre-incorporation Contracts.

Analysis: Contract of lease happened before the company could actually come into existence.

Conclusion: It was held that legal action by B&Co. is not maintainable as it was not in existence when the contract between Mr. A and syndicate were signed.

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.

Natal Land & Colonization Co. v. Pauline C. Syndicate (1904) AC 120

Issue: Mr. A entered a contract with B, who acted on behalf of a proposed syndicate. Under the contract Mr. A was to give a lease of coal mining rights to the syndicate. The syndicate was then registered as B & Co. On registration it asked for agreed mining rights, which Mr. A refused. The company filed a suit against Mr. A claiming that he should be ordered to give lease of mining rights to B & Co.

Solution to the case

Rule: ACompany cannot enforce Pre-incorporation Contracts.

Analysis: Legal action by B&Co. is not maintainable as it was not in existence when the contract between Mr. A and syndicate were signed.

Conclusion: Since the company did not exist when the two parties entered into the contract, no legal action is possible.

Summary

A business needs a certificate of incorporation to carry out lawful activities under its business name. A good time to file an application to obtain a certificate of incorporation is generally after business owners have decided that they want to operate their company as a corporation, after the promoter has decided its name, abbreviated form, a statement specifying the business purpose, registered office address and the name of the registered agent for the address, number of shares that are authorized to be issued and the description of the different types of stock that can be issued if there is more than one type.

Keywords

Pre-incorporation contract: Such a contract never binds a company since a person cannot contract before or its existence. It is so because a company before incorporation has no legal existence.
Promoters: Promoters are described to be in fiduciary relationship (relationship of trust and confidence) with the company.
Promotion: 'Promotion' is a term that denotes preliminary steps taken for the purpose of registration and floatation of the company.

Self Assessment

Q1. Name will be reserved by using Part A of

A. SPICe+
B. SPICE –
C. SPICe-
D. SPICE++

Q2. If a Company is Listed in the stock exchange, its Corporate Identification Number will start with alphabet ……

A. X

B. Y
C. U
D. L

Q3. A company CIN No. Code, shall have …... digits alpha-numeric code.

A. 11
B. 12
C. 21
D. 31

Q4. Minimum number of members required to apply for incorporation certificate in a public ltd company is

A. 3
B. 7
C. 2
D. 50

Q5.The application for a company's registration should be submitted to the registrar of the state where the company's _____will be located.

A. Manufacturing plant
B. first branch
C. business office
D. any of the above

Q6. Contracts entered into by a public company after it has received its certificate of incorporation but before it has received its certificate to begin doing business are known as____

A. Provisional contracts
B. Construction contracts
C. Basic contracts
D. Contingent contracts

Q7. Which of the given order is true regarding the stages of formation of a public company?
A. Promotion, Commencement of Business, Incorporation, Capital Subscription
B. Incorporation, Capital Subscription. Commencement of Business, Promotion
C. Promotion, Incorporation, Capital Subscription, Commencement of Business
D. Capital Subscription, Promotion, Incorporation, Commencement of Business

Q8. Preliminary Contracts are signed____
A. Before the incorporation
B. After incorporation but before capital subscription
C. After incorporation but before commencement of business
D. After commencement of business

Q9. Preliminary Contracts are____
A. binding on the Company
B. binding on the Company, if ratified after incorporation
C. binding on the Company, after incorporation
D. not binding on the Company

Q10. Identify the false statement regarding the Promoter:

A. Until the contracts are discharged or the firm assumes the promoter's duty, a promoter is personally liable for all contracts established on behalf of the company.

B. A promoter's death does not absolve him of his obligations.

C. Until the contracts are discharged or the firm assumes the promoter's liability, a promoter is personally liable for all contracts made on behalf of the company.

D. When a promoter dies, he is no longer liable.

Q11. In case of misstatement in Prospectus, a Promoter is liable to a fine:

A. Which can go up to two times the amount of the fraud.

B. If the fraud is in the public interest, the term of imprisonment must be at least three years.

C. The term of imprisonment shall not be less than three years if the amount involved in the fraud is three times the amount involved in the fraud or if the crime involves public interest.

D. The period of imprisonment shall not be less than three years, if the fraud concerns the public interest and the amount involved in the fraud is three times the amount engaged in the fraud.

Q12. The company may_____, if a promoter contracts to sell a property to the company without giving a full disclosure, and the property was acquired when he was in a fiduciary position to the firm.

A. Perform the obligations laid under the contract.

B. Repudiate the sale or affirm the contract

C. Repudiate the sale or affirm the contract and recover the profit made out of it by the promoters

D. Recover the profit made out of it by the promoters

Q13. Identify which of the given is not a right of promoter?

A. Right of indemnity

B. Right for entertainment

C. Right to receive the legitimate preliminary expenses:

D. Right to receive the remuneration

Q14. Consent of Nominee is taken in:

A. INC–3

B. INC-2

C. INC-1

D. INC-4

Q15. The charge for submitting an incorporation form for a company with a share capital of more than Rs. 15,00,000 shall be:

A. NIL

B. Rs. 100

C. Rs. 500

D. Rs. 1,000

Answers for Self Assessment

1.	A	2.	D	3.	C	4.	B	5.	C
6.	A	7.	C	8.	A	9.	D	10.	B
11.	D	12.	C	13.	B	14.	A	15.	C

Review Questions

1. Discuss the duties and obligations of a Promoter?

2. Who is a Promoter? Discuss his position in relation to the company he promotes.

3. Discuss the process of incorporation of a company in detail.

4.Explain certificate of incorporation in detail.

5. Discuss the rights and liabilities of a promoter in detail.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S.Gogna, S. Chand & Sons

2. Elements Of Company Law By N.D.Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

http://www.mca.gov.in/MinistryV2/homepage.html

https://cleartax.in/s/certificate-of-incorporation

Unit 03: Company Documents

CONTENTS

Objectives

After studying this unit, you will be able to:

- Comprehend the relevance, form, contents and alteration of Memorandum of Association and Article of Association.
- Cognize the concepts of doctrine of indoor management and constructive notice.

Introduction

The Memorandum of Association's objectives are carried out via the Articles of Association. The contents of the Memorandum of Association (MOA) and Articles of Association (AOA) must be finalized during the establishment of a corporation. These documents should be written and posted through the Ministry of Corporate Affairs' web page. Instead of utilizing a physical form, the memorandum of association and articles of association must be prepared digitally using form INC-33 and INC-34 forms respectively. Whether you're forming a company under Section 8 of the Act, you'll need to fill out FORM No.INC-13 (Memorandum of Association) (spice plus).

3.1 Memorandum of Association

Meaning of a Memorandum of Association

A memorandum of Association is the business's charter, and it lays out the basic terms under which the company can be formed. It contains the company's formation objects. The company must act within the boundaries of the MOA's stated objectives. It both defines and limits the company's authority. Anything done outside of the scope of the MOA will be considered ultra vires. Their actions will be void and null. The outsider has to transact after properly reading the MOA.

Purpose of MOA

1. ***For Prospective Shareholders***

To find out:

i) How the money will be spent?

ii) What are the risks associated with the investment?

2. ***For Outsiders:***To determine whether the contracts negotiated are within the company's objectives?

Printing of Memorandum of Association

A Memorandum of Association should be laser printed neatly and legibly. It should be broken down into paragraphs and numbered properly. In the case of public Subscribers, it must be signed by 7 people, and in the case of private Subscribers, it must be signed by two people.

Tables for drafting Memorandum of Association

Because there are several tables for different companies, the company must adopt one that is suitable to it. The summarized table describes the form to be used by different companies regarding the drafting and submission of a Memorandum of Association:

Table coding	Form details
Table A	For company limited by shares.
Table B	For company limited by guarantee and not having a share capital.
Table C	For a company limited by guarantee and having a share capital.
Table D	Form for an unlimited company.
Table E	For unlimited company and having share capital.

3.2 Clauses or Contents of Memorandum of Association

A company's Memorandum of Association contains eight clauses in total. These are outlined in further detail below:

1. **Name Clause:** A Promoter who wants to start a business must choose at least one good name, and up to six names in order of preference, that reflect the firm's main objectives. It's crucial to make sure the name doesn't clash with the name of any other company that's already been registered, as well as the standards for emblems and names (Prevention of Improper Use Act, 1950).

   The promoter can check the availability of a proposed company's name on the Ministry of Corporate Affairs' portal. He must log in to the site and apply to the relevant Registrar of Companies (RoC) to check the availability of the name in eForm1A.A charge of Rs. 500/- must be paid along with the form, which must also include the digital signature of the applicant proposing the firm. If the suggested name is not available, the user must submit a new application with a new name. Within 60 days of receiving name approval, the applicant can file for new company registration by submitting the relevant forms (Forms 1, 18, and 32).

   Avoiding any undesirable name

   a) Identical or confusingly similar to the name of an existing company registered under this act or any earlier company law, for example, I cannot keep my company name of ITC Limited because it is already registered. It has a diverse footprint spanning industries such as

cigarettes, FMCG, hotels, packaging, paperboards and specialty papers, and agribusiness, and is headquartered in Kolkata.

b) A deceptive/misleading name, implying the company is affiliated with or endorsed by the Central Government, any State Government, or any local authority, corporation, or entity established by the Central Government or any State Government under any current law.

c) Search word or expression as may be prescribed.

Prohibition of use of certain names

The Emblems and Names (Prevention of Improper Use) Act of 1950 makes it illegal to use or register a corporation or firm with any of the names or emblems listed in the act's schedule. Name, emblem, or official seal of the United Nations Organization, World Health Organization, Central Government and State Governments, President of India or any state governor and Indian Flag should be avoided in the name of a company.

Suffix to added

The last words of the name must be limited or private limited, depending on the situation.

It is not necessary for the term "business" to be included in the name.

Publication of a firm's name:

a) Every company should have a common seal with its details written in legible characters and in the local language, provided it has not authorized 2 directors or 1 director and 1 company secretary. If it has then no need of common seal.

b) Have its name engraved in legible characters on its seal;

c) Have its name, registered office address, and CIN (corporate identity number), as well as telephone, fax, e-mail, and website addresses, printed on all business letters, letter papers, billheads, and notices and other official publications. It should also have its name printed on hundis, promissory notes, and bills of exchange.

Did you know? : For the sake of 'Ease of Doing Business,' the Ministry of Corporate Affairs reduced its requirements for name approval under the Incorporation Rules 2016.Now, a proposed corporate need not reflect its operation and does not have to be in accordance with the objectives.A company name can be imprecise or truncated, and it can engage in entirely new economic activities without changing its name.

2. Registered Office Clause/ Situation Clause

The old name for situation clause used to be known as Registered Office clause. A company's Memorandum of Association must include the name of the state in which the company's registered office will be located. This determines the company's domicile and includes the names of the registrars. A newly created company must have its registered office within 30 days of its incorporation, rather than 15 days, per Section 12(1) of the Companies (Amendment) Act 2017.

A Memorandum of Association of an entity must state the name of the State in which the registered office of the company is to be situated. This decides domicile of company and also has the names of the registrars enrolled. As per Sec 12(1) Companies (Amendment) Act 2017, a newly incorporated company shall have its registered office within 30 days of its incorporation instead of 15 days. After the date of incorporation of the company, notice of any change in the situation of the registered office, verified in the manner prescribed, must be sent to the Registrar within 30 days of the change, who will record it.

3. Objective Clause

The Memorandum clearly states the company's objectives, as a corporation can only do what is connected to the objectives in the Memorandum. When a corporation is registered, these

objectives define and limit the scope of its operations and abilities. It can be changed in accordance with the Act's provisions. Subscribers to the memorandum have the option of choosing the company's goal.

 Notes: Points to be kept in mind while drafting Object Clause are---

(i) It must not be illegal;
(ii) It must not be contrary to the Companies Act; and
(iii) It must not be contrary to public policy
(iv) It can't be against the law of the land
(v) It must be crystal clear and unmistakable.

Purpose of an object clause

The purpose of an object clause is basically to inform MOA subscribers about the uses to which their money may be put. It also assists, the creditors and other parties interacting with the company about the firm's permissible spectrum of enterprise or operations.

4. **Liability Clause:** Liability refers to as an obligation to pay some fixed amount to the creditors. Liability limited by shares is a condition as per which shareholders are legally liable to pay the debts of a company only to the extent of the nominal value of their shares. Companies having Liability limited by Guarantee does not usually have a Share capital or shareholders, but instead has members who act as guarantors. So, what so ever type of liability that the shareholders shall undertake needs to be clearly mentioned in the MOA of the company. Company with Unlimited Liability is a hybrid company incorporated with or without a share capital and where the legal liability of the members or shareholders is not limited.
5. **Capital Clause:** The Memorandum of Association having a share capital shall state the amount of share capital with which the company is to be registered and its further division into shares of a fixed amount. This clause shall provide information regarding the registered/ authorized/ nominal Capital, Equity/ Preference shares and Number and value of shares into which capital is divided. Equity shares means all shares which are not preference shares and provide voting rights to its holder. These have no preferential or special rights in respect of annual dividends (but paid out of profits after preference shareholders) and in the repayment of capital at the time of liquidation of the company are called equity shares. Preference shares Carry a preferential right in terms of - payment of dividend, either fixed or amount @ a fixed rate and repayment of capital in the case of winding up of company as they receive it first before anything is paid to the equity shareholders.
   i) Amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
   ii) The number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

 Notes: In the case of One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company

6. **Succession Clause:** This clause states that the persons subscribing their signatures at the end of the Memorandum are desirous of forming themselves into an association in pursuance of the Memorandum.

 W.E.F from 1 Jan 2017 we can use INC 33 for filling eMOA in that case we require Digital Signature Certificate of subscribers as well as of witness.

7. **Association Clause:** The subscriber must make a declaration reading as under: -

"We, the several persons, whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set against our respective names"


Notes: Signature Name, Address, Description and occupation of the subscribers; Number of equity shares taken by each subscribers and Signature, Name, Address, description and occupation of the witnesses also needs to be mentioned.

8. **Succession Clause:** According to this clause the memorandum must state the name of the person who shall become the member of the company in the event of death of the subscriber.

3.3 Alteration of Memorandum of Association

The expression 'alter' means to modify, change or vary; to make or become different; to change in character, appearance, etc. to change in some respect.Section 13 of the Companies Act states that a company may alter the provisions contained in its MoA.

(i) Alteration is possible with the approval of members of a company via Special Resolution
(ii) No alternations shall have any effect unless registered with the Registrar
(iii) The alteration is done with reference to Companies (Incorporation) Second Amendment Rules, 2017 notified by MCA; Rules 28/ 30 relating to shifting of registered office and Forms INC 23/ INC 26 Amended; The Companies (Amendment) Act, 2017 (Amendment Act) (Passed on 3rd January, 2018) and Companies (Incorporation) Amendment Rules, 2018. (come into force from the 26th day of January, 2018).

Steps for alteration in Memorandum of Association:

Step 1: Informing about a Board Meeting of Directors as per section 173 and SS-1. A notice of Board Meeting should be issued to all the directors of company at least 7 days before the date of Board Meeting. There should be also an attachment of meeting agenda, notes to agenda and draft resolution.

Step 2: Hold the Board Meeting

At the Board meeting, the given resolutions for the alteration of MOA must be passed.This requires obtaining an approval for the Alteration in Memorandum of Association and recommend the proposal for members' consideration by way of special resolution.A specific date, time, and venue of the general meeting must be fixed. An authorized director or any other person should send the notice for the same to the members.

Step 3: Issue a Notice of General Meeting(Section 101)

Notice of Extraordinary General Meeting needs to be given at least 21 days before the actual date of its conduct. This meeting can also be called on a Shorter Notice with the consent of at least majority in number and ninety-five percent of such part of the paid-up share capital of the company giving a right to vote at such a meeting. The parties who need to attend such a meeting includes all the Directors, Members and Auditors of Company.


Notes: The notice shall specify the place, date, day and time of the meeting and contain a statement on the business to be transacted at the EGM.

Step 4: Hold General Meeting(Section 101)

To hold a general meeting, it is important to check the Quorum.Quorum of Meetings. In case of a private or public company, that depends upon their total members. In case of a Private company at least 2 members must be personally present to attend such meeting. If the members in a Public

Company are up to 1000 then quorum to hold a valid meeting is of 5 members. Incase the members are more than 1000 and up to 5000, then 15 members should be present but if the total exceeds 5000 members, then 30 members must be present. Apart from quorum, it is also important to check whether auditor is present. In case auditor is absent, then check out the person is on leave, whether such a leave is granted or not(As per Section- 146).In this meeting, a Special Resolution approving the alteration in MOA should be passed [Section-114(2)].

Step 5: Filing of form with ROC: (Section 117)

File the form MGT-14 (Filing of Resolutions and agreements to the Registrar under section117) with the Registrar along with the requisite filing within 30 days of passing the special resolution, along with given documents: -

Certified True Copies of the Special Resolutions along with explanatory statement; Copy of the Notice of meeting send to members along with all the annexure and a printed copy of the Altered Memorandum of Associations.

Following changes can be made in the contents of a Memorandum of Association.

1. **Alteration in name clause:** Changing the name of a company depends upon case to case. It can be done on its own discretion or on the direction of central government. If the company wants to alter its name on its own, then it needs to pass a special resolution for the same. This requires a prior approval of the central government. The company with a new name must intimate its new name within 30 days to the registrar. Thereafter, a fresh Certificate of Incorporation shall be issued to the company with its new name on it.

Example: 8K Miles Software Services Limited company got its new name as Securekloud Technologies Limited on 20th January 2021.

Aashee Infotech Ltd. Got renamed as Jatalia Global Ventures Limited on 24th April 2019.

A company name may be changed on directions of central government, if, through inattention or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which, —

(a) in the opinion of the Central Government, is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;

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

(c) Notice of change to registrar -Where a company changes its name or obtains a new name under (a) and (b)

(d) it shall, within a period of fifteen days from the date of such change, give notice of the change to the Registrar, along with the order of the Central Government,

(e) On receipt of notice of change, Registrar shall carry out necessary changes in the certificate of incorporation and the memorandum.

Did you know? **:** Penalty for not complying with any direction given by Central Govt.

- In case of failure to comply, a fine of Rs 1000 per day to the company
- and Rs 5000-100,000 to every officer

e-forms to be filled for alteration

(i) The existing company needs to reserve the name through 'RUN'.

(ii) After the name is approved, MGT-14 (necessary resolution for the alteration of Memorandum of Association and Articles of Association (MOA and AOA) needs to be filed.

(iii) eForm INC-24 (Application for approval of Central Government for change of name) needs to be filed to give effect to change in name.

(source-Companies (Incorporation) Amendment Rules, 2018)

Case study: Ewing vs. Buttercup Margarine Co. Ltd

The plaintiff, who carried on business under the trade name of the Buttercup Dairy Company, was held entitled to restrain a newly registered company from carrying on business under the name of the Buttercup Margarine Company Ltd on the ground that the public might reasonable think that the registered company was connected with his business. However, if the company's business is different from that of the complaining party, confusion is not likely to arise and an injunction will not be granted. To avoid the risk of choosing a name that ultimately turns out to be desirable, the promoters should enquire from the registrar whether the name they intend to give the company is "too like" that of a company already in the register of companies. After obtaining confirmation that the name is a registerable one they should immediately make a written application for its reservation under section 19(1) of the Act. Any such reservation shall remain in force for a period of 30 days or such longer period, not exceeding 60 days as the Registrar, for special reasons may allow. Every public company must write the word "limited" after its name and every private limited must write the word "private limited" after its name. Companies whose liabilities are not limited are prohibited from using the word "limited".

2. **Alteration of registered office clause:**

a) Shifting of the Registered Office outside the local limits of any city, town or village where such office is situated requires passing of special resolution by the company and notice of the change shall be given to the Registrar within 15 days of the change, who shall record the same.

b) Shifting of the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies requires passing of special resolution by the company and confirmation by the Regional Director on an application made by the company in this regard. The shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

c) Shifting of Registered Office from one State or Union territory to another State. The alteration of the memorandum relating to the place of the registered office from one State to another requires [Sec. 13(2)]:

i. Passing of the special resolution, and

ii. Approval of the Central Government

Procedure for Alteration of Memorandum of Association

An application for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State or Union territory to another, shall be filed with the Central Government along with the fee and shall be accompanied by the following documents:

- a copy of the memorandum and articles of association;

- a copy of the special resolution sanctioning the alteration by the members of the company;
- the list of creditors and debenture holders giving details of their addresses and amounts dues;
- an affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state;
- a copy of the notice served on the Registrar, Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application, and to the SEBI in case of listed companies.

The company shall at least 14 days before the date of hearing advertise the application in a vernacular newspaper and an English newspaper circulating in that district; serve individual notice(s) on each debenture holder and creditor of the company; and serve a notice together with the copy of the application to the Registrar and to the Securities and Exchange Board of India. Before confirming the alteration, the Central Government shall ensure that, with respect to every creditor and debenture holder who, have objections to the proposed shifting either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Central Government.The Central Government may make an order confirming the alteration on such terms and conditions, if any, as it thinks fit, and may make such order as to costs as it thinks proper:

Shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act. A certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.A company may change its registered office from one place to another within the local boundaries of the same city or town or village. It needs to pass a board resolution and needs to intimate the registrar of such change within 30 days to the registrar. The registrar will make a record of the same. In case the company wants to shift from one city to another within the same state (ROC is same), then it needs to pass a special resolution. The notice of change should be given to the registrar by the company within 30 days (The company shall file the special resolution with the registrar within 30 days).

3. Alter object clause

A company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company through postal ballot and the notice in respect of the resolution for altering the objects shall contain the following particulars:

i. The total money received the total money utilized for the objects stated in the prospectus;
ii. the unutilized amount out of the money so raised through prospectus;
iii. the particulars of the proposed alteration or change in the objects;
iv. the justification for the alteration or change in the objects;
v. the amount proposed to be utilised for the new objects;
vi. the estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
vii. the other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
viii. the place from where any interested person may obtain a copy of the notice of resolution to be passed.
ix. the details, as may be prescribed, in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;

The dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and

Exchange Board of India. In case of companies which have not raised money through prospectus, objects can be changed any time by passing of special resolution. The Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of 30 days from the date of filing of the special resolution.

5. **Alteration in the Liability Clause**

Ordinarily it cannot be altered so as to make the liability of the members unlimited. However, with the authority of the Articles of Association, a company may pass special resolution altering liability clause of the Memorandum of Association so as to make the liability of directors or of any one director or manager unlimited. But, in such a case any person holding office as director or manager before such alteration shall not be liable until the expiry of his present term or unless he has accorded his consent to his liability becoming unlimited. Alterations, which are likely to impose additional liability on a member or which are likely to compel a member to buy additional shares of the company after the date on which he became a member, not be made except with the consent of the member concerned in writing. However, in case a company happens to be a club or any other association and the alteration requires the member to pay recurring or periodical subscriptions or charges at a higher rate, the member will be bound by the alteration although he does not agree in writing to be bound by the alteration.

6. Alteration of the Capital Clause

Alterations in the capital clause of the Memorandum of Association may be of the following type:

- Alteration of the share capital
- Reduction of share capital
- Variation of the rights of shareholders
- Alteration of the Share Capital

Following kinds of alteration in share capital may be made by a limited company having a share capital, if authorized by its articles by passing of ordinary resolution at the general meeting (Section 61):

- increase its authorized share capital;
- consolidate or sub-divide its share capital into shares of larger or smaller denominations;
- convert its fully paid-up shares into stock, and re-convert that stock into fully paid-up shares of any denomination;
- Cancel shares which have not been taken or agreed to be taken by any person, and diminish the amount of its share capital.

Reduction of the Share Capital [Sec. 66]

To provide protection to interests of the investors especially creditors of companies, reduction of share capital is permissible with strict stipulation of the law. A company limited by shares or a company limited by guarantee and having a share capital, may, reduce its share capital by adopting any of the following *methods of reduction*:

i. extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;
ii. either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or
iii. either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

Procedure of Reduction

The articles of association of the company must authorize the company to reduce its share capital. (In case the articles do not authorize the company to do so, articles of the company have to be altered to authorize the company for the same). The company must pass a special resolution referred to as "a resolution for reducing share capital". The company has to apply, by petition to the Tribunal for an order confirming the reduction:

Provided that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it or the interest payable thereon. The Tribunal shall give notice of every application made to it for reduction of share capital to the Central Government, Registrar and to the Securities and Exchange Board, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by that Government, Registrar, the Securities and Exchange Board and the creditors within a period of three months from the date of receipt of the notice:

The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit.

The order of confirmation of the reduction of share capital by the Tribunal shall be published by the company in such manner as the Tribunal may direct.

(5) The company shall deliver a certified copy of the order of the Tribunal and of a minute approved by the Tribunal showing—

- the amount of share capital;
- the number of shares into which it is to be divided;
- the amount of each share; and
- the amount, if any, at the date of registration deemed to be paid-up on each share,
- to the Registrar within thirty days of the receipt of the copy of the order, who shall register the same and issue a certificate to that effect.

In the following cases reduction of share capital does not require sanction of the Tribunal.

i. forfeiture of shares
ii. surrender of shares
iii. cancellation of unissued capital (also known as diminution of share capital)
iv. buy-back of shares by the company
v. redemption of preference shares, and
vi. purchase by the company of shares of a member under an order of the Tribunal for prevention of oppression and mismanagement.


Did you know?

If any officer of the company—

- knowingly conceals the name of any creditor entitled to object to the reduction;
- knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
- abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under section 447.

3.4 Doctrine of Ultra Vires

'*Ultra*' means beyond, and '*vires*' means powers. Memorandum of Association of a company defines the powers of a company. Any act done contrary to or in excess of the scope of the activity of the company as laid down by its memorandum of association is *ultra vires* the company, *i.e.*, beyond the legal powers and authority of the company, and shall be wholly void and not binding on the company. Acts *ultra vires* the company can neither be legalized nor ratified even with the unanimous consent of all the members of the company.

Rationale of the Doctrine

The doctrine of *ultra vires* is primarily developed to protect the interest of the investors and the creditors. The doctrine prevents a company to employ the money of the investors for a purpose other than those stated in the object clause of the memorandum of association. Thus, the investors and creditors may be assured by this doctrine that their investment will not be directed for the activities which they did not contemplate while making investment in the company.

The doctrine prevents the wrongful application of the company's assets to result in losses or insolvency of the company. It puts a check on the directors of the company from deviating from the objects for which the company is formed. A company only has the capacity to do those acts which fall within its objects as set out in its memorandum of association or are reasonably incidental to the attainment of such objects.

Establishment of the Doctrine

The doctrine of *ultra vires* was established and applied in 1875 by the House of Lords in the case of

Case Study: *Ashbury Railway Carriage & Iron Co. Ltd.* v. *Riche.*

Issue: In this case, the company's objects, as stated in the memorandum of association, were:

(a) To make and sell, and lend or hire railway carriages and wagons, and all kinds of railway plants, fittings, machinery and rolling stock;

(b) To carry on the business of mechanical engineering and general contractors;

(c) To purchase, lease, work and sell mines, minerals, land and buildings, and

(d) To purchase and sell as merchants, timber, coal, metals, or other materials and to buy and sell any such materials on commission or as agents.

The directors entered into a contract with the defendant, Riche for financing the construction of a railway line in a foreign country and the company subsequently purported to ratify the act of the directors by passing a special resolution at a general meeting. The company, however, repudiated the contract. Riche thereupon sued the company for breach of contract.

Rule: If the borrowing is ultra vires the memorandum of association it is incapable of ratification by the company even with the assent of every shareholder

Analysis: The purpose of the memorandum is to enable the shareholder, creditors and those who deal with the company, to know what is its permitted range of enterprise. The Court finally gave the decision in favour of the plaintiff, Ashbury Railway Carriage Co. Ltd. and turned down the arguments of the defendant, Riche. The Memorandum of Association of Ashbury defined its objects as "to make and sell, or lend on hire railway carriages and wagons and all kinds of railway plants etc.; to carry on the business of mechanical engineering and general contractors…". The company entered into a contract with M/s. Riche, a firm of railway contractors, to finance the construction of a railway line in Belgium. On repudiation/cancellation of his contract by the company on the ground of its being *ultra vires,* Riche brought an action for damages for breach of contract on the ground that the words "general contractors" gave power to the company to enter into such contract and, that, it was well within the powers of the company.

Conclusion: The House of Lords held the contract as ultra vires the MoA (or company) and, therefore, declare it null and void. The doctrine of ultra vires should not be unreasonably understood and applied. It does not restrain a company from doing such things which are reasonably fair and incidental to its objects or which the company is authorized to do under the Companies Act.

For example, a company which has been authorized by its memorandum to purchase land had implied authority to let it and if necessary, to sell it. However, it has no power to go beyond the objects or to do any act which has not a reasonable proximate connection with the object or which would only bring an indirect or remote benefit to the company. There is difference between objects and powers. Powers are not to be stated in the memorandum. Even if stated, these can be used only to achieve the

objects of the company. In no case, these can become independent objects by themselves. Acts of a company may also be ultra vires the Articles or ultra vires the powers of the directors. Acts ultra vires the Articles can be validated and made binding upon the company by altering the Articles of Association with special resolution at a general meeting. Alteration of Article of Association with retrospective effect, if to the benefit of the company, shall be valid. An act beyond the scope of the powers of the directors may also be ratified by the general body of the shareholders.

Effects of Ultra Vires Transactions

Following are the effects of *ultra vires* transactions:

a. Injunction. Any member of the company can bring injunction against the company to restrain it from doing *ultra vires* acts.

b. Liability of Directors towards the Company. The directors of the company are personally liable to make good those funds of the company which they have used for *ultra vires* It is the duty of the directors of the company to employ funds and properties of the company for the purposes laid down in the memorandum of association of the company.

c. Liability of Directors towards the Third Party. Directors are the agents of the company. It is their duty to conduct the affairs of the company within the powers of the company as laid down in the memorandum. Where the directors represent the third party that the contract entered into by them on behalf of the company is within the powers of the company, while in reality the company has no such powers under the memorandum, the directors will be personally liable to the third party for his losses on account of breach of warranty of authority.

Case Study: Week v. Propert (1873)The directors of a railway company through an advertisement, invited applications to invest in the company by way of loans and bonds. The limit of borrowing as put in the memorandum had been exhausted. Week lent to the company on the faith of it. Held that the loan is *ultra vires* but Week could sue the directors for breach of warranty of authority.

d. Contract Void. A contract which is *ultra vires* the company will be void and of no effect whatsoever. "An *ultra vires* contract being void *ab initio*, cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence or delay". However, if the contract is only *ultra vires* the powers of the directors but not *ultra vires* the company, it may be ratified in the general meeting and thereby the company will be bound by it.

e. Ultra vires acquisition of Property. When money of a company is spent *ultra vires* in acquiring a property, the right of the company over that property would be secure. This is because the property represents corporate capital, though acquired wrongly.

However, where the payment for ultra vires acquired property/asset has not been made, the vendor can obtain a tracing order to recover the property from the hands of the company. A company cannot be allowed to benefit from such transactions at the cost of the other party.

f. Ultra vires Borrowings. A bank or other person lending to company for purposes *ultra vires* the memorandum cannot recover the money under that loan agreement. But nothing prevents the company from repaying that money. The lender is also entitled to a tracing order, and if the money lent is traced *in specie* or into any investment held by the company, the lender can recover it from the company in that form. Further, if that money is used by the company in discharging any debts or liabilities of the company, the lender will, on accounts of principle of subrogation, step into the shoes of the creditors whose claims have been paid off by the company and acquire rights against the company.

g. Ultra vires Lending. If the money has been lent by the company and the lending is *ultra vires*, the contract would be void. No action can be brought on it, but the company can sue for recovery of its

money. This is because the borrower who has made a promise to repay that money, cannot be allowed to refrain from paying it back on the ground that it is without authority.

h. Ultra vires Torts. In order to make the company liable for the torts (civil wrongs) of its employees, it is to be proved that the tort was committed in the course of an activity which falls within the purview of the company's memorandum, and the tort was committed by the employee in the course of his employment.

Issue: A company, having the statutory powers to run tramways, starts operating omnibuses–a venture entirely outside its memorandum. The driver of one such bus negligently injures *X*. Can the company be held liable?

Rule: In order to make the company liable for the torts (civil wrongs) of its employees, it is to be proved that the tort was committed in the course of an activity which falls within the purview of the company's memorandum, and the tort was committed by the employee in the course of his employment.

Analysis: The company cannot be held liable for injury to *X* because the company does not have any existence outside its corporate sphere. Therefore, *X* 's remedy is only against the driver and not against the company.

Conclusion: From the case details it gets clear that the tort was committed in the course of an activity which falls very much within the purview of the company's memorandum. Hence, *X* 's can seek a remedy against the driver only and not against the company.

3.5 Article of Association

The Articles of Association (AoA) is a document that defines the purpose of a company and specifies the regulations for its operations. The document outlines how tasks should be accomplished within an organization, including the preparation and management of financial records, and the process of director appointments.

Tables for drafting AoA: The companies act specifies different e-tables to be used for the draft of AoA.

Table	Details
F	Company limited by shares
G	Company limited by guarantee and having share capital
H	Company limited by guarantee and not having share capital
I	Unlimited company and having share capital
J	Unlimited company and not having share capital

According to section 5, companies like unlimited companies, companies limited by guarantee, private companies limited by share must have own articles. Articles of an Unlimited company must state: a) Number of members with which the company is to be registered b) If it has a share capital, then amount with which company is to be registered. Articles of a company limited by guarantee must state the number of members with which the company is to be registered. Articles of a private company having share capital shall contain provisions which:

a) Restrict the right to transfer shares

b) Limit number of its members to 50

c) Prohibit any invitation to the public to subscribe for any shares in, or debentures of, the company

Form and Signature of Articles:

The article shall be:

a) Printed

b) Divided into paragraphs

c) Signed by each subscriber of memorandum.

Contents of AoA

1. Share Capital and variation of rights
2. Lien
3. Call on Shares
4. Transfer of Shares
5. Transmission of Shares
6. Forfeiture of Shares
7. Alteration of Capital
8. Capitalization of Profits
9. Buy-back of Shares
10. General meetings
11. Proceedings at General Meetings
12. Adjournment of meeting
13. Voting rights
14. Proxy
15. Board of Directors
16. Proceedings of the Board
17. Chief Executive Officer, Manager, Company Secretary or Chief Financial officer
18. The seal
19. Dividend and Reserves
20. Winding up

Circumstances under which companies need to alter their Articles of Association

Conversion of Private Company into Public Company or Public Company into Private Company OR Alteration in any of the existing Articles.

3.6 Procedure of altering the articles

Step 1: Convene a Meeting of Board of Directors As per Section 173 & Secretarial Standard (SS-1)

A notice of this meeting must be sent to all the Directors of Company at their addresses registered with the Company, at least 7 days before the date of conduct of such a meeting. A shorter notice can also be issued in case of urgent matter to be discussed. In this notice an Agenda, Notes to Agenda

and Draft Resolution with the Notice must be attached. In this notice an Agenda, Notes to Agenda and Draft Resolution with the Notice must be attached.

A Board Resolution need to be passed in the meeting for the given reasons:

i) for alteration of articles;

ii) to authorize a Company Secretary or any Director to sign and file the relevant form with Registrar of Companies and to do such acts, deeds and things as may be necessary to give effect to the Board's decision;

iii) to fix the day, date, time and venue of the General Meeting and to approve the draft notice convening the General Meeting along with explanatory statement annexed to the notice as per requirement of the Section 102 of the Companies Act, 2013 and authorize the Director or Company Secretary to sign and issue notice of General Meeting.

Once the Board meeting gets over its important to prepare and circulate Draft Minutes within 15 days from the meeting so held, by Hand/ Speed Post/ Registered Post/ Courier/ E-mail to all the Directors for their comments.

Step 2: Convene General Meeting

Notice of General Meeting shall be given at least clear 21 days before the conduct of actual date of a General Meeting. A Shorter Notice can also be issued with the consent of at least majority in number and 95% of such part of the paid-up share capital of the company giving a right to vote at such a meeting as per Section 101. Notice will be sent to all the Directors, Members, Auditors of Company, Secretarial Auditor, Debenture Trustees and to others who are entitled to receive the notice of the General Meeting. Notice shall specify the day, date, time and full address of the venue of the Meeting and contain a statement on the business to be transacted at the Meeting. Well, now on a fixed day the General Meeting will be held and a Special Resolution for alteration of Articles of Association shall be passed.

Disclose the proceedings of General Meeting to the Stock Exchange within 24 hours from the conclusion of the meeting and post the same on Company's website within 2 working days. Prepare the minutes of General Meeting, get them signed and compile accordingly.

Step 3: Filing of Form MGT-14 with ROC

File the form within 30 days of passing the Special resolution in the General Meeting, along important documents as an attachment namely:

1. Certified True Copies of the Special Resolutions along with explanatory statement
2. Copy of the Notice of meeting sent to members along with all the annexure
3. Altered Articles including the provision of entrenchment inserted in the Articles, if any.
4. Copy of Attendance Sheet of General Meeting
5. Shorter Notice Consent, if any.

Step 4: Alteration of Articles to be noted in every copy

As per section 15(1): Every alteration made in the articles of a company shall be noted in every copy of the articles.

Provision for Entrenchment Clause

An entrenchment clause is the one that makes certain amendments either impossible or difficult. It contains specified provision of articles may be altered only if more restrictive conditions or procedure is followed. Any entrenchment Clause which is against the provision of Companies Act, 2013 or Memorandum of Association is void and unenforceable. An entrenchment provision can be made at the time of incorporation of the company, or after the incorporation of the company by way of an amendment to the articles of association of the company. Where the articles contain such provision Company shall give the notice to registrar in the prescribed manner

Statutory right of alteration

Sec 14 of the act gives a clear and statutory power to the company to alter AOA. This power cannot be taken away from the company. Any clause in articles of association providing that company cannot alter its article, is invalid

Notes: Amendments in articles must be agreed to by all members in case of a private company and in case of public company amendments in articles should be done by special resolution.

Limitations of Alteration

- ✓ Must not be inconsistent with the Act
- ✓ Must not conflict with Memorandum of Association
- ✓ Must not sanction anything illegal
- ✓ Must be for the benefit of the company
- ✓ Must not increase the liability of a member
- ✓ Alteration by special resolution only
- ✓ Breach of Contract
- ✓ Must not result in the expulsion of a member
- ✓ No power of the tribunal to amend articles
- ✓ Alteration may be with retrospective effect

3.7 Difference between MoA and AoA

Basis for Comparison	Memorandum of Association	Articles of Association
Meaning	Memorandum of Association is a document that contains all the fundamental information which are required for the incorporation of the company.	Articles of Association is a document containing all the rules and regulations that governs the company.
Type of Information contained	Powers and objects of the company.	Rules of the company.
Status	It is subordinate to the Companies Act.	It is subordinate to the memorandum.
Retrospective Effect	The memorandum of association of the company cannot be amended retrospectively.	The articles of association can be amended retrospectively.
Major contents	A memorandum must contain six clauses.	The articles can be drafted as per the choice of the company.
Obligatory	Yes, for all companies.	Only a private company is required to frame its articles while a public company limited by

Basis for Comparison	Memorandum of Association	Articles of Association
		shares can adopt Table F in place of articles.
Compulsory filing at the time of Registration	Required	Not required at all.
Alteration	Alteration can be done, after passing Special Resolution (SR) in Annual General Meeting (AGM) and previous approval of Central Government (CG) or Company Law Board (CLB) is required.	Alteration can be done in the Articles by passing Special Resolution (SR) at Annual General Meeting (AGM)
Relation	Defines the relation between company and outsider.	Regulates the relationship between company and its members and also between the members inter se.
Acts done beyond the scope	Absolutely void	Can be ratified by shareholders.

3.8 Doctrine of Constructive Notice

The Doctrine of Constructive notice talks about assuming the person or entity has all the knowledge about the law which a reasonable person should have. In this doctrine, it is noted that no person cannot give the excuse of he was not aware of any specific notice or law, such in conditions like a legal notice of company which is published in a newspaper which the designated for legal notices or posting them in the designated court house. As these places are public, it is assumed that the person involved in a dispute have acknowledged about this notice. The articles and memorandum of association of a company are registered with registrar of companies, as of this office of the registrar is a public office the above-mentioned documents become public documents, and these documents become accessible for all. So, it is the duty of all persons belonging to the company to have knowledge about the public documents, their conduct should be relatable to the provisions of the documents.

Meaning of Constructive Notice

The constructive notice states that every outsider dealing with the company is deemed to have a proper notice or knowledge of Memorandum of Association and Article of Association. These documents assume character of public documents and are open as well as accessible to public to see. It is the duty of every person dealing with the company to have thorough knowledge of contents of MoA and AoA.

Case Study:

Issue: The Article of the Company stated that the cheque must be signed by 2 or 3 directors and the secretary. But the issue regarding this case was that the Director who signed the cheque was not properly appointed at the time of signing.

Rule: Section 399 of the Companies Act 2013 states that it is essential for outsiders to read and gain knowledge of memorandum of association, article of association and

other important public documents published by the company before entering into a contract. Ignorance of such knowledge of facts is not acceptable by law.

Analysis: In this case directors' appointment was not done as per the provisions laid regarding their appointment. Still, the director signed the cheque.

Conclusion: Appointment of the Director came under the Internal Management of the Company. Even if the director was not properly appointed, the third party was entitled to receive or cash the cheques as Mr. Mahony is entitled to presume that the Directors were properly appointed

3.9 Doctrine of Indoor Management

The doctrine evolved 150 years ago and is also known as Turquand's rule. The role of the doctrine of indoor management is opposed to the role of the doctrine of constructive notice. The doctrine of indoor management protects outsiders against the actions of the company. It is a possible safeguard against the possibility of abusing the doctrine of constructive notice. The person who is entering into a transaction with the company just needs to ensure that proposed transaction is not inconsistent with the articles and memorandum of the company. Such a person is not bound to see the internal irregularities of the company. In case there are any internal irregularities then the company shall be liable as the person must have acted in the good faith anddid not know about the internal arrangement of the company. The rule is based upon the obvious reason of convenience in business relations. Firstly, the articles of association and memorandum are public documents and they are open to the public for inspection. Hence an outsider "is presumed to know the constitution of a company, but what may or may not have taken place within the doors that are closed to him."

Case Study: Royal British Bank V. Turquand

Suppose that directors of a company borrowed some money from Mr. Turquand. The article of the company provided that the directors could borrow money after passing the resolution in the general meeting.The directors simply borrowed the money from Mr. Turquand without passing resolution. In this case shareholders claims that as there was no such resolution passed in general meeting, so the company was not bound to pay the money. It was held that the company is bound to pay back the loan to Mr. Turquand. As per the articles of association, directors could borrow provided a resolution is passed,

So, Mr. Turquand had the right to assume that the necessary resolution must have been passed. He may be unaware about internal irregularities of companies. It was held that Turquand could sue the company on the strength of the bond as he was entitled to assume that the necessary resolution had been passed. Lord Hatherly in this case observed- "Outsiders are bound to know the external position of the company, but are not bound to know its indoor management."

Exceptions:

1. **Knowledge of irregularity:** The rule will not apply if the person dealing with the company has a slight knowledge about the lack of authority of the person who is acting on behalf of the company in this situation the doctrine will not apply.

Case Study: Howard v. Patent Ivory Co.

Issue: As per the Articles of the company, the directors were authorized to borrow up to 1,000 pounds. Their limit to borrow could be raised provided consent was given in the General Meeting. They borrowed 3,500 pounds from one of the directors who took debentures Without the resolution being passed. Can the directors be held liable?

Rule: Outsiders are bound to assume that the necessary resolution has been passed

Analysis: The directors have borrowed excess money without following the proper procedure.

Conclusion: The directors shall be personally liable for money borrowed in excess of their authority.

2. **Negligence**: In case an officer of a company is doing something which he shall not ordinarily be doing within his authority, the person dealing with him must make proper inquiries and satisfy himself as to the officer's authority. If he fails to make an inquiry, he is prevented from relying on the rule.
3. **Forgery**: Forgery involves a false document, signature, or other imitation of an object of value

Case Study: B. Anand Behari Lal v. Dinshaw& Co. (Bankers) Ltd.,

Issue: An accountant of a company enters into a contract to transfer its immovable property of company in favor of Anand Behari. He does not check power of attorney executed in favour of accountant by the company. Can the transfer of property have held valid?

Rule: In case an officer of a company is doing something which he shall not ordinarily be doing within his authority, the person dealing with him must make proper inquiries and satisfy himself as to the officer's authority.

Analysis: The person transferring the immovable property had no authority but the buyer did not verify his authority

Conclusion: Hence, the transfer was void as it was beyond the scope of authority of an accountant.

used with the intent to deceive another. Those who commit forgery are often charged with the crime of fraud. Documents that can be the object of forgery include contracts, identification cards, and legal certificates. The rule does not apply to the transaction as Obviously in such transactions the consent of aggrieved party shall be missing. These are void ab initio. Here the question of consent cannot arise as the person whose signature is forged he is not even aware of the transaction.

Rouben v. Great Fingal Consolidated

Issue: Secretary of the company forged the signature of two of the directors and issued a certificate without the authority. The issue of the certificate required the signatures of two directors as given in the article. Can the transaction be held valid?

Rule: Transactions done through forgery are These are void ab initio
Analysis: Forged the signature of two of the directors were done and a certificate without the authority got issued by the secretary of a company.

Conclusion: Holder of the certificate cannot take the advantage of the doctrine as it was forged transaction which is void ab initio.

4. Act outside the scope of apparent authority

If an act is done in contradiction to their authority, it is considered void ab ignition.

 Example: Assume that a manager Mr. Charley, signs the bill of exchange of a company with his own signature under the words stating that he signed on behalf of the company. It shall be considered as forgery on part of Mr. Charley, when the bill was drawn in favour of a payee to whom he is personally indebted.

Difference between Doctrine of Constructive Notice and Doctrine of Indoor Management

Doctrine of **Constructive Notice**	**Doctrine of Indoor Management**
1. Protects the company against the outsider	1. Protects outsider against the company
2. It is confined to the external position and affairs of the company	2. It is confined to the internal position and affairs of the company

Conclusion

Memorandum and Articles are the two very important documents of the company, which are to be maintained by them as they guide the company on various matters. They also help in the proper management and functioning of the company throughout its life. That is why every company is required to have its own memorandum and articles.

Summary

Memorandum and Articles are the two very important documents of the company, which are to be maintained by them as they guide the company on various matters. They also help in the proper management and functioning of the company throughout its life. That is why every company is required to have its own memorandum and articles.

Keywords

Name Clause: This clause specifies the name of the company. The name of the company should not be identical to any existing company. Also, if it is a private company, then it should have the word 'Private Limited' at the end.

Liability Clause: Liability clause states the nature of liability of the members.

Memorandum of Association: The Memorandum of Association of a company is its charter which contains the fundamental conditions upon which alone the company can be incorporated.

The Capital Clause: It states the amount of share capital with which the company is registered and the mode of its division into shares of fixed value, i.e., the number of shares into which the capital is divided and the amount of each share.

The Object Clause: The objects clause defines the objects of the company and indicates the sphere of its activities.

Article of Association: The articles of association of a company and its bye laws are regulations which govern the management of its internal affairs and the conduct of its business.
Doctrine of Indoor Management: Doctrine of indoor management allows all those who deal with the company to assume that the provisions of the articles have been observed by the officers of the company.
Doctrine of Ultra Vires: Any act done by the company which is neither authorized by its objects nor by the Companies Act is ultra vires the powers and authority of the company. An act which is ultra vires the company is void and cannot bind the company. Since the act is void, it cannot be ratified by the shareholders either.

Self Assessment

1. Prospective Investors use a Memorandum of Association to:

A. know how the money is going to be used and what risk the investment is prone to

B. know how the money is going to be misused and what expectations can be kept for the returns
C. know the objects of the company if the contracts entered are outside those objects
D. Know the objects of the company's formation and acts it can go beyond the objects specified in the MOA

2. In case of a Public company, a Memorandum of Association must be signed by:

A. Five subscribers
B. Six subscribers
C. Seven subscribers
D. Ten subscribers

3. Identify the false statement regarding the Memorandum of Association:

A. It must be illegal
B. Must not be against the provisions of Companies Act
C. Must not be against Public policy
D. Must be Clear and definite

4. Which clause in a Memorandum of Association must state the name of the person who shall become a member of the company in the event of the death of the subscriber

A. Name Clause
B. Object Clause
C. Location Clause
D. Succession Clause

5. Alteration of a Memorandum of Association is possible with the approval of members of a company via

A. Ordinary Resolution
B. Special Resolution
C. State Government
D. Central Government

6. A company makes certain alterations in its objective clause, which it has not registered with the Registrar. In such a situation, can the alteration be considered valid?

A. Yes, as alteration must be made after passing ordinary resolution
B. Yes, as alteration must be made after passing special resolution
C. No, as alteration in memorandum of association must be registered with the registrar
D. No, as alteration in memorandum of association must be registered with the Chartered Accountant

7. If a company wants to alter its Memorandum of Association, which of the following is most essential?

A. Special resolution must be passed
B. Ordinary resolution must be passed
C. Ordinary resolution needs to be passed with prior approval of Central Government
D. Special resolution needs to be passed with prior approval of Central Government

8. Identify which of the following is involved in case the central government asks a company to change its name?

A. The company needs to pass a special resolution
B. The company needs to pass an ordinary resolution within a period of 3 months from receiving the orders for change in name by central government
C. The company needs to pass a special resolution within a period of 5 months from receiving the orders for change in name by court
D. The company needs to pass a special resolution within a period of 8 months from receiving the orders for change in name by court

9. The term ultra vires is:

A. doing an act beyond the legal power and authority of the company
B. doing an act within the legal power and authority of the local authorities
C. doing a legal act within the legal powers and authority of the company
D. doing a valid act beyond the legal powers and authority of the central government

10. A telephone company put up telephone wires in a certain area. The company had no power in the memorandum to put up these wires there. The other company in whose area these wires were laid, cut them down. Can the company claim damages from the other company for cutting off its wires?

A. No, as laying telephone vires in a certain area was intra vires act on part of telephone company
B. No, as even though laying telephone vires in a certain area was ultra vires act on part of Telephone Company yet cutting of wires is very much permissible by law to protect ones' rights. Hence, the telephone company that cut the wires need not to pay the damages
C. Yes, as even though laying telephone vires in a certain area was ultra vires act on part of Telephone Company yet cutting of wires is not permissible by law. Hence, the telephone company that cut the wires shall have to pay the damages
D. Yes, as laying telephone vires in a certain area is intra vires act on part of telephone company and hence can recover proportional damages from the other company for cutting off its wires

11. The Articles of Association needs to be submitted to the Registrar of Companies during the formation of a company in Form _____along with the Memorandum of Association in Form ____

A. INC-32 and INC-33
B. INC-33 and INC-34
C. INC-35 and INC-36
D. INC-34 and INC-33

12. ___ form needs to be filled with the Registrar of Companies to alter the article of association.

A. MGT-13
B. MGT-14
C. MGT-15
D. MGT-16

13. Notice of General Meeting shall be given at least clear ___ days before the conduct of actual date of a General Meeting.

A. 10
B. 11

C. 12
D. 21

14. A Shorter Notice can also be issued with the consent of at least majority in number and ____of such part of the paid-up share capital of the company giving a right to vote at such a meeting as per Section 101.

A. 65%
B. 85%
C. 95%
D. 105%

15. In the case of doctrine of constructive notice, there is a presumption that an outsider has _____

A. Ignored the certificate of incorporation
B. Has read the memorandum of association and article of association
C. Read the prospectus
D. Read the partnership deed carefully

Answers for Self Assessment

1.	A	2.	C	3.	A	4.	D	5.	B
6.	C	7.	D	8.	B	9.	A	10.	C
11.	D	12.	B	13.	D	14.	C	15.	B

Review Questions

Q1. What is a memorandum of association? Explain the various contents of it in detail.

Q2. Differentiate between MoA and AoA.

Q3. What are articles of association? Enumerate some of the items included therein.

Q4. Discuss the procedure to alter the contents of a memorandum of association.

Q5. Discuss the concept of doctrine of indoor management and its exceptions with relevant examples.

Further Readings

A Textbook Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company

Elements Of Company Law by N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://www.taxmann.com/post/blog/5734/all-about-memorandum-of-association/

https://taxguru.in/company-law/process-alteration-moa-section-13-companies-act-2013.html

https://www.indiafilings.com/memorandum-of-association-amendment

https://lawgupshup.com/2019/09/ashbury-railway-carriage-iron-co-ltd-vs-riche/

Unit 04: Prospectus

CONTENTS

Objectives

After studying this unit, you will be able to:

- Cognize the relevance of a Prospectus and Comprehend its types
- Understand the legal consequences of mis-statement in a prospectus

Introduction

Once a company gets formally incorporated, it needs money to finance its activities. This amount can be easily arranged through the issue of shares, debentures or private contracts. But, arranging funds through public as a private money may not be sufficient enough for the needs of company. As a matter of fact, a public company may be formulated. The money from public may be invited by issuing the shares or by inviting the public through a prospectus to purchase the shares and debentures of the company. Thus, the public may subscribe to the shares or debentures of the company.

4.1 Definition of a Prospectus

Section 2(70) of the Companies Act 2013 defines Prospectus as "any document issued for advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate". It is an invitation issued to the public to offer for purchase/subscribe shares or debentures of the company. In simple words, any advertisement offering shares or debentures of the company Private limited companies are strictly prohibited from

issuing a prospectus and they cannot invite the public to subscribe to their shares. A prospectus can only be issued by public limited institutions. Making it an open invitation prolonged to the public at large.

4.2 Purpose of a Prospectus

1. To inform public about the company
2. Induce people to invest in shares or debentures of a company
3. Provide authentic information about company and terms and conditions of issue of shares and debentures

4.3 Legal rules regarding the issue of Prospectus

1. It must be signed by every person who is named as director or proposed director or his duly authorized attorney.

2. It must be dated as that date becomes the date of its publication.

3. Statement of an expert may be included in prospectus if concerned expert is not interested in formation, promotion or management of company. It is must to ensure that such an expert must have given a written consent to issue of prospectus. He must not have withdrawn consent before delivery of prospectus for registration. This fact must be also stated in the prospectus.

4. A copy of prospectus must eb registered with the registrar of companies before the issue of prospectus.

5. A prospectus must be issued within 90 days of delivery of its copy to the registrar for registration.

6. Every prospectus issued by the company on its face should state that its copy is already provided to the registrar and also what all documents were attached to the copy so delivered.

7. Once registration of prospectus is over, the terms and conditions of a contract states in prospectus cannot vary or differ.

8. When the company issued an application form for the purchase of shares or debenture, then the form must be accompanied by an abridged prospectus.

4.4 The Companies (Amendment) Act, 2017 with regard to the Contents of Prospectus

Every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall:

I. State such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government.

II. Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-sectionthe regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

Declaration of Compliance

Every prospectus shall make a declaration about the compliance of the provisions of this Act and a statement to the effect thatnothing in the prospectus is contrary to the provisions of this Act the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made there under. No prospectus shall be issued by or on behalf of a company or in relation to an intended company unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his duly authorized attorney.

4.5 Public Issue of Prospectus

The Prospectus has issued to the public at large, so the question arises that the prospectus is whether a general offer to the public? No, a prospectus is not an offer but merely it is an invitation to offer according to the Indian Contract Act. The prospectus is a constructed document that shall be issued to the public as an invitation for the subscription of shares.

When the new company is incorporated, they issue a prospectus through which the public gets to know about the existence of the Company. The company tries to convince the public that they give the best opportunity to them for their investment. If the public is convinced then they give an offer through the application for the purchase of shares and debentures.

Prospectus — invitation of offer

Application for purchase of shares – Offer

Allotment of Shares — Acceptance

After acceptance, the contract is binding to the Companies and the shareholders.

A Company gets 120 days for this whole process after the prospectus was issued. But if the company fails to do so i.e. obtain a minimum subscription from the public with a specified period, then the amount they received from the public is returned to them. Also, the company didn't get the "*Certificate of Commencement of Business*" because the public doesn't rely upon or interested in this company.

Notes: Any private communication like Invitation made to friends and relatives of the directors will not be an invitation to the public and therefore not a prospectus.

4.6 Contents of Prospectus

The Prospectus has issued on the behalf of the company. Section 26 of the Companies Act, 2013, read with Rule 3 of the Companies (Prospectus and Allotment of Securities) Rule 2012: - For the formation of the Public Company, the prospectus must be signed and dated and contains the following information:

1. General Information:

- Name and Addresses- It includes the name and registered office address of the Company. It must also include the name and address of the Company Secretary, Auditor, Chief Financial Officers, Legal Advisor, Banker, Trustee.
- Issued Listed at (Name of Stock Exchange)
- Opening and Closing Date of the issue- Details of opening and closing date of the Subscription list.
- Rating of the shares and debentures
- Details about underwriters
- A statement by the Board of Directors- A statement was given by the Board of Directors about the separate bank account in which the money raised from the issue shall be deposited. Also, the Board of the Director discloses that how much amount they used or utilized.
- Consent of the directors/ auditors/ bankers to the issue, experts opinion or another person as may be prescribed.

2. The capital structure of the Company:

- Issued, subscribed, and paid-up capital
- Size of the present issue

3. Terms of the Present Issue:

- The Authority for the issue
- Procedure and schedule for allotment and issue of securities
- How to apply- Availability of Prospectus and Terms & Mode of Payment for the subscription
- Special tax benefits to the shareholders and Company

4. Particulars of the Issue:

- Objects of the Issue
- Project Cost

5. The company, Management and Project:

- History, main objects and present Business of the Company
- Plant location, machinery, technology, etc.
- Backgrounds of promoters, collaboration, etc.
- Infrastructure and facility
- The products and services
- Information related to threat factors of certain specific projects or their imminent legal actions, the gestation period of the project, and all other information related to it.

6. Financial Performance of the Company:

- Balance Sheet Data, Profit and Loss Account
- Any change in accounting policy during the last three years
- Stock market quotation of shares and debentures

7. Details of all payment's refunds, interest, dividend, dues, etc.

8. Detail of Companies under same management- If there are numbers of companies under the same management, disclose all the details of these companies.

Advertisement of the Prospectus

Section 30 of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. In any manner where an advertisement of any prospectus of a company is published, it shall be necessary to specify therein the contents of its memorandum as regards the objects, the liability of members and the amount of share capital of the company, and the names of the signatories to the memorandum and the number of shares subscribed for by them, and its capital structure.

4.7 Types of Prospectus

1. **Red Herring Prospectus:** As specified under Art 31 of the Companies Act 2013 a red herring prospectus is issued prior to the prospectus when a company is proposing to make an offer. It shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer. A red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.
2. **Shelf Prospectus:** A prospectus that has been issued by any public financial institution, company, or bank for one or more issues of securities or class of securities as mentioned in the prospectus is known as Shelf prospectus. When a shelf prospectus is issued then the issuer

does not need to issue a separate prospectus for each offering, he can offer or sell securities without issuing any further prospectus. The provisions related to shelf prospectus have been discussed under section 31 of the Companies Act, 2013.

3. **Abridged prospectus:** A summary of a prospectus filed before the registrar. It contains all the features of a prospectus known as Abridged prospectus. An abridged prospectus contains all the information of the prospectus in brief so that it should be convenient and quick for an investor to know all the useful information in short. Section33(1) of the Companies Act, 2013 also states that when any form for the purchase of securities of a company is issued, it must be accompanied by an abridged prospectus.
4. **Deemed Prospectus:** A deemed prospectus has been stated under section 25(1) of the Companies Act, 2013.A document will be considered as a deemed prospectus through which the offer is made to the public for sale when any company offers securities for sale to the public, allots or agrees to allot securities. The document is deemed to be a prospectus of a company for all purposes and all the provision of content and liabilities of a prospectus will be applied upon it.
5. **Statement in Lieu of Prospectus**: It is a document filed with the Registrar of the Companies (ROC) when the company has not issued prospectus to the public for inviting them to subscribe for shares. The statement must contain the signatures of all the directors or their agents authorized in writing. It is similar to a prospectus but contains brief information. The Statement in Lieu of Prospectus needs to be filed with the registrar if the company does not issue prospectus or the company issued prospectus but because minimum subscription has not been received the company has not proceeded for the allotment of shares.

4.8 Golden rule of framing a Prospectus

The 'Golden Rule' for framing of a prospectus was laid down by Justice Kindersley in New Brunswick & Canada Rly. The Golden Rule of Prospectus has a meaning and a moral in it, which says whatever information comes from the company to the public, through the medium of a prospectus, must be true, fair and accurate. Those who issue a prospectus hold out to the public great advantages which will accrue to the persons who will take shares in the proposed undertaking.

A company issues prospectus to attract the general public to purchase its shares, interested people rely on the information presented in the prospectus and on the basis of which they desire to make an investment in the shares of the issuing company. The public is invited to take shares on the faith of the representations contained in the prospectus. The public is at the mercy of company promoters.

According to the 'Golden Rule' the followings must be kept in mind when preparing the prospectus of a company:

- The prospectus must be an honest statement of the company's profile; there must be no misleading, ambiguous or erroneous reference to the company in its prospectus.
- Every important aspect of a contract of the company should be clarified.
- The contents of the prospectus should conform to the provision of the Companies Act.
- The restrictions on the appointment of directors must be kept in mind.
- The conditions of civil liability as laid down must have strictly adhered to issue and registration of prospectus or legal requirement regarding the issue of the prospectus.

4.9 Mis-statement in Prospectus

The persons liable for an untrue statement in the prospectus under Sec-62 are;

(a) Director **–** every person who is a director of the company at the time of the issue of the prospectus;

(b) Proposed Director – every person who has authorized himself to be a director, either immediately or after an interval of time;

(c) Promoter – every person who is a promoter of the company;

(d) Authorized person – every person who has authorized the issue of the prospectus.

Exemption from Liability -Sec 35(2)

a) No person shall be liable if he proves that he had though consented to become a director of the company but withdrew hisconsent before the issue of the prospectus, and that it was issued without his authority or consent; or

b) that the prospectus was issued without his knowledge or consent, and the moment he became aware of its issue, he immediately gave a reasonable public notice of it that it was issued without his knowledge or consent.

c) that he had reasonable grounds to believe that the statement was true or the inclusion or omission was necessary andbelieved in it up to the time of issue of the prospectus.

Note: A person may also not be liable for a misleading statement made by an expertthe report is a correct and fair representation of the statement, or a correct copy or a correct and fair extract of the report or valuation; andhe had reasonable ground to believe that such expert was competent to make the statement and had given the consent required by sub-section (5) of section 26to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration.

Liability for compensation

All those persons as discussed in previous slide are liable to pay compensation to every such person who suffered losses by subscribing shares/ debenturesor any other security relying upon the faith of prospectus under the 2 heads that is Liability of compensation for misstatement and for damages under general law

Unlimited liability in case of intent to defraud [Sec 35(3)]

A Prospectus that was issued with an intention to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in subsection (1) shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have beenincurred by any person who subscribed to the securities on the basis of such prospectus.

Remedies against the company

Company is also liable for misleading information. It can be made liable only if it is proved that the false prospectus is issued by the directors within the scope of their authority. Liability of company is only for those misstatements which amount to "fraud"

Consequences for Mis-statement in Prospectus

The prospectus is a trusted legal document on which people can rely before subscribing or purchasing securities from the company. But any misstatement that occurs in the prospectus leads to punishment in the form of a fine or imprisonment. Misstatement includes an untrue or misleading statement, non-disclosing facts, which is issued in the prospectus. The liabilities for Misstatement in a prospectus are Civil Liability (Section 35) and Criminal Liability (Section 34).

A. Civil Liability

According to the provision of Section 35 under the Companies Act, 2013, civil liability arises when a person who has subscribed for securities on the faith of the misleading prospectus has remedies against the company and the directors, promoters, experts & every person who authorized the issue of prospectus.

(i) Remedies against Company: -

In against company, two remedies are available:

(a) Rescind the Contract– The person who purchases the shares can rescind the contract if he found any misstatement in the prospectus and the money will be refunded to him which he pays to the company while purchasing securities.

Right to rescind or terminate the contract is available if the person proves the following:

- The prospectus was issued on the behalf of the company;
- The statement must be untrue;
- The statement must be a material misrepresentation;
- The misrepresentation must have induced the shareholders to take the securities and he must have relied on the statement in applying for securities;
- The misrepresentation of statement must be of fact and not of law
- That he has taken an action promptly to rescind the contract within a reasonable time and before the company goes into liquidation.

(b) Damages for Fraud – In this case, the person only claims damages against the company but he cannot rescind the contract because of unreasonable delay, affirmation (provide assurance), and commencement of winding- up. At these stages, the shareholder can file a suit against the company for the misstatement and claim damages for it.

Remedies against the directors, promoters, experts & every person who authorized the issue of prospectus–

In cases where it is proved that a prospectus has been issued with intent to defraud the applicants, then, every person referred to in subsection (1) of Section 35[5] shall be personally accountable without any limitation of liability any of the losses or damages that may have been sustained by any person who subscribed to the securities based on such prospectus.

Defences available to avoid criminal liability:

Under Section 35 (2) of the Act, if the person proves that, having a director of the company given his consent for issuing prospectus but he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent; that the prospectus was issued without his knowledge or consent and that on becoming aware he gave a reasonable public notice that it was issued without his knowledge or consent.

B. Criminal Liability

According to the provision of Section 34 of the Companies Act, 2013, criminal liability arises where prospectus contains any untrue statement, then, every person who has authorized the issue of the prospectus shall be punishable under Section 447. The punishment involves imprisonment for a period of 6 months which can be extended to 10 years or a fine, maybe the amount involved in the fraud, or it can be extended 3 times the amount involved in the fraud or both.

Liability

Any person who is found to be guilty of fraud involving an amount of at least 10 Lakh rupees or 1% of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years. Provided further that where the fraud involves an amount less than 10 lakh rupees or 1% of the turnover of the company, whichever is lower and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to 20 lakh rupees or with both.

Defenses available under criminal liability:

(i) The defenses are available under criminal law if a person proves that, such statement or omission was immaterial;
(ii) He has a judicious ground to consider that the inclusion or omission was necessary;
(iii) He has judicious ground to consider that the statement was true.
(iv)


Case Study:

1. *Derry v. Peek*

Issue: The prospectus of a company contained a statement that the company had been authorized by special act of parliament to use steam or mechanical power for running the trains. In fact, the authority to use the steam was subject to the approval of Board of Trade. But, this fact was not mentioned in Prospectus. However, the Board of Trade did not approve the use of steam, and subsequently the company was wound up. Aman, an investor filed a suit against directors for damages for fraud. Decide will Aman succeed as per the provisions of companies act?

Rule: Damages for fraud may be granted if a person knowingly makes a statement to deceive the other party.

Analysis: In this case, directors genuinely believed that once act of Parliament authorizes the use of steam, consent of Board or Trade was practically concluded.

Conclusion: The directors are not guilty of fraud as they honestly believed that once Parliament had authorized the use of steam, the consent of Board of Trade was practically concluded

Issue: A company was formed for manufacturing leather tyred wheels for trolleys. The company issued a prospectus stating that orders have already been received from Queen of London to be followed by large orders later. In fact, no single order has been received for supply of wheels. All orders received were for trial and by way of experiment. Is the prospectus valid in the eyes of law?

Rule: A contract may be rescinded due to false representation of facts.

Analysis: A misleading statement is made to the prospective investors

Conclusion of case: The issue of Prospectus is not valid as the statement contains untrue and misleading statement.

Conclusion

The prospectus is a legal document only issued by a public company that wants to go in for raising funds. A public company must issue a prospectus for raising funds but, in case of private company converts into public then they should issue a prospectus or statement in lieu of prospectus with the memorandum of association (MOA) on its conversion into a public company. A prospectus plays a major role in the decision-making of the subscribers for the subscription of securities (shares, debentures, and other related instruments). It is an invitation to offer for the subscription of sharesand includes detailed information of the company's Board of Directors, Company Secretary, company's management, capital structure, financial performance, recent projects of a company, and other related information. To ensure the validity of a prospectus, it should contain all the essential requisites and must be registered. An unregistered prospectusis considered invalid. For any misstatement of a prospectus i.e. untrue statement or misleading statement to deceive anyone, then such person was held guilty and was liable for fine or imprisonment.

Summary

The prospectus is a legal document only issued by a public company that wants to go in for raising funds. A public company must issue a prospectus for raising funds but, in case of private company converts into public then they should issue a prospectus or statement in lieu of prospectus with the memorandum of association (MOA) on its conversion into a public company. A prospectus plays a major role in the decision-making of the subscribers for the subscription of securities (shares, debentures, and other related instruments). It is an invitation to offer for the subscription of shares and includes detailed information of the company's Board of Directors, Company Secretary, company's management, capital structure, financial performance, recent projects of a company, and other related information. To ensure the validity of a prospectus, it should contain all the essential requisites and must be registered. An unregistered prospectus is considered invalid. For any

misstatement of a prospectus i.e. untrue statement or misleading statement to deceive anyone, then such person was held guilty and was liable for fine or imprisonment.

Keywords

Abridge Prospectus: An 'abridged prospectus' need only be appended to the application form.
Prospectus: A prospectus, as per s.2 (36), means any document described or issued as prospectus and includes any notice, circular, advertisement.
Red Herring Prospectus: The 'red-herring' prospectus means, a prospectus which does not have the complete particulars on the price of the securities offered and the quantum of securities offered.
Shelf Prospectus: A 'shelf-prospectus' means, a prospectus issued by any financial institution or bank, for one or more issues of the securities or class of securities specified in that prospectus.

Deemed Prospectus: A document will be considered as a deemed prospectus through which the offer is made to the public for sale when any company offers securities for sale to the public, allots or agrees to allot securities.

Self Assessment

1. If a company want to issue securities in stages, which type of prospectus it must issue?

A. Red herring prospectus
B. Deemed prospectus
C. Shelf prospectus
D. Abridged prospectus

2. What is the validity period of Shelf Prospectus?

A. 3 months
B. 6 months
C. 9 months
D. 1 year

3. Which among the following prospectus contains salient features of a prospectus is a brief version of the information contained in the prospectus?

A. Red herring prospectus
B. Abridged prospectus
C. Deemed prospectus
D. Shelf prospectus

4. Which among the following information is not included in Red herring prospectus?

A. Issue Price
B. Number of Share offered
C. Details of Company
D. Both 1 & 2

5. Information memorandum + shelf prospectus together constitutes_____
   A. Memorandum
   B. Articles
   C. Prospectus
   D. None of the above

6. Any document by which the offer for sale to the public is made, where a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, shall be ……. Prospectus issued by the company

A. Deemed Prospectus
B. Red herring Prospectus
C. Shelf Prospectus
D. Abridged Prospectus

7. Identify the false statement regarding a Prospectus:

A. It is a legal document that outlines the company's financial securities for sale to the investors.
B. Induce people to invest in shares or debentures of a company
C. Provide authentic information about company and terms and conditions of issue of shares and debentures
D. A prospectus must be verbally communicated to friends and relatives only in a company.

8. Suppose a prospectus was prepared and distributed by a company only among the members of certain gas companies. Can we say that this an offer of shares to the 'public'?

A. No, as there is no offer of shares to the 'public' as it is made to members of certain gas companies
B. Yes, it is an offer of shares to the 'public'
C. No, as the offer is not made in written form
D. Yes, as it is an invalid offer made to the 'public'

9. An advertisement in a 'The Hindu' stated that some shares are still available for sale as per the terms and conditions of an Infrastructure company, which may be obtained on application. Can such advertisement be considered as a Prospectus?

A. Yes, as prospectus is invited for public to purchase the shares.
B. No, as public may not like the terms and conditions of the company.
C. Yes, as through this medium investor can privately purchase shares of the company.
D. No, as newspaper advertisement is merely a publicity stunt.

10. The managing director of a JK Lakshmipat Cement company prepared a document which was in the form of a prospectus. The document was marked as strictly private and confidential. But the document did not contain all material facts that need to be disclosed as per the companies act. It was circulated among the directors and their friends. Hira Lal an outsider received this document through some friend of a director. On the basis of this document, Hira Lal applied for the shares of the company. Can the document so received by Hira Lal considered a valid Prospectus in the eyes of law?

A. Yes, as prospectus is for general public to apply for issue of shares.
B. No, as the prospectus in this case is merely a private communication between directors and their friends.
C. Yes, as prospectus is well circulated among directors and their friends.

D. No, as the Hira is has not yet paid the call money for shares bought.

11. A Prospectus was issued by a company to borrow money from the applicants for the infrastructure building business. This money was actually to be used for match fixing. In such a situation what shall be the liability of directors who have signed the prospectus?

A. They shall have no liability as the money is illegally used by the company and not by them.
B. They shall have a liability limited by guarantee, for all or any of the losses or damages that may have beenincurred by any person who subscribed to the securities on the basis of such prospectus.
C. They shall have a liability limited by share, for all or any of the losses or damages that may have beenincurred by any person who subscribed to the securities on the basis of such prospectus.
D. They shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

12. A Prospectus shall not be valid if it is issued more than ____after the date on which a copy thereof is delivered to the Registrar.

A. 70 days
B. 60 days
C. 90 days
D. 110 days

13. _____is a document issued by the company when it does not offer its securities for public subscription.

A. Statement in Lieu of Prospectus
B. Red Herring Prospectus
C. Deemed Prospectus
D. Shelf Prospectus

14. Which of the following is a civil liability for mis-statement in a Prospectus?

A. Rescind the contract
B. Either rescind the contract or claim damages
C. Claim damages
D. Neither rescind the contract or claim damages

15. Under which of the given circumstances, a person can be exempted from liability for mis-statement in Prospectus?

A. A person who had although consented to become a director of the company but withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent
B. When the prospectus was got issued without the knowledge or consent, and the moment a person became aware of its issue, he immediately gave a reasonable publicnotice of it that it was issued without his knowledge or consent.
C. Either A but not B
D. Both A and B

Answers for Self Assessment

1.	C	2.	D	3.	B	4.	D	5.	C
6.	A	7.	D	8.	B	9.	A	10.	B
11.	D	12.	C	13.	A	14.	B	15.	D

Review Questions

Q1. What is a Prospectus? What are its contents and rules regarding its issue?

Q2. Discuss the liability for mis-statement in Prospectus.

Q3. Discuss the Golden rule of framing a Prospectus and liability for mis-statement in Prospectus.

Q4. Write a short note on:

a) Deemed prospectus

b) Shelf prospectus

c) Abridged prospectus

d) Statement in lieu of prospectus.

Q5. What is Prospectus and why it is issued? Also, discuss the legal rules regarding the issue of Prospectus.

Further Readings

A Textbook Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company

Elements Of Company Law by N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

http://www.mca.gov.in/SearchableActs/Section447.htm

http://www.mca.gov.in/SearchableActs/Section31.htm

http://www.mca.gov.in/SearchableActs/Section32.htm

Unit 05: Raising of Capital

CONTENTS

Objectives

- After studying this unit, you will be able to:
- Understand the concept of Share capital. Cognize the various types of Shares and Share capital.
- Understand the process of alteration of share capital

Introduction

Any corporation limited by shares, required share capital. A share capital is the amount invested in a firm to carry out its activities is referred to as its share capital. In order to increase or decrease the share capital, certain conditions must be met. The capital of a company can be divided into small shares of various classes. The different classes of share capital, as well as the rights that come with them, are distinct.

5.1 What is a Share Capital?

A Share capital is the money a company raises by issuing common or preferred stock. The amount of share capital or equity financing a company has can change over time with additional public offerings. The term share capital can mean slightly different things depending on the context. Accountants have a much narrower definition and their definition rules on the balance sheets of public companies. It means the total amount raised by the company in sales of shares.

5.2 Types of share capital

1. **Nominal, Authorized or Registered Capital:** It is the amount as stated in the Memorandum of Association of the company and which the company is authorized to issue. Any company whether public or private cannot issue shares more than the amount of its authorized capital.

 Example: Suppose the amount of capital mentioned in Memorandum of Association of a Pharmaceutical company is 10lakhs then this will be its Nominal, Authorized or Registered Capital.

2. **Issued Capital:** It is a part of Authorized Capital, which has been issued by the company for public subscription. It can never be more than Nominal Capital.

 Example: If the company issues share of Rs.5Lakh out of the authorized capital of Rs.10 lakh then Rs.5lakh will be the issued capital of the company.

3. Subscribed Capital: It is that part of Nominal Capital which has been actually subscribed by general public by cash or in kind. If the whole issued capital has been subscribed by the public, then issued capital becomes the subscribed capital.

 Example: Suppose an FMCG company issued capital is Rs.5Lakh but the applications were received for only 4Lakh, then Rs.4Lakh would be the Subscribed Capital of the company.

4. Called up Capital: It is the part of the Subscribed Capital, which includes the amount paid by the shareholder. In this case, a company does not receive the entire amount of Capital at once. The remaining part of the Subscribed Capital is called Uncalled Capital.

 Example**:** Suppose a company has a total subscribed capital of Rs.4Lakh. The face value of a share is Rs.10 and it demands Rs.5 from its shareholders. Then, Rs.2Lakh will be the Called-up capital.

5. Paid-up Capital: The part of Called up Capital which has been paid by the shareholders to the company is known as Paid-Up Capital and the remaining part of the Called-Up Capital is known as Unpaid Capital.

6. Uncalled Capital: The amount on shares which has not been called by the company from its shareholders to pay is known as Uncalled Capital. The company may call upon its members to pay the uncalled amount on shares.

 Example: Suppose a company called Rs. 5 per share, so remaining Rs.5 which has not been called by the company is known as uncalled capital.

7. **ReserveCapital**: It is that part of uncalled capital which can be called upon by the company only in the event of Winding up.A company may by special resolution convert the uncalled capital into reserve capital.

5.3 Meaning of share and stock

A share is defined as the smallest division of share capital of the company which represents the proportion of ownership of the shareholders in the company. Stock means total capital aggregate of fully paid up shares. It is a mere collection of the shares of a member of a company in a lump sum.

5.4 Difference between share and stock

1. **On basis of Nominal Value:**A share has a nominal value but stock has no nominal value.
2. **On basis of fully paid up value:**A share can be partly as well as fully paid up whereas, a Stock is always fully paid up
3. **On basis of fractional transferability:**A share can never be transferred in small fraction. It is always transferred as a whole. A stock can be transferred in any fraction.
4. **On basis of original issue:**Shares can be issued directly to the Public. Stock cannot be issued directly to the Public. Only fully paid shares can be converted into stock.
5. **On basis of denomination:**Shares are always of equal denomination Stock may be of unequal denomination.

6. **On basis of distinct number:**A share has a definite number known as distinctive number. A stock does not have any distinctive number.

5.5 kinds of shares

Equity Shares

Companies issue these shares to the public to raise capital. The funds thus raised are used for the expansion of a start-up.Since equity shares are non-redeemable, they serve as a long-term source of finance for companies.The share capital is held by the company throughout and is distributed at the event of winding up.The fact equity shareholders avail the residual share during liquidation makes them the actual risk bearers of a company. In fact, it is also a point of origin of the difference between equity share and preference share.Equity shares come with voting rights, and its holders are also entitled to receive surplus and claim company assets.The company's management determines the rate of dividend be distributed among such shareholders. Moreover, these shares are transferable and can be transferred without consideration.Notably, the unit of shares held by investors signifies the proportion of ownership they have in a said company.Generally, they are traded in the market through a stock exchange. The value of these shares is expressed in issue price, face value, market price, book value, intrinsic value, etc.

Equity shares offer substantial dividends to shareholders and also entitle them to benefit from price appreciation in investment value.Also, their liquidity enables shareholders to sell them off effortlessly and gives rise to another point of difference between equity share and preference share.On the other hand, besides being a permanent source of capital, equity shares also help companies to secure credit easily.Both investors and creditors consider companies with large equity capital as creditworthy. Furthermore, the liability arising out of equity shares are required to be paid, and companies are also not obligated to pay a dividend to shareholders.

Types of Equity Shares

Equity shares appear on the liability side of a company's balance sheet. They do not have any types as such and are hence considered as ordinary stocks. Nonetheless, they are usually categorised as –

1. **Authorised share capital:** It is the amount as stated in the Memorandum of Association of the company and which the company is authorized to issue. Any company whether public or private cannot issue shares more than the amount of its authorized capital.

2. **Issued share capital:** It is a part of Authorized Capital, which has been issued by the company for public subscription. It can never be more than Nominal Capital.

3. **Subscribed share capital:**It is that part of Nominal Capital which has been actually subscribed by general public by cash or in kind. If the whole issued capital has been subscribed by the public, then issued capital becomes the subscribed capital.

4. **Paid-up capital:** The part of Called up Capital which has been paid by the shareholders to the company is known as Paid-Up Capital.

5. **Bonus shares:** Bonus shares are additional shares given to the current shareholders without any additional cost, based upon the number of shares that a shareholder owns. These are company's accumulated earnings which are not given out in the form of dividends, but are converted into free shares. For instance, if Investor A holds 200 shares of a company and a company declares 4:1 bonus, that is for every one share, he gets 4 shares for free. That is total 800 shares for free and his total holding will increase to 1000 shares.
   Companies issue bonus shares to encourage retail participation and increase their equity base. When price per share of a company is high, it becomes difficult for new investors to buy shares of that particular company. Increase in the number of shares reduces the price per share. But the overall capital remains the same even if bonus shares are declared.

6. **Right shares:** Right Shares refers to those issues of shares which a company offers to their existing shareholders at a discounted price. The company's shareholders have rights to accept or reject the proposal and also there are minimum criteria for subscriptions of the share if the shareholder accepts the proposal. Such issuance of shares is called Right issues and such share is known as Right Shares.

7. **Sweat equity shares:** As per Section 2(88) of the Companies Act, 2013 "sweat equity shares" means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

Preference Shares

The capital that a company raises through the issuance of preference shares is termed as preference share capital.These shares come with a fixed rate of dividend and a preferential right to avail profits and claim assets during liquidation.In fact, these shares are ranked between debt and equity in terms of priority and repayment of capital.Like equity shares, preference shareholders are also partial owners of a company. However, they are not entitled to voting rights and hence do not really possess the power to control or influence company-oriented decisions.Also, shareholders do not have a claim over the bonus shares and are a prominent preference shares and equity shares difference.What is most noteworthy is that preference shares are similar to debentures, and they could be converted to preferred stock.Furthermore, preference share issuers can repurchase the shares at a given date. These shares extend substantial dividends to their holders but do not come with a closing date.The decision to declare dividend on preference shares lies with the management, and it is not mandatory in case of loss. This is the most crucial difference between equity share and preference share.Also, if a company decides not to offer a dividend in a particular year, they must pay it to the shareholders later. Notably, shareholders can convert their preference shares into equity shares and cannot be traded in the market.

Types of Preference Shares

1. **Cumulative Preference Shares:** All dividends under this type are carried forward until specified, and paid out only at the end of the specified period.Even in the event of liquidation, accumulated preference dividend and the preference share capital will be redeemed prior to any payment to equity shareholders.
2. **Non-Cumulative Preference shares:**Dividends are paid out of profits for every year. There are no arrears carried over a time period to be paid at the end of the term.If a company does not pay the dividend in the current year, the claim of preference shareholder is lost to that extent. Unless it is specified that preference shares are non-cumulative, it is assumed that it is of cumulative in nature.
3. **Participating Preference Shares:**Its' a unique type of preference shares which has an additional benefit of participating in profits of the company apart from the fixed dividend.The distribution may depend on the terms and conditions mentioned in the agreement which may vary to some extent from case to case.
4. **Non-participating Preference Shares:**Other preference shares who do not participate are called non-participating preference shares. Unless it has been mentioned, that preference shares are participating, it is assumed that it is non-participating.
5. **Convertible Preference Shares:**These shares possess an option or right whereby they can be converted into an ordinary equity shares at some agreed terms and conditions.
6. **Non-convertible Preference Shares:**Non-convertible simply does not have this option but has all other normal characteristics of a preference share.
7. **Redeemable Preference Shares:**A redeemable preference share is very commonly seen preference share which has a maturity date on which date the company will repay the capital amount to the preference shareholders and discontinue the dividend payment thereon.
8. **Non-redeemable Preference Shares:** These have no maturity date which makes this instrument very similar to equity except that the dividend of these shares isfixed and they enjoy priority in payment of both dividend and capital over the equity shares.There is an absence of maturity, they are also known as perpetual preference share capital.

5.6 Difference between Equity and Preference Shares

Basis for Comparison	Equity Shares	Preference Shares
1. Meaning	Equity shares are the ordinary shares of the company representing the part ownership of the shareholder in the company.	Preference shares are the shares that carry preferential rights on the matters of payment of dividend and repayment of capital.
2. Payment of dividend	The dividend is paid after the payment of all liabilities.	Priority in payment of dividend over equity shareholders.
3. Repayment of capital	In the event of winding up of the company, equity shares are repaid at the end.	In the event of winding up of the company, preference shares are repaid before equity shares.
4. Rate of dividend	Fluctuating	Fixed
5. Redemption	No	Yes
6. Voting rights	Equity shares carry voting rights.	Normally, preference shares do not carry voting rights. However, in special circumstances, they get voting rights.
7. Convertibility	Equity shares can never be converted.	Preference shares can be converted into equity shares.
8. Arrears of Dividend	Equity shareholders have no rights to get arrears of the dividend for the previous years.	Preference shareholders generally get the arrears of dividend along with the present year's dividend, if not paid in the last previous year, except in the case of non-cumulative preference shares.

5.7 Alteration/Reduction of Share Capital

It means to reduce the issued, subscribed and paid up share capital of the Company as per the provisions laid under section 66 of the Companies Act 2013. Following are the reasons behind the Capital Alteration:

1. Reduce liability
2. Reduce heavy capital expenses
3. Eliminate the losses
4. Return the surplus capital, etc.

Conditions for altering the share capital by a company depends upon given cases:

- If the company is authorized by its articles to do so
- If the Articles do not authorize the so-called reduction (Then Articles of Association must be altered prior to capital alteration)

Notes: 1. Article of Association of the Company should have power for reduction of share capital.

2. No such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, or the interest payable.

Did you know? Ministry of Corporate Affairs update regarding alteration

The National Company Law Tribunal (NCLT) made it mandatory for companies to file the application/petition/appeal/reply etc. online through its e-filing portal via notice dated31st January 2020, w.e.f. 03rd February 2020 for reduction in share capital.

Process of alteration of Share Capital

Step 1 : Check whether the Article of Association has a power for reduction of capital

Step 2 : Prepare the draft of the Scheme of reduction of capital.

Step 3 : Convey the Board Meeting for approval of the draft scheme and to approve the notice of extraordinary general meeting (EGM).

Step 4 : Hold the extraordinary general meeting (EGM) and shareholders shall approve the draft scheme by way of special resolution. File MGT-14 with ROC, within thirty days of passing a special resolution.

Step 5 : Filing an online application for reduction of capital with National Company Law Tribunal.

Petition shall be Accompanied with :

- Synopsis of the Application / petition

– List of Events

– Petition for Reduction of Share Capital

– Certificate of Incorporation

- Memorandum of Association

– Articles of Association

– Copies of Financial Statements of the Company for last 3 preceding financial years.

- Scheme of Reduction

– Shareholding Pattern

– Resolutions Passed

– Valuation Report

– Certificate issued by the Auditors in respect of Creditors

- in respect of the Accounting Treatment

– and for outstanding Deposits

- Declaration from the Company in respect of the outstanding Deposits

– General Affidavit

– Memorandum of Appearance

Step 6 : File two complete sets in hard copies before the filing counter National Company Law Tribunal

Step 7 : The Tribunal shall, within fifteen days of submission of the application give notice, or direct that notice be given to :

(i) the Central Government, Registrar of Companies, in all cases, in Form No. RSC-2;

(ii) the Securities and Exchange Board of India, in the case of listed companies in Form No. RSC-2;

(iii) the creditors of the company, in all cases in Form No. RSC-3;

Step 8 : Notice to Creditors

A notice is to be issued to the creditors then within 7 days of the direction given such other period as may be directed by the Tribunal, to each creditor whose name isentered in the list of creditors submitted by the company regarding the presentation of the application and the said list. They

need to be informed about the amount of proposed reduction of share capital and the amount or estimated value of the debt or the contingent debt or claim or both, and the time within which they may send their representations and objections.

Step 9 : Publication of Notice: The NCLT shall give direction for the notice to be published in Form No. RSC-4 within seven days from the date on which the directions are given, in English language in a leading English newspaper and in a leading vernacular language newspaper Both having wide circulation in the State in which the registered office of the company is situated, or suchnewspapers as may be directed by the Tribunal and for uploading on the website of the company (if any) seeking objections from the creditors and intimating about the date of hearing.

Step10: Confirmation of Publication of Notice. The company or the person who was directed to issue notices and the publication in the newspaper as soon as may be, but not later than 7 days from the date of issue of such notices, file an affidavit in Form No. RSC- 5 confirming the dispatch and publication of the notice.

Step 11: Representation by Regulatory: Representation by the Central Govt. / Registrar , Creditors and SEBI shall be sent to tribunal within 3 months from the date of receipt of notice and copy of such representation shall simultaneously be sent to the company and in case no representation has been received within the said period by the Tribunal it shall be presumed that they have no objection to the reduction.

Step 12: Submission of Representation: The company shall submit to the Tribunal, within seven days of expiry of period up to which representations or objections were sought, the representations or objections so received along with the responses of the company thereto.

Step 13: National Company Law Tribunal Order: The order confirming the reduction of share capital and approving the minute shall be in Form No. RSC – 6 on such terms and conditions as may be deemed fit.

Step 14 :Filing Order with ROC: : The company shall file a certified copy of the order of the NCLT and the minute approved by the NCLT to the ROC in e-form INC 28 within 30 days of the receipt of the order.

Summary

Share capital is the amount of money received by a company from sale of its shares. It is used for goods, movable properties, etc. and is used in the memorandum of Association, Articles of association, and also in the prospectus.The share capital can be of various types like Authorized capital; Issued, Subscribed, Allotted, and Uncalled, while the Shares that a company may issue are of two kinds: i) Equity share capital where share capital is not limited by shares; ii) Preference share capital which carries preferential rights.Share-Capital can be altered using ordinary procedure without confirming to the National Company Law Tribunal by following the provisions of Section 61 of the act. Such Share-Capital can also be reduced. But, this requires a special procedure and confirmation from the National Company Law Tribunal which are mentioned under Section 66 of the Companies Act, 2013.

Keywords

1. **Ministry of Corporate Affairs** is an Indian governmentministry. It is primarily concerned with administration of the Companies Act 2013, the Companies Act 1947, the Limited Liability Partnership Act, 2008, Insolvency and Bankruptcy Code, 2016 & other allied Acts and rules & regulations framed there-under mainly for regulating the functioning of the corporate sector in accordance with law. It is responsible mainly for regulationof Indian enterprises in Industrial and Services sector.
2. **Share Capital:** Share capital is the money a company raises by issuing common or preferred stock.
3. **Nominal, Authorized or Registered Capital:** It is the amount as stated in the Memorandum of Association of the company and which the company is authorized to issue.
4. **Issued Capital:** It is a part of Authorized Capital, which has been issued by the company for public subscription. It can never be more than Nominal Capital.
5. **Subscribed Capital:** It is that part of Nominal Capital which has been actually subscribed by general public by cash or in kind
6. **Share**: It is defined as the smallest division of share capital of the company which represents the proportion of ownership of the shareholders in the company.
7. **Stock**: It means total capital aggregate of fully paid up shares.

Self Assessment

1. Identify the false statement regarding alteration of share capital:
A. An ordinary resolution is required to be passed for such changes.
B. Such alteration does not require any confirmation of NCLT.
C. Notice of alteration to be given to the Registrar within 30 days from doing so.
D. Permission from district court of India is needed to do the alteration.

2. A limited company having a share capital may, if so authorized by its articles, alter its share capital as follows by:
A. Passing a special resolution
B. Passing an ordinary resolution
C. Permission from court
D. None of the above

3. Assume that a company offers 18,000 shares of Rs. 100 each and the people subscribes only for 15,000 shares. What will be the issued capital?

A. Rs. 12 lakh
B. Rs. 28 lakh
C. Rs. 18 lakh
D. Rs. 15 lakh

4. In the absence of maturity, preference shares are also known as :
A. Perpetual preference share capital
B. Redeemable preference share capital
C. Equity share capital
D. Participating preference share capital

5. Which of the given statement is false about Equity Shares?

A. Equity shares carry voting rights
B. Equity shares can never be converted
C. Equity shareholders have no rights to get arrears of the dividend for the previous years
D. Equity shares can be redeemed

6. Rate of dividend in case of Equity Shares _____
Fixed

Negligible

Fluctuating

None of the above

7. In the event of winding up of the company, ____are repaid at the end.

A. Preference Shares
B. Convertible Preference Shares
C. Irredeemable Preference Shares
D. Equity Shares

8. _____ have no maturity date which makes this instrument very similar to equity except that the dividend of these shares.
A. Redeemable Preference Shares
B. Irredeemable Preference Shares
C. Convertible Preference Shares
D. Non-Participating Preference Shares

9. _____ is defined as the smallest division of the share capital of the company which represents the proportion of ownership of the shareholders in the company.

A. Share
B. Warrant
C. Capital
D. Stock

10. Which of the following is not an appropriate reason for alteration of capital?
A. Reduce liability
B. Increase heavy capital expenses
C. Eliminate the losses
D. Return the surplus capital

11. If the articles of a company do not allow for alteration of share capital, then what must be done?

A. Change is not possible
B. Promoters of the company must give consent to alter the capital
C. Articles of Association must be altered prior to capital alteration
D. Memorandum of Association must be altered prior to capital alteration

12. The order confirming the reduction of share capital and approving the minute shall be in Form No. _____on such terms and conditions as may be deemed fit.
A. RSC – 4
B. RSC – 5
C. RSC – 7
D. RSC – 6

13. The company shall file a certified copy of the order of the NCLT and the minute approved by the NCLT to the ROC in e-form ____within thirty days of the receipt of the order.

A. INC 25
B. INC 28
C. INC 26
D. INC 29

14. Sweat Equity Shares are issue to _____?
A. Ordinary Shareholders
B. Preference Shareholders
C. Both A&B
D. Employees of the Company

15. _____refers to those issues of shares which a company offers to their existing shareholders at a discounted price.

A. Bonus Shares
B. Right Shares
C. Preference Shares
D. Bonds

Answers for Self Assessment

1.	D	2.	B	3.	C	4.	A	5.	D
6.	C	7.	D	8.	B	9.	A	10.	B
11.	C	12.	D	13.	B	14.	D	15.	B

Review Questions

Q1. What is a Share Capital? Discuss its various types of Share Capitalwith the help of suitable examples.

Q2. What is meant by the term Share and Stock? Differentiate between Share and Stock.

Q3. What is meant by an Equity and Preference Share? Discuss the various classes of both in detail.

Q4. Under what circumstances the Share Capital of a company may be altered? Discuss the procedure of altering the Share Capital in detail.

Q5.a) Differentiate between Share and Stock b) Differentiate between Equity and Preference Shares.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company
2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://indiabitz.wordpress.com/2012/03/12/types-of-capital/

https://taxguru.in/company-law/issue-preference-share-preferential-basis.html

https://taxguru.in/company-law/reduction-share-capital-e-filing-faqs.html

Unit 06: Company Management

CONTENTS

Objectives

After studying this unit, you will be able to:

i) Understand the various types and recently emerged director types

ii) Comprehend the legal procedure for appointment, qualification and disqualification of a director

iii) Comprehend the legal provisions for removal and resignation of a director

iv) Understand the remuneration payable to a director

Introduction

A company is an artificial legal person and does not has any physical existence. It can act only through natural persons to run its affairs. A person acting on behalf of a company is better known as a Director. Directors refer to the part of the collective body known as the Board of Directors, that is responsible for controlling, managing and directing the affairs of a company. They are considered as trustees of company's property and money, and they also act as the agents in those transactions which are entered into by them on behalf of the company. It is important to note that the Appointment of Director in a Company shall be pursuant to provisions of Companies Act, 2013. In accordance with the Companies Act 2013, every company shall have a certain number of directors. The minimum number of directors is fixed according to the different type of companies- a Public Company shall have at least 3 Directors, a Private Company shall have atleast 2 and a One Person Company shall have atleast 1 Director. The upper limit is fixed at 15. However, a Company needs to pass a Special Resolution if it wants to have more than 15 directors. **[Section 149(1)]**

6.1 Definition of a Director

According to Section 2(34) of Companies Act, 2013 a director is a person who is appointed as director in the company. A person who is appointed but not designated as a director will not be considered as a director under the meaning of this Act. Only an individual shall be eligible to be appointed as director because in case of corporates and firms it will be difficult to fix duties and responsibilities. Minor cannot be a director because of the ineligibility to obtain DIN (Section 152(3)). As per Section 149(3), at least one director has to be an Indian resident.

Types of Directors

1. **Residential Director:** Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.Such a director is known as Residential director.
2. **Additional Director:** According to the Act, the articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.This definition says that the articles of the company has authorized the board of directors to appoint the additional directors whenever needed.

Notes: Term of holding an office by the additional director is up to the date of next AGM.

3. **Alternate Director:** The Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than 3 months.This director is to be specifically appointed when the original director or the whole-time director is not present in the office due to any of the factors.

Notes: Term of office for an alternate director: Such a director shall hold office for the remaining period office of the original director in whose place he is appointed.

4. **Small Shareholders Director:** Every Listed Company may have one director elected by small shareholders "small shareholders" means a shareholder holding shares of nominal value of not more than Rs.20,000/- or such sum as may be prescribed. A listed company may by notice to not less than 1,000 or 1/10th(one-tenth) of total small shareholders whichever is lower shall have a Small Shareholders director appointed by them Or A listed company may suo moto opt to appoint a director representing small shareholders.

Notes: Term of office of small shareholder director: It shall not be more than a period of 3 consecutive years and he shall not be liable to retire by rotation. On the expiry of the tenure, such director shall not be eligible for re-appointment

5. **Women Director:** According to the Companies Act 2013, some companies have been compulsory ordered to get at least 1 director as the women director.

The list of companies who are required to get their director as women are:

1. A listed Company

2. Any Public company having –

   i. Turnover of Rs. 300 crore or more
   ii. Paid up capital of Rs. 100 crore or more

6. **Independent Director:** As the name suggests such directors are not related in certain ways with the company. They are not Managing directors, whole time directors or nominee directors, such directors have to comply with the criteria's given in section 149(6). An independent director can be appointed for a consecutive period of not more than 2 years then a gap of 3 years is required before their reappointment in the same company for the same position.

Every listed public company shall have not less than one third of its directors as independent. Following prescribed public companies shall have minimum of 2 independent directors: -

1. whose paid-up share capital is of 10 crores or more; or

2. whose turnover is of 100 crores or more; or

3. whose outstanding loans, debentures, and deposits in aggregate exceeds 50 crores.

A joint venture, wholly owned subsidiaries and dormant companies need not to have such directors. If a company has audit committee then more than half shall be independent directors and this will be the minimum number of independent directors in such companies.

Example: If a public company has paid up share capital of Rs. 12 crores and has 7 members in audit committee then minimum number shall not be 2 but 4 i.e. more than half of 7.

7. **Nominee Director:** They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The term 'oppression' is not clearly defined by Company Law 2013. However, the court of law defines it as a conduct that involves a visible departure from the standards of fair dealing and a violation of conditions that require fair – especially with regard to the right of shareholders. For example, in case of:

i) Depriving a member of the right to dividend.

ii) Issue of further shares benefiting a section of shareholders.

iii) Not calling a general meeting and keeping shareholders in dark.

iv) Non-maintenance of statutory records

v) Not conducting affairs of the company in accordance with the Companies Act.

vi) Refusal to register transmission under will.

vii) Failure to distribute the amount of compensation received on nationalization of business of company among members, where required to be so distributed.

8. **Shadow Director:** It is the new term which has been arrived, which means that the person who is not officially appointed by the board but he or she gives such advice to the directors which they are accustomed to follow except when such shadow director provides the same in his professional capacity. According to companies act the term "officer" includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act. A Shadow Director is defined as an "officer" under the Companies Act, 2013. It includes, any person in accordance with whose directions or instructions the Board of Directors or any one or more of the Directors is or are accustomed to act.
9. **Managing Director:** It means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.
10. **Manager:** It means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, bywhatever name called, whether under a contract of service or not.
11. **Non-executive Director:** Well, such a director plays an important role in providing objective judgement independent of management on issues facing the company. They are not directly involved in the management of the company due to which they are called as non-executive directors. They are independent of management on all issues including strategy, performance, sustainability, resources, transformation, diversity, employment equity, standards of conduct and evaluation of performance.

Notes: An individual in the full-time employment of the holding company is also considered a non-executive director of a subsidiary company unless the individual, by conduct or executive authority, is involved in the day-to-day management of the subsidiary.

12. **Executive Director:** Involvement in the day-to-day management of the company or being in the full-time salaried employment of the company (or its subsidiary) or both, defines the

director as executive. An executive director, through his or her privileged position, has an intimate knowledge of the workings of the company. There can, therefore, be an imbalance in the amount and quality of information regarding the company's affairs possessed by executive and non-executive directors. Executive directors carry an added responsibility. They are entrusted with ensuring that the information laid before the board by management is an accurate reflection of their understanding of the affairs of the company. In law there is no real distinction between the different categories of directors. Thus, for purposes of the Act, all directors are required to comply with the relevant provisions, and meet the required standard of conduct when performing their functions and duties. It is an established practice, however, to classify directors according to their different roles on the board.

6.3 Appointment, Qualification and Disqualification of a Director

A Director may be appointed by any of the given means:

1. **By Promoters (First directors of the company):** They are named in company's articles usually and gets appointed by promoters in the manner laid down in AOA. In case of a One Person Company(as per 2013 act), an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of the section. Further, we can explore the vvarious situations as per which they get appointed:

First Situation: When during the process of incorporation of a company, when a promoter gets the memorandum of association and article of association drafted and submitted along with online application form. He mentions the name of directors in the articles of association who usually becomes the first director of a company.They remain appointed till the 1st Annual General Meeting of the company.

Second Situation: If the articles of association are silent about first director, but articles prescribe the manner of appointment of directors, then the first director will be determined in writing by the subscribers of MOA or majority of them. However, until first directors are so determined, all the subscribers who are individuals shall continue to be deemed as directors. They remain appointed until the appointment of directors in the 1st AGM.

Third Situation: If the first director is not named in articles of association and it does not contain any provision for appointment of first director: then the subscribers of Memorandum who are individuals become directors. If all the subscribers to MOA are body corporates, the company will have no directors until the first directors are appointed at annual general meeting.

2. **By Members/ shareholders of the company at General Meeting:** The directors are appointed by the company in annual general meeting of shareholders. Not less than 2/3 of total number of directors of a company, shall be rotational directors, i.e shall be liable to retire by rotation and remaining 1/3rd may be non-rotational. Also, not less than 2/3rd of total number of directors shall be liable to retire by rotation. The total number of directors here means the number of directors for the time being appointed a director and not the number fixed by AoA. The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons whobecame directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

i) Directors are appointed by passing an Ordinary resolution in General meeting. A Separate resolution for appointment of each directors is to be passed

ii) In case 2 or more directors get appointed by passing a single resolution, then their appointment shall not be considered valid.There is an option to adopt principle of proportional representation for appointment of directors. Notwithstanding anything contained in this Act, the articlesof a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation.

3. **By small shareholders:** A shareholder is the one who holds shares of nominal value of not more than Rs. 20,000 or such other sum as may be prescribed. He may be a holder of equity shares or preference shares of both.A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.The provisions related to small shareholder director is applicable to listed companies only, where the appointment of small shareholder is optional or obligatory.If a notice is served by the small shareholders for the appointment of such director, then it is

obligatory or legally compulsory.A Notice must be in writing regarding their appointment. It shall be given at least 14 days before the meeting. The notice shall be given by at least 1/10th in number of small shareholders.The notice shall be signed by at least 1,000 small shareholders, which shall specify name, address, number of shares held, particulars of shares with differential rightsand folio number of Shareholders proposing the resolution and the person whose name is proposed as a "small shareholder's Director.'' Only a small shareholder can be appointed as small shareholders directors. Small shareholders shall be appointed in suchmanner and with such terms and conditions as may be prescribed.

Notes: Disqualification of small shareholders directors - It is same as of any other director, that is: He shall vacate the office if he ceases to be a small shareholder. The small shareholder director shall be appointed for a maximum period of three years and shall not retire by rotation. He may be re- elected for another period of three years. A person cannot be a small shareholder's director in more than 2 companies.

4. By the Board of directors: It can be well understood as per the given cases:

a. Appointment of an Additional director: Within the maximum strength of board fixed by articles, board may appoint such director if authorised by Articles of association by passing a resolution at the Board Meeting. The position of additional director is same in terms of rights, provisions, duties, liabilities as any other director. Such a Director will vacate the office as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Notes:

i) No Central Govt. approval is required to appoint Additional director. In case number of directors falling below legal minimum, appointment of additional director by remaining directors will be valid

ii) Legal provisions related to appointment of additional directors is applicable to all companies(Public and private)

iii) Total number of directors additional and others must not exceed maximum number of directors fixed by AoA.

iv) A person who fails to get appointed as director in AGM cannot be appointed by board as an additional director

b. Casual vacancy (other than retirement of director): In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy arisesas a result of death, resignation, disqualification or any reason other than retirement by rotation. If Articles contains provision for filling casual vacancy, casual vacancy is filled in accordance with the regulations and provisions prescribed in AoA. If articles of company does not contain any provision related to filling of casual vacancy then it may be filled by Board of Directors at a board meeting by passing a resolution at the board meeting. Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

c. Alternate Director: The Board of Directors of a company may, if so authorized by its articles or by a resolution passed by the company in a general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India:

No person shall be appointed as an alternate director for an independent director unless he is qualified to beappointed as an independent director under the provisions of this Act.An alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India. An alternate director is excluded for the purposes of counting number of directorships which a person can hold.

5. Appointment by nominee: Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

6. Appointment by Third parties/ Appointment of Nominee Directors: Third parties here mean the debenture holders, financial or banking companies or financial corporations who have advanced loans to the company. Director so appointed is known as nominee director Nominee directors are watchdogs of third parties to safeguard their fund in the assisted company. They can also be appointed by financial company if authorized by articles of assisted company. Their number cannot exceed by 1/3rd of the total no. of directors, also appointment should be within maximum number of directors specified in company's articles.

Notes: All the provision of company's act will be applicable to nominee director, also liable to retire by rotation.Nominee director representing financial institutions constituted under special act, do not retire by rotation. They need not to hold qualification shares. They are not counted for total number of directors but can be appointed even if there is no provision in the assisted company's article. They can be appointed even if his appointment will result in increasing the number of directors beyond maximum number of directors. They can be removed only by the authority appointing him.

7. By Tribunal: National Company Law Tribunal has power to appoint a nominee director on the board of directors where the company's affair is conducted in manner prejudicial or oppressive to company's member / public interest/ company's interest. It is Applicable to all companies i.e public and private.

The Board appoints an Independent director: He may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, as maintained by any body, institute or association, as may by notified by the Central Government, having expertise increation and maintenance of such data bank.They have a responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company making such appointment.The appointment of independent director shall be approved by the company in general meeting.The Central Government may prescribe the manner and procedure of selection of independent directors who fulfill the qualifications and requirements. It is important for the company and independent directors to abide by the provisions specified in Schedule IV Companies act 2013(Sec 149(8)).

8. By Proportional Representation: Its' a method of voting by the stockholder, giving individual shareholders more power over the election of directors than they have under statutory voting. It can be done by:

a) S**ingle Transferable Vote:** In this system of voting, all the names of the candidates for election as directors are entered in the ballot paper. Each voter has only one vote to cast. However, a voter is permitted to indicate first preference, second preference, third preference, and so on… in the ballot paper. That candidate gets elected, if he receives the required number of votes fixed as quota (minimum number of votes required to win the election).If any such elected candidate gets more votes than the quota, the excess votes are transferred to other candidates proportionally based on their next preference. If no one exceeds the quota, then the candidates with the fewest votes are eliminated and those ballots aretransferred to each voter's next preferred candidate. This continues until winners for every seat is not found.

b) **Cumulative Voting:** In this system, each shareholder is entitled to one vote per share multiplied by the number of directors to be elected. In a case where multiple candidates are being considered for multiple positions, each shareholder has the option of placing all of his votes toward one seat or he can also choose to split his votes across multiple options. In general, one shareholder is equal to one vote but in caseof cumulative voting one shareholder is equal to as many votes as the number of directors to be elected.

Example: Assume that the number of directors required for the post are 3. Total number of candidates stood in the elections for the post of directors are 5. Majority shareholders in number are 60 minority shareholders in number are 40. Total number of shareholders are 100.

Suppose each shareholder has one share

No. of Votes = one vote per share multiplied by the number of directors to be elected

Total Majority has (60X3) = 180 votes

Total Minority has (40X3) = 120 votes

6.2 Qualification of a Director

As regards to the qualification of directors, there is no direct provision in the Companies Act, 2013. There is no prescribed academic or professional qualification for directors. Their qualification can be summed up as:

A director must be an individual.

A director must not suffer from any disqualification of directors.

1. There is no age limit as prescribed by law for a person to get appointed as a director. There should be adequate disclosure of age in the company's documents. It should be the duty of the Director to disclose his age correctly.

2. In case of a public company, appointment of directors beyond a prescribed age say 70 years, should be subject to a special resolution by the shareholders which should also prescribe his term. Continuation of a director above the age of 70 years, beyond such term, should be subject to a fresh resolution.

6.3 Disqualification of a director [Section 164 of Companies Act, 2013]

As per **164.** (1) A person shall not be eligible for appointment as a director of a company, if —
(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;
(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof toimprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years ormore, he shall not be eligible to be appointed as a director of any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and sixmonths have elapsed from the last day fixed for the payment of the call;

(g) he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding five years.

h) he has not complied with sub-section (3) of section 152.

(i) He has not complied with the provisions of sub-section (1) of section 165.

(2) No person who is or has been a director of a company which—
(a) has not filed financial statements or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest duethereon or pay any dividend declared and such failure to pay or redeem continues for one year or more shall be eligible to be re-appointed as adirector of that company or appointed to another company for a period of five years after the said company fails to do so.

Section 165 Regarding number of Directorship

No person after the commencement of this act shall hold office as a director, or any alternate director for more than 20 companies at the same time, and also specifies a maximum number of public companies of ten.

Directors disqualified to be appointed or re-appointed

a) Has not filed financial statements or annual returns of three financial years

b) Has failed to repay deposits accepted by it or pay interest thereon or to redeem debentures on the due date thereon or pay any dividend declared andsuch failure to pay or redeem continues for one year or more year.

c) The defaulting director is ineligible for re-appointment or appointment in another company for a period of five years from the date the said company fails to do so.

Removal of a Director

Whenever a director is found negligent in doing his duties, is involved in breach of privacy or any other condition, he is removed from his post.By Ordinary Resolution
A director cannot be removed, if appointed by National Company Law Tribunal (NCLT). Nothing contained in this sub-section shall apply if company has availed itself to the principal of proportional representation.

Removal of a director by National Company Law Tribunal

In case of oppression and mismanagement, sometimes the application is made to Tribunal, and if the tribunal is satisfied that the relief should be granted, it mayterminate any agreement of the company with directors and may remove any manager, managing director or any director of the company.The person so terminated by tribunal cannot serve the company in same capacity for a period of 5 years.The term 'oppression' is not clearly defined by Company Law 2013. However, the court of law defines it as a conduct that involves a visible departure from the standards of fair dealing and a violation of conditions that require fair – especially with regard to the right of shareholders.

For example: Depriving a member of the right to dividend.

Issue of further shares benefiting a section of shareholders.

Not calling a general meeting and keeping shareholders in dark.

Non-maintenance of statutory records

Not conducting affairs of the company in accordance with the Companies Act.

Refusal to register transmission under will.

Failure to distribute the amount of compensation received on nationalization of business of company among members, where required to be so distributed.

Mismanagement arises when the affairs of the company are conducted in such a manner that it is injurious or harmful to the interests of the company orany material change in the management of control of the company, and that by reason of such change, it is likely that the affairs of the company will be conducted in a mannerHarmful/injurious to the interests of the company.

- **Mismanagement includes:**
  Serious infighting between directors.
- Where Board of Directors is not legal and the illegality is being continued.
- Where bank account(s) was/were operated by unauthorized person(s).
- Sale of assets at low price and without compliance with the Act. Where directors take no serious action to recover amountsembezzled. Continuation in office after expiry of term of directors.
- Violation of Memorandum.
- Violation of statutory provisions and those of Articles.
- Company doomed to trade unprofitably.

Special Resolution for removing a director

- To appoint a new director, a special resolution is required. Under this section, you have to appoint somebody else in place of a director who was removed.
- A notice of a resolution needs to be sent, to remove any director to the concerned director

In the representation a director can make a written representation and request its notification to members of company, company, if the time permits. Such a representation requires:

- Stating a fact that representation has been made.
- Send a copy of resolution to every member of company to whom notice of meeting is sent.
- If notice is not sent due to insufficient time or for company's' default then even an oral representation can be made

- Representation need not be sent out and read out at the meeting either of company or any other aggrieved, if tribunal thinks that rights provided by this section are being abused to secure needless publicity for defamatory matters.

a. Procedure for removal of a Director

By ordinary resolution a director who was not appointed by the Tribunal, can be removed before the expiry of the period ofhis office after giving him a reasonable opportunity of being heard.

Step 1: A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed. Notice shall be served 14 days before the meeting.

Step2: Copy of notice: On receiving the notice of a resolution to remove a director under this section, the company shall send a copy thereof to the director concerned. The director, shall be then entitled to make a representation against the resolution and to be heard at the meeting.

Step3: Written representation: The concerned direct needs to make a written representation to the company and requests its notification to members of the company.

The company shall, if the time permits it to do so, send a copy of the representation to every member of the company to whomnotice of the meeting is sent (whether before or after receipt of the representation by the company)

Step4: Oral Representation: If a copy of the representation is not sent due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting.

Step5: Hold a general meeting: A general meeting needs to be held and concerned director will be given an opportunity to be heard. If the resolution for removal is passed by ordinary resolution, the director shall be removed. It is also important to know the circumstances in which director cannot be removed

a) Where the director is appointed by the system of proportional representation

b) Where the director has been appointed by tribunal

Filling of vacancy caused by Removal: A vacancy created due to the removal of a director may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given together with the notice of approval.

A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.

If the vacancy is not filled at the same meeting, it may be filled by directors as a casual vacancy in accordance. Provided that the director who was removed from office shall not be re-appointed as a director by the Board of Directors.

Section 168 of Companies Act, 2013: Resignation notice by director

A director may resign from his office by giving a notice in writing to the Company and the Board shall on receipt of suchnotice take note of the same and the Company shall intimate the Registrar and shall also place the fact of such resignation in the report of directors laid in the immediately following General Meeting by the Company.

Mandatory Requirements for resignation
The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

The director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

A director may resign from his office by giving a notice in writing to the company i.e. the Board of Directors of the company.

E-mail communication or letter addressed to the company is a valid mode of communication. The director may also forward a copy of resignation along with detailed reason for the resignation to the Registrar in Form DIR-11 along with the fee as provided in the companies (Registration offices and Fees) Rules,2014 within 30 days from the date of resignation. While submitting DIR-11, the director is required to attach the documents namely:

Notice of resignation filed with the company (Resignation Letter can be attached)

- Proof of dispatch
- Acknowledgement received from company, if any and is mandatory if yes selected in Form
- DIR-11 (Resignation acceptance Letter by the Company can be attached)
- Any other information can be provided as an optional attachment(s).
- Obligation on part of company

The Board of Directors shall take note of the receipt of the notice of resignation which can be considered in the meeting of the Board of Directors. Accordingly, the resolution is passed by the Board of Directors for accepting the resignation and the minutes of the meeting of the Board of Directors shall be drafted.

The Board of Directors shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12.

The Board of Directors shall also place the fact of resignation in the Director's Report of subsequent annual general meeting of the company and also it must be reflected in the website of the company.

Company is required to attach the necessary documents such as:

i) notice of resignation (Resignation Letter can be attached) and ii) evidence of cessation (board Resolution or Resignation acceptance letter can be attached).

6.4 Remuneration for Directors

Remuneration' means any money or its equivalent given to any person for services rendered by him. Managerial remuneration in simple words is the remuneration paid to managerial personals. Here, managerial personals mean directors including managing director and whole-time director, and manager. There are 3 ways of paying remuneration to a director:

1. Automatically by Profits
2. By Shareholders' Approval
3. By Shareholders' and Central Government

Permissible managerial remuneration of Directors payable under section 197 of the companies act 2013

Total managerial remuneration payable by a public company, to its directors, managing director and whole-time director and its manager in respect of any financial year:

Condition	Max Remuneration in any financial year
Company with one Managing director/whole time director/manager	5% of the net profits of the company
Company with more than one Managing director/whole time director/manager	10% of the net profits of the company
Overall Limit on Managerial Remuneration	11% of the net profits of the company
Remuneration payable to directors who are neither managing directors nor whole-time directors	
For directors who are neither managing director or whole-time directors	1% of the net profits of the company if there is a managing director/whole time director
If there is a director who is neither a Managing	3% of the net profits of the company if there is no

Condition	Max Remuneration in any financial year
director/whole time director	managing director/whole time director

Remuneration of Director under section 197 of the companies act 2013: In case of Public Company, a company can pay not more than 11% of the net profit as calculated in a manner laid down in section 198 of the companies act. A company having only one managing director, whole-time director or manager shall not pay more than 5% of its net profits. A company has more than one such directors, remuneration shall be payable not more than 11% of the net profit.

Maximum remuneration for a Director

If Capital (Rupees) of a company is Less than 5 crores, then the highest limit for Remuneration to a Director is 30 lakhs

The percentages displayed above shall be exclusive of any fees payable under section 197(5). Until now, any managerial remuneration in excess of 11% required government approval. However, now a public company can pay its managerial personnel remuneration in excess of 11% without prior approval of the Central Government. A special resolution approved by the shareholders will be sufficient. In case a company has defaulted in paying its dues or failed to pay its dues, permission from the lenders will be necessary.

When the company has inadequate profits/no profits: In case a company has inadequate profits/no profits in any financial year, no amount shall be payable by way of remuneration except if these provisions are followed.

Where the effective capital is:	Limits of yearly remuneration
Negative or less than 5 Crores	60 Lakhs
5 crores and above but less than 100 Crores	84 Lakhs
100 Crores and above but less than 250 Crores	120 Lakhs
250 Crores and above	120 Lakhs plus 0.01% of the effective capital in excess of 250 Crores

Important Pointers

- **Determination of Remuneration:** The remuneration payable to the director shall be determined by:
  - The articles of the company
  - A resolution
  - Special resolution if articles require it to be passed in the general meeting. The remuneration payable as per these rules shall also include the remuneration payable to the personals working in any other capacities. However, if the services are rendered in professional a capacity and if the nomination and remuneration committee/Board of directors believes that the director possesses the necessary qualification for the practice of the profession, exceptions are possible.
- **Fees to directors:** The directors may receive fees for attending meetings and such fees cannot exceed the limits prescribed. Different fees for different classes of companies may be as prescribed.
  The fees can be paid:
  a. Monthly

b. As a Specified Percentage of the Net Profits yearly
c. Partly by method (a) and partly by method (b)

- **Remuneration of independent directors**: An Independent director shall be entitled to a sitting fee, a reimbursement for participation in meetings and profit related commission as approved by Board. However, he shall not be entitled to ESOP.
- **Excess Remuneration to be refunded:** If any director receives any remuneration in excess of the provisions of law, the same shall be refunded to the company or kept in trust for the company. Such recovery shall not be waived unless permitted by the Central Government.
- **Disclosure by a listed company**: Every listed company shall disclose the ratio of the remuneration paid and the median employee's remuneration along with other prescribed details.
- **Insurance:** When the company insures its personnel by providing protection against any act done by them due to negligence, default, misfeasance, breach of duty, breach of trust, such the premium paid for this insurance shall not be treated as part of remuneration except if the director is proved guilty.
- Any managing director/whole time director receiving commission from the company may also receive a remuneration or commission from the holding or subsidiary of such a company provided the same is disclosed in the board's report

Did You know?

Any person who contravenes these provisions shall be punishable with a minimum fine of Rs.1 Lakh and a maximum fine of Rs. 5 Lakhs.

6.5 Duties of a Director

1. **Fiduciary duties (Good Faith):** The Director occupies a fiduciary position in the company. Fiduciary position refers to a position of trust and confidence. The fiduciary position of directors requires them to act honestly and in good faith. It is a directors' duty to promote the objects of a company for the benefit of its members as a whole. They must work in best interest of company, its employees, the shareholders, the community and for the protection of environment.
2. **Due and reasonable care:** A director must be the one who is more focused, well-organized and carefully does his duties than someone who is mismanaged or confused.It is so because, a director of a company is expected to exercise his duties with due and reasonable care, skill and diligence and exercise independent judgment.
3. **Duty not to involve in conflict of interest:** A director of a company shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
4. **Duty not to obtain gain or advantage:** A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.
5. **Duty not to assign his office:** A director of a company shall not assign his office. Any assignment so made shall be void. So, may be if a director appoints someone else on his behalf to look after things in his absence without information of company, or may be proper procedure is not followed, then the company may even remove him as such an act is not a valid in eyes of law and is ultra vires activity.
6.

6.6 Powers of a Director

A. General Powers

A director is entitled to exercise all such powers and acts as the company is authorised to do. Exercise such powers subject to rules in Articles of Association or Memorandum of Association or the General meeting. He cannot exercise any power which are required is to be exercised by shareholders in general meeting.

In nutshell: 1. A director shall exercise only those powers that he gets as per the memorandum of Association. In case a suit is to be filed, a director cannot file it onbehalf of a company until a power is given to do so by the board through a resolution in that regard.

If the board of directors passes a resolution to authorize a director to file an appeal in the court, and such authorized director delegates his power to an officer of the company, then an appeal by that officer would be competent. A director is an agent of company as a whole but not of majority of shareholders.

B. Specific Powers or Powers at Board meeting

A director can perform powers on behalf of company by means of resolutions passed at the meetings to:

- Approve Financial Statements and Board Report
- Approve bonus to employees
- Declare dividend in the Company
- Power to make calls in respect of money unpaid on shares
- Call meetings on suo moto basis.
- Approve Amalgamation/Merger/ Takeover
- Diversify the business of the Company
- Issue shares, debentures, or any other instruments in respect of the Company.
- Borrow and invest funds for the Company
- Power to grant loans or give guarantee in respect of loans
- Authorize buy back of securities

6.7 Position of Directors

1. **Agents of the company:** A company cannot act on its own as it can act only through directors by the reason of which a relation of principal and agent is established between the company and the directors. For every contract made by directors in the name and on behalf of company, it is the company that becomes liable and not the directors. This is what the court recognized in Ferguson v. Wilson case.

Case Study:

Issue: Mr. Denny is a director in SSP Logistics company. As per the memorandum of association he could borrow up to Rs. 20 lakhs on behalf of company. He borrows Rs. 10 lakh from a bank. The company sustained losses and before repayment of such loan, the company liquidated. The bank files a case against Mr. Denny. A question arises that can Mr. Denny be held liable for debts of company?

Rule: A Director is an agent of company and cannot be held liable for any transaction entered within scope of power

Analysis: Mr. Denny acted within the scope of power as conferred on him through the memorandum of association, hence, cannotbe personally made liable for debts of company. Secondly, he is merely an agent of company who acted on its behalf to borrow money. He cannot be forced to repay debts of the company.

Conclusion: Directors are agents of the company in the eyes of law. A company cannot act on its own as it can act only through directors by the reason of which a relation of principal and agent is established between the company and the directors. For every contract made by directors in the name and on behalf of company, it is the company that becomes liable and not the directors. Thus, Mr. Denny cannot be held liable for debts of company. But, keep it in mind that the Position of directors differ from agents. It is so because an agent can enter into a contract in his own name but a director cannot. Again, an agent may not disclose the name of his principal but a director must disclose the name of his principal. Hence, the directors are not agents in the true sense.

Directors are Trustees of company's money, property and their powers and such must account for all the moneys over which they exercise control and shall refund any moneys improperly paid away, and shall exercise their powers honestly in the interest of the company and all the shareholders, and not their own sectional interest. The directors of a company are trustees for the company, and for reference to their power of applying funds of the company and for misuse of the power they could be rendered liable as trustees and on their death, cause of action survives against their legal representatives.

Directors are not Trustees

In real sense directors are not trustees as a trustee is the legal owner of the trust property and contracts in his own name. On the other hand, director is a paid agent or officer of the company and contracts for the company. In fact, the directors are commercial men managing a trading concern for the benefit of themselves and of all the shareholders in it.

Then to whom the directors are trustee?

Directors have no duty towards individual shareholders. From this it is very clear that, the directors are trustees to the company and not of individual shareholders.

1. **As a managing director**

   They are so described because like a partner of a firm, they manage the affairs of the company and they are also usually important shareholders of the company. They do all proprietorial functions like allotting shares, making calls, forfeiting shares etc.

Summary

A company is an artificial person with no brain of its own. It requires natural persons to carry out its activities economically and efficiently. The directors act as the brain of the company. They handle its management, make sure its functions run smoothly and help to execute the goals. In the absence of directors, a company cannot grow. The Companies Act 2013 has a comprehensive policy regarding appointing, resigning, removal etc. of directors and is easy to understand.

Keywords

Deemed Director: For certain purposes, a person even when he is not a director may be deemed to be a director of a company.

Director: Any person occupying the position of director, by whatever name called director.

Legal Position of Director: The exact position of 'Director' is hard to define, as no formal definition, either statutory or judicial, of the term has been given. However, judicial pronouncements have described them as (i) agents, (ii) trustees, or (iii) managing partners.

Statutory Duties: The statutory duties are the duties and obligations imposed by the Companies Act.

Self Assessment

1. Every company shall have at least one director who has stayed in India for a total period of not less than ____in the previous calendar year.

A. 132 days

B. 182 days

C. 142 days

D. 162 days

2. Every Listed Company may have one director elected by small shareholders "small shareholders" means a shareholder holding shares of nominal value of not more than _____or such sum as may be prescribed.

A. Rs.5,000/-

B. Rs.10,000/-

C. Rs.15,000/-

D. Rs.20,000/-

3. An independent director can be appointed for a consecutive period of not more than ____
A. 1 years then a gap of 2 years is required before their reappointment in the same company for the same position.

B. 2 years then a gap of 6 months is required before their reappointment in the same company for the same position.

C. 2 years then a gap of 3 years is required before their reappointment in the same company for the same position.

D. 2 years then a gap of 2 years is required before their reappointment in the same company for the same position.

4. _____ is a person who is not officially appointed by the board but he or she gives such advice to the directors which they are accustomed to follow except when such shadow director provides the same in his professional capacity.
A. Shadow director

B. Nominee director

C. Independent Director

D. Small Shareholder Director

5. _____ is a director who is Involved in the day-to-day management of the company or being in the full-time salaried employment of the company (or its subsidiary) or both.
A. Shadow director

B. Nominee director

C. Independent Director

D. Executive Director

6. If the capital of a company is of 100 crores and above b ut less than 250 crores, then how much remuneration is to be paid to the director?
A. 100 lakhs

B. 120 lakhs

C. 150 lakhs

D. 200 lakhs

7. Identify a false statement regarding refund of remuneration to a director?
A. If any director receives any remuneration in excess of the provisions of law, the same shall be refunded to the company or kept in trust for the company.

B. Excess remuneration recovery shall not be waived unless permitted by the Central Government.

C. Both a or b

D. Neither a nor b

8. The fiduciary position of directors requires them to act:
A. Dishonestly only

B. Honestly and in good faith

C. Honestly and bad faith

D. Cleverly and dishonestly

9. Which of the given is a specific power of a Director?

A. Power to make calls in respect of money unpaid on shares

B. Call meetings on suo moto basis.

C. Approve Amalgamation/Merger/ Takeover

D. All of the above

10. A director who was not appointed by the Tribunal, can be removed by ____ before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

A. Ordinary resolution

B. Special resolution

C. Emergency resolution

D. White resolution

11. Which of the following is not a qualification to become a director?

A. A director must be an insolvent

B. A director must be an individual

C. A director must not suffer from any disqualification of directors

D A director must be sound mind

12. Term of office for a small shareholder director shall not be more than a period of ___ consecutive years and he shall not be liable to retire by rotation.

A. 2

B. 3

C. 4

D. 5

13. Malti is acting as a director in a public limited company. Her brother Suresh lives in Ontario, Canada. His wedding is fixed by Malti parents who live with him to a girl from Quebec, Canada. Suresh is Maltis' younger brother and she is really excited to attend his wedding. She applied for 6 months visa to Canada. Decide what arrangement should be done by the Board of Directors in such a situation?

A. Let Malti return from overseas and meanwhile let his office be vacant.

B. A casual vacancy arises in case Malti leaves for overseas and which must be filled.

C. An alternate director needs to be appointed for 6 months.

D. Any of the above methods can be adopted by the Board of Directors.

14. Nelson was appointed properly as a director of a public limited company. Subsequently, the company altered its articles of association and made it a compulsory qualification for the directors to be at atleast the holder of the degree of Chartered Accountancy. Nelson did not hold that qualification and thus he was asked to quit office. Is the company justified in doing so?

A. Yes, company is empowered to do so as per the provisions of companies act

B. No, company is very selfish and inhuman towards Nelson. However, it can be still acceptable

C. Yes, in minutes of meeting, company can keep this as power to decide additional qualification

D. No, as there is no such provision that prescribes additional disqualification to be director

15. _____ is a system of voting where all the names of the candidates for election as directors are entered in the ballot paper. Each voter has only one vote.

A. Single Transferable Voting

B. Cumulative voting

C. Either single transferable voting or cumulative voting

D. Both single transferable voting and cumulative voting

Answers for Self Assessment

1.	B	2.	D	3.	C	4.	A	5.	D
6.	B	7.	C	8.	B	9.	D	10.	A
11.	A	12.	B	13.	C	14.	D	15.	A

Review Questions

Q1. Discuss the various types of a Director?

Q2. Explain how a director may be appointed in a company?

Q3. Write a detailed note on qualification and disqualification of a director?

Q4. What are the rights of a director? What remuneration a director may obtain?

Q5. Explain in detail various powers and duties of a director.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company
2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

- **https://cleartax.in/s/managerial-remuneration**
- https://taxguru.in/company-law/appointment-directors-provisions-companies-act-2013.html
- https://taxguru.in/company-law/rights-duties-powers-and-accountabilities-of-part-time-directors.html
- https://www.mca.gov.in/MinistryV2/management+and+board+governance.html

Unit 07: Borrowing Power of a Company

Objectives

After studying this unit, you will be able to:

- Comprehend the authorized and unauthorized borrowings of a company
- Understand the various methods of borrowing

Introduction

Capital is the life blood to run a business effectively and efficiently. It can be arranged through internal as well as external resources. Internal sources of financing the capital needs of a company includes issuing shares through a prospectus, while the external sources comprise of long-term, short-term and medium-term borrowing, secured and unsecured borrowing etc.Borrowing can be defined as under which money is arrange with an external source. Every trading company has an implied power to borrow, as borrowing is implied within the object that it's incorporated. A trading company can exercise this power albeit it's not included within the Memorandum. However non-trading company has no implied power to borrow, and such powers are often taken by its implied power to borrow and such power are often acquired by it by including a clause thereto effect within the Memorandum.

Under the Companies Act, 1956, there were no restrictions on the board of directors of private companies regarding borrowings for the purpose of business of the company. The board of directors of public companies were required to seek approval of shareholders by way of ordinary resolution in case of fresh loans to be taken exceed paid up capital and free reserves. However, Companies Act, 2013 enacted to increase the objective of corporate governance and more involvement of shareholders in the core business of the company.

7.1 Extent of Borrowing

For understanding the extent of borrowing, the companies may be divided into two categories, namely:

a) **Trading Companies:** Every trading company has an implied power to borrow, as borrowing is implied within the object that it's incorporated. A trading company can exercise this power albeit it's not included within the Memorandum.

b) **Non-trading Companies:** A non-trading company has no implied power to borrow and such power are often taken by its implied power to borrow and such power are often taken by it by including a clause thereto effect within the Memorandum.

7.2 Borrowing Power under Companies act, 2013

Section 180 of the companies act, 2013, restricts the power of board of directors. The Board can exercise certain powers with the consent of the company by a special resolution only. **Section 180 (1)** states that the Board of Directors of a company shall exercise the given powers only with the consent of the company by a special resolution, namely: —

(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

(b) to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business:

Provided that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

(d) to remit, or give time for the repayment of, any debt due from a director.

Section 180 (2): Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in clause (c) of sub-section (1) shall specify the total amount up to which monies may be borrowed by the Board of Directors. **Section 180(5)**: No debt incurred by the company in excess of the limit imposed by clause (c) of sub-section (1) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded.

Exception to section 180: In the year 2015, notification came on 5th June which stated that this section shall not apply to private companies. Further on 4th January 2017, Specified IFSC (Indian Financial System Code) public company would also not be required to comply with this section, unless the article of the company provides otherwise.

7.3 Authorized Borrowing

Authorized borrowing means the money borrowed within the powers as provided by the memorandum of association of the company. Such borrowings are valid and enforceable, which means the company is going to be held liable for the payment of the same.

7.4 Unauthorized Borrowing

When the money is borrowed without any power to borrow is known as ultra vires borrowing. Such a borrowing is naturally invalid in the eyes of law and hence not enforceable. It can be of two types, namely:

i) Borrowing ultra-vires the company and
ii) Borrowing ultra-vires the directors.

7.5 Borrowing Ultra-Vires the Company

These are without express or implied authority i.e., which are beyond the powers of the company. It can occur in the given ways:

a) Where company had no power to borrow the money, even then it did so. In such a case, any borrowing of such a nature shall be ultra-vires the company.
b) Where the memorandum of association has set a limit for borrowing power of company, in case the company exceeds such a given limit, it shall be considered as ultra-vires the company.

7.6 Borrowing Ultra-Vires the Directors (Intra-Vires the Company)

Ultra-vires borrowings are **void and unenforceable**. The lender of money has **no legal debt** against the company. As such, the lender can exercise **no legal right** against the company to recover the amount of loan.

Money Lenders rights against the Company

1. Injunction:It means a court order restraining a person from doing a particular thing. Think about a situation where money is advanced by lender and is not spent by company, in such a situation, a money lender can obtain injunction orders restraining company from parting or spending his money. Thus, lender can take money back so long it is actually in possession of company.

Case Study

Issue: The memorandum of association of a company contained no provision for the company to borrow money. But, still the directors borrowed Rs. 10 lakhs to purchase a welding machine from Rinka. Before the company could actually spent the money from Rinka, she became aware that the borrowing by the directors was unauthorized. What can Rinka do in such a situation?

Rule: In case of ultra-vires borrowing, if the money is not spent by company, the lender can obtain injunction orders.

Analysis: If we Analyze the case carefully then we get a clear idea that in this case the memorandum of association of the company did not have any provision that could authorize the company to borrow money. Despite knowing this fact, the directors borrowed money from Rinka without authority.

Conclusion: It can be concluded that the money borrowed by directors can be recovered through Injunction, whereby the court can restrict the company from spending the money of Jyoti. Hence, she can get all her money back.

2. Subrogation: If the cash as given by a money lender has been invested in some particular asset, he may claim that asset, or if such asset can't be ascertained he may claim that any increase in the assets as a result of such borrowing be restored to him within the event of a completing.

Case Study:

Issue: A Pharmaceutical company owed Rs. 5lakh to Samar, one of its creditor. The directors of the company borrowed Rs. 7 lakh from Birju, a money lender. This borrowing was ultra-vires the company to pay its legitimate debt and remaining for its business activities. Can Birju get any remedy in this circumstance?

Rule: If an ultra vires borrowing is used to pay off legitimate or genuine debts of the company, the lender is entitled to treat his loan as valid and can sue the company by virtue of principle of subrogation.

Analysis: A company owed money to Samar. To pay legal debt of company, its

directors borrowed Rs. 7 lakh and paid off a legitimate debt of Rs. 5 lakh and invested the remaining in business activity.

Conclusion: Yes! Birju can get a remedy in this circumstance. He is subrogated to the rights of company's' creditor Samar to the extent of Rs. 5 lakhsand can recover the same from the company. For remaining rupees, Birju may exercise other rights available to him.

3. Identification and Tracing: If the money lent to the company can be traced in the hands of the company in original form or even if it has been employed for the purchase of propertywhich is still capable of identification, the ultra vires lender can obtain a tracing order and may claim that asset or money.

Case Study

Issue: The directors of a company borrowed Rs. 3,50,000 from Jimmy, a money lender and purchased a welding machine with this amount. The money so borrowed by directors was ultra-vires as the memorandum of association of the company did not authorize it to borrow money for this purpose. What is your take, Can Jimmy recover his money?

Rule: When the lender's money and that of the company have become mixed up and the two cannot be separated from each other, the lender may claim Perry paripassu distribution of the assets with the shareholders in the event of the winding up of the company.

Analysis: Unauthorized borrowing was used to buy a welding machine. However, it can be easily traced as the machine costed Rs. 3,50,000.

Conclusion: Yes, Jimmy can recover his money by taking the machine in his possession and sell it to recover his money.

Did you Know?

If the lender's money and that of the company have become mixed up and the two cannot be separated from each other, then the lender may claim paripassu distribution of the assets with the shareholders in the event of the winding up of the company.

Sinclair v. Brougham case year 1914

Issue: A building society started banking business which was ultra vires the society. On its winding up, the assets were composed partly of the shareholders' money and partly of the ultra vires depositors' money. It was not possible to trace out which part of the mixed fund belonged to the shareholders or the creditors. The assets were also not sufficient to pay both in full. Can the creditors recover their money?

Rule: If the lender's money and that of the company have become mixed up and the two cannot be separated from each other, the lender may claim paripassu distribution of the assets with the shareholders in the event of the winding up of the company.

Analysis: in the given case, it was not possible to trace out which part of the mixed fund belonged to the shareholders or the creditors. The assets were also not sufficient to pay both in full.

Conclusion: To conclude we can say that Yes creditors can recover their money. The entire remaining amount should be apportioned between the shareholders and ultra vires depositors in proportion to the amount paid by them respectively.

Notes: The lender may obtain injunction from the court for restraining the company from parting with the property or money held the same in trust for the lender.

4. Recovery and damage: As per this right the lender may hold the directors personally liable for contracting an ultra vires loan of the company. The directors are liable for damages to the lender for the breach of the implied warranty of authority.

Case Study:

Issue: Mr. Harshad Mohan did a construction work for a company and agreed to accept debentures in payment instead of cash. He was unaware that all the debentures which the directors could issue were already issued. As the company had no assets to satisfy Phantoms' claim on debentures, he sued the directors. Can he get any remedy?

Rule: The lender may hold the directors personally liable for contracting an ultra vires loan of the company.

Analysis: The issue of debentures was an over issue and hence was ultra vires and void.

Conclusion: Yes, Mr. Harshad Mohan can recover his money as directors are liable for breach of the implied warranty of authority. They need to pay the par value of the debentures Mr. Harshad ought to have received.

[Based on Firbanks Executors v. Humphereys (1886) 18 Q.B.D. 54]

7.7 Legal Implication of Borrowing ultra-Vires the Directors

1. ***Ratification by Company***: It is a procedure through which an irregularity in the running of the company is sanctioned by the shareholders and a director is absolved from his or her personal liability to the company arising from a breach of duty. The borrowing ultra-vires the directors can be ratified by company and after that, it becomes bound by the act of directors and liable to pay loan. In case the act of directors' act is not ratified but the money borrowed is in name of company and even used for its benefit, the company is liable to pay the debt.

Case Study:

Issue: An Ice-cream manufacturing company was authorized to borrow money for its business and had no limit on its borrowing power as per its memorandum. However, as per legal restrictions, the directors could not borrow money beyond the limit of issued capital of company without sanction of general meeting. The directors borrowed from Raghunath, a money lender beyond their power without sanction of general meeting. This borrowed money was used to pay lawful debts of company and for other legitimate business needs. On company's' refusal to repay the amount, Raghunath filed a suit against company to recover money. Will he succeed?

Rule: The rule says that in case the act of directors' act is not ratified but the money borrowed is in name of companyand even used for its benefit, the company is liable to pay the debt.

Analysis: On analysing the details, we get an idea that the borrowing done by directors was ultra vires but used to pay lawful debts ofcompany and other legitimate business needs. Raghunath filed a case against company to recover his money.

Conclusion: Yes, Raghunath shall succeed in getting his money back from company as even though the act of borrowing by the directors was ultra-vires yet it was used for its benefit. Hence, the company shall be legally liable to repay borrowed amount.

[***T.R Pratt (Bombay) Ltd. Vs E.D.S & Co. AIR 1936 Bombay 62 case]***

2. Misappropriation of Money to Unauthorized Activities

Sometimes the borrowings are within the powers of company but used by directors for unauthorized activities. In such cases, company will be liable to lender if he had no knowledge of intended misuse of money.

Example: Assume that Jacob lends money to the directors of a company. He was unaware that the directors intended to use his money for unauthorized activities. In this case the company shall be liable to repay the amount of loan. [This e.g. Is based on V.K.R.S.T. Firm v Oriental Investment Trust Ltd. AIR 1944 Madras 532] Further let us presume that Jacob was aware about such intentions of directors. Well, then he cannot recover any money as the borrowing will be ultra vires and invalid. [Based on Re International Ltd. (1969)]

Summary

Borrowings are undoubtedly an essential part of companies and they cannot operate without them. However, it is also necessary that the interest of the creditors and investors of companies are protected. Any irregular and negligent act may result in the insolvency of the company which may cause considerable losses to them. Thus, to facilitate the smooth functioning of the company and protect the interests of shareholders, specific provisions are provided in the Companies Act 2013 which defines the objectives of the company.

Keywords

Long Term Borrowings– Liabilities that represent money borrowed from banks or other lenders to fund the on-going operations of a business and that will not come due within one year. Long term borrowings or debt are those which are borrowed for more than one year and generally extend up to 5 years.

Short Term borrowings– Reflects the total carrying amount as of the balance sheet date of debt having initial terms less than one year or the normal operating cycle, if longer. These are borrowings that have to be paid off within a year. It is a temporary support for business and meeting the working capital needs is the main purpose.

Medium-term borrowings– The borrowings which are undertaken between short term borrowings and long-term borrowings which is up to 2-5 years.

Secured borrowing – These are the borrowings against collateral which is security.

Unsecured borrowings- Under this, the debt consists of financial obligation. There is no collateral issued against the unsecured borrowings.

Private borrowing– The company takes a loan from banks and other private institutions.

Public borrowings– It consists of all institutions which are for public exchange.

Self Assessment

Q1.Authorized borrowing means

A. the money borrowed outside the powers as provided by the memorandum of association of the company
B. the money borrowed within the powers as provided by the article of association of the company
C. the money borrowed within the powers as provided by the prospectus of the company
D. the money borrowed within the powers as provided by the memorandum of association of the company

Q2. Long term borrowings or debt are those which are borrowed for _____

A. more than ten year and generally extend up to five years.
B. more than two year and generally extend up to five years.
C. more than one year and generally extend up to five years.
D. more than three year and generally extend up to five years.

Q3. The borrowings which are undertaken between short term borrowings and long-term borrowings are known as:

A. Short-term borrowings
B. Medium-term borrowings
C. Long-term borrowings
D. Unsecured borrowings

Q4. Identify the false statement from the below:

A. Ultra-vires borrowings are valid and enforceable.
B. Ultra-vires borrowings are void and unenforceable.
C. The lender of money has no legal debt against the company.
D. The lender can exercise no legal right against the company to recover the amount of loan.

Q5. Which of the given companies have implied power to borrow money for the purpose of business?

A. Non-trading companies
B. Both a and c
C. Trading companies
D. None of the above

Q6. Legal status of authorized borrowing is:

A. Voidable
B. Valid and unenforceable for repayment of money borrowed
C. Illegal and enforceable for repayment of money borrowed
D. Valid and enforceable for repayment of money borrowed

Q7. Which of the following is false regarding ultra vires borrowing?

A. Company has a power to borrow
B. Memorandum of association of the company restricts it or fixes a limit to its borrowing power and any borrowing in excess of that defined limit will become ultra-vires
C. It happens without express or implied authority
D. Any borrowing that is ultra vires the company, is null and void

Q8. A building society started banking business which was ultra vires the society. On its winding up, the assets were composed partly of the shareholders' money and partly of the ultra vires depositors' money. It was not possible to trace out which part of the mixed fund belonged to the shareholders or the creditors. The assets were also not sufficient to pay both in full. What remedy stakeholders may have if any?

A. No remedy is available to ultra vires depositors.
B. Entire remaining amount should be apportioned between the shareholders and ultra vires depositors in proportion to the amount paid by them respectively.
C. Entire remaining amount should be apportioned between the shareholders and ultra vires depositors in proportion to the amount paid by them respectively. Moreover, the lender

may obtain injunction from the court for restraining the company from parting with the property/money held the same in trust for the lender.

D. The lender may obtain injunction from the court for restraining the company from parting with the property or any money held the same in trust for the lender.

Q9. Assume that the directors of a company borrowed Rs. 2,35,000 from Timmy, a money lender and purchased a welding machine with this amount. The money so borrowed by directors was ultra-vires as the memorandum of association of the company did not authorize it to borrow money for this purpose. Can Timmy recover his money?

A. No, as already a welding machine got purchased and all the amount is spent
B. Yes, as even though there is an unauthorized borrowing used to buy a welding machine, still it can be easily traced as the machine costed Rs. 2,35,000
C. Yes, as even though there is an authorized borrowing used to buy a welding machine, it cannot be easily traced as an amount of Rs. 2,35,000 got spent completely
D. None of the reasons seems to be valid

Q10. Assume that a money lender lends Rs. 10 lakh to the directors of a company. But, later he comes to know they were not authorized to borrow more than Rs. 2 lakh. In such a situation, what remedy can the money lender may seek against his lent money?

A. He can obtain injunction orders restraining company from parting or spending his money
B. He cannot do anything to recover his debt
C. He can obtain rights of subrogation restraining company from parting or spending his money
D. He can do the Identification and tracking only

Q11. Hillary purchased certain shares in JK Limited company.Subsequently he became aware that there a false representation, yet he went on a foreign trip with friends. He had made up his mind that as he returns from trip he shall request for cancellation of shares issued. Meanwhile as he returned from the trip and was going to file a suit for getting his money back, he became aware that the company already liquidated. What remedy can Hillary receive?

A. Hillary shall get no remedy as he should not have gone on trip with friends
B. Hillary can get his shares back for the call money so paid
C. Hillary cannot get any remedy as there was unexplained delay that precluded him to get any remedy do far
D. Hillary cannot get any remedy as company might have already used his money in business

Q12. If the money borrowed ultra vires has been used to pay off legitimate debts of the company (whether incurred before or after the money was borrowed), the lender is entitled to treat his loan as intra-vires to the extent to which the money was so applied. He can sue the company by virtue of principle of _____

A. Misappropriation
B. Subrogation
C. Any of the above
D. Injunction

Q13. A company owed Rs. 2 lakh to Tulika, one of its creditor. The directors borrowed Rs. 3 lakh from Merry, a money lender. This borrowing was ultra-vires the company to pay its legitimate debt and remaining for its business activities. What remedy does Merry can have in such a situation?

A. She cannot get any remedy
B. Merry is subrogated to the rights of companys' creditor Tulika to the extent of Rs. 2 lakh and can recover the same from the company. For remaining rupees, Merry may exercise other rights available to her
C. Merry should not have given money as it was ultra vires act
D. Merry can contact the board for return of his money

Q14. A company owed Rs. 2 lakhs to Amar, one of its creditors. The directors borrowed Rs. 3 lakhs from Lakhan, a money lender. This borrowing was ultra-vires the company to pay its legitimate debt and remaining for its business activities. Can Lakhan get any remedy in this circumstance?

A. Yes, as the loan money was used to pay off the legitimate or legal debt of the company. The lender of money can recover his money by exercising his right of subrogation.
B. No, as the loan money was used to pay off the legitimate or legal debt of the company.
C. Yes, as the loan money was used to pay off the legitimate or legal debt of the company. The lender of money can recover his money by exercising his right of injunction.
D. No, as the loan money was an illegal activity

Q15. A company was authorized to borrow money for its business, and there was no limit on the borrowings for business in companys' memorandum of association. However, as per legal restrictions, the directors could not borrow money beyond the limit of issued share capital of company without the sanction in general meeting. The directors borrowed money from Ajay, a money lender beyond their powers without such sanction. The money so borrowed was used for the benefits of company, in paying its lawful debts and for other legitimate business needs. On company's' refusal to repay the amount, Ajay filed a suit against company for recovery of the money lent. Will he succeed?

A. No, as company is not liable at all. It did not ask directors to borrow the money.
B. Yes, but the directors' are liable to pay the money.
C. Yes, both company and directors are liable.
D. Yes, the company is liable to pay as the money is used to pay its debts and other legitimate business needs.

Answers for Self Assessment

1.	D	2.	C	3.	B	4.	A	5.	C
6.	D	7.	A	8.	C	9.	B	10.	A
11.	C	12.	D	13.	B	14.	A	15.	D

Review Questions

1.Discuss the rights of Money Lenders against the Company in detail.

2. What are the legal implications of Borrowing ultra-Vires the Directors.

3. Discuss the given terms: Long Term Borrowings, Short Term borrowings**,** Medium-term borrowings, Secured and unsecured borrowing.

4.Discuss the concept of ultra vires borrowing in detail.

5.Write a note on extent and power of borrowing of a company as per companies act.

Further Readings

1. A Textbook Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Sons

2. Elements of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://www.lawcolumn.in/restriction-upon-the-borrowing-powers-of-a-company/

https://taxguru.in/company-law/borrowing-powers-section-8-companies.html?__cf_chl_managed_tk__=pmd_tCpljz17bepNsdLOojf5YnAFA04Hz1T202SvwTZ_XPM-1632201876-0-gqNtZGzNAvujcnBszQl9

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Unit 08: Charges

CONTENTS

Objectives

After studying this unit, you will be able to:

i) comprehend the provisions for creation, modification, and registration of charges
ii) understand the punishment for contravention of charges
iii) appreciate the role of central government in rectifying the charges

Introduction

Almost every big and small companies depend upon share capital and borrow capital for their project financing. This borrowed capital may consist of funds raised by issuing debentures, which may be secured or unsecured, or by obtaining financial assistance from financial institution or banks. The financial institutions/banks do not lend their monies unless they are sure that their funds are safe and they would be repaid as per agreed repayment schedule along with payment of interest. For securing their loan, they resort to creating right in the assets and properties of the borrowing companies, which is known as a charge on assets.

8.1 What is Charge?

The term charge refers to as the transfer of an interest in the assets of the company for the purpose of securing the repayment of loan, which the lender may enforce through court if this amount of loan is not repaid.

Important points regarding creation of charge

1. There should be two parties to the transaction, the creator of the charge and the charge holder.
2. The subject-matter of charge, which may be current or future assets and other properties of the borrower.
3. The intention of the borrower to offer one or more of its specific assets or properties as security for repayment of the borrowed money together with payment of interest at the agreed rate should be manifested by an agreement entered into by him in favor of the lender, written or otherwise.

8.2 Definition

As per Section 2(16) of Companies Act, 2014 the term charge mean an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

What is Mortgage?

Mortgage is a legal process whereby a person borrows money from another person and secures the repayment of the borrowed money and also the payment of interest at the agreed rate, by creating a right or charge in favor of the lender on his movable and/or immovable property.

8.3 Difference between Mortgage and Charge

A mortgage deed includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, one-person transfers, or creates in favour of another, aright over a specified property.

In case of charge, there is a transfer of an interest in immoveable property as a security for the loan whereas in case or mortgage, there is no transfer, though it is nonetheless a security for the payment of an amount.

8.4 Types of Charge?

a) **Fixed Charge**: A charge which is identifiable with specific and clear asset/property at the time of creation of charge. The Company cannot transfer such identified and defined property unless the charge holder (creditor) is paid off his dues.

Important features of a fixed charge are:

i) A company cannot deal with the property charged in the ordinary course of its business. The company can deal with such property subject to the charge as the charge holder gets a priority over the subsequent charge holders of same property.

ii) The company can create another specific charge on the same property. However, in case the specific charge which is first in point of time (takes priority over subsequent charge)

b) **Floating Charge**: It covers the floating and circulating nature of properties of a company, like sundry debtors, stock in trade etc. The floating charge crystallizes into fixed charge if the Company crystallizes or the undertaking ceases to be a going concern. The nature of the property charged under this method may change from time to time.

Important features of a Floating Charge

i) It's a charge on class of assets of a company both present and future.

ii) Class of assets that are charged must be the one which, in ordinary course of business of the company, would be changing from time to time.

iii) It should be contemplated by the charge that until some steps are taken to enforce the charge, the company shall have the right to deal with the assets charged in ordinary course of its business.

c) On basis of conditions of charge

i) Pari-passu Charge: The expression Paripassu implies with an equal step, equally treated, at the same rate, or at par with. It is the Latin term which means "*On equal Footing*". Under this, the Charge is shared by more than one lender in the ratio of their outstanding amount. The prior consent of the existing Charge holder is required by the company for creating Paripassu.

ii) Exclusive Charge: The exclusive Charge is provided to a particular lender only under the security provided. The creditor who is given credit facility security over the property on which the Charge is created has a right over the security above all other people.

iii) Further Charge: With the consent of the first Charge holder, a further Charge can be created on the security already provided for the first Charge. In case of winding up or liquidation, the first Charge holder has the right to recover his dues first and then the balance is recovered by the second Charge holder followed by other lenders

iv) Crystallization of Charge: It refers to as the conversion of floating charge into a fixed charge is usually called Crystallization of floating charge. It happens when a debtor is unable to pay off the debts. The Company cease to carry on its business and goes in for liquidation. On the happening of any event as specified indeed of agreement. The business couldn't be carried out when the creditor/debenture Holder acts against the debtor for not repaying the debts and in all such circumstances which are listed out under the relevant provisions of the Companies Act 2013

8.5 Difference between fixed and floating charge

1. A fixed charge is created on the definite and ascertained assets of the company, whereas floating charge is creating on assets that constantly keep changing.

2. As per the fixed charge, a company cannot deal with the property charged without the consent of charge holders. In the case of floating charge, a company can deal with property charged without the consent of charge holders.

3. In case of a fixed charge, if subsequent charge is created on same assets, the subsequent charge holder will not have the priority over first charge holders. In the other case, if subsequent charge is created on same assets, the subsequent charge holder may have the priority over first charge holders.

Did you know?

Form CHG-1 is to be filed with fees as prescribed. This form is to be signed by the charge holder and the company. A Proper instrument for the creation of charge is to be made. The complete form, along with the instrument of charge is to be filed with the Registrar.

8.6 Registration of Charge

Section 77 to 87 of the Companies Act 2013 provides the procedure for the registration of Charges. Every company, creating or modifying a Charge on its property, assets or undertakings, whether it is tangible or intangible situated within or outside India, shall register the particular of Charge with

the Registrar within thirty days of such creation by applying Form No. CHG-1 (for other than debentures) and Form No. CHG-9 (for debentures).

Along with the Form CHG-1 or CHG-9 as the case may be, the documents such as a certified true copy of every instrument evidencing creation or modification of the Charge, particular of other Charge holders in case of joint Charge and consortium finance, and in case of acquisition of property which is already subject to Charge instrument evidencing such acquisitions, are filed. Payment of fees can be made online in accordance with Annexure B of Companies (Registration offices and fees) Rules, 2014.

Notes: Section 77(1) provides that it shall be the duty of every company creating a charge

Registrar may, on an application by the company, allow such registration to be made by two ways:-

A.) If the charge is created before the Ordinance – within 300 days – If not registered, to be completed within 6 months from the date of Ordinance on paying fee

B.) If the charge is created after the Ordinance– within 60 days. If not registered – ROC may grant another 60 days on application on payment of advalorem fee

Time limit for registration of a charge

A charge created by a company is required to be registered with the Registrar within thirty days of its creation in such form and on payment of such fees as may be prescribed. According to Companies (Registration of Charges) Rules, 2014 e-forms prescribed for the purpose of creating or modifying the charge is Form No.CHG-1 (for other than Debentures) or Form No.CHG-9 (for debentures including rectification).

Condonation of delay by Registrar

The term 'condonation' is an act of forgiving, excusing or overlooking a wrongdoing. The Registrar may on an application by the company allow registration of charge within three hundred days of creation or modification of charge on payment of additional fee. The Registrar may, on being satisfied that the company had sufficient cause for not filing the particulars and instrument of charge, if any, within a period of thirty days of the date of creation of the charge, allow the registration of the same after thirty days but within a period of three hundred days of the date of such creation of charge or modification of charge on payment of additional fee.

The application for delay shall be made in Form No.CHG-10 and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company. The application for extension shall be allowed in case of Charge created before the commencement of the Companies (Amendment) Ordinance 2019 within a period of 300 days and on or after the commencement of the Companies (Amendment) Ordinance 2019 within 60 days upon payment of additional fees as prescribed. Further, if the Charge created is not registered within the condoned 300 days or 60 days then the Charge holder shall file Form No. CHG-8 with the central government for further condonation of delay of 300 days if the Charge was created before the commencement of the Companies (Amendment) Ordinance 2019 and 60 days if the Charge was created on or after the commencement of the Companies (Amendment) Ordinance 2019.If company fails to register the charge even within this period of three hundred days, it may seek extension of time in accordance with Section 87 from the Central Government.

According to Section 78 where a company fails to register the charge within the period specified, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge in Form No.CHG-1 or Form No.CHG-9, as the case may be, duly signed along with fee. The registrar may, on such application, give notice to the company about such application. The company may either itself register the charge or shows sufficient cause why such charge should not be registered. On failure on part of the company, the Registrar may allow registration of such charge within fourteen days after giving notice to the

company for such registration. Where registration is affected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company, the amount of any fee or additional fees paid by him to the Registrar for the purpose of registration of charge.

Certificate of registration of Charge or modification of Charge

Once the Charge is registered, Registrar will issue a certificate of registration of such charge in Form No. CHG-2 and if the particulars of modification of charge are registered with the Registrar, then the Registrar shall issue a certificate of modification of charge in Form No. CHG-3.

8.7 Consequence of non-registration of Charge

Non-registration of the Charges with the Registrar of Companies shall not invalidate the Charge created but the same shall not be considered by the liquidator appointed under the Companies Act, 2013 or the Insolvency and Bankruptcy Code, 2016 on winding up of the company and the creditor. However, this does not prejudice any contract or obligation for the repayment of the money secured by the Charge.

8.8 Default to file Documents or Forms by Companies Between 01.04.2020 and 30.09.2020

On 30.03.2020, the Ministry of Corporate Affairs (MCA) introduced the Companies Fresh Start Scheme (CFSS). The CFSS provides relaxation to companies in default of filing their documents or forms between 01.04.2020 and 30.09.2020 without the need to pay additional fees.

Notes: Under CFSS, relaxations were not extended to the charge related to documents. To provide similar relaxations, the MCA vide General Circular No. 23/2020, extended the waiver of additional fees for the late filing of charges related to documents too.

8.9 Details of the Scheme

The scheme comes into effect from June 17th, 2020.

Applicability: It is applicable in respect of filing of **Form No.CHG-1** and **Form No.CHG-9** (collectively referred to as forms).

Form No.CHG-1: This is an e-form used by companies to file the creation or modification of any charge to the concerned RoC. in the case of a foreign company this form needs to be filed with the RoC of Delhi

Form No.CHG-9: this e-form is used by companies to file the creation or modification of charge for debentures to the concerned RoC.

8.10 Relaxation

Period of exclusion (will not be included) starts from 01.03.2020 to the date of 30.09.2020 for the purpose of calculating the 120 days.

Example: If the creation or modification of charge took place on 01.02.2020, then, for the purpose of calculation of 120 days, the count will start from 01.02.2020 to 29.02.2020, and will only resume from 01.10.2020 onwards. The period from 01.03.2020 to 30.09.2020 will be excluded during the calculation. Therefore, in this scenario, you will have time till 30.12.2020 for the purpose of filing the form.

The Fee applicability case wise

a) **Case (I):** If the form is filed on or prior to 30.09.2020, the normal fee charged shall depend upon the slab of share capital. Additional or Ad Valorem fee will be charged depending upon the period of delay beyond thirty days. If the form is filed post 30.09.2020, the pertinent fees will be charged under the Fees Rules after adding the number of days starting from 01.10.2020 and, ending on the date of filing plus the period elapsed from the date of the creation of charge till 29.02.2020. The fee will be dependent upon the slab of share capital, and an additional fee or ad valorem fee will apply in case of delay beyond thirty days.

b) **Case (II):** In the case where the date of creation or modification of charge is during the exclusion period, i.e., from 01.03.2020 to 30.09.2020. Period of exclusion starts from the date of creation or modification of charge to the date of 30.09.2020 will not be considered for the calculation of the 120 days.

Example: If the creation or modification of charge is on 02.03.2020, then, for the purpose of calculating the 120 days the period from 02.03.2020 to 31.09.2020 will not be considered. Therefore, the start of the 120 days will only begin from 01.10.2020. In this case, you will have time till 01.28.2021. for the purpose of filing the forms.

Fee Applicability: In the case where the form is filed during the exclusion period, only normal charges will be imposed. However, in the case where the form is filed after the exclusion period, the applicable fee shall be charged additional or ad valorem as the case may be.

Fees for filing within of Forms within due dates:

a) In case of Indian company having share capital

S.No.	Nominal Share Capital	Fee Applicable
1	Less than Rs. 1,00,000	Rs. 200
2	1,00,000 to Rs. 4,99,999	Rs. 300
3	Rs. 5,00,000 to Rs.24,99,999	Rs. 400
4	Rs. 25,00,000 to Rs. 99,99,999	Rs. 500
5	Rs.1,00,00,000 or more	Rs. 600

In case of Indian company not having share capital**: – Rupees 200** and in case of foreign company: – **Rupees 6,000**

Non-applicability of the Scheme

i) Forms CHG-1 and CHG-9 have already been filed before 17.06.2020. Where the last date for filing has already expired as under Section 77 and 78 of the Act before the date of 01.03.2020.

ii) ii) Filing of Form CHG-4 for the satisfaction of charges. This means that the relaxations provided in this scheme do not extend to the filing of Form CHG-4.

Notes: Suppose the 120 days expire on any date after 30.09.2020 after considering the exclusion period, then this scheme will not be applicable.

8.11 Modification of Charges

There are provisions for alteration or modification of charge. The process is identical to the creation of charge as the application needs to be submitted to Registrar of Companies who further issues the certificate of the required change.

Satisfaction of Charges

The company shall within the period of thirty days intimate the Registrar of companies through Form CHG-4 along with the fee as prescribed in Annexure B of Companies (Registration offices and fees) Rules, 2014. The Registrar shall enter the memorandum of satisfaction of Charge and issue the certificate of registration of satisfaction of Charge in Form No. CHG-5. Further, the company shall incorporate the changes in the creation, modification or satisfaction of the Charges in the form no. CHG-7 in the Register of Charges maintained by the company. Further, if the Charge satisfied is not registered within the condoned 300 days or 60 days then the Charge holder shall file Form No. CHG-8 with the central government for further condonation of delay of 300 days. If the Charge was created before the commencement of the Companies (Amendment) Ordinance 2019 and 60 days if the Charge was created on or after the commencement of the Companies (Amendment) Ordinance 2019. If no cause of reply shown within such time from the holder of charge, then the Registrar in his register of charge will record the satisfaction of charge and will also inform the company.

Register of charges maintained in Roc's office

In accordance with section 81 and the rules the Registrar of Companies shall maintain a register containing particulars of the charges registered in respect of every company. The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of section 81 of the Act. This charge register shall be open to inspection by any person on payment of fee for each inspection. Section 85 provides that every company shall keep at its registered office a register of charges in Form No.CHG.7 which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed. The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be. Such register of charges shall contain the particulars of all the charges registered with the Registrar on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge. All the entries in the register shall be authenticated by a director or the secretary of the company or any other person authorized by the Board for the purpose. The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

Inspection of registers as per Section 85 [effective from 1st April 2014]

Every company shall keep at its registered office a register of charges in such a form and manner as may be prescribed, which shall include therein all charges and floating charges affecting any property or assets of company or any of its undertakings, indicating in each case such prescribed:

Provided that a copy of instrument creating the charge shall also be kept at the registered office of the company along with register of charges. The registers of charges and instrument of charges kept under sub-section:

a) shall be open for inspection during business hours by a) any member or creditor without any payment of fees;

or

b) by any other person on payment of such fees as may be prescribed, subject to such reasonable restrictions as the company may, by its articles, impose.

If any company contravenes any provision regarding the charges, it shall be punishable with fine – minimum Rs. 1 lac & maximum Rs. 10 lac every officer of the company who is in default shall be punishable with imprisonment — a term which may extend to 6 months or with fine – minimum Rs. 25000 & maximum Rs. 1 lac or with both. Recently pursuant to recommendation from the Company Law Committee, the Companies Amendment Bill, 2020 has been introduced which majorly aims to decriminalization of certain offenses and to improve the ease of doing business. With this bill section 86 has also been amended and now the offence w.r.t. this chapter is now been kept civil wrong and changes made from fine to penalty to make it in house adjudication by

Registrar or Regional Director. Wherein section 86(2) states that if any person willfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action under section 447.

8.12 Rectification by Central Government in Register of Charges [Section 87]

The Central Government on being satisfied that—

(a) the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required under this Chapter; or

(b) the omission or misstatement of any particulars, in any filing previously made to the Registrar with respect to any charge or modification thereof or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83, was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors or shareholders of the company, it may, on the application of the company or any person interested and on such terms and conditions as it deems just and expedient, direct that the time for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or misstatement shall be rectified.

8.13 Punishment for contravention

1. If any company contravenes any provision regarding the Charges, it shall be punishable with fine – minimum Rs. 1 lac & maximum Rs. 10 lacs.

Every officer of the company who is in default shall be punishable with imprisonment — a term which may extend to 6 months or with fine – minimum Rs. 25000 & maximum Rs. 1 lac or with both.

2. Recently pursuant to recommendation from the Company Law Committee, the Companies Amendment Bill, 2020 has been introduced which majorly aims to decriminalization of certain offenses and to improve the ease of doing business.

3. With this bill section 86 has also been amended and now the offence w.r.t. this chapter is now been kept civil wrong and changes made from fine to penalty to make it in-house adjudication by Registrar or Regional Director.

4. Wherein Section 86(2) states that if any person willfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of Section 77, he shall be liable for action under Section 447.

Summary

The Companies Act, 2013 defines a Charge as an interest or lien created on the assets or property of a Company or any of its undertaking as security and includes a mortgage. Section 77(1) provides that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India. To register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such Form CHG-1 (for other than debentures) or Form CHG-9 (for debentures including rectification), on payment of such fees and in such manner as may be prescribed in the Rules, with the Registrar within thirty days of its creation.

Key words

1. Charge: It is the creation of interest or a right on a property or asset of a company or any of its undertaking as a security against loan provided to the company in respect of such interest. It is created by Companies who need monetarist assistance for making their companies productive and in doing so creating any right or interest in assets of companies.

2. Mortgage Deed: A mortgage deed includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, one-person transfers, or creates in favour of another, aright over a specified property.

3. **Pari-passu Charge:** The expression Pari-passu implies with an equal step, equally treated, at the same rate, or at par with. It is the Latin term which means "*On equal Footing*". Under this, the Charge is shared by more than one lender in the ratio of their outstanding amount. The prior consent of the existing Charge holder is required by the company for creating Pari-passu.

4. Fixed Charge: A charge which is identifiable with specific and clear asset/property at the time of creation of charge. The Company cannot transfer such identified and defined property unless the charge holder (creditor) is paid off his dues.

5. Floating Charge: It covers the floating and circulating nature of properties of a company, like sundry debtors, stock in trade etc. The floating charge crystallizes into fixed charge if the Company crystallizes or the undertaking ceases to be a going concern. The nature of the property charged under this method may change from time to time.

Self Assessment

1. A capital may be borrowed by_____

A. issuing debentures
B. obtaining financial assistance from financial institution or banks
C. issuing shares
D. All of the above

2. _____refers to as the transfer of an interest in the assets of the company for the purpose of securing the repayment of loan, which the lender may enforce through court if this amount of loan is not repaid.

A. Charge
B. Mortgage
C. Mortgage
D. Both b and c

3. Charge means_____

A. an interest
B. a lien created on the property or assets of a company
C. a lien created on or any of the undertakings of a company or both as security and includes a mortgage
D. All of the above

4. _____includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, one-person transfers, or creates in favour of another, aright over a specified property.

A. Interest
B. Charge
C. Mortgage
D. Both a and b

5. _____ is identifiable with specific and clear asset/property at the time of creation of charge.

A. Floating Charge

B. Fixed Charge
C. Pari-passu Charge
D. Further Charge

6. The nature of the property charged under this method may change from time to time. Which method is referred here?

A. Floating Charge
B. Fixed Charge
C. Pari-passu Charge
D. Further Charge

7. Which one of the given statements regarding the floating charge is incorrect?

A. It's a charge on class of assets of a company both present and future.
B. Class of assets that are charged must be the one which, in ordinary course of business of the company, would be changing from time to time.
C. It should be contemplated by the charge that until some steps are taken to enforce the charge, the company shall have the right to deal with the assets charged in ordinary course of its business.
D. A charge which is identifiable with specific and clear asset/property at the time of creation of charge.

8. It is a Latin term that means "*On equal Footing*". Under this, the Charge is shared by more than one lender in the ratio of their outstanding amount. Which method is referred here?

A. Pari-passu Charge
B. Fixed Charge
C. Floating Charge
D. Further Charge

9. _____ is a conversion of floating charge into a fixed charge.

A. Pari-passu charge
B. Crystallization of charge
C. Floating Charge
D. Fixed Charge

10. In case of a_____, if subsequent charge is created on same assets, the subsequent charge holder will not have the priority over first charge holders.

A. fixed charge
B. floating charge
C. paripassu charge
D. Mortgage

11. Which of the given statement is false regarding the creation of charge?

A. There should be two parties to the transaction, the creator of the charge and the charge holder.
B. The subject-matter of charge, which may be current or future assets and other properties of the borrower.
C. The subject-matter of charge, which may be current or future assets and other properties of the borrower.

D. The intention of the borrower to offer one or more of its specific assets or properties as security for repayment of the borrowed money together with payment of interest at the agreed rate should be manifested by an agreement entered into by him in favour of the lender, written or otherwise.

12. ____ is a method as per which a creditor who is given credit facility security over the property on which the charge is created has a right over the security above all other people.

A. Pari-passu Charge
B. Exclusive Charge
C. Mortgage
D. Further Charge

13. A charge created by a company is required to be registered with the Registrar within _____of its creation in such form and on payment of such fees as may be prescribed.

A. Twenty days
B. Forty days
C. Thirty days
D. Fifty days

14. Once the Charge is registered, Registrar will issue a certificate of registration of such charge in Form No. ____

A. CHG-1
B. CHG-2
C. CHG-3
D. CHG-4

15. _____ is an e-form is used by companies to file the creation or modification of charge for debentures to the concerned RoC.

A. CHG-7
B. CHG-5
C. CHG-6
D. CHG-9

Answers for Self Assessment

1.	D	2.	B	3.	D	4.	C	5.	B
6.	A	7.	D	8.	A	9.	B	10.	A
11.	C	12.	B	13.	C	14.	B	15.	D

Review Questions

Q1. What do you mean by the term 'Charge'? what are the different types of a charge? Distinguish between fixed and floating charge.

Q2. Discuss in detail about registration of a charge.

Q3. Discuss in detail about modification of charge. Explain the rectification by Central Government in register of charges.

Q4. What do you mean by charge and mortgage? Explain the difference between the two terms.

Q5. Discuss the classification of charge under Companies Act. Also explain the applicability of fee in this context.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Sons

2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://taxguru.in/company-law/creation-modification-charge-companies-act-2013.html

https://taxguru.in/company-law/charges-companies-act-2013-meaning-procedure.html

Unit 09: Committee Meeting

CONTENTS

Objectives

After studying this unit, you will be able to:

i) Comprehend the significance of various committees formulated by the board of directors.

Introduction

Committees assist in performing a work requiring some kind of expertise. A board committee is a small working group identified by the board, consisting of board members, for the purpose of supporting the board's work. Members of the committee are expected to have expertise in the specified field. Committees are usually formed as a means of improving board effectiveness and efficiency, in areas where more engrossed, focused and technical discussions are required. These committees lay the foundation for decision-making and report at the subsequent board meeting. Committees enable better management of full board's time and allow in-depth scrutiny and focused attention. However, the Board of Directors are ultimately responsible for the acts of the committee. It is the responsibility of the Board to define the committee role and structure. The structure of a board and the planning of the board's work are in fact the key elements to effective governance. Establishing committees is one way of managing the work of the board, thereby strengthening the board's governance role. Boards should regularly review its own structure and performance and whether it has the right committee structure and an appropriate scheme of delegation from the board.

9.1 Role of Committees

1. Governance: In large organizations participation of each and every director is not possible in decisions making of the organization as a whole, a committee is given the power to make decisions, spend money, or take actions. Some or all such powers may be limited or effectively unlimited. Members of the committee take decisions, keeping in view the interest of all stakeholders.

2. Coordination: Where there is a large board, it is common to have committees with more specialized functions for better coordination - for example, audit committee, finance committee,

compensation committee, etc. wherein members meet regularly to discuss developments in their areas, review projects that cut across organizational boundaries, talk about future options, etc. Research and recommendations: Committees are often formed to do research and make recommendations on a potential or planned project or change. For example, an organization considering a major capital investment might create a temporary working committee of several people to review options and make recommendations to the Board of Directors. Such committees are typically dissolved after giving recommendations. With the increasing business complexities and time commitment of Board members, constituting committees has become inevitable for organization of any significant size. Committees keep the number of participants manageable; in larger groups, either many people do not get to speak or discussion gets quite lengthy.

9.2 Need for committees

A Board can set up committees with particular terms of reference when it needs assistance (for example a New project sub-committee) or when an issue requires more resources and attention (review of effect of legislative changes on organizational programs). They can be set up fora specific purpose or to deal with general issues such as 'development'. They can be established on a short-term or temporary basis, or they can be formed as a permanent body for ongoing work. A Board can either delegate some of its powers to the committee, enabling it to act directly, or can require the recommendations of the committee to be approved by the Board. The Board will normally depend heavily on the findings and recommendations of its committees, although final decisions to accept or reject these recommendations will be made by the Board. Committees thus have an important role to play in company governance.

Committees may be formed for a range of purposes, including:

• Board development or Governance Committee – to look after/administer/support Board members and committee members and other executive positions

• Selection Committee/Nomination Committee– to select Board members, to select a CEO, to select key managerial and senior management personnel

• Investment Committee

• Risk Management Committee

• Safety, Health & Environment Committee

• Committee of Inquiry

– to inquire into particular questions (disciplinary, technical, etc.)

– to manage the business of the organization between Board meetings.

• Finance or Budget Committees– to be responsible for financial reporting, organizing audits,

etc.

• Marketing and Public Relations Committees – to identify new markets, build relationship with media and public, etc.

Committees need clear goals, objectives, and terms of reference in order to function efficiently, and Boards should ensure that these are developed before establishing the committee. Many committees have been known to work outside their intended purpose due to a lack of precise objectives.

9.3 Committees mandatorily to be constituted under the Companies Act,2013

1. Audit Committee

Section 177(4) of the Act provides that every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board. Terms of reference as prescribed by the board shall inter alia, includes, –
(a) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;
(b) review and monitor the auditor's independence and performance, and effectiveness of audit process;
(c) examination of the financial statement and the auditors' report thereon;
(d) approval or any subsequent modification of transactions of the company with related parties;
(e) scrutiny of inter-corporate loans and investments;
(f) valuation of undertakings or assets of the company, wherever itis necessary;
(g) evaluation of internal financial controls and risk management systems;
(h) monitoring the end use of funds raised through public offers and related matters.

Applicability: Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 100 Crore or more. Additionally, all Public Companies which have in aggregate outstanding loans, debentures and deposits exceeding 50 crore rupees are required to constitute an Audit Committee.

Composition of Audit Committee as per Companies Act, 2013:

i. Minimum 3 directors with majority of Independent Director.
ii. Members including the Chairman of Audit Committee should be able to read and understand financial statement.
iii. Composition of Audit Committee as per clause 49 of Listing Agreement:
iv. Minimum of 3 Director of which 2/3rd are independent Directors.
v. All members should be financially literate and at least 1 member shall have accounting or related financial management expertise.

Role of the Audit committee is also given in the revised clause 49, which includes*:*

1. oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible;

2. recommendation for appointment, remuneration and terms of appointment of auditors of the company;

3. approval of payment to statutory auditors for any other services rendered by the statutory auditors;

4. reviewing, with the management, the annual financial statements and auditor's report thereon before submission to the board for approval, with particular reference to:

(a) matters required to be included in the Director's Responsibility Statement to be included in the Board's report in terms of clause (c) of sub-section 3 of section 134of the Companies Act, 2013

(b) changes, if any, in accounting policies and practices and reasons for the same

(c) major accounting entries involving estimates based on the exercise of judgment by management

(d) significant adjustments made in the financial statements arising out of audit findings

(e) compliance with listing and other legal requirements relating to financial statements

(f) disclosure of any related party transactions

(g) qualifications in the draft audit report

5. reviewing, with the management, the quarterly financial statements before submission to the board for approval;

6. reviewing, with the management, the statement of uses / application of funds raised through an issue (public issue, rights issue, preferential issue, etc.), the statement of funds utilized for purposes other than those stated in the offer document / prospectus / notice and the report submitted by the monitoring agency monitoring the utilisation of proceeds of a public or rights issue, and making appropriate recommendations to the Board to take up steps in this matter;

7. review and monitor the auditor's independence and performance, and effectiveness of audit process;

8. approval or any subsequent modification of transactions of the company with related parties;

9. scrutiny of inter-corporate loans and investments;

10. valuation of undertakings or assets of the company, wherever it is necessary;

11. evaluation of internal financial controls and risk management systems;

12. reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems;

13. reviewing the adequacy of internal audit function, if any, including the structure of the internal audit department, staffing and seniority of the official heading the department, reporting structure coverage and frequency of internal audit;

14. discussion with internal auditors of any significant findings and follow up there on;

15. reviewing the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature and reporting the matter to the board;

16. discussion with statutory auditors before the audit commences, about the nature and scope of audit as well as post-audit discussion to ascertain any area of concern;

17. to look into the reasons for substantial defaults in the payment to the depositors, debenture holders, shareholders (in case of non-payment of declared dividends) and creditors;

18. to review the functioning of the Whistle Blower mechanism;

19. approval of appointment of CFO (i.e., the whole-time Finance Director or any other person heading the finance function or discharging that function) after assessing the qualifications, experience and background, etc. of the candidate;

20. carrying out any other function as is mentioned in the terms of reference of the Audit Committee.

9.4 Powers of the Audit Committee [Section 177]

The Audit committee has the given powers:

1. The Audit Committee has the power to call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company.

2. The Audit Committee has authority to investigate into any matter in relation to the items specified in terms of reference or referred to it by the Board and for this purpose the Committee has power to obtain professional advice from external sources. The Committee for this purpose shall have full access to information contained in the records of the company.

3. The auditors of a company and the key managerial personnel have a right to be heard in the meetings of the Audit Committee when it considers the auditor's report but shall not have the right to vote.

As per revised clause 49 the Audit Committee shall have the powers to:

(i) investigate any activity within its terms of reference;

(ii) seek information from any employee;

(iii) obtain outside legal or other professional advice;

(iv) secure attendance of outsiders with relevant expertise, if it considers necessary.

Revised Clause 49 further provides that the Audit Committee shall mandatorily review the following information:

(a) management discussion and analysis of financial condition and results of operations;

(b) statement of significant related party transactions (as defined by the Audit Committee), submitted by management;

(c) management letters / letters of internal control weaknesses issued by the statutory auditors;

(d) internal audit reports relating to internal control weaknesses; and

(e) the appointment, removal and terms of remuneration of the Chief internal auditor shall be subject to review by the Audit Committee.

9.5 Function of Audit Committee

1. To recommend appointment, remuneration and terms of appointment of the Auditor of the Company.
2. To establish a Vigil Mechanism Policy.
3. To call for remarks of the auditors about the internal control system.
4. At the Annual General Meeting, the chairman of the Committee should be present to answer the shareholder's inquiry.
5. To discuss any issues related to internal and statutory auditors and the management of the Company.

9.6 Vigil Mechanism

It provides an adequate safeguard against victimisation of persons. It is established for directors and employees to report their grievances and concerns. Rule 7 of Companies (Meetings of Board and its Powers) Rules, 2014 describes about establishment of Vigil Mechanism for every Listed Company and companies prescribed below:

i. Companies which accept deposits from public.
ii. Companies which have borrowed money from bank and public financial institutions in excess of Rs.50 Crores.
iii. The Board of Directors shall nominate a director to play role of Audit Committee for the purpose of Vigil Mechanism for reporting purpose. The aggrieved person will have direct access with the Chairperson/Nominated Director of the Audit Committee.
iv. The details of establishment of such mechanism shall be disclosed on the company's website, and in the Board 'report.

Penalty for the Violation of Audit Committee Provisions

The Company shall be punishable with a fine of Rs. 1 lakh to Rs. 5lakh and every officer of the company who is in default shall be punishable with imprisonment upto 1 year or with Rs. 25,000 to Rs. 1 lakh or with both.

Meeting of committee

The audit committee shall meet at least thrice a year. One meeting shall be held before finalization of annual accounts and one every six months. The quorum shall be either two members or one third of the members of the audit committee, whichever is higher and minimum of two independent directors.

Penalty for the Violation of Audit Committee Provisions

The Company shall be punishable with a fine of Rs. 1 lakh to Rs. 5lakh and every officer of the company who is in default shall be punishable with imprisonment up to 1 year or with Rs. 25,000 to Rs. 1 lakh or with both.

Disclosure in Board's Report

The Board's report is required to disclose the composition of audit committee and where the Board had not accepted any recommendation of the Audit Committee, the same is also required to be disclosed in the Board's report along with the reasons therefore.

2. Risk Management Committee

In addition to the requirement of the Companies Act 2013 as well as the revised clause 49 that the audit committee will evaluate of internal financial controls and risk management systems, the revised Clause 49 of the Listing Agreement also requires that the company through its Board of Directors shall constitute a Risk Management Committee. The majority of the Risk Management Committee shall consist of members of the Board of Directors. Senior executives of the company may be members of the said committee but the chairman of the committee shall be a member of the Board of Directors. The Board shall be responsible for farming, implementing and monitoring the risk management plan for the company. Further, the Board shall define the roles and responsibilities of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit.

A committee formed by board of directors to oversee the risk management policy and global risk management framework of the business is known as the Risk Management Committee.It will assist the Board of Directors in fulfilling its oversight responsibilities with regard to the risk appetite of the Corporation, the Corporation's risk management and compliance framework, and the governance structure that supports it.The Company already has an elaborate risk management system to inform Board Members about risk assessment and minimization procedures. A Risk Management Committee headed by Whole-time Director evaluates the efficacy of the framework relating to risk identification and its mitigation. Board Members are accordingly informed.

Applicability

Top 500 listed entities determined on the basis of market capitalization at the end of immediate previous financial year.

Composition

Majority of member of Committee shall consist of Members of the board of directors or may be senior executives (in case listed company has issued SR equity shares at least two third of the committee shall comprise of independent directors).

3. Nomination and Remuneration Committee

Applicability: Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 100 Crore or more. Additionally, All Public Companies which have in aggregate outstanding loans, debentures and deposits exceeding 50 crore rupees are required to constitute an Audit Committee.

Composition of Nomination and Remuneration Committee as per Companies Act,2013:

Minimum of 3 Non-Executive Directors out of which two shall be Independent Directors.

Chairperson shall be an independent director.

Functions of Nomination and Remuneration Committee:

i. Recommendation of success plans for the directors.
ii. To review the elements of the remuneration package, structure of remuneration package.

iii. To review the changes to remuneration package, terms of appointment, severance fee, requirement and termination policies and procedures.
iv. To recommend the shortlisted candidates who are qualified to be director and who can be appointment in senior management.
v. The committee is authorised to seek information about any employee and the management is directed to co-operate.
vi. The Committee can be present at the General Meeting to answer the shareholder's queries.

4. Stakeholders Relationship Committee:

Section 178 of Companies Act,2013 states that a company which holds 1000 numbers of shareholders, debenture holders, deposit holders and any other security holders at any time during a financial year.

Composition of Stakeholders Relationship Committee:

As per the SEBI Listing regulations the Committee should consist of least three directors, with at least one being an Independent director, shall be members of the committee and in case of a listed entity having outstanding SR equity shares, at least two-thirds of the committee shall comprise of independent directors.

The chairperson of the Committee shall be a non-executive director and such other members as may be decided by the Board.

As per regulation the Committee shall meet at least once in a year. The chairperson or, in his absence any other member of the committee authorized by him in this behalf shall attend the general meetings of the Company.

Functions of Corporate Stakeholders Relationship Committee:

The Committee shall resolve complaints related to transfer/transmission of shares, non-receipt of annual report and non-receipt of declared dividends, general meetings, approve issue of new/ duplicate certificates and new certificate on split/consolidation/ renewal etc. approve transfer/transmission, dematerialization.

5. Corporate Social Responsibility Committee:

Sec 135 (1) read with rule 3 of Companies (Corporate Social Responsibility Policy) Rules, 2014, states that every company having:

i. net worth of rupees 500 crore or more, or;
ii. turnover of rupees 1,000 crore or more or;
iii. a net profit of rupees 5 crore or more during any financial year to constitute a Corporate Social Responsibility (CSR) Committee of the Board.

Composition of CSR Committee as per Companies Act, 2013:

In case of Listed Company at least 3 Directors out of which 1 should be an Independent Director.

Functions of Corporate Social Responsibility Committee:

i. To suggest and devise a CSR Policy according to the Schedule VII of Companies Act, 2013 to the board.
ii. To recommend the amount of expenditure of the devised policy above.
iii. To monitor the CSR Policy of company from time to time and prepare a transparent monitoring mechanism.
iv. Institution of a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

Companies (Meetings of Board and Powers) Rules,2014, however, relax this requirement as:

1. an unlisted public company or a private company covered under sub-section (1) of section 135 which is not required to appoint an independent director, shall have its CSR Committee without such director.
2. a private company having only two directors on its Board shall constitute its CSR Committee with two such directors.
3. with respect to a foreign company covered under these rules, the CSR Committee shall comprise of at least two persons of which one person shall be as specified under clause (d) of sub-section (1) of section 380 of the Act, i.e. the person resident in India authorized to accept on behalf of the company, service of process and any notices or other documents and another person shall be nominated by the foreign company.

6. Ethics Committee

The possible roles for an Ethics Committee are:

a) To Contribute to the continuing definition of the organization's ethics and compliance standards and procedures

b) Assume responsibility for overall compliance with those standards and procedures.

c) Oversee the use of due care in delegating discretionary responsibility.

d) Communicate the organization's ethics and compliance standards and procedures, ensuring the effectiveness of that communication.

e) Monitor and audit compliance.

f) Oversee enforcement, including the assurance that discipline is uniformly applied.

g) Take the steps necessary to ensure that the organization learns from its experiences.

7. Corporate Compliance Committee

It is responsible for considering and making recommendations to the Board concerning the appropriate size, functions and needs of the Board. This Committee may be constituted:

i. To develop and recommend the board a set of corporate governance guidelines applicable to the company,

ii. Implement and periodically review policies and processes relating to corporate governance,

Typically, the committee may be responsible for considering matters relating to corporate governance including:

i. The composition of board

ii. Appointment of new directors

iii. Review of strategic human resource decisions

iv. Succession planning for the chairman and other key board and executive positions

v. Performance evaluation of the board and its committees and individual directors.

Primary objective of the Compliance Committee

a) To review, oversee, and monitor: a) Company's compliance with applicable legal and regulatory

b) Company's policies, programs, and procedures to ensure compliance with the Company's Code of Conduct and other relevant standards

c) Company's efforts to implement legal obligations arising from settlement agreements and other similar documents; and

d) The committee oversees the Company's non-financial compliance programs and systems with respect to legal and regulatory requirements

Section 134 (5) of the Act dealing with Directors Responsibility Statement states that the directors need to ensure that they have devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

Further the following committees may also be constituted:

i. Science, Technology & Sustainability Committee
ii. Customer Service Committee/ Customer Grievance Committee
iii. Fraud Monitoring Committee
iv. Information Technology Committee
v. Performance Appraisal Committee

Conclusion

Committees are a sub-set of the board, deriving their authority from the powers delegated to them by the board. As per section 177 of Companies Act, 2013**,** Board of Directors may delegate certain matters to the committees set up for the purpose. Committees are formed as a means to improve board effectiveness and efficiency in areas where more focused, specialized and technically oriented discussions is required.

Summary

The pillars of Corporate Governance are the Board Committees. Owing to the growing responsibilities, directors have become more demanding. The Boards have increasingly formed committees to deal with some of their more detailed work. As the needs of the Board change, the need for committees may also change. Hence, it is essential that committees and their role be subject to periodic review. Board members should be aware that Board responsibilities remain, when serving on a Board committee, and maybe enhanced. To be more effective, Board committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.

Keywords

Vigil Mechanism: It provides an adequate safeguard against victimisation of persons.

Corporate Compliance Committee: It is the responsibility of this committee for considering and making recommendations to the Board concerning the appropriate size, functions and needs of the Board.

Corporate social responsibility: It refers to the initiative and contribution of an enterprise towards the economic, environmental and social welfare of the general community.

Ethics Committee: The role of the Ethics Committee is to monitor distribution and understanding of the Code of Business Conduct within the Group. It Provide recommendations concerning ethical issues and draws attention to risks associated with individual behaviors that fail to abide by principles described in the Code of Business Conduct.

Risk Management Committee: It will assist the Board of Directors in fulfilling its oversight responsibilities with regard to the risk appetite of the Corporation, the Corporation's risk management and compliance framework, and the governance structure that supports it.

Self Assessment

1. Corporate governance is a form of

A. self-regulation
B. external regulation
C. government control
D. charitable action

2. Corporate governance is a ____ approach
A. Bottom-up
B. Hybrid
C. Scientific
D. Top-down

3. Which of the following is a true statement related to corporate governance?
A. It excludes entity management.
B. It requires entity's to have a board of directors.
C. It refers to the manner in which an entity is managed and governed.
D. It is a uniquely distinct concept from those charged with governance

4. Which of the following is/are feature of corporate governance?
A. Non-universality
B. Accountability
C. Ambiguity
D. None of the above

5. Identify the true statement regarding the Corporate Governance?
A. It is the structure of rules, practices, and processes used to direct and manage a company
B. A company's board of directors is the primary force influencing corporate governance
C. Bad corporate governance can cast doubt on a company's operations and its ultimate profitability
D. All the above statements are absolutely correct

6. Identify the false statement regarding the Board of Director?
A. The institution of Board of Directors is based on the premise that a group of trustworthy and respectable people should ignore the interests of the large number of shareholders who are not directly involved in the management of the company.
B. Board of Directors which oversees how the management serves and protects the long-term interests of all the stakeholders of the company.
C. At the core of corporate governance practices is the Board of Directors which oversees how the management serves and protects the long-term interests of all the stakeholders of the company
D. The position of board of directors is that of trust as the board is entrusted with the responsibility to act in the best interests of the company.

7. Formulating an Audit Committee is required in which of the given options?
A. Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 20 Crore or more.
B. Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 100 Crore or more.
C. Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 80 Crore or more.
D. Every Listed Public Companies and Public Companies having a Paid-up share capital of 10 crore rupees or more, and a turnover of Rs. 150 Crore or more.

8. In an Audit committee what is the minimum number of directors required to be appointed withmajority of Independent Directors?
A. Five
B. Four

C. Three
D. Two

9. Identify which of the given is not a function of Audit Committee?
A. To recommend appointment, remuneration and terms of appointment of the Auditor of the Company
B. To establish a Vigil Mechanism Policy
C. To recommend removal, penalty and terms of laying off employees in the company
D. To call for remarks of the auditors about the internal control system.

10. In which of the cases, a Nomination and Remuneration Committee is not applicable?
A. Every Listed Public Company.
B. All public companies with a paid-up share capital of Rs. 10/- crores or more; or.
C. All public companies having turnover of Rs. 100/- crore or more; or
D. Every Private Company which is unlisted

11. _____ is a problem, situation, or opportunity requiring an individual, group, or organization to choose among several actions that must be evaluated as right or wrong.
A. Crisis
B. ethical issue
C. indictment
D. fraud

12. Which of the following does the term Corporate Social Responsibility relate to?
A. Ethical Conduct
B. Environmental Practice
C. Community Investment
D. All of the above

13. What does Ethics to do with?
A. The wider community
B. Business
C. Right and Wrong
D. None of the above

14. What does the importance of ethical behaviour, integrity and trust call into question?
A. The extent to which managers should attempt to change the underlying beliefs and values of individual followers
B. What does what?
C. What we do next?
D. None of the above

15. The role of _____is to monitor distribution and understanding of the Code of Business Conduct within the Group.

A. Customer Service Committee/ Customer Grievance Committee

B. Ethics Committee

C. Good Corporate Governance Committee

D. Science, Technology & Sustainability Committee

Answers for Self Assessment

1.	A	2.	D	3.	C	4.	B	5.	D
6.	B	7.	B	8.	D	9.	C	10.	D
11.	A	12.	D	13.	C	14.	A	15.	B

Review Questions

Q1. Discuss the role and need of board committee.

Q2. Discuss in detail about the applicability, composition, powers, functions and vigil mechanism of audit committee.

Q3. Write a note on: i) Nomination and Remuneration Committee, ii) Stakeholders Relationship Committee and iii) Corporate Social Responsibility Committee.

Q4. Write a note on: i) Ethics Committee ii) Corporate Compliance Committee and iii) Risk Management Committee

Q5. Write a detailed note on applicability, composition and functions of Corporate Stakeholders Relationship Committee, and Audit Committee.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Sons

2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://taxguru.in/company-law/nomination-remuneration-committee.html

https://www.icsi.edu/media/webmodules/companiesact2013/BOARD%20COMMITTEES.pdf

https://taxguru.in/company-law/types-committees-companies-act-2013.html

https://taxguru.in/company-law/risk-management-committee.html

https://www.lawctopus.com/academike/board-committees-importantce/#_edn7

Unit 10: Corporate Social Responsibility

CONTENTS

Objectives

After studying this unit, you will be able to:

i. Understand the types of Corporate Social Responsibility Activities and their reporting as per Companies (CSR) Amendments Rules 2021

ii. Comprehend the role of Corporate Social Responsibility Committee

Introduction

Corporate Social Responsibility can be defined as the responsibility a company undertakes towards the community and environment (ecological and social both) in which it operates. Companies can accomplish this responsibility through waste and pollution reduction processes, contribution through educational and social programs, by acting environmentally friendly and by undertaking activities of similar nature. In simple words, CSR is a way of conducting business, by which corporate entities visibly contribute to the social good. These entities do not restrict themselves to using resources to engage in activities that increase their profits only. They also use CSR to integrate economic, environmental and social objectives with company's operations and growth. CSR is said to increase reputation of a company's brand among its customers and society.

10.1 Definition of Corporate Social Responsibility (CSR)

Corporate Social Responsibility (CSR) implies a concept, whereby companies decide voluntarily to contribute to a better society and a cleaner environment – a concept, whereby the companies integrate social and other useful concerns in their business operations for the betterment of their stakeholders and society in general in a voluntary way. It means and includes but is not limited to:

- Projects or program relating to activities specified in Schedule VII to The Act.
- Projects or program relating to those activities which are undertaken by the Board of directors of a company in ensuring the recommendation of the CSR Committee of the Board as per declared CSR Policy of the Company along with the conditions that such policy will cover subjects specified in Schedule VII of the Act.

Its' important to note that it does not include:

1. Activities carried out under the normal course of the business. Provide that Companies which are engaged in the R&D works of new vaccine, drug and medical devices in their normal course of business may undertake R&D activity of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 subject to the conditions that:

a. Such R&D work shall be carried out in collaboration with any institute or organization mentioned in item (ix) of Schedule VII.

b. Details of such activity shall be mentioned in the Annual report on CSR included Board Report.

2. Any activity undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level;

2. Any activity undertaken by the company outside India except for training of Indian sports personnel representing any State or Union territory at national level or India at international level;
3. Political Contribution under section 182 of the Income Tax Act.
4. Activities benefitting employees of the company as defined in clause (k) of section 2 of the Code on Wages, 2019
5. Activities carried out for fulfilment of any other statutory obligations under any law in force in India;
6. Activities carried out for fulfilment of any other statutory obligations under any law in force in India;

10.2 Applicability

The provisions of CSR applies to: • Every company • Its holding company • It's subsidiary company • Foreign company
Having in the preceding financial year: • Net worth > 500 crore • Turnover > 1000 crore • Net profit > 5 crore

10.3 Importance of Corporate Social Responsibility

CSR refers to as the efforts of a company in improvement of society in any other way. It publicizes the efforts of a company towards a better society and increase their chance of becoming favorable in the eyes of consumers. The media coverage throws a positive light on the organization and

enhances its brand value by building a socially strong relationship with customers. This helps entities to stand out from the competition when companies are involved in any kind of community.

Reason for Introduction of CSR for Companies

The concept of Corporate Social Responsibility (CSR), introduced through Companies Act, 2013 puts a greater responsibility on companies in India to set out a clear CSR framework. Many corporate houses like TATA and Birla have been engaged in doing CSR voluntarily. The Act introduces the culture of corporate social responsibility (CSR) in Indian corporate requiring companies to formulate a CSR policy and spend on social upliftment activities. CSR is all about corporate giving back to society. The Company Secretaries are expected to be known about the legal and technical requirements with respect to CSR in order to guide the management and Board.

10.4 Role of Board of Directors

After considering the recommendations made by the CSR Committee, the board approves the CSR policy for the Company. The company should undertake only those activities that are mentioned in the policy. The Board must ensure that a minimum of 2% of the average net profits made during the 3 immediately preceding financial years as per CSR policy must be spent by the company in every financial year. However, if a company has not completed 3 financial years since its incorporation, the average net profits shall be calculated for the financial years since its incorporation.

10.5 Board's Report Disclosure

A board report shall disclose details regarding the CSR Committee's composition, CSR Policy contents. This report can also cover the reasons for the unspent amount. It will explain why the CSR spending does not meet 2% as per CSR Policy by the company and what arrangements are made regarding the transfer of unspent amount relating to an ongoing project to a specified fund (transfer within a period of six months from the expiry of the financial year).

10.6 Transfer and Use of Unspent Amount

The specified funds for transfer of unspent amount are:

i. A contribution made to the prime minister's national relief fund.

ii. Any other fund is initiated by the central government concerning socio-economic development, relief and welfare of the scheduled caste, minorities, tribes, women and other backward classes.

iii. A contribution made to an incubator is funded either by the central government, the state government, public sector undertaking of state or central government, or any other agency.


Notes:

- In case of the unspent amount relating to an ongoing project under the company's CSR policy, the amount shall be transferred by the firm in **less than 30 days** from the end of the financial year to an exclusive account to be opened by a firm in any scheduled bank. The account shall be designated as 'Unspent Corporate Social Responsibility Account', and the funds shall be used towards its obligations under the CSR policy within a period of three financial years from the date of the transfer.
- In a case where the company fails to utilise the funds at the end of the three financial years, the funds should be transferred to the specified fund mentioned above within a period of thirty days upon completion of the third financial year.

Contributions can be made to:

i. Council of Scientific and Industrial Research (CSIR)

ii. Department of Atomic Energy (DAE)

iii. Defence Research and Development Organisation (DRDO) Ministry of Electronics and Information Technology)

iv. Department of Science and Technology (DST) engaged in conducting research in technology, science, medicine, and engineering aimed at encouraging Sustainable Development Goals (SDGs).

v. Indian Institute of Technology (IITs)

vi. Indian Council of Medical Research (ICMR)

vii. National Laboratories and Autonomous Bodies (established under the auspices of the Indian Council of Agricultural Research (ICAR)

viii. Public-funded universities

10.7 Constitution of the CSR Committee

A Corporate Social Responsibility of the Board (i.e. CSR Committee) shall include:

a) Minimum 3 or more directors must form CSR Committee.

b) Among those 3 directors, at least 1 director must be an independent director.

 Did you know?

An unlisted public company or a private company shall have its CSR Committee without any independent director if an independent director is not required. In case of a foreign company, the CSR Committee shall comprise of at least 2 persons of which one person shall be a person resident in India authorized to accept on behalf of the foreign company – the services of notices and other documents. Also, the other person shall be nominated by the foreign company.

Relaxation for CSR committee as per Section 135(9)

Where the amount to be spent by a company does not exceed fifty lakh rupees, the requirement for the constitution of the CSR Committee shall not be applicable and the functions of such Committee provided under this section shall, in such cases, be discharged by the Board of Directors of such company.

10.8 Duties of the CSR Committee

i. Formulate and recommend a CSR policy to the Board. CSR policy shall point out the activities to be undertaken by the company as enumerated in Schedule VII.

ii. Recommend the amount of expenditure to be incurred on the CSR activities to be undertaken by the company.

iii. Monitor the CSR policy of the Company regularly.

iv. Establish a transparent controlling mechanism for the implementation of the CSR projects or programs or activities undertaken by the company.

10.9 CSR Reporting

The Board's Report referring to any financial year initiating on or after the 1st day of April 2014 shall include an annual report on CSR. In the case of a foreign company, the balance sheet filed shall contain an Annexure regarding a report on CSR.

CSR Policy

The Policy explains activities that a Company intends to undertake as named in Schedule VII to the Act and shall spend its money on them. The contents of CSR Policy should be placed on the company's website by the Board. It is mandatory that the activities mentioned in the policy must be undertaken by the company. The Company can also collaborate with other companies for undertaking projects or programs or CSR activities and report separately on such programs or projects. The CSR policy shall monitor the projects or programs.

10.10 Permitted Activities included in accordance with Schedule VII of the Companies Act, 2013

Sr. No	CSR Activities
1	abolishing poverty, malnourishment and hunger, improvising health care which includes preventive health care and sanitation and making available safe drinking water.
2	Areas for the advantage of skilled armed forces, war widows and their dependents.
3	Disaster management, including relief, rehabilitation and reconstruction activities.
4	Contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development providing relief and welfare of the Scheduled Castes, the Scheduled and backward classes, minorities and women.
5	Contributions or funds provided to technology incubators are approved by the Central Government.
6	improvement in education which includes special education and employment strengthening vocation skills among children, women, elderly and the differently-abled and livelihood enhancement projects.
7	Improving gender equality, setting up homes and hostels for women and orphans.
8	Introducing the measures for reducing inequalities faced by socially and economically backward groups.
9	Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts.
10	Rural development projects.
11	Safeguarding environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agroforestry, conservation of natural resources and maintaining a quality of soil, air and water which also includes a contribution for rejuvenation of river Ganga.
12	Slum area development where 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.
13	Training to stimulate rural sports, nationally recognized sports, Paralympic sports and Olympic sports.

Notes

"Slum area" here shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

10.11 CSR Plan and Expenditure

Annual Plan: *[Rule 5(2)*] The CSR committee shall formulate & recommend an annual plan to the Board.

4.5 The annual plan by the CSR committee shall include (a) The list of CSR projects or programs that are approved to be undertaken in areas or subjects specified in Schedule VII of the Act.

(b) The manner of execution of such projects or programs.

(c) The modalities of utilization of funds and implementation schedules for the projects or programs.

(d) Monitoring and reporting mechanism for the projects or programs.

(e) The details of need and impact assessment, if any, for the projects undertaken by the company.

4.6 The Board of the company may alter the plan at any time during the financial year, as per the recommendation of the CSR committee based on the reasonable justification to that effect.

1. The Board shall ensure that the administrative overheads (AO) shall not exceed 5% of total CSR expenditure of the company for financial year.

2. Any surplus arising out of the CSR activities- a) shall not form part of the business profit of a company, b) and be ploughed back into the same project and

c) shall be transferred to Unspent CSR account and annual action plan of the Company,

d) transfer such surplus amount to a fund specified in schedule VII, within a period of 6 Months of the expiry of the financial year.

3. Where a company spends an amount in excess of requirement provided under sub-section 135(5), such excess amount may be set off against the requirement to spend under sub-section (5) of section 135 up to immediate succeeding three financial years subject to the conditions that –

a. the excess amount available for set off shall not include the surplus arising out of the CSR activities, if any, in pursuance of sub-rule (2) of this rule.

b. the Board of the company shall pass a resolution to that effect.

4. The CSR amount may be spent by a company for creation or acquisition of a capital asset, which shall be held by –

a. Section 8 Company, Registered public trust or registered society having charitable object and CSR registration no.

b. Beneficiaries of said CSR project, in the form of self-help groups, collectives, entities, or c. A public authority.

Provided that any capital asset created by a company prior to the commencement of the Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, shall within a period of 180 days from such commencement comply with the requirement of this rule, which may be extended by a further period of not more than 90 days with the approval of the Board based on reasonable justification.

10.12 Procedure to file the form CSR-1 by a company

Every entity which intends to undertake any CSR activity, needs to register itself with the Central Government by filing the form CSR-1 electronically with the Registrar, with effect from 01.04.2021. Form CSR-1 will be signed and submitted electronically by the entity and shall be verified digitally by a Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice. On the submission of the Form CSR-1 on the Ministry of Corporate Affairs portal, a unique CSR Registration Number will be generated by the system automatically. The figure given explains the information required to be reported in the form:

10. In the said rules,-

(i) The Annexure shall be numbered as "Annexure –I" and in the heading of Annexure I as so numbered, after the words "BOARD'S REPORT", the words and figures "FOR FINANCIAL YEAR COMMENCED PRIOR TO 1ST DAY OF APRIL, 2020" shall be inserted;

(ii) after Annexure –I as so numbered, the following Annexure shall be inserted, namely:-

"ANNEXURE -II

FORMAT FOR THE ANNUAL REPORT ON CSR ACTIVITIES

TO BE INCLUDED IN THE BOARD'S REPORT FOR FINANCIAL

YEAR COMMENCING ON OR AFTER 1ST DAY OF APRIL, 2020

1. Brief outline on CSR Policy of the Company.

2. Composition of CSR Committee:

Sl. No.	Name of Director	Designation / Nature of Directorship	Number of meetings of CSR Committee held during the year	Number of meetings of CSR Committee attended during the year

3. Provide the web-link where Composition of CSR committee, CSR Policy and CSR projects approved by the board are disclosed on the website of the company.

4. Provide the details of Impact assessment of CSR projects carried out in pursuance of sub-rule (3) of rule 8 of the Companies (Corporate Social responsibility Policy) Rules, 2014, if applicable (attach the report).

5. Details of the amount available for set off in pursuance of sub-rule (3) of rule 7 of the Companies (Corporate Social responsibility Policy) Rules, 2014 and amount required for set off for the financial year, if any

Sl. No.	Financial Year	Amount available for set-off from preceding financial years (in Rs)	Amount required to be set-off for the financial year, if any (in Rs)
1			
2			
3			
	TOTAL		

6. Average net profit of the company as per section 135(5).

7. (a) Two percent of average net profit of the company as per section 135(5)

(b) Surplus arising out of the CSR projects or programmes or activities of the previous financial years.

(c) Amount required to be set off for the financial year,

Important Points with respect to filing Form CSR-1:

1. Form CSR-1 is required to be filed with the Registrar of Companies, with effect from the **01st day of April 2021.**

2. In case of entity is established by any Company or group of companies, maximum 5 CIN(s) of such companies can be provided in the Form.

3. Email id of the entity is required to be entered and the same will be verified by One Time Password (OTP).

4. The Facility to send OTP will be enabled only after successful Pre-scrutiny of the form.

5. The OTP can be successfully sent to the email ID against one form, for a maximum of 10 times in one day. OTP shall be valid for a span of 30 minutes.

6. For further chances, you may download a fresh form on the same day or try next day.

7. While entering the details of Directors/ Board of Trustees/ Chairman/ CEO/ Secretary/ Authorized Representatives of the entity, ensure that DIN or PAN must be valid and associated with the entity.

8. Maximum of 10 rows shall be available for entering the details of Directors/ Board of Trustees/ Chairman/ CEO/ Secretary/ Authorized Representatives of the entity.

9. Mandatory attachments:

i. Copy of Certificate of Registration of entity; and

ii. Copy of PAN of entity.

10. Ensure that the form is digitally signed by:

i. The Director in case of a Section 8 Company (Disqualified Director should not sign the form)

ii. One of the Trustee/ CEO in case of Registered Public Trust

iii. Chairperson/ CEO/ Secretary in case of Registered Society

iv. Authorized Representative in case of entity established under an Act of Parliament or State Legislature

11. Ensure the e Form is digitally signed by a Chartered Accountant/ Cost Accountant or Company Secretary in whole-time practice.

12. The Form will be processed in STP mode.

Email & Immunity Certificate:

When a Form is successfully processed, an acknowledgement of the same will be sent to the user in the form of an email to the email id of the entity. Further, a digitally signed approval letter along with CSR Registration number with Format **CSRXXXXXXXX** where X represents system generated unique sequential number will be sent to the FO User as well as the email ID of the entity as entered in the form.

The following documents can be obtained and verified by the practicing professional:

1. Trust deed of the entity.

2. Certificate of Incorporation in case of Section 8 Company.

3. Society Registration certificate in case of Society.

4. Registration with State Public Trust Act, if any.

5. Valid Certificate u/s 12A issued by the Director of Income Tax (Exemption).

6. Valid Certificate u/s 80G issued by the Commissioner of Income Tax (Exemption).

Important Points with respect to certification of Form CSR-1:

As per the Certificate by Practicing Professional:

i. The Practicing Professional should obtain an engagement letter for the certification of Form CSR-1 from the entity.

ii. The documents (including attachment(s)) should be verified from the original/certified records maintained by the Company/ applicant before affixing the digital signature certifying the CSR-1 Form.

iii. Ensure that the records have been properly prepared, signed by the required officers/ authorized representatives of the entity and are in order.

iv. All the required attachments are completely and legibly attached to form CSR-1.

Notes: The Practicing Professional shall be liable for action under Section 448 of the Companies Act, 2013 for wrong certification.

10.13 Fines and Penalties for Non-Compliance

In case a company fails to comply with the provisions relating to CSR spending, transferring and utilizing the unspent amount, the company will be punishable with a minimum fine of Rs 50,000 which may increase to Rs 25 lakh. Further, every officer of such company who defaults in the compliance will be liable for a punishment which is imprisonment for a term which may extend to three years or with a minimum fine of Rs 50,000 which may increase to Rs 5 lakh, or with both.

10.14 Net Profit for Corporate Social Responsibility Policy (CSR)

It means the profits of the company as per its financial Statements subject to section 198 of the Companies Act, 2013.

Net profit excludes:

1. any profit arising from any overseas branch or branches of the company, whether operated as a separate company or otherwise; and

2. any dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the Act:

Provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381, read with section 198 of the Companies Act, 2013.

10.15 Display of CSR activities on its website- (Rule-9)

The Board of Directors of the Company shall mandatorily disclose the composition of the CSR Committee, and CSR Policy and Projects approved by the Board on their website, if any, for public access.

Summary

Corporate Social Responsibility (CSR) is a means through which a company incorporates environmental, social and human development concerns into its planning and actions to ensure that its operations are ethical and beneficial for society. with the introduction of Section 135 in the Companies Act 2013, India became the first country to have statutorily mandated CSR for specified companies. The Act requires companies with a net worth of ₹500 crore or more, or turnover of ₹1,000 crore or more, or a net profit of ₹5 crore or more during the immediately preceding financial year, to spend 2 per cent of the average net profits of the immediately preceding three years on CSR activities. It enumerates the activities that can be undertaken and the manner in which the companies can undertake CSR projects/programmes.

Keywords

1. Corporate Social Responsibility (CSR): It implies a concept, whereby companies decide voluntarily to contribute to a better society and a cleaner environment – a concept, whereby the companies integrate social and other useful concerns in their business operations for the betterment of their stakeholders and society in general in a voluntary way.
2. Slum area: It means any area declared by the Central Government or any State Government or any other competent authority under any law for the time being in force.
3. Holding company: It is a parent business entity—usually a corporation or LLC—that doesn't manufacture anything, sell any products or services, or conduct any other business operations.

Its purpose, as the name implies, is to hold the controlling stock or membership interests in other companies.

Self Assessment

1. Every entity which intends to undertake any CSR activity, needs to register itself with the Central Government by filing the form ____electronically with the Registrar, with effect from 01.04.2021.

A. CSR-2

B. CSR-3

C. CSR-1

D. CSR-4

2. Form CSR-1 will be signed and submitted electronically by the entity and shall be verified digitally by a _____

A. Promoter

B. Chartered Accountant

C. Independent Director

D. Members

3. What is known as, where an organization considers the effect its strategic decisions have on society?

A. Corporate Social Responsibility

B. Business Policy

C. Corporate Governance

D. Business Ethics

4. Which of the following cannot be considered as a Corporate Social Responsibility?

A. Safe Drinking Water

B. Solid waste management

C. vocational training

D. None of the above

5. In case a company fails to comply with the provisions relating to CSR spending, transferring and utilizing the unspent amount, the company will be punishable with :

A. a minimum fine of Rs 10,000 which may increase to Rs. 5 lakhs

B. a minimum fine of Rs 20,000 which may increase to Rs 10 lakhs

C. a minimum fine of Rs 50,000 which may increase to Rs 25 lakhs

D. a minimum fine of Rs 50,000 which may increase to Rs 55 lakhs

6. It is said that there must be at least 3 Directors in a Corporate Social Responsibility Committee. How many shall be Independent Directors among those 3 Directors?

A. Three

B. One

C. Two

D. No Independent Director

7. Every officer of such company who defaults in the compliance with the provisions relating to CSR spending, transferring and utilizing the unspent amount will be liable for a punishment which is imprisonment for a term which may:

A. extend to one year

B. extend to two years or with a minimum fine of Rs 30,000 which may increase to Rs 2 lakh, or with both.

C. extend to two years or with a minimum fine of Rs 35,000 which may increase to Rs 3 lakh, or with both.

D. extend to three years or with a minimum fine of Rs 50,000 which may increase to Rs 5 lakh, or with both.

8. Constitution of the CSR Committee shall not be applicable to:

A. Where the amount to be spent by a company does not exceed ten lakh rupees

B. Where the amount to be spent by a company does not exceed fifty lakh rupees

C. Where the amount to be spent by a company does not exceed thirty lakh rupees

D. Where the amount to be spent by a company does not exceed sixty lakh rupees

9. The annual plan by the CSR committee shall include:

A. The list of CSR projects or programs that are approved to be undertaken in areas or subjects specified in Schedule VII of the Act

B. The manner of execution of such projects or programs

C. The modalities of utilization of funds and implementation schedules for the projects or programs

D. All of the above

10. The Board shall ensure that the administrative overheads (AO) shall not exceed _____ of total CSR expenditure of the company for financial year

A. 5 %

B. 7 %

C. 10 %

D. 15 %

11. CSR activities does not include:

A. Disaster management

B. Contributions or funds provided to technology incubators are approved by the Central Government.

C. Ensuring gender biasness.

D. Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts.

12. Identify a false statement about CSR:

A. CSR improves the public image by publicizing the efforts towards a better society and increase their chance of becoming favourable in the eyes of consumers.

B. CSR degrades the company's brand value by building a socially strong relationship with customers.

C. CSR increases media coverage as media visibility throws a positive light on the organisation.

D. CSR helps companies to stand out from the competition when companies are involved in any kind of community.

13. Unspent amount related CSR cannot be transferred to which of the following?

A. A contribution made to the prime minister's national relief fund.

B. Any other fund is initiated by the central government concerning socio-economic development, relief and welfare of the scheduled caste, minorities, tribes, women and other backward classes.

C. A contribution made to an incubator is funded either by the central government, the state government, public sector undertaking of state or central government, or any other agency.

D. A contribution made to personal account of directors and employees of the company.

14. CSR is termed as_____, which is meant to help the company promote its commercial interests along with the responsibilities it holds towards the society at large.

A. Double-Bottom-Line-Approach

B. Triple-Bottom-Line-Approach

C. Single-Bottom-Line-Approach

D. None of the above

15. A Corporate Social Responsibility of the Board (i.e. CSR Committee) shall include:

A. Minimum 3 or more directors must form CSR Committee.

B. Among those 3 directors, at least 1 director must be an independent director.

C. Both a and b

D. Either a or b

Answers for self Assessment

1.	D	2.	B	3.	A	4.	D	5.	C
6.	B	7.	D	8.	B	9.	D	10.	A
11.	C	12.	B	13.	D	14.	A	15.	C

Further Readings

1. A Text Book of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Sons

2. Elements of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

Web Links

https://cleartax.in/s/corporate-social-responsibility

https://taxguru.in/company-law/corporate-social-responsibility-csr-companies-act-2013.html

Unit 11: Transparency and Disclosures

CONTENTS

Objectives

After studying this unit, you will be able to:

i. Comprehend the relevance of transparency and disclosure of various reports

ii. Cognize the significance and contents of Board of Directors' report

Introduction

Transparency and disclosure (T&D) are important essentials of a strong corporate governance framework. It supports for informed decision to be taken by stakeholders like shareholder sand prospective investors in relation to apportionment of capital, corporate transactions and monitoring the financial performance. The significance of transparency is very much widely recognized by academics as well as market regulators, resulting into the introduction of numerous rules and regulations over time, thereby ensuring timely and reliable disclosure of financial information, creation of standards that the entities must adhere. Today, transparency has obtained a new meaning, requiring more comprehensive and proactive disclosures to be made instead of simply releasing the corporate governance details or policies in a 'reactive' way. The new concept puts in for more responsibilities on the corporation to not just let the truth be available to the public but also impose to disclose it to every stakeholder and different stakeholder groups. Currently, the global environment has made the corporate governance more complex and dynamic in recent years, owing to increased regulatory requirements and greater scrutiny, creating amplified responsibilities for board of directors to obey with rigorous governance standards and also to cope with increasing demand from the stakeholders. Corporations must offer timely, reliable and accurate information to shareholders and public pertaining to financial performance, liabilities, control and ownership, and corporate governance issues. This is critical, if the stakeholders are to be able to make informed judgments on the risks and rewards of any investment. Hence, companies must adhere with the provisions related to the transparency and disclosure religiously.

11.1 Definition

i. Transparency: Transparency of information refers to the ease with which investors may obtain the necessary financial information about a firm. The information so shared by the company includes details about market depth, price levels, and audited financial reports. Investors require transparency regarding the firms in which they invest and funds they opt for investment including details about various fees that'll be charged to them. This lays a basis for formation of trust between a firm and its investors, customers, partners, and employees. This means a company needs to be honest and open while communicating with stakeholders about matters related to its business.

ii. Disclosure: Timely publication of all information about a firm that may affect an investor's choice in the financial sector is known as disclosure. It reveals both positive and negative news, data, and operational details that impact its business. Similar to disclosure in the law, the concept is that all parties should have equal access to the same set of facts in the interest of fairness.

11.2 Board's Report

A company's Board of Directors as per Companies Act 2013, must attach their report to the financial statements that will be presented to shareholders at the annual general meeting. This board report is required to be filed at end of the financial year by the Companies as an attachment in e-form AOC-4, which serves as an important tool for a firm to communicate with its stakeholders. It gives stakeholders financial and non-financial information on the company's performance and prospects, as well as changes in management and capital structure, profit distribution recommendations, future and ongoing expansion, modernization, and diversification programs, reserve capitalization, additional capital issuance, and other relevant information. The Securities and Exchange Board of India (with respect to listing duties and disclosure requirements) Regulations, 2015 makes it compulsory for every listed firm to adhere some specified additional requirements. Even if its securities are listed on a foreign stock exchange, the corporation must adhere to any additional regulations imposed by the stock exchange.

In implementation of Section 129 of the Act, Section 134 of the Companies Act says that the Board has a responsibility to write up their report to the shareholders and attach the said report to financial statements placed before the shareholders at the annual general meeting. This report is a crucial communication between a company's board of directors and its shareholders. Its purpose is to keep shareholders informed about the company's performance as well as several other factors such as its primary policies, future expansion, modernization, and diversification plans, necessary management changes, capitalization or reserves, and so on. It also allows lenders, bankers, government officials, and the general public to make an application.

S. No.	Particulars	Small Company / OPC	Private Company	Public Company	Listed Company
1.	Financial Results-Standalone and Consolidated (If any) and Highlights	**Applicable to all the four types of companies**			
2.	State of Company's Affairs & Operations				
3.	Material Changes and commitment affecting the financial position of the company				

4.	Total number of Board Meetings conducted during the FY specifying the dates of the Board Meeting	
5.	Details of Director as appointed or resigned during the Financial Year	
6.	Director Responsibility Statement	
7.	The WEB link to access the annual return of company shall be published	
8.	Details of important substantial orders against the company's going concern status issued by regulators, courts, or tribunals.	
9.	Details of any fraudulent activity reported by the auditor under sub section (12) of Sec 143 of Companies Act	
10.	Remarks made by the board on a qualification or a negative remark made by the Auditor and Pcs in their audit reports	
11.	A statement confirming the compliance of Secretarial Standards by the company	
12.	The amounts, if any, which it proposes to carry to any reserves	
13.	Dividend Recommendation for the Financial Year	
14.	Information on loans, guarantees, and investments made under	

	section 186			
15.	Change in nature of business if any	**NA**	**Applicable to all except small company/OPC**	
16.	Board statement stating its opinion regarding the attitude, truthfulness of ID appointed during the Financial Year	**NA**	**NA**	**Applicable to every public and listed company**
17.	Name of companies that became or ceased to be the subsidiary, associate, joint venture during the Financial Year. The information concerning these businesses must be included in an annexure in the form **AOC 1**	**NA**	**Applicable to all except small company/OPC**	
18.	Deposits taken, underpaid, unclaimed, and defaulted in repayment during the course of the year	**NA**	**Applicable to all except small company/OPC**	
19.	Details of deposit not in compliance with Chapter V of the Act	**NA**	**Applicable to all except small company/OPC**	
20.	Earnings from Foreign Exchange and outflows during the Financial Year	**NA**	**Applicable to all except small company/OPC**	
21.	Reporting about energy conservation and technology absorption as per Rule 8 of the Companies Accounts Rules 2014	**NA**	**Applicable to all except small company/OPC**	
22.	Details in respect of Adequacy of Internal Financial Controls with Reference to The Financial Statements	**NA**		
23.	Disclosure of whether the firm is required to keep cost records as defined by CG Section under Section 148(1) of the Companies	**NA**		

	Act, 2013 or not				
24.	declaration that the firm has complied with the rules pertaining to the internal complaint committee (under the prohibition on sexual harassment of women at work)	**NA**			
25.	A statement describing how the Board evaluates its own performance, as well as the performance of its committees and individual directors, on an annual basis	**NA**	**NA**	**Paid up share capital >= 25 crores**	**Applicable to listed companies**
26.	Contractual or Arrange mental details with Relatives Such information must be included in Annexure AOC-2.	**Applicable to all the four types of companies**			
27.	A statement on Declaration given by Independent Director	**NA**	**NA**	**Applicable if IDs are appointed**	**Applicable to listed companies**
28.	Disclosure about the company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided	**NA**	**NA**	**Applicable if NRC committee is formulated**	**Applicable to listed companies**
29.	Composition of the Audit Committee and if the Board has not accepted any recommendation of the Audit Committee, the same shall also be disclosed along with reasons therefore	**NA**	**NA**	**Applicable if NRC committee is formulated**	**Applicable to listed companies**

30.	Details of Establishment of vigil mechanism	**NA**	**If the company has accepted deposits from the public or borrowed money from banks & FIs in excess of Rs 50 Cr**	**Applicable to listed companies**
31.	Statement indicating development and implementation of Risk Management Policy (Only if there are any risk)	**Applicable to all the four types of companies**		
32.	If the financial statements and the Board report has been revised by the Company under Section 131 of the Companies Act then the detailed reasons for revision of such financial statement or report shall also be disclosed	**Applicable to all the four types of companies**		
33.	Share Capital of the Company and the details of issue of securities made during the year.	**Applicable to all the four types of companies**		
34.	Details about policy developed by the company on CSR initiatives during the year. **The annual report of CSR shall be enclosed as an annexure in the Board Report**	**NA**	**Net Worth> 500 CR or Turnover >1000 CR or Net Profit >50 CR**	
35.	Details of ESOP granted, vested, exercised, lapsed during the FY along with the details of employees to whom such ESOP is granted, vested, exercised, lapsed.	**Applicable to all the four types of companies**		
36.	Share Capital of the Company and the details of issue of securities made during the year.	**Applicable to all the four types of companies**		
37.	Name of the Statutory Auditor of the company and the changes in the	**Applicable to all the four types of companies**		

	appointment of the auditor during the FY				
38.	Name of the Secretarial Auditor and the statement that the secretarial audit report is attached as an **Annexure to the Report in Form MR-3**	**NA**	**O/s loans and borrowings >= 100 crore**	**Paid Up share Capital ≥ 50Cr OR Turnover ≥ 250 Cr OR O/s loans and borrowings >= 100 crore**	**Applicable to listed companies**
39.	Disclosure about receipt of any commission by MD / WTD from a Company and also receiving commission / remuneration from it Holding or subsidiary as per Section 197(14)	**NA**	**NA**	**Applicable to every public and listed company**	
40.	**Disclosure:**	**NA**			**Applicable to listed companies**
	1. the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;				
	2. The percentage increase in remuneration of each director, Chief Executive Officer, Company Secretary or Manager,Chief Financial Officer, if any, in the financial year;				
	3. the percentage hike in the median remuneration of employees in the financial year;				
	4. the number of permanent employees on the rolls of company;				

	5. average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration				
	6. affirmation that the remuneration is as per the remuneration policy of the company.				
41.	Name /designation of top 10 employees in terms of remuneration drawn along with all the details mentioned in Rule 5 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014	**NA**	**NA**	**Applicable to every public and listed company**	
42.	Additional Annexures to the Board Report: 1. Management and Discussion Analysis Report 2. Corporate Governance Report 3.Business Responsibility Report	**NA**	**NA**	**NA**	**Applicable to listed companies**
43.	1. Details of application made or any preceding pending under Insolvency Bankruptcy Board, 2016 during the Financial Year along with the current status	**NA**	**(These ones are applicable from 01st April 2021 therefore they will be disclosed in the Board Report for the year 2021-22 onwards)**		
	2. The details of difference between amount of the valuation done at the time of one-time settlement and the valuation done while taking loan from the Banks or Financial Institutions along with				

	the reasons thereof		

1. **Web address of company:** Section 134 (3) (a) requiring the submission of an extract of the annual return under section 92 (3) got replaced with the submission of the web address.
2. **Number of board meetings:** Section 134 (3) clause (b) requires a company to disclose or provide an information regarding the number of board meetings held in the financial year in its Board report.
3. **Directors responsibility statement: This statement mainly emphasizes on given three points only:**

i. Establishment and maintenance of mechanisms ensuring compliance.
ii. Effectiveness of such mechanisms.
iii. Competency of such mechanisms.

In this statement, the directors basically declare that:

a) Preparation of annual reports was done on going concern basis by them.
b) They selected the applied accounting policies and made reasonable judgments and estimates. All this leads to knowing the true and fair position of the company at the end of a financial year.
c) Applicable accounting standards along with appropriate explanations were followed while preparing the annual accounts.
d) Reasonable care was taken to preserve the accounts in compliance with the provisions of the Companies Act 2013. Due care to prevent and detect the fraud was taken by directors.
e) In the case of a listed company, sufficient and efficient internal financial controls. Also, such type of internal financial controls was followed by the company.
f) A mechanism ensuring compliance with all the applicable provisions of law has been put in place by the directors. Moreover, such a mechanism is functioning effectively.

4. **Details in respect of fraud:** Section 143(12) along with Rule 13 Companies (Audit and Auditors) Rules, 2014 , states that if an auditor while performing his duty, believes or has reason to believe that an offence of fraud is committed in company, he must report the same. If the amount of which the fraud has been committed is less than INR 1 crore then the offence is to be reported to the board or the audit committee by the auditor of the company. If the amount is more than INR 1 crore then the said offence should be reported to the central government of India.The following details of the fraud should describe the nature of fraud.

i. What is the estimated amount of fraud?
ii. If remedial action was not taken, then what are the Party details?
iii. In the case of corrective action taken, then the details of such action.

5. **Statement on declaration provided by Independent director:** The provisions as laid under section 149 sub-section 6 of the companies Act needs to be complied by the directors. In the statement of declaration, they confirm that such provisions were met. This statement is provided at the first meeting of the board where he participates in the meeting as a director. The board report shall contain a statement on the declaration given by the independent director.

6. **Nomination and remuneration committee:** Companies that are covered under section 178 subsection (1) of Companies Act, must constitute a nomination and a remuneration committee of three or more non-executive directors. Independent directors on the committee shall not be less than one – half of the committee. The committees shall lay down the criteria for qualification, policy relating to the remuneration of the directors, key personnel management, independence of directors, and recommend the same to the board. It is necessary that the company policies are disclosed in the board report. It shall also be disclosed on the company website along with its salient features. The board of directors is required to give its comments and explanations regarding qualifications, remarks as may be made by the Auditor and Company secretary in their reports.
7. **Borrowings and investments of the company:** The board report must disclose the particulars of the loans given by the company, the investments made by the company and the guarantees given by the company under section 186 of the companies Act of 2013. It shall also disclose the purpose for which such a loan or guarantee is given. These particulars are to be mentioned in the financial statement and the reference of such note is to be mentioned in the board report.
8. **Related party transactions :** The board report must provide the particulars of any contracts or arrangements entered into with related parties as referred to in section 188 of the Companies Act, 2013. According to Rule 8 (2) of Companies (Accounts) Rules, 2014, the particulars of related party contracts or arrangements shall be in the Form AOC-2. Section 188 (2) requires a justification for entering into a contract or arrangement with a related party is also to be disclosed in the board report.
9. **Financial position of a company:** The board report must disclose the state of a company's affairs. It must underline the situations that affect a company's business, changes in its operations, development, and growth of the company, future plans of the company, etc.
10. **Transfer to Reserves:** The amount as transferred to the reserves of the company needs to be clearly provided. Such a reserve may be a general reserve/capital redemption reserve/debenture redemption reserve/ or any other reserve created.
11. **Interim dividend:** Dividend can be declared by the company only out of profits earned by the company for the financial year. The money may also be provided by the government for the purpose of declaring a dividend in pursuance of a guarantee given by the government. It is important to note that no company shall declare dividends out of its reserves other than free reserves. The board of directors can declare an interim dividend, out of the surplus in the profit and loss account or out of the surplus in the profit. The interim dividend may be declared during any financial year or at any time between the period from the closure of the financial year till the annual general meeting. If a company during the current financial year up to the end of the quarter immediately leading to the declaration date has incurred any loss then the dividend shall not be declared more than the average rate of dividends declared by the company. The average rate of dividend paid by the company shall be calculated on the basis of dividend declared by the company during the immediate 3 preceding years. The board of directors shall recommend the amount of dividends, in the board report. The shareholders may decrease the amount recommended by the board by the amount cannot be increased. Details of such dividends are to be disclosed in the Board report.
12. **Material changes:** Material changes or commitments occurred during the financial year and that have an effect on the financial position of the company must be communicated. Such changes may have occurred post the financial statements. The changes, their effects, and the details of the impact of such changes and commitments should be disclosed in the board report. Also, the details of the cause and remedial measures taken by the board must also be mentioned in the board report.
13. **Conservation of energy, technology, etc. :** As per rule 8 of the Companies (Accounts) Rules, 2014, the board report shall contain details regarding conservation of energy, technology absorption by the company, and foreign exchange earnings. According to the rule, the following matters shall be covered under this part of the board report:

    - Technology absorption

- Imported technology which has been absorbed within the last 3 years, the details of such technology.
- Steps were undertaken towards technology absorption.
- Benefits derived from technology absorption.
- Conservation of energy
    - Impact and measures are undertaken for energy conservation.
    - Measures were undertaken for utilizing alternate sources of energy.
    - Capital investment by the company in furtherance of energy conservation equipment.
- Amount of money spent on research and development.
- Foreign exchange earnings

The details of the inflow and outflow of foreign exchange during the year in terms of actual outflow. This shall not apply to any government company engaging in the production of defence equipment.

14. **Development and risk management:** The board report shall disclose a statement on development and adoption of risk management for the company. It shall discuss the elements of risk that exist which may threaten the existence of the company in the opinion of the board; and the measures to decrease such risks.
15. **Corporate Social Responsibility Initiatives:** Rule 9 of the Companies (Accounts) Rules, 2014 mandates disclosure of Corporate Social Responsibility policy of the company. The disclosure is to be made on the company's website and the board report. The disclosure shall state the company policy regarding CSR that has been developed and implemented.
16. **Evaluation of board performance: E**very listed and public company having a paid-up share capital of INR 25 crores or more at the end of the previous financial year, shall include a statement by the board of directors regarding the manner in which a formal performance evaluation of the board of directors, the committees that have been conducted.
17. **Additional disclosures as per rule 8(5):** The additional disclosures are related to:

    a) Highlights or the summary of the financial.
    b) If any change in nature of the business of the company.
    c) Details of appointments or resignations of and by directors or key managerial employees.
    d) A statement regarding the integrity, expertise, and experience of independent directors that have been appointed during the financial year.
    e) Names of the new addition or deductions to the company's subsidiaries or ventures or associated companies.
    f) Details regarding the deposits; details such as:

        i. Number of deposits accepted during the year
        ii. Deposits that remained unpaid or unclaimed.
        iii. Defaults in repayment of deposits or default in payment of interest.
        iv. The deposit details are not in accordance with the act's chapter v.
        v. Details of important orders passed by the courts or regulators affecting the company and its future operations.
        vi. Details regarding the efficiency of internal financial controls.
        vii. Statement regarding the compliance of the company with the provisions of prevention of Sexual harassment at Workplace (prevention, prohibition, and Redressal) Act, 2013.

18. **Disclosures relating to employees: E**very listed company shall disclose the following particulars with respect to their employees in the board report:

a) Remuneration ratio paid to a director to that of the median remuneration paid to the employees.
b) Any increase in remuneration of directors or chief Executive Officer, Chief Financial Officer, Company Secretary, or Manager.
c) Percentage growth in the median remuneration of the employees.
d) Permanent employees in total.
e) A declaration that remuneration is in accordance with the policy. Disclosures pertaining to Employee Stock Option and Employee Stock Purchase Schemes shall also be mentioned in the board report. Rule 12(9) of Companies (Share Capital and Debentures) Rules, 2014.

19. **Disclosure of commission**: Commission as received by the Managing director or whole-time director needs to be mentioned in the report. It is important to note that they shall not be disqualified from receiving such commission subject to its disclosure in the report.

20. **Approval of the Board report**: The report along with all annexure must be approved and signed at the Board meeting These need to be signed by:

i. The chairperson of the company only if he has been authorized to do so.
ii. If the chairperson is not authorized then the board report shall be signed by a director and the managing director.
iii. In case if there is only one director then the report is to be signed by that director.

21. **Attachments to the Financial statement:** The financial statement shall have a signed copy of the following attached to it:

i. Any notes or annexures.
ii. Auditors report.
iii. Board report.

22. Fine and penalty: In case of non-compliance with the provision of section 134 of the Companies Act and the allied rules, the company shall be liable to a fine of INR 3 lakhs. Further, the officers who are in default shall also be liable to a fine of INR 50 thousand.

23. One-person company: In the case of one-person company, the report of the board of directors would mean, a report that contains explanations on every qualification, or remark, or comments, or reservations or disclaimers made by the auditor in his report. (section 134 subsection (4) of the companies Act 2013.) Further subsection 3 of section 134 of the companies Act 2013 is not applicable to a One Person company.

24. Copies of the Board report and the financial statement: Section 136 of the companies Act states a copy of the financial statement, the board report along with all the annexure such as auditor's report, and any other notes that are to be laid before the shareholders at the annual general meeting must be sent to every member of the company. The said copy must be sent at least 21 days before the meeting. A listed company may also update the consolidated financial statements and its attached documents on the company website.

Annexure to the Board report:

- Related party contracts, arrangements – Form No. AOC-2
- Yearly report on Corporate social responsibility initiatives undertaken by the company.
- Extract of Annual Return – Form No. MGT-9
- Secretarial audit report – Form No MR3 (applicable only for public companies having
    - Having a paid-up share capital of INR 50 crore or more;
    - Having a turnover of INR 250 crore or more;

- Companies having loans or borrowing one hundred crore rupees from banks or any financial institutions.

11.3 Annual Return

An Annual Return is a snapshot of certain company information as they stood on the close of the financial year. It is perhaps the most important document required to be filed by every company with the Registrar of Companies. Apart from the financial statements, this is the only document to be compulsorily filed with the Registrar of Companies every year irrespective of any events/happenings in the company. While the financial statements give information on the financial performance of a company, it is the Annual Return which gives extensive disclosure and greater insight into the non-financial matters of the company viz. operations, funding, ownership and control, governance structure, remuneration etc. In short, it is a crisp report of the significant non-financial information about a company for the benefit of stakeholders. Filing of Annual Return yearly with the Registrar of Companies is the responsibility of the management of the company. It helps stakeholders to ensure that the company is administered in a proper way in the interest of its members and creditors.

An annual return is a publicly available data about a company appearing on the Companies Register. As a document it contains details of a company's share capital, indebtedness, directors, shareholders, changes in dictatorships, corporate governance disclosures etc. It should have an authorized digital certificate of a director and the company secretary. In the absence of a company secretary, a company secretary in practice can fulfill this responsibility. If the particular firm is a one-person company or small company, the annual return can be signed by a director only. The extracts of the Annual Return shall form the part of the Board's Report. The format of extracts of Annual Return is Form **MGT-9.**

How to ensure correctness of an Annual Return?

A certificate of correctness is needed to be obtained. Every listed company and public company having paid-up share capital of 10 crore rupees or more or a turnover of 50 crore rupees or more are required to take certification from a Practicing Company Secretary (PCS) regarding the correctness of the facts stated in the Annual Return in Form MGT-8.

Who has to file the form?

- All companies, whether public or private which are registered in India must file the Form MGT-7 every year.
- One-person company (OPC) introduced in the Finance Act 2021 are also mandatorily required to file the annual return in Form MGT-7.
- A company files the Form MGT-7 for its annual return.

What are the consequences of non-filing the form?

The penalty for not filing an annual return has been remarkably increased in 2018 to **Rs. 100** (Rupees Hundred) per day of default. Hence, it should be ensured that the annual return in this form is filed before the due date.

What is the purpose of the e-Form MGT-7?

Every company shall prepare an annual return in the form MGT-7 containing the particulars as they stood on the close of the financial year. These details include details regarding:

- The registered office, principal business activities, particulars of its holding, subsidiary and associate companies;
- The shares, debentures, other securities and shareholding pattern of the company;

- Indebtedness of the company;
- The members and debenture-holders along with alterations connected to them since the end of the previous financial year;
- The promoters, directors, key managerial personnel along with alterations connected to them since the close of the previous financial year;
- Meetings of members or a class thereof, Board and its various committees along with attendance details;
- Remuneration of directors and key managerial personnel;
- Penalty or punishment imposed on the company, its directors or officers and details of compounding of offences and appeals made against such penalty or punishment;
- The matters relating to certification of compliances and disclosures as may be prescribed;
- Its Shareholding pattern; and
- Such other matters as required in the form.

Which are the attachments required to file this form?

This e-form can be filled by attaching the scanned copy of documents under the attachments head. This is at the end of the form. The attachments required include:

- List of shareholders, debenture holders
- Approval letter for extension of AGM;
- Copy of MGT-8;
- Optional Attachment(s), if any

What is the due date of filing this form?

- Form MGT-7 is to be filed within 60 days from the date of Annual General Meeting of the company.
- The due date for regulating annual general meeting is on or before the 30th day of September following the close of every financial year.
- Therefore, the last date for filing form MGT-7 is generally 29th of November every year.

11.4 Contents of Annual Return

The annual return of a company must contain the following details:

1. Information about its registration
2. Registered office of company
3. Principal business activities as may be pursued by the company
4. Particulars of Holding, Subsidiary and Associate Companies
5. Particulars of the shares, debentures and other securities of the company
6. Particulars of turnover and net worth of the company
7. Pattern of Shareholding of company.
8. Indebtedness
9. Details of members, debenture holders and other securities holder
10. Details of shares/Debenture transferred related to a particular financial year
11. Who are the promoters of company?
12. Particulars of directors
13. Particulars of Key Managerial Personnel
14. Meetings details related to members/class of members/Board/Committees of the Board of Directors
15. Remuneration of directors

16. Remuneration of Key Managerial Personnel
17. Details on penalties/punishment/compounding of offences on company, directors and other officers in default
18. Details of matters pertaining to certification of compliances and disclosure
19. Details in respect of shares held by or on behalf of the Foreign Institutional Investor (FII)
20. Details of other pertinent disclosures

These points are further discussed in detail regarding the required information to be given:

Details of Registration

- Registration number of the company
- Corporate Identity Number (CIN)
- Foreign company registration number/ Global Location Number (GLN)
- Category of the company
- Sub-category of the company
- Names of stock exchanges where the shares are listed
- Whether or not the AGM was held in the particular year. If it was held, the date or due date of AGM. If it wasn't held, the reason for not organizing the same.

Particulars of the Company's Registered Office

- Name of the company
- Complete address of the company
- Telephone and fax numbers
- E-mail address and website of the company, if any
- Name of the police station situated in the jurisdiction of the company
- Address for correspondence
- Address of the principal place of business in the country (if it is a foreign company)
- Name and address of the Registrar and Transfer agents

Principal Business Activities Pursued by the Company

Specification of the business activities that contributes to 10% or more of the company's turnover.

Particulars of Holding, Subsidiary and Associate Companies

Name and address of each of the companies, along with the following details:

- Corporate identity number/Global location number
- Nature of relationship (holding, subsidiary or Associate company)
- Percentage holding and applicable section

Particulars of Shares, Debentures and other Securities of the Company

- Capital structure of the company.
- Upward or downward change in the authorized, issued, subscribed, paid-up for equity shares, preference shares,
  unclassified shares, and debentures.
- Details of stock split/ consolidation during the year.
- Number of shares, nominal value per share and total amount of capital.

- Total quantity of fully convertible, partly convertible and non-convertible debentures issued and outstanding as on date of concerned Annual General Meeting of the Company.
- Details of other securities.
- Details of securities premium account along with changes, if any, during the particular year.

Particulars of Turnover and Net Worth of the Company

This section is self-explanatory, as the title covers the details to be included i.e. details of the company's turnover and its net worth should be mentioned. These details are sufficient and other details needn't be mentioned.

Details of Share Holding Pattern

This part of the return relates to the breakup of equity share capital as percentage of total equity. The specified details must be in connection with category-wise shareholding, which includes:

- Promoters
- Public shareholding
- Custodian for GDR's and ADR's
- Shareholding of promoters
- Change in promoter's shareholding
- Shareholding pattern of top ten shareholders, except that of Directors, Promoters and Holders of GDR and ADR
- Shareholding of Directors and Key managerial personnel
- Shares held in physical from and demat form for each of the categories mentioned above.

Indebtedness

- Secured loans other than deposits.
- Unsecured loans.
- Deposits.
- Total indebtedness at the beginning of the financial year, changes during the financial year and indebtedness at the end of the financial year.

Details of Members, Debenture Holders and other Securities Holder

- Ledger folio
- Name
- Type of share, debenture or other security
- Number of shares
- Date of becoming a member/debenture holder/other security holder
- Address

Furthermore, the company needs to provide the following details without share capital:

- Total number of members at the date of incorporation/end of financial year
- Number of persons who have joined as a member since incorporation/end of previous financial year
- Number of persons who have relinquished their membership since incorporation/end of previous financial year

- Number of members as on the end of financial year

Details of Shares/Debenture Transfer Since the end of the Previous Financial Year.

- The closing date of previous financial year
- The date of registration for share transfer
- Type of security
- Name of the transferor
- Number of shares/debentures
- Ledger folio of transferor
- Name of transferee
- Ledger folio of transferee

Particulars of Promoters

- Designation of the person
- Category (He/She can be categorized as independent, Nominee, Alternative Executive Director or non-executive director)
- Total number of promoters

Particulars of Directors

- Composition of Board of Directors
- Category-wise number of directors at the beginning of the year and percentage of total number of directors
- Category-wise number of the directors at the end of the year and percentage of total number of directors

With particular reference to individual directors:

- Director Identification Number (DIN)
- Full name
- Name of the father, mother or spouse
- Nationality
- Date of Birth
- Designation
- Category
- Occupation
- E-mail ID
- Number of equity shares held
- Date of appointment
- Date of relinquishing the position
- Residential address
- Details of directorial role performed in other companies and the pertinent changes

Particulars of Key Managerial Personnel

If the concerned person holds the position of a Managing Director/CEO/manager/Whole-time Director:

- DIN/ PAN/ UIN/ Passport No
- Name of the person.
- Name of the father, mother or spouse
- Nationality
- Date of Birth
- Designation
- Date of appointment
- Date of relinquishing the position
- Residential address of the person

If the concerned person holds the position of a company secretary:

- PAN/UIN/Passport number
- Name of the person
- Nationality
- Date of Birth
- Designation
- Membership number
- Date of appointment
- Date of relinquishing the position
- Residential address of the person

If the concerned person holds the position of a Chief Financial Officer:

- DIN/ PAN/ UIN/ Passport No
- Name of the person.
- Name of the father, mother or spouse
- Nationality
- Date of Birth
- Designation
- Date of appointment
- Date of relinquishing the position
- Residential address of the person

Details of meetings of members/class of members/Board/Committees of the Board of Directors

Details of Members/class/requisitioned/NCLT/Court Convened Meetings:

- Types of meeting
- Date of meeting
- Total number of members authorized to attend the meeting
- Number of members participated with percentage of total shareholding

Details of Board Meeting

- Date of meeting
- Total number of directors as on the date of meeting
- Number of directors participated
- Percentage of attendance

Details of Committee Meeting

- Number of committees
- Name of committee
- Date of meeting
- Total number of committee members
- Number of members participated
- Percentage of attendance

Participation of Directors at Board and Committee Meetings

- Name of the Director
- Number of meetings conducted
- Number of meetings participated by each director
- Percentage of attendance
- Participation in the previous AGM

Remuneration of Directors

Particulars of remuneration paid to Managing Director, Whole Time-director or manager:

- Name of MD/WTD/Manager
- Gross Salary
- Stock Option
- Sweat Equity
- Commission
- Others

Particulars of remuneration paid to Independent Director:

- Fee for participating in board committee meetings
- Commission
- Others

Particulars of remuneration paid to Key Managerial Personnel other than MD/Manager/WTD

- Gross Salary
- Stock Option
- Sweat Equity
- Commission
- Others

Details on penalties/punishment/compounding of offences on company, directors and other officers in default

Details of the fees penalized with; accompanied with the following details:

- Section of the companies Act under which penalties were imposed
- Brief description
- The name of the penalizing authority

- Details of appeals made, if any

Details of Matters Pertaining to Certification of Compliances and Disclosure

- Details of events/matters owing to which the company was liable to file returns or comply with the required provisions of the Companies Act and the pertinent rules.
- Due date of filing compliance
- The date in which compliance was filed
- Concerned authority
- Reasons for delay, if any

Details in respect of shares held by or on behalf of the Foreign Institutional Investor (FII)

This section is self explanatory, as the title covers the details to be included i.e. details in respect of shares held by on or behalf of the FII. These details are sufficient and no additional details are required.

Other Vital Disclosures

- Closure of Register of Members, Debenture Holders or Other security holders
- Declaration of dividend
- Delisting of shares/securities, if any
- Change in nominal value of shares, sub-division and consolidation
- Particulars of inter-corporate loans and investment
- Contracts or arrangements that the directors are interested in/ related party transactions
- Details of resolution passed in postal ballots
- Corporate social responsibility (CSR)
- Investments made in CSR in the particular financial year
- Amount spent as percentage of the average net profits of the company made during the financial years immediately preceding the current financial year
- The limits specified in Section 186(2) and 180(1)(c) of the Companies Act
- Disclosure of directors
- Appointment and Re-appointment of chartered accountants as the auditors of the company.

11.5 Annual Report

An annual report is a comprehensive report detailing a company's activities throughout the preceding year. Its purpose is to provide users, such as shareholders or potential investors, with information about the company's operations and financial performance. The reports contain information, such as performance highlights, a letter from the CEO, financial information, and objectives and goals for future years.

There are many users of annual reports, including shareholders and potential investors, employees, and customers. In a company's annual report, whatever is mentioned, it is assumed to be official. Hence, any misrepresentation of facts in the annual report can be held against the company. It contains the auditor's certificates (signed, dated, and sealed) certifying the sanctity SANKTITY or PURITY of the financial data included in the annual report. These are formal financial statements published year after year. It is sent to company stockholders and various other interested parties. The reports assess the year's operations and discuss the companies' view of the upcoming year and the companies' place and prospects. Both whether for-profit and not-for-profit organizations produce annual reports. Securities and Exchange Commission (SEC) has made it an essential

requirement for the businesses owned by the public since 1934. Companies meet this requirement in many ways. At its most basic, an annual report includes:

- ✓ General description of the industry or industries in which the company is involved.
- ✓ Audited statements of income, financial position, cash flow, and notes to the statements providing details for various line items.
- ✓ It is a management's discussion and analysis (MD&A) of the business's financial condition and the results that the company has posted over the previous two years.
- ✓ It provides a brief description of the company's business in the most recent year.

So, it contains Information related to the company's various business segments and includes Listing of the company's directors and executive officers, as well as their principal occupations, and, if a director, the principal business of the company that employs him or her. It provides information about Market price of the company's stock and dividends paid.

Users of an Annual report

1. **Employees:** These also are often shareholders. So, like other shareholders, these employees can use the annual report to help gauge their investment in the company. In this case, the annual report can serve as a reminder to employees of the impact that the work they do has on the value of the company's stock value.
2. **Customer:** Customers want to work with quality suppliers of goods and services, and an annual report can help a company promote its image with customers by highlighting its corporate mission and core values. Describing company initiatives designed to improve manufacturing processes, reduce costs, create quality, or enhance service can also illustrate a company's customer orientation. Finally, the annual report can also show the company's financial strength. Customers are reducing their number of suppliers, and one evaluation criterion is financial strength. They want committed and capable suppliers that are going to be around for the long term.
3. **Suppliers:** A company's abilities to meet its customers' requirements will be seriously compromised if it is saddled with inept or incompetent or undependable suppliers. Successful companies today quickly weed out such companies. By highlighting internal measurements of quality, innovation, and commitment, annual reports can send an implicit message to suppliers about the company's expectations of outside vendors. Sometimes an annual report will even offer a profile of a supplier that the company has found exemplary.

   Such a profile serves two purposes. First, it rewards the supplier for its work and serves to further cement the business relationship. Second, it provides the company's other suppliers with a better understanding of the level of service desired (and the rewards that can be reaped from such service).

4. **Community:** Companies invariably pay a great deal of attention to their reputation in the community or communities in which they operate, for their reputations as corporate citizens can have a decisive impact on bottom-line financial performance. A company would much rather be known for its sponsorship of a benefit charity event than for poisoning a local river, whatever its other attributes. Annual reports, then, can be invaluable tools in burnishing/polishing a company's public image. Many annual reports discuss community initiatives undertaken by the company, including community renovation projects, charitable contributions, volunteer efforts, and programs to help protect the environment. The objective is to present the company as a proactive member of the community. This sort of publicity also can be valuable when a company is making plans to move into a new community. Companies seek warm welcomes in new communities (including tax breaks and other incentives). Communities will entice/attract a company supposed as a "good" corporate citizen more zealously than one that is not. The good corporate citizen also will receive less resistance from local interest groups. The company's annual report will be one document that all affected parties will pore over in evaluating the business.

Objective behind reporting

- Taking prospective economic decisions
- Providing information about the financial position, performance and changes in financial position of an entity
- Presenting and disclosing information about the company
- To lure new investors and make adequate disclosures to the existing ones

Purpose of Annual Report

1. **Provide Financial Information**: An annual report provides information on the company's fiscal year. The financial information provided in the annual reports helps determine the current status of business, how the company is funding operations and growth, and how good the company is placed at making money for its investors.
2. **Accountability**: Annual report is considered as the main accountability mechanism. Accountability is a pre-requisite, as it gives an idea of how far the company has met its responsibilities towards its owners, and fulfilled the role defined, which through the financial reports should reflect the extent of performance that are related to the entity.
3. **Decision Making:** The objective of reporting the financial statements' is to inform about the performance of the company that could be helpful to a wide range of potential users for evaluating and making economic decisions.
4. **Promote / Marketing the Company:** In addition to providing financial information, an annual report serves as a marketing tool for the company. Inclusion of positive feedbacks from employees and customers or key developments in the company worth highlighting can increase the readership of the report and appeal to new investors and customers.
5. **Achievements highlighted:** Annual reports provide information on the company's mission and history and summarizes the company's achievements in the past year. The achievement section also includes information on aspects like sales increases and factors related to growth in profitability and productivity. This serves the purpose of making the shareholders and stakeholders feel good about their investments or participation in the company.
6. **Target Audience:** Current shareholders and potential investors are the primary audiences for annual reports. By and large it is also required by lenders, banks and potential employees for taking appropriate financially viable decisions.

Contents of Annual Report

I. Company Profile

- ❑ Business activities
- ❑ company Mission
- ❑ Vision
- ❑ Goals, and
- ❑ Policies

II. Chairman Message

III. Board of Directors and Committees

IV. Management Committee

V. Company Performance

VI. Business Strategy

VII. Business Model

An annual report may be divided into various sections.

1. Report of Board of Directors and Management Discussion and Analysis

Section 134 of the Act enjoins upon the Board a responsibility to make out its report to the shareholders and attach the said report to financial statements laid before the shareholders at the annual general meeting, in pursuance of Section 129 of the Act. The Board's Report is very important communication by the Board of Directors of a company with its shareholders. It serves to inform the shareholders about the performance and various other aspects of the company, its major policies, relevant changes in management, future programs of expansion, modernization and diversification, capitalization or reserves, etc. The Board's Report is very important communication by the Board of Directors of a company with its shareholders. It serves to inform the shareholders about the performance and various other aspects of the company, its major policies, relevant changes in management, future programs of expansion, modernization and diversification, capitalization or reserves, etc. It also enables lenders, bankers, government and the public to make an appraisal of the company's performance and provides an insight into the future growth and profitability of the company.

2. Appointment and Remuneration of Managerial Personnel: Every listed company needs to disclose in its Board's report **[Employee Rule 5 of Companies regarding the Appointment and Remuneration of Managerial Personnel Rules, 2014]:**

(i) the ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year;

(ii) the percentage increase in remuneration of each director, Chief Financial Officer, Chief Executive Officer, Company Secretary or Manager, if any, in the financial year;

(iii) the percentage increase in the median remuneration of employees in the financial year;

(iv) the number of permanent employees on the rolls of company;

(v) average percentile increases already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration;

(vi) affirmation that the remuneration is as per the remuneration policy of the company. Further the board's report shall include a statement showing the names of the top ten employees in terms of remuneration drawn.

The report shall also give detail about name of every employee, who-

(i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than 1 crore and 2 lakh rupees;

(ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than 8,50,000 rupees per month;

(iii) if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

Further such statement shall also indicate:

(a) designation of such employee;

(b) remuneration received;

(c) nature of employment, whether contractual or otherwise;

(d) qualifications and experience of the employee;

(e) date of commencement of employment;

(f) the age of such employee;

(g) the last employment held by such employee before joining the company;

(h) the percentage of equity shares held by the employee in the company

(i) whether any such employee is a relative of any director or manager of the company and if so, name of such director or manager.

3. commission to managing or whole-time director: Any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report. (Sec 197(14) of the Act).

4. Re-Appointment of Independent Director: In terms of section 149(10), an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

5. change in the composition of the Board: Any appointment, reappointment or change in the office of a director (including whole-time director, additional director, alternate director or a director filling a casual vacancy) whether by virtue of rotation, resignation, death or otherwise should be indicated in the Board's Report.

6. Disqualifications of Directors as per Section 164 of the Act **:**It lays down grounds for disqualification of directors. The Section 164(2)(b) mandates that no person who is a director of a company shall be reappointed as a director thereof or be appointed on the Board of any other company for a period of 5 years if the company on which he is a director fails to:

(i) File Financial Statements or Annual Return for 3 consecutive financial years or
(ii) Repaying deposits or redemption of debentures as and when due or
(iii) Pay dividend which has been recommended and declared.

7. **Audit Committee:** In terms of Section 177(1) of the Act read with rule 6 of Companies (Meetings of Board and its Powers) Rules, 2014 and rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014. Following companies shall constitute an Audit Committee:
   (i) every listed company;
   (ii) all public companies with a paid-up capital of Rs.10 Crores or more;
   (iii) all public companies having turnover of Rs.100 Crores or more;
   (iv) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 Crores or more.

However, the following classes of unlisted public company shall not constitute an Audit Committee: -

(a) a joint venture; (b) a wholly owned subsidiary; and c) a dormant company as defined under section 455 of the Act.

8. Change in Capital Structure of the company: Board requires the disclosure of any changes in the capital structure of the company during the year

9. Investor Education and Protection Fund: The Board should, as a good corporate practice, inform the shareholders about the amounts, if any, which have been transferred during the year to the Investor Education and Protection Fund established under sub-section (2) of section 125 of the Act and the IEPF (Accounting, Audit, Transfer and Refund) Rules, 2016.

10. Vigil Mechanism: Section 177(9) read with Rule 7 of the Companies (Meeting of Board and its Powers) Rules, 2014 provides that every listed company and the companies belonging to the following class or classes shall establish a vigil mechanism for their directors and employees to report their genuine concerns or grievances-

(a) the Companies which accept deposits from the public;

(b) the Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.

11. Additional disclosures: As a good corporate practice, the Board's Report should also contain disclosures with regard to:

(i) name of the candidate nominated by small shareholders in terms of Section 151 of the Act which states that a listed company may upon notice of not less than 1,000 small shareholders or one-tenth of the total number of such shareholders, whichever is lower, have a small shareholder's director elected by the them.

(ii) name of retiring Auditors and/or the Secretarial Auditors and whether or not they are eligible and willing for reappointment;

(iii) name of Auditors and/or Secretarial Auditors, if any, who resigned during the year;

(iv) reasons for delay, if any, in holding Annual General Meeting together with references to the approval obtained from the Registrar of Companies for extension of time for holding Annual General Meeting pursuant to the Third Proviso to Section 96(1) of the Act;

(v) change in auditor and/or Secretarial Auditors during the year along with the reasons if any;

(vi) appointment of relatives of directors to an office or place of profit;

(vii) special resolutions which were passed by the shareholders in the previous meeting(s) but which have not been acted upon and the reasons therefore.

12. Credit rating of securities: As a good governance practice the disclosure on credit rating should also be included in the Board's report. A credit rating can be assigned to any entity that seeks to borrow money—an individual, a corporation, a state or provincial authority, or a sovereign government.

13. Certificate on Compliance of conditions of Corporate Governance: Companies which have listed their specified securities, shall annex with the Report a certificate obtained from either the Statutory Auditor or a practicing Company Secretary regarding compliance of the conditions of corporate governance.

14. Sexual harassment of women at the workplace (prevention, prohibition and redressal) act, 2013 and as per the directions of Reserve Bank of India: Non-Banking Financial Companies (NBFCs), a miscellaneous non-banking company and residuary companies shall include report disclosing a compliance with the provisions of RBI directions.

The disclosure shall include the following:

1. a statement that the company has complied with the provision relating to the constitution of Internal Complaints Committee under the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013.

2. the details of number of cases filed and disposed as required under the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013

15. Management discussion and analysis (**MD&A**): It is a section within a company's annual report or quarterly filing where executives analyze the company's performance. The section can also include a discussion of compliance, risks, and future plans, such as goals and new projects. The MD&A section is not audited and represents the thoughts and opinions of management.

16. Corporate Social Responsibility Report: A CSR, corporate social responsibility or sustainability report is a periodical (usually annual) report published by companies with the goal of sharing their corporate social responsibility actions and results. The report synthesizes and makes public the information organizations decide to communicate regarding their commitments and actions in social and environmental areas. By doing so, organizations let stakeholders (i.e., all

parties interested in their activities) aware of how they are integrating the principles of sustainable development into their everyday operations.

According to the Global Reporting Initiative, a CSR report can be defined as: *"A sustainability report is a report published by a company or organization about the economic, environmental and social impacts caused by its everyday activities. "*

"A sustainability report also presents the organization's values and governance model, and demonstrates the link between its strategy and its commitment to a sustainable global economy."

Purpose of Corporate Social Responsibility: The main intention of a CSR or sustainability report is to improve the transparency of organizations' activities. The goal is two -fold. On one hand, CSR reports aim to enable companies to measure the impact of their activities on the environment, on society and on the economy (the famous triple-bottom-line). In this way, companies can get accurate and insightful data which will help them improve their processes and have a more positive impact in society and in the world. On the other hand, a CSR or sustainability report also allows companies to externally communicate with their stakeholder what are their goals regarding sustainable development and CSR. This allows stakeholders such as employees, investors, media, NGOs, among other interested parties, to get to know better what are the short, medium and long-term goals of companies and make more informed decisions. These decisions can spread from investing in a business, buying its products, writing positive (or negative) reviews, protesting in the streets against the intentions or actions of an organization.

Benefits:

1. **Internal Organization:** Internally speaking, CSR reports are important because they allow companies to estimate the impact their operations have on the environment, society, and the economy. Through the (supposedly) detailed and meaningful data collected (or simply gathered) for the sustainability report, companies have a chance to improve their operations and to reduce operational costs. Not only do they become better prepared to optimize and reduce their energy consumption; as a result of reviewing their waste cycles product innovation strategies or circular economy opportunities can be found. At the same time, collecting this data requires joint efforts from different departments. As a result of the hype that's created, employees often end up becoming more conscious the company is focusing on CSR and sustainability, which leaves them proud – increasing employee retention and decreasing turnover (and its costs). It's good news for employer branding.
2. **External Organizational benefit:** When it comes to external benefits, a CSR and sustainability report can help companies engage better with their interested parties. By letting their stakeholders know about the organization's short, medium and long-term project decisions, companies can be better understood which may have positive financial outputs. For instance, a sustainability report helps stakeholders become aware of whether a company is positively contributing to minimizing the negative impacts of an environmental hazard or that it is only focused on growing profits for its managers and investors. Silence is also a way of communication and if no sustainability report is found the odds are people will focus on the second option just mentioned. In this way, consumers can decide whether they want to buy from a brand that protects orangutans by sourcing sustainable palm oil or one that produces clothes locally with little environmental harm and paying fair wages. Investors can anticipate if companies are becoming more resilient to face consequences of climate change and decide whether to invest in them or not. Journalists can share best case practices from companies leading the way on topics such as micro plastic pollution or ocean acidification. NGOs can exert pressure and expose irresponsible practices…

3. **Business Responsibility Report:** Companies play an integral part in the progress of the Society and this has been tested by time. Companies are not only responsible towards well-being of its employees and to the extent of paying dividends to its investors but they also extend their responsibility towards betterment of stakeholders at large. Their impact on society and environment is as deep as its financial and operational performance. In the year 2011, Ministry of Corporate Affairs had first proposed the concept of 'National Voluntary

Guidelines' on social, environmental and economic responsibilities of the companies incorporated in India. These guidelines comprised of reporting framework that companies have to follow for a structured business responsibility reporting. The reporting framework under these guidelines are designed on the **'Apply-or-Explain'** principle. The suggested framework takes in account the requirements of the business entities that are already reporting in other recognized framework as well as those which yet do not have the capacity to undertake full reporting. These guidelines are laid down to be applied by all the businesses irrespective of size, sector, or location and therefore touch on the fundamental aspects – the **'spirit'** of an enterprise. Below are the nine core principles acknowledged highlighted in the Guidelines-

1) Businesses should conduct and govern themselves with ethics, transparency and accountability;

2) Businesses should provide goods and services that are safe and contribute to sustainability throughout their life cycle;

3) Businesses should promote the well- being of all the employees;

4) Businesses should respect the interests of and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized;

5) Businesses should respect and promote human right;

6) Businesses should respect, protect and make efforts to restore the environment;

7) Businesses when engaged in influencing public and regulatory policy, should do so in a responsible manner;

8) Businesses should support inclusive growth and equitable development; and

9) Businesses should engage with and provide value to their customers and consumers in a responsible manner.

Stock Exchange Board of India (SEBI) had introduced BRR requirement in the year 2012 and later rescinded the same. Over a period of years, SEBI has provided for Business Responsibility Reporting through the **Regulation 34 (2) (f) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Regulations)** by initially mandating this requirement for top 500 Listed entities in India to make BRR as a part of their Annual Report. In addition to this requirement, SEBI provided that the Listed entities which have listed their specified securities on SME Exchange, may on **voluntary basis** include BRR in their Annual Reports. Further, the mandate to publish BRR with Annual Report for top **1000 Listed companies** was implemented through **SEBI (Listing Obligations and Disclosure Requirements) (Fifth amendment) Regulations, 2019**,with effect from **26 December, 2019**.SEBI has laid down principles for Listed entities to assess compliance with environmental, social and governance norms along with a specified format to disclose their environmental, social and governance practices to its shareholders. This format was suggestive in nature and companies may disclose any additional information under this report if it deems fit. However, the specified format provides a large range of disclosure areas comprising inter-alia of the following –

1. Corporate information of the company including details of its subsidiaries;

2. Financial data;

3. Details of Directors responsible for Business Responsibility;

4. Corporate Social Responsibility budget and spends;

5. Principle wise BR Policies (as per NGV's); and

6. Measures or strategies planned by the company to preserve environment,

7. Employee details (permanent/ contract basis/ women employees/ employees with disabilities)

SEBI had exempted those listed entities which have been submitting sustainability reports to overseas regulatory agencies/stakeholders based on internationally accepted reporting framework from preparing a separate report for the purpose of meeting the reporting requirements mentioned in the Regulations and to furnish the same report to its stakeholders along with the details of the framework under which their BR Report has been prepared and a mapping of the principles contained in these Regulations to the disclosures made in their sustainability reports.

17. **Corporate Governance Report:** Corporate governance report in general parlance is a report which is given by the company to the management. Corporate governance report significant varies from one company to another company. Each company follows its own set of rules, practices and process and ensures that the company is being managed in a proper way which does not jeopardize with working of the company. The ultimate aim of all the companies is to meet the stakeholders and shareholders expectations. It is further said that good corporate governance practices steps from the dynamic culture and positive mindset of the organisation. The primary objective of Corporate Governance is to ensure that shareholders wealth is maximized. Few are some of the objectives of good Corporate Governance:

- The board should be in the right position to take independent and objective decision.
- The board should adopt transparent procedures and practices.
- The board from time to time must monitor the functioning of the management team.

18. Secretarial Audit Report

Secretarial Audit is an audit to check compliance of various legislations including the Companies Act and other corporate and economic laws applicable to the company. The Secretarial Auditor expresses an opinion as to whether there exist adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines. Secretarial Audit helps to detect the instances of non-compliance and facilitates taking corrective measures. It audits the adherence of good corporate practices by the company. It is therefore an independent and objective assurance intended to add value and improve operations of the Company. It helps to accomplish the organization's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes. Secretarial Audit thus provides necessary comfort to the management, regulators and the stakeholders, as to the statutory compliance, good governance and the existence of proper and adequate systems and processes.

Secretarial Audit facilitates monitoring compliances with the requirements of law through a formal compliance management programme which can produce positive results to the stakeholders of a company:
(a) Promoters: Secretarial Audit assures the promoters of a company that those in-charge of its management are conducting its affairs in accordance with the requirements of laws and the owners' stake is not being exposed to unintended risk.

(b) Non-executive/Independent directors: Secretarial Audit provides comfort to the Non-executive/Independent Directors that appropriate mechanisms and processes are in place to ensure compliance with laws applicable to the company, thus mitigating any risk from a regulatory or governance perspective.

(c) Government authorities/regulators: It also facilitates reducing the burden of the regulators in ensuring compliances and they can take timely actions against the offenders.

(d) Investors: Secretarial Audit helps the investors in taking informed investment decision, as it evaluates the company in terms of compliance and governance norms being followed by the company.
(e) Other Stakeholders: It is an effective due diligence exercise for the prospective investors or joint venture partners. Further Financial Institutions, Banks, Creditors and Consumers can measure the law abiding nature of company management.

(f) Benefits to the company itself:

(i) Companies that go the extra mile with their compliance programs lay the foundation for good governance.
ii. Companies with an effective compliance management programme have lesser chance of receiving penalties, both monetary and by way of imprisonment.
iii. Companies that imbibe business and personal ethics and an effective compliance management programme within their work culture often enjoy employee and customer loyalty and public respect for their brand, which can translate into better market capitalization and shareholder returns.
iv. Recognition for the company as a good corporate citizen.


Did you know?

1. Only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the company. [Section 204(1) of Companies Act, 2013]
2. 2. As per section 204(1) of Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following companies are required to obtain Secretarial Audit Report
3. - Every listed company;
4. - Every public company having a paid-up share capital of fifty crore rupees or more; or
5. - Every public company having a turnover of two hundred fifty crore rupees or more.
6. "Turnover" means the aggregate value of the realization of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year. [Section 2(91)]

19. **Economic Value Added:** Traditional approaches to measuring Shareholder's Value Creation' have used parameters such as earnings capitalization, market capitalization and present value of estimated future cash flows. Extensive equity research has established that it is not earnings per se, but VALUE that is important. A measure called 'Economic Value Added' (EVA) is increasingly being applied to understand and evaluate financial performance.

Notes:

*EVA = Net Operating Profit after Taxes (NOPAT)–Cost of Capital Employed (COCE), where, NOPAT = Profits after depreciation and taxes but before interest costs on borrowings. NOPAT thus represents the total pool of profits available on an ungeared basis to provide a return to lenders and shareholders, and COCE = Weighted Average Cost of Capital (WACC) x Average Capital Employed

*Cost of debt is taken at the effective rate of interest applicable to an "AAA" rated Company like HUL for a short-term debt, net of taxes. We have considered a pretax rate of 6.28% for 2020-21 (7.02% for 2019-20)

*Cost of Equity is the return expected by the investors to compensate them for the

variability in returns caused by fluctuating earnings and share prices. Cost of Equity = Risk free return equivalent to yield on long-term Government Bonds (taken at 6.17% for 2020-21) + Market risk premium (taken at 4.20%) (x) Beta variant for the Company, (taken at 0.641) where Beta is a relative measure of risk associated with the Company's shares as against the market as a whole.

11.6 Website Disclosure

The Companies Act 2013 mandates disclosing certain information on the company's website. Information such as the name of the company, address of the registered office, the corporate identity number, telephone number, fax number, email ID, and name of the company's representative in case of any grievances/queries. The company's website address must be disclosed on the letterhead, business letters, billheads, letter papers, and official publications and notices. It is not mandatory for the companies to have a website as per the Companies Act 2013, in the case of a listed company, the Securities and Exchange Board of India (SEBI) has made it mandatory for companies to have an updated website since April 2011. Therefore, the mandatory disclosures on the website are governed by the following Acts:

- Companies Act 2013
- SEBI Listing (Obligations and Disclosure Requirements) Regulations 2015
- SEBI (Prohibition of Insider Training) Regulations 2015

The Disclosure requirements are specific to the type of company and the nature of business.

Website Disclosures for Companies that Conduct Online Business: For companies that conduct online business, the following must be disclosed on the website:

- Name of the Company
- Registered Office Address
- Company Identification Number (CIN)
- Telephone Number
- Fax Number, if any
- Email Address
- Contact person in case of any grievances or queries on the landing page of the website

Website Disclosures for Private Companies: For private companies, the following must be disclosed on the website along with the mandatory disclosures:

- The Notice of the General Meeting must be placed on the website.
- Details of unpaid dividends, including names and last known addresses of the shareholders, must be disclosed.
- Details of the Corporate Social Responsibility (CSR) must be published on the website.
- Separated Audited accounts with respect to each subsidiary must be published on the website.
- If a director resigns, the same information must be published within 30 days of the director's resignation.

Website Disclosures for Public Companies: In addition to the mandatory disclosures for the private company, a public company must also publish the following:

- The notice of "Change of objects for which money is raised through prospectus" under Rule 32 of Chapter II – Companies (Incorporation) Rules 2014 must be published on the website.
- A copy of the circular inviting deposits from the public must be on the website of the company.
- Information about the closure of the register of members or debenture holders or other security holders.
- Notice of the postal ballot.
- Results of the postal ballot along with the scrutiniser's report must be published.
- Details of the establishment of the Vigil Mechanism must also be disclosed on the website.
- Terms of Appointment of Independent Directors must also be published on the website.

Website Disclosures for Listed Companies: A listed company is compulsorily required to have a functional website. The following details must also be mentioned on the website:

- Particulars of the business activities.
- Terms of Appointment of Independent Directors must also be published on the website.
- Particulars of the structure of the various committees of the Board of Directors.
- Code of Conduct of Senior Management and Board of Directors.
- A policy with regards to related party transactions.
- Details of the establishment of the Vigil Mechanism and Whistle Blower Policy.
- Email of Grievance Redressal Mechanism and other relevant information.
- Shareholding Pattern.
- Designated Officials who can handle investor grievances.
- All other information about notices, taxes, agreements, and financial information.

Mandatory Disclosures under Companies Act 2013

- Website address on all its official publications like business letters, billheads, and notices, etc.
- The notice of "Change of objects for which money is raised through prospectus" under Rule 32 of Chapter II – Companies (Incorporation) Rules, 2014 must be published on the website.
- Details of Annual Return.
- Details of Vigil Mechanism.
- CSR and Company's policy on director's appointment and remuneration.
- Terms and Conditions of the Independent Director.
- Closure of register of members or debenture holders.
- Notice of General Meeting.
- Notice of Voting through electronic means.
- Notice of Postal Ballot.
- Special Notice, if any.
- Striking Off of the name of the company details.
- Unpaid Dividend Details.
- Invitation of Deposits.
- Resignation of Director details, if any.

Consequences of Non-compliance of Website Disclosure:

As such, there are no penalties for non-compliance with the website disclosure requirements. But as per Section 450 of the Companies Act of 2013, the penalty for non-compliance by the company or any officer of the company who defaults to any of the Act's provisions will be Rs 10,000. For continuing contravention, it will be a further fine of Rs 1,000 for every day of default. This will apply to the default of non-disclosure; a company must take care of publishing all relevant information on the website.

11.7 Policies

A Policy is a set of ideas or a plan of what to do in particular situations that has been agreed to officially by a group of people, a business organization, a government, or a political party.

Eg: Reliance has put in place a liberal leave policy for employees affected by COVID-19. It is providing financial assistance of up to 3 months' pay as interest-free salary advance in case of an exigency.

Following policies are to be framed and implemented by companies as registered under Companies Act 2013:

S. No.	Policy	Act requirement	Committee & policy details	Board's Responsibility
1	CSR Policy as per Sec.135 of Companies Act, 2013	Every company that has a net worth of Rs.500 crore or more OR turnover of Rs.1,000 crore or more OR a net profit of Rs. 5 crore or more during immediately preceding financial year	(i) Board shall constitute CSR Committee of the Board which shall formulate & recommend to the Board, CSR Policy which shall indicate the activities to be undertaken by the company as per Schedule VII of the act (ii) recommend the amount of expenditure to be incurred on the activities to be undertaken by the company and (iii) monitor CSR Policy of the company from time to time	Board of Directors shall: (i) Approve the Policy (ii) ensure that the activities as are included in CSR Policy are undertaken by the company
2	Device proper systems to ensure compliance with the provisions of all applicable laws to the company Sec.134(5)(f) of CA,2013		All Companies	However, Board shall periodically review compliance reports of all laws applicable to the company as well as steps taken by the company to rectify instances of non-compliances.
3	Policy for	Listed companies and all	Nomination and	Board to approve.

	formal Annual Evaluation by the Board of its own performance, that of its committees and individual Directors. Sec.134(3)(p) of Act	Public companies having: paid up share capital of Rs.10 crore or more; OR turnover of Rs.100 crore or more OR which have, in aggregate, outstanding loans, debentures and deposits exceeding Rs.50 crore.	Remuneration Committee (NRC) shall lay down criteria for performance evaluation of very director and shall carry out their evaluation. Further, NRC shall lay down evaluation criteria for performance evaluation of Independent Directors and the Board. • Independent Directors shall evaluate the performance of the Board and management [Schedule IV(II) (2) of CA, 2013]	
4	Policy on directors' appointment and remuneration of the directors, key managerial personnel and other employees including criteria for determining qualifications, positive attributes, independence of a director and other matters. Section 134(3)(e)/178 (3) of CA, 2013	Every listed company and all Public companies having – Paid up capital of Rs.10 crore or more; OR Turnover of Rs.100 crore or more OR Which have, in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 crores or more.	Board shall constitute the Nomination & Remuneration Committee, if applicable, which shall formulate a policy and recommend to the Board.	

S. No.	Policy	Act requirement	Committee & policy details	Board's Responsibility
5	Policy for Prevention of Sexual Harassment at Workplace	All companies	All Companies & Companies having more than 10 employees at any of their offices/ branches are required	Board to oversee the same.

			to constitute an Internal Complaint Committee.	
6	Risk Management Policy Section 134(3)(n) of CA, 2013	All companies	Board of Directors of listed companies shall constitute a Risk Management Committee of the Board which shall frame and update risk management plan and policy and recommend to the Board. In other cases, Board shall formulate the policy.	Board to approve.
7	Vigil mechanism Policy Sec.177 (9)/177 (10) of Act.	Every listed company and all companies which: (i)accept deposits from the public; (ii) have borrowed money from banks and public financial institutions in excess of Rs.50 Crore.	As the Audit Committee shall review the functioning of the Whistle Blower mechanism, the Policy can be routed through the Audit Committee. In case of companies not required to constitute Audit Committee, Board shall nominate a person as Ethics & Whistle Officer to oversee the same.	Board to approve.

Summary

Strong corporate governance framework requires two imperative fundamentals, namely: Transparency and disclosure (T&D).Various stakeholders such as shareholders, stakeholders and potential investors are better able to take decisions in relation to apportionment of capital, corporate transactions and monitoring the financial performance. In a business, transparency is the basis for trust between a firm and its investors, customers, partners, and employees. Being transparent means being honest and open when communicating with stakeholders about matters related to the business. In the financial world, disclosure refers to the timely release of all information about a company that may influence an investor's decision. It reveals both positive and negative news, data, and operational details that impact its business. Similar to disclosure in the law, the concept is that all parties should have equal access to the same set of facts in the interest of fairness. Companies Act 2013 provide various provisions to ensure transparency and fair disclosure if information to the stakeholders. All companies registered under the act needs to comply with these provisions meticulously.

Keywords

1. **Transparency:** In a business, transparency is the basis for trust between a firm and its investors, customers, partners, and employees. When engaging with stakeholders about business matters, being transparent involves being honest and open. Depending on the nature

of the communication and the parties involved, business transparency can take many various forms, but the core objective is always the same. It is to establish trust and goodwill by building and preserving the firm's reputation for openness and honesty in its business dealings.

2. **Disclosure**: Disclosure refers to the timely sharing of all information about a company that may impact an investor's decision in the financial realm. It discloses both positive and bad news, data, and operational information that have an impact on the company's operations. In the spirit of fairness, all parties should have equal access to the same set of information, similar to how disclosure works in the law.
3. **Board Report:** It is a report provides financial as well as non-financial information to the stakeholders, including the performance and prospects of the company, pertinent changes in the management and capital structure, recommendations regarding the distribution of profits, future and on-going programmes of expansion, modernization and diversification, reserve capitalization, further issuance of capital and other relevant information.
4. **Annual return:** It is a publicly available data about a company appearing on the Companies Register. As a document it contains details of a company's share capital, indebtedness, directors, shareholders, changes in dictatorships, corporate governance disclosures etc.
5. **Annual report:** An annual report is a comprehensive report detailing a company's activities throughout the preceding year. Its purpose is to provide users, such as shareholders or potential investors, with information about the company's operations and financial performance. The reports contain information, such as performance highlights, a letter from the CEO, financial information, and objectives and goals for future years.
6. **Policy:** It is a set of ideas or a plan of what to do in particular situations that has been agreed to officially by a group of people, a business organization, a government, or a political party.

Self Assessment

1. Which of the given is not an objective of an annual report?

A. Taking prospective economic decisions.
B. Providing information about the financial position, performance and changes in financial position of an entity.
C. Taking stringent action against the employees for their below average performance.
D. Presenting and disclosing information about the company.

2. Identify false statement regarding Policy?

A. Policies are rules, principles, guidelines or frameworks that are adopted or designed by an organization to achieve long term goals.
B. Policies are always verbal that is easily recallable.
C. Policies are formulated to direct and exert influence on all the major decisions to be made within the organization and keep all activities within a set of established boundaries.
D. Policies guide to the thinking and action of subordinates for the purpose of achieving the objectives of the business successfully.

3. An annual return It should have an authorized digital certificate of___

A. a director
B. a company secretary
C. auditor of the company
D. a director and a company secretary

4. Which of the following is not a characteristic of a Policy?

A. Fixed in nature
B. Flexible

C. Effective instrument for the execution
D. Should follow established and conventional procedure in normal circumstances

5. Which of the given makes a policy ineffective?
A. Policies as far as possible should be in writing
B. They should be clearly understood by those who are supposed to implement them
C. They should reflect the objectives of the organization
D. To ensure successful implementation of policies, the top managers and the subordinates who are supposed to implement them must not participate in their formulation

6. In case of a one-person company or small company, the annual return can be signed by ___
A. a company secretary
B. a director only
C. both auditor and company secretary
D. auditor only

7. Every listed company and public company having paid-up share capital of _____are required to take certification from a Practicing Company Secretary (PCS) regarding the correctness of the facts stated in the Annual Return in Form MGT-8.
A. 5 crore rupees or more or a turnover of 10 crore rupees or more
B. 10 crore rupees or more or a turnover of 30 crore rupees or more
C. 10 crore rupees or more or a turnover of 50 crore rupees or more
D. 10 crore rupees or more or a turnover of 70 crore rupees or more

8. Every foreign company must file their annual returns in Form FC-4 within a period of ____ days from the last day of its financial year.
A. 60 days
B. 10 days
C. 30 days
D. 40 days

9. Corporate governance is a form of
A. external regulation
B. self-regulation
C. government control
D. charitable action

10. Which of the following is/are feature of corporate governance
A. Non-universality
B. Ambiguity
C. Accountability
D. None of the above

11. Corporate governance is a ____ approach
A. Top-down
B. Bottom-up
C. Hybrid
D. Scientific

12. If the Net Operating Profit after Taxes of a company are Rs. 10,00,000 and Cost of Capital Employed = Rs. 55,000; then Economic Value Added = ____?

A. Rs. 55,000
B. Rs. 10,00,000
C. Rs. 1,55,000
D. Rs. 9,45,000

13. EVA shall not increase in which of the given circumstances?

A. Additional capital invested in projects that return less than the cost of obtaining new capital, i.e. probable loss.
B. Operating profits can be made to grow without employing more capital, i.e. greater efficiency.
C. Additional capital invested in projects that return more than the cost of obtaining new capital, i.e. profitable growth.
D. Capital is curtailed in activities that do not cover the cost of capital, i.e. liquidate unproductive capital.

14. Identify the false statement regarding Transparency:

A. It refers to as the access and proper disclosure of financial information, such as a company's audited financial reports
B. It also involves clarity with investment firms and funds surrounding the various fees that'll be charged to clients
C. It refers to keeping the financial information as highly confidential such as a company's audited financial reports
D. Transparency helps reduce uncertainty and wild stock price fluctuations because all market participants can base decisions of value on the same data

15. An annual report does not include_____

A. General description of the industry or industries in which the company is involved.
B. Unaudited statements of income, financial position, cash flow, and notes to the statements providing details for various line items.
C. Audited statements of income, financial position, cash flow, and notes to the statements providing details for various line items.
D. A management's discussion and analysis (MD&A) of the business's financial condition and the results that the company has posted over the previous two years.

Answer for Self Assessment

1.	C	2.	B	3.	D	4.	A	5.	D
6.	B	7.	C	8.	A	9.	B	10.	C
11.	A	12.	D	13.	A	14.	C	15.	B

Review Questions

Q1. What is the relevance of a Board report? Discuss the contents of a Board report in detail.

Q2. What is the rationale behind the preparation of Annual report? Discuss the contents of Annual report in detail.

Q3. What is meant by the term policy? What all types of policies need to be framed and followed by the companies under the Companies Act?

Q4. What is an Annual Return? What all information is provided by it?

Q5. What is the rationale behind a website disclosure? What are the disclosure requirements are specific to the type of company and the nature of business in India?

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company

2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

3. Legal Aspects Of Business By Daniel Albuquerque, Oxford & Ibh

Web Links

https://www.hul.co.in/investor-relations/corporate-governance/hul-policies/corporate-social-responsibility-policy/

https://www.itcportal.com/about-itc/policies/corporate-social-responsibility-policy.aspx

https://www.nestle.in/sites/g/files/pydnoa451/files/2021-04/CSR-Policy-1-4-21.pdf

https://www.indiafilings.com/learn/contents-of-annual-return/

https://www.icsi.edu/media/webmodules/companiesact2013/Guidance%20note%20on%20Annual%20Return.pdf

https://cleartax.in/s/mgt7-companies-act-2013

https://taxguru.in/sebi/business-responsibility-report-brr.html

https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf

https://cleartax.in/s/website-disclosures-companies-act-2013

Unit 12: Company Meeting

CONTENTS

Objectives

After studying this unit, you will be able to:

i. comprehend the relevance of holding a meeting
ii. understand the types of meetings that needs to be conducted by a company as per the provisions of Companies Act

Introduction

A company is an artificial person. It cannot act on itself. It needs some human intermediary to carry out its business activities. A business can be defined as a legal institution that involves a group of persons interested in the running of a business. A company's management needs the efforts of several people who debate and ponder on issues before a decision is made. The decisions are also made in meetings that are a structured conversation between the company's administration, typically the directors and in some cases, representatives who address the affairs of the company and operations.

The Act has provided some provisions for the different types of meetings of shareholders, namely:
(i) Statutory Meeting;
(ii) Annual General Meeting;
(iii) Extraordinary General Meeting; and
(iv) Class Meetings. In this chapter we shall cognize the essentials of holding such meetings.

12.1 Meaning and Definition of Meeting

Meeting is not defined under any provisions of Companies Act of 2013, but taking references from common business and market parlance and also from some of the decided case laws like Sharp vs. Dawes, as decided in 1971, and through citations of various renowned authors, we can gather that a 'Company Meeting' is basically coming together of at least two persons to either transact any ordinary or special business for lawful purposes.

Ordinarily, a company meeting may be defined as gathering, assembling or coming together of two or more persons (by previous notice or by mutual arrangement) for discussion and transaction of some lawful business. According to P.K Ghosh "Any gathering, assembly or coming together of two or more persons for the transaction of some lawful business of common concern is called meeting." Similarly, K. Kishore discusses "A concurrence or coming together of at least a quorum of members by previous notice or mutual agreement for transaction business for a common interest is meeting."

So, from the above discussion, it can be summarized about a meeting as:

1. Depending upon total members in a company, two or more persons must be present at the meeting.

2. The assembly of persons must be for discussion and transaction of some lawful business.

3. A previous notice would be given for convening a meeting.

4. The meeting must be held at a particular place, date and time.

5. The meeting must be held as per provisions/rules of Companies Act.

12.2 Essentials of a valid meeting

A valid meeting is that which is conducted by the appropriate authority or the authorized person as per the act, a proper notice of meeting is given to the ones who are to attend it. There must be a presence of quorum in the meeting so called, else it stands invalid. A chairman must be present to conduct the meeting and proper minutes should be recorded regarding the points discussed. These features are discussed in detail below:

1. **Authority to hold meeting:** As per the Companies Act 2013, Board of Directors are authorized to hold the meeting. In case the Board of Directors fails in calling and holding the meeting, National Company Law Tribunal can also call a general meeting.

2. **Notice of meeting:** The notice of holding a meeting can be in writing or electronic mode. The reason behind sending a notice is to inform about the place, day, hour, business to be transacted-General and special to the members, auditors, directors Legal representative deceased/ the assignees of an insolvent. It must be sent at least 21 days before the actual date of conduct of meeting. However, it can be given in less than 21 days too but that is only under some circumstances. In case ofdeliberate omission in giving notice to a single member, it may invalidate the meeting.
3. **Quorum:** It is the minimum number of voting members who must be present at a properly called meeting in order to conduct business in the name of the group. In a private company at leasttwo voting members must be present. If the total number of members are less than 1,000 then five members must attend and participate in the meeting. In a Public company, if total members are more than 1,000 but less than 5,000 then 15 members need to be present and attend the meeting. However, if the total number of members are more than 5,000 then 30 members must be present and attending the meeting.

   The Companies Act provides for when the quorum has not been met within half an hour of the time set for the meeting to begin, then the meeting will be adjourned, and it shall be held on the same day and at the same time next week, or any other date and time as the Board may determine. If the meeting is adjourned then the date, time and place of the meeting will be notified personally or via advertisement. The advertisement must be published in both English as well as the vernacular language in a newspaper which is in circulation at a place where the registered office of the company is situated. If the meeting is called by requisitions under Section 100, it shall stand cancelled. If the quorum is not present at the adjourned meeting, then the members present shall be the quorum.

4. **Chairman:** A'Chairman' is designated to chair over and conduct the proceedings of a meeting. He is the chief authority in the conduct and control of the meeting. He is to put resolution in the meeting, count the votes, declare the result and authenticate the minutes by signature. Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the Chairman thereof on a show of hands.

Did you know?

The duties of a chairman?

Well, he must perform the given duties:

i. Must act honestly and in the interest of company

ii. Ensure that meeting is properly called and proceedings of meetings properly conducted

iii. Must preserve the order in the meeting

iv. Must give chance to members to discuss any proposed resolution

v. Must exercise his powers of adjournment of meeting and demanding of poll honestly and correctly

5. Minutes of meeting: These are notes recorded during a meeting, highlighting the key issues that were discussed, motions proposed or voted on, and activities to be undertaken. The minutes of a meeting are usually taken by a designated member of the group, who provides an accurate record of what transpired during the meeting.

Following points needs to be kept in mind while preparing the minutes of a meeting:

i. It must be made within 30 days of the conclusion of every meeting
ii. Minute book
iii. Numbering of pages
iv. Signing of minutes (on each page)
   - In case of Board or committee meeting, chairman of the same or next meeting should sign on meeting minutes.
   - In case general meeting, chairman of the same meeting should sign & if he's dead or unable then director authorised by the Board
v. A very fair and correct summary should be prepared.

6. **Proxy:**The term 'proxy' is used to refers to the person who is nominated by a shareholder to represent him at a general meeting of the company. It also refers to the instrument through which such anominee is named and authorised to attend the meeting.Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Notes:

i. A person appointed as proxy shall act on behalf of such member or number of members not **exceeding 50** and such number of shares as may be prescribed (effective from 01-04-2014).
ii. Proxy need not be a member.
iii. The relationship between a member and his proxy is that of a principal and agent. Therefore, the proxy is bound to act in accordance of with the instructions of the member appointing him.

Provisions in Article of Association Section 105 of Companies Act 2013, Rule 19 regarding Proxy: The Article explains appointment of proxy by Shareholders / Members, Right of Proxies, Limits for appointment as a proxy, Penalty in case of contravention of provisions related to Proxies, Invitation to appoint Proxy, Proxy forms, Inspection of Proxy Form etc.

Member may appoint proxy Section 105(1): Member of the company entitled to attend the meeting and vote at the meeting shall have a right to appoint another person as a proxy to attend and vote at the meeting on his behalf. The provisions regarding proxy are discussed further as:

1st Proviso to section 105(1): Proxy shall have not any right to speak at the meeting and shall have right to vote except on a poll.

2nd Proviso to section 105(1): Unless AOA of the company otherwise provided, Section 150(1) shall not be applicable of company having no share capital.

3rd Proviso to section 105(1): Person appointed as a proxy shall act on behalf of such no. of member(s) not more than 50 members.

Rule 19 of the Companies (Management and Administration) Rules, 2019

a. In case of Section 8 Company no member of this company shall have right to appoint proxy unless shall other person is also member of such company;

b. A person can be appointed as a proxy and holding in aggregate maximum 10% of total share capital carrying voting rights for maximum 50 members**.**

Proxy form shall be in form MGT-11.

Statement in the Notice of Meeting Section 105(2): A prominent reasonable statement that a member entitled to attend, and vote have right to appoint a proxy; or where that is allowed, one or more proxies, to and vote instead of himself and a proxy need not to be a member

Penalty in case of contravention Section 105(3): In case of contravention of section 105(2), then every officer in default of the company shall be punishable with Penalty which shall not be less than Rs. 5000.

Deposit of Form Section 105(4): The form should be submitted 48 hrs before the company, regarding the appointment of proxy or any other document showing the validity or otherwise relating to appointment that may be effective at such meeting.

Invitation to appoint Proxy Section 105(5): At the expenses of the company, invitation to appoint proxy a person or no. of person specified in the invitation are issued to any member entitled to have a notice of the meeting sent to him and to vote thereat by proxy; every officer of the company who knowingly issues the invitations as aforesaid or willfully authorizes orpermits their issue shall be punishable with fine which may extend to Rs. 1,00,000

Proviso to section 105(5): An officer shall not be punishable under this sub-section by reason only of the issue to a member at his request in writing of a form of appointment naming the proxy, or of a list of persons willing to act as proxies, if the form or list is available on request in writing to every member entitled to vote at the meeting by proxy.

Relevant points to be consider as per section 105(6)regarding the document appointing proxy-

a. shall be in writing;

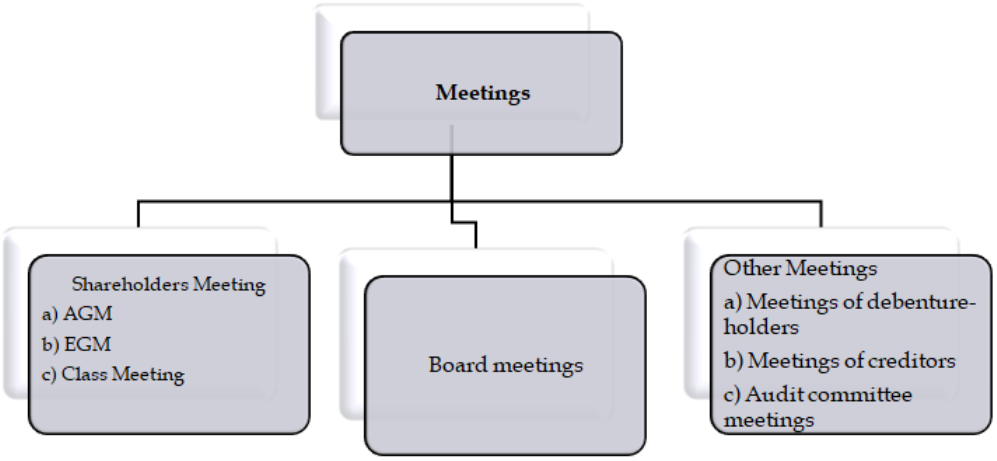
b. signed by the member appointing proxy or his attorney duly authorized by him or in case appointer is anybody corporate, be under its seal or be signed by an officer or an attorney duly authorized by it.

c. Proxy form shall be in form MGT-11.

Proxy forms Section 105(7): Proxy form shall be in form **MGT-11**

Inspection of Proxy Form Section 105(8): During the period beginning 21 hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, inspect the proxies forms filed, at any time during the business hours of the company, provided not less than three days' notice in writing of the intention so to inspect is given to the company.

12.3 Types of Meeting



A. Shareholder Meeting

1. Annual General Meeting (AGM): In compliance with Section 96 every company other than a one-person company is required to conduct annual generalmeetings as an annual general meeting other than any other form of meeting. The company needs to ensure that there is no difference of more than 15 months between two annual general meetings. As per Section 101 of the act, **e**very member of a company should be informed through a 21 days clear notice regarding the Annual General Meeting in writing or electronic mode. The notice provides the details about location, day, date and time of the meeting and should also include a resolution specifying the business to be carried out at the meeting. This notice should be distributed to each member of the company, to the legal representative of the deceased and to the insolvent member's assignor, to the auditor and to the company's director. In case a 21 days clear notice could not be sent, even a shorter notice may also be given provided 95% of the member entitled to vote in meeting agree. Some of the important points to be kept in mind regarding annual general meeting are:

i. A meeting needs to be called at the registered office of the company or any other such place in city where such registered office is situated.
ii. A government company can also hold its Annual General Meeting at any other place as the Central Government may approve.
iii. An unlisted company can hold an AGM at any place in India after obtaining consent from its members in writing or in electronic mode.
iv. In the case of a Section 8 company, the Board decides the date, time and place of the Annual General Meeting as per the directions given in a general meeting of the company.
v. Annual General Meeting is between 9:00 am to 6:00 pm and not on any public holiday as so declared by Central or State Government.
vi. An annual general meeting cannot be held on a national holiday.

The gap between two meetings not more than fifteen months, and after conducting first annual general meeting, subsequent annual general meetingsneed to be conducted between 6 months from the end of financial year. The members (including shareholders) of the company are entitled to attend and vote at the AGM. Members can cast their votes by a physical ballot or postal ballot or through e-voting. Members can appoint proxies to attend an AGM and vote on their behalf. The proxy should be appointed in writing, and the proxy form should be signed by the member. The members can elect one among themselves as the chairman of the meeting. However, if the articles of association of the company provide for a chairman, such person shall chair the Annual General Meeting of the company.

Minutes of Annual General Meeting

1. Every company has to prepare the minutes of the AGM compulsorily. The minutes of the AGM means the written record of the proceedings of the meeting. They state the events that took place and the resolutions passed in the AGM.

2. The Company Secretary will record the proceedings of the AGM. Where there is no Company Secretary, any other person duly authorised by the Board or by the Chairman will record the proceedings.

3. The minutes of the AGM should be signed and entered in the minute book within thirty days from the AGM. The Minutes book will be kept at the Registered Office of the company or at such other place approved by the Board. Any member/shareholder of the company, upon request to the company, can inspect the Minutes book of the AGM on paying the prescribed fee.

4. Upon request, the company will give a copy of the minutes of the AGM to the member within seven days of request. If the minutes are not given by seven days of the request, the company shall be liable to a penalty of Rs.25,000 and every officer of the company who is in default shall be liable to a penalty of Rs.5,000.If there are any urgent circumstances or emergency situation arises, when the company was not able to conduct the annual general meeting, then the National company Law Tribunal my grant an extension of 3 months.

Condition for extension in holding an Annual General Meeting: If, the said extension is not available for first annual general meeting, and therefore first annual general meeting must be conducted within 9 months from the end of financial year.

Case Study

Issue: A company intended to hold its Annual General Meeting after 5 days. A clear notice regarding meeting details could not be sent by it. Can a valid meeting be held?

Rule: The Rule applicable is that in case a 21 day clear notice could not be sent, then a shorter notice may also be given if agreed by 95% of the member entitled to vote in meeting.

Analysis: A company wanted to hold its Annual General Meeting after 5 days. It could not send a clear notice regarding meeting details.

Conclusion: No, a valid meeting cannot be held until 95% of the member entitled to vote in meeting agree with the notice.

In case of default in holding an Annual General Meeting, a National Company Law Tribunal has a power to call such a meeting under section 97 of Companies Act 2013 on receiving an application as filed by a member if not held in due time. The matters that are discussed at the Annual General Meeting are:

i. Annual accounts of company are presented
ii. Dividends are declared
iii. Appointment and retirement of auditor
iv. Appointment and retirement by rotation of directors
v. Consideration and adoption of audited financial statement.
vi. Consideration and adoption of Directors' report and auditors' report.

2. Extra Ordinary General Meeting: As per section 100(1) of the Companies Act, the Board can call an extraordinary company meeting whenever it deems appropriate. Section 100(2) points out the process for calling, in the event of a proposal, an extraordinary general meeting. The board of directors has been vested with powers to call extraordinary general meeting. This meeting is called between two Annual General Meetings to discuss matter requiring serious attention.

 Note: If the board cannot call Annual General Meeting, the Act provides calling the meeting on requisition made by members holding not less than 1/10 of shares on day of voting or holding not less than 1/10 of total voting power. Also, national company tribunals can call Extra Ordinary General Meetings.

Who can call the Extraordinary General Meeting?

It can be called by the board, requisition of eligible members, Requisitionist and Tribunal.

B. Board Meeting

The Board, on suo-moto basis hold the meeting in any parts of the country. Suo moto is a latin legal term, meaning "on its own motion" and implies that an action is taken by a group or person on their own. In case a company has share capital, then members holding at least $1/10^{th}$ of such share capital, and if not having share capital, then members holding at least 10% of the total voting powers in that company can request to call for such meeting. A notice to hold the meeting has to be well written and specify the nature of business. It should be duly signed by all the members or any one authorized person acting on behalf of all. The board needs to call meeting within 21 days of getting such request or maximum of 45 days, by giving such notice to such members prior to 3 days of conducting such meeting.

If Board fails to hold the meeting within 45 days, then the members can call for meeting within 3 months of from the original request made to Board at firstcan't deny this, and also need to accept such changes that might have occurred instance, and here the members have all the rights to have their name on the main list of members and Board between 21^{st} to 45^{th} day of date of notice provided to Board at first instance. Any reasonable expenses incurred by the requisitionists in calling a meeting shall be reimbursed to the requisitionists by the company. If the quorum is not present within half an hour meeting shall stand cancelled. The tribunal can conduct meeting on its own or on any request received by the member of such company. The meeting shall be held at the registered office or any place in the city where such registered office is situated.Notice of holding an Extra Ordinary General Meeting needs to be given to all the members in writing or through an electronic mode of at least 21 Clear days before convening such meeting, and one important thing here is that if meeting is called up by the requisionists, then there's no formality of attesting explanatory statement to it.

3. **Class meeting**: Such a meeting is convened by a particular class of shareholders only and only if they think that their rights are being altered or if they want to vary their attached rights, asmentioned under section 48 of Companies Act 13, and under section 232 also, if under Mergers and Amalgamation scheme, meetings of particular shareholders and creditors can be convened if their rights or privileges are being varied to their interests in such company.They meet frequently to discuss the working of the company. These meetings must have a purpose, must be held with proper notice as well as have an effective chair. It must also be documented. Board Meetings are considered to be important part of every organization in building Strong Financial Position, Qualitative Management Decisions, Customer Relationship Management (CRM), Employee Relationship, Future Prospects of the Company and many more in the bucket.

To keep it simple, the Board Meetings are considered to be an exchange of ideas, information's and decisions among the top-level management personnel for formulating and implementing the working plan for running the Company. In light of above, to safeguard the interest of the Stakeholders and Companies business, several statutory prescriptions are incorporated in the Companies Act, 2013, which mandates every company to compulsorily conduct meeting in order to ensure the actions approved by the Board are in the interest of the company and reflect the fiduciary nature of the duties of directors. As per Section 173 of Companies' act 2013, every company needs to convene first board meeting within 30 days of its incorporation, and then minimum four meetings in each calendar year, with time gap of not less than 120 days (at present it is 180 days due to COVID-19) between two board meetings. In case of One Person company, Small

company, any company under section 8 or any private company (Start-up), then it requires to hold two board meetings in each half of calendar year with time gap of at least 90 days. In case of Specified IFSC Private & Public Company, then to hold first board meeting within 60 days of incorporation and then hold one meeting in each half of calendar year. IFSC stands for Indian Financial System Code. It is an eleven-character alphanumeric code that helps in transferring funds online.

This meeting can be attended by directors either in person, or through audio-visual mode or through video conferencing, subject to the nature of meeting being discussed and after complying with necessary formalities as specified in Sec.173. But, there may be certain matters which cannot be discussed through video conferencing or audio-visual means and in such cases central government may prohibit the use of the same. Also, a director can only remain absent if granted permission by the chairman. Every director has to be pre-notified about the meeting at his registered address and notice should be given in not less than 7 days. Moreover, the decisions of the meetings are to be notified to directors who were absent from it. If the person responsible for notifying defaults from his duty, he is liable to be penalized. Compliance with the law is ascertained when directors are notified.

Section 174 states that a definite number of members or directors need to be present in the meeting. The board meeting is to comprise of 1/3 of total members or two directors (whatever is feasible). In case of OPC, 1/4th of total strength or 8 members, whichever is higher.

Matters that can't be dealt in Board Meeting

Approving Prospectus/ Boards Report/ Annual Financial Statements, scheme of Merger, Amalgamation, Demerger, etc.

C. Other Meeting

There are certain other kinds of meetings that take place in a company. There are no well-defined sections for such meetings buthave been part of company law through various judicial cases and interpretation.

a) **Creditor's meetings:** Section 230 of the Act, discusses the requisites for conducting a meeting with creditors. Such a meeting between the directors, board and creditors is known as meeting of creditors. In some cases, the judiciary may also play an important role in calling meeting of the creditors.
b) **Debenture holders meeting:** Companies are entitled to issues debentures and to implement the same it calls meeting of debenture holders. It is between the board of directors and debenture holders to discuss the rights and responsibilities related to debentures.
c) **Audit Committee Meeting:** Section 177 of companies Act provides that companies can have audit committee comprising of directors of companies similar to the main company. These auditors have their own meeting to deliberate upon various issues in meetings of audit committee.

Keywords

1. Proxy: It refers to the person who is nominated by a shareholder to represent him at a general meeting of the company.
2. Quorum: It refers to as the minimum number of voting members who must be present at a properly called meeting in order to conduct business in the name of the group.
3. Suo moto: It means an action is taken by a group or person on their own.
4. Ordinary Resolution: The ordinary business of the company will be passed by an ordinary resolution where the votes cast in favor are more than the votes cast against the resolution.
5. Special Resolution: A special resolution requires at least 75% votes in favor of the resolution.

Summary

A meeting is the assembling together of two or more persons (by previous notice or by mutual arrangement) for discussion and transaction of some lawful business. According to the total number of members in a company, minimum number of members must be present at the meeting. A previous notice at least 21 days before the formal commencement of a meeting needs to be given to all stakeholders. The meeting must be held at a particular place, date and time. All Companies needs to comply by the provisions laid under the act to hold different types of a meeting to ensure their validity.

Self Assessment

Q1. A company having registered office in Gujrat, wants to hold its meetings from now on in Meerut, Uttar Pradesh. Can the meetings in case held in Amritsar valid in the eyes of law?

A. No, until travelling expenses are not paid by the company
B. Yes, meeting can be held anywhere in India
C. Yes, in case the location of meeting is accessible and well connected by road
D. No, as meeting must be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated

Q2. A company intended to hold its AGM after 5 days. A clear notice regarding meeting details could not be sent by it. Can a valid meeting be held?

A. No, as Notice of AGM-21 days clear notice in writing or electronic mode must ne given to every member
B. No, all members must be present for meeting
C. A Shorter notice may also be given if agreed by 95% of the member entitled to vote in meeting
D. Yes, a valid meeting can be held by calling selective members who are willing to attend it on shorter notice

Q3. Assume that a company sends a clear 21 days notice regarding its meeting to be held on 2nd October 2020. Decide can it be considered a valid meeting.

A. No, as it is a national holiday and as per rule, a meeting cannot be called on a date and day observed a national holiday
B. Yes, as 21 days clear notice is sent to all members
C. No, as meeting should be conducted between 9:00 am to 6:00 pm only
D. Yes, with quorum also a valid meeting may be held

Q4. Minutes of a Meeting must be made within _____of the conclusion of every Meeting.

A. 10 days
B. 30 days
C. 15 days
D. 20 days

Q5. Which of the following is not a duty of a Chairman?

A. He must act honestly and in the interest of company
B. He must ensure that meeting is properly called and proceedings of meetings properly conducted
C. He must preserve the order in the meeting

D. He must make secret profits at the loss of company

Q6. Laxman Crackers Pvt. Ltd. got itself registered in Goregaon, Maharashtra. It has to hold a meeting and suddenly all the members got informed through a notice to reach Chandigarh. Many of the members found it very challenging to reach due to lack of means of transport and did not reach. However, since the quorum was present, the meeting was successfully conducted. A resolution was passed that instead of cash payment of dividend, bonus shares shall be offered to interested existing shareholders. What shall be the legal status of decision taken?

A. No, as meeting must be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.
B. Yes, it is valid as quorum was present.
C. No, as all members should have reached for the meeting anyhow.
D. Yes, as resolution got passed through present members. Hence, the decision is valid in eyes of law.

Q7. If there are any urgent circumstances or emergency situation arises, due to which the company was not able to conduct the annual general meeting, then the National company Law Tribunal my grant an extension of_____

A. 1 months
B. 2 months
C. 3 months
D. 6 months

Q8. After the conduct of Annual General Meeting, every listed company has to file a report on the AGM in form ____within a period of ___ from the conclusion of the Annual General Meeting.

A. MGT-10 and 10 days
B. MGT-15 and 40 days
C. MGT-15 and 20 days
D. MGT-15 and 30 days

Q9. Jaya, a new member of a company, asks you regarding the term Proxy in a company meeting. Which of the given fact would you tell, to explain the Proxy?

A. A member of a company is not all entitled to appoint another person as a proxy who is not in their relation or not a member in company.
B. The relationship between a member and his proxy is that of a principal and agent. Therefore, the proxy is bound to act in accordance of with the instructions of the member appointing him.
C. A person appointed as proxy shall act on behalf of such member or number of members not exceeding sixty and such number of shares as may be prescribed.
D. None of the above is true explanation for Proxy.

Q10. Any _____gathering, assembly or coming together of two or more persons for the transaction of some lawful business of common concern is called meeting.

A. Gathering, Assembly or Coming together
B. Assembly
C. Coming together
D. Gathering

Q11. The company needs to ensure that the gap between two annual general meetings is not more than _____

A. 6 months
B. 9 months
C. 15 months
D. 12 months

Q12. Every member of a company should be informed through a _____clear notice regarding the Annual General Meeting in writing or electronic mode.

A. 10 days
B. 21 days
C. 15 days
D. 18 days

Q13. Assume that in a company the board of directors failed to call a meeting. In such a situation who can call for a general meeting?

A. Board of Directors
B. Either National Company Law or Board of Directors
C. Neither National Company Law or Board of Directors
D. National Company Law Tribunal [NCLT]

Q14. A company has 5,350 members and has sent a clear 21 days' notice regarding the upcoming meeting. The notice provides that agenda of meeting is about dividend payment. On the day of meeting 25 members reached in time for the meeting. They together passed the resolution regarding payment of dividend. Decide whether the resolution so passed is valid?

A. No, as 30 members must be present for a valid meeting to be held.
B. Yes, as the present members are empowered to take decision as they feel like.
C. No, as 25 members must be present for a valid meeting to be held.
D. No, as 20 members must be present for a valid meeting to be held.

Q15. Proxy form shall be in form

A. MGT-10
B. MGT-11
C. MGT-12
D. MGT-13

Answer for Self Assessment

1.	D	2.	C	3.	A	4.	B	5.	D
6.	A	7.	C	8.	D	9.	B	10.	A
11.	C	12.	B	13.	D	14.	A	15.	B

Review Questions

Q1. Discuss the essentials of holding a valid meeting.

Q2. Discuss the various types of meetings that need to be conducted by a company as per companies act.

Q3. Write short notes on:

(a) Notice of a meeting

(b) Proxy

(c) Voting by poll

(d) Resolutions

Q4. Summarise the provisions as regards Annual General Meeting.

Q5. Discuss the various types of shareholder meetings that may be conducted by a company.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company

2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

3. Legal Aspects Of Business By Daniel Albuquerque, Oxford & Ibh

Web Links

https://cleartax.in/s/understanding-ordinary-special-resolutions

https://taxguru.in/company-law/kinds-meetings-companies-act-2013.html

https://taxguru.in/company-law/agm-extension-2021-key-provisions-draft-application.html

Unit 13: Winding Up of Companies

CONTENTS

Objectives

- After studying this unit, you will be able to:
- Comprehend the underlying concept of winding up
- Understand the circumstances responsible for compulsory and voluntary winding up
- Understand the winding up under Insolvency Bankruptcy Code

Introduction

A company has a continued existence. Unlike other non-registered business entities, a company is a stable business organization. Its life doesn't depend on the life of its shareholders, directors, or employees. Members may come and go but the company goes on forever. A company gets created and gets ended as per the provisions laid under the Companies Act. In this chapter we shall discuss the grounds for putting an end to a corporate entity.

13.1 Meaning of Winding-up

Winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. An administrator, called a 'liquidator', is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus

among the members in accordance with their rights. In simple words, winding up means applying the assets of a company in the discharge of its liabilities and returning any surplus to those entitled to it, subject to the cost of doing so. The statutory process by which this is achieved is called 'liquidation'. Winding up of a company differs from insolvency of an individual in as much as a company cannot be made insolvent under the insolvency law. Besides, even a solvent company may be wound up. As per section 270 of the Companies Act, 2013 a company can be wound up either by a National Company Law Tribunal ("Tribunal") or by way of voluntary winding up.

Winding-up involves:

- Every contract of the company, including individual contracts that are completed, transferred or ended. The company is no more able to do business.
- Any outstanding legal disputes are settled.
- All the assets of the company are sold.
- Money owed to the company, if any, is collected.
- Funds raised are distributed to the creditors.
- Surplus funds left after all the transactions are distributed amongst shareholders.

There may be several reasons for winding up of the company including mutual agreement among stakeholders, loss, bankruptcy, death of promoters etc. Thus, winding up ultimately leads to the dissolution of the company. In between winding up and dissolution the legal entity of the company remains and it can be sued in a Tribunal of law. With a view to systemize the procedure of winding up of a Company under Companies Act 2013, the Ministry of Corporate Affairs ("MCA") vide notification dated January 24, 2020, notified the Companies (Winding Up) Rules, 2020. The said Rules are applicable to "companies going into winding up for the circumstances mentioned under section 271" and "Summary procedure for liquidation under section 361"of the Companies Act, 2013 and is applicable with effect from April 01, 2020.It is important to note that the proceedings pertaining to voluntary winding up and winding up on the grounds of inability to pay debts fall within the realm or domain of Insolvency and Bankruptcy Code 2016 since its enforcement.

13.2 Definition of Winding-up

"Winding up is a means by which the dissolution of a company is brought about and its assets are realized and applied in payment of its debts, and after satisfaction of the debts, the balance, if any, remaining is paid back to the members in proportion to the contribution made by them to the capital of the company." "The liquidation or winding up of a company is the process through which its life gets ended and its property is administered for the benefit of its creditors and members. An Administrator, called a liquidator, is appointed and who takes the control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights." As per section 2(94A) of the Companies Act, 2013, "winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016.

13.3 Meaning of Dissolution

A company is said to be dissolved when it ceases to exist as a corporate entity. On dissolution, the company's name shall be struck off by the Registrar from the Register of Companies and he shall also get this fact published in the Official Gazette. The dissolution thus puts an end to the existence of the company. Dissolution of a company may be brought about in any of the following ways:

1.Through transfer of a company's undertaking to another under a scheme of reconstruction or amalgamation. In such a case the transferor company will be dissolved by an order of the Tribunal without being wound up.

2.Through the winding up of the company, wherein assets of the company are realized and applied towards the payment of its liabilities. The surplus, if any is distributed to the members of the company, in accordance with their rights.

13.4 Difference between Winding-up and Dissolution

1. Winding up is one of the methods by which dissolution of a company is brought about. Dissolution is the end result of winding up.
2. Legal entity of the company continues at the commencement of the winding up. Dissolution brings about an end to the legal entity of the company.
3. A company may be allowed to continue its business so far necessary for the beneficial winding up of the company. However, a Company ceases to exist on its dissolution.

Conditions for Summary Winding Up

A company seeking to wind up or liquidate under Section 361 should meet the below-mentioned conditions: – The book value of assets of the company does not exceed Rs 1 crore; and – Anyone of the below conditions based on the latest audited balance sheet:

a) In the case of a firm which has taken deposits, the total outstanding deposits do not exceed Rs 25 lakh or

b) In case the company has outstanding loans, the total outstanding loan including secured loan does not exceed Rs 50 lakh; or

c) The turnover of the company is up to Rs 50 crore; or

d) The paid-up share capital of the company does not exceed Rs 1 crore.

Summary Procedure for Winding Up of Companies

A summary procedure for winding up of companies is provided under section 361 of the Companies Act, 2013. The proceedings for liquidation are carried out by an Official Liquidator appointed by the Central Government. The summary procedure provides for the method for winding up other than winding up in the situation of an inability to pay debts. The Companies (winding up) rules, 2020have been notified specifying the detailed procedure for summary winding up. The Companies (winding up) rules, 2020 are applicable from 1 April 2020.

Conditions for Summary Winding Up

i. A company seeking to wind up or liquidate under Section 361 should meet the below-mentioned conditions: – The book value of assets of the company does not exceed Rs 1 crore; and – Anyone of the below conditions based on the latest audited balance sheet:
ii. In the case of a firm which has taken deposits, the total outstanding deposits do not exceed Rs 25 lakh or
iii. In case the company has outstanding loans, the total outstanding loan including secured loan does not exceed Rs 50 lakh; or
iv. The turnover of the company is up to Rs 50 crore; or
v. The paid-up share capital of the company does not exceed Rs 1 crore.

13.5 Appointment of an Official Liquidator

The central government appoints the Official Liquidator of the company seeking winding up under the summary procedure for liquidation.

Procedure for Summary Liquidation

Sale of assets and properties: The Official Liquidator shall dispose of all the assets or property belonging to the company after obtaining the previous approval of the central government. Every sale has to be made with the confirmation of the central government. The gross sale proceeds shall be paid to the liquidator. Any expenses incurred in connection with the sale shall be paid by the liquidator out of the gross proceeds of the sale. The monies obtained by the Official Liquidator shall

be paid into the public account of India in the Reserve Bank of India (RBI) as mentioned in section 349 not later than the next working day of the RBI.

Payments to creditors: The Official Liquidator has to within thirty days of his appointment call upon the creditors of a company to prove their claims from the company. The claims should be made in the prescribed manner within a time of thirty days from the receipt of the call from the liquidator. The liquidator shall examine the proof of debt lodged by the creditors. Within 30 days from the expiry of the time allowed for making claims, the liquidator shall file a list of creditors with the Central Government. The liquidator shall then discharge the dues of the creditors.

Powers of the Official Liquidator

The Official Liquidator appointed shall take custody or control of all the assets, effects and actionable claims to which the company is entitled or appears to be entitled. This will include all assets owned by the company and all amount due to the company. For the purpose of executing a sale of the assets and properties of the company, a liquidator can appoint an agent or auctioneer as approved by the central government.

Duties of the Official Liquidator

The Official Liquidator shall investigate into the affairs of the company and submit a report to the Central Government in the prescribed manner. The report shall mention whether any fraud has been committed in promotion, formation or management of the affairs of the company. The report should also be made in case the liquidator is of the opinion there is no fraud committed. If on the receipt of the liquidator's report, if the Central Government is satisfied that a fraud has been carried out by the promoters, directors or any other officer of a company, it might direct further investigation into the affairs of the firm and that a report will be submitted within a time frame as may be specified.

Winding-up Order

After considering the investigation report submitted by the Official Liquidator, the Central Government may order that winding up may be commenced in the same manner in which a company is wound up by the tribunal.

13.6 Who can file a winding-up petition?

Section 272 of the Act provides that the completed petition may only be submitted to the Tribunal by the aforementioned parties.

- Company
- Debtors; or
- Any donations or donations
- It is a central or state government.
- Registrar authorized by the central government. for that purpose

The given table summarises the parties who can file a winding-up

Modes of winding up

A company may be wound up in any of the following two ways:

1. Compulsory winding up (Sec. 272): Compulsory winding up takes place when a creditor of an insolvent company asks the court for a wind up. As such, the court of law appoints a liquidator for the liquidation. The primary objective of the liquidator is to raise as much funds as needed to pay the creditors. The company will then be dissolved and its name will be struck off from the list of companies in the registrar's office. Any surplus money left will be distributed amongst the shareholders of the company. This legal process ends with the company's name struck off from the

list of companies in the registrar's office. After the name is struck off, the company ceases to exist anymore.

2. Liquidation under Insolvency and Bankruptcy Code, 2016: Liquidation of a corporate debtor refers to the end of its operations or existence. In simple terms, liquidation means closing down the business of the corporate debtor. Under the Insolvency and Bankruptcy Code, 2016 **(hereinafter referred to as "IBC" / "Code"),** the process of liquidation can be initiated if the corporate debtor becomes incapable of repaying the debts or amounts owed by it to other entities. Though the main objective of the Code is to revive the corporate debtor and prevent it from going through the process of liquidation, there are various circumstances wherein the insolvency of the corporate debtor does not get resolved through the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP"). Therefore, the corporate debtor has to go through the process of liquidation.

IBC and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (hereinafter referred to as "Liquidation Regulations") both deal with the process of liquidation of the corporate debtor. In order to carry out the liquidation process, a liquidator is appointed by the Adjudicating Authority. Once the process of liquidation of the corporate debtor has been initiated, its assets will be sold and distributed amongst the creditors, employees, shareholders, partners, etc., as per the order of priority prescribed under the Code. Distribution of the net proceeds of the assets of the corporate debtor as per the priority is the most important aspect of the liquidation process. The order of priority is also known as the "waterfall mechanism".

13.7 What is liquidation?

The IBC does not define the term "liquidation". However, in the general sense, liquidation is a process wherein the corporate debtor is dissolved or wound up. Dissolution or winding up of the corporate debtor means that will cease to exist or close down completely. Under the IBC, the process of liquidation is initiated when the corporate debtor becomes incapable of repaying its debts and carrying on its business in the ordinary course. The settlement of its debts is done by selling the assets of the corporate debtor and distributing the proceeds of the sale to its creditors, workmen, shareholders, partners, and in some cases to the Government. Once the order of dissolution has been passed by the Adjudicating Authority, the officers, employees, and workmen of the corporate debtor will be discharged from their respective duties and responsibilities. However, the said persons shall not stand discharged if, during the liquidation process, the liquidator continues the business of the corporate debtor. Moreover, after the process of liquidation of the corporate debtor has been initiated, a moratorium will be declared against the corporate debtor stating that the corporate debtor cannot sue or be sued before any court of law. However, the liquidator may institute/start a legal proceeding on behalf of the corporate debtor only with the permission of the Adjudicating Authority. It is pertinent to note that, the aforesaid conditions shall not apply to the proceedings notified by the Central Government.

13.8 Consequences of Winding Up

I. As Regards the Company Itself

- Winding up doesn't take away the existence of the company completely.
- The company continues to exist as a corporate entity till its dissolution.
- All the ongoing business of the company is administered by the liquidator during the phase of liquidation.

II. As Regards the Shareholders

- Contributors − a new statutory liability comes into existence.
- Every transaction of share during the liquefaction done without the approval of the liquidator is termed void.
- They must explain their claims and justify their claims to the liquidator.

IV. As Regards the Management

- With the appointment of the liquidator, all the powers of the directors, chief executives and other officers tend to cease.
- Only the powers to give notice of resolution and the power of appointment of the liquidator upon winding up of the company are given to the members.

V. As Regards the Disposition of the Company's Property

- All the dispositions of the company's properties are void if the dispositions are not approved by the court or the liquidator.

13.9 Compulsory Winding-up

When a company, formed and registered under the Companies Act 2013, has been ordered to be wind up by the Court or Tribunal the same is known as compulsory winding up of a company. Compulsory winding up takes place when a creditor of an insolvent company asks the court for a wind up. If the company goes into liquidation, the court of law appoints a liquidator for the liquidation. The primary objective of the liquidator is to raise as much funds as needed to pay the creditors. The company will then be dissolved and its name will be struck off from the list of companies in the registrar's office. Any surplus money left will be distributed amongst the shareholders of the company. This legal process ends with the company's name struck off from the list of companies in the registrar's office. After the name is struck off, the company ceases to exist anymore. As per Section 271 of the Act, the Company may on a petition under section 272, can be wound up by the Tribunal in the following circumstances:

1. By passing Special resolution;

2. Where a Company has acted against the interests of the sovereignty and integrity of India;

3. Where an application is made by Registrar of Companies ("ROC") to the Tribunal informing that the affairs of the company are fraudulent;

4. Where the Company is in default in filing the financials with ROC for consecutive five financial years;

5. If Tribunal is of the opinion that winding up of the Company is just and equitable.

Section 114 (2) of the Companies Act, 2013states that *A resolution shall be a special resolution when:*

- the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;
- the notice required under this Act has been duly given; and the votes cast in favor of the resolution, whether on a show of hands or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

There are 3 Deleted grounds for winding up from Section 271 of companies Act 2013. These are:

a) Default in providing statutory report to Registrar or default in holding a Statutory meeting

b) Failure to commence business within 1 year of incorporation or suspension of business for a whole year

c) Reduction in company membership below minimum prescribed limit

Circumstances/grounds for winding up of a company as per section 271 by court/tribunal

1. **Inability of a company in paying its debts:** If the company is unable to pay its debts, then the tribunal may order to wind up the company. The term 'debt' here means a definite sum of

money which is due and immediately payable by the company. The term 'inability to pay' here means the incapacity or incapability of a company to pay its current liability. In simple words it means the company lacks the ability to pay its liabilities as and when they arise. This helplessness in paying the debts is to be taken in commercial sense.

Further, if a creditor of the company obtains a **'decree from any court or Tribunal'** for the payment of his debts by the company, and the execution issued on the decree in favor of the creditor is returned unsatisfied in whole or in part. If it is proved to the satisfaction of the tribunal that the company is unable to pay its debts.

- In clause (a) a winding up petition can be filed against the company only if the company owes an amount exceeding rupees one lakh to a creditor.
- In clause (b) an unsatisfied execution of a decree for any amount, however, small, amounts to inability to pay debts. The cases of commercial insolvency (i.e; where a company is not in a position to meet its current liabilities) are covered under clause (c)

 Caution:

1. A conditional liability (amount payable upon some condition) is not considered a debt unless the condition has happened.
2. It is important to know whether the company can pay its existing liability so long as it is a going concern. If it is not in a position to meet its existing dues, a petition can be filed against the company even if it may have very valuable assets not presently realizable.
3. The companies act recognizes following 3 cases in which a company shall be deemed to be unable to pay its debts: (a) If a creditor to whom the company owes a sum of money exceeding Rs. 1 lakh, has served a demand notice to repay the amount at its registered office. Such a company has failed to return the money within 21 days after the receipt of such notice or to provide adequate security or restructure or compound the debt to the reasonable satisfaction of creditor.

4. Commercial insolvency may be presumed from the silence of a company in spite of statutory notice.

Case Study:

Associated Forest Products (P) Ltd. vs. K.T.S. (Singapore) Plc. Ltd. (1993) 1 Cal LJ 382

Associated Forest Product (P.) Ltd. borrowed Rs. 15 lakhs from, K.T.S. (Singapore) Plc. Ltd. as a creditor, repayable in 10 in equal instalments. Associated Forest Product (P.) Ltd. repaid 9 instalments due but did not pay the last instalment in time. Consequently, a notice is served upon the Associated Forest Product (P.) Ltd. demanding the repayment of amount due. Despite of getting a notice, Associated Forest Product (P.) Ltd. did not pay anything, nor it give any reason for not paying the amount. Moreover, 3 weeks passed thereafter.

Issue: What justice can K.T.S. (Singapore) Plc. Ltd. get?

Rule: It is said that a winding up petition can be filed against the company only if the company owes an amount exceeding rupees one lakh to a creditor.

Analysis: In this case the amount of Rs. 15 lakhs so borrowed is more than Rs. 1 lakh, which means petition can be obviously filed. The Tribunal may order winding up of the company if it gets proved that the company has omitted to pay the amount without reasonable excuse. Analysis: The company had no excuse to defend itself from not making a payment.

Conclusion: The company can be wound up by the Tribunal as amount of debt to be payable is Rs. 15 lakhs. Winding up petition can be entertained against the company

only if the company owes an amount exceeding rupees one lakh to a creditor.

Points to note:

1. In execution proceedings, a person against whom a decree (an official order given) is passed is ordered to pay the amount for which decree is passed.

2. A creditor who has obtained court order against the company is not bound to initiate/start execution proceedings in order to bring his case under clause (b) for the purpose of winding up. He may also get a statutory notice the company as required under clause (a) if the amount of decree exceeds Rs. 1 lakh and may file a winding up petition if the company neglects to pay.

Case Study: Sree Shamnagar Mills vs. Dharmaraja Nadar, AIR 1970 Madras 203

A company borrowed a huge sum of money in order to carry on its activities on large scale. At one stage, it was found that the company was heavily indebted as its liabilities amounted to Rs. 10 lakhs. The current assets of the company were insufficient to meet its liabilities. However, its total assets amounted to Rs. 15 lakhs (including land, building and machinery worth Rs. 7 lakhs). All the assets of the company were under mortgage, and there were no chance of business to progress. A winding up petition against the company was filed by the Registrar on the ground that the company was commercially insolvent. The company challenged the petition on the ground that its total assets far exceeded its total liabilities.

Issue: Can the company succeed in challenging the petition on the ground that its total assets far exceeded its total liabilities?

Rule: In case of inability to pay debts, a company can be winded up.

Analysis: In this case a winding, up may be allowed since the company is unable to pay its debts. As a matter of fact, for the purpose of knowing companys' ability to pay, the value of such assets for which the company cannot carry on its business (eg. Land, building, machinery etc.) are not to be considered.

Conclusion: The petitioncannot be challenged ascompanys' total assets far exceeded its total liabilities can be set aside by the Tribunal.

Did you know?

When will a Tribunal not order for Winding Up a company?

- Where the debt is not presently payable by the company
- Where the debt amount is not definite and includes unliquidated damages
- Where the debt has become a time-barred on the date of filing of petition

- Where the debt is bona fide disputed by the company: When there is an honest and reasonable reason for non-payment of debts, Tribunal shall not order for winding up of a company. However, if the dispute is not real but is flimsy or false grounds, the winding up order may be passed by the Tribunal.
- Where there is an honest counter claim put forward by the company

2. **Special resolution by company:** A special resolution is a resolution of the company's shareholders which requires at least 75% of the votes cast by shareholders in favor of it in order to pass. Where no special resolution is required, an ordinary resolution may be passed by shareholders with a simple majority – more than 50% – of the votes cast. Tribunal may order to wind up the company on a petition presented to it by the company or contributory. Its' important to note that the passing of special resolution by the company itself is a ground for presenting a petition. Thus, a winding up petition under this clause is maintainable simply if the company passes the resolution that it should be wound up by the Tribunal. However, the Tribunal is not bound to order the wind up the company. It has discretionary powers in this regard and may refuse to wind up a company despite receiving an application from it wind up, when the Tribunal thinks that it is opposed to public interest or interests of the company.

Case study:

A public ltd. company passed a special resolution to the effect that it would be wound up by the Tribunal and presented a winding up petition before the Tribunal for its winding up. Mr. Jatin, who had lent Rs. 1,50,000 to the company received his amount due from it. The moment he got the knowledge about the companys' intention to opt for winding up by passing a special resolution, he raised an objection.

Issue: Decide whether Mr. Jatin succeed in his objection and stop the company from winding up?

Reason: For this lets' recall the rule that If a company passes the resolution that it should be wound up by the Tribunal, then it can order for its winding up.

Analysis: In this case firstly the dues of Mr. Jatin are already met by the company and as such he cannot object with the decision of the company. Secondly, passing of special resolution by the company itself is a ground for presenting a petition. Thus, a winding up petition under this clause is maintainable simply if the company passes the resolution that it should be wound up by the Tribunal.

Conclusion: So, we can conclude that Yes, undoubtedly the company can be wound up by the Tribunal as from the case details it gets clear that a decision to wind up the company is not against public or companys' interest. Moreover, the dues of creditor are already met by the company and when the company has itself passed the special resolution, the Tribunal shall have no objection in issuing orders for the winding up of the company.

3. Acting against sovereignty and integrity of India: If the company has acted against the interests ofsovereignty and integrity of India; Security of the state; Friendly relations with foreign states; Public order, decency or morality; then the company may be wound up by the Tribunal. It is important to note that on this ground, the petition / application can be made by Central Government or State Government.

4. Company becoming a sick company: According to the section 253 sub-section (1) of the companies act 2013, when a company fails to pay the amount on demand by the secured creditor, which could be **50% or more** which the company has acquired as debt, fails to pay the full amount or the amount satisfying the secured creditor back within a period of **30 days** from the notice given, then the secured creditor can file an application and reach out to the tribunal in a prescribed

manner along with the relevant facts and evidences of the default of the payment by the company and if all these things are checked and justified, so for a determination the company is declared as a sick company.According to sub-section (5) of section 253 of the companies act 2013; even the **central, state, Reserve Bank of India or any public or state level financial institution or even a scheduled bank** if have sufficient reasons to believe or prove that a company has become a sick company, it could make a reference in respect of such and such company to the tribunal for the determination of certain measures which needs to be taken to be taken care of that. The Tribunal has to decide within a period of 60 days that whether a company is sick or not, provided the, the company shall be given a chance and a reasonable opportunity to reply within a period of 30 days. If the Tribunal is satisfied that a company has become a sick company, after reading and considering all the facts of the case, it has to decide and give an order in writing that whether the company would be able to make the repayments of its debts and should give a reasonable amount of time for that.

Example:

ABC ltd has a total debt of Rs. 500 Crores and three banks have lent 350 crores to ABC through a consortium agreement. In such situation on failure to pay the debt within 30 days of the demand notice any bank can file an application to the Tribunal that ABC ltd may be declared as sick company.

Latest Guidelines on Revival and Rehabilitation of a sick company sub-section (1) of section 254 of the companies act 2013 states that either the secured creditor or the sick company has to make an application to the Tribunal for determination of the measures which are to be taken for the revival and rehabilitation of such company. In order to make the application for the revival and rehabilitation of the company, the application shall be accompanied by audited financial statements of the accounts of the company relating to the previous financial year. The required documents and drafts must be duly authenticated in a certain manner along with the required fees as it would have been prescribed. The application for the revival and rehabilitation of a sick company under the sub-section (1) of section 254 of the companies act 2013 must be made to the Tribunal within a period of 60 days from the day of declaration of such company, as a sick company. After the receipt of the application of revival and rehabilitation of a sick company, the Tribunal must fix a date which must not be later than 90 days of the receipt of the application for the hearing of the company. An appointment of an interim administration is done in order to settle the disputes and set a meeting with the creditors of the declared sick company under section 253, and the meeting must be held under 45 days of the order passed by the Tribunal on the application of the revival and rehabilitation of the sick company made under the section 254 of the companies act 2013, all the necessary drafts and required documents must be seen and carefully looked upon and the interim administration has to submit a report to the Tribunal in respect to the case within 60 days of the order passed by the Tribunal. Incase if no drafts have been submitted by the board of directors of the declared sick company, the Tribunal may order the interim administration to take charge or control over the management of the sick company and It issues certain other directions to the interim administration in order to protect and preserve the assets of the sick company. When the interim administration has been ordered to take over the control over the management by the Tribunal of the declared sick company under section 253, the management and other staffs of the company are required to provide full support and assistance to the interim administration in order to complete the process in a smooth manner and to avoid any problem to be faced by the interim administration. The section 257 of the companies act 2013 mandates that a committee of creditors is to be made by the interim administration consisting of not more than 7 members in order to represent each class of the creditors, and a meeting is setup with the committee of creditors in which all the necessary objectives are discussed with the committee of creditors. After all these functions are completed and everything is done in a smooth and decent manner, the section 258 of the companies act 2013 states that the Tribunal has to fix a date on which the hearing on the matter of the revival and rehabilitation of the sick company is to be done. If the Tribunal is satisfied that

the creditors representing three-fourths in value of the amount outstanding against the sick company present and voting have resolved that:

a) the company could not be revived and rehabilitated, the Tribunal records the opinion of the creditors and orders the process of winding up of the company.
b) If the creditors decide that by adopting certain measures the sick company may be revived and rehabilitated, the Tribunal appoints a company administration for the company and orders it to prepare a scheme of revival and rehabilitation of the sick company.

If the company has become sick company and its revival scheme is not feasible and the revival scheme is also not approved by the creditors, then the Tribunal shall order the winding up of the company.

5. **Conducting affairs in a fraudulent manner:**A winding up order may be given by the Tribunal, if:

a) The affairs of the company were conducted in a fraudulent manner; or

b) If the company was formed for fraudulent and unlawful purpose; or

c) If the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith.

The tribunal may order the winding up if a petition is made to it by a Registrar or by any person authorized by Central Government by notification under this Act.

6. **Default in submitting annual returns/financial statements:** If the annual returns/financial statements of a company are not submitted for **5 consecutive financial years** then such a company may be wound up by the tribunal.
7. **Just and Equitable grounds:** A just and equitable petition is issued in the case of a shareholder dispute. Hence, the creditor of the company is not required in it. If there is a breakdown in the shareholder's mutual trust and confidence which is having a calamitous or disastrous impact on the company, any shareholder can file a petition to wind up the company on just and equitable grounds. Company shareholders or the directors(if board resolution passed by the majority of creditors and shareholders of the company) can file this petition. Any shareholder can also file such petition if they have been a shareholder of the company for minimum 6 out of 18 months preceding the presentation of the petition or if they are the only, or an original shareholder. If any dispute raised in the company which cannot be resolved then winding up petition can be presented to close the company. However, the decision to wind-up lies with the court so, it should not be presumed that the company will be wound up immediately.

Notes:

1. There must be some strong grounds for winding up of the company. The tribunal should give due weight to the interest of the company, its employees, creditors and shareholders. The interest of public should also be considered.

2. The Tribunal may refuse to make an order if it is of the opinion that some other remedy is available to the petitioner and instead of pursuing other remedy, he is acting unreasonable in seeking the winding up of the company.

3. A winding up petition on 'just and equitable' grounds can be filed by a contributory, Registrar of Companies or by a person authorized by the Central Government.

Further, the circumstances in which the winding up on 'just and equitable' grounds may occur are:

a) **Complete deadlock in management of the company:** Where the relation between the directors is such that they would not speak to each other except through the secretary, the court found it 'just and equitable' to order winding up. There need not be a paralyzing dead lock in the management, a justifiable lack of confidence in the management of the company is sufficient for the court to invoke the just and equitable clause to order its winding up.

Case study:

Suppose Monu and Sonu were the two shareholders in a private limited company and were the only directors of the company. They had equal voting rights. As per the article of association of the company, the dispute shall be settled through arbitration. Thereafter, they became so hostile to each other and would never agree on any point. They spoke through the secretaries only. The

Issue: What can be done in a situation where its directors do not talk to each other?

Rule: See basically in a situation where the relation between the directors is such that they would not speak to each other except through the secretary, the court shall wind it on 'just and equitable grounds.

Analysis: In this case the directors are not on talking terms and rather interacting through secretaries. In such a situation there may never be a consensus for a specific decision between them, which may affect the working of a company efficiently.

Conclusion: Due to deadlock in the management, the tribunal can order for winding up of the company.

b) **Failure of companys' main object:** When the main object of the company fails to materialize. In such a case the Tribunal may order the winding up of a company on just and equitable grounds.

Case study:

Re German Date Coffee Co; (1882) 20 Ch.D. 169

A company was formed for the purpose of manufacturing coffee from dates under a German Patent to be granted by the Government of Germany. The German Patent was never granted. So, the company acquired a Swedish Patent and started manufacturing coffee from dates. Two shareholders of the company filed a petition for the winding up of the company on the grounds that the main object of the company has failed, and it was not possible for the company to carry out the object for which it was formed.

Issue: Will the two shareholders succeed in getting the company wound up through the order of Tribunal?

Rule: In case of failure of companys' main object, the Tribunal may call or order for its winding up.

Analysis: The main purpose of forming a coffee manufacturing company was to obtain a German Patent. Since, the German Patent could not be obtained from Government and instead the company acquired a Swedish Patent for coffee manufacturing, which defeated its very purpose.

Conclusion: Yes, the shareholders will succeed in obtaining the order from Tribunal to wind up the company on 'just and equitable' grounds.

c) **Recurring losses:** Sometimes it is not possible for the company to carry on its business except at losses i.e; there is no reasonable hope of trading at a profit. In such cases, the Tribunal may order the winding up of the company on just and equitable grounds.

Example: Suppose a company was carrying on its business at losses, and was paying its debts by making new calls on members. Moreover, there was no chance of earning profits in the near future. In this case, the company is liable to be wound up on just and equitable grounds. However, a winding up order is not passed by the Tribunal on the ground that the company has made losses in the current year and is likely to make further losses. As a matter of fact, a mere apprehension/anxiety/nervousness on the part of shareholders that losses will

occur in future is no ground for winding up. To obtain a winding up order from the Tribunal, it must be shown that there are no reasonable prospects of earning profit.

d) **Aggressive or oppressive policy of majority shareholders**: Sometimes the majority shareholders adopt an Aggressive or Oppressive policy towards minority shareholders. In such a case, the Tribunal may order the winding up of the company on 'just and equitable' grounds. The directors of a company were able to exercise a dominating influence on the management of the company. The managing director of the company refused to hold a meeting. The dividends were also not paid to the shareholders, with a view to squeezing out the minority shareholders by purchasing their shares at an under value.

Case study:
Loch vs. John Blackwood Ltd; (1924) AC 783
Issue: Shareholders contact the Tribunal for justice. Will they succeed in getting justice from Tribunal?
Rule: In case of oppression of minority shareholders, tribunal may order to wind up a company.
Analysis: The dividends were not paid to the shareholders, so as to squeeze the minority shareholders by purchasing their shares at an under value.
Conclusion: Yes, the minority shareholders shall succeed in getting justice from Tribunal. They may get a remedy from the tribunal. The tribunal can issue an order to wind up the company on 'just and equitable' grounds.

e) **Incorporation of a company for fraudulent or illegal purpose:** The tribunal may order the winding up of the company on 'just and equitable' grounds in case a company got formulated with fraudulent or illegal purpose.

Case study:
A company gets incorporated for match fixing. The company would raise from public in the name of its diamond jewelry manufacturing business but would invest that money in match fixing. A complaint is made by the creditors to the tribunal to take an adequate decision.
Issue: Will the creditors succeed in getting any remedy from tribunal?
Rule: Incorporation of a company for fraudulent or illegal purpose may become a ground for its winding up by the tribunal.
Analysis: The company raised money from public for its diamond manufacturing business but used it for IPL match fixing. Such an activity is illegal in the eyes of law.
Conclusion: Yes, the creditors succeed in getting any remedy from tribunal on 'just and equitable' grounds.

f) **Public Interest:** Sometimes, it is in public interest to wind up the company by the tribunal.
Suppose a company is wasting the capital resources of country and befooling small shareholders, the court may order winding up of such a company. Tribunal may refuse an order of winding up where it would operate against public interest, then the tribunal may refuse to wind up the company. But, when there is no sufficient evidences to show a company is operating against public interest, Tribunal may set aside the petition to wind up a company
.

Case study:

A company had ten creditors in total. Two creditors develop animosity with the company and makes a petition to tribunal to initiate the winding up procedure on grounds that it is operating against public interest. They had no evidences to prove their point but kept insisting

that the company is unfair in its dealing.

Issue: Can the two creditors get the company wound up by Tribunal?

Rule: Tribunal may refuse an order of winding up where it would operate against public interest, then the tribunal may refuse to wind up the company.

Analysis: A company had ten creditors in total. Two creditors develop animosity with the company and makes a petition to tribunal to initiate the winding up procedure on grounds that it is operating against public interest. They had no evidences to prove their point but kept insisting that the company is unfair in its dealing.

Conclusion: No, the two creditors cannot get the company wound up by Tribunal as there was no proves found against it. The company is nowhere working against public interest and hence, the 'just and equitable' grounds for winding up by tribunal cannot apply.

13.10 Compulsory Insolvency Resolution Process

Mentioned below is the procedure for filing compulsory winding up:

1. Filing of petition in Form WIN-1 or WIN-2 by the Eligible Petitioner: The eligible petitioners shall file the petitions in the following manner:

a) For the purposes of sub-section (1) of section 272, a petition for winding up of a company shall be presented by the eligible petitioner in Form WIN-1 or WIN-2.In case when the petition presented by the Company, then it shall be presented in the Form WIN-2 and in other cases in Form WIN-1.

b) Every petition shall he verified by an affidavit made by the petitioner or by the petitioners, where there are more than one petitioners, and in case the petition is presented by a body corporate, by the Director, Secretary or any other authorized person thereof, and such affidavit shall be in FormWIN-3.

c) Statements of Affairs must be annexed along with petition in Form WIN-4which shall contain the information up to the date, which shall not exceed thirty days prior to the date of filling the petition duly verified by an affidavit in Form WIN-5.

2. Service of Petition: Every contributory of the Company shall be entitled to be furnished by the petitioner or by his authorized representative with a copy of the petition within 24 hours of the requisition made by the contributory on payment of five rupees per page.

3. Advertisement of Petition: The Petition shall be advertised atleast 14 days before the date fixed for hearing by the Tribunal in Form WIN-6 in any daily newspaper in English and vernacular language widely circulated in the State or Union territory in which the registered office of the company is situated. Further, an application for leave to withdraw a petition for winding up which has been advertised shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition. Withdrawal of petition is only allowed upon adherence to order of Tribunal, including costs and it shall be advertised in the same manner as the original petition.

4. Appointment of Company Liquidator ("CL") or Provisional Liquidator ("PL")

The process to appoint a Company or Provisional Liquidator is mentioned below:

a) After the admission of a petition for the winding up of a company by the Tribunal, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the Tribunal, if it thinks fit, and upon such terms and conditions as in the opinion of the Tribunal shall be just and necessary, may appoint a provisional liquidator of the company, pending final orders on the winding up petition, and where the company is not the applicant, notice of the application for appointment of provisional liquidator shall be given to the company in Form

WIN 7 and the company shall be given a reasonable opportunity to make its representation unless the Tribunal, for reasons to be recorded in writing, dispenses with such notice.

b) As per Section 275, Company Liquidator (CL) shall be appointed by the Tribunal amongst the Insolvency Professionals registered under the Insolvency and Bankruptcy Code, 2016.

c) Notice of appointment of CL by Tribunal shall be made to the liquidator within 7 days in form WIN-9.

d) The declaration disclosing conflict of interest in Form WIN-10 within7 days of his appointment by CL.

5. Order of Winding up by the Tribunal: The following methodology is prescribed for receipt and filing of the order:

a) For the purposes of sub section (1) of section 277, the order for winding up shall be in Form WIN-11.

b) The Tribunal shall send the signed and sealed order of winding up within 7 days from the date of receipt of the order by the Registrar, to CL in Form WIN-12 and to ROC in Form WIN-13.

c) A copy of the order made by the Tribunal shall also be filed by the liquidator within thirty days of the receipt with the Registrar of Companies in form INC-28 of the Companies (Incorporation) Rules, 2014 within 30 days of the date of order.

d) Contents of the Winding up Order: An order for winding up a company shall inter-alia contain that it will be the duty of such of the persons as are liable to submit the books of account of the company completed and audited up to the date of the order, to attend on the Company Liquidator at required time and place and give him all the information, and it will be the duty of every person who is in possession of any property, books or papers, cash or any other assets of the company, including the benefits derived therefrom, to surrender forthwith such property, books or papers, cash or other assets and the benefits so derived , as the case may be, to the CL.

6. Advertisement of Winding up order: The order for the winding up of a company by the Tribunal shall, within 14days of the date of the order be advertised by the petitioner in a newspaper in the English language and a newspaper in vernacular language widely circulating in the State or the Union territory where the registered office of the company is situated and shall be served by the petitioner upon such person, if any, and in such manner as the Tribunal may direct, and the advertisement shall be in Form WIN 14.

7. Power of CL upon winding up order: On winding up order being made, the following powers can be exercised by CL:

a) CL shall take charge of assets and books of accounts and papers of the Company.

b) The CL can file an application against the promoters/directors of the Company if they do not cooperate in giving the charge of assets and books of accounts of the Company.

c) The CL may make an application before Tribunal thereby seeking direction up on any contributory/ trustee etc. to pay such sum to which the Company is entitled.

8. Reports by the Company Liquidator (CL) :As per sub section (1) of Section 281 of the Act, the CL shall submit report to the Tribunal in following manner:

a) The CL shall file first Report within 60 days of order in form WIN-16 reporting nature and details of asset of the Company, debts due, guarantees, list of contributories and their dues, subsisting contracts etc. Further, as per sub section (4) of Section 281 of the Act, CL may make further report or reports, if he thinks fit to the Tribunal.

b) The Tribunal shall within 7 days from the receipt of such report, fix a date for the

consideration and notify the date on the notice board of the Tribunal and to the CL.

9. Settlement of list of contributories Sec 285 read with Rule 28 to 35

a. Preparation of provisional list of contributories (Rule 28)

Unless the Tribunal dispenses with the settlement of a list of contributories, the CL shall prepare the list of contributories within 21 days of the winding up order. The list shall consist the name of every person who was a member on commencement on winding up or his representative and the list shall be in Form WIN-17.

b. Notice of Settlement (Rule 29)

Upon the filing of the provisional list of contributories mentioned in Rule 28 above, CL shall do the following functions:

- The CL shall obtain a date from the Tribunal for settlement of the list of contributories.
- The CL shall give notice of the date appointed by the Tribunal to every person included in the list form WIN-18.

Further, if any person intends to object to his being settled as a contributory in such case he should file in Tribunal, at least 2 days before the hearing, his affidavit in form WIN-19 in support of his contention and serve a copy of the same on the CL.

c. Settlement List (Rule 30): On the date appointed for the settlement of the list referred to in rule 29, the Tribunal shall hear any person who objects to being settled as a contributory or as a contributory in such character or for such number of shares or extent of interest as is mentioned in the said list, and after such hearing, shall finally settle the list in accordance with sub-section (1) of section 285 and the aforesaid list when settled shall be certified by the Tribunal under its seal and shall be in Form WIN 20.

d. Notice of settlement to contributories (Rule 31): Upon the receipt of the settled list of contributories, as certified by the Tribunal in terms of rule 30, the CL shall within a period of 7 days issue notice to every person placed on the said list of contributories in form WIN 21 and shall be sent to each person settled on the said list by pre-paid registered post or speed post at the address mentioned in the said list and an Affidavit confirming the service of notice in form WIN-22.

e. Supplemental list (Rule 32): The Tribunal may add to the list of contributories by a supplemental list or lists and any such addition shall be made in the same manner in all respects as the settlement of the original list.

f. Variation of list (Rule 33): Save as provided in rule 31, the list of contributories shall not be varied, and no person settled on the list as a contributory shall be removed from the list, or his liability in any way varied, except by order of the Tribunal and in accordance with such order.

g. Application for rectification of list (Rule 34): If after the settlement of the list of contributories, the Company Liquidator has reason to believe that a contributory who had been included in the provisional list has been improperly or by mistake excluded or omitted from the list of contributories as finally settled or that the character in which or the number of shares or extent of interest for which he has been included in the list as finally settled or any other particular contained therein, requires rectification. Then the CL can make application for rectification in the list even after the settlement.

h. List of Contributories consisting of past members (Rule 35): It shall not be necessary to settle a list of contributories consisting of the past members of a company, unless so ordered by the Tribunal and where an order is made for settling a list of contributories consisting of the past members of a company, the provisions of these rules shall apply to the settlement of such list in the same manner as they apply to the settlement of the list of contributories consisting of the present members.

10. Advisory Committee: The Tribunal may direct for constitution of an Advisory Committee and determine the persons who may be the members of the advisory committee. The meeting of the creditors and contributories in accordance with the provisions of sub-section (3) of section 287 to determine the persons who may be the members of the advisory committee shall be convened, held and conducted in the manner provided in the prescribed rules for the holding and conducting of meeting of creditors and contributories.

11. Meeting of creditors and contributors (Rule 44 – 65): Subject to any directions given by the Tribunal, rules as hereinafter set out shall apply to meetings of creditors and contributories as may be convened in pursuance of sub-section (3) of section 287 and sub-section (3) of section 292.

a. Notice of Meeting: The provisions of sending notice of the meeting of creditors and contributories by CL is stipulated below:

- The CL shall summon meetings of creditors and contributories by giving at least 14 days' notice by sending individually to every creditor of the company a notice of the meeting of creditors, and to every contributory of the company a notice of the meeting of contributories.
- The notice of the meeting required to be sent not less than 14 days before the date fixed for the meeting. Where creditors and contributors are more than 500, the notice to be sent by way of newspaper advertisement shall begiven in Form WIN-25.
- The CL or any other person nominated by him shall be the Chairman and the nomination shall be given in WIN-32.
- Notice of the meeting shall be given in form WIN-30. The CL may, at its discretion can give notice to the officers of the Company. Proof of notice shall be submitted by way of an Affidavit in form WIN-31.

b. Resolution at Creditors or Contributory meeting: Resolution shall be deemed to be passed when majority in value of the contributories present personally or by proxy and voting has been made in favour of the resolution.

c. Quorum: The Quorum shall be at least three creditors or contributories entitled to vote and where total creditors or contributors do not exceed 3, then all creditors or contributors entitled to vote.

d. Minutes of proceedings: The chairman of the meeting shall cause minutes of the proceedings at the meeting in the following manner:

- Minutes to be drawn up and fairly entered in the Minute Book within 30 days and the minutes shall be signed by him or by the chairman of the next meeting.
- A list of creditors and contributories present at every meeting shall be made and kept in Form WIN 33.
- The Company Liquidator shall, within seven days of the conclusion of the meeting, report the result thereof to the Tribunal in Form No. WIN 34.

12. Examination of Promoters or Directors u/s 299 And 300 read with rule 139 to 154

The process of examination of Promoters or Directors is mentioned below:

a) Where CL made a report stating fraud by the promoters/ directors of the Company:

Tribunal may after considering the report, direct that such person or officer shall attend before the Tribunal on an appointed day for examination as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as an officer thereof.

b) Issue of summons against the directors or promoters: Tribunal may, upon hearing, make an order for issuing summons against persons named in the order in form WIN-62 and summon shall be in form WIN- 63.

c) Order directing examination shall be in form WIN-64 and shall be made at least 7 days prior to date fixed for hearing. No person shall take part in examination except CL and his Authorized Representative.

13. Sale by Company Liquidator

The process of sale of asset or property of the Company can be made by the CL, post taking previous sanction of the Tribunal. The procedure of sale is mentioned below:

a) Every sale shall be held by the CL, or, if the Tribunal shall so direct, by an agent or an auctioneer approved by the Tribunal, and subject to such terms and conditions, if any, as may be approved by the Tribunal and all sales shall be made by public auction or by inviting sealed tenders or by electronic bidding or in such manners as the Tribunal may direct.

b) Where property forming part of a company's assets is sold by the Company Liquidator through an auctioneer or other agent, the gross proceeds of the sale shall, unless, the Tribunal otherwise orders, be paid over to the liquidator by such auctioneer or agent and the charges and expenses connected with the sale shall afterwards be paid to such auctioneer or agent in accordance with the scales, if any, fixed by the Tribunal.

14. Termination of winding up: The process of conclusion of winding up of the affairs of the Company is mentioned below:

a) When all affairs have been fully wound up, CL shall file application for dissolution within 10 days along with audited financial accounts & auditor's certificate.

b) Upon application filed, Tribunal shall in consideration of accounts and auditor's certificate, pass an order of dissolution.

c) Liquidator shall pay the balance into Company Liquidation Dividend and Undistributed Assets Account any unclaimed dividends payable to creditors or undistributed assets refundable to contributories in his hands on the date of the order of dissolution, and such other balance in his hands.

d) The winding up of a company shall, for purposes of section 302, be deemed to be concluded at the date on which the order dissolving the company has been reported by the Company Liquidator to the Registrar of Companies unless any fund or assets of the company remaining unclaimed or undistributed in the hands or under the control of the Company Liquidator, have been distributed, or paid into the Company Liquidation Dividend and Undistributed Assets Account as provided in section 352.

Summary procedure for liquidation under section 361

The rules allow any of the following class of companies to close their business by making a winding up application to Central Government without going to Tribunal. For the purpose of clause (ii) of sub-section (1) of section 361, the class of companies shall be as under, based on the latest audited Balance Sheet:

- Companies accepting deposit and having total outstanding deposits upto INR 25 Lacs
- Companies having total outstanding loan including secured loan upto INR 50 Lacs
- Companies having total turnover upto INR 50 Crores
- Companies with Paid up capital upto INR 1 Crore

The provisions of the Rules related to filing and audit of the Company Liquidator's accounts and its procedure (Rule 91 to 99 of the Rules) and disposing of assets (Rule 165 to 167 of the Rules) shall be applicable to above class of companies with modification that the word "Tribunal" shall be considered as "Central Government".

13.11 Insolvency Bankruptcy Code 2016

Insolvency and Bankruptcy Code (IBC) 2016 was implemented through an act of Parliament. It

got Presidential assent in May 2016. Centre introduced the IBC in 2016 to resolve claims involving insolvent companies. The bankruptcy code is a one stop solution for resolving insolvencies, which previously was a long process that did not offer an economically viable arrangement. The code aims to protect the interests of small investors and make the process of doing business less cumbersome. The IBC has 255 sections and 11 Schedules. IBC was intended to tackle the bad loan problems that were affecting the banking system. The IBC process has changed the debtor-creditor relationship. A number of major cases have been resolved in two years, while some others are in advanced stages of resolution. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and must take decisions to resolve insolvency. Under IBC, debtor and creditor both can start 'recovery' proceedings against each other. Companies have to complete the entire insolvency exercise within 180 days under IBC. The deadline may be extended if the creditors do not raise objections on the extension. For smaller companies, including startups with an annual turnover of Rs 1 crore, the whole exercise of insolvency must be completed in 90 days and the deadline can be extended by 45 days. If debt resolution doesn't happen the company goes for liquidation. IBC was intended to tackle the bad loan problems that were affecting the banking system. The IBC process has changed the debtor-creditor relationship. A number of major cases have been resolved in two years, while some others are in advanced stages of resolution. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and must take decisions to resolve insolvency. Under IBC, debtor and creditor both can start 'recovery' proceedings against each other. Companies have to complete the entire insolvency exercise within 180 days under IBC. The deadline may be extended if the creditors do not raise objections on the extension. For smaller companies, including startups with an annual turnover of Rs 1 crore, the whole exercise of insolvency must be completed in 90 days and the deadline can be extended by 45 days. If debt resolution doesn't happen the company goes for liquidation. This Act may also be called the Insolvency and Bankruptcy Code (Amendment) Act, 2018. It shall be deemed to have come into force on the 23rd day of November, 2017.

13.12 Corporate Insolvency Process (CIRP)

Corporate Insolvency Resolution Process (CIRP) refers to insolvency proceedings of corporates whereby any corporate debtor who commits a default would thereby allow a financial creditor, an operational creditor, or the corporate debtor itself to initiate corporate insolvency resolution process in respect of such corporate debtor. In this article, we will explain who is eligible to initiate the Insolvency Proceedings against the corporate Debtor.

Who can initiate CIRP: –

Section 7 – Initiation of corporate insolvency resolution process by financial creditor

Section 8 and 9 – Initiation of corporate insolvency resolution process by operational creditor.

Section 10 – Initiation of corporate insolvency resolution process by corporate applicant.

Initiation by financial creditors: –

As per Section 5(7) of the Code "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred. In simpler terms, Financial Creditors refer to those persons from whom money was borrowed by the corporate debtor as a loan or against interest under any credit facilities. E.g. – Banks, Financial Institutions, NBFCs, etc.

Process: –

1. A financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority

(i.e., NCLT) when a default has occurred.

2. Application for initiating CIRP shall include:

- Record of the default recorded with the information utility or such other record or evidence of default.
- Name of the resolution professional proposed to act as an interim resolution professional.
- any other information as may be specified by the Board.

3. The Adjudicating Authority (i.e., NCLT) shall within 14 days either accept or reject the application filed by the Financial creditors.

4. On Acceptance of Application, the insolvency proceeding will commence from the date of such acceptance and the order shall be sent within 7 days to both Financial creditors and corporate debtors along with the appointment of a proposed resolution professional.

5. On Rejection of Application, a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice shall be provided.

Initiation by operational creditors: –

AS per Section 5(20) of the code "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. These creditors are those who are in employment with the company or are owed some debt in respect of the goods and services provided by them to the Corporate debtor. E.g. – Employees, Suppliers, etc.

Process: –

1. On default being occurred, the operational creditors shall send a demand notice to the corporate debtors for repayment of the money owed.

2. The Corporate debtor shall within 10 days of demand notice, either give proof of payment made by it to the creditor or give the existence of dispute against such sum owed in respect of financial creditors.

3. In case the Operational creditor after 10 days of demand notice does not receive any payment or notice of dispute from the Corporate debtor shall file an application with Adjudicating Authority (i.e., NCLT) for initiating a corporate insolvency resolution process.

4. Application for initiating CIRP shall include:

- a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor.
- an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt.
- a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt.
- a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available.
- any other proof as may be prescribed.

5. The Adjudicating Authority (i.e., NCLT) shall within 14 days either accept or reject the application filed by the operational creditors.

6. On Rejection of Application, a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice shall be provided.

Initiation by corporate applicant: –

As per Section 5(5) of the code, the following persons can be "corporate applicant"

i. Corporate debtor or a member or partner of the corporate debtor who is authorized to make an application.
ii. an individual who is in charge of managing the operations and resources of the corporate debtor.
iii. a person who has control, and supervision over the financial affairs of the corporate debtor.

Process: –

1. On the occurrence of default a corporate applicant may file an application for initiating the corporate insolvency resolution process with the Adjudicating Authority.

2. Application for initiating CIRP shall include:

- the information relating to its books of account and such other documents for such period as may be specified.
- the information relating to the resolution professional proposed to be appointed as an interim resolution professional.
- the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving the filing of the application.

3. The Adjudicating Authority (i.e., NCLT) shall within 14 days either accept or reject the application filed by the corporate applicant.

4. On Rejection of Application, a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice shall be provided.

Note: The corporate insolvency resolution process shall commence from the date of admission of the application by the Adjudicating Authority (i.e., NCLT).

13.13 Voluntary Winding-up

A company goes for voluntary liquidation under IBC when its members make a decision to not continue their business operations. The main objective of voluntary winding up under IBC is to suspend all business operations and dispense its assets, while also disbursing its debts and arrears. The step wise process to conduct a voluntary winding up is given below:

Step 1: Declaration/Announcement of Solvency by Board or Elected Partners: The Management/Directors of the Company has to make a Declaration of Solvency by presenting a form of an Affidavit that confirms the following:

- The company has not defaulted any debt repayments.
- The company is solvent in terms of credit standing and can pay its debts in full from the earnings of assets to be sold in the procedure for voluntary liquidation under IBC; and
- The company is not getting liquidated to defraud any individual.
- The declaration statement shall list the corporate body's debt status, as on that date alongside Audited financial statements and records of company's operations for the preceding two years, or for the period after the incorporation. Additionally, a valuation report of the company's by a Registered Valuer, if any, needs to be declared.

For the same, the declaration of solvency under voluntary liquidation regulations should be filed in Form GNL-2 with the Registrar of Companies.

Step 2: Find an Insolvency Expert as Liquidator: The Board of Directors/Executive Management has to identify and recognize an Insolvency Expert, who is listed with the Insolvency and Bankruptcy Board of India (IBBI). This Insolvency Expert act as the company's 'Liquidator' to carry out the voluntary liquidation procedure.

Step 3: Summon A Board Meeting: In this step, there is a summon regarding a meeting of Board of Directors/ Executive Management. Following points need to be decided in the meeting:

- Authorizing the voluntary liquidation of the company under IBC
- Appointing an Insolvency Expert as the legal liquidator of the company
- Fixing the day, date and time for the company's general meeting and issue EGM notice that contains the proposed resolutions and the clarifying statement.

Step 4: Arrange A General Meeting of Shareholders:

Arrange a General Meeting of shareholders/ investors within 4 weeks of the Declaration of Solvency and to pass these subsequent resolutions:

Special Resolution in a general meeting for voluntary winding up of a company under IBC, or an ordinary resolution for liquidating as a consequence of the expiry of the term of its existence in clauses. Resolutions for electing an expert Insolvency Liquidator for the procedure of voluntary liquidation of a company. If the company has creditors, a resolution has to be passed by the creditors who hold 2/3rdof the balance due, within 7 days duration of the decision.

Step 5: Filings with the Registrar of Companies and IBBI: As mentioned under voluntary liquidation regulations, the company's liquidator has to file the voluntary liquidation resolutions to the Registrar of Companies & the IBBI. Being subjected to the creditor's approval, the voluntary liquidation procedures are considered to have commenced from the date when the members pass the resolution. With the passing of special resolutions in the general meeting and appointment of Insolvency Liquidator, all functions/powers of the board of directors (BODs), key managerial personnel (KMPs) and the partners of the company debtor shall cease to have any effect and will be vested into the role of the liquidator.

Step 6: Liquidator Takes Charge of The Company: The liquidator/ insolvency professional will now take control of the company and go on with further actions, which includes:

- Realization of assets of the company
- Settlement of outstanding dues
- Distribution of proceeds to the stakeholders

The company liquidator shall also have the capability to seek advice from any shareholders who are entitled to the distribution of the earnings/proceeds.

Step 7: Making Public Announcement: The company liquidator is obliged to make a public announcement within 5 days from his date of appointment in 'Form A of Schedule I', calling shareholders to present their claims in 30 days from the commencement date of the liquidation. The public announcement should be issued to get published in English and other regional language newspapers that have an extensive circulation network. Details regarding the company's physical location with registered office address, alongside the company's official website, must be published to the newspapers.

Besides, the liquidator has to verify all claims, within 30 days from the last date of receipt of claims, and choose to either accept or refuse the requests. The liquidator must make a list of shareholders within 45 days from the last date for receipt of claims based on proof obtained with:

- The amounts of claim disclosed, if valid,
- The degree/extent to which the debts or payments are procured or un-secured, if appropriate,

- The details of the shareholders, and the evidence/proofs declared or denied in part and the proofs that are entirely rejected.

Step 8: Preliminary Reports and Statements: The liquidator needs to submit a preliminary report addressed to the company within 45 days from the commencement of the voluntary liquidation process affirming the capital structure/model of the corporate body. The estimations of the company's assets and liabilities as on the date of commencement of the liquidation based on the books of the corporate body, Whether he plans to make any further inquiry about any other matter related to the promotion, advancement or closure of the corporate entity, or the operations of the business, and the suggested course of action to carry out the voluntary liquidation under IBC, including the timelines within which the liquidator proposes to carry out the procedure and the projected liquidation costs.

Step 9: Opening of A Bank Checking Account: The liquidator is liable to open a bank account in a listed bank (in the company's name) that is followed by the words 'In Voluntary Liquidation' for getting all the money's due and realize liquidation costs. Any kind of payments, above 5000 Rupees, should be conducted by drawing a cheque or through online banking, so as to keep a track on all related transactions.

Step 10: No-Objection Certificate from Tax Authorities: The liquidator has to get a No-Objection Certificate/Letter from appropriate Tax authorities of the area where the company's registered office is located.

Step 11: Realization of Company's Assets: The liquidator shall recuperate and realize the company's assets promptly to maximize the value for the shareholders. Thus, the money realized under IBC's voluntary liquidation, shall be deposited into the bank account that's opened on the company's name to fulfil this purpose.

Step 12: Distribution and Supply: The money recognized and ascertained from the proceeds shall be distributed to the shareholders within 6 months from the amount's receipt, after deducting all liquidation costs. If any asset cannot be realized because of its nature or other circumstances, the liquidator can distribute it as such after the company's approval.

Step 13: Completion of the Company's Liquidation: The elected liquidator has to complete the liquidation process of a company within 12 months from the date of commencement of the voluntary winding up the company, under IBC.

Step 14: Liquidation stretching beyond the 12 months duration and Annual Reports. If the liquidation process goes beyond the 12-month period, then the liquidator has to hold a meeting of contributors within 15 days, from the end of 12 months period. Additionally, the liquidator also has to hold a meeting for every succeeding 12 months, until the company is entirely dissolved.

Subsequently, the liquidator shall also present an annual report indicating the progress of the voluntary liquidation process, which shall include:

- Settlement of list of shareholders
- Specifics of any remaining unsold assets
- Distribution made to the shareholders
- Distribution of unsold assets, if any, that are made to the shareholders
- Development of changes in any material litigation that is by or against the corporate entity
- Filing of applications for evasion of transactions in accordance with Chapter III of Part (ii) of the IBC code.

Step 15: Final Report on Liquidation: After the competition of the liquidation process, the liquidator has the responsibility to prepare the Final Report, which contains the following:

- Liquidation's audited accounts

- Statements indicating disposed assets, discharged debts, and no pending litigations
- Sale statement of assets indicating the realized value, its related costs, method and mode of sale, any kind of shortfalls, and to whom it has been sold.

Step 16: Final Report Filing: The company liquidator now shall file the final report with the Registrar and the IBBI to ensure all obligations for Voluntary winding up of a company under IBC is met.

Step 17: Application to National Company Law Tribunal (NCLT): Once the company affairs are completely winded up, the liquidator has to proceed with an application to NCLT for the company's dissolution.

Step 18: NCLT Orders: The NCLT passes an order stating that the company shall stand dissolved from the date of order of the NCLT application.

Step 19: Sending NCLT Order to the Company Registrar: After receiving the NCLT's order, the copy of the NCLT order shall then be sent to the registrar, where the company is registered officially.

Step 20: Preservation of records: The liquidator has to preserve and store all necessary reports, registers and account books for at least the succeeding 8 years, after the company's dissolution.

Summary

Winding up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members. A company goes for voluntary liquidation under IBC when its members decide to not continue their business operations. The main objective of voluntary winding up under IBC is to suspend all business operations and dispense its assets, while also disbursing its debts and arrears. A company can also get wound up by the tribunal:

1. If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years

2. If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years;

3. If the company has acted against the interests of the sovereignty and integrity of India the security of the State friendly relations with foreign States, public order, decency or morality;

4. If the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up.

5. When the object of the company was fraudulent

6. When foundation of the company has disappeared i.e original object become impossible to attain;

7. The object for which the company is formed is illegal or becomes illegal by change in law;

8. There is a deadlock in management due to differences among rival group and disagreement cannot be resolved in general or board meeting.

Keywords

1. **Voluntary Volunteering: It is t**he process of volunteering for a company is specified in the Insolvency and Bankruptcy Code, 2016, and applies to the individual company. A voluntary decision to close a company may be made after the approval of its members after which the process of termination of the commencement takes effect. The voluntary opening was made with the intention of stopping work, disposing of its

assets, and distributing them while paying off debts.

2. **Compulsory winding up of a company:** When a company, formed and registered under the Companies Act 2013, has been ordered to be wind up by the Court or Tribunal, the same is known as compulsory winding up of a company.
3. **Liquidation or winding up:** It is the process whereby its life is ended and its property is administered for the benefit of its creditors and members. An Administrator, called a liquidator, is appointed and he takes control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their rights."
4. **"financial creditor"** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
5. "**liquidator**" means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be;
6. **"insolvency professional"** means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207;
7. **"operational creditor"** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;
8. **"resolution applicant"** means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional
9. **"resolution plan"** means a plan proposed by "resolution applicant" for insolvency resolution of the corporate debtor as a going concern in accordance with Part II;
10. **"resolution professional",** for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; and
11. **"insolvency resolution process period"** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day;
12. **"Corporate Insolvency Resolution Process"** (CIRP) is a recovery mechanism made available to creditors as under the Insolvency and Bankruptcy Code, 2016 (IBC).

Self Assessment

1. _____ is a process by which the company the corporate life of an entity is put to an end.

   A. Incorporation
   B. Registration
   C. Covering up
   D. Winding Up

2. Identify untrue statement regarding the dissolution of an entity?

   A. A company is said to be dissolved when it ceases to exist as a corporate entity. On dissolution, the company's name shall be struck off by the Registrar from the Register of Companies and he shall also get this fact published in the Official Gazette.
   B. The dissolution, thus puts an end to the existence of the company.
   C. Dissolution is not an end result of winding up.
   D. Dissolution of a company may be brought about through transfer of a company's undertaking to another under a scheme of reconstruction or amalgamation. In such a case the transferor company will be dissolved by an order of the Tribunal without being wound up.

3. when a person is declared incapable of paying their due and payable bills, that person is known as____

   A. Idiot
   B. Bankrupt
   C. Lunatic
   D. Mental

4. Identify the false statement regarding compulsory winding up?

   A. The company will then be dissolved but its name shall never be struck off from the list of companies in the registrar's office.
   B. Compulsory winding up takes place when a creditor of an insolvent company asks the court for a wind up.
   C. If the company goes into liquidation, the court of law appoints a liquidator for the liquidation.
   D. The primary objective of the liquidator is to raise as much funds as needed to pay the creditors.

5. Which of the given circumstances under which a Company can be wound up:

   A. A special resolution needs to be passed.
   B. Where a Company has acted against the interests of the sovereignty and integrity of India;
   C. Where an application is made by Registrar of Companies ("ROC") to the Tribunal informing that the affairs of the company are fraudulent
   D. All of the above

6. Identify which of the given is not a ground for compulsory winding up?

   A. Inability of a company in paying its debts
   B. Acting against sovereignty and integrity of India
   C. Conducting affairs in an honest manner
   D. Default in submitting annual returns/financial statements

7. A petition presented by the Company for winding up before the Tribunal shall be admitted only if accompanied by _____in such form and in such manner as may be prescribed.

   A. a statement of affairs
   B. a statement declaring incomplete facts
   C. a financial statement
   D. a statement of financial statements

8. ROC shall be entitled to present a petition for the winding up of the Company by an application made to Tribunal, where ROC is in the view that affairs of the Company are fraudulent or default in filing financials with ROC for _____by the Company.

   A. 2 consecutive financial years
   B. 4 consecutive financial years
   C. 3 consecutive financial years
   D. 5 consecutive financial years

9. In case when the petition is presented by the Company for winding up, then it shall be presented in the form ___and in other cases in form _____

A. WIN-2 and WIN-1
B. WIN-3 and WIN-2
C. WIN-1 and WIN-3
D. WIN-1 and WIN-4

10. Identify the true statement regarding voluntary winding up?

A. voluntary liquidation or voluntary winding up of a company is administered under the Insolvency and Bankruptcy Code (IBC), 2016
B. A voluntary liquidation is generally initiated by a company itself, when it wants to pay off its debt through auction of its assets.
C. The only condition is that debt of the company should not be more than its assets. Experts feel that companies may have increasingly gone for voluntary liquidations due to compliance issues.
D. All of the above statements are absolutely true regarding the voluntary winding up

11. Voluntary liquidation or voluntary winding up of a company is administered under the _____

A. Insolvency and Bankruptcy Code (IBC), 2010
B. Insolvency and Bankruptcy Code (IBC), 2008
C. Insolvency and Bankruptcy Code (IBC), 2016
D. Insolvency and Bankruptcy Code (IBC), 2009

12. In case of any wrongful disclosure, lifting of corporate veil is initiated against company and its every director who gave such declaration. It indicates that _____

A. they become personally liable
B. they become liable jointly liable
C. they are free from any liability
D. the company and its directors have no liability to pay

13. Identify the false statement regarding the Insolvency Bankruptcy Code:

A. Insolvency Bankruptcy Code was intended to tackle the bad loan problems that were affecting the banking system. The Insolvency Bankruptcy Code process has changed the debtor-creditor relationship.
B. Under Insolvency Bankruptcy Code, debtor and creditor both cannot start 'recovery' proceedings against each other.
C. A number of major cases have been resolved in two years, while some others are in advanced stages of resolution.
D. It provides for a time-bound process to resolve insolvency. When a default in repayment occurs, creditors gain control over debtor's assets and must take decisions to resolve insolvency.

14. In case of smaller companies, including startups with an annual turnover of_____, the whole exercise of insolvency must be completed in 90 days and the deadline can be extended by 45 days.

A. 50 Lakhs

B. 2 Crores
C. 5 crores
D. 1 Crores

15. _____is a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred...

A. Operational Creditor
B. Operational Debtor
C. Either Operational Creditor or Operational Debtor
D. Neither Operational Creditor or Operational Debtor

Answer for Self Assessment

1.	D	2.	C	3.	B	4.	A	5.	D
6.	C	7.	B	8.	D	9.	A	10.	D
11.	C	12.	A	13.	B	14.	D	15.	A

Review Questions

Q1. Discuss the Summary Procedure for Winding Up of Companies in detail.

Q2.What are the circumstances in which a company may be wound up on the ground that it is just and equitable to wind it up?

Q3.Explain the procedure to wind up a company voluntarily.

Q4.Explain the circumstances in which a company may be wound up by the court on the ground that the company is unable to pay its debts.

Q5. What is meant by the term 'Corporate Insolvency Resolution Process (CIRP)'? Discuss the step wise procedure to conduct the process.

Further Readings

1. A Text Book Of Company Law (Corporate Law) By P.P.S. Gogna, S. Chand & Company

2. Elements Of Company Law By N.D. Kapoor, Sultan Chand & Sons (P) Ltd.

3. Legal Aspects Of Business By Daniel Albuquerque, Oxford & Ibh

4.A Handbook On Corporate And Other Laws By Manish Bhandari, Not Mentioned

Web Links

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Unit 14: Other Legal Aspects

CONTENTS

Objectives

- Comprehend the concept of Insider Trading and whistle blowing to curb the Insider Trading
- Cognize the management and administration of company law
- Cognize the role of National Company Law Tribunal and National Company Appellate Tribunal under Companies Act, 2013
- Cognize the role of Special Courts under Companies Act, 2013

Introduction

Insider trading is a blow on the integrity of capital markets. In financial exchanges, symmetric data makes everything fair permitting the financial backers to set their understanding and examination of occasions in opposition to one another. But trading on unpublished price sensitive information gives insiders an unfair advantage over regular investors. Incautious individual investors, many of whom have invested time and effort identifying companies for investment, may find themselves on the losing end of a deal. Investors whether they are retail investors or overseas investors, lose trust in the stock market if they perceive insider trading is common. Insider trading must be met with force in order to increase retail stock market participation.

14.1 Meaning and definition of Insider Trading

Insider trading refers to trading of shares by an 'insider' based on unpublished price sensitive information (UPSI). It entails purchasing or selling shares of a publicly traded business based on information that has yet to be made public but has the potential to have a significant influence on

the stock price. Insider information cannot be traded on or passed along to others for the purpose of trading in securities. Material information is any information that potentially influence an investor's decision to buy or sell a security. Any non-public information will be an information that has not been legally released to the public about material information on security. As a result of the debate, it may be inferred that:

- Insider trading is the purchase or sale of a publicly listed company's shares by someone who has access to non-public information. Any information that has not been made accessible to the public but might have a significant influence on an investor's decision to purchase or sell an asset is considered material non-public information.
- This type of insider trading is unlawful and carries stiff consequences, including fines and maybe jail time.
- Insider trading is lawful if it follows the standards laid out by the Securities and Exchange Commission.

14.2 Insider trading Material Information

Material information is any information that potentially influence an investor's decision to buy or sell a security. Any non-public information will be the information that has not been legally released to the public about material information on security. Insider trading is defined as "selling or acquiring a security, breaching fiduciary obligations, or another sort of trust or confidence connection, based on non-public material knowledge about said security," according to the SEC. The question of whether insider trading is permissible stems from the SEC's efforts to maintain market fairness. Someone who happens to have access to non-public information will be seen as having an unfair advantage over any other investor who would not have similar access, and that investors may end up making a much larger profit than any other fellow investors. Whenever an investor begins to tip off other investors with any non-public information, they may be seen as illegal insider trading. However, it will be considered legitimate insider trading if a corporate director begins to sell or acquire shares after this information has been legally revealed about the activities. However, the SEC has a specific set of rules to help protect any investment from any effects that may come from insider trading.

Note:

1. You don't have to be an employee of a company to possess insider information. No matter whether you are a Contractor, Spouse, Friend and family — anyone with access to insider information is forbidden from using that information to buy and sell securities.

2. There are severe consequences associated with violating insider trading laws. You can be personally fined and jailed for engaging in or contributing to insider trading. It is your obligation to get familiar with the rules and federal regulations prohibiting such behavior. It is your obligation to get familiar with the rules and federal regulations prohibiting such behaviour. Insider trading can be illegal or legal depending on when the insider makes the trade. When relevant knowledge is still not public, it is unlawful to trade on it, and this type of insider trading carries severe penalties.

Example: Derry is a corporate manager who notifies his father of an upcoming business agreement, which he then passes on to his pals. This act of Derry cannot be held legal as he, his father and his friends can be booked for violation of insider trading norms.

Who is an insider?

According to SEBI rules, an "insider" is someone who is connected to or has access to unpublished price sensitive information (UPSI). A related or connected person is someone who has been involved with the firm in some capacity in the six months leading up to the insider trade. This might be a corporate director or employee, or their close relatives, or a legal counsel or banker for the firm, or even a stock exchange official or trustees or workers who engaged with the corporation.

14.3 Significance of Insider Trading

Retail investors have little prospect of making money in the markets if insiders are using their information to make winning transactions. All the time and effort put into understanding a company or short-listing stocks will be laid to waste when insiders come in and swoop down just in time to pocket all gains because of their access to company- and stock-specific information. Insider trading is regulated in India by the Securities and Exchange Board of India (Sebi) under the Insider Trading Regulations of 2015. If you have friends or relatives who work for publicly traded firms, you must take extra precautions not to utilize any insider information you may have. Securities and Exchange Board of India can impose fines and debar individuals/entities from trading in the market if found in violation of these rules. It is not unlawful if such trades are declared to stock exchanges in accordance with SEBI requirements. However, if stocks worth more than ten lakh rupees is exchanged, a business must notify the exchanges within a few days about the trading details of the promoter/member of the promoter group or a director.

Advantages of Insider Trading

1. Insiders may sell their shares for a variety of reasons, but they only buy them if they believe the price will grow.
2. Insiders know their industry, in particular the company they are managing.
3. Insider trading can only be lucrative if the price of a security moves. As a result, insiders wishing to profit from inside information may try to change the price by decreasing expenses, looking for new items, and so on. While such acts help the insider, they also benefit the rest of the company's stockholders.
4. No one invests to lose money, so do corporate insiders. They are not allowed to acquire or sell business shares within a six-month period. As a result, insiders acquire shares when they believe the firm will do well in the long run.

Disadvantages of Insider Trading

The risk of damaging public exposure, severe financial fines, and a jail term are all disadvantages of insider trading. This is a prohibited and illegal conduct. Illegal insider trading might be difficult to prove at times.

14.4 Whistle Blowing Insider Trading

The phrase "whistle-blowing" comes from British police officers who used to blow their whistles anytime they saw a crime being committed. Whistleblowing is the act of drawing upper management's attention to misconduct inside an organization. A whistle blower can be an employee, former employee, or member of an organization, such as a government agency, who is willing to report malpractice and take corrective action. Certain firms are required by Section 177 of the Companies Act, 2013 to establish a Vigil/Whistle-blowing process for reporting any unethical activity or other issues to management.

A whistleblower is a person who, as an employee of a firm or a government agency, informs the public or a higher authority about any wrongdoing, such as fraud, corruption, or other forms of wrongdoing. Senior management/board of directors, mid-level executives, or junior staff (who might be following senior management's directions or be part of the IT/secretarial task force) can all be informants. Similarly, the hierarchy of those violating the insider trading regulations cannot be pre-determined. They come forward and share their knowledge on any wrongdoing which they think is happening in the whole organization or in a specific department. It is important to note here that a whistleblower could be an employee, contractor, or a supplier who becomes aware of any illegal activities. To protect whistleblowers from losing their job or getting mistreated there are specific laws. Most companies have a separate policy which clearly states how to report such an incident. A whistleblower can file a lawsuit or register a complaint with higher authorities which will trigger a criminal investigation against the company or any individual department. There are two types of whistleblowers: internal and external. Internal whistleblowers are individuals who

disclose misbehavior, fraud, or indiscipline to the organization's highest executives, such as the CEO or the Head of Human Resources. Whistleblowers who reveal wrongdoings to persons outside the company, such as the media, higher government authorities, or the police, are known as external whistleblowers. Fraud, deception of employees, corruption, or any other act that misleads individuals might be the crime or violation.

The Whistleblowers Protection Act of 2011 establishes a comprehensive framework for investigating suspected misconduct. On December 26, 2019, the Securities and Exchange Board of India (Prohibition of Insider Trading) (Third Amendment) Regulations, 2019 went into effect, providing a viable alternative to the existing legal framework for reporting insider trading concerns by whistleblowers. With this, a whistleblower would have an option to report insider trading concerns directly to the Indian securities market regulator, the Securities and Exchange Board of India (SEBI), instead of approaching the listed company.

Prior to this amendment, to tackle insider trading activities, listed companies were required to put in place a vigil mechanism as contemplated by the Companies Act 2013, the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, and the SEBI (Prohibition of Insider Trading) Regulations, 2015. Any suspected violation had to be internally received and dealt with. This process was required to be overseen by the company's audit committee which is required to have a minimum of 3 directors with independent directors forming a majority. While some amount of checks and balances did exist to prevent muffling of genuine concerns highlighted by whistleblowers (such as the composition of a relatively independent audit committee), reporting and resolution did present challenges that are discussed below.

1. **Market's integrity**: Detection and prosecution of insider trading activities remain a challenge due their clandestine nature. In this context, whistleblowers are invaluable in revealing information that is critical to take steps for holding accountable those indulging in such malpractices and market manipulation. Timely detection and redressal are essential for preserving the integrity of the securities market. The necessity to maintain a healthy environment where investors are on an equal footing in terms of knowledge is a major motivator for supporting whistle blowing. Increase in transparency and a secure environment will instill confidence in the investors leading to greater participation in the capital markets. Informants now have a direct line to SEBI to report insider trading suspicions, according to the revamped regulatory framework. It calls for the SEBI to establish an office of informant protection (OIP), which would, among other things, safeguard informants:

   (a) receive complaints through a voluntary information disclosure form (VIDF),

   (b) maintain a hotline for assisting potential informants,

   (c) act as a communication line between SEBI and the informant, and

   (d) recommend monetary rewards for the informant.

2. **Secrecy of Whistle blower**: It establishes measures to ensure that the identity of the whistle blower remains secret at all times. The Right to Information Act of 2005 exempts the disclosure of information reported as well as the name of the informant. Furthermore, every publicly traded firm must put in place necessary precautions to protect the informant against reprisal and persecution.

Malicious Whistleblowing

Frivolous/Silly and deceitful complaints can affect shareholder confidence and lead to significant negative impact on the share prices of the company. Therefore, some protection has been provided against this risk with the informant being required to provide an undertaking that the information does not contain any false, frivolous, fictitious or fraudulent statement. The Sebi investigation will be conducted in confidentially to ensure that this mechanism is not used to manipulate the stock market through bogus complaints or to settle personal scores with the promoters of a publicly traded firm.

Reward for whistleblowing

The regulatory body has approved amendments to the SEBI (Prohibition of Insider Trading) Regulations, 2015, to increase the amount of reward for whistleblowers. From Rs 1 crore, the maximum award sum has been increased to Rs 10 crore. It stated that if the total reward given to

the informant is less than or equivalent to Rs 1 crore, Sebi may provide the prize after the final order is issued. If the prize exceeds Rs 1 crore, the excess will be paid "only upon receipt of monetary sanctions equal to at least twice the remainder of the award sum payable by Sebi," according to the press release.

Sarbanes-Oxley Act 2002(SOX): The act was passed by the United States Congress in 2002 to safeguard investors by increasing the accuracy and trustworthiness of company disclosures made under the securities laws, among other things. It is a set of criteria to which all public corporations and public accounting firms in the United States must conform in order to provide high-quality reporting.

SOX is a crucial law that has regulated the financial reporting process. The transparency brought by this act is boosting investor's confidence that further helps building a strong capital market in the economy. Clause 49 of the listing agreement is quite similar to the Sarbanes-Oxley Act of 2002, which was enacted by the Securities and Exchange Commission (SEC) for businesses listed on US stock exchanges. The bottom line in the context of Section 302 of the Sarbanes-Oxley Act of 2002 is that Clause 49 makes senior management fully liable for the organization's financial statements and internal controls.

Did you know?

Is SOX in India?

All companies, including Indian, which are listed on US stock exchanges, are required to comply with the requirements of the Act. The requirements of Section 404 of the Act have also influenced corporate governance in India.

Provisions of SOX for whistle-blowers

i. Make it unlawful to "fire, demote, suspend, threaten, harass, or discriminate in any way against" whistleblowers.

ii. Penalize CEOs who retaliate against whistleblowers with up to ten years in prison.

iii. Require board audit committees to establish procedures for hearing whistle blower complaints

iv. Allow the Secretary of Labor to force a corporation to rehire a dismissed employee without having to go through a judicial process.

v. Allow a whistleblower to have a jury trial instead of going through months or years of administrative processes.

Objectives of Whistle-blowing

1. To encourage employees to bring ethical and legal violations they are aware of to an internal authority so that action can be taken immediately to resolve the problem
2. To minimize the organization's exposure to the damage that can occur when employees circumvent internal mechanisms
3. To let employees, know the organization is serious about adherence to codes of conduct.

Barriers to Whistle-blowing

- A lack of trust in the internal system
- Unwillingness of employees to be "snitches"
- Belief that management is not held to the same standard
- Fear of retaliation
- Fear of alienation from peers

SAMPLE FORMAT FOR WHISTLE BLOWING

Date	**:**	_
Name of the Employee/Director	**:**	_
E- mail id of the employee/Director	**:**	_
Communication Address	**:**	_
Contact No	**:**	_
Subject matter which is reported	**:**	_
(Name of the person/ event focused at)	**:**	_
Brief about the concern	**:**	_
Evidence (enclose, if any)	**:**	_

Signature

Creating a Whistle-blowing Culture

This requires to Create a Policy, get endorsement From Top Management, publicize the Organization's Commitment, investigate and follow Up and finally assess the Organization's Internal Whistle-blowing System.

14.5 Vigil Mechanism- Listing Agreement Vs Companies Act,2013

It is a non-mandatory requirement under clause 49 of the listing agreement. Employees may be able to report concerns about unethical behaviour, real or suspected fraud, or violations of the firm's code of conduct or ethics policy to management through a method established by the organization. It includes appropriate protections against exploitation of workers who use the system, as well as direct access to the Chairman of the Audit Committee in extraordinary circumstances. Once established, the existence of the mechanism may be appropriately communicated within the organization.

It is mandatory for:

- All the listed companies and
- Companies which accept deposits from the public
- Companies that have borrowed more than Rs.50 crores from banks and PFIs are subject to section 177(9) of the Companies (Meetings of Board and its Powers) Rules, 2014.
- Companies which are required to constitute an audit committee shall operate the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.

For other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns. It provides adequate safeguards against victimization of employees and directors who avail of the Vigil mechanism and also provide for direct access to the chairperson of the Audit committee or the director nominated to play the role of audit committee, as the case may be, in exceptional cases. The presence of the mechanism may then be properly conveyed within the organization once it has been developed. The corporation must publish the specifics of the Vigil mechanism's creation on its website, if one exists, and in the Board of Directors' Report. If a director or employee submits a large number of frivolous complaints, the audit committee or a director

appointed to the audit committee may take appropriate action against them, including reprimand. The process of whistle-blowing can be summarized as:

Vigil Mechanism- Listing Agreement Vs Companies Act,2013:

Vigil Mechanism- Listing Agreement is a non-mandatory requirement under clause 49 of listing agreement. The company may establish a mechanism for employees to report to the management concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy. It includes adequate safeguards against fraud of workers who use the system, as well as immediate access to the Audit Committee Chairman in exceptional circumstances. Once established, the existence of the mechanism may be appropriately communicated within the organization.

Companies Act, 2013 & Rules, 2014 is mandatory for all the listed companies and Companies which accept deposits from the public Companies which have borrowed money from Banks and PFI in excess of Rs.50 crores under section 177(9) read with Companies (Meetings of Board and its Powers) Rules, 2014. Companies that are obliged to form an audit committee must engage the audit committee to conduct out all the vigil mechanism, and if any of the members of the committee have a conflict of interest in a specific issue, they must withdraw themselves and the remaining of the committee would handle things. For other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns. It includes suitable protections against exploitation of workers and directors who use the Vigil mechanism, as well as direct access to the chairperson of the Audit Committee or the director chosen to act as the Audit Committee in extreme circumstances. Once established, the existence of the mechanism may be appropriately communicated within the organization. The corporation must disclose the specifics of the Vigil mechanism's formation on its website, if one exists, and in the Board's Report. If a director or employee files numerous bogus complaints, the audit committee or a director chosen to serve on the audit committee may take the appropriate action against the director or employee, including punishment.

Management & Administration of a Company

A company is composed of members, though it has its own entity distinct from members. The members of a company are the persons who, for the time being, constitute the company, as a corporate entity. However, a company, being an artificial person, cannot act on its own. It, therefore, expresses its will or takes its decisions through resolutions passed at validly held Meetings. The primary purpose of a Meeting is to ensure that a company gives reasonable and fair opportunity to those entitled to participate in the Meeting to take decisions as per the prescribed procedures. The decision-making powers of a company are vested in the Members and the Directors and they exercise their respective powers through Resolutions passed by them. General Meetings of the Members provide a platform to express their will in regard to the management of the affairs of the company. Convening of one such meeting every year is compulsory. Holding of more general meetings is left to the choice of the management or to a given percentage of shareholders to exercise their power to compel the company to convene a meeting. Shareholder

Democracy, Class Action Suits and Protection of interest of investors are the essence and attributes of the Companies Act, 2013.

Chapter VII of the Companies Act, 2013 read with Companies (Management and Administration) Rules, 2014 deals with the legal and procedural aspects of management and administration of companies. Section 88 of the Companies Act, 2013: Register of members etc. It lays down that: (1) Every company shall keep and maintain the following registers namely:—
(a) register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;

(b) register of debenture-holders; and

(c) register of any other security holders.

Rule 3 of Companies (Management and Administration) Rules, 2014: Every company limited by shares shall from the date of its registration maintain a register of its members in Form No. MGT-1. In the case of a company not having share capital, the register of members shall contain the following particulars, in respect of each member, namely:-

a) name of the member; address (registered office address in case the member is a body corporate); e-mail address; Permanent Account Number or CIN; Unique Identification Number, if any; Father's/Mother's/Spouse's name; Occupation; Status; Nationality; in case member is a minor, name of the guardian and the date of birth of the member; name and address of nominee;

b) date of becoming member;

c) date of cessation;

d) amount of guarantee, if any;

e) any other interest if any; and

f) instructions, if any, given by the member with regard to sending of notices etc.

Rule 5 of Companies (Management and Administration) Rules, 2014

1. The entries in the registers maintained under section 88 is to be made within seven days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.
2. The registers shall be maintained at the registered office of the company unless a special resolution is passed in a general meeting authorizing the keeping of the register at any other place within the city, town or village in which the registered office is situated or any other place in India in which more than one-tenth of the total members entered in the register of members reside.
3.Consequent upon any forfeiture, buy-back, reduction, sub-division, consolidation or cancellation of shares, issue of sweat equity shares, transmission of shares, shares issued under any scheme of arrangements, mergers, reconstitution or employees stock option scheme or any of such scheme provided under this Act or by issue of duplicate or new share certificates or new debenture or other security certificates, entry shall be made within seven days after approval by the Board or committee, in the register of members or in the respective registers, as the case may be.
4. If any change occurs in the status of a member or debenture holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries thereof explaining the change shall be made in the respective register.
5. If any rectification is made in the register maintained under section 88 by the company pursuant to any order passed by the competent authority under the Act, the necessary reference of such order shall be indicated in the respective register.
6. If any order is passed by any judicial or revenue authority or by Security and Exchange Board of India (SEBI) or Tribunal attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest, the necessary reference of such order shall be indicated in the respective register.

7. In case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, lien or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of pledge/Pawnee and any revocation therein shall be entered in the register within fifteen days from such an event.

8. If promoters of any listed company, which has formed a joint venture company with another company have pledged or hypothecated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars of such pledge, hypothecation, charge and lien shall be entered in the register members of the listed company within fifteen days from such an event.

Rule 8 of Companies (Management and Administration) Rules, 2014

The entries in the registers maintained under section 88 and index included therein shall be authenticated by the company secretary of the company or by any other person authorized by the Board for the purpose, and the date of the board resolution authorizing the same shall be mentioned.
The entries in the foreign register shall be authenticated by the company secretary of the company or person authorized by the Board by appending his signature to each entry.

Rule 6 of Companies (Management and Administration) Rules, 2014 - Index of names to be included in Register

Every register maintained under sub-section (1) of section 88 shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found:

The maintenance of index is not necessary, in case, the number of members is less than fifty.

The company shall make the necessary entries in the index simultaneously with the entry for allotment or transfer of any security in such Register.

Place of keeping and inspection of the Registers
Section 94 of the Companies Act, 2013: It fixes the place for maintaining a company's registers, returns etc. and for allowing their inspection. According to Section 94(1), the registers required to be kept and maintained by a company under section 88 and copies of the annual return filed under section 92 shall be kept at the registered office of the company. Such registers or copies of return may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company and the Registrar has been given a copy of the proposed special resolution in advance.

Companies (Management and Administration) Rules, 2014: A copy of the proposed special resolution in advance to be filed with the registrar as required in accordance with first proviso of sub-section (1) of section 94, shall be filed with the Registrar, at least one day before the date of general meeting of the company in Form No.MGT-14.(Also refer to Rule 5(2) which was already discussed).

LET US REMEMBER!

To keep the Register of Members at any other place (instead of the registered office of the company) in India in which more than one-tenth of the total number of members entered in the register of members reside:-

(i) Special Resolution is required, and

(ii) Registrar has to be given advance copy of the proposed Special Resolution atleast one day before in MGT-14.

According to section 94(2) states that the registers and their indices, except when they are closed under the provisions of this Act, and the copies of all the returns shall be open for inspection by any member, debenture-holder, other security holder or beneficial owner, during business hours without payment of any fees and by any other person on payment of such fees as may be specified in the articles of association of the company but not exceeding Rs. 50 for each inspection. As per Section 94(3) any such member, debenture-holder, other security holder or beneficial owner or any other person may –

(a) take extracts from any register, or index or return without payment of any fee; or

(b) require a copy of any such register or entries therein or return on payment of such fees as may be specified in the Articles of Association of the company but not exceeding Rs 10 for each page.

Rule 14 of Companies (Management and Administration) Rules, 2014

(1) The registers and indices maintained pursuant to section 88 and copies of returns prepared pursuant to section 92, shall be open for inspection during business hours, at such reasonable time on every working day as the board may decide, by any member, debenture holder, other security holder or beneficial owner without payment of fee and by any other person on payment of such fee as may be specified in the articles of association of the company but not exceeding fifty rupees for each inspection.

Explanation:–

For the purposes of this sub-rule, reasonable time of not less than two hours on every working day shall be considered by the company. Any such member, debenture holder, security holder or beneficial owner or any other person may require a copy of any such register or entries therein or return on payment of such fee as may be specified in the articles of association of the company but not exceeding ten rupees for each page. Such copy or entries or return shall be supplied within seven days of deposit of such fee.

Let us Remember!

Every company limited by shares shall, from the date of its registration, maintain a register of its members in Form No. MGT-1

Rule 16 : Copies of the registers and annual return: It provides copies of the registers maintained under section 88 or entries therein and annual return filed under section 92 shall be furnished to any member, debenture-holder, other security holder or beneficial owner of the company or any other person on payment of such fee as may be specified in the Articles of Association of the company but not exceeding rupees ten for each page and such copy shall be supplied by the company within a period of seven days from the date of deposit of fee to the company.

Section 94(4): Consequences if inspection is refused

According to, if any inspection or the making of any extract or copy required under this section is refused, the company and every officer of the company who is in default shall be liable, for each such default to a penalty of one thousand rupees for every day subject to a maximum of one lakh rupees during which the refusal or default continues.

Case Study : Re. M.F.R.D. Cruz, A.I.R. 1939 Madras 803

The plaintiff applied for 4,000 shares in a company but no allotment was made to him. Subsequently 4,000 shares were transferred to him without his request and his name was entered in the register of members. The plaintiff knew it but took no steps for rectification of the register of members. The company went into liquidation and he was held liable as a contributory. The Court held "when a person knows that his name is included in the register of shareholders and he stands by and

allows his name to remain, he is holding out to the public that he is a shareholder and thereby he loses his right to have his name removed".

Rectification of a Register of Members

Section 59 of the Companies Act, 2013 confers powers on the Tribunal or a competent court outside India specified by the Central Government by notification in respect of foreign members or debenture-holders residing outside India to order rectification of register of members of a company if an appeal is made by the aggrieved person or by any member of the company or the company on any of the following grounds:

(a) where the name of a person is without sufficient cause, entered in the register of members of a company;
(b) where his name, after having been entered in the register, is omitted without sufficient cause; or
(c) where default is made or unnecessary delay takes place in entering in the register of members the fact of any person having become, or ceased to be, a member of company. This may happen where a person has transferred his shares according to law and the company either refuses or delays registration of transfer in the transferee's name. The Tribunal may, after hearing the parties to the appeal for rectification of register of members either dismiss the appeal or direct that the transfer or transmission shall be registered by the company within ten days or direct for rectification of records of the depository or the register and in the latter case also direct the company to pay damages if any, sustained by the party aggrieved.

If any default is made in complying with the order of the Tribunal under this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both. [Section 59(5)]

Rule 7 of Companies (Management and Administration) Rules, 2014 states that:

(1) A company which has share capital or which has issued debentures or any other security may, if so authorized by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners, resident in that country (hereafter in this rule referred to as the "foreign register").
(2) The company shall, within thirty days from the date of the opening of any foreign register, file with the Registrar notice of the situation of the office in Form No.MGT-3 along with the fee where such register is kept; and in the event of any change in the situation of such office or of its discontinuance, shall, within thirty days from the date of such change or discontinuance, as the case may be, file notice in Form No.MGT-3 with the Registrar of such change or discontinuance.
(3) A foreign register shall be deemed to be part of the company's register (hereafter in this rule referred to as the "principal register") of members or of debenture holders or of any other security holders or beneficial owners, as the case may be.

(4) The foreign register shall be maintained in the same format as the principal register.

(5) A foreign register shall be open to inspection and may be closed, and extracts may be taken there from and copies thereof may be required, in the same manner, mutatis mutandis, as is applicable to the principal register, except that the advertisement before closing the register shall be inserted in at least two newspapers circulating in the place wherein the foreign register is kept.

(6) If a foreign register is kept by a company in any country outside India, the decision of the appropriate competent authority in regard to the rectification of the register shall be binding.

(7) Entries in the foreign register maintained under sub-section (4) of section 88 shall be made simultaneously after the Board of Directors or its duly constituted committee approves the

allotment or transfer of shares, debentures or any other securities, as the case may be. (8) The company shall—

(a) transmit to its registered office in India a copy of every entry in any foreign register within fifteen days after the entry is made; and

(b) keep at such office a duplicate register of every foreign register duly entered up from time to time.

(9) Every such duplicate register shall, for all the purposes of this Act, be deemed to be part of the principal register.

(10) Subject to the provisions of section 88 and the rules made thereunder, with respect to duplicate registers, the shares or as the case may be, debentures or any other security, registered in any foreign register shall be distinguished from the shares or as the case may be, debentures or any other security, registered in the principal register and in every other foreign register; and no transaction with respect to any shares or as the case may be, debentures or any other security, registered in a foreign register shall, during the continuance of that registration, be registered in any other register.

(11) The company may discontinue the keeping of any foreign register; and thereupon all entries in that register shall be transferred to some other foreign register kept by the company outside India or to the principal register.

Section 91 of Companies Act:

Closing of Register of Members lays down: (1) A company may close the register of members or the register of debenture-holders or the register of other security holders for any period or periods not exceeding in the aggregate forty-five days in each year, but not exceeding thirty days at any one time, subject to giving of previous notice of at least 7 days or such lesser period as may be specified by Securities and Exchange Board for listed companies or the companies which intend to get their securities listed, in the prescribed manner.

(2) If the register of members or of debenture-holders or of other security holders is closed without giving the notice as provided above, or after giving shorter notice than that so provided, or for a continuous or an aggregate period in excess of the limits specified in that sub-section, the company and every officer of the company who is in default shall be liable to a penalty of 5000 rupees for every day subject to a maximum of one lakh rupees during which the register is kept closed." The provisions contained in Section 154 (Corresponds to section 91 of the Companies Act, 2013) are permissive and not mandatory. The section has application only when a company desires to close its register of members and in such a situation, the requirements of the section are to be complied with (Talyar Tea Co. v. Union of India, (1991) 71 Com Cases 95).

The power in this section is intended for the convenience of the company in order to enable the register of members to be brought up to date for the purpose of calculating dividend and bonus, etc. However, even if the register of members is closed, the company is obliged to make certain entries during the period of closure, such as entries relating to registration and probates and letters of administration, notices of change of name and address and court orders, such as changing orders, etc. [Killick Nixon Ltd. v. Dhanraj Mill Pvt. Ltd., (1983) 54 Com Cases 432 (DB) (Bom)]. The closure of the register is cloaked with the right to refuse the transfer of shares/debentures. Record date is an alternate for closing the registers. The purpose of closing the registers is to get the registers updated and to fix a cut-off date for the purpose of payment of dividend or issue of rights and bonus shares. This purpose can also be achieved by fixing a record date for a day.

Rule 10 of Companies (Management and Administration) Rules, 2014: Closure of register of members or debenture holders or other security holders.

(1) A company closing the register of members or the register of debenture holders or the register of other security holders shall give at least seven days previous notice and in such manner, as may be specified by Securities and Exchange Board of India, if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the

principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company.

(2) The provisions contained in sub-rule (1) shall not be applicable to a private company provided that the notice has been served on all members of the private company not less than seven days prior to closure of the register of members or debenture holders or other security holders.

Rule 15 of Companies (Management and Administration) Rules, 2014

Preservation of Registers, etc. :

(1) The register of members along with the index shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose; and
(2) The register of debenture holders or any other security holders along with the index shall be preserved for a period of eight years from the date of redemption of debentures or securities, as the case may be, and shall be kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose.
(3) Copies of all annual returns prepared under section 92 and copies of all certificates and documents required to be annexed thereto shall be preserved for a period of eight years from the date of filing with the Registrar.
(4) The foreign register of members shall be preserved permanently, unless it is discontinued and all the entries are transferred to any other foreign register or to the principal register. Foreign register of debenture holders or any other security holders shall be preserved for a period of eight years from the date of redemption of such debentures or securities.
(5) The foreign register shall be kept in the custody of the company secretary or person authorized by the Board.

Power of the Central Government to Investigate into the Ownership of Company

Sometimes, the registered holder of shares in a company may be a nominee for some other person, who really owns the shares. This enables persons, who in fact control a company, to conceal their real status from the shareholders and from the public and practice fraud with regard to the management of the company. To check such a practice, Sections 216 empowers the Central Government to appoint an inspector to investigate into and report on the ownership of a company.

Rule 9 of Companies (Management and Administration) Rules, 2014 Declaration in respect of beneficial interest in any shares.-

(1) A person whose name is entered in the register of members of a company as the holder of shares in that company but who does not hold the beneficial interest in such shares (hereinafter referred to as "the registered owner"), shall file with the company, a declaration to that effect in Form No. MGT-4, within a period of thirty days from the date on which his name is entered in the register of members of such company:

(1) When any change occurs in the beneficial interest in such shares, the registered owner shall, within a period of thirty days from the date of such change, make a declaration of such change to the company in Form No.MGT-4.

(2) Every person holding and exempted from furnishing declaration or acquiring a beneficial interest in shares of a company not registered in his name (hereinafter referred to as "the beneficial owner") shall file with the company, a declaration disclosing such interest in Form No. MGT-5, within thirty days after acquiring such beneficial interest in the shares of the company:

Provided that where any change occurs in the beneficial interest in such shares, the beneficial owner shall, within a period of thirty days from the date of such change, make a declaration of such change to the company in Form No. MGT-5.

(3) Where any declaration under section 89 is received by the company, the company shall make a note of such declaration in the register of members and shall file, within a period of thirty days from the date of receipt of declaration by it, a return in Form No.MGT-6 with the Registrar in respect of such declaration with fee.

Rights of member

When once a person becomes a member, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the provisions of the Act. The appointment of a receiver, the attachment of the shares, the pledge of the shares or taking over of the management of a company which is holding shares in another company under Section 18A of the Industries (Development & Regulation) Act, 1951 will not alter the position. So long a person's name stands registered in the books as a member, even if he has sold the share and has given the share certificates and the blank transfer deed duly signed, he alone is entitled to exercise the rights of membership. These rights are derived by virtue of the membership contract between the company and the member and the general law. Some of these rights can be exercised by him individually and others along with other members unless member himself holds shares equivalent to the minimum holding prescribed under the various provisions of the Companies Act, 2013.

1. ***Individual Rights of member:*** Members of a company enjoy certain rights in their individual capacity, which they can enforce individually. These rights are contractual rights and cannot be taken away except with the written consent of the member concerned. These rights can be categorized as under:
   (1) Right to receive copies of the following documents from the company:
   (i) Abridged financial statement and auditor's report in the case of a listed company (Section 136).
   (ii) Report of the Cost Auditor, if so directed by the Government.
   (iii) Notices of the general meetings of the company (Sections 101-102).
   (2) Right to inspect statutory registers/returns and get copies thereof without payment on any fee or on payment of prescribed fee.
   The members have been given right to inspect the following registers etc.:
   (i) Debenture trust deed (Section 71);
   (ii) Register of Charges and instrument of charges (Section 85 & 87);
   (iii) Copies of contract of employment with Managing or Whole-time directors);
   (iv) Shareholders' Minutes Book (Section 119);
   (v) Register of Contracts, Companies and Firms in which directors are interested (Section 189);
   (vi) Register of directors and key managerial personnel and their shareholding (Section 170);
   (3) Right to attend meetings of the shareholders and exercise voting rights at these meetings either personally or through proxy (Sections 96, 100, 105 and 107).
   (4) Other rights. Over and above the rights enumerated at Item Nos. 1 to 3 above, the members have the following rights:
   (i) To transfer shares (Sections 44 and 56 and Articles of Association of the company).
   (ii) To resist and safeguard against increase in his liability without his written consent.
   (iii) To receive dividend when declared.
   (iv) To have rights shares (Section 62).
   (v) To appoint directors (Section 152).
   (vi) To share the surplus assets on winding up (Section 320).
   (vii) Right of dissentient shareholders to apply to Tribunal (Section 48).
   (viii) Right to be exercised collectively by passing a special resolution and intimating the same to the Central Government for investigation of the affairs of the company (Section 210).
   (ix) Right to make application collectively to the Tribunal for relief in cases of oppression and mismanagement (Sections 241).
   (x) Right to file class action suits before the Tribunal (Section 245)
   (xi) Right of Nomination. (Section 72)
   (xii) Right to file a suit or take any other action in case of any misleading statement or the inclusion or omission of any matter in the prospectus. (Section 37)
2. ***Voting Rights of Members:*** The right of attending shareholders' meetings and voting thereat is the most important right of a member of a company, as shareholders' meetings play a very

important role in the company's life. Directors are appointed by the shareholders, who direct the affairs of the company, formulate short-term plans and long-term policies of the company, appoint management personnel to constitute organisation to implement their plans and policies in order to achieve the objects of the company. In view of the importance of the general meetings of a company, the Companies Act has not left the members to the will of the directors to call general meetings. If the members feel that the affairs of the company are not being properly managed by the directors and the directors are avoiding to call a general meeting of the company. Section 100 of the Companies Act confers right on members specified therein to deposit a requisition setting out the matters for the consideration of which the meeting is to be called and if the Board of directors does not proceed within twenty-one days of the requisition to call a meeting within forty-five days of the requisition, the requisitionist may themselves call the meeting. Section 47 provides that every member of a company limited by shares ad holding equity share capital therein, shall have right to vote on every resolution placed before the company and his voting right on a poll shall be in proportion to his share in the paid-up equity share capital of the company. Section 43 of the Companies Act, 2013 provides that a company limited by shares shall be entitled to issue (i) equity share capital with voting rights or (ii) with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed by the Central Government. Preference shareholders ordinarily vote only on matters directly affecting the rights attached to preference share capital and on any resolution for winding up of the company or for the repayment or reduction of the equity or preference share capital. The voting right of a preference shareholder on poll shall be in proportion to his share in the paid-up preference share capital of the company. In respect of a resolution on a matter affecting both equity shareholders and preference shareholders, the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares. However, where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company (Section 47). Section 50 of the Act lays down that a company may, if authorised by its articles, accept from any member the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up. Such advance payment, however, shall not confer on the member concerned any voting rights.

3. **Shareholders' Pre-emptive Rights** with regard to further issue of share capital (Right Shares): To preserve the shareholders' proportionate dividend, liquidation and voting rights, pre-emptive rights are often recognized, but their existence and scope can be effected by provisions in the articles. However, Section 62 of the Companies Act, 2013 secures shareholders' pre-emptive rights with regard to the further issue of share capital by the company. The Section lays down:

"(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered to persons who, at the date of the offer, are holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares by sending a letter of offer subject to the condition that unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person and the notice of offer shall contain a statement of this right [Sub-clause (a)].

4. **Variation of Member's Rights:** Member's rights are determined by the Companies Act, Memorandum of association, Articles of association of the company and the terms of issue of shares. Rights attached to a class of shares are known as "class rights".

5. Member's rights relate to dividend, voting at members' meetings and return of capital: Preference shareholders may have rights to a fixed amount or a fixed rate of dividend or to cumulative dividend. Where the ordinary shareholders are conferred the right to participate in the surplus assets on winding up of a company, it is not deemed to be a class right as it is implied even

in the absence of any express provision in the articles. Section 48 (1) of the Companies Act, 2013 lays down that the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class. Further, the variation of rights of shareholders can be affected only:

(i) if provision with respect to such variation is contained in the Memorandum or Articles of association of the company; or

(ii) in the absence of any such provision in a Memorandum or Articles of association of the company, if such a variation is not prohibited by the terms of issue of the shares of that class. However, if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

6. Rights of Dissenting Members

According to section 48(2), where the holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled; the variation shall not have effect unless and until it is confirmed by the Tribunal. The above application shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

Nomination by Security holders (including members) (Section 72)
Section 72(1) states that every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death. Section 72(2) states that when the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders. Section 72(3) states that notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner. Section 72 (4) states that when the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

Rule 19 of Companies (Share Capital and Debentures) Rules, 2014 with respect to nomination

Nomination by securities holders:-

(1) Any holder of securities of a company may, at any time, nominate, in Form No. SH.13, any person as his nominee in whom the securities shall vest in the event of his death.
(2) On the receipt of the nomination form, a corresponding entry shall forthwith be made in the relevant register of securities holders, maintained under section 88.
(3) Where the nomination is made in respect of the securities held by more than one person jointly, all joint holders shall together nominate in Form No.SH.13 any person as nominee.
(4) The request for nomination should be recorded by the Company within a period of two months from the date of receipt of the duly filled and signed nomination form.
(5) In the event of death of the holder of securities or where the securities are held by more than one person jointly, in the event of death of all the joint holders, the person nominated as the nominee may upon the production of such evidence as may be required by the Board, elect, either-

(a) to register himself as holder of the securities ; or (b) to transfer the securities, as the deceased holder could have done.

(6) If the person being a nominee, so becoming entitled, elects to be registered as holder of the securities himself, he shall deliver or send to the company a notice in writing signed by him stating that he so elects and such notice shall be accompanied with the death certificate of the deceased share or debenture holder(s).

(7) All the limitations, restrictions and provisions of the Act relating to the right to transfer and the registration of transfers of securities shall be applicable to any such notice or transfer as aforesaid as if the death of the share or debenture holder had not occurred and the notice or transfer were a transfer signed by that shareholder or debenture holder, as the case may be.

(8) A person, being a nominee, becoming entitled to any securities by reason of the death of the holder shall be entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he shall not, before being registered as a holder in respect ofsuch securities, be entitled in respect of these securities to exercise any right conferred by the membership in relation to meetings of the company. The Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the securities, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends or interests, bonuses or other moneys payable in respect of the securities, as the case may be, until the requirements of the notice have been complied with.

(9) A nomination may be cancelled, or varied by nominating any other person in place of the present nominee, by the holder of securities who has made the nomination, by giving a notice of such cancellation or variation, to the company in Form No. SH.14.

(10) The cancellation or variation shall take effect from the date on which the notice of such variation or cancellation is received by the company. (11) When the nominee is a minor, the holder of the securities, making the nomination, may appoint a person in Form No. SH.13 specified under sub-rule (1), who shall become entitled to the securities of the company, in the event of death of the nominee during his minority.

Let us Remember!

Any holder of securities of a company may at any time nominate in Form No. SH.13 any person as his nominee in whom the securities shall vest in the event of his death.

Liability of members

The liability of a member depends on the nature of the company. If the company is registered with unlimited liability, every member is liable in full for all the debts of the company contracted during the period of his membership. Where the company is limited by guarantee, each member will be bound to contribute in the event of winding up a sum specified in the liability clause of the memorandum of association. In case of company limited by shares, each member is bound to contribute the full nominal value of shares and his liability ends there. If before the full nominal value of the shares is paid, the company goes into liquidation, the member becomes liable as contributory to pay the balance when called upon to pay, by the liquidator of the company. Where a company has been incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants, direct that liability of the members shall be unlimited. [Section 7(7)]. If a member ceased to be member of a company within one year prior to the commencement of the winding up of the company he is liable to pay on the shares which he held to the extent of the amount unpaid thereon, if:
(i) on the winding up, debts exist which were incurred while he was a member, and

(ii) it appears to the Tribunal that the present members are not able to satisfy the contribution required from them in respect of their shares.

A person is liable as member in spite of a valid transfer of shares by him, if the name of the transferee is not placed on the register of members, in place of the transferors' name. If a person applies for shares in the name of a fictitious person or a person not in existence or uses another person's name for himself, or uses an alias, and shares are allotted in that name or alias, he will be liable as a member.

14.6 National company law Tribunal [NCLT]

National company law Tribunal would be a specialized body dealing with company matters and shall exercise powers and jurisdictions that were earlier exercised by Company Law Board. Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Tribunal is closed, that day and any succeeding days on which the Tribunal remains closed shall also be excluded.

Format of order or direction or rule

Every rule, direction, order, summons, warrant or other mandatory process shall be issued in the name of the President and shall be signed by the Registrar or any other officer specifically authorised in that behalf by the President, with the day, month and year of signing and shall be sealed with the seal of the Tribunal.

Official seal of the Tribunal - The official seal and emblem of the Tribunal shall be such, as the Central Government may from time to time specify and shall be in the custody of the Registrar.

Custody of the records- The Registrar is in charge of the Tribunal's records, and no record or document submitted in any cause or issue may be removed from the Registrar's custody without the permission of the Tribunal, provided that the Registrar may allow any other officer of the Tribunal to remove any official paper or record for administrative purposes from the Tribunal.

Sitting of the Tribunal- The Tribunal shall hold its sittings either at its' headquarter or at such other place falling within its territorial jurisdiction as it may consider convenient.
Sitting hours- The sitting hours of the Tribunal shall ordinarily be from 10:30 AM to 1:00 PM and 2:00 P.M. to 4:30 PM, subject to any order made by the President.

Working hours- (1) Except on Saturdays, Sundays and other National Holiday, the office of the Tribunal shall remain open on all working days from 09.30 A.M. to 6.00 P.M.
(2) The Filing Counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.

Inherent Powers-Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal.
Calendar- The calendar of days of working of Tribunal in a year shall be as decided by the President of the Tribunal.

Appointment of President and Members

1. Appointment by Central Government: President and members of National Company Law Tribunal shall be appointed by the Central Government. The president shall be appointed by Central Government in consultation with Chief Justice of India [as per Section 412 (1)] while the members shall be appointed by Central Government on recommendation of Selection Committee [as per Section 412 (2)]
2. Appointment on the recommendation of the selection committee [section 412(2)]: Selection committee shall consist of a chairman who shall be the chief justice of India or his nominee, and following four other members. They are:
    - Senior Judge of Supreme Court or Chief Justice of High Court

- Secretary in Ministry of Corporate Affairs
- Secretary in Ministry of Law and Justice
- Secretary in Department of Financial Services in the Ministry of Finance


Note:

1. The secretary in the Ministry of corporate affairs shall be the convenor of selection committee.
2. Selection committee shall determine its procedure for recommending persons under section 412 (4)
3. Appointment of members of NCLT shall not be invalidated merely by reason of any vacancy or defect in constitution of selection committee under section 412 (5)
4. President, members and other employers of National Company Law Tribunal shall be deemed to be public servants within the meaning of section 21 of Indian Penal Code [Section 427]

Qualification for Appointment of President and Members

Qualification for appointment of president [Section 409(1)]: A person shall be qualified to be appointed as President of National Law Tribunal who is or has been judge of a High Court for 5 years.

Qualification for appointment of judicial members [Section 409(2)]: A person shall be qualified to be appointed as a Judicial member of National Company Law Tribunal if he has qualifications such as:

a. He is or has been a Judge of High Court

b. He is or has been a District Judge for at least 15 years

c. He has been an advocate of a court for at least 10 years

Qualification for appointment of a technical member [Section 10 FD (3)]: A person shall be qualified to be appointed as a technical member of National Company Law Tribunal if he has any one of the qualifications such as:

a) He has for at least 15 years been a member of Indian Corporate Law Service or Indian Legal Service out of which at least 3 years shall be in the pay scale of joint secretary to Government of India or equivalent or above in that service; or labour matter of such other disciplines related to Management, conduct of affairs, revival, rehabilitation and winding up of companies; or

b) He is, or has been, for at least 15 years in practice as a Chartered Accountant; or

c) He is, or has been, for at least 15 years in practice as a Cost Accountant; or

d)He is, or has been, for at least 15 years in practice as a Company Secretary; or

e) He is a person of ability, integrity and standing having special knowledge and professional experience of not less than 15 years in law, Industrial Finance, Industrial Management, Indian reconstruction, administration, Investment and accountancy; or

f) He is, or has been, for at least 5 years, a Presiding Officer of a Labour Court, Tribunal or National Tribunal constituted under industrial Dispute Act 1947

President and Members

Term of office: The President and every other member of Tribunal shall hold office for a term of 5 years from the date on which he enters upon his office, but shall eligible for re-appointment for

another 5 years. However, no President or other Member shall hold office as such after he has attained,

a) In the case of President, the age of 67 years;

b) In the case of any other member, the age of 65 years;

It may be noted that the President or other member may retain his lien with his parent cadre or Ministry or Department, as the case may be, while holding office as such for a period not exceeding one year.

Resignation of President and Members: President or a Member of the Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office. However, the President or a member shall unless he is permitted by Central Government to relinquish his office sooner, continue to hold office until the expiry of 3 months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is earliest.

Removal and Suspension of President or Member

Central Government may in consultation with Chief Justice of India, remove from office the President or any member of the Tribunal, who:

a) Has been adjudged an insolvent; or

b) Has been convicted of an office which, in opinion of Central Government, involves moral turpitude; or

c) Has become physically or mentally incapable of acting as such President or Member of Tribunal; or

d) Has acquired such financial or other interest as is likely to affect prejudicially his functions as such President or Member of Tribunal; or

e) Has so abused his position as to render his continuance in office prejudicial to the public interest:

Reasonable Opportunity of being heard: No such President or a Member shall be removed on any of the grounds specified in clause (b) to (e) without giving him reasonable opportunity of being heard in respect of those charges.

 **Note:**

a) The president or member of Tribunal shall not be removed from his office except by an order of Central Government on the ground of proved misbehavior or incapacity

b) Central Government may suspend from office the President or members of Tribunal in respect of whom a reference has been made to judge of the Supreme Court until Central Government has passed orders on receipt of report of Judge of Supreme Court on such reference.

Functions of the President

In addition to the general powers provided in the Act and in these rules the President shall exercise the following powers, namely: -
(a) preside over the consideration of cases by the Tribunal;
(b) direct the Registry in the performance of its functions;
(c) prepare an annual report on the activities of the Tribunal;

(d) transfer any case from one Bench to other Bench when the circumstances so warrant;
(e) to withdraw the work or case from the court of a member.
(f) perform the functions entrusted to the President under these rules and such other powers as my be relevant to carry out his duties as head of the Tribunal while exercising the general superintendence and control over the administrative functions of the Members, Registrar, Secretary and other staff of the Tribunal.

Functions of the Registrar

(1) The Registrar shall have the following functions, namely: - (a) registration of appeals, petitions and applications;
(b) receive applications for amendment of appeal or the petition or application or subsequent proceedings.
(c) receive applications for fresh summons or notices and regarding services thereof;
(d) receive applications for fresh summons or notices and for short date summons and notices;

(e) receive applications for substituted service of summons or notices;
(f) receive applications for seeking orders concerning the admission and inspection of documents;
(g) transmission of a direction or order to the civil court as directed by Tribunal with the prescribed certificates for execution etc., and
(h) such other incidental or matters as the President may direct from time to time.
(2) All adjournments shall normally be sought before the concerned Bench in court and in extraordinary circumstances, the Registrar may, if so directed by the Tribunal in chambers, at any time adjourn any matter and lay the same before the Tribunal in chambers.

Functions of the Secretary

(1) There shall be a Secretary at the Principal Bench of the Tribunal, New Delhi.
(2) The Secretary shall, under the general superintendence and control of the President, discharge such duties, functions and exercise such powers as are prescribed under these rules and as assigned by the President from time to time.
(3) Secretary shall –

(a) be in charge of the long-term projects and initiatives of the Tribunal;

(b) supervise the divisions and sections of the Human Resources;
(c) prepare, monitor and manage budgetary allocations and financial managements of the Tribunal and the Benches;
(d) provide all necessary support in the day to day operations of the Tribunal;
(e) manage and supervise the facilities and administrative services of the Tribunal;
(f) manage and administer the public grievances mechanism of the Tribunal;
(g) coordinate with authorized representatives and other professionals in the smooth functioning of the Tribunal;
(h) oversee information and communication technology and other technological facilities in the Tribunal;
(i) manage and facilitate communication and services of the Tribunal;
(j) manage, monitor and administer the public affairs and public safety provisions within the premises of the Tribunal; and
(k) supervise library and research wings of the Tribunal.

Delegation of powers by the President: The President may assign or delegate to any suitable officer all or some of the functions required by these rules to be exercised by the Registrar.

Constitution of National Company Law Tribunal: This is done by Central Government of India.

Benches of Company Law Tribunal: The powers of Tribunal are to be exercised by Benches consisting of 2 members out of which one shall be a Judicial Member and another shall be a Technical Member. There shall be constituted such member of Benches of Tribunal as may be specified by Central Government by notification. Other legal provisions relating to Benches of Tribunal may be summed as:

i. **Single Member:** Members of Tribunal may also be authorized to function as a single member bench. The members authorized shall be competent to function as a Bench consisting of single judicial member and to exercise the jurisdiction, powers and authority of Tribunal in respect of such matters as the President of Tribunal may specify by a general or special order in this regard.

ii. **Two Member:** If at any stage of hearing of any case by single member bench, it appears to the member of Tribunal that the case is of such a nature that it should be heard by a Bench consisting of 2 members, the case may be referred to President of Tribunal for transfer to a 2 members bench. The President may also directly transfer such case or matter to such a Bench.

iii. **Special Benches:** President of Tribunal shall for the disposal of any case relating to rehabilitation, restructuring a reviving of Companies, constitute one or more special benches consisting of 3 or more members, majority necessarily being of Judicial members.

iv. **Decision by Majority Number of Benches:** In case members of a bench differ in opinion on any point or points, it shall be decided as per majority.

v. **Principal Bench:** In addition to other benches discussed, there shall also be a Principal bench at New Delhi which will be presided over by President on NCLT.

<table>
<tr><th>S.NO.</th><th>Name of Bench</th><th>Location</th><th>Territorial Jurisdiction of the Bench</th></tr>
<tr><td rowspan="2">1</td><td>(a) National Company Law Tribunal, Principal Bench.</td><td rowspan="2">New Delhi</td><td rowspan="2">(1) Union territory of Delhi.</td></tr>
<tr><td>(b) National Company Law Tribunal, New Delhi Bench.</td></tr>
<tr><td rowspan="3">2</td><td rowspan="3">(a) National Company Law Tribunal, Ahmedabad Bench.</td><td rowspan="3">Ahmedabad</td><td>(1) State of Gujarat</td></tr>
<tr><td>(2) Union Territory of Dadra and Nagar Haveli</td></tr>
<tr><td>(3) Union Territory of Daman and Diu</td></tr>
<tr><td rowspan="2">3</td><td rowspan="2">National Company Law Tribunal, Allahabad Bench.</td><td rowspan="2">Allahabad</td><td>(1) State of Uttar Pradesh.</td></tr>
<tr><td>(2) State of Uttarakhand.</td></tr>
</table>

4	National Company Law Tribunal, Amaravati Bench.	Hyderabad	(1) State of Andhra Pradesh
5	National Company Law Tribunal, Bengaluru Bench.	Bengaluru	(1) State of Karnataka.
6	**National Company Law Tribunal, Chandigarh Bench.**	Chandigarh	
			(3) State of Punjab.
			(4) Union territory of Chandigarh.
			(5) State of Haryana.
7	**National Company Law Tribunal, Chennai Bench.**	Chennai	(1) State of Tamil Nadu.
			(2) Union territory of Puducherry.
8	**National Company Law Tribunal, Cuttack Bench.**	Cuttack	(1) State of Chhattisgarh.
			(2) State of Odisha.
9	**National Company Law Tribunal, Guwahati Bench.**	Guwahati	(1) State of Arunachal Pradesh.
			(2) State of Assam.

			(3) State of Manipur.
			(4) State of Mizoram.
			(5) State of Meghalaya.
			(6) State of Nagaland.
			(7) State of Sikkim.
			(8) State of Tripura.
10	**National Company Law Tribunal, Hyderabad Bench.**	Hyderabad	(1) State of Telangana.
11	**National Company Law Tribunal, Indore Bench.**	Ahmedabad	(1) State of Madhya Pradesh
12	**National Company Law Tribunal, Jaipur Bench.**	Jaipur	(1) State of Rajasthan.
13	**National Company Law Tribunal, Kochi Bench.**	Kochi	(1) State of Kerala
			(2) Union Territory of Laksha
14	**National Company Law Tribunal, Kolkata Bench.**	Kolkata Bench	(1) State of Bihar.
			(2) State of Jharkhand.

			(3) State of West Bengal.
			(4) Union territory of Andaman and Nicobar Islands.
15	**National Company Law Tribunal, Mumbai Bench.**	Mumbai Bench	(1) State of Goa.
			(2) State of Maharashtra.

Procedure for applying to the National Company Law Tribunal

(1) Every appeal/request/application/caveat petition/ objection/ counter presented to the Tribunal must be in English, and if it is in another Indian language, it must be accompanied by a copy translated into English, and it must be fairly and legibly typewritten, lithographed, or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top, a right margin of 2.5 cm, and a left margin of 2.5 cm.

(2) The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.

(3) Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

(4) Where Saka or other dates are used, corresponding dates of Gregorian Calendar shall also be given.

(5) Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.

(6) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.

(7) These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.

(8) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

(9) Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

Particulars to be set out in the address for service

The address for service of summons shall be filed with every appeal or petition or application or caveat on behalf of a party and shall as far as possible contain the following items namely: -

(a) the name of the road, street, lane and Municipal Division or Ward, Municipal Door and other number of the house;
(b) the name of the town or village;
(c) the post office, postal district and PIN Code, and
(d) any other particulars necessary to locate and identify the addressee such as fax number, mobile number, valid e-mail address, if any.

Initialing alteration: Every interlineations, eraser or correction or deletion in any appeal or petition or application or document shall be initialed by the party or his authorized representative presenting
it.

Presentation of petition or appeal

(1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
(2) Every petition or application or appeal may be accompanied by documents duly certified by the authorized representative or advocate filing the petition or application or appeal duly verified from the originals.
(3) All the documents filed in the Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed under these rules.

(5) In the pending matters, all applications shall be presented after serving copies thereof in advance on the opposite side or his authorized representative.

(6) The processing fee prescribed by these rules, with required number of envelopes of sufficient size and notice forms shall be filled along with memorandum of appeal.

Lodging of caveat

(1) Any person may lodge a caveat in triplicate in any appeal or petition or application that may be instituted before this Tribunal by paying the prescribed fee after forwarding a copy by registered post or serving the same on the expected petitioner or appellant and the caveat shall be in the form prescribed and contain such details and particulars ororders or directions, details of authority against whose orders or directions the appeal or petition or application is being instituted by the expected appellant or petitioner or applicant which full address for service on other side, so that the appeal or petition or application could be served before the appeal or petition or interim application is taken up: Provided, that the Tribunal may pass interim orders in case of urgency.

(2) The caveat shall remain valid for a period of ninety days from the date of its filing.

Endorsement and Verification

(1) At the foot of every petition or appeal or pleading there shall appear the name and signature of the authorized representative.
(2) Every petition or appeal shall be signed and verified by the party concerned in the manner provided by these rules.

Translation of document

(1) A document other than English language intended to be used in any proceeding before the Tribunal shall be received by the Registry accompanied by a copy in English, which is agreed to by both the parties or certified to be a true translated copy by authorized representative engaged on behalf of parties in thecase or by any other advocate or authorized representative whether engaged in the case or not or if the advocate or

authorized representative engaged in the case authenticates such certificate or prepared by a translator approved for the purpose by the Registrar on payment of such charges as he may order.

(2) Appeal or petition or other proceeding shall not be set down for hearing until and unless all parties confirm that all the documents filed on which they intend to rely are in English or have been translated into English and required number of copies are filed into Tribunal.

Registration of proceedings admitted: On admission of appeal or petition or caveat or application, the same shall be numbered and registered in the appropriate register maintained in this behalf and its number shall be entered therein.

Calling for records. -On the admission of appeal or petition or application the Registrar shall, if so directed by the Tribunal, call for the records relating to the proceedings from any adjudicating authority and retransmit the same.

Interlocutory applications: Every Interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in prescribed form and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing an affidavit supporting the application.

Procedure on production of defaced, torn or damaged documents: When a document produced along with any pleading appears to be defaced, torn, or in any way damaged or otherwise its condition or appearance requires special notice, a mention regarding its condition and appearance shall be made by the party producing the same in the Index of such a pleading and the same shall be verified and initialed by the officer authorized to receive the same.

Advertising the detailing petition

(1) Where any application, petition or reference is required to be advertised, it shall, unless the Tribunal otherwise orders, or these rules otherwise provide, be advertised in Form NCLT-3A, not less than fourteen days before the date fixed for hearing, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situate, and at least once in English language in an English newspaper circulating in that district.

(2) Every such advertisement shall state;-
(a) the date on which the application, petition or reference was presented;
(b) the name and address of the applicant, petitioner and his authorized representative, if any;
(c) the nature and substance of application, petition or reference;
(d) the date fixed for hearing;
(e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorized representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing.
(3) Where the advertisement is being given by the company, then the same may also be placed on the website of the company, if any.
(4) An affidavit shall be filed to the Tribunal, not less than three days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served: Provided that the affidavit shall be accompanied with such proof of advertisement or of the service, as may be available.
(5) Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit.

(6) The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.

Notice to Opposite Party

(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in Form No. NCLT.5 shall be accompanied by a copy of the application with supporting documents.
(2) If the respondent does not appear on the date specified in the notice in Form No. NCLT.5, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

(3) If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorized representative, file a reply accompanied with an affidavit and along with copiesof such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.

Production of Evidence by Affidavit:

(1) The Tribunal may direct the parties to give evidence, if any, by affidavit.

(2) Notwithstanding anything contained in sub-rule (1), where the Tribunal considers it necessary in the interest of natural justice, it may order cross-examination of any deponent on the points of conflict either through information and communication technology facilities such as video conferencing or otherwise as may be decided by the Tribunal, on an application moved by any party.

(3) Every affidavit to be filed before the Tribunal shall be in Form No. NCLT.7.

Filing of Reply and other Documents by the Respondents

(1) Each respondent may file his reply to the petition or the application and copies of the documents, either in person or through an authorized representative, with the registry as specified by the Tribunal.
(2) A copy of the reply or the application and the copies of other documents shall be forthwith served on the applicant by the respondent.
(3) To the reply or documents filed under sub-rule (1), the respondent shall specifically admit, deny or rebut the facts stated by the applicant in his petition or application and state such additional facts as may be found necessary in his reply.

Hearing of petition or applications
(1) The Tribunal shall notify to the parties the date and place of hearing of the petition or application in such manner as the President or a Member may, by general or special order, direct.
(2) Where at any stage prior to the hearing of the petition or application, the applicant desires to withdraw his petition or application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary, such other party arrayed as opposite parties in the petition or the application or otherwise, may permit such withdrawal upon imposing such costs as it may deem fit and proper for the Tribunal in the interests of the justice.

Rights of a party to appear before the Tribunal

(1) Every party may appear before a Tribunal in person or through an authorized representative, duly authorized in writing in this behalf.

(2) The authorized representative shall make an appearance through the filing of Vakalatnama or Memorandum of Appearance in Form No. NCLT. 12 representing the respective parties to the proceedings.
(3) The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorize an officer or an Advocate to represent in the proceedings before the Tribunal.
(4) The officer authorized by the Central Government or the Regional Director or the Registrar of

Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor.

(5) During any proceedings before the Tribunal, it may for the purpose of its knowledge, call upon the Registrar of Companies to submit information on the affairs of the company on the basis of information available in the MCA21 portal. Reasons for such directions shall be recorded in writing.
(6) There shall be no audio or video recording of the Bench proceedings by the parties or their authorized representatives.

Registration of authorized representative's interns

(1) No intern employed by an authorized representative shall act as such before the Tribunal or be permitted to have access to the records and obtain copies of the orders of a Bench of the Tribunal in which the authorized representative ordinarily appears, unless his name is entered in the register of interns maintained by the Bench.
(2) An authorized representative desirous of registering his intern shall make a petition or an application to the Registrar in Form NCLT 10 and on such application being allowed by the Registrar, his name shall be entered in the register of interns.

Oath to the witness: The Bench Officer or the Court Officer, as the case may be, shall administer the following oath to a witness:- "I do swear in the name of God / solemnly affirm that what I shall state shall be the truth and nothing but the truth."

Consequence of non-appearance of applicant

(1) Where on the date fixed for hearing of the petition or application or on any other date to which such hearing may be adjourned, the applicant does not appear when the petition or the application is called for hearing, the Tribunal may, in its discretion, either dismiss the application for default or hear and decide it on merit.

(2) Where the petition or application has been dismissed for default and the applicant files an application within thirty days from the date of dismissal and satisfies the Tribunal that there was sufficient cause for his non-appearance when the petition or the application was called for hearing, the Tribunal shall make an order restoring the same: Provided that where the case was disposed of on merits the decision shall not be re-opened.

Registry to send certified copy: The Registry shall send a certified copy of final order passed to the parties concerned free of cost and the certified copies may be made available with cost as per Schedule of fees, in all other cases.

Power to regulate the procedure: The Tribunal may regulate its own procedure in accordance with the rules of natural justice and equity, for the purpose of discharging its functions under the Act.

Summoning of witnesses and recording Evidence

(1) If a petition or an application is presented by any party to the proceedings for summoning of witnesses, the Tribunal shall issue summons for the appearance of such witnesses unless it considers that their appearance is not necessary for the just decision of the case.
(2) Where summons is issued by the Tribunal under sub-rule (1) to any witness to give evidence or to produce any document, the person so summoned shall be entitled to such travelling and daily allowance sufficient to defray the travelling and other expenses as may be determined by the Registrar which shall be deposited by the party as decided by the Registrar.

Effect of non-compliance: Failure to comply with any requirement of these rules shall not invalidate any proceeding, merely by reason of such failure, unless the Tribunal is of the view that such failure has resulted in miscarriage of justice.

Procedure for imposition of penalty under the Act

(1) Notwithstanding anything to the contrary contained in any rules or regulations framed under the Act, no order or direction imposing a penalty under the Act shall be made unless the person or the company or a party to the proceeding, during proceedings of the Bench, has been given a show cause notice and reasonable opportunity to represent his or her or its case before the Bench or any officer authorized in this behalf.

(2) In case the Bench decides to issue show cause notice to any person or company or a party to the proceedings, as the case may be, under sub-rule (1), the Registrar shall issue a show cause notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice.

(3) The Bench shall, on receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts and circumstances of the case.

Powers of National Company Law Tribunal

1. **Power to delegate:** The National Company Law Tribunal may, by general or special order, delegate to any of its officers or employees the power to inquire into any matter connected with any proceeding before it in such a manner as may be specified in the order delegating the power

2. **Power to seek assistance of Chief Metropolitan Magistrate, Chief Judicial Magistrate and District Collector [Section 429]:** The National Company Law Tribunal may seek assistance for the purpose of taking into custody the property, books of accounts or documents belonging to a sick industrial company. The Tribunal in order to take into custody or under its control all property, books of accounts or other documents, request in writing, Chief Metropolitan Magistrate, Chief Judicial Magistrate and District Collector within whose jurisdiction any property, books of accounts or other document of such sick industrial company, be situate or be found, to take possession thereof, and the Chief Metropolitan Magistrate or District Magistrate, as the case may be, shall, on such request being made to him,

   a) Take possession of such property, books of accounts or other documents; and

   b) Cause the same to be entrusted to the Tribunal or Operating Agency. It is important to note that any of the Chief Metropolitan Magistrate or Chief Judicial Magistrate done in pursuance of this section shall not be called in question in any court or before any agency on any ground whatsoever [Section 429 (3)]

3. **Power of a Civil Court:** For the purpose of discharging its functions under Companies Act, National Company Law Tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of matters such as:

   a) Power to summon and enforce attendance of any person and examining him on oath.

   b) Power to require discovery and production of documents

   c) Power to receive evidence on affidavits

   d) Power to requisition any public record or document or copy of such record or document from any office.

   e) Power to issue commission for the examination of witness or documents

   f) Power to dismiss a representation for default or to decide it ex parte

   g) Power to set aside any order of dismissal of any representation for default or any order passed by it ex parte.

   h) Power in respect of any other matter which may be prescribed by Central Government.

   Procedure followed by National Company Law Tribunal

   National Company Law Tribunal shall not be bound by the procedure laid down in Code of Civil Procedure, 1908. Section 424(1) makes the following provisions about the procedure to be followed by Tribunal:

1. The Tribunal shall be guided by the principles of natural justice while deciding the matters before it, and

2. The Tribunal shall have the power to regulate its own procedure. This means that the Tribunal can itself decide the procedure to be followed by it. This is however, subject to other provisions of Companies Act and also subject to any rules made by the Central Government in this regard.

Note: All proceedings before the Tribunal shall be deemed to be judicial proceedings and the Tribunal shall be deemed to be a civil court.

14.7 National Company Appellate Tribunal

The NCLAT is a quasi-judicial authority formed under the power of Section 410 of the Companies Act, 2013 ('the Act') to hear appeals from the NCLT. However, as the years passed by, it has seen considerable addition in its powers as it now hears appeals from the Competition Commission of India (CCI) and under matters of Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) as well. It is the highest tribunal of appellate jurisdiction, and appeals from its decision lie only to the Supreme Court. With the advent of the Act, powers and jurisdiction in these matters of the High Court, the Company Law Boards, the Board for Industrial and Financial Reconstruction and the Appellate Authority for Industrial and Financial Reconstruction were all transferred to the NCLT and the NCLAT accordingly in a phased manner. With effect from June 1, 2016, the National Company Law Appellate Tribunal (NCLAT) was established under Section 410 of the Companies Act, 2013 to hear appeals against the rulings of the National Company Law Tribunal(s) (NCLT).

Objectives

1. Hear appeals against the orders passed by NCLT(s) under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC), with effect from 1st December, 2016.

2. Hear appeals against the orders passed by Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC.

3. Hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India (CCI) – as per the amendment brought to Section 410 of the Companies Act, 2013 by Section 172 of the Finance Act, 2017, with effect from 26th May, 2017.

14.8 Appeals to National Company Appellate Tribunal

Any person aggrieved by an order or decision of National Company Tribunal may prefer an appeal to National Company Appellate Tribunal within 45 days from the date on which a copy of the order or decision of NCLT is received by an appellant. The appellate Tribunal may entertain/consider an appeal after the expiry of said period that is 45 days, but within a further period not exceeding 45 days. If it is determined that the appellant was prohibited from filing an appeal within the time limit by sufficient reason. This provision ensures that beyond 90 days from the date on which copy of Tribunal order is made available to the appellant, no appeal shall be heard by Appellant Tribunal. No appeal shall lie to National Company Law Appellate Tribunal from an order or decision made by the National Company Law Tribunal with the consent of parties. On receipt of an appeal, the Appellate Tribunal shall, after giving parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. The Appellate Tribunal shall send a copy of every order made it to the Tribunal and parties to the appeal. The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal within 3 months from the date of receipt of appeal.

Constitution of National Company Appellate Tribunal and related provisions

a. Constitution of National Company Appellate Tribunal: Constitution of Appellate Tribunal: Central Government shall, by notification in Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called as 'National Company Appellate Tribunal'

b. Composition of National Company Appellate Tribunal: The Appellate Tribunal shall consist of a Chairperson and such number of members of Judicial and Technical Members not exceeding 11 as the Central Government may deem fit, to be appointed by that Government, for hearing appeals against orders of Tribunal under this act.

c. Qualification of Chairperson: Chairperson of Appellate Tribunal shall be a person who is or has been a Judge of Supreme Court or Chief Justice of a High Court.

d. Qualification of members:

Judicial Member: A person who is or has been a judge of High court or a Judicial Member of Tribunal for 5 years

Technical Member: He shall be a person of proven ability, integrity and standing having special knowledge and experience of not less than 25 years in law, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, labour matter or such other discipline related to management, conduct of affairs, revival, rehabilitation and winding up of Companies. A person who has not completed 50 years shall not be eligible for appointment as a member of Appellate Tribunal.

Chairperson and members to be Public Servants: Chairperson, members, officers and other employees of Appellate Tribunal Shall be deemed to the public servants within the meaning of section 21 of Indian Penal Code [Section 427].

Term of office in case of Chairperson and Member

Chairperson or a Member of Appellate Tribunal shall hold office a s such for a term of 5 years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of 5 years. However, no Chairperson or a Member shall hold office a such after he attained

a) The age of 70 years in case of Chairperson

b) Attained the age of 67 years in case of any other member

Resignation of Chairperson or a Member

Chairperson or a Member of Appellate Tribunal may, by noticing in writing under his hand addressed to Central Government, resign his office. However, Chairperson or a Member of Appellate Tribunal shall, unless he is permitted by Central Government to relinquish his office sooner, continue to hold office until the expiry of 3 months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

Removal and Suspension of Chairperson and Members of Appellate Tribunal

Removal by Central Government: It may in consultation with chief justice of India, remove from office the chairperson or any Member of Appellate Tribunal, who:

a) Has been adjudged an insolvent; or

b) Has been convicted of an offence which, in opinion of Central Government involves moral turpitude (wickedness)

c) Has become physically or mentally incapable of acting as such chairperson or member of Tribunal; or

d) Has acquired such financial or other interest as is likely to affect prejudicially his functions as such chairperson or Member of Appellate Tribunal; or

e) Has so abused his position as to render his continuance in office prejudicial to public interest.

Notes:

a) Chairperson or a Member of Appellate Tribunal shall not be removed from his office except by an order made by Central Government on ground of proved misbehavior or incapacity. He can be removed only after an inquiry made by a Judge of Supreme Court nominated by Chief Justice of India on a reference made to him by Central Government, in which such chairperson or Member had been informed of charges against him and given a reasonable opportunity of being heard in respect of those charges.

b) Central Government may, with agreement of Chief Justice of India, suspend a chairperson or a member of Appellate Tribunal in respect of whom a reference has been made to the Judge of Supreme Court until Central Government has passed orders on receipt of report of judge of Supreme Court on such reference.

c) Central Government may, after consultation with Supreme Court, make rules to regulate the procedure for investigation of misbehaviors or incapacity of the Chairperson or a Member referred to in point (a)

Powers of an Appellate Tribunal

i) Powers of a Civil Court: For the purpose of discharging its functions under Companies Act,National Company Law Appellate Tribunal shall have same powers under Code of Civil Procedures, 1908 while trying a suit in respect of following matters:

- Summoning and enforcing attendance of any person and examining him on oath;
- Requiring discovery and production of documents;
- Receiving evidence on affidavits; Subject to provisions of section 123 and 124 of Indian Evidence Act, 1872(1 of 1872) requisitioning any public record or document or copy of such record or document from any office;
- Issuing commission for examination of witness or documents;
- Dismissing a representation for default or deciding ex parte;
- Setting aside any order of dismissal of any representation for default or any order by it ex parte; and
- Any other matter which may be prescribed by Central Government.

ii) Power to punish for Contempt

Appellate Tribunal shall have same jurisdiction, powers and authority in respect of contempt of itself as High Court has for its contempt. The Appellate Tribunal may exercise same powers for this purpose as High Court may exercise for its Contempt/Disrespect/Disapproval of Courts Act, 1971.

Orders of Appellate Tribunal enforceable as decree of a Civil Court [Section 424(3)]

Any order made by Appellate Tribunal may be enforced by that Tribunal in same manners as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send in case of its inability to execute such order, to the court within the local limits of whose jurisdiction:

a) In case of an order against a company, registered office of the company is situated; or

b) In the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

c) Appeal to Supreme Court: Any person aggrieved by any decision or order of Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of decision or order of Appellate Tribunal to him on any question of law arising out of such decision or order. However, the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filling the appeal within the said period, allow it to be filed within a further period not exceeding 60 days [Section 423]

14.9 Definition of Special Courts

The definition of Court under Section 2(29) the Act, 2013 may be read as under: –

"(29) "Court" means-

(i) the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district courts subordinate to that High Court under sub-clause (ii);

(ii) In circumstances where the Central Government has authorized any district court, by notification, to exercise all or all of the authority conferred on the High Court in respect of a corporation whose registered office is located in the district, the district court.

(iii) the Court of Session having jurisdiction to try any offence under this Act or under any previous company law;

(iv) the Special Court established under section 435;

(v) any Metropolitan Magistrate or a Judicial Magistrate of the First-Class having jurisdiction to try any offence under this Act or under any previous company law." It is submitted that Section 2(29) of the Act, 2013 has been notified on 12.09.2013*except clause*

(iv). Later on, in exercise of the powers conferred by Sub-section (3) of Section 1 of the Act, 2013, the Central Government has appointed the 18th day of May, 2016 vide Notification No. S.O.1975 (E) dt 18.05.2016, as the date on which the provisions of clause (iv) of sub-section (29) of section 2, sections 435 to 438 (both sections inclusive) and section 440 of the Act, 2013 come into force. It means the provisions of '*Special Court*' under Sections 435 to 438 (both sections inclusive) and Section 440 were enforced first time in the year 2016 i.e. on 18th day of May, 2016.

As mentioned earlier, the Ministry of Corporate Affairs ("MCA") vide Notification No. S.O. 1975 (E) dt 18.05.2016 has first time notified Sections 435 to 438 (both sections inclusive) and section 440 of the Act, 2013 for the setting up of '*Special Courts*' to specifically deal with and dispose of criminal offences under the Act, 2013. Therefore, the transitional provisions provided under Section 440 of the Act, 2013 has come into force w.e.f. 18th May, 2016.

Section 435: Establishment of Special Courts

(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge."

Amendments in Companies Act 2013 regarding the provisions of 'Special Court'

Section 435 of the Act, 2013 was, therefore, introduced by the Government to expedite the trial and disposal of cases which have piled up under the Act. As the 'Special Courts' are exclusively constituted for companies, they are more effective and efficient than general Session Courts. Such a step is a welcome move to further improve the ease of doing business,

enforce Corporate Governance and reduce the number of litigations pending at various Courts. It is also to be noted that even though original Section 435 of the Act, 2013 was not notified, however, the Government had made the amendment in Act, 2013 through Companies (Amendment) Act, 2015 ("the Amendment Act, 2015")w,e.f. 29.05.2015 wherein amendment in Section 435 was brought in. Section 435 as amended by the Amendment Act , 2015 read as under-

(1) The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of two years or more, by notification, establish or designate as many SpecialCourts as may be necessary. Provided that all other offences, shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First-Class having jurisdiction to try any offence under this Act or under nay previous company law.

(2) A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge."

It is submitted that Section 435 was envisaged in the Act, 2013 to ensure speedy "trial of offences". Later, the provision was amended vide Amendment Act, 2015 to ensure "speedy trial of offences punishable under the Act with imprisonment of two years or more". Additionally, a 'proviso' was added to Section 435 of the Act, 2013 to state that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First-Class having jurisdiction to try any offence under this Act or under any previous company law.It is pertinent to note that till the amendments by Amendment Act, 2015, no special Court was designated as Special Court by the Central Government having power to notify the same under Section 435(1) of the Act, 2013.

The Ministry of Corporate Affairs ("MCA") vide Notification No. S.O.1975 (E) dt 18.05.2016 has first time notified Sections 435 to 438 (both sections inclusive) and section 440 of the Act, 2013 for the setting up of 'Special Courts' to specifically deal with and dispose of criminal offences under the CA, 2013 which are punishable with imprisonment of a period of 2 years or more in an expeditious manner.

The main objective for the setting up of 'Special Courts' is to divide the disposal mechanism i.e. the grave offences would be tried by the 'Special Courts', whereas the 'minor contraventions and violations would be tried by Magistrate Courts'.

It is submitted that despite of holding the provision of 'Special Courts' under the Act, 2013, the Courts have been designated by the Government after more than two years since provisions of this began to take effect.

In exercise of the powers conferred by sub-section (1) of section 435 of the Act, 2013, the Central Government, after obtaining the concurrence of the respective Chief Justices of the High Courts, had notified, vide Notification No. S.O.1975 (E) dt 18.05.2016 'Special Courts' for the purposes of 'speedy trial' of offences punishable under the Act, 2013 with imprisonment of two years or more in terms of Section 435 in the following 8 States/Union territories: Jammu & Kashmir, Maharashtra, Dadra and Nagar Haveli and Daman and Diu, Goa, Gujarat, Madhya Pradesh, Andaman and Nicobar Islands, West Bengal. It is submitted that the Government had made further amendments in Act, 2013 through Companies (Amendment) Act, 2017 ("the Amendment Act, 2017") w,e.f. 07.05.2018, wherein some amendments in Section 435 was brought in. Section 435 as amended by Amendment Act, 2017 read as :

(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of-

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences.

who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed in working."

Before the Amendment Act, 2017, Metropolitan Magistrate or a Judicial Magistrate of the First Class could not be designated as 'Special Court'. However, after this, these Courts can also be designated as 'Special Court' for speedy trail of offence punishable under the Act, 2013 with imprisonment of less than two years.

Companies (Amendment) Act, 2020

It is submitted that the Companies (Amendment) Act, 2020 ("the Amendment Act, 2020") was passed by the Parliament on September 22, 2020 to decriminalized minor procedural or technical lapse under the Act, 2013 into civil wrong and also to exclude the offences under Section 452 (punishment provided for wrongful withholding of any property) of the Act to fall under the jurisdiction of 'Special Courts'.

It is submitted that most of the provisions of Amendment Act, 2020 has come into force with effect from 21st December 2020. MCA has issued in the Official Gazette a Notification No. S.O. 4646(E) in this regard on 21st December, 2020. It is pertinent to mention that Section 60 of the Amendment Act, 2020 regarding exclusion of the offences under Section 452 (punishment provided for wrongful withholding of any property) of the Act to fall under the jurisdiction of Special Courts is not notified yet.

Number of Special Courts

The Ministry of Corporate have issued 18 circulars as on date designating various courts as Special Courts. The state wise inclusive list of courts is as under:

States	**Number of Special Courts**
UT of Dadra & Nagar Haveli and Daman & Diu, Goa, Gujarat, Madhya Pradesh, UT of Andaman & Nicobar Islands, West Bengal, NCT of Delhi, Chhattisgarh, Rajasthan, Punjab, Haryana, UT of Chandigarh, Puducherry, Manipur, Meghalaya, Telangana, Andhra Pradesh, Telangana, Bihar, Karnataka, Odisha, Nagaland, Manipur & Arunachal Pradesh.	1
Tamil Nadu, Kerela, UT of Lakshadweep, Assam and Uttar Pradesh.	2
UT of Jammu & Kashmir, Maharashtra and Uttarakhand.	3
Total Number of Courts	**41**

Recently, Ministry of Corporate Affairs has designated 5 Special Courts in respect of the cases filled by SEBI vide notification dated November 27, 2020. The place wise list of these courts is as under:

Place	**Number of Courts**
Mumbai	2
Kolkata and Chennai	1
Total	**4**

Jurisdiction of Special Courts & NCLT

Indicative matters under Special Courts

1. All the cases in which imprisonment is provided for two years or more, by a designated Special Court consist of a single judge holding office as Session Judge or Additional Session Judge. Contravention of provisions related to loan, guarantee etc. for the purpose of purchase or subscription for any shares in the company or in its holding company. Matters pertaining to knowingly failure to distribute dividends. Matter related to Fraud including repayment of any debt.
2. All other cases in which the imprisonment is provided for less than 2 years, by a designated Special Court consists of a Metropolitan Magistrate or a Judicial Magistrate of the First Class. Contribution in contravention of the provisions relating to Prohibitions and restrictions regarding political contributions. Disobeying the direction issued by the Registrar or the inspector under section 207. Disobeying the direction issued by the Registrar or the inspector under section 217.

Indicative matters under NCLT

- Matters pertaining of Oppression & Mismanagement.
- Matters related to compromise or arrangements with creditors and members.
- Class Action by members or depositors.
- Rectification of register of members.
- Confirmation on reduction of share capital by the company.
- Calling of Annual General Meeting or other meeting of members in case of default in holding of General Meetings.
- Matters pertaining to Amendment of Articles for public company into a private company.
- Matters related to issue and transfer of securities; and non-payment of dividend.
- Cancellation of variation in the Rights of Shareholders.

Note:

1.The jurisdiction of the courts are decided on the basis of registered office of the Company or if more than one court having jurisdiction, as may be specified by the High Court.

2. High Court is the appellate authority for Special Courts and NCLAT is appellate authority for NCLT.

The jurisdiction of the courts is decided on the basis of registered office of the Company or if more than one court having jurisdiction, as may be specified by the High Court. High Court is the appellate authority for Special Courts and NCLAT is appellate authority for NCLT. Under Companies Act, 2013, the judicial magistrate or executive magistrate may authorize the detention for 15 Days or 7 Days only respectively. These magistrate(s) are also empowered to forward the person accused to the Special Court without unnecessary detention. The Special Courts

are empowered to take cognizance of the offence without accused being committed for trial upon perusal of the police report and also to try an offence under the Code of Criminal Procedure, 1973 with which the accused may be charged at the same trial. The Special Courts may also try an offence summarily for which the imprisonment is provide for a term not exceeding three years. However, the punishment for conviction in a summary trial is limited to one year. The provisions of reversion back to the regular trial and condition thereto are also provided under the act. The person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Transitional Provisions: The transitional provisions are added and power rests with the Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class for trial of offence under the act. The powers of the high court relating to transfer cases and appeals is reserved specifically as per the provisions of section 407 of Criminal Procedure Code.

Application of code to proceedings before special court

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply to the proceedings before a Special Court and for the purpose of the said provisions, the Special Court shall be deemed to be a Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be, and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor pursuant to Section 438 of the Act, 2103, save as otherwise provided in this Act, the provisions of Code of Criminal Procedure, 1973 shall apply to the proceedings before a 'Special Court' and for the purposes of the said provisions, the Special Court shall be #[Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be] and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

#Substituted for the words "Court of Session" by the Companies (Amendment) Act 2017 vide Notification No. S.O. 1883 (E) dated 7th May, 2018. It is stated that Section 438 of Act, 2013 was started with the following words "Save as otherwise provided in this Act, the provisions …..", which was provided that if there is any other provision of the Act, 2013 then such specific permission shall prevail over this section. Basically, the law relating to criminal procedure applicable to all criminal proceedings in India is contained in the Code. The Code is an Act to consolidate and amend the law relating to Criminal Procedure. It is stated that Section 2(n) of the Code defines offence as "any act or omission made punishable by any law for the time being in force". Further, Section 40 of the Indian Penal Code ("IPC") defines offence as "to denote a thing made punishable under the Code". Therefore, to constitute an offence, the particular 'act' should be specifically made punishable under the Code or any other law. So, an act which has not been made punishable expressly under any law, is not termed as an offence. Therefore, it is submitted that each and every offence under the Code or any other law for the time being in force shall be triable under the Code except in case where there is specific provision under any other law. It is mentioned in Section 435 of the Act, 2013 that for the purpose of Speedy Trial of Offence under the Act, the Central Government has power to designate many special courts through notification. But, Speedy trial does not mean that summarily trial. The power of 'Summary Trial' is provided under sub-section (3) of Section 436 of the Act, 2013, which may be read as:

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court may, if thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years. Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed. Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial .

It is stated that if the 'Special Court' thinks fit, it may try in a 'summary way', any offence under the Act, 2013, which is punishable with imprisonment for a term not exceeding 3 years, provided that

in the case of any conviction in such trial, person cannot be sentenced for imprisonment for a term exceeding 1 year. As sub-section (3) of Section 436 of the Act, 2013 start with a "no-obstante clause", therefore, the offences which may be tried in a summary way under the Code shall not consider to try in summary way under the Act, 2013. Under Section 260 of the Code "offences not publishable with death, imprisonment for life or imprisonment for a term exceeding two years" may be tried in a summary way. But pursuant to sub-section (3) of Section 436 of the Act, 2013, 'Special Court' under Companies Act, can try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years. It is also important to note that at the time of 'Summary Trail' by 'Special Court' the provisions contained in Section 260 to Section 265 of the Code shall be applicable except specific provision provided under sub-section (3) of Section 436 of the Act, 2013.

Summary

Insider trading refers to trading of shares by an 'insider' based on unpublished price sensitive information (UPSI). It involves buying or selling shares of a listed company using information that can materially impact the stock price, but has not been made public yet. Insider information cannot be traded on or passed along to others for the purpose of trading in securities.

Material information is any information that potentially influence an investor's decision to buy or sell a security. Any non-public information will be information concerning significant security information that has not been legally given to the public. A whistleblower is a person, who could be an employee of a company, or a government agency, disclosing information to the public or some higher authority about any wrongdoing, which could be in the form of fraud, corruption, etc.

The National Company Law Tribunal is a quasi-judicial body in India that adjudicates issues relating to Indian companies. The tribunal was established under the Companies Act 2013 and was constituted on 1 June 2016 by the government of India and is based on the recommendation of the V. Balakrishna Eradi committee on law relating to the insolvency and the winding up of companies.

The **National Company Law Appellate Tribunal** (NCLAT) has been constituted by the Central Government under section 410 of the Companies Act, 2013 for hearing appeals against the orders of the National Company Law Tribunals (NCLTs) with effect from 1st June 2016.

Under the Act, special courts would expedite the prosecution of delinquent businesses.

Keywords

1. Insider: Someone who is linked or has access to UPSI is referred to as an Insider.
2. A linked person is someone who has been involved with the firm in some capacity in the six months leading up to the insider trade. This might be a corporate director or employee, or their close relatives, or a legal counsel or banker for the firm, or even a stock exchange official or trustees or workers who engaged with the corporation.
3. Insider Trading Material Information: Any information that could impact an investor's decision to purchase or sell security will be considered as material information. Any non-public information will be the information that has not been legally released to the public about material information on security.
4. Whistle-blowing: The phrase "whistle-blowing" comes from British police officers who used to blow their whistles anytime they saw a crime being committed.
5. Whistleblowing is the act of bringing a problem inside an organization to the notice of top management. A whistle blower can be an employee, former employee, or member of an organization, such as a government agency, who is willing to report malpractice and take corrective action.

Self Assessment

1. Every appeal, petition, application, caveat petition, objection, or counter brought before the Tribunal must be in ____and must be accompanied by a copy translated into English if it is in any other Indian language.

A. Tamil
B. English
C. Malayalam
D. Punjabi

2. National Company Law Tribunal may seek assistance for the purpose of :

A. taking into custody the property
B. books of accounts or documents belonging to a sick industrial company
C. taking into custody the property, books of accounts or documents belonging to a sick industrial company
D. None of the above

3. Identify the true statement regarding an appeal presented to the Tribunal.

A. It should be in a double spacing on one side of standard petition paper with an inner margin of about four-centimeter width on top and with a right margin of 2.5. cm
B. Its' left margin should be of 2.5 cm, which is duly paginated, indexed and stitched together in paper book form
C. It shall be randomly and overwritten
D. None of the above

4. Which of the given statement defines the term 'Court'?

A. It refers to the High Court with authority over the location of the company's registered office, save to the extent that authority has been delegated to any district courts subordinate to that High Court under sub-clause (ii)
B. It means the district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdiction conferred upon the High Court, within the scope of its jurisdiction in respect of a company whose registered office is situated in the district.
C. It refers to any Metropolitan Magistrate or First-Class Judicial Magistrate with the authority to try any act of crime or any earlier business legislation.
D. All of the above

5. Unless the Tribunal orders otherwise or these rules provide otherwise, an application, petition, or reference must be advertised in Form NCLT-3A not less than _____before the date set for hearing, at least once in a vernacular newspaper in the district in which the company's registered office is located, and at least once in an English newspaper circulating in that district.

A. 10 days
B. 12 days
C. 14 days
D. 15 days

6. Which of the given is not a power of National Company Law Tribunal?

A. Power to fire employees in a company
B. Power to delegate
C. Power to seek assistance of Chief Metropolitan Magistrate, Chief Judicial Magistrate and District Collector
D. Power of a Civil Court

7. The _____is a quasi-judicial authority formed under the power of Section 410 of the Companies Act, 2013 ('the Act') to hear appeals from the National Company Law Tribunal.

A. National Company Law Tribunal
B. National Company Appellate Tribunal
C. Either National Company Appellate Tribunal or National Company Appellate Tribunal
D. Neither National Company Appellate Tribunal nor National Company Appellate Tribunal

8. Any person aggrieved by a National Company Tribunal order or decision may file an appeal with the National Company Appellate Tribunal within how many days of receiving a copy of the order or decision of the National Company Law Tribunal?

A. 25 days
B. 55 days
C. 35 days
D. 45 days

9. _____would be a specialized body dealing with company matters and shall exercise powers and jurisdictions that were earlier exercised by Company Law Board.

A. National company law Tribunal
B. National Appellate Tribunal
C. Either National company law Tribunal or National Appellate Tribunal
D. Neither National company law Tribunal nor National Appellate Tribunal

10. Who has custody of the Tribunal's records, and no record or document submitted in any cause or issue may be removed from the Tribunal's custody without the Tribunal's permission?

A. State Government
B. Central Government
C. The Registrar
D. The auditor of company

11. What are the ordinary sitting hours of the Tribunal subject to any order made by the President?

A. 10:30 AM to 1:00 PM and 2:00 P.M. to 4:30 PM
B. 8:30 AM to 1:00 PM and 1:00 P.M. to 3:30 PM
C. 9:30 AM to 12:30 PM and 1:00 P.M. to 2:30 PM
D. 7:30 AM to 12:00 PM and 1:00 P.M. to 4:30 PM

12. If it is satisfied that the appellant was prevented by sufficient cause from filing appeal within prescribed time. This provision ensures that beyond _____from the date on which copy of Tribunal order is made available to the appellant, no appeal shall be heard by Appellant Tribunal.

A. 50 days
B. 60 days
C. 180 days

D. 90 days

13. For the purpose of providing speedy trial of offences punishable under the Act, what tenure of imprisonment the central government may impose by notification, establish or designate as many Special Courts as may be necessary?

A. 1 year
B. 2 years
C. 3 years
D. 5 years

14. A company which is closing the register of members or the register of debenture holders or the register of other security holders shall give at least how many days previous notice and, in such manner, as may be specified by Securities and Exchange Board of India?

A. seven days
B. five days
C. three days
D. two days

15. Identify the false statement regarding insider information:

A. Insider information is any information not publicly available that affects the value or perceived value of the company.
B. Sharing insider corporation information is potentially illegal.
C. Preventing illegal insider trading has become very important to public companies.
D. Insider information is any information that is publicly available that affects the value or perceived value of the company.

Answer for Self-Assessment

1.	B	2.	C	3.	A	4.	D	5.	C
6.	A	7.	B	8.	D	9.	A	10.	C
11.	A	12.	D	13.	B	14.	A	15.	D

Further Readings

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2. Elements Of Company Law By N.D.Kapoor, Sultan Chand & Sons (P) Ltd.

3. Legal Aspects Of Business By Dan

Iel Albuquerque, Oxford & Ibh

4. A Handbook On Corporate And Other Laws By Manish Bhandari, Not Mentioned

Web Links

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