

**CA INTERMEDIATE**

**CORPORATE AND OTHER LAWS**

**REGULAR BOOK**

**VOLUME:1**

**Edition 1.0**

*By CA Indresh Gandhi*

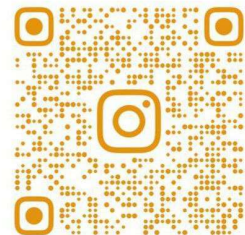
**HIGHLIGHTS OF THIS BOOK...**

- ✓ Compiled from ICAI Study Material
- ✓ Includes Latest Amendments
- ✓ Properly Arranged & Sequenced
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- ✓ Point to point Content

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# CA INTER Corporate and other LAWS.

Regular Book




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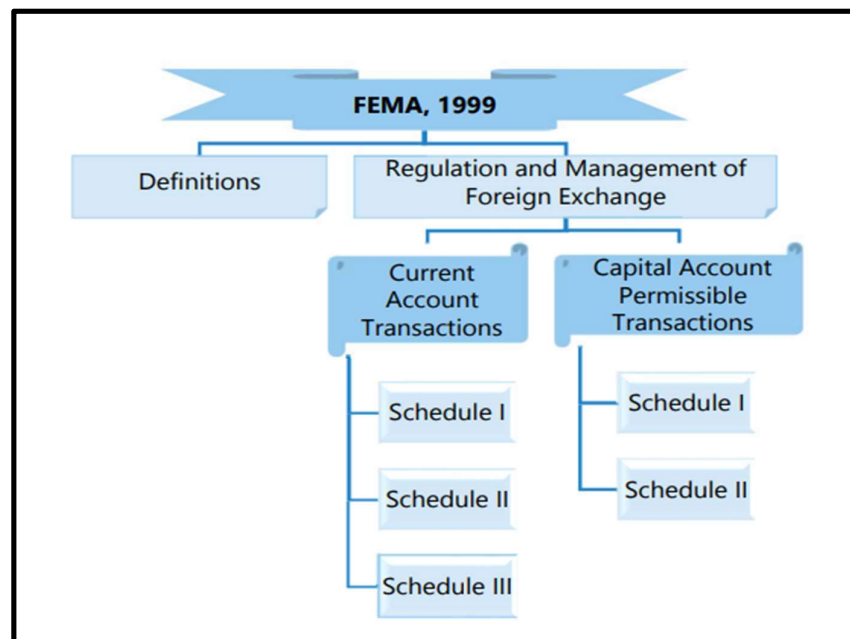


*The Foreign Exchange  
Management ACT, 1999*

## Ch. 1:

### The Foreign Exchange Management ACT, 1999

#### CHAPTER OVERVIEW



#### 1. Introduction

##### Need for the Act

- The change in the economic scenario globalization of the capital, free trade access across the globe, necessitated the need for managing foreign exchange in the country in an orderly manner.
- To facilitate cross border trade and cross border capital flows, exchange control law was required.
- Government as part of its agenda of liberalization of the Indian economy in 1991, permitted free movement of foreign exchange in connection to trade related receipts and payments as well as Foreign Investment in various sectors.

##### Salient features of the Act:

- Regulation of transactions between residents and non-residents
- Investments in India by non-residents and overseas investments by Indian residents

- c) Freely permissible transactions on current account subject to reasonable restrictions that may be imposed.
- d) Reserve Bank of India (RBI) and Central Government control over capital account transactions.
- e) Requirement for realisation of export proceeds and repatriation to India
- f) Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer/ Money Changer/ Off-shore banking unit
- g) Adjudication and Compounding of Offences
- h) Investigation of offences by Directorate of Enforcement
- i) Appeal provisions including Special Director (Appeals) and Appellate Tribunal.

## 2. PREAMBLE, EXTENT, APPLICATION AND COMMENCEMENT OF FEMA, 1999

- a) **Preamble:** This Act aims to consolidate and amend the law relating to foreign exchange with the objective of –
  - (i) Facilitating external trade and payments and
  - (ii) For promoting the orderly development and maintenance of foreign exchange market in India.
- b) **Extent and Application (Sec 1):**
  - (i) FEMA, 1999 extends to the whole of India.
  - (ii) It shall also apply to all branches, offices and agencies outside India owned or controlled by a person resident in India.
  - (iii) Also, to any contravention thereunder committed outside India by any person to whom this Act applies.

## 3. DEFINITIONS (SEC 2)

In this Act, unless the context otherwise requires:

- a) **"Authorised person"** means an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised under Sec 10(1) to deal in foreign exchange or foreign securities; [Sec 2(c)]
- b) **"Capital Account Transaction"** means a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liability in India of persons resident outside India, and includes transactions referred to in 1 Sec 6(3); [Sec 2(e)]

- c) **"Currency"** includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers' cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank. [Sec 2(h)]
- d) **"Current Account Transaction"** means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes:
- (i) payments due in connection with foreign trade, other current business, services, and short-term banking and credit facilities in the ordinary course of business
  - (ii) payments due as interest on loans and as net income from investments
  - (iii) remittances for living expenses of parents, spouse and children residing abroad, and
  - (iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children; [Sec 2(j)]
- e) **"Export"**, with its grammatical variations and cognate expressions means:
- (i) the taking out of India to a place outside India any goods.
  - (ii) provision of services from India to any person outside India; [Sec 2(l)]
- f) **"Foreign Currency"** means any currency other than Indian currency; [Sec 2(m)]
- g) **"Foreign Exchange"** means foreign currency and includes:
- (i) Deposits, credits, and balances payable in any foreign currency
  - (ii) drafts, travellers' cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency
  - (iii) drafts, travelers' cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency; [Section 2(n)]
- h) **"Person"** includes:
- (i) an individual,
  - (ii) a Hindu undivided family,
  - (iii) a company
  - (iv) a firm
  - (v) an association of persons or a body of individuals, whether incorporated or not
  - (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and.
  - (vii) any agency, office or branch owned or controlled by such person; [Sec 2(u)]
- i) **"Person resident in India"** means:

- a person residing in India for more than 182 days during the preceding financial year but does not include—

(A) A person who has gone out of India or who stays outside India, in either case—

- (i) for or on taking up employment outside India, or
- (ii) for carrying on outside India a business or vocation outside India, or
- (iii) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period.

(B) A person who has come to or stays in India, in either case, otherwise than:

- (i) For on taking up employment in India, or
- (ii) For carrying on in India a business or vocation in India, or
- (iii) For any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period

- Any person or body corporate registered or incorporated in India,
- An office, branch or agency in India owned or controlled by a person resident outside India.
- an office, branch or agency outside India owned or controlled by a person resident in India; [Section 2(v)]

j) "Person Resident Outside India" means a person who is not resident in India; [Sec 2(w)]

k) "Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien. [Sec 2(ze)]

l) Citizenship is not the criteria for determining whether or not a person is resident in India.

m) It is understood that this condition applies only to individuals. If HUF, AOP etc. are in India, they will be considered as Indian Residents.

**Illustration 1**

Mr. X had resided in India during the financial year 2019-2020 for less than 182 days. He had come to India on April 1, 2020 for carrying on business. He intends to leave the business on April 30, 2021 and leave India on June 30, 2021. Determine his residential status for the financial years 2020-2021 and 2021-2022 up to the date of his departure?

**Answer:**



As explained in the above illustration, Mr. X will be considered as a 'person resident in India' from 1st April 2020. As regards, financial year 2021-2022, Mr. X would continue to be an Indian resident from 1st April 2021. If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure.

It may be noted that even if Mr. X is a foreign citizen, has not left India for any of these purposes, he would be considered, 'person resident in India' during the financial year 2021-2022. Thus, it is the purpose of leaving India which will decide his status from 1st July 2021.

### Illustration 2

Mr. Z had resided in India during the financial year 2019-2020. He left India on 1st August, 2020 for United States for pursuing higher studies for three years. What would be his residential status during financial year 2020-2021 and during 2021- 2022?

#### Answer:

Mr. Z had resided in India during financial year 2019-2020 for more than 182 days. After that he has gone to USA for higher studies. He has not gone out of or stayed outside India for or on taking up employment, or for carrying a business or for any other purpose, in circumstances as would indicate his intention to stay outside India for an uncertain period.

Accordingly, he would be 'person resident in India' during the financial year 2020-2021. RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies. For the financial year 2021-2022, he would not have been in India in the preceding financial year (2020-2021) for a period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2021-2022.

### Illustration 3

Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its headquarters in Mumbai and has a branch in Singapore. The Headquarters at Mumbai controls the Singapore branch of the robotic unit. What would be the residential status of the robotic unit in Mumbai and that of the Singapore branch?

#### Answer:

Toy Ltd. being a Japanese company would be a person resident outside India. [Sec 2(w)]. Sec 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi).

Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person'. Sec 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India.

Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'. The robotic unit headquartered in Mumbai, which is a person resident in India as discussed above, controls the Singapore branch, Hence, the Singapore branch is a 'person resident in India'.

**Illustration 4:**

Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the Airline is headquartered. However, for security considerations, she was based at Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

**Answer:**

Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period.

Under Sec 2(v)(B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be a Person Resident in India. If, however she has been employed in Mumbai branch of British Airways, then she will be considered a Person Resident in India.

## **4. REGULATION AND MANAGEMENT OF FOREIGN EXCHANGE**

### **(a) Dealing in foreign, etc (Sec 3)**

No person shall -

- (i) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person (AP);
- (ii) make any payment to or for the credit of any person resident outside India in any manner.
- (iii) receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner. Explanation—For the purpose of this clause, where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;
- (iv) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

The above transactions may carry on:

- (a) as otherwise provided in this Act; or
- (b) with the general or special permission of the Reserve Bank.

**Explanation** - For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt. This Sec imposes blanket restrictions on the specified transactions. This Sec applies to PRIIs and PROIs. The purpose of this Sec is to regulate inflow and outflow of Foreign Exchange through Authorised dealers and in a permitted manner.

- (c) no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.
- (d) This Sec prevents Indian residents to acquire, hold, own, possess or transfer any foreign exchange, foreign security or immovable property abroad. Then through separate notifications, acquisition of these assets has been permitted subject to certain conditions and compliance rules.

### **Example 1 :**

If an Indian resident receives bank balance of US\$ 10,000 from his uncle in London, the Indian resident cannot hold on to the foreign funds. He is supposed to bring back the funds as provided in Sec 8.

### ***b) Current Account Transactions (Sec 5)***

The term 'Current Account Transaction' is defined negatively by Sec 2(j) of the Act. It means a transaction other than a capital account transaction and includes the following types of transactions:

- (i) Payments in the course of ordinary course of foreign trade, other services such as short-term banking and credit facilities in the ordinary course of business etc.
- (ii) Payments in the form of interest on loans or income from investments
- (iii) Remittances for living expenses of parents, spouse, or children living in abroad.
- (iv) Expenses in connection with foreign travel, education etc.
- (v) The Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.
- (vi) The general rule to be understood is that Current Account transactions are freely permitted unless specifically prohibited and Capital Account transactions are prohibited unless specifically or generally permitted.

### I. Schedule I

Transactions for which drawl of foreign exchange is prohibited:

- (i) Remittance out of lottery winnings.
- (ii) Remittance of income from racing/riding, etc., or any other hobby
- (iii) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc
- (iv) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- (v) Remittance of dividend by any company to which the requirement of dividend balancing is applicable
- (vi) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.
- (vii) Payment related to "Call Back Services" of telephones
- (viii) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c

### II. Schedule II

Transactions, which require prior approval of the **Government of India** for drawl of foreign exchange

Purpose of Remittance	Ministry/Department of Govt. of India whose approval is required
Cultural Tours	Ministry of Human Resources Development (Department of Education and Culture)
Advertisement in foreign print media for the purposes other than promotion of tourism, foreign investments and international bidding (exceeding US\$ 10,000) by a State Government and its Public Sector Undertakings.	Ministry of Finance, Department of Economic Affairs
Remittance of freight of vessel chartered by a PSU	Ministry of Surface Transport (Chartering Wing)
Payment of import through ocean transport by a Govt. Department or a PSU on c.i.f. basis (i.e., other than f.o.b. and f.a.s. basis)	Ministry of Surface Transport (Chartering Wing)
Multi-modal transport operators making remittance to their agents abroad	Registration Certificate from the Director General of Shipping
Remittance of hiring charges of transponders by (a) TV Channels (b) Internet service providers	Ministry of Information and Broadcasting Ministry of Communication and Information Technology.
Remittance of container detention charges exceeding the rate prescribed by Director General of Shipping	Ministry of Surface Transport (Director General of Shipping)
Remittance of prize money/ sponsorship of sports activity abroad by a person other than International/ National/State Level sports bodies, if the amount involved exceeds US \$ 100,000	Ministry of Human Resource Development (Department of Youth Affairs and Sports)
Remittance for membership of P & I Club	Ministry of Finance (Insurance Division)

Transactions which require RBI's prior approval for drawl of foreign exchange:

### III. Schedule III

a) Facilities for Individuals - Individuals can avail of foreign exchange facility for the following purposes within the limit of USD 250,000 only:

- (i) Private visits to any country (except Nepal and Bhutan)
- (ii) Gift or Donation
- (iii) Going abroad for employment
- (iv) Emigration

- (v) Maintenance of close relatives abroad
- (vi) Travel for business or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/ check-up
- (vii) Expenses in connection with medical treatment abroad
- (viii) Studies Abroad
- (ix) Any other current account transactions

**Any other additional remittance in excess of the said limit for the said purposes shall require prior approval of the Reserve Bank of India.**

However, for the purposes mentioned at item numbers (iv), (vii) and (viii) above, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalised Remittance Scheme.

Further, if an individual remits any amount under the said Liberalised Remittance Scheme in a financial year, then the applicable limit for such individual would be reduced from USD 250,000 (US Dollars Two Hundred and Fifty Thousand Only) by the amount so remitted:

Further, that for a person who is resident but not permanently resident in India and-

- (a) Is a citizen of foreign state other than Pakistan; or
- (b) Is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company.

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions)

**b) Facilities for persons other than Individuals - The following remittances by persons other than Individuals shall require prior approval of the Reserve Bank of India**

- (i) Donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000 whichever is less, for -
  - Creation of chairs in reputed educational institutions
  - By contribution to funds (not being an investment fund) promoted by educational institutions, and
  - Contribution to a technical institution or body or association in the field of activity of the donor company.
- (ii) Commission, per truncation, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.

- (iii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

c) **Procedure** - The procedure for drawl or remittance of any foreign exchange under this schedule shall be the same as applicable for remitting any amount under the said Liberalised Remittance scheme.

**If the transaction is not listed in any of the above three schedules, it can be freely undertaken.**

- (i) **Exemption for remittance from RFC Account** - No approval is required where any remittance has to be made for the transactions listed in Schedule II and Schedule III above from a Resident Foreign Currency (RFC) account.
- (ii) **Exemption for remittance from EEFC Account** - If any remittance has to be made for the transactions listed in Schedule II and Schedule III above from Exchange Earners' Foreign Currency (EEFC) account, then also no approval is required. However, if payment has to be made for the following transactions, approval is required even if payment is from EEFC account:
- Remittance for membership of P & I club.
  - Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five per cent of the inward remittance whichever is more. Remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses.

**Exemption for payment by International Credit Card while on a visit abroad** - If a person is on a visit abroad, he can incur expenditure stated in Schedule III if he incurs it through international credit card.

**Note: Liberalised Remittance Scheme (LRS)** -: Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 250,000 per financial year (April - March) for any permissible current or capital account transaction or a combination of both.

This is inclusive of foreign exchange facility for the purposes mentioned in Para 1 of Schedule III of Foreign Exchange Management (CAT) Amendment Rules 2015, dated May 26, 2015.

**In case of remitter being a minor** the LRS declaration form must be countersigned by the minor's natural guardian. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

**Consolidation of remittance of family members** - Remittances under the Scheme can be consolidated in respect of family members subject to individual family members complying with its terms and conditions.

**Exception:** Clubbing is **not permitted** by other family members for **capital account transactions** such as opening a bank account/investment/purchase of property, if they are not the co-owners/co-partners of the overseas bank account/investment/property.

**Capital Account Transactions** means "A transaction which alters the assets or liabilities including contingent liabilities outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction."

- Capital Accounts Transaction in India can be carried out only to the extent permitted because Indian Rupee is not yet fully convertible.
- Capital and current account transactions are intended to be mutually exclusive
- A transaction which alters the asset or liabilities in India of non-residents falls under the category of capital account.
- However, as far as residents are concerned transactions which alter the contingent liabilities outside India are also capital account transactions.
- The Reserve Bank of India may by regulations place restrictions on various specified capital account transactions. In simple terms, cross border transactions pertaining to investments, loans, immovable property, transfer of assets are Capital Account Transactions.
  - (a) Subject to the provisions of sub-Sec (2), any person may **sell or draw foreign exchange to or from an authorised person** for a capital account transaction.
  - (b) Reserve Bank had the **power to specify the Capital Account transactions which are permitted and the relevant limits, terms and conditions.**

The Reserve Bank may, in consultation with the Central Government, specify:

- (i) any class or classes of capital account transactions, involving debt instruments, which are permissible.
- (ii) the limit up to which foreign exchange shall be admissible for such transactions.
- (iii) any conditions which may be placed on such transactions.

Provided that the Reserve Bank or the Central Government shall not impose any restrictions on the drawl of foreign exchange for payment due on account of amortisation of loans or for depreciation of direct investments in the ordinary course of business

RBI has issued notification for Debt instruments specifying the terms and conditions. These regulations for foreign investment in debt instruments. For investment by Indian residents outside India, RBI continues to have power to regulate the transactions for equity and debt.

(2A) The Central Government may, in consultation with the Reserve Bank, prescribe— (a) any class or classes of capital account transactions, not involving debt instruments, which are permissible; (b) the limit up to which foreign exchange shall be admissible for such transactions; and (c) any conditions which may be placed on such transactions.



Central Government has issued notification for non-debt instruments specifying the terms and conditions. RBI has issued notification for mode of payment and reporting of non-debt instruments

- (c) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Clarification of Sec 6(4) -

- (i) Foreign currency accounts opened and maintained by such a person when he was resident outside India;
- (ii) Income earned through employment or business or vocation outside India taken up or commenced which such person was resident outside India, or from investments made while such person was resident outside India, or from gift or inheritance received while such a person was resident outside India;
- (iii) Foreign exchange including any income arising therefrom, and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India.
- (iv) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.
- (d) **A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by a such person when he was resident in India or inherited from a person who was resident in India.**
- (e) Without prejudice to the provisions of this Sec, the Reserve Bank may, by regulation, prohibit, restrict, or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.
- (f) "Debt instruments" shall mean, such instruments as may be determined by the Central Government in consultation with the Reserve Bank.

A capital account transaction as stated earlier is a transaction, which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India would be a capital account transaction.

The Sec gives a liberty by providing that any person may sell or draw foreign exchange to or from an authorised person for capital account transactions. However, the liberty to do so is subject to the provisions of sub-Sec (2) and (2A), which states that

The Reserve Bank and the Central Government may specify class or classes of capital account transactions, which are permissible limit up to, which the foreign exchange shall be admissible for such transactions and the conditions which may be placed on such transactions.

Capital account transaction is basically split into the following categories under **Foreign Exchange Management (Permissible capital account transactions) Regulations, 2000<sup>6</sup>** -:

- (i) Transaction which are permissible in respect of persons resident in India and outside India
- (ii) Transaction on which restrictions cannot be imposed; and
- (iii) Transactions, which are prohibited.

### Schedule I

The list of permissible classes of transactions made by **persons resident in India** is:

- (a) Investment by a person resident in India in foreign securities.
- (b) Foreign currency loans raised in India and abroad by a person resident in India.
- (c) Transfer of immovable property outside India by a person resident in India.
- (d) Guarantees issues by a person resident in India in favour of a person resident outside India.
- (e) Export, Import and holding of currency/ currency notes.
- (f) Loans and Overdrafts (borrowings) by a person resident in India from a person resident outside India.
- (g) Maintenance of foreign currency accounts in India and outside India by a person resident in India.
- (h) Taking out of insurance policy by a person resident in India from an insurance company outside India.
- (i) Loans and overdrafts by a person resident in India to a person resident outside India.
- (j) Remittance outside India of capital assets of a person resident in India.
- (k) Undertake derivate contracts.

### Schedule II

The list of permissible classes of transactions made by **persons resident outside India** is:

- (a) Investment in India by a person resident outside India, that is to say,
  - (i) Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; and
  - (ii) Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of a person in India.

- (b) Acquisition and transfer of immovable property in India by a person resident outside India.
- (b) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.
- (c) Import and export of currency/currency notes into/from India by a person resident outside India.
- (d) Deposits between a person resident in India and a person resident outside India.
- (e) Foreign currency accounts in India of a person resident outside India.
- (f) Remittance outside India of capital assets in India of a person resident outside India.
- (g) Undertake derivative contracts.

### Transactions with no restrictions -

They are:

- (a) For amortisation of loan and
- (b) For depreciation of direct investments in ordinary course of business.

Also, restrictions cannot be imposed when drawl is of the purpose of repayments of loan instalments.

### Prohibited Transactions -

On certain transactions, the Reserve Bank of India imposes prohibition.

No person shall **undertake or sell or draw foreign exchange to or from an authorised person** for any capital account transaction,

Provided that:

- i) Subject to the provisions of the Act or to the rules or regulations or directions or orders made or issued thereunder, a **resident individual may, draw from an authorised person foreign exchange not exceeding USD 250,000 per financial year or such amount as decided by Reserve Bank** from time to time for a capital account transaction specified in Schedule I.
- ii) Where the **drawl of foreign exchange** by a resident individual for any capital account transaction specified in Schedule I **exceeds USD 250,000 per financial year, or as decided by Reserve Bank** from time to time as the case may be, the limit specified in the regulations relevant to the transaction shall apply with respect to such drawl.

Provided further that no part of the foreign exchange of USD 250,000, drawn under provision

- shall be used for remittance directly or indirectly to countries notified as non-co-operative countries and territories by Financial Action Task Force (FATF) from time to time and communicated by the Reserve Bank of India to all concerned.

➤ **The person resident outside India is prohibited from making investments in India** in any form, in any company, or partnership firm or proprietary concern or any other entity whether incorporated or not which is engaged or proposes to engage.

iii) **In the business of chit fund**, Registrar of Chits or an officer authorised by the state government in this behalf, may, in consultation with the State Government concerned, permit any chit fund to accept subscription from Non-resident Indians. Non-resident Indians shall be eligible to subscribe, through banking channel and on non-repatriation basis, to such chit funds, without limit subject to the conditions stipulated by the Reserve Bank of India from time to time.

iv) **As Nidhi Company.**

v) **In agricultural or plantation activities.**

vi) **In real estate business, or construction of farmhouses or**

Explanation: In "real estate business" the term shall not include development of townships, construction of residential/commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.; or

vii) **In Trading in Transferable Developmental Rights (TDRs)**

Transferable Development Rights' means certificates issued in respect of category of land acquired for public purpose either by Central or State Government in consideration of surrender of land by the owner without monetary compensation, which are transferable in part or whole.

viii) **No person resident in India shall undertake** any capital account transaction which is not permissible in terms of Order, as amended from time to time, of the Government of India, Ministry of External Affairs, **with any person who is, a citizen of or a resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise, in Democratic People's Republic of Korea**, until further orders, unless there is specific approval from the Central Government to carry on any transaction.

ix) **The existing investment transactions, with any person who is, a citizen of or resident of Democratic People's Republic of Korea, or an entity incorporated or otherwise in Democratic People's Republic of Korea, or any existing representative office or other assets possessed in Democratic People's Republic of Korea, by a person resident in India**, which is not permissible in terms of Order as amended from time to time, of the Government of India, Ministry of External Affairs **shall be closed/ liquidated/disposed/settled within a period of 180 days from the date of issue of this Notification**, unless there is specific approval from the Central Government to continue beyond that period."

Thus, a capital account transaction is permitted only if it is specifically permitted under the regulations. If the transaction is not stated as generally permitted, a prior specific approval is required.

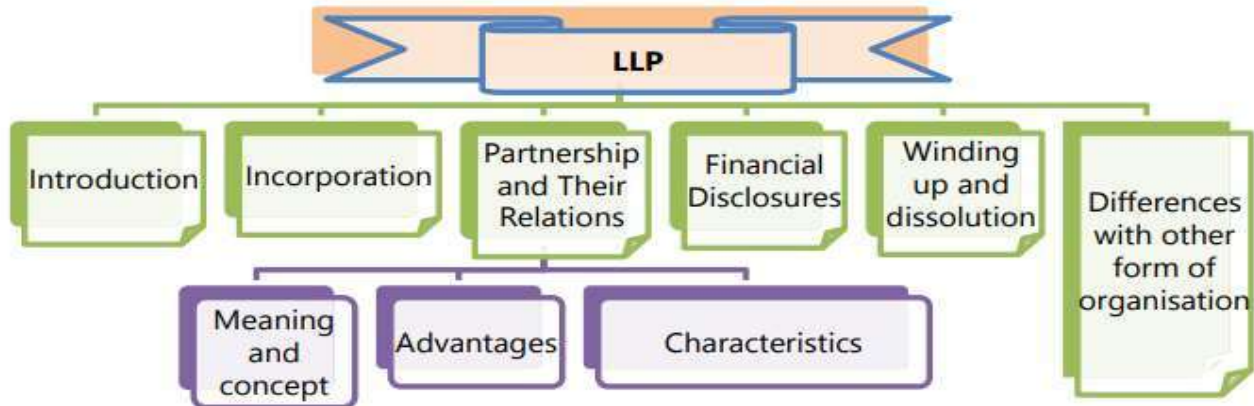


*The Limited Liability  
Partnership ACT, 2008*

## Ch. 2:

### The Limited Liability Partnership ACT, 2008

#### CHAPTER OVERVIEW



#### 1) INTRODUCTION

- a) President of India has assented the Bill on 7th January 2009 and called as the Limited Liability Partnership Act, 2008.
- b) This Act has been enacted to make provisions for the formation and regulation of Limited Liability Partnerships and for matters connected there with or incidental thereto.
- c) The LLP Act, 2008 has 81 sections and 4 schedules.
- d) **The First Schedule deals** with mutual rights and duties of partners and limited liability partnership and its partners where there is absence of a formal agreement amongst them.
- e) **The Second Schedule** deals with conversion of a firm into LLP.
- f) **The Third Schedule** deals with conversion of a private company into LLP.
- g) **The Fourth Schedule** deals with conversion of unlisted public company into LLP.
- h) The Ministry of Corporate Affairs and the Registrar of Companies (ROC) are entrusted with the task of administrating the LLP Act, 2008. The Central Government has the authority to frame the

The LLP Act, 2008 is applicable to the whole of India


Rules with regard to the LLP Act, 2008, and can amend them by notifications in the Official Gazette, from time to time.

- i) It is also to be noted that the Indian Partnership Act, 1932 is not applicable to LLPs.

#### NOTE

The Limited Liability Partnership Act, 2008 has been recently amended through the Limited Liability Partnership (Amendment) Act, 2021 dated 13th August, 2021.

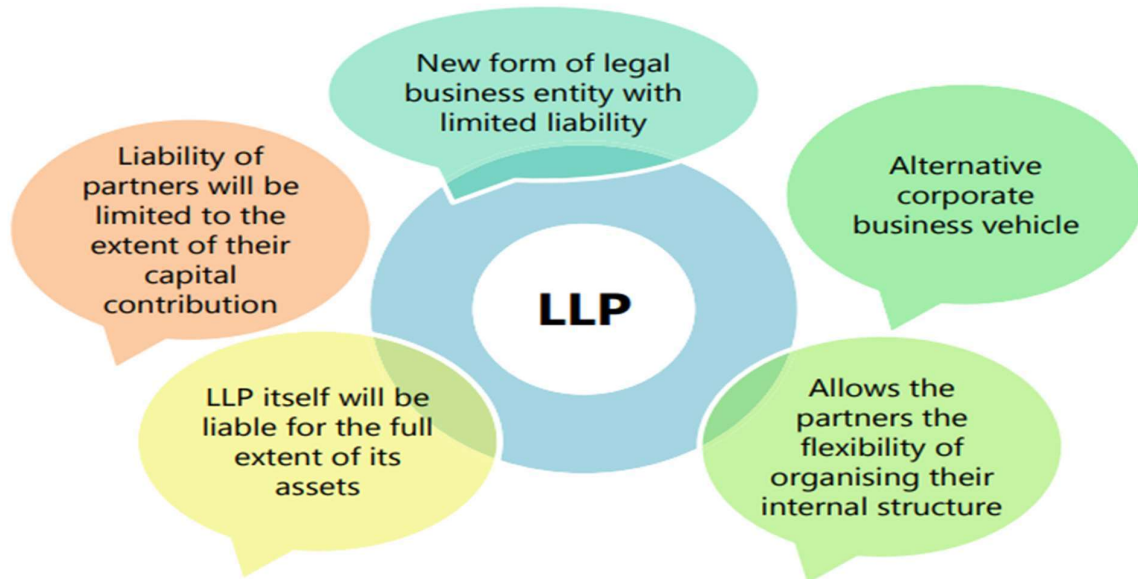
### Need of new form of Limited Liability Partnership

- a) A need has been felt for a new corporate form that would provide an alternative to the traditional partnership with unlimited personal liability on the one hand and the statute-based governance structure of the limited liability company on the other hand. In order to enable professional expertise and entrepreneurial initiative and to combine and operate in flexible, innovative and efficient manner, the LLP Act, 2008 was enacted.
- 
- b) Thus, LLP as a form of business organization is an alternative corporate business vehicle. It provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement.
- c) The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements.
- d) Owing to flexibility in its structure and operation, the LLP is a suitable vehicle for small enterprises and for investment by venture capital.

## **2. LIMITED LIABILITY PARTNERSHIP MEANING AND CONCEPT**

- a) **Meaning:** LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that not only gives the benefits of limited liability at low compliance cost but allows its partners the flexibility of organising their internal structure as a traditional partnership.
- b) The LLP is a separate legal entity and, while the LLP itself will be liable to the full extent of its assets, the liability of the partners will be limited to the extent of their capital contribution.
- c) LLP as a separate legal entity and business organisation is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.

- d) Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.



### 3. DEFINITIONS

- a) **Address [(Section 2(1)(a))]:** "Address" in relation to a partner limited liability partnership, means—

- i) if an individual, his usual residential address; and
- ii) (ii) if a body corporate, the address of its registered office.



- b) **Body Corporate [(Section 2(1)(d))]:** It means a company as defined sec. 2(20) of the Companies Act, 2013 and includes—

- i) a LLP registered under this Act;
- ii) a LLP incorporated outside India; and
- iii) a company incorporated outside India but does not include-
  - a corporation sole.
  - a co-operative society registered under any law for the time being in force; and
  - any other body corporate (not being a company as defined in clause (20) of section 2 of the Companies Act, 2013 or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

- c) **Business [Section 2(1)(e)]:** "Business" includes every trade, profession, service and occupation except any activity which the Central Government may, by notification, exclude.

- d) **Chartered Accountant [Section 2(1)(f)]:** means a Chartered Accountant as



defined in sec 2(1)(c) of the Chartered Accountants Act, 1949 and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act.

- e) **Designated Partner [Section 2(1)(j)]**: "Designated partner" means any partner designated as such pursuant to section 7.
- f) **Entity [Section 2(1)(k)]**: "Entity" means anybody corporate and includes a firm setup under the Indian Partnership Act, 1932.
- g) **Financial Year [Section 2(1)(l)]**: "Financial year", in relation to a LLP, means the period from the 1st day of April of a year to the 31st day of March of the following year. However, in the case of a LLP incorporated after the 30th day of September of a year, the financial year may end on the 31st day of March of the year next following that year.

**Example 1:** If a LLP has been incorporated on 15th October 2022, then its financial year may be from 15th October 2022 to 31st March 2024. However, the LLP can always maintain its first accounts from 15<sup>th</sup> October 2022 to 31<sup>st</sup> March 2023 i.e., for a period of less than 12 months. The period for which the first accounts of LLP are prepared shall not exceed 18 months.

The Income Tax department has prescribed uniform financial year from 1st April to 31st March of next year. In keeping with the Income tax law, the financial year for LLP should always be from 1st April to 31st March each year.


- h) **Foreign LLP [section 2(1)(m)]**: It means a LLP formed, incorporated or registered outside India which establishes a place of business within India.
- i) **Limited liability partnership [Section 2(1)(n)]**: Limited Liability Partnership means a partnership formed and registered under this Act.
- j) **Limited Liability partnership agreement [Section 2(1)(o)]**: It means any written agreement between the partners of the LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP. The First Schedule shall be applicable for all matters not covered by the Agreement w.r.t the mutual rights and duties of the partners and their rights and duties in relation to the LLP.
- k) **Name [Section 2(1)(p)]**: in relation to a partner of a limited liability partnership, means—
  - (i) if an individual, his forename, middle name and surname; and
  - (ii) if a body corporate, its registered name.
- l) **Partner [Section 2(1)(q)]**: Partner, in relation to a LLP, means any person who becomes a partner in the LLP in accordance with the LLP agreement.

- m) **Regional Director [Section 2(1)(a)]**: means a person appointed as such by the Central Government for the purpose of this Act or the Companies Act 2013, as the case may be.
- n) **Registrar [Section 2(1)(s)]**: means a person appointed by Central Government as Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, for the purpose of this Act or the Companies Act, 2013, as the case may be.
- o) **Small, limited liability partnership [Section 2(1) (ta)]**: It means a limited liability partnership—
- (i) the contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and
  - (ii) the turnover of which, as per the Statement of Accounts and Solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount, not exceeding fifty crore rupees, as may be prescribed; or
  - (iii) which meets such other requirements as may be prescribed and fulfils such terms and conditions as may be prescribed.
- p) **Tribunal [Section 2(1)(u)]**: means the National Company Law Tribunal constituted u/s 408 of Companies Act 2013.

#### 4. CHARACTERISTIC OF LLP

- a) **LLP is a body corporate**: a LLP is a body corporate formed and incorporated under this Act. Section 3 of the LLP Act provides that LLP is a legal entity separate from that of its partners and shall have perpetual succession.
- b) **Perpetual succession**: Death, insanity, retirement or insolvency of partners has no impact on the existence of LLP.
- c) **Separate Legal Entity**:
- i) a LLP is a legal entity separate from that of its partners.
  - ii) The LLP is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. In other words, creditors of LLP shall be the creditors of LLP alone.
- d) **Mutual Agency**: all partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.
- e) **LLP Agreement**:
- i) Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners.
  - ii) In the absence of any such agreement, the mutual rights and duties shall be governed by Schedule I of the LLP Act, 2008
- f) **Artificial Legal Person**: A LLP is an artificial legal person because it is created by a legal process and is clothed with all rights of an individual. except of course that, it cannot be sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or

Medicine.

- g) **Common Seal:** A LLP being an artificial person can act through its partners and designated partners. LLP may have a common seal, if it decides to have one [Section 14(c)]. Thus, it is not mandatory for a LLP to have a common seal. It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP.
- h) **Limited Liability:** Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section 26). The liability of the partners will be limited to their agreed contribution in the LLP. Such contribution may be of tangible or intangible nature or both.
- i) **Management of Business:** The partners in the LLP are entitled to manage the business of LLP. But only the designated partners are responsible for legal compliances.
- j) **Minimum and Maximum number of Partners:** Every LLP shall have at least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit on the partners in LLP.
- k) **Business for Profit Only:** The essential requirement for forming LLP is carrying on a lawful business with a view to earn profit. Thus, LLP cannot be formed for charitable or non-economic purpose. 
- l) **Investigation:** The Central Government shall have powers to investigate the affairs of an LLP by appointment of competent authority for the purpose.
- m) **Compromise or Arrangement:** Any compromise or agreements including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act, 2008.
- n) **Conversion into LLP:** A firm, private company or an unlisted public company would be allowed to be converted into LLP in accordance with the provisions of LLP Act, 2008.
- o) **E-Filing of Documents:** Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website [www.mca.gov.in](http://www.mca.gov.in) and authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.
- p) **Foreign LLPs:** Section 2(1)(m) defines foreign limited liability partnership "as a limited liability partnership formed, incorporated, or registered outside India which established a place of business within India". Foreign LLP can become a partner in an Indian LLP.

## 5. ADVANTAGES OF LLP FORM

LLP form is a form of business model which:

- Is organised and operates on the basis of an agreement.
- Provides flexibility without imposing detailed legal and procedural requirements.
- Easy to form.

- d) All partners enjoy limited liability.
- e) Easy to dissolve.

### Partners [Section 5]

Any individual or body corporate may be a partner in a LLP. However, an individual shall not be capable of becoming a partner of a LLP, if—

- a) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;
- b) he is an undischarged insolvent; or
- c) he has applied to be adjudicated as an insolvent and his application is pending.



The following persons can become partner in LLP:

- (i) Individuals (Resident Indians including Non-Resident Indians & Overseas Citizen of India as well as foreign nationals) \*
- (ii) Limited Liability Partnerships
- (iii) Companies (including foreign companies) \*
- (iv) Foreign Limited Liability Partnerships\*
- (v) Limited Liability Partnerships incorporated outside India
- (vi) Foreign Companies

Co-operative society and corporation sole cannot become partner in a LLP. \*In case of introduction of capital / acquisition of existing stake in LLP by Persons resident outside India (other than NRIs & OCIs investing on a non repatriation basis), the Foreign Direct Investment (FDI) compliances shall have to be undertaken by the LLP in which such investment is made.

### Minimum number of Partners [Section 6]

- a) Every LLP shall have at least two partners.

- b) If at any time the number of partners of a LLP is reduced below two and the LLP carries on business for more than six months while the number is so reduced, the person, who is the only partner of the LLP during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the LLP incurred during that period.

### Designated Partners [Section 7]

- a) Every LLP shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. Provided, if in LLP, all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such LLP or nominees of such body corporate shall act as designated partners.

**Example:** A LLP has three partners, one individual i.e., Mr. X and two bodies corporates viz. M/s XYZ Ltd and M/s ABC Ltd. In this case Mr. X and one nominee of any body's corporate shall be designated partners.

**Example:** A LLP by the name SMY LLP has three partners namely 1. SI Limited, 2. MIS Limited, 3. YI Private Limited. As there is no individual as partner in LLP, nominees of any two said body corporates shall act as designated partners.

**Resident in India:** For the purposes of this section, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred twenty days during the financial year.

- b) If the incorporation document
- specifies who are to be designated partners, such persons shall be designated partners on incorporation; or
  - states that each of the partners from time to time of LLP is to be designated partners, every partner shall be a designated partner.
  - any partner may become a designated partner by and in accordance with the LLP Agreement and a partner may cease to be a designated partners in accordance with LLP agreement.
- c) An individual shall not become a designated partner in any LLP unless he has given his prior consent to act.
- d) Every LLP shall file with the Registrar the particulars of every individual who has given his consent to act as designated partners within 30 days of his appointment.

- e) Every designated partner of the LLP shall obtain a Designated Partner Identification Number (DPIN) from the Central Government and the provisions of sections 153 to 159 of the Companies Act, 2013 shall apply mutatis mutandis for the said purpose.

### Liabilities of Designated Partners [Section 8]

Unless expressly provided otherwise in this Act, a designated partner shall be—

- a) Responsible for the doing of all acts, matters and things as are required to be done by the limited liability partnership in respect of compliance of the provisions of this Act including filing of any document, return, statement and the like report pursuant to the provisions of this Act and as may be specified in the limited liability partnership agreement; and
- b) Liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

### Changes in Designated Partners [Section 9]

A limited liability partnership may appoint a designated partner within 30 days of a vacancy arising for any reason and provisions of sub-section (4) and sub-section (5) of section 7 shall apply in respect of such new designated partner, provided that if no designated partner is appointed, or if at any time there is only one designated partner, each partner shall be deemed to be a designated partner.

### Punishment for contravention of sections 7 and 9 [Section 10]

- a) If the LLP contravenes the provisions of sub-section (1) of section 7 (meaning that the number of designated partners are less than two or none of the designated partner is a resident in India), the LLP and its every partner shall be liable to a penalty of ₹10,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹1,00,000 for LLP and ₹50,000 for every partner of such LLP.
- b) If the LLP contravenes the provisions of sub-section (4) of section 7 (failure to file the consent of appointment of designated partner within 30 days of his appointment), the LLP and its every designated partner shall be liable to a penalty of ₹5,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹50,000 for LLP and ₹25,000 for every designated partner.
- c) If the LLP contravenes the provisions of sub-section (5) of section 7 or section 9, the LLP and its every partner shall be liable to a penalty of ₹10,000 and in case of continuing contravention, with further penalty of ₹100 per day subject to maximum ₹1,00,000 for LLP and ₹50,000 for every partner of such LLP.

## 6. INCORPORATION OF LLP

### Incorporation Document [Section 11]

a) For a LLP to be incorporated:

- i) two or more persons associated for carrying on a lawful business with a view to earn profit shall subscribe their names to an incorporation document.
- ii) the incorporation document shall be filed in such manner and with such fees, as may be prescribed with the Registrar of the State in which the registered office of the LLP is to be situated.

iii) **Statement to be filed:**

there shall be filed along with the incorporation document, a statement in the prescribed form:

- made by either an advocate, or a Company Secretary or a Chartered Accountant or a Cost Accountant, who is engaged in the formation of the LLP and
- by anyone who subscribed his name to the incorporation document,
- that all the requirements of this Act and the rules made thereunder have been complied with,
- in respect of incorporation and matters precedent and incidental thereto.

b) The incorporation document shall—

- i) be in a form as may be prescribed.
- ii) state the name of the LLP;
- iii) state the proposed business of the LLP;
- iv) state the address of the registered office of the LLP;
- v) state the name and address of each of the persons who are to be partners of the LLP on incorporation;
- vi) state the name and address of the persons who are to be designated partners of the LLP on incorporation;
- vii) contain such other information concerning the proposed LLP as may be prescribed.

c) If a person makes a statement as discussed above which he—

- i) knows to be false; or
- ii) does not believe to be true,  
shall be punishable (Penalty for false declaration)
  - with imprisonment for a term which may extend to 2 years and
  - with fine which shall not be less than ₹10,000 but which may extend to ₹5 Lakhs.

### Incorporation by Registration [Section 12]

- a) When the requirements imposed by clauses (b) and (c) of sub-section (1) of section 11 have been complied with, the Registrar shall retain the incorporation document and, unless the requirement imposed by clause (a) of that sub-section has not been complied with, he shall, within a period of 14 days—
- (i) register the incorporation document; and
  - (ii) give a certificate that the LLP is incorporated by the name specified therein.
- b) The Registrar may accept the statement delivered under clause (c) of subsection (1) of section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub-section has been complied with.
- c) The certificate issued under clause (b) of sub-section (1) shall be signed by the Registrar and authenticated by his official seal.
- d) The certificate shall be conclusive evidence that the LLP is incorporated by the name specified therein.

### Registered Office of LLP and Change therein [Section 13]

- a) Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.
- b) A document may be served on a LLP or a partner or designated partner thereof by sending it by post under a certificate of posting or by registered post or by any other manner, as may be prescribed, at the registered office and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.
- c) A LLP may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.
- d) If the LLP contravenes any provisions of this section, the LLP and its every partner shall be punishable with penalty of ₹ 500 per day subject to maximum ₹ 50,000.



### Effect of registration [Section 14]

On Registration, LLP shall by its name, be capable of -

- a) Suing and being sued;
- b) Acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible.
- c) Having a common seal, if it decides to have one; and
- d) Doing and suffering other acts and things as bodies corporate may lawfully do and suffer.



### Name [Section 15]

- a) Every limited liability partnership shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name.
- b) No LLP shall be registered by a name which, in the opinion of the Central Government is—
- (i) undesirable; or
  - (ii) identical or too nearly resembles to that of any other LLP or a company or a registered trademark of any other person under the Trademarks Act, 1999.

Limited Liability  
Partnership  
LLP

### Reservation of name [Section 16]

- a) A person may apply in such form and manner and accompanied by such fee as may be prescribed to the Registrar for the reservation of a name set out in the application as—
- (i) the name of a proposed LLP; or
  - (ii) the name to which a LLP proposes to change its name.
- b) Upon receipt of an application under sub-section (1) and on payment of the prescribed fee, the Registrar may, if he is satisfied, subject to the rules prescribed by the Central Government in the matter, that the name to be reserved is not one which may be rejected on any ground referred to in sub-section (2) of section 15, reserve the name for a period of 3 months from the date of intimation by the Registrar.

### Rectification of name of LLP [Section 17]

- a) Notwithstanding anything contained in sections 15 and 16, if through inadvertence, or otherwise, the LLP, on its first registration or on its registration by new name, is registered by a name which is identical with or too nearly resembles to—
- i) that of any other LLP or a company; or
  - ii) a registered trademark of a proprietor under the Trademarks Act, 1999 as likely to be mistaken, then on an application of such LLP or proprietor referred to in clauses (a) and (b) respectively or a company, the Central Government may direct such LLP to change its name or new name within a period of 3 months from the date of issue of such direction,

Provided that an application of the proprietor of the registered trademarks shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of the LLP under this Act.

- b) Where an LLP changes its name or obtains new name, it shall within a period of 15 days from the date of such change, give notice of the change to Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and within 30 days of such change in the certificate of incorporation, such LLP shall change its name in the LLP agreement.
- c) If the LLP is in default in complying with any direction given under subsection (1), the Central Government shall allot a new name to the LLP and the Registrar shall enter the new name in the register of LLP in place of the old name and issue a fresh certificate of incorporation with new name.

Provided that nothing contained in this sub-section shall prevent a LLP from subsequently changing its name.

### STEPS TO INCORPORATE LLP

#### Step 1

**Reservation of name of LLP:** Applicant has to file e-Form RUNLLP, for ascertaining availability and reservation of the name of a LLP.

#### Step 2

**File e- Form FiLLiP for incorporating a new LLP:** contains the details of proposed LLP, details of partners/designated partners and their consent.

#### Step 3

Execution of **LLP Agreement** is mandatory as per Section 23 of Act. It will be filed in **e-Form 3** within 30 days of incorporation of LLP.

## 7. PARTNERS AND THEIR RELATIONS

### Eligibility to be partners [Section 22]

### Relationship of partners [Section 23]

- a) Save as otherwise provided by this Act, the mutual rights and duties of the partners of a LLP, and the mutual rights and duties of a LLP and its partners, shall be governed by the LLP agreement between the partners, or between the LLP and its partners.
- b) The LLP agreement and any changes, if any, made therein shall be filed with the Registrar in such form, manner and accompanied by such fees as may be prescribed.

- c) An agreement in writing made before the incorporation of a LLP between the persons who subscribe their names to the incorporation document may impose obligations on the LLP, provided such agreement is ratified by all the partners after the incorporation of the LLP.
- d) In the absence of agreement as to any matter, the mutual rights and duties of the partners and the mutual rights and duties of the LLP and the partners shall be determined by the provisions relating to that matter as are set out in the First Schedule.

### Cessation of partnership interest [Section 24]

- a) A person may cease to be a partner of a LLP in accordance with an agreement with the other partners or, in the absence of agreement with the other partners as to cessation of being a partner, by giving a notice in writing of not less than 30 days to the other partners of his intention to resign as partner.
- b) A person shall cease to be a partner of a LLP—
  - i) on his death or dissolution of the LLP; or
  - ii) if he is declared to be of unsound mind by a competent court; or
  - iii) if he has applied to be adjudged as an insolvent or declared as an insolvent.
- c) Where a person has ceased to be a partner of a LLP the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless—
  - i) the person has notice that the former partner has ceased to be a partner of the LLP; or
  - ii) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.
- d) The cessation of a partner from the LLP does not by itself discharge the partner from any obligation to the LLP or to the other partners or to any other person which he incurred while being a partner.
- e) Where a partner of a LLP ceases to be a partner, unless otherwise provided in the LLP agreement, the former partner or a person entitled to his share in consequence of the death or insolvency of the former partner, shall be entitled to receive from the LLP—
  - i) an amount equal to the capital contribution of the former partner actually made to the LLP; and
  - ii) his right to share in the accumulated profits of the LLP, after the deduction of accumulated losses of the LLP, determined as at the date the former partner ceased to be a partner.
- f) A former partner or a person entitled to his share in consequence of the death or insolvency of the former partner shall not have any right to interfere in the management of the LLP.

### Registration of changes in partners [Section 25]

- a) Every partner shall inform the LLP of any change in his name or address within a period of 15 days of such change.
- b) A LLP shall—
- where a person becomes or ceases to be a partner, file a notice with the Registrar within 30 days from the date he becomes or ceases to be a partner; and
  - where there is any change in the name or address of a partner, file a notice with the Registrar within 30 days of such change.
- c) A notice filed with the Registrar under sub-section (2)—
- shall be in such form and accompanied by such fees.
  - shall be signed by the designated partner of the LLP and authenticated in a manner as may be prescribed; and
  - if it relates to an incoming partner, shall contain a statement by such partner that he consents to becoming a partner, signed by him and authenticated in the manner as may be prescribed.
- d) If the LLP contravenes the provisions of sub-section (2), the LLP and every designated partner of the LLP shall be liable to penalty of ₹10,000.
- e) If any partner contravenes the provisions of sub-section (1), such partner shall be liable to penalty of ₹10,000.
- f) Any person who ceases to be a partner of a LLP may himself file with the Registrar the notice referred to in sub-section (3) if he has reasonable cause to believe that the LLP may not file the notice with the Registrar and in case of any such notice filed by a partner, the Registrar shall obtain a confirmation to this effect from the LLP unless the LLP has also filed such notice. However, where no confirmation is given by the LLP within 15 days, the registrar shall register the notice made by a person ceasing to be a partner under this section.

## 8. EXTENT AND LIMITATION OF LIABILITY OF LLP AND PARTNER

**Partner as agent [Section 26]:** Every partner of a LLP is, for the purpose of the business of the LLP, the agent of the LLP, but not of other partners.

### **Extent of liability of LLP [Section 27]**

- a) A LLP is not bound by anything done by a partner in dealing with a person if—
- the partner in fact has no authority to act for the LLP in doing a particular act; and
  - the person knows that he has no authority or does not know or believe him to be a partner of the LLP.

- b) The LLP is liable if a partner of a LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the LLP or with its authority.
- c) An obligation of the LLP whether arising in contract or otherwise, shall be solely the obligation of the LLP.
- d) The liabilities of the LLP shall be met out of the property of the LLP.

#### Extent of liability of partner [Section 28]

- a) A partner is not personally liable, directly or indirectly for an obligation referred to in sub-section (3) of section 27 solely by reason of being a partner of the LLP.
- b) The provisions of sub-section (3) of section 27 and sub-section (1) of this section shall not affect the personal liability of a partner for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the LLP.

#### Holding out [Section 29]

- a) Any person,
  - i) who by words spoken or written or by conduct,
  - ii) represents himself, or knowingly permits himself to be represented to be a partner in a LLP.
  - iii) is liable to any person.
  - iv) who has on the faith of any such representation?
  - v) given credit to the LLP, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.However,
  - vi) where any credit is received by the LLP as a result of such representation,
  - vii) the LLP shall,
  - viii) without prejudice to the liability of the person so representing himself or represented to be a partner,
  - ix) be liable to the extent of credit received by it or any financial benefit derived thereon.
- b) Where after a partner's death the business is continued in the same LLP name, the continued use of that name or of the deceased partner's name as a part thereof shall not by itself make his legal representative or his estate liable for any act of the LLP done after his death.

#### Unlimited liability in case of fraud [Section 30]

- a) In case of fraud:
  - i) In the event of an act carried out by a LLP, or any of its partners,
  - ii) with intent to defraud creditors of the LLP or any other person, or for any fraudulent purpose,

- iii) the liability of the LLP and partners who acted with intent to defraud creditors or for any fraudulent purpose.
- iv) shall be unlimited for all or any of the debts or other liabilities of the LLP.  
However, in case any such act is carried out by a partner, the LLP is liable to the same extent as the partner unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.
- b) Where any business is carried on with such intent or for such purpose as mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with
- (i) imprisonment for a term which may extend to five years and
  - (ii) with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5 Lakhs.
- c) Where a LLP or any partner or designated partner or employee of such LLP has conducted the affairs of the LLP in a fraudulent manner, then without prejudice to any criminal proceedings which may arise under any law for the time being in force, the LLP and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.  
However, such LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the LLP.



### Whistle blowing [Section 31]

- a) The Court or Tribunal may reduce or waive any penalty leviable against any partner or employee of a LLP, if it is satisfied that—
- i) such partner or employee of an LLP has provided useful information during investigation of such LLP; or
  - ii) when any information given by any partner or employee (whether or not during investigation) leads to LLP or any partner or employee of such LLP being convicted under this Act or any other Act.
- b) No partner or employee of any LLP may be discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against the terms and conditions of his LLP or employment merely because of his providing information or causing information to be provided pursuant to sub-section (1).

## **9. CONTRIBUTIONS**

### Form of contribution [Section 32]

- a) A contribution of a partner may consist of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.
- b) The monetary value of contribution of each partner shall be accounted for and disclosed in the accounts of the limited liability partnership in the manner as may be prescribed.

### Obligation to contribute [Section 33]

- a) The obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement.
- b) A creditor of a limited liability partnership, which extends credit or otherwise acts in reliance on an obligation described in that agreement, without notice of any compromise between partners, may enforce the original obligation against such partner.

## **10. FINANCIAL DISCLOSURES**

### Maintenance of books of account, other records and audit, etc. [Section 34]

- a) Proper Books of account:
  - i) The LLP shall maintain such proper books of account as may be prescribed.
  - ii) relating to its affairs for each year of its existence
  - iii) on cash basis or accrual basis and
  - iv) according to double entry system of accounting and
  - v) shall maintain the same at its registered office.
  - vi) for such period as may be prescribed.
- b) for such period as may be prescribed.
  - i) Every LLP shall,
  - ii) within a period of 6 months from the end of each financial year,
  - iii) prepare a Statement of Account and Solvency
  - iv) for the said financial year as at the last day of the said financial year
  - v) in such form as may be prescribed, and
  - vi) such statement shall be signed by the designated partners of the LLP.
- c) Every LLP shall file within the prescribed time, the Statement of Account and Solvency prepared pursuant to sub-section (2) with the Registrar every year in such form and manner and accompanied by such fees as may be prescribed.

- d) The accounts of LLP shall be audited in accordance with such rules as may be prescribed. However, the Central Government may, by notification in the Official Gazette, exempt any class or classes of LLP from the requirements of this sub-section.
- e) Penalty for non-compliance of provisions of sub-section 3- LLP -  
₹100 per day subject to maximum ₹1,00,000 Every Designated Partners -  
₹100 per day subject to maximum ₹50,000.
- f) Penalty for non-compliance of provisions of sub-section 1, 2 & 4 -  
LLP - not less than ₹25,000 which may extend to ₹ 5 Lakhs.  
Every designated partner -not less than ₹10,000 which may extend to ₹1 Lakh.

#### Accounting and auditing standards [Section 34A]

Central Government may, in consultation with the National Financial Reporting Authority constituted under Section 132 of the Companies Act 2013 –

- a) Prescribe the standards of accounting; and
- b) Prescribe the standards of auditing, as recommended by ICAI.

#### Annual Return [Section 35]

- a) Every LLP shall file an annual return duly authenticated with the Registrar within 60 days of closure of its financial year in such form and manner and accompanied by such fee as may be prescribed.
- b) Penalty for non-filing of annual return -  
LLP - ₹100 per day subject to maximum ₹1,00,000  
Every Designated Partners - ₹100 per day subject to maximum ₹50,000

#### INSPECTION OF DOCUMENTS KEPT BY REGISTRAR [SECTION 36]

The incorporation document, name of partners and changes, if any, made therein, Statement of Account and Solvency and annual return filed by each LLP with the Registrar shall be available for inspection by any person in such manner and on payment of such fee as may be prescribed.

#### PENALTY FOR FALSE STATEMENT [SECTION 37]

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement—

- a) which is false in any material particular, knowing it to be false; or
- b) which omits any material fact knowing it to be material,



He shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine which may extend to 5 lakh rupees but which shall not be less than 1 lakh rupees.

#### POWER OF REGISTRAR TO OBTAIN INFORMATION [SECTION 38]

- a) In order to obtain such information as the Registrar may consider necessary for the purposes of carrying out the provisions of this Act, the Registrar may require any person including any present or former partner or designated partner or employee of a limited liability partnership to answer any question or make any declaration or supply any details or particulars in writing to him within a reasonable period.
- b) In case any person referred to in sub-section (1) does not answer such question or make such declaration or supply such details or particulars asked for by the Registrar within a reasonable time or time given by the Registrar or when the Registrar is not satisfied with the reply or declaration or details or particulars provided by such person, the Registrar shall have power to summon that person to appear before him or an inspector or any other public officer whom the Registrar may designate, to answer any such question or make such declaration or supply such details, as the case may be.
- c) Any person who, without lawful excuse, fails to comply with any summons or requisition of the Registrar under this section shall be punishable with fine which shall not be less than two thousand rupees, but which may extend to twenty-five thousand rupees.

#### COMPOUNDING OF OFFENCES [SECTION 39]

- a) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government may compound any offence under this Act which is punishable with fine only, by collecting from a person reasonably suspected of having committed the offence, a sum which may extend to the amount of the maximum fine provided for the offence but shall not be lower than the minimum amount provided for the offence.
- b) Nothing contained in sub-section (1) shall apply to an offence committed by a limited liability partnership or its partner or its designated partner within a period of three years from the date on which similar offence committed by it or him was compounded under this section.

*Explanation.* —For the removal of doubts, it is hereby clarified that any second or subsequent offence committed after the expiry of the period of three years from the date on which the offence was previously compounded, shall be deemed to be the first offence.

- c) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Regional Director or any other

officer not below the rank of Regional Director authorised by the Central Government, as the case may be.

- d) Where any offence is compounded under this section, whether before or after the institution of any prosecution, intimation thereof shall be given to the Registrar within a period of seven days from the date on which the offence is so compounded.
- e) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence.
- f) Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which prosecution is pending and on such notice of the compounding of the offence being given, the offender in relation to which the offence is so compounded shall be discharged.
- g) The Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, while dealing with the proposal for compounding of an offence may, by an order, direct any partner, designated partner or other employee of the LLP to file or register, or on payment of fee or additional fee as required to be paid under this Act, such return, account or other document within such time as may be specified in the order
- h) Notwithstanding anything contained in this section, if any partner or designated partner or other employee of the LLP who fails to comply with any order made by the Regional Director or any other officer not below the rank of Regional Director authorised by the Central Government, under subsection (7), the maximum amount of fine for the offence, which was under consideration Regional Director or such authorised officer for compounding under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

## **11. ASSIGNMENT AND TRANSFER OF PARTNERSHIP RIGHTS**

### **PARTNER'S TRANSFERABLE INTEREST [SECTION 42]**

- a) The rights of a partner are transferable either wholly or in part.
- b) It does not by itself cause the disassociation of the partner or a dissolution and winding up of the limited liability partnership.
- c) The transfer of right pursuant to this section does not, by itself, entitle the transferee or assignee to participate in the management or conduct of the activities of the limited liability partnership, or access information concerning the transactions of the limited liability partnership.

## **12. CONVERSION INTO LLP**

**Conversion from firm into LLP [Section 55]:** The Second Schedule.

**Conversion from private company into LLP [Section 56]:** The Third Schedule.

**Conversion from unlisted public company into LLP [Section 57]:** The Fourth Schedule.

### **Registration and effect of conversion [Section 58]**

- a) The Registrar, on satisfying issue a certificate of registration in such form as the Registrar may determine stating that the LLP s, on and from the date specified in the certificate,
- b) The LLP shall, within 15 days of the date of registration, inform the concerned Registrar of Firms or Registrar of Companies.
- c) Upon such conversion, the partners of the firm, the shareholders of private company or unlisted public company, as the case may be, the LLP to which such firm or such company has converted, and the partners of the LLP shall be bound by the respective Schedules, as the case may be, applicable to them.
- d) Upon such conversion, on and from the date of certificate of registration, the effects of the conversion shall be such as specified in the respective schedules, as the case may be.

**Effect of Registration:** Notwithstanding anything contained in any other law for the time being in force, on and from the date of registration specified in the certificate of registration issued under the respective Schedule, as the case may be, —

- a) there shall be a LLP by the name specified in the certificate of registration registered under this Act.
- b) all tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the firm or the company, as the case may be, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed; and
- c) the firm or the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be.

### **FOREIGN LLP**

#### **Foreign limited liability partnerships [Section 59]**

The Central Government may make rules for provisions in relation to establishment of place of business by foreign LLP within India and carrying on their business therein by applying or incorporating, with

such modifications, as appear appropriate, the provisions of the Companies Act, 2013 or such regulatory mechanism with such composition as may be prescribed.

### **13. COMPROMISE, ARRANGEMENT OR RECONSTRUCTION OF LIMITED LIABILITY PARTNERSHIPS**

#### Compromise or arrangement of limited liability partnerships [Section 60]

- a) Where a compromise or arrangement is proposed—
- i) between a limited liability partnership and its creditors; or
  - ii) between a limited liability partnership and its partners,

the Tribunal may, on the application of the limited liability partnership or of any creditor or partner of the limited liability partnership, or, in the case of a limited liability partnership which is being wound up, of the liquidator, order a meeting of the creditors or of the partners, as the case may be, to be called, held and conducted in such manner as may be prescribed or as the Tribunal directs.

- b) If a majority representing three-fourths in value of the creditors, or partners, as the case may be, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal, by order be binding on all the creditors or all the partners, as the case may be, and also on the limited liability partnership, or in the case of a limited liability partnership which is being wound up, on the liquidator and contributories of the limited liability partnership:

Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the limited liability partnership or any other person by whom an application has been made under sub-section (1) has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the limited liability partnership, including the latest financial position of the limited liability partnership and the pendency of any investigation proceedings in relation to the limited liability partnership.

- c) An order made by the Tribunal under sub-section (2) shall be filed by the limited liability partnership with the Registrar within thirty days after making such an order and shall have effect only after it is so filed.
- d) If default is made in complying with the provisions of sub-section (3),
- LLP - 10000 + 100/DAY → 100000
- DP - 10000 + 100/DAY → 50000

#### Power of Tribunal to enforce compromise or arrangement (Section 61)

- a) Where the Tribunal makes an order under section 60 sanctioning a compromise or an arrangement in respect of a limited liability partnership, it—
- i) shall have power to supervise the carrying out of the compromise or an arrangement; and
  - ii) may, at the time of making such order or at any time, thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.
- b) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 60 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the limited liability partnership, make an order for winding up the limited liability partnership, and such an order shall be deemed to be an order made under section 64 of this Act.

### Provisions for facilitating reconstruction or amalgamation of limited liability partnerships

#### [Section 62]

- a) Where an application is made to the Tribunal under section 60 for sanctioning of a compromise or arrangement proposed between a limited liability partnership and any such persons as are mentioned in that section, and it is shown to the Tribunal that—
- i) compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any limited liability partnership or limited liability partnerships, or the amalgamation of any two or more limited liability partnerships; and
  - ii) under the scheme the whole or any part of the undertaking, property or liabilities of any limited liability partnership concerned in the scheme (in this section referred to as a "transferor limited liability partnership") is to be transferred to another limited liability partnership (in this section referred to as the "transferee limited liability partnership"), the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provisions for all or any of the following matters, namely:—
    - the transfer to the transferee limited liability partnership of the whole or any part of the undertaking, property or liabilities of any transferor limited liability partnership.
    - the continuation by or against the transferee limited liability partnership of any legal proceedings pending by or against any transferor limited liability partnership.
    - the dissolution, without winding up, of any transferor limited liability partnership.
    - the provision to be made for any person who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement; and

- such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:  
such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out:

Provided that no compromise or arrangement proposed for the purposes of, or in connection with, a scheme for the amalgamation of a limited liability partnership, which is being wound up, with any other limited liability partnership or limited liability partnerships, shall be sanctioned by the Tribunal unless the Tribunal has received a report from the Registrar that the affairs of the limited liability partnership have not been conducted in a manner prejudicial to the interests of its partners or to public interest:

Provided further that no order for the dissolution of any transferor limited liability partnership under clause (iii) shall be made by the Tribunal unless the Official Liquidator has, on scrutiny of the books and papers of the limited liability partnership, made a report to the Tribunal that the affairs of the limited liability partnership have not been conducted in a manner prejudicial to the interests of its partners or to public interest.

- b) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to and vest in, and those liabilities shall be transferred to and become the liabilities of, the transferee limited liability partnership; and in the case of any property, if the order so directs, freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.
- c) Within thirty days after the making of an order under this section, every limited liability partnership in relation to which the order is made shall cause a certified copy thereof to be filed with the Registrar for registration.
- d) If default is made in complying with the provisions of sub-section (3)  
LCP - 10000 + 100/day -> 100000  
DP - 10000 + 100/Day -> 50000

## 14. WINDING UP AND DISSOLUTION

Winding up and dissolution [Section 63]: The winding up of a LLP may be either voluntary or by the Tribunal and LLP, so wound up may be dissolved.

Circumstances in which LLP may be wound up by Tribunal [Section 64]: A LLP may be wound up by the Tribunal:

- (i) if the LLP decides that LLP be wound up by the Tribunal.
- (ii) if, for a period of more than six months, the number of partners of the LLP is reduced below two.

- (iii) if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order.
- (iv) if the LLP has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or
- (v) if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

Rules for winding up and dissolution [Section 65]: The Central Government may make rules.

## 15. MISCELLANEOUS

Business Transactions of Partner with LLP [Section 66]: A partner may lend money to and transact other business with the LLP and has the same rights and obligations with respect to the loan or other transactions as a person who is not a partner.

Application of the Provisions of the Companies Act [Section 67]:

- a) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of the Companies Act, 1956 specified in the notification—
  - (i) shall apply to any LLP; or
  - (ii) shall apply to any LLP with such exception, modification and adaptation, as may be specified, in the notification.
- b) A copy of every notification proposed to be issued under sub-section (1)
  - i) shall be laid in draft before each House of Parliament, while it is in session,
  - ii) for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and
  - iii) if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification,
  - iv) the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

Payment of Additional Fee [Section 69]

Any document or return required to be registered or filed under this Act with Registrar, if, is not registered or filed in time provided therein, may be registered or filed after that time, on payment of such additional fee as may be prescribed in addition to any fee as is payable for filing of such document or return:

Provided that such document or return shall be filed after the due date of filing, without prejudice to any other action or liability under this Act:

Provided further that a different fee or additional fee may be prescribed for different classes of limited liability partnerships or for different documents or returns required to be filed under this Act or rules made thereunder.

### Enhanced Punishment [Section 70]

In case a limited liability partnership or any partner or designated partner of such limited liability partnership commits any offence, the limited liability partnership or any partner or designated partner shall, for the second or subsequent offence, be punishable with imprisonment as provided, but in case of offences for which fine is prescribed either along with or exclusive of imprisonment, with fine which shall be twice the amount of fine for such offence.

## **16. DIFFERENCES WITH OTHER FORMS OF ORGANISATION**

Distinction between LLP and Partnership Firm: The points of distinction between a limited liability partnership and partnership firm are tabulated as follows:

	Basis	LLP	Partnership firm
1.	<b>Regulating Act</b>	The limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932.
2.	<b>Body corporate</b>	It is a body corporate.	It is not a body corporate,
3.	<b>Separate legal entity</b>	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity.
4.	<b>Creation</b>	It is created by a legal process called registration under the LLP Act, 2008.	It is created by an agreement between the partners.
5.	<b>Registration</b>	Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can sue the third parties.
6.	<b>Perpetual succession</b>	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence continues forever.	The death, insanity, retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
7.	<b>Name</b>	Name of the LLP to contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.



8.	<b>Liability</b>	Liability of each partner limited to the extent to agreed contribution except in case of wilful fraud.	Liability of each partner is unlimited. It can be extended up to the personal assets of the partners.
9.	<b>Mutual agency</b>	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
10.	<b>Designated partners</b>	At least two designated partners and at least one of them shall be resident in India.	There is no provision for such partners under the Partnership Act, 1932.
11.	<b>Common seal</b>	It may have its common seal as its official signatures.	There is no such concept in partnership
12.	<b>Legal compliances</b>	Only designated partners are responsible for all the compliances and penalties under this Act.	All partners are responsible for all the compliances and penalties under the Act.
13.	<b>Annual filing of documents</b>	LLP is required to file:  (i) Statement of accounts and solvency (to be filed annually)  (ii) Annual return with the registration of LLP every year.	Partnership firm is not required to file any annual document with the registrar of firms.
14.	<b>Foreign partnership</b>	Foreign nationals can become a partner in a LLP.	Foreign nationals cannot become a partner in a partnership firm.
15.	<b>Minor as partner</b>	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

### DISTINCTION BETWEEN LLP AND LIMITED LIABILITY COMPANY

	<b>Basis</b>	<b>LLP</b>	<b>Limited Liability Company</b>
1.	<b>Regulating Act</b>	The LLP Act, 2008	The Companies Act, 2013.

2.	<b>Members/ Partners</b>	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company.
3.	<b>Internal governance structure</b>	The internal governance structure of a LLP is governed by contract agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013).
4.	<b>Name</b>	Name of the LLP to contain the word "Limited Liability partnership" or "LLP" as suffix.	Name of the public company to contain the word "limited" and Pvt. Co. to contain the word "Private limited" as suffix.
5.	<b>No. of members/ partners</b>	Minimum - 2 members  Maximum - No such limit on the members in the Act. The members of the LLP can be individuals/or body corporate through the nominees.	Private company: Minimum - 2 members Maximum 200 members public company: Minimum - 7 members Maximum - No such limit on the members. Members can be organizations, trusts, another business form or individuals.
6.	<b>Liability of members/ partners</b>	Liability of a partners is limited to the extent of agreed contribution in case of intention is fraud	Liability of a member is limited to the amount unpaid on the shares held by them
7.	<b>Management</b>	The business of the company is managed by the partners including the designated partners authorized in the agreement.	The affairs of the company are managed by board of directors elected by the shareholders.
8.	<b>Minimum number of directors/ designated partners</b>	Minimum 2 designated partners	Pvt. Co. - 2 directors Public co. - 3 directors



*Corporate Law*

## Ch. 3 U1:

### Preliminary

#### CHAPTER OVERVIEW

Preliminary chapter of the Act covers



#### 1. INTRODUCTION

The Companies Act, 2013 is an Act to consolidate and amend the law relating to companies. The legislation was necessitated to meet changes in the national and international economic environment and for expansion and growth of economy of our country. **The Companies Act, 2013** received the **assent** of the Hon'ble President of India on **29th August 2013** and was notified in the **Official Gazette** on **30th August 2013** for public information stating that different dates may be appointed for enforcement of different provisions of the Companies Act, 2013, through notifications.

The Companies Act, 2013 is rule based legislation with **470 sections** and seven schedules. The entire Act has been **divided into 29 chapters**. Each chapter has at least **one set of Rules**. The Companies Act, 2013 aims to improve corporate governance, simplify regulations and strengthen the interests of investors. Thus, this enactment makes our corporate regulations more contemporary

#### 2. SHORT TITLE, EXTENT, COMMENCEMENT AND APPLICATION

**Section 1** of the Companies Act, 2013 deals with the title of the Act according to which this Act may be called as the Companies Act, 2013. Further, section deals with the extent to the applicability of the Act. It says that the **Act shall extend to the whole of India**.

This Section furthermore states of the **applicability of the Act**. 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 or the Insurance Regulatory and Development Authority Act, 1999;
- c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 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.
- 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.

**Example:** Food Corporation of India (FCI), National Highway Authority of India (NHAI) etc.

**Note:** The term "except in so far as" shall mean excluding to the extent of i.e. if any provision of the Companies Act is inconsistent with any of the provisions of other Act (Insurance Act, Banking Regulation Act, Electricity Act, etc.) to which the company is regulated than that company shall comply with the provisions of respective Act/Acts to which it is governed and regulated by.

### 3. DEFINITIONS

Section 2 of the Companies Act, 2013 is a definition section. It provides various terminologies used in the Act. Definitional Sections or Clauses, are known as 'internal aids to construction' and can be of immense help in interpreting or construing the enactment or any of its parts. Also, according to clause 95 of section 2, words and expressions used and not defined in this Act but defined in the Securities Contracts (Regulation) Act, 1956 or the Securities and Exchange Board of India Act, 1992 or the Depositories Act, 1996 shall have the meanings respectively assigned to them in those Acts.

When a word or phrase is defined as having a particular meaning in the enactment, it is that meaning alone which must be given to it while interpreting Section of the Act unless there be anything repugnant in the context.

Section 21 states that- In this Act, unless the context otherwise requires,

1. **Abridged prospectus** means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf;



2. **Accounting standards** means the standards of accounting or any addendum thereto for companies or class of companies referred to in section 133;

**Section 133 of the Act deals with the Central Government to Prescribe Accounting Standards.** As per the section, the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

Section 133 is to be read with Rule 7 of the Companies (Accounts) Rules, 2014. Accordingly,

- a) The standards of accounting as specified under the Companies Act, 1956 shall be deemed to be the accounting standards until accounting standards are specified by the Central Government under section 133.
- b) Till the National Financial Reporting Authority\* is constituted under section 132 of the Act, the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India in consultation with and after
- c) examination of the recommendations made by the National Advisory Committee on Accounting Standards constituted under section 210A of the Companies Act, 1956.

Further, in exercise of the powers conferred by section 133, the Central Government in consultation with the National Advisory Committee on Accounting Standards prescribed that Companies (Accounting Standards) Rules, 2006 and the Companies (Indian Accounting Standards) Rules, 2015 may be followed. \*The Central Government hereby appoints the 1st October 2018 as the date of constitution of National Financial Reporting Authority.

3. **Alter or Alteration** includes the making of additions, omissions and substitutions;

4. **Articles means**- the articles of association of a company as originally framed, or

- a) as altered from **time to time**, or
- b) applied in pursuance of any **previous company law**, or
- c) applied in pursuance of this Act;

6 **Associate company**, in relation to another company, means a company in which that other company has a **significant influence**, but which is **not a subsidiary company** of the company having such influence and **includes a joint venture company**.

**Explanation.** — For the purpose of this clause, —

- a) the expression "significant influence" means control of **at least twenty per cent.** of total voting power, or control of or participation in business decisions under an agreement;

b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

Vide Circular dated 25/06/2014 it has been clarified that the shares held by a company in another company in a fiduciary capacity (a fiduciary is a person who holds a legal or ethical relationship of trust with one of more parties (persons or group of persons. Typically, a fiduciary prudently takes care of money or other assets for another person) shall not be counted for the purpose of determining the relationship of associate company

7. **Auditing standards** means the standards of auditing or any addendum thereto for companies or class of companies referred to in sub-section (10) of section 143.
8. **Authorised capital or Nominal capital** means such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company;
9. **Board of Directors or Board**, in relation to a company, means the collective body of the directors of the company;
10. **Body corporate or Corporation** includes a company incorporated outside India, but does not include—
- co-operative society registered under any law relating to cooperative societies; and
  - any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf
11. **Book and Paper and Book or Paper** include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;
13. **Books of account** includes records maintained in respect of—
- all sums of money received and expended by a company** and matters in relation to which the receipts and expenditure take place;
  - all sales and purchases of goods and services by the company;**
  - the assets and liabilities** of the company; and
  - the items of cost** as may be prescribed under section 1482 in the case of a company which belongs to any class of companies specified.
14. **Branch office**, in relation to a company, means any establishment described as such by the company;



15. **Called-up capital** means such part of the capital, which has been called for
16. **Charge** means 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;
17. **Chartered Accountant** means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 who holds a valid certificate of practice under sub-section (1) of section 6 of that Act;
18. **Chief Executive Officer (CEO)** means an officer of a company, who has been designated as such by it;
19. **Chief Financial Officer (CFO)** means a person appointed as the Chief Financial Officer of a company; These definitions of CEO & CFO should be read with section 2(51) and 203 which deals with the definition and appointment of Key Managerial Personnel (KMP) of the Companies Act, 2013.
20. **Company** means a company incorporated under this Act or under any previous company law.
21. **Company limited by guarantee** means a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up;
22. **Company limited by shares** means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.
23. **Contributory** means a person liable to contribute towards the assets of the company in the event of its being wound up.
- Explanation:** For the purpose of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory.
27. **Control** shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner; It is an inclusive definition and relevant for the provisions relating to subsidiary and holding companies.
30. **Debenture** includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not; Provided that— (a) the instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and (b) such



other instrument, as may be prescribed by the Central Government in consultation with the Reserve Bank of India, issued by a company, shall not be treated as debenture;

34. **Director** means a director appointed to the Board of a company;

35. **Dividend** includes any interim dividend;

36. **Document** includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form;

37. **Employees' stock option** means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;

38. **Expert** includes an engineer, a valuer, a Chartered Accountant, a Company Secretary, a Cost Accountant and any other person who has the power or authority to issue a certificate in pursuance of any law for the time being in force;

40. **Financial statement** in relation to a company, includes—

- a) a balance sheet as at the end of the financial year;
- b) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
- c) cash flow statement for the financial year;
- d) a statement of changes in equity, if applicable; and
- e) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv):

Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement.

### EXEMPTIONS

For private companies, the proviso to section 2(40) shall be read as follows:

"Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement;

**Explanation.** - For the purposes of this Act, the term "start-up" or "start-up company" means a private company incorporated under the Companies Act, 2013 or the Companies Act, 1956 and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry".

The exceptions, modifications and adaptations shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.

**41. Financial year**, in relation to any company or body corporate, means the period ending on the 31<sup>st</sup> day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up

Provided that where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

**43. Free reserves** mean such reserves which, as per the latest audited balance sheet of a company, are available for distribution as dividend: Provided that—

- a) any amount representing unrealised gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise, or
- b) any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value, shall not be treated as free reserves;

**44. Global Depository Receipt** means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

**45. Government company** means any company 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, and includes a company which is a subsidiary company of such a Government company; 5

**Explanation.** - For the purposes of this clause, the "paid-up share capital" shall be construed as "total voting power", where shares with differential

**Example:** X Industries Ltd. is a company in which 25% of shareholding is held by Central Government; 10% shareholding is held by Government of Maharashtra and 15% shareholding is held by Central Government and Government of Rajasthan. Here, X Industries Ltd. is not a government company as there is no compliance of minimum holding of paid-up share capital i.e. at least 51 % by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Government.

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

**Explanation.** - For the purposes of this clause, the expression "company" includes any body corporate.

For meaning of "subsidiary company" refer the definition given in section 2(87) of the Companies Act, 2013.

**50. Issued capital** means such capital as the company issues from time to time for subscription;

**51. Key Managerial Personnel**, in relation to a company, means—

- a) the Chief Executive Officer or the managing director or the manager;
- b) the company secretary
- c) the whole-time director;
- d) the Chief Financial Officer;
- e) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- f) such other officer as may be prescribed;



**Note:** However, till now no other officer has been prescribed.

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

Provided that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the Securities and Exchange Board, shall not be considered as listed companies

According to rule 2A of the Companies (Specification of definitions details) Rules, 20146, the following classes of companies shall not be considered as listed companies, namely: -

- a) Public companies which have not listed their equity shares on a recognized stock exchange but have listed their -
  - i) non-convertible debt securities issued on private placement basis in terms of SEBI.
  - ii) non-convertible redeemable preference shares issued on private placement basis in terms of SEBI
  - iii) both categories of (i) and (ii) above.
- b) Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;
- c) Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in sub-section (3) of section 23 of the Act.

**53. Manager** 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, by whatever name called, whether under a contract of service or not;

**54. Managing Director** 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.

**Explanation.** — For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as:

- i) the power to affix the common seal of the company to any document or
- ii) to draw and endorse any cheque on the account of the company in any bank or
- iii) to draw and endorse any negotiable instrument or
- iv) to sign any certificate of share or to direct registration of transfer of any share,

shall not be deemed to be included within the substantial powers of management;

**Explanation.** - For any individual to be called as managing director, an individual shall first be a director duly appointed by the Company under the provisions of the Companies Act, 2013. This also

implies that an individual who is not a director in the company cannot be appointed as Managing Director of that company.

**55. Member**, in relation to a company, means—

- a) **the subscriber to the memorandum** of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
- b) **every other person who agrees in writing to become a member of the company** and whose name is entered in the register of members of the company;
- c) **every person holding shares of the company** and whose name is entered as a beneficial owner in the records of a depository;

**56. Memorandum** means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;

**57. Net worth** means the aggregate value of the paid-up share capital and all reserves created out of the profits, securities premium account and debit or credit balance of profit and loss account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation;

**Example:** The statutory auditors of a company were required to issue a certificate on the net

**Note:** As per sec 2(57) of the Companies Act 2013, any reserves created out of revaluation of assets doesn't form part of net worth. The company fair valued its property, plant and equipment and took that to retained earnings.

Even if the company has taken the fair valuation to the retained earnings in its books of accounts, the resultant credit in reserves (by whatever name called) would be in the category of 'reserves created out of revaluation of assets' which is specifically excluded in the definition of 'net worth' in section 2 (57) and hence should be excluded by the company.

Further the auditors should also consider the matter related to accounting of this reserve separately at the time of audit of books of accounts of the company

worth of the company as per the requirement of the management as on 30th September 2020 computed as per the provision of section 2(57) of the Companies Act, 2013. The company had fair valued its property, plant and equipment in the current year which was mistakenly taken into retained earnings of the company in its books of accounts. Advise whether this fair valuation would be covered in the net worth of the company as per legal requirements.

**58. Notification** means a notification published in the Official Gazette and the expression "notify" shall be construed accordingly;

**59. 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;

**60. Officer** who is in default, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely: —

- a) whole-time director (WTD);
- b) key managerial personnel (KMP);
- c) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;
- d) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;
- e) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;
- f) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;
- g) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

**Example:** In a company, a default was committed with respect to the allotment of shares by the officers. In company there were no managing director, whole time director, a manager, secretary, a person charged by the Board with the responsibility of complying with the provisions of the Act, and neither any director/directors specified by the board. Therefore, in such situation, all the directors of the company may be treated as officers in default.

**62. One Person Company** means a company which has only one person as a member;

**63. Ordinary or special resolution** means an ordinary resolution, or as the case may be, special resolution referred to in section 114 (Ordinary and Special Resolution);

**64. Paid-up share capital or share capital paid-up** means as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called;

**65. Postal ballot** means voting by post or through any electronic mode; This definition is related to section 110 to be read with Rule 22 of the Companies (Management and Administration) Rules, 2014 specifying the procedure to be followed for conducting of business through postal ballot and provides the list of items of business which should be transacted only by means of voting through a postal ballot.

**66. Prescribed** means prescribed by rules made under this Act;

**68. Private company** means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, —

- a) restricts the right to transfer its shares;
- b) except in case of One Person Company, limits the number of its members to two hundred: Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

- i) persons who are in the employment of the company; an
- ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members; and
- c. prohibits any invitation to the public to subscribe for any securities of the company.

The requirement of having a minimum paid up share capital shall not apply to a section 8 company (Formation of companies with charitable objects, etc.) vide notification dated 5th June 2015. The above-mentioned exemption shall be applicable to a section 8 company which has not committed a default in filing its financial statements under section 137 of the Companies Act, 2013, or annual return under section 92 of the said Act with Registrar. [Vide amendment notification G.S.R. 584(E) dated 13th June 2017.]

**69. Promoter** means a person—

- a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92, or

- b) who has **control over the affairs of the company**, directly or indirectly whether as a shareholder, director or otherwise; or
- c) in accordance with whose **advice, directions or instructions** the Board of Directors of the company is accustomed to act:  
Provided that nothing in sub-clause shall apply to a person who is acting merely in a professional capacity.

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

**71. Public company** means a company which

- a) is not a private company; and
- b) has a minimum paid-up share capital as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles;

**Example:** A Pvt. Ltd. is wholly owned subsidiary of AB Ltd., a public company incorporated under the Companies Act, 2013. A Pvt. Ltd. wanted to avail exemptions as provided to private companies. In this case, since A Pvt. Ltd. is subsidiary of AB Ltd., which is a public company, therefore A Pvt. Ltd. will be deemed to be a public company and will be not allowed to avail exemptions provided to a private company.

The requirement of having a minimum paid up share capital shall not apply to a section 8 company vide notification dated 5th June 2015

**74. Register of companies** means the register of companies maintained by the Registrar on paper or in any electronic mode under this Act



**75. Registrar** means a Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, having the duty of registering companies and discharging various functions under this Act;

**76. Related party**, with reference to a company, means—

- a) a **director** or his relative;
- b) **key managerial personnel** or his relative;
- c) a **firm**, in which a director, manager or his relative is a partner;



- d) a **private company** in which a director or manager or his relative is a member or director;
- e) a **public company** in which a director or manager is a director and holds along with his relatives, more than two per cent of its paid-up share capital.
- f) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- g) any person on whose advice, directions or instructions a director or manager is accustomed to act: Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;
- h) any body corporate which is-
  - i) a holding, subsidiary or an associate company of such company;
  - ii) a subsidiary of a holding company to which it is also a subsidiary; or
  - iii) an investing company or the venturer of the company;

**Explanation.** - For the purpose of this clause, "the investing company or the venturer of a company" means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate.

- i) **such other person as may be prescribed;** As per Rule 3 given in the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of sub-clause.
- j) of clause (76) of section 2 of the Act, a **director (other than an independent director) or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party.**

**Example:** XYZ Pvt. Ltd. has two subsidiary companies, Y Pvt. Ltd. and Z Pvt. Ltd. Here as per the section 2(76)(viii)(B), Y Pvt. Ltd and Z Pvt. Ltd. are related parties. However, as per the Notification No. G.S.R. 464(E) dated 5th June, 2015, clause (viii) shall not apply with respect to section 188 to a private company. Therefore Y Pvt. Ltd and Z Pvt. Ltd are not related parties for the purpose of section 188. However, if Y Pvt. Ltd and Z Pvt. Ltd. have common directors, then they will be deemed to be related parties because of section 2(76)(iv).

**Example:** Now suppose, XYZ Ltd. a public company, has two subsidiary companies, Y Pvt. Ltd and Z Pvt. Ltd. Here as per section 2(71), a private company which is a subsidiary of a public company will be deemed to be a public company, so Y Pvt. Ltd and Z Pvt. Ltd will not be eligible to avail exemption under the Notification No. G.S.R. 464(E) dated 5th June, 2015. Therefore, as per section 2(76)(viii)(B), Y Pvt. Ltd and Z Pvt. Ltd are related parties. In addition, XYZ Ltd. will also be related Party to Y Pvt. Ltd and Z Pvt. Ltd.

**77 Relative**, with reference to any person, means anyone who is related to another, if—

- a) they are members of a Hindu Undivided Family;

- b) they are husband and wife; or
- c) one person is related to the other in such manner as may be prescribed.

According to Rule 4, List of Relatives:

- i) 1 "Father" includes step-father
- ii) 2 "Mother" includes the step-mother
- iii) 3 " Son" includes the step-son
- iv) 4 Son's wife.
- v) 5 Daughter.
- vi) 6" Daughter's" husband.
- vii) 7 "Brother" includes the step-brother.
- viii) 8 "Sister" includes the step-sister.

**78. Remuneration** means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income Tax Act, 1961

**84. Share** means a share in the share capital of a company and includes stock;

**85. Small company** means a company, other than a public company, —

- a) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
- b) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to—7

- i) a holding company or a subsidiary company;
- ii) a company registered under section 8; or
- iii) a company or body corporate governed by any special Act.

As per the Companies (Specification of Definitions Details) Rules, 2014/10, for the purposes of sub-clause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up capital and turnover of the **small company shall not exceed rupees four crore and rupees forty crore respectively.**

**Example:** H Ltd. is the holding company of S Pvt. Ltd. As per the last profit and loss account for the year ending 31st March, 2023 of S Pvt. Ltd., its turnover was to the extent of ` 1.50 crores; and paid up share capital was ` 40 lacs. Since S Pvt. Ltd., as per the turnover and paid up share capital norms, qualifies for the status of a 'small company' it wants to be categorized as 'small company'. S Pvt. Ltd. cannot be categorized as a 'small company' because it is the subsidiary of another company (H Ltd.). [Proviso to section 2(85)].

**86. Subscribed capital** means such part of the capital which is for the time being subscribed by the members of a company;

**87. Subsidiary company or Subsidiary**, in relation to any other company (that is to say the holding company), means a company in which the holding company—

- a) controls the composition of the Board of Directors; or
- b) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

**Explanation**—For the purposes of this clause, —

- a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;
- b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
- c) the expression "company" includes any body corporate;
- d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

**88. 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;

**89. Total voting power**, in relation to any matter, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all the members thereof or their proxies having a right to vote on that matter are present at the meeting and cast their votes;



**90. Tribunal** means the National Company Law Tribunal constituted under section 408;

**91. Turnover** means the gross amount of revenue recognised in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year;

92. Unlimited company means a company not having any limit on the liability of its members;

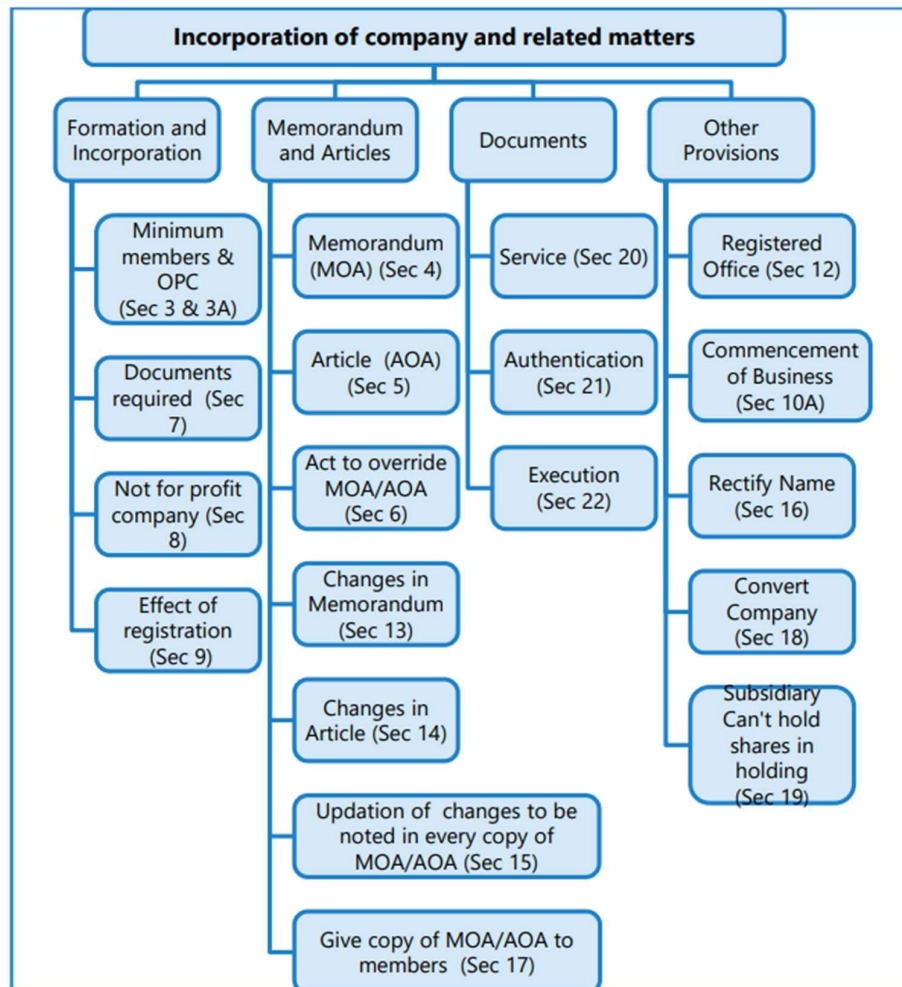
93. Voting right means the right of a member of a company to vote in any meeting of the company or by means of postal.



## Ch. 3 U2:

### Incorporation of Co. & matters incidental thereto

#### CHAPTER OVERVIEW



#### 1. INTRODUCTION TO INCORPORATION OF COMPANIES & PROMOTOR

A company is a separate legal entity from its members. It has perpetual succession and can be incorporated only for lawful purposes. Prior to incorporation, promotion activities are essential. Promotion signifies a number of business operations familiar to the commercial world by which a company is brought into existence.

Persons who undertake promotion activities in order to incorporate the company are generally known as promoters.

Promoter is one who undertakes to form a company with reference to a given project, and to set it going, and who takes the necessary steps to accomplish that purpose. To be a promoter, one need not necessarily be associated with the initial formation of the company; one who subsequently helps to arrange floating of its capital will equally be regarded as a promoter. Hence, "promoter" denotes any individual, association, partnership or a company that takes all the necessary steps to incorporate (create and mould) a company and set it going, in a fiduciary position.

### Illustration (True/False)

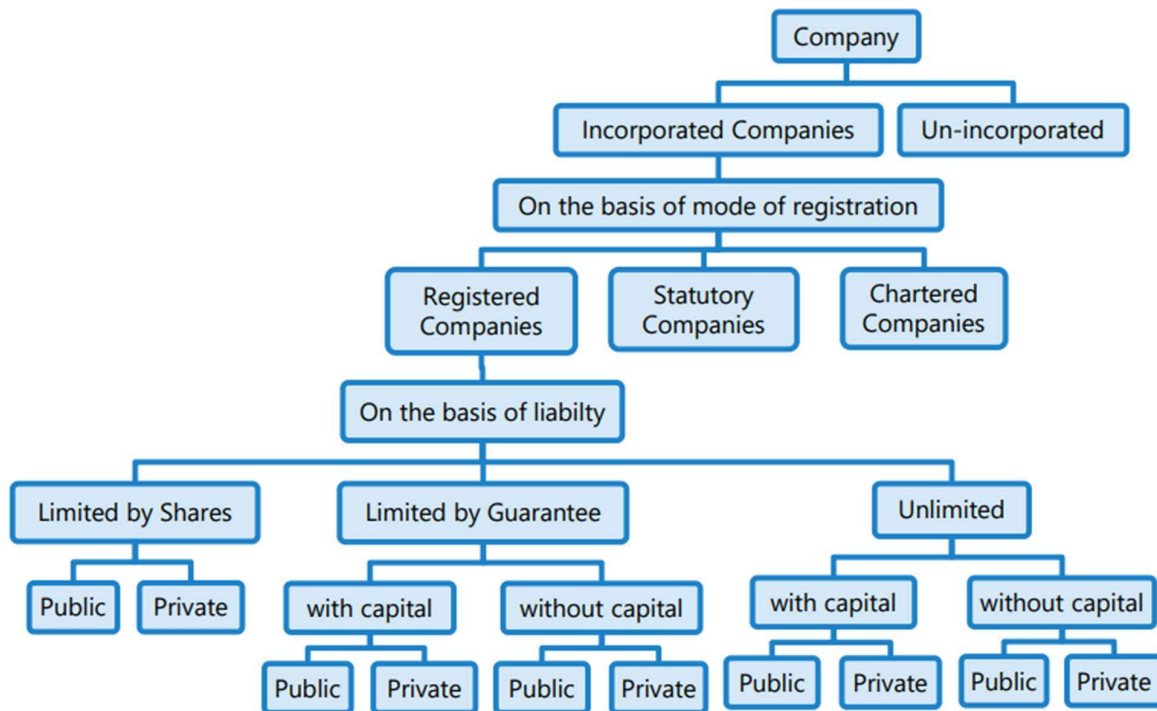
**Statement** - To be a promoter one necessarily be associated with the initial formation of the company.

**Answer** - False, one who subsequently helps company to keep going, raise fund & advice to board (other than in professional capacity) will equally be regarded as a promoter.

## 2. FORMATION OF COMPANY [SECTION 3]

Section 3 of the Act deals with registered companies.

### a) FORMS OF COMPANIES



Sec 3(1) provides that for lawful purpose, by subscribing their name to memorandum and complying with requirement of this Act;

- i) A public company may be formed by seven (7) or more persons
- ii) A private company may be formed by two (2) or more persons
- iii) A one person company (as private company) may be formed by one (1) person.

Sec 3 (2) provides that, company formed as specified above may be incorporated either as:

- i) Companies limited by shares; or
- ii) Companies limited by guarantee; or
- iii) Unlimited liability companies.

### **b) ONE PERSON COMPANY (OPC)**

The Companies Act, 2013 for the first time allowed the formation of company by just one person with limited liability, called one person company; such a company is described as a private company under section 3(1)(c).

#### Who can form one person company?

Only a natural person, other than minor; who is an Indian citizen and whether resident in India or otherwise shall be eligible to incorporate a One Person Company. Resident in India means a person who has stayed in India for a period of not less than one hundred and twenty days during the immediately preceding financial year.

OPC can't be incorporated or converted into a company under section 8 of the Act. Further, OPC can't carry out Non-Banking Financial Investment activities including investment in securities of any body-corporates.

#### Indicate Name & Consent Nominee

The memorandum of One Person Company shall also indicate the name of the natural person, other than minor; who is an Indian citizen, whether resident in India or otherwise (as nominee), along with his prior written consent in the Form No. INC-3, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company.

**Note:** This provision is to ensure perpetual succession of legal existence of OP

Form No. INC-32 (SPICe) along with consent of such nominee obtained in Form No. INC-3 and fee shall be filed with the registrar.

Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the above specified criteria (can be member of only one OPC) within a period of one hundred and eighty days.

#### Withdrawal of Consent by Nominee

Such other person (nominee) **may withdraw** his consent by giving a notice in writing to such sole member and to the One Person Company.

In this case, the sole member shall nominate another person as nominee within **fifteen days** of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written consent of such other person so nominated in Form No. INC-3.

### Replacing Nominee with another

The member **may change** the name of the person nominated by him at any time for **any reason** including in case of death or incapacity to contract of nominee and nominate another person (new nominee) after obtaining the prior consent of such another person in Form No. INC-3.

Member can do so by prior intimation in writing to the company. Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

**Example** - Rajesh has formed a 'One Person Company (OPC), wherein his wife Roopali is named as nominee. For the last two years, his wife Roopali is suffering from terminal illness and due to this hard fact, he wants to change her as nominee. He has a trusted and experienced friend Ramnivas who could be made nominee or his (Rajesh) son Rakshak who is of seventeen years of age. In the instant case, Rajesh can appoint his friend Ramnivas as nominee in his OPC and not Rakshak because Rakshak is a minor.

### When Nominee become Member

Where the sole member ceases to be the member and nominee become new member, then such new member shall nominate within fifteen days of becoming member, a person (new nominee) who shall in the event of his death or his incapacity to contract become the member of such company.

### Notice of change to Registrar

the company within thirty days of receipt of notice of withdrawal of consent by nominee, intimation of change of nominee from member, or cessation; shall file the notice with the Registrar of such withdrawal of consent, change or cessation respectively and intimate the name of such another person (new nominee) in Form No. INC-4 along with the fee.

### Additional reading

**Relaxations available to an OPC include**

- i) No cash-flow statement
- ii) annual return can be signed by the Director and not necessarily a Company Secretary,
- iii) if one director signs the audited financial statements and abridged form of director report may be prescribed.
- iv) Holding annual general meeting as required under section 96 is not necessary in case of OPC. Moreover, certain specific provisions related to general meetings and extraordinary general meetings, specified under sections 100 to 111 not applicable to OPC.
- v) Even relaxation is also there in convening board meetings section 173 requires an OPC to hold only one meeting of the Board of Directors in each half of a calendar year.
- vi) Vide section 137, the OPC are allowed to file financial statements within six months



### 3. MEMBERS SEVERALLY LIABLE IN CERTAIN CASES i.e. REDUCTION IN MINIMUM MEMBERSHIP [SECTION 3A]

The members are jointly liable for the debt of company, but they shall be severally liable for the payment of the debts of the company and may be severally sued therefore; if at any time:

- The number of members of a company is reduced below **seven (7)** and **two (2)** in case of a public and private company, respectively; and
- Such company carries on business for **more than six months** with reduced number of members; and
- Every such person who carries on business after those six months is cognizant (aware) of the fact that business is carried reduced members

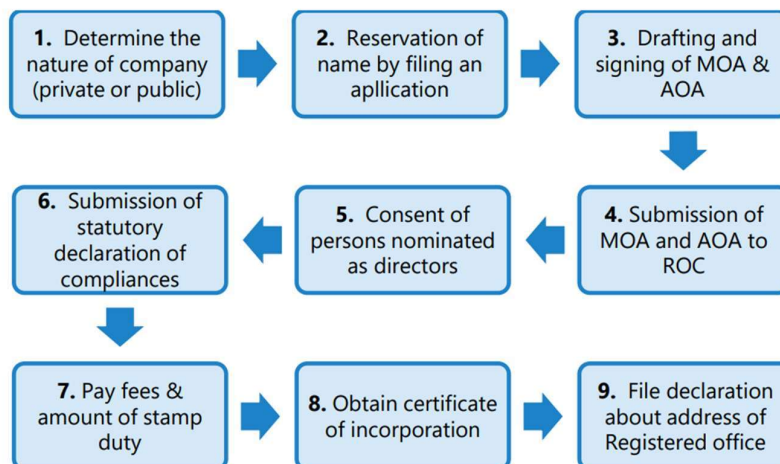
Such members are liable for the payment of the whole debts of the company contracted during that time (after elapse of six months)

**Example** - Amar, Akbar, and Anthony along with five of their friends were member of Harmony Limited. Amar and Akbar died on 18th August 2022, resultantly members count reduced to 6 and every one aware about it. Harmony limited continued its operation without increasing members. In March 2023, Company took loan for business operations, and defaulted in payment thereof. The lender of such loan can sue company, or Anthony or any of rest of five friends, because members shall severally liable for said loan in given case.

### 4. INCORPORATION OF COMPANY [SECTION 7]

Section 7 of the Act provides for the procedure to be followed for incorporation of a company.

#### Steps for Incorporation



## a) FILING OF THE DOCUMENTS AND INFORMATION WITH THE REGISTRAR [SUB-SECTION 1]

An **application** for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in **SPICE+**(Simplified Proforma for Incorporating company Electronically Plus: **INC- 32**) **along with the fee** accompanied by following documents and information

### The duly signed memorandum of association and articles of association

The memorandum (e-MOA in Form No. INC-33) and article (e-AOA in Form No. INC-34) of company so furnished shall be duly signed by all the subscribers to the memorandum in the manner prescribed by rule 13 of the Companies (Incorporation) Rules, 2014 as stated below:

- i) Each subscriber shall add his name, address, description & occupation, if any, in the presence of at least one witness who shall attest the signature, shall sign and add his name, address, description and occupation, if any.
- ii) Where a subscriber is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him.
- iii) Where the subscriber is a body corporate, the memorandum and articles of association shall be signed by director, officer or employee of the body corporate duly authorized in this behalf by a resolution of the board of directors.
- iv) Where the subscriber is a Limited Liability Partnership, it shall be signed by a partner of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership:

**Note:** In either case c or d stated above, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association

- v) Where subscriber to the memorandum is a foreign national residing outside India his signatures and address on the memorandum and articles of association and proof of identity shall be **notarized by a Notary (Public)** with a certificate. Further, if such person residing in a country outside the Commonwealth or which is not a party to the Hague Apostille Convention, 1961, the certificate of the Notary (Public) shall be **authenticated by a Diplomatic or Consular Officer**.
- vi) Where subscriber to the memorandum is a foreign national residing outside India and visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa. In case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable

### Declaration of Compliance by Professional & Director, Manager or Secretary of company

A declaration that all the requirements of this Act and the rules made thereunder by:

- i) an advocate, a chartered accountant, cost accountant or company secretary in practice who is engaged in the formation of the company and
- ii) a person named in the articles as director, manager or secretary of the company.

### Declaration by subscribers to the memorandum and persons named as the first directors

A declaration in Form No. INC-9 from each of the subscribers to the memorandum and from persons named as the first directors (if any) in the articles, stating that all the documents filed with the Registrar for registration of the company contain information that is **correct and complete and true** to the best of his knowledge and belief

- i) He is **not convicted** of any **offence** in connection with the promotion, formation or management of any company, or
- ii) He has **not been found guilty** of any **fraud or misfeasance** or of any **breach of duty** to any company under this Act or any previous company law during the last five years.

### Address for correspondence

The address for correspondence till its registered office is established.

### Particulars of persons named as the first directors

The particulars i.e. name, including surname or family name, the Director Identification Number (DIN), residential address, nationality and such other particulars including proof of identity of each person mentioned in the articles as first director of the company and **his interest** in other firms or bodies corporate along with **his consent** (Form No. DIR-2) to act as director of the company shall be filed in Form No. DIR-12 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014.

### Particulars of subscribers to the memorandum

The following particulars of every subscriber to the memorandum shall be filled;

- i) Name (including surname or family name) and recent Photograph affixed
- ii) Father's/Mother's name
- iii) Nationality, Proof of nationality in case the subscriber is a foreign national

- iv) Date and Place of Birth (District and State)
- v) Educational qualification and Occupation
- vi) Permanent Account Number
- vii) Email id and Phone number of Subscriber h. Permanent residential address and also Present address
- viii) Residential proof such as Bank Statement, Electricity Bill, Telephone / Mobile Bill, provided that Bank statement Electricity bill, Telephone or Mobile bill shall not be more than two months old.
- ix) Proof of Identity (For Indian Nationals - Voter's identity card, Passport copy, Driving License copy, Unique Identification Number (UIN) & for Foreign nationals and Non-Resident Indians - Passport)
- x) If the subscriber is already a director or promoter of a company(s), the particulars relating to name of the company; Corporate Identity Number;

Whether interested as a director or promoter Where the subscriber to the memorandum is a body corporate, then the following particulars shall be filed with the Registrar<sup>7</sup>

- i) The name of the body corporate and Corporate Identity Number of the Company or Registration number of the body corporate, if any
- ii) GLN, if any
- iii) The registered office address or principal place of business
- iv) E-mail Id
- v) If the body corporate is a company, certified true copy of the board resolution specifying inter alia the authorization to subscribe to the MOA
- vi) If the body corporate is a LLP or partnership firm, certified true copy of the resolution agreed to by all the partners specifying inter alia the authorization to subscribe to the MOA
- vii) In case of foreign bodies corporate, the details relating to the copy of certificate of incorporation of the foreign body corporate; & the registered office address.

As per rule 12 of the *Companies (Incorporation) Rules, 2014*

In case any of the objects of a company requires registration or approval from sectoral regulators such as the RBI and SEBI, then such registration or approval shall be obtained by the proposed

company before pursuing such objects and a declaration in this behalf shall be submitted at the stage of incorporation.

In case of a Company being incorporated as a Nidhi, the declaration by the Central Government under Section 406 of the Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the Company

### **b) ISSUE OF CERTIFICATE OF INCORPORATION ON REGISTRATION**

The Registrar shall issue a certificate of incorporation in the Form No. INC-11 to the effect that the proposed company is incorporated under this Act. Certificate of Incorporation shall mention permanent account number of the company where if it is issued by the Income-tax Department.

Earlier, the certificate of incorporation considered as conclusive proof, but as per the Companies Act, 2013, certificate of Incorporation is not conclusive proof of everything prior to incorporation being in order.

### **c) ALLOTMENT OF CORPORATE IDENTITY NUMBER (CIN)**

On and from the date mentioned in the certificate of incorporation, the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate of incorporation.

CIN is a 21 alpha-numeric digit based unique identification number, comprising data sections/elements that reveals the basis aspects about company.

#### **Example - Decode the CIN**

CIN of **Infosys Limited** is **L85110KA1981PLC013115**

The first character - **L** (reveals listing status, L for listed and U for unlisted, for instance Infosys is Listed one)

The next five digits - **85110**

The next two letters - **KA** (reveals the Indian state where the company is registered, for

for instance, KA is for Karnataka)

The next four digits - **1981** (reveals the year of incorporation of a company)

The next three characters - **PLC** (reveals the company classification - PLC for public, PTC for private, FTC for foreign, and GOI for government)

The last six digits - **013115** (reveals registration number with concerned ROC)

#### d) MAINTENANCE OF COPIES OF ALL DOCUMENTS AND INFORMATION

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

#### e) FURNISHING OF FALSE OR INCORRECT INFORMATION OR SUPPRESSION OF MATERIAL FACT AT THE TIME OF INCORPORATION (I.E. DURING INCORPORATION PROCESS)

If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action for fraud under section 447.

#### f) COMPANY ALREADY INCORPORATED BY FURNISHING ANY FALSE OR INCORRECT INFORMATION OR REPRESENTATION OR BY SUPPRESSING ANY MATERIAL FACT (i.e. POST INCORPORATION)

Where, at any time after the incorporation of a company, it is proved that the company has been got incorporated by

- i) furnishing any false or incorrect information or representation or
- ii) by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or
- iii) by any fraudulent action,

Then, the promoters, the persons named as the first directors of the company and the persons making declaration under this section shall each be liable for action for fraud under section 447.

#### g) ORDER OF THE TRIBUNAL

- i) Where a company has been got incorporated by
- ii) furnishing **false or incorrect information** or representation, or
- iii) by **suppressing any material fact** or information in any of the documents or declaration filed or made for incorporating such company or
- iv) by any **fraudulent action**,

Then, **the tribunal (NCLT)** on being satisfied that the situation so warrants, in response to an application made to it, may pass order as it may deem fit including

- i) **regulation of the management** of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- ii) direct that liability of the members shall **be unlimited; or**
- iii) direct **removal of the name** of the company from the register of companies; or d. winding up of the company;
- iv) winding up of the company;

Provided that before making any such order:

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

#### **4. FORMATION OF COMPANIES WITH CHARITABLE OBJECTS, ETC. [SECTION 8]**

##### **a) WHO CAN ISSUE AND GET THE LICENSE UNDER SECTION 8(1)?**

As per section 8, the Central Government (ROC in its behalf) may grant such a licence if it is proved to the satisfaction that a **person** or an **association of persons** proposed to be registered under this Act as a **limited company**.

- i) has in its **objects** the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
- ii) intends to apply its profits (if any) or other income in promoting its objects and,
- iii) intends to **prohibit payment** of any dividend to its members

##### **Note:**

- i) OPC cannot be incorporated as Sec (8) company.
- ii) a small company cannot be incorporated or converted into a section 8 company.
- iii) A firm may be a member of the company registered under section 8.
- iv) Despite, members liability is limited, the words 'Limited' or 'Private Limited' shall not be added to its name. But on registration, the company shall enjoy same privileges and obligations as of a limited company.
- v) Licence issued may on such conditions as Central Government (ROC) deems fit.

## b) REGISTRATION OF COMPANY USING LICENSE

### Application for registration

A person or an association of persons desirous of incorporating a company with limited liability under section 8(1), shall make an application to registrar in Form **SPICE+** (Simplified Proforma for Incorporating company Electronically Plus: INC32) along with the fee.

### Supporting document along with Application

The application furnished as specified above shall be accompanied by the following documents:

- i) The memorandum and articles of association of the proposed company in the Form No. INC-13 and Form No. INC-31, respectively;
- ii) An estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
- iii) The declaration in by an Advocate, a Chartered Accountant, cost accountant or Company Secretary in practice Form No. INC-14 and by each of the persons making the application in Form No. INC-15, that;
  - the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and
  - all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

## c) ALTERATION OF MEMORANDUM AND ARTICLES REQUIRES PRIOR PERMISSION OF GOVERNMENT

A company registered under this section requires prior permission from:

- i) Central Government (power delegated to **regional directors**) for alteration of its **memorandum** and
- ii) Central Government (power delegated to **ROCs**) for alteration of its **articles**.

## d) CONVERSION INTO ANY OTHER KIND OF COMPANY

A company registered under this section may convert itself into company of any other kind prescribed below:



- i) A company shall pass a **special resolution** at a general meeting for approving such conversion
- ii) An **explanatory statement** to notice of such general meeting must set-out the details on reason of such conversion.
- iii) The company shall file an application in Form No. INC-18 with the **Regional Director** with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for conversion. Also attach the proof of serving of the notice served by **registered post or hand delivery**, to:
  - the Chief Commissioner of Income Tax having jurisdiction over the company,
  - Income Tax Officer who has jurisdiction over the company,
  - the Charity Commissioner,
  - the Chief Secretary of the State in which the registered office of the company is situated,
  - any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating.
- iv) A **copy** of the application with annexures as filed with the Regional Director shall also be **filed with the Registrar**.
- v) The company shall, within a week from the date of submitting the application to the Regional Director, **publish a notice** at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in Form No. INC-19 and shall be published:
  - **at least once in a vernacular newspaper** in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in **English language** in an English newspaper having a wide circulation in that district; and
  - on the **website of the company**, if any, and as may be notified or directed by the Central Government
- vi) The company should have filed all its **financial statements and Annual Returns** upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Act up to the date of submitting the application to the Regional Director.
- vii) On receipt of the application, and on being satisfied, the Regional Director shall issue an order **approving the conversion of the company** into a company of any other kind subject to **such terms and conditions** as may be imposed in the facts and circumstances of each case.

- viii) Before imposing the conditions or rejecting the application, the company shall be given a reasonable **opportunity of being heard** by the Regional Director
- ix) On receipt of the approval of the Regional Director, the company shall convene a **general meeting** of its members to pass a **special resolution** for amending its **memorandum of association** and articles of association and the Company shall thereafter **file these with the Registrar** (with declaration to adhere conditions if any, imposed by Regional Director)
- x) On receipt of the documents referred above, the Registrar shall register the documents and **issue the fresh Certificate of Incorporation**

### e) **REVOCAATION OF LICENSE**

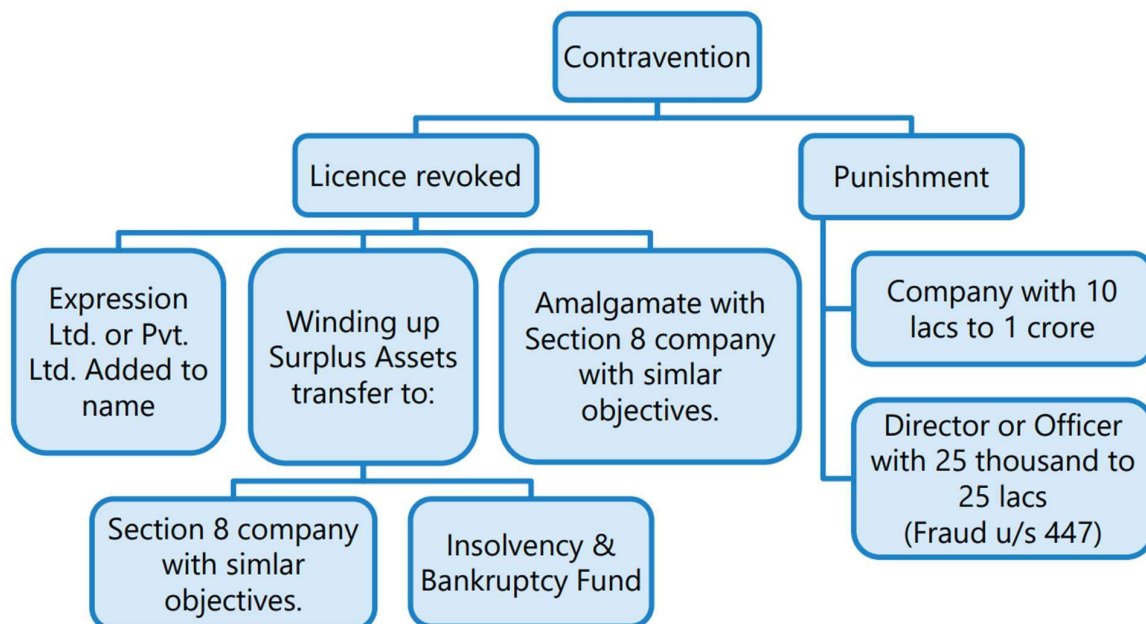
- i) The Central Government (power delegated to regional director) may by order revoke the licence of the company where;
- the company contravenes any of the requirements or the conditions of this sections subject to which a licence is issued or
  - the affairs of the company are conducted fraudulently, or in violation of the objects of the company or prejudicial to public interest, before such revocation a written notice must be served on such company and opportunity to be heard in the matter shall be given.
- ii) Where a licence is revoked and the Central Government is satisfied, that it is essential in the public interest; then after giving a reasonable opportunity of being heard; by order it may direct that
- Company be **wound up** under this Act. **Excess assets** on the winding up or dissolution, after the satisfaction of its debts and liabilities, may be transferred to;
  - **Another company** registered under this section and **having similar objects**, subject to such **conditions** as the Tribunal may impose, or
  - **May be sold and proceeds thereof credited to the Insolvency and Bankruptcy Fund** formed under section 224 of the Insolvency and Bankruptcy Code, 2016.
  - Company be **amalgamated** with another company registered under this section and **having similar objects**. The Central Government empowered with **overriding effects to provide the said amalgamation** to form single entity with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order

### f) **PENALTY/ PUNISHMENT IN CONTRAVENTION**

Penalty for offences under section 8 are summarised below:

Offence	Penalty
company makes any default in complying with any of the requirements laid down in this section	company shall, be punishable with fine varying from ten lakh rupees to one crore rupees
	directors and every officer of the company who is in default shall be punishable with fine varying from twenty-five thousand rupees to twenty-five lakh rupees
the affairs of the company were conducted fraudulently	every officer in default shall be liable for action under section 447

**g) FIGURE- SUMMARY OF SUB-SECTION 6 TO 11 OF SECTION**

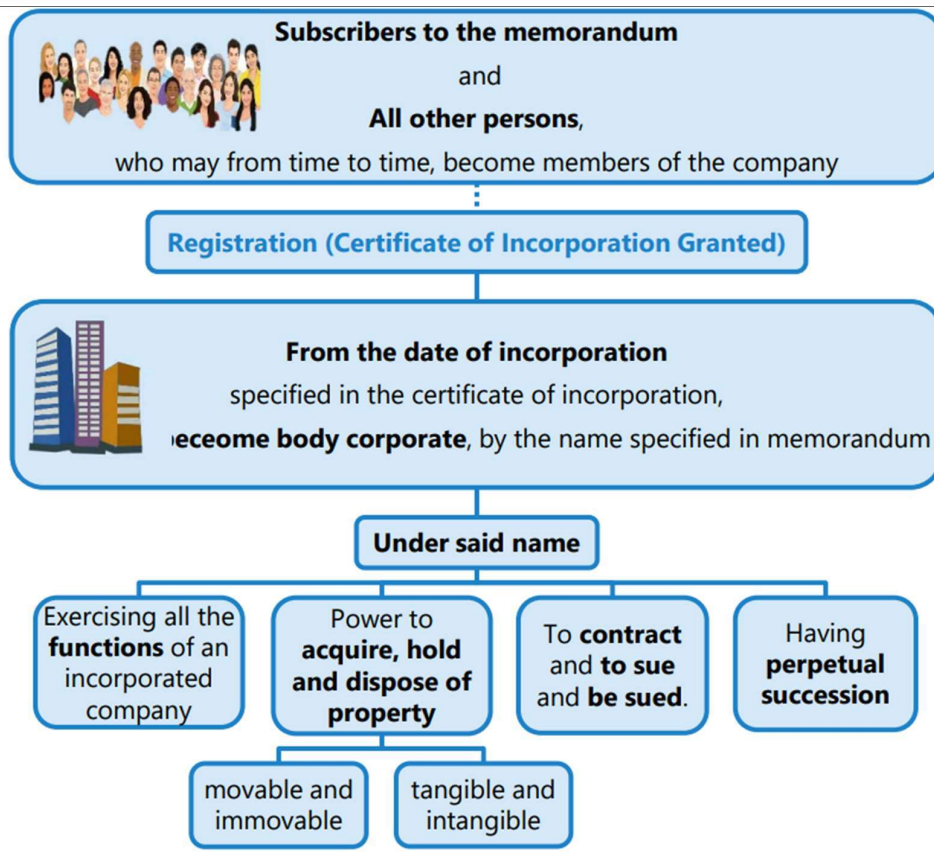


**Additional reading**

**Relaxations available to a Section 8 Company include**

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

**6. EFFECT OF REGISTRATION [SECTION 9]**



## 7. MEMORANDUM OF ASSOCIATION - MOA [SECTION 4]

- i) Memorandum of association (MOA) is the fundamental document for the formation of the company, hence considered as its charter or constitution.
- ii) Memorandum defines the relationship of the company with outsiders because it enables all those who deal with the company to know what its powers are and what activities it can engage in.
- iii) The memorandum shall contain the following clause
  - Name Clause
  - Situation Clause (also called registered office clause)
  - Objects Clause
  - Liability Clause
  - Capital Clause (applicable, if company is formed with share capital)
  - Association Clause or Subscription Clause (specifically drafted in case of OPC)
  - Nomination Clause (applicable, in case of OPC)

### a) NAME CLAUSE

The name of the company with the last word "Limited" in the case of a public limited company, or "Private Limited" in the case of a private limited company.

[Application for reserving name for proposed company](#)

A person may make an application in SPICe+ accompanied by fee, as provided by rules to the registrar for reservation of a name set out in the application as name of the proposed company.

Resubmission shall be allowed within 15 days, for rectification of defect, if any.

#### Application for reserving the name for the changing name of existing company [sub-section 4]

- i) A person may make an application, using web service RUN (Reserve Unique Name) along with fee to the Registrar for the reservation of a name set out in the application as the name to which the company proposes to change its name.
- ii) Resubmission shall be allowed within 15 days, for rectification of defect, if any.

#### Restriction regarding names and use of words & expressions therein [subsection 2 and 3]

Sub-section 2 states that the name mentioned in the memorandum **shall not** be;

- i) **Identical with or resemble** too nearly to the name of an existing company registered under this Act or any previous company law; or
- ii) Such, use of which by the company will constitute an **offence** under any law for the time being in force; or
- iii) Such, use of which by the company is **undesirable** in the opinion of the *Central Government* (this power of *Central Government* has been delegated to ROC) 13 Further, sub-section 3 provides, unless the **previous approval of the Central Government** has been obtained; a company **shall not** be registered with that name.
- iv) Which contains any word or expression that is likely to give the **impression that the company is in any way connected with, or having the patronage of**, the *Central Government*, any *State Government*, or any local authority, corporation or body constituted by the *Central Government* or any *State Government* under any law for the time being in force; or
- v) Which includes **words or expressions** namely Board; Commission; Authority; Undertaking; National; Union; Central; Federal; Republic; President; Rashtrapati; Small Scale Industries; Khadi and Village Industries Corporation; Financial Corporation and the like; Municipal;; Development Authority; Prime Minister or Chief Minister; Minister; Nation; Forest corporation; Development Scheme; Statute or Statutory; Court or Judiciary; Governor; Bureau; and the use of word Scheme with the name of *Government (s)*, *State*, *India*, *Bharat* or any *Government authority* or in any manner resembling with the schemes launched by *Central*, *State* or *local Governments* and authorities

**A name is said to 'resemble' when difference is only and only of**

- i) Plural or singular form of words in one or both names (Green Technology Ltd. is same as Greens Technology Ltd. and Greens Technologies Ltd.)
- ii) Type and case of letters, spacing between letters, and punctuation marks used in one or both names (ABC Ltd. is same as A.B.C. Ltd. and A B C Ltd.)
- iii) Use of different tenses in one or both names (Ascend Solutions Ltd. is same as Ascended Solutions Ltd. and Ascending Solutions Ltd.)
- iv) Slight variation in the spelling of the two names including a grammatical variation thereof (Disc Solutions Ltd. is same as Disk Solutions Ltd. but it is not same as Disco Solutions Ltd)
- v) Use of different phonetic spellings including use of misspelled words of an expression (Bee Kay Ltd is same as BK Ltd, Be Kay Ltd., B Kay Ltd., Bee K Ltd., B.K. Ltd. and Beee Kay Ltd)
- vi) Complete translation or transliteration, and not part thereof, of an existing name, in Hindi or in English (National Electricity Corporation Ltd. is same as Rashtriya Vidyut Nigam Ltd.)
- vii) Use of host name such as 'www' or a domain extension such as '.net', '.org', '.dot' or '.com' in one or both names (Ultra Solutions Ltd. is same as Ultrasolutions.com Ltd. But Supreme Ultra Solutions Ltd. is not the same as Ultrasolutions.com Ltd.)
- viii) The order of words in the names (Ravi Builders and Contractors Ltd. is same as Ravi Contractors and Builders Ltd.)
- ix) Use of the definite or indefinite article in one or both names (Congenial Tours Ltd. is same as A Congenial Tours Ltd. and The Congenial Tours Ltd. But Isha Industries Limited is not the same as Anisha Industries Limited.)
- x) Addition of the name of a place to an existing name, which does not contain the name of any place; (If Salvage Technologies Ltd. is an existing name, it is same as Salvage Technologies Delhi Ltd. But Retro Pharmaceuticals Ranchi Ltd. is not the same as Retro Pharmaceuticals Chennai Ltd.)
- xi) addition, deletion, or modification of numerals or expressions denoting numerals in an existing name, unless the numeral represents any brand (Thunder Services Ltd is

same as Thunder 11 Services Ltd and One Thunder Services Ltd.)

**Reservation of name [sub-section 5]**

Upon receipt of an application the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for **a period of twenty days** from the date of approval or such other period. Provided that in case of an application for reservation of name or for change of its name by an **existing company**, the Registrar may reserve the name for a period of **sixty days** from the date of approval

- i) While allotting names, the Registrar of Companies concerned should exercise due care to ensure that the names are not in contravention of the provisions of the **Emblems and Names** (Prevention of Improper Use) Act, 1950. It is necessary that Registrars are fully familiar with the provisions of the said Act.14
- ii) An application for extension of reservation of name under rule 9A of the Companies (Incorporation) Rules 2014 can be made before expiry of 20 days.
  - For another 20 days (total of 40 days) with fee of Rs 1000, which may be further extend by another 20 day (total of 60 days) with fee of Rs 2000. Or
  - For another 40 days (total of 60 days) with fee of 3000

#### Cancellation of reserved name [sub-section 5]

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

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

#### **b) SITUATION CLAUSE - SECTION 4 (1) (b)**

- i) It shall mention the name of state, where registered office is proposed to be situated.
- ii) The situation (place) of registered office is important from perspective of.
  - Establishing the domicile of company for the purpose of determining jurisdictions in context to compliance (ROC, RD etc.), judicial aspects (bench of NCLT, high court etc.), fiscal aspects (taxation), and for many other purposes.
  - Place at which the company's statutory books must normally be kept (in case of public company, general meeting also required to be conducted at registered office or in the city where it is situated).
  - Act as the address to which notices and other communications can be sent.

- A company shall, within thirty days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

### c) OBJECT CLAUSE & DOCTRINE OF ULTRA VIRES

- i) Section 4(1)(c), requires the memorandum of a company shall state the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.
- ii) Specified IFSC Public Company & IFSC Private company **shall state its** objects to do **financial services activities** as permitted under the Special Economic Zones Act, 2005 read with SEZ Rules, 2006 and any matter considered necessary in furtherance thereof **in accordance with license to operate**, from **International Financial Services Centre** located in an approved multi services Special Economic Zone, granted **by the RBI, SEBI, or IRDA**.
- iii) A company can't depart away to do anything beyond or outside its objects stated in memorandum and if any act done beyond that will be ultra vires and void, same can't be ratified even by the assent of the whole body of shareholders.
- iv) It is worth noting here that Memorandum of company can be altered to widen the scope of objects, but such alteration shall have prospective effect only; not the retrospective, hence an act once ultra-vires remains so ever.

A company may do anything which is **incidental to** and **consequential upon** the objects specified and such act will not be an ultra vires act. To illustrate for trade, one has rent or own a building, issue invoices, make and receive payments

**Note:** Acts ultra-vires to the authority of the directors may be ratified by the company. 15 Articles provide for regulations inside scope established by MOA, hence acts beyond (ultra-vires) the articles, can be ratified by the shareholders provided the relevant provisions are not beyond the memorandum. To illustrate; One of the directors is

authorised to issue cheque of Rs 10000, but he issued for Rs 12000; company can ratify to do so.

### Essence of the Doctrine of Ultra Vires

The Doctrine of Ultra Vires is meant to protect shareholders and the creditors of the company or anyone who deals with the company.



### Enunciation of Doctrine of Ultra Vires

The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, **Ashbury Railway Carriage and Iron Co. Ltd. v. Riche**.

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

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

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

### Effects of Doctrine of Ultra Vires

The key effect will be as under;

- i) Whenever an ultra vires act has been or is about to be undertaken, any member of the company can get an injunction to restrain it from proceeding with it.
- ii) Neither party (even outsider) can sue for enforcement or specific performance of such agreement. Reason explained under heading Constructive Notice.

### **d) LIABILITY CLAUSE**

Section 4(1)(d) requires, the memorandum of a company shall state;

- i) In the case of a company limited by shares the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
- ii) In the case of a company limited by guarantee, the amount up to which each member undertakes to contribute:
  - to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company

or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and

- to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves.

**Note:** Those shareholders who are members of the company at the time of its winding-up are included in list 'A'. They are primarily liable for making payment to the company at the time of its winding-up. While list 'B' consists of those persons who were the members of the company during the 12 months preceding the date of winding-up. B list contributories are liable to contribute if the amount realised from the contributories of list 'A' is not sufficient to discharge the liabilities of the company.

### e) CAPITAL CLAUSE

Section 4 (1) (e) (i) requires, in the case of a company having a share capital, the memorandum of a company shall state.

- i) The amount of share capital with which the company is to be registered (usually termed as authorised or nominal capital); and
- ii) The division thereof into shares of a fixed amount (i.e., face value and number of shares); and
- iii) The number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share.

### f) SUBSCRIPTION CLAUSE

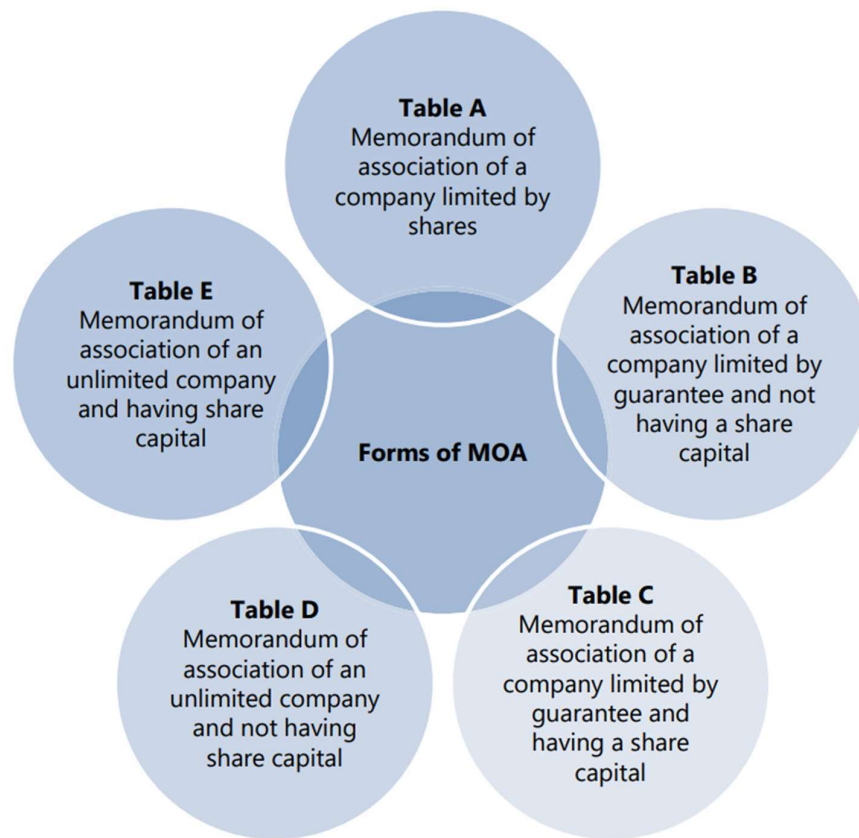
Section 4 (1) (e) (ii) requires, the memorandum of a company shall state, the number of shares each subscriber to the memorandum intends to take, indicated opposite his name, in the case of a company having a share capital.

### g) NOMINATION CLAUSE (ONLY IN CASE OF ONE PERSON COMPANY)

Section 4 (1) (f), requires, the memorandum of a company shall state the name of the person (nominee) who, in the event of death of the subscriber, shall become the member of the company, in the case of One Person Company.

**Note:** This provision is corresponding to first proviso to section 3 (1) already discussed earlier in this chapter.

## h) FORMS AND SCHEDULE RELATED TO MEMORANDM [SUB-SECTION 6]



- i) As per **section 399** of the Act, a memorandum is a public document. Consequently, every person entering into a contract with the company is presumed to have the knowledge of the conditions contained therein.
- ii) As per **section 4 (7)**, any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, shall not give any person a right to participate in the divisible profits of the company otherwise than as a member. If the contrary is done, it shall be void.

## 8. ARTICLES OF ASSOCIATION - AOA [SECTION 5]

- i) articles of association of a company contains internal rules and regulations of the company. It is complementary to Memorandum and together give effect as charter of the company.
- ii) Articles establish a contract between the company and the members and between the members inter se. This contract governs the ordinary rights and obligations incidental to membership in the company.

## a) CONTENTS AND MATTERS TO BE INCLUDED [SUB-SECTION 1 AND 2]

The articles of a company shall contain.

- i) The regulations for management of the company
- ii) Such matters as may be prescribed (rules 11)

However, a company may also include such additional matters in its articles as may be considered necessary for its management.

### **b) PROVISION FOR ENTRENCHMENT [SUB-SECTION 3 TO 5]**

**Entrenchment is the chronic or deep-rooted fact of an attitude, habit, or belief that is firmly established or accustomed, therefore it become difficult or unlikely to change. To illustrate - Men don't cry**

**Entrenchment may be possible for processes, as well as procedures in both way; that processes are so well established, it become difficult to change them or make process of change so rigid that process become well established.**

**Entrenchment is the process of alteration in articles more difficult, in order to enhance the protection.**

Usually, an article of association may be altered by passing special resolution but entrenchment makes it more difficult to change the articles, in manner specified ahead.

#### Article may contain provisions for entrenchment [Sub-section 3]

The articles may provide that specified provisions contained in it may be altered only if conditions that are more restrictive and harder than those applicable in the case of a special resolution, are met or complied with.

#### Manner of inclusion of the entrenchment provision [Sub-section 4]

The provisions for entrenchment shall only be made either:

- i) On formation of a company, or
- ii) By an amendment in the articles agreed to
  - By all the members of the company in the case of a private company and
  - By a special resolution in the case of a public company

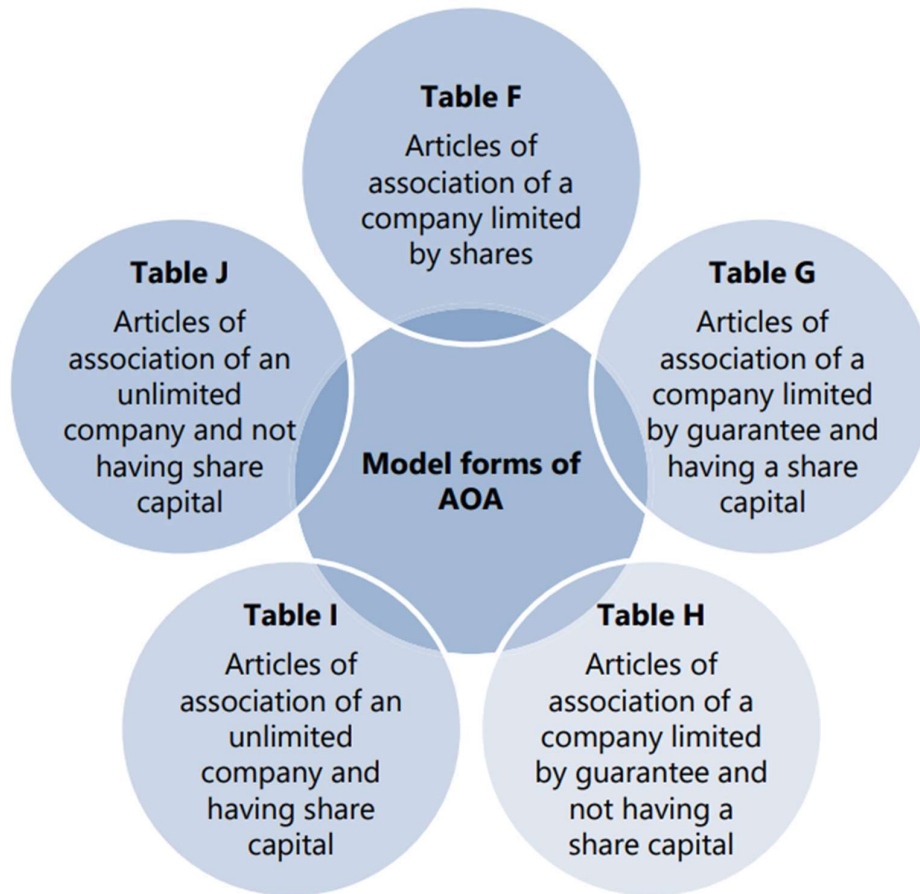
#### Notice to the registrar of the entrenchment provision

The company shall give notice to the Registrar of entrenchment provisions included in article.

- i) In the SPICe+ along with the fee at the time of incorporation of the company, and

- ii) In case of existing companies, in Form No. MGT-14 within thirty days from the date of entrenchment of the articles, along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014

### C) MODEL FORMS OF ARTICLES [SUB-SECTION 6 TO 8]



**Sub-section 8 provides that** in case of any company, which is registered after the commencement of this Act, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company - **Either exclude or modify expressly or else it applies what stated in model applicable to company.** Sub-section 9 restricts the scope of section to the articles either registered or amended under this Act - Hence no provision of this section (section 5) shall be applicable to articles registered under previous company law; provided not amended under this Act.

### Illustration -

#### Question & Answer

**Question** - Highlight differences between the MOA and AOA

**Answer** - The key differences between the MOA and AOA includes;

- i) **Content** - The memorandum contains the fundamental conditions as basis of incorporation. It lays down the parameters that define relation of company with outsiders. The Articles contain internal regulations of the company; hence regulate the relationship between company and the members and members inter se.
- ii) **Supremacy** - Memorandum cannot include any clause that is contrary to the provisions of the law, whereas the articles shall be subordinate to both the law and memorandum. Therefore, in case on conflict among the two, the MOA shall prevail.
- iii) **Scope** -Memorandum lays down the scope beyond which the activities of the company cannot go. An act done by a company beyond the scope of the memorandum are ultra vires and void. They cannot be ratified even by all the shareholders. Articles provide for regulations inside scope established by MOA, hence acts beyond the articles can be ratified by the shareholders provided the relevant provisions are not beyond the memorandum

## 9. DOCTRINE OF CONSTRUCTIVE NOTICE AND DOCTRINE OF INDOOR MANAGEMENT

### a) DOCTRINE OF CONSTRUCTIVE NOTICE

#### Essence of Doctrine of Constructive Notice

All those who are dealing with company deemed to be aware of what is stated in its MOA and AOA, in its true perspective, because both these documents are public documents.

Section 399 provides that the Memorandum and Articles when registered with Registrar of Companies 'become public documents' and then they can be inspected by any one by electronic means on payment of the prescribed fee.

Further, Section 17 provides that a company shall on payment of the prescribed fee send a copy of each of the following documents to a member within seven days of the request being made by him

- i) Memorandum;
- ii) Articles;
- iii) Every agreement and every resolution referred to in sub-section (1) of section 117, if and so far, as they have not been embodied in the memorandum and articles.

Any failure will make the company as well as every officer in default liable to a fine of one thousand rupees for each day during which default continues or one lac rupee whichever is less.

### Enunciation of Doctrine of Constructive Notice

The doctrine of constructive notice is based on the rule laid down in *Ernest v Nicholls*. It was held for the first time that any person who is dealing with the company is deemed to be familiar with the contents of all the public documents of the company. The memorandum and the articles of association of every company are registered with the Registrar of Companies. The office of the Registrar is a public office. Hence, the memorandum and the articles of association become public documents. It is therefore the duty of person dealing with a company to inspect its public documents and make sure that his contract is in conformity with their provisions.

As observed by Lord Hatherley whether a person actually reads them or not, he is to be in the same position as if he had read them.

### Effect of Doctrine of Constructive Notice

Every person (dealing with company) shall be presumed to know the contents of the documents and understood them in their true perspective.

Absence of notice of MOA and AOA cannot be an excuse to claim relief for outsiders.

Even if the party dealing with the company does not have actual notice of the contents of these documents, it is presumed that he has an implied (constructive) notice of them.

**Example** - One of the articles of a Modern Furniture Limited provides that a cheque below Rs 1 lacs may be signed by single director but if above Rs 1 lac shall be signed by at-least two directors. Similar instructions issued to bank with which MFL have account, as well. M/s Sagwan Wood Works, a vendor accepts a cheque of Rs 2.20 lacs, signed only by single director. Considering Doctrine of Constructive Notice, the M/s Sagwan Wood Works (payee) has no right to claim, when cheque will be returned without payment by bank.

### Criticism of Doctrine of Constructive Notice

The 'Doctrine of Constructive Notice' is an unreal doctrine. People know a company through its officers and not through its documents. Since it does not take notice of the realities of business life, hence caused inconvenient for business transaction.

**To illustrate**, where the directors or other officers of the company were empowered under the articles to exercise certain powers subject only to certain prior approvals or sanctions of the shareholders, it is difficult for an outsider to ascertain whether necessary sanctions and approvals have been obtained before a certain officer exercises his powers or not.

Therefore, to mitigate such a situation, those dealing with the company can assume that if the directors or other officers are entering into those transactions, they would have obtained the necessary sanctions. This is known as the '**Doctrine of Indoor Management**' or **Turquand's Rule**, and act as an exception to the constructive notice.

### **b) DOCTRINE OF INDOOR MANAGEMENT**

#### Essence of Doctrine of Indoor Management

The people who are dealing with company are entitled to presume that internal proceedings and requirements has been duly met.

#### Enunciation of Doctrine of Indoor Management

The Doctrine of Indoor Management was first laid down in the case of **Royal British Bank v. Turquand**

The directors of a company were authorised by the articles to borrow on bonds such sums of money as should from time to time, by a resolution of the company in general meeting, be authorised to be borrowed. The directors gave a bond to Turquand without the authority of any such resolution. The question arose whether the company was liable on the bond. Held, the company was liable on the bond, as Turquand was entitled to assume that the resolution of the company in general meeting had been passed.

#### Rationale of Doctrine of Indoor Management

What happens internally in a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.



If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

### Exceptions to Doctrine of Indoor Management

Relief on the ground of 'indoor management' cannot be claimed by an outsider dealing with the company in the following circumstances:

- i) **Knowledge of irregularity** - In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.
- ii) **Negligence**: If with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.
- iii) **Forgery**: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.
- iv) Where the **question** is in regard to the **very existence of an agency**.
- v) Where a **pre-condition** is required to be fulfilled before company itself can exercise a particular power. In other words, the act done is not merely ultra\_vires the directors/officers but ultra\_vires the company itself.

## **10. ACT TO OVERRIDE MEMORANDUM, ARTICLES, ETC. [SECTION 6]**

The provisions of this Act shall have overriding effect to the provisions contained in;

- i) Memorandum of company; or
- ii) Articles of company; or
- iii) Any agreement executed by it; or
- iv) Any resolution passed by the company in general meeting or by its Board of Directors

Whether the same be registered, executed or passed, as the case may be, before or after the Commencement of this Act.

Any provision contained in the memorandum, articles, agreement or resolution, to the extent in conflict to the provisions of the Act; shall be void.

**Example** - Section 123 declares that no dividend shall be paid by a company except out of profits. The force of this section cannot be undone by any provision in the articles of association, because the

articles cannot sanction something which is forbidden by the Act. Even still it attempts then shall be void.

## 11. EFFECT OF MEMORANDUM AND ARTICLES [SECTION 10]

When the memorandum and articles got registered; it shall bind the:

- i) Members to the company.
- ii) Company to the members.
- iii) Members to the members.

i) Articles bind the members to the company and the company to the members. But neither of them is bound to an outsider to give effect to the articles. **"No Article can constitute a contract between the company and a third person."**

ii) Further sub-section 2 to section 10 provides, all monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

**Example** - A company can recover calls in arrear from a member as forcefully as it is recovering loan due.

## 12. ALTERATION OF MEMORANDUM [SECTION 13]

### a) PROCEDURE OF ALTERATION OF MEMORANDUM

#### Alteration by special resolution [Sub-section 1]

Company may alter the provisions of its memorandum with the approval of the members by a special resolution. Further, company shall file with the Registrar, such special resolution.

#### Name change of the company [Sub-section 2 and 3]

As per sub-section 1, any change in the name of a company shall be affected only with the approval of the Central Government (power delegated to ROC by Central Government) in writing in Form No. INC-24 along with fee.

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

The change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. Once the necessary documents filled or payment or repayment made then change shall be allowed.

on any change in the name of a company, the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation in the Form No. INC-25 with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

### **b) RECTIFICATION OF NAME OF COMPANY [SECTION 16]**

Where **Regional Directors** by section 458 of the Act) 29 is of opinion that name (original or revised/new) of company is **identical** with or **too nearly resembles** to the name by which a company in existence.

- i) On its own or
- ii) On an application by a proprietor of already registered trade mark under the Trade Marks Act, 1999

Then it may direct the company to change its name;

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.

**Note** - Application by a proprietor of registered trade mark shall be made **within three years** of incorporation or registration or change of name of the company

Further, the company, after changing its name or obtains a new name shall give notice of the change to the Registrar along with the order of the Central Government (Regional Directors) within a period of **fifteen days** from the date of such change.

Registrar on receipt of notice shall carry out necessary changes in the certificate of incorporation and the memorandum.

If a company makes default in complying with any directions for rectification;

- i) company shall be punishable with fine of Rs 1,000 for every day during which the default continues and
- ii) every officer who is in default shall be punishable with fine which shall not be less than Rs 5000 but which may extend to Rs 1,00,000.

### Change in the registered office [Sub-section 4, 5, and 7]

#### **Application [sub-section 4]**

The alteration of the memorandum relating to the place of the registered office from one **State to another** shall not have any effect unless it is approved by on an application in Form No. INC-23 along with the fee and shall be accompanied by the following documents, namely.

- i) Copy of Memorandum of Association, with proposed alterations.
- ii) Copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;
- iii) Copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.
- iv) List of creditors and debenture holders
- v) Acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.

#### **Advertisement in Newspapers**

The Company **not more than thirty days before** the date of filing the above application, shall advertise in the Form No. INC-26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with wide circulation in the state in which the registered office\_of the company is situated.

#### **Dispose of the application by central government [sub-section 5]**

Regional Director shall dispose of the application of change of place of the registered office within a **period of 60 days**. Before passing of order, Central Government may satisfy itself that

- i) the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company, or
- ii) the sufficient provision has been made by the company either for the due discharge of all its debts and obligations, or
- iii) adequate security has been provided for such discharge.

#### **Filing of the certified copy of the order with the registrar [sub-section 7]**

Where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States in Form No. INC-28 along with the fee **within thirty days** from the date of receipt of certified copy of the order, who shall register the same.

### Issue of fresh certificate of incorporation [sub-section 7]

The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

### Change in the object of the company [Sub-section 8 and 9]

#### Who can make change in object clause & How? [Sub-section 8]

- i) Where the company has raised money from public through prospectus and has any un-utilised amount out of the money so raised, can change the objects for which the money so raised is to be applied only after passing a **special resolution through postal ballot** and the notice in respect of the resolution for altering the objects shall contain the following particulars, namely;
- ii) Total money received;
- iii) Total money utilized for the objects stated in the prospectus;
- iv) Un-utilized amount out of the money so raised through prospectus
- v) Particulars of the proposed alteration or change in the objects;
- vi) Justification for the alteration or change in the objects;
- vii) Amount proposed to be utilised for the new objects;
- viii) Estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
- ix) Other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
- x) Place from where any interested person may obtain a copy of the notice of resolution to be passed.

#### Advertisement [Sub-section 8]

The advertisement giving details of each resolution to be passed for change in objects, simultaneously to the dispatch of postal ballot notices to shareholders; shall be:

- i) 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
- ii) Hosted on the website of the company, if any.

#### Dissenting shareholders to change of object [Sub-section 8]

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.

### **Registrar to certify the registration on alteration of the objects [sub-section 9]**

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 under clause (a) to sub-section 6 of this section.

**Sub-section 10** provides that alteration made under this section (section 13) shall have effect only after it has been registered in accordance with provisions of section.

**Sub-section 11** states any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, intending to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. This provision is confirming and extending provision to Section 4(7).

## **13. ALTERATION OF ARTICLES [SECTION 14]**

### **a) ALTERATION BY SPECIAL RESOLUTION [SUB-SECTION 1]**

A company may alter its articles by a special resolution, subject to the provisions of this Act and the conditions contained in its memorandum. Alteration of articles include alterations having the effect of conversion of a private company into a public company or vice-versa,

Any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made **within sixty days** from the date of passing of special resolution, be filed with Regional Director in e-Form No. RD-1 along with the fee as provided in Rules, and shall be accompanied by the following documents, namely:

- i) Draft copy of Memorandum of Association and Articles of Association, with proposed alterations;
- ii) Copy of the minutes of the general meeting at which the special resolution authorising such alteration was passed together with details of votes cast in favour and or against with names of dissenters;
- iii) Copy of Board resolution or Power of Attorney dated not earlier than thirty days, as the case may be, authorising to file application for such conversion;
- iv) Declaration by key managerial personnel regarding the compliance under difference section of the Act and rules made there under;

In case of a private company, where post alteration the articles no longer include the restrictions and limitations which are required to be included in the articles of a private company, from the date of such alteration.

### **b) FILING OF ALTERATION WITH THE REGISTRAR [SUB-SECTION 2]**

Every alteration of the articles and a copy of the order of the Central Government approving the alteration, shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of **fifteen days** in Form No. INC 27 along with fee, who (Registrar) shall register the same.

**Sub-section 3** provides that alteration made under sub-section 1 and registered under sub-section 2 subject to provision of this, shall be valid and have effect as if it were originally contained in the Articles.

### **14. ALTERATION OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY [SECTION 15]**

Section 15 of the Act requires that every alteration made in memorandum and articles of a company shall be noted in every copy. Be it issued in electronic form or otherwise; because MOA and AOA considered to be public document under section 399. If a company makes any default in complying with the stated provisions, the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the articles issued without such alteration. 15.

### **15. REGISTERED OFFICE OF COMPANY [SECTION 12]**

A company is considered to be a separate legal entity from the members. Once a company gets incorporated, it is required to maintain a registered office. This is a physical office where the corporation will receive service of legal documents from ROC or in case of a lawsuit, etc.

This address cannot be a P.O. Box but must be a physical location where someone is present, to receive service of legal documents during normal business hours. It could be different from a Head Office or Corporate office. Section 12 of the Companies Act, 2013 seeks to provide for the registered office of the companies for the communication and serving of necessary documents, notices, letters etc. The domicile and the nationality of a company is determined by the place of its registered officer. This is also important for determining the jurisdiction of the court.

### **a) REGISTERED OFFICE & VERIFICATION THEREOF [SUB-SECTION 1 & 2]**

As per **sub-section 1**, a company shall, **within thirty days** of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. Further, **sub-section 2** requires the company shall furnish to the Registrar **verification** of its registered office within a **period of thirty days** of its incorporation.

With the respected specified IFSC public & IFSC private companies, they shall have its registered office at the IFSC located in the approved multiservice SEZ set up under the SEZ Act, 2005 read with SEZ Rules, 2006.32

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

### **b) LABELING OF COMPANY [SUB-SECTION 3]**

Every company shall:

- i) **Paint or affix its name**, and the **address of its registered office**, and keep the same painted or affixed, on the outside of **every office or place** in which its business is carried on, in a **conspicuous position**, in legible letters, and if the characters employed are not those of the language/s in general use in that locality, then also in the characters of that language/s.
- ii) Have its name engraved in legible characters on its seal, if any;
- iii) Get its name, address of its registered office and the **Corporate Identity Number** along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and
- iv) Have its name printed on hundies, promissory notes, bills of exchange and such other documents as may be prescribed:

**Note:**

Where a company has changed its name(s) during the last two years, it shall paint or affix or print, both or all such names in case of point a as well as c above.

In case of One person company, the words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

### **c) NOTICE OF CHANGE & VERIFICATION TO REGISTRAR [SUB-SECTION 4]**

Notice of every change of the situation of the registered office after the date of incorporation of the company, verified in the Form No. INC-22, along with fee as prescribed shall be given to the Registrar within 30 days of the change, who shall record the same.

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



#### **d) APPROVAL/CONFIRMATION OF CHANGE [SUB-SECTION 5]**

##### **Change by passing of special resolution**

The registered office of the company shall be changed only by passing of special resolution by a company, outside the local limits of any city, town or village where such office is situated or where it may be situated later by virtue of a special resolution passed by the company.

##### **Change of registered office outside the jurisdiction of registrar**

Where a company changes the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State, there such change is to be confirmed by the Regional Director on an application made by the company. Application shall be made in Form No. INC-23 along with fee.

In case of specified IFSC public & IFSC private company Board resolution will sufficient, provided that such Company shall not change the place of its registered office to any other place outside the said International Financial Services Centre.

#### **e) COMMUNICATION AND FILING OF CONFIRMATION [SUB-SECTION 6]**

The confirmation of change of registered office from jurisdiction of one registrar to another registrar within the same state, shall be:

- i) **Communicated within 30 days** from the date of receipt of application by the Regional Director to the company, and
- ii) **The company** shall file the confirmation with the Registrar **within a period of 60 days** of the date of confirmation who shall register the same, and
- iii) Certify the registration within a **period of thirty days** from the date of filing of such confirmation.

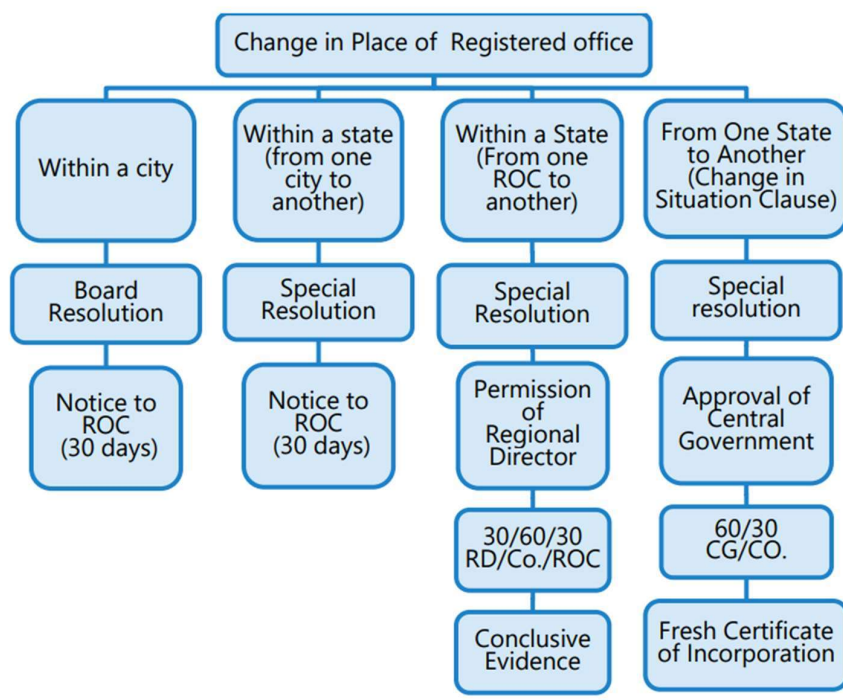
The certificate so issued by registrar shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate. If the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the registered office of the company in such manner as may be prescribed and if any default is found to be made in complying with the requirements of sub-section (1), he may without prejudice to the provisions contained in this section regarding the penalties, initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

## f) PENALTIES IN CASE OF DEFAULTS [SUB-SECTION 8]

If any default is made in complying with the requirements of this section.

COMPANY+ OFFICER IN DEFAULT ----- 100/DAY UPTO 1,00,000

### Summary of Provisions applicable in case of change of place of registered office



## 16. COMMENCEMENT OF BUSINESS ETC. [SECTION 10A]

### a) CONDITIONS FOR COMMENCEMENT OF BUSINESS

A company incorporated

- i) After the commencement of the Companies (Amendment) Ordinance, 2019 and
- ii) Having a share capital

Shall commence any business or exercise any borrowing powers only if;

- i) The company has filed with the Registrar a **verification of its registered office** as provided in sub-section (2) of section 12, and
- ii) A declaration is filed with the Registrar, by a director, within a period of **180 days** of the date of incorporation of the company, in Form No. INC-20A, duly verified by a Company Secretary or a Chartered Accountant or a Cost Accountant, in practice, along with prescribed fee; that **every**

subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration

**Note:**

1. Section 12(2) i.e. Verification of registered office with registrar, discussed earlier heading i.e. 15 in this chapter.
2. In the case of a company pursuing objects requiring registration or approval from any sectoral regulators such as the Reserve Bank of India, Securities and Exchange Board of India, etc., the registration or approval, as the case may be from such regulator shall also be obtained and attached with the declaration

### **b) OUTCOME WHERE CONDITIONS ARE NOT SATISFIED**

#### Penalty

If any default is made in complying with the requirements of this section, the penalty shall be:

Liable	Quantum of penalty
Company	Fifty thousand rupee
Every officer who is in default	One thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.

#### Declaration not filled by director within 180 days

Where no declaration has been filed by directors within a period of 180 days of the date of incorporation with the Registrar and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

**Note:** Action by registrar for removal of name can be take place simultaneously with levy of penalty.

### **17. CONVERSION OF COMPANIES ALREADY REGISTERED [SECTION 18]**

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

#### **a) BY ALTERATION OF MEMORANDUM AND ARTICLES**

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

### **b) FILE AN APPLICATION TO THE REGISTRAR**

Wherever conversion to be done under section 18, **Registrar on basis of an application** filled with it by company, shall after **satisfying himself** that the provisions applicable for registration of companies have been complied with,

- i) Close the former registration of the company; and
- ii) After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.

### **c) NO EFFECT ON THE DEBTS, LIABILITIES ETC. INCURRED BEFORE CONVERSION**

The registration of a company under this section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

To put in more simple way, the company remains the same entity as it was before in respect of its debts and liabilities, obligations or contracts.

## **18. SUBSIDIARY COMPANY NOT TO HOLD SHARES IN ITS HOLDING COMPANY [SECTION 19]**

As per section 19 of the Act, a subsidiary company is not allowed to hold shares of its holding company. The prohibition also extends up to the nominees of the subsidiary company.

Consequently, any allotment or transfer of shares in a holding company to its subsidiary shall be void. If the holding company is a guarantee or unlimited company, not having a share capital the above restriction will apply on holding the interest, whatever be the form of interest.

The prohibition does not apply to the following cases:

- i) Where the subsidiary is concerned as a **legal representative** of a deceased member of the holding company; or
- ii) Where the subsidiary holds such shares as a **trustee**; or
- iii) Where the **subsidiary company** is a shareholder even before it became a subsidiary company of the holding company.

Note:

- i) Right to vote at a meeting of the holding company only in respect of the shares held by it as a **legal representative** or as a trustee
- ii) The prohibition does not apply to the case of a subsidiary company which already had shares in its holding company at the commencement of the Act
- iii) A subsidiary can buy shares in its holding company where it is a part of a scheme of amalgamation sanctioned by the court/tribunal

## 19. SERVICE OF DOCUMENTS [SECTION 20]

### a) SERVING OF DOCUMENT TO COMPANY OR AN OFFICER THEREOF

A document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by

- i) registered post, or
- ii) speed post, or
- iii) courier service, or
- iv) leaving it at its registered office, or
- v) means of such electronic or other mode as may be prescribed

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

### b) SERVING OF DOCUMENT TO REGISTRAR OR MEMBERS

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

- i) Post, or
- ii) registered post, or
- iii) speed post, or
- iv) courier, or
- v) by delivering at his office or address, or
- vi) by such electronic or other mode as may be prescribed.

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

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

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

- i) Facsimile telecommunication (**fax**) or electronic mail (**email**), which the company or the officer has provided from time to time for sending communications,
- ii) Posting of an **electronic message board** or network that the Registrar or the member has designated for those communications, and which transmission shall be validly delivered upon the posting, or
- iii) Other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person purporting to send the transmission

Further sub-section 2 provides, in case of delivery by post, such service shall be deemed to have been affected:

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

Section 20 (2) shall apply to a Nidhi Company, subject to the modification; that

- i) The document may be served only on members who hold shares of more than Rs 1,000 in face value or more than 1% of the total paid-up share capital; whichever is less.
- ii) For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi.

**Example** - Modern Furniture sent the notice of general meeting through postal mail 48 hours after the post of letter containing such notice, shall be deemed to be served. Hence, requirement of 21 clear days' notice under section 101 of the Act, if seen in this context, Modern Furniture Limited should have posted the letter containing notice 23 days prior to meeting day (48 hours of post-delivery+21 clear days).

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

As per section 21 of the Act:

- i) document or proceeding requiring authentication by a company or
- ii) Contracts made by or on behalf of a company

May be signed by:

- i) Any key managerial personnel<sup>37</sup>, or
- ii) An officer or employee of the company duly authorized by the Board in this behalf.

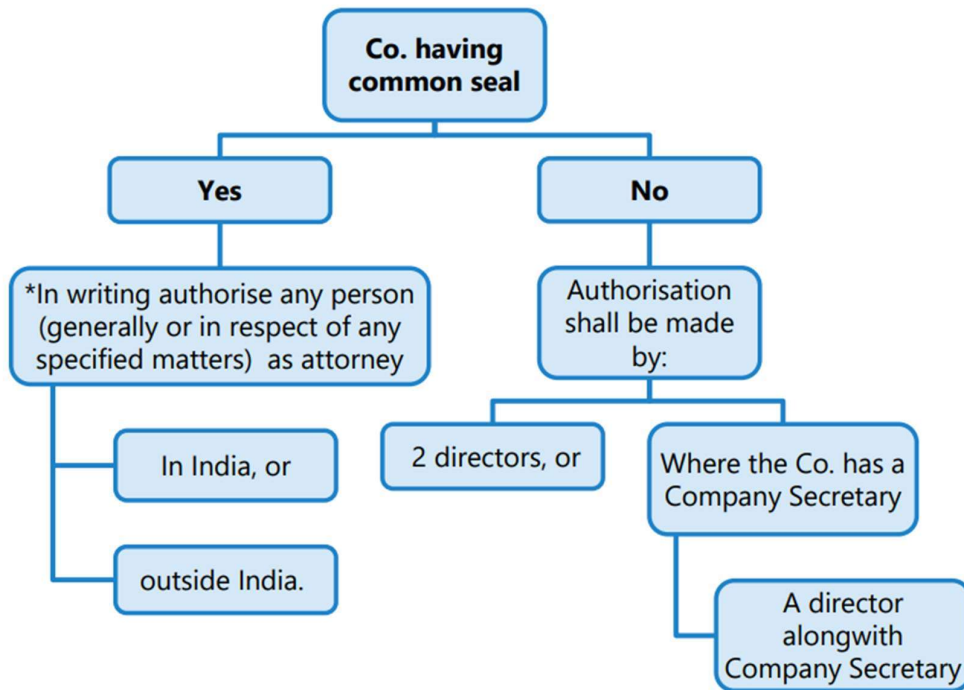
In the case of specified IFSC public company and IFSC private company, for the word "An officer" read as "An officer or any other person".

## 21. EXECUTION OF BILLS OF EXCHANGE, ETC. [SECTION 22]

Sub-section 1 provides, a **bill of exchange, hundi or promissory note** shall be deemed to have been made, accepted, drawn or endorsed on behalf of a company **if made, accepted, drawn, or endorsed** in the name of, or on behalf of or on account of, the company **by any person acting under its authority**. Authority can be either express or implied.

Formal deeds can be executed only through a power of attorney. Therefore subsection 2 and 3 together provides:

- i) A company may, by writing under
  - Its common seal, if any,
  - Where in case a company does not have a common seal, then authorized by 2 directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary.
- ii) Authorize any person,
- iii) Either generally or in respect of any specified matters,
- iv) As its attorney to execute other deeds on its behalf
- v) In any place either in or outside India.
- vi) Deed signed by such an attorney on behalf of the company and under his seal shall bind the company.

Summary of sub-section 2

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

The seal is a method of making a physical impression upon the documents of the company, of its name, etc.

Section 22 comes into play when a person wants to enforce obligations against a company arising out of a contract and the company denies the contract or disputes its liability. The section cannot be used where the proceeding is by the company