THE COMPANIES ACT, 2013 [Incorporation of a Company]

PROMOTER

DEFINITION 2(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; 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 accustomed to act.

Provided that nothing in sub- clause (c) shall apply to a person who is acting merely in a professional capacity.

DEFINITION OF PROMOTER

"Promoter is a person who originates a scheme for the formation of the company, gets the memorandum and articles prepared, executed and registered, and find the first directors, settle the terms of preliminary contracts and prospectus, and makes arrangements for advertising and circulating the prospectus and placing the capital

FUNCTIONS

- Generating the idea of a starting a business and forming a company, i.e. which business to be started.
- Making a feasibility study so as to determine whether the proposed business is profitable or not.
- Taking decisions regarding some fundamental questions, like -

a) Whether to start a new business or to take over an existing business by purchase of an existing undertaking.

b) Nature of company to be formed - whether it should be a public company or a private company; whether it should be a limited company or an unlimited company; whether the liability of members shall be limited by shares or by guarantee or by both.

c) The amount of authorised capital of the company.

d) Preparation of memorandum, articles and other documents

e) Arranging the subscribers to memorandum

f) Filing the required documents with the registrar

g) Entering into negotiations with the person who shall become the first directors of the company

h) Entering into pre-incorporation contracts (for the purpose of business of the company) on behalf of the company.

i) Making arrangements for issue of shares

SECTION 3: FORMATION OF COMPANY

(1) A company may be formed for any lawful purpose by—

a) 7 or more persons, where the company to be formed is to be public company;

b) 2 or more persons, where the company to be formed is to be private company; or

c) 1 person, where the company to be formed is to be One Person Company that is to say, a private company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.

(2) A company formed may be either —

a) a company limited by shares; or

b) a company limited by guarantee; or

c) an unlimited company.

SECTION 7: INCORPORATION OF COMPANY

Sec 7(1): Filing of the documents & information with the registrar

Filed with the registrar within whose jurisdiction the registered office of the company is proposed to be situated-

- MOA & AOA of the company duly signed by all the subscribers to the memorandum.
- the address for correspondence till its RO is established;
- the particulars (names, including surnames or family names, residential address, nationality) of every subscriber to the MOA along with proof of identity,
- the particulars of the persons mentioned in the articles as the first directors of the company
- Particulars of the interests of the persons mentioned in the articles as the first directors of the company in other firms or bodies corporate along with their consent to act as directors of the company.
- Declaration by person engaged in the formation of the company (an advocate, a CA, CA or CS in practice), and by a person named in the articles (director, manager or secretary of the company), that all the requirements of this Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with
- Declaration from each of the subscribers to the MOA and from persons named as the first directors, if any, in the articles stating that- he is not convicted of any offence in connection with the promotion, formation or management of any company, or
  - he has not been found guilty of any fraud or of any breach of duty to any company under this Act or any previous company law during the last five years,
  - and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief;

Sec 7(2): Registrar on the basis of documents and information filed, shall register all the documents and information in the register and issue a certificate of incorporation in the prescribed form.(INC- 11)

Sec 7(3): 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.

Sec 7(4): Co. shall maintain and preserve at its RO copies of all documents and information as originally filed, till its winding up.

Sec 7(5) & (6): Furnishing any false or incorrect information or representation or by suppressing any material fact, punishable u/s 447.

Sec 7(7): Order of the Tribunal (NCLT)

Where a company got incorporated by furnishing false or incorrect info or by suppressing any material fact or info in any of the documents or declaration filed or made for incorporating such Co. or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—

a) pass such orders, as it may think fit, for regulation of the management of the Co. including changes, if any, in its MOA and articles, in public interest or in the interest of the company and its members and creditors; or

b) direct that liability of the members shall be unlimited; or

c) direct removal of the name of the company from the register of companies; or

d) pass an order for the winding up of the company; or

e) pass such other orders as it may deem fit

Provided that before making any order,—

- the company shall be given a reasonable opportunity of being heard in the matter by NCLT

SECTION 9: EFFECTS OF REGISTRATION

1. **Date of incorporation:** The date mentioned in the COI issued by the Registrar, shall be; the date of incorporation of the company.
2. **Body corporate:** From the date mentioned in the certificate of incorporation, the subscribers to MOA and all other persons, as may, from time to time, become members of the company, shall be a body corporate.
3. **Name:** The name, as mentioned in the memorandum, shall be the name of the company.
4. **Capacity to function:** The Company shall become capable of exercising all the functions of an incorporated company.
5. **Perpetual succession:** The Company shall have perpetual su ccession.
6. **Power to acquire:** The company shall have the power to acquire, hold and dispose of the property of any property kind, whether movable or immovable, tangible or intangible.
7. **Power to contract:** The company shall have the power to contract in its own name.
8. **Capacity to sue and be sued:** The company shall have the power to sue in its own name, and the company can be sued in its own name.

MEMORANDUM OF ASSOCIATION

Statutory definition [Sec. 2(56)]

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

OTHER POINTS

- Also called as the Charter of the company.
- It is a public document, i.e. any person (whether a member of the company or not) can inspect it in the office of Registrar.(S.399)
- Every company must have its own MOA.
- Enables shareholders, creditors and all those who deal with company to know what its powers are and what activities it can engage in.
- Company cannot depart from the provisions contained in the MOA. If it does so, it would be ultra vires the company & void.

CONTENTS OF MOA [SEC 4(1)]

1. **Name Clause:**
   It shall state the name of the company. In the case of a public company, the word 'limited' shall be the last word of the name of the company. In the case of a private company, the words 'private limited' shall be the last words of the name of the company. The requirement to use the word 'limited' or the words 'private limited', as the case may be, shall not apply to a company registered u/s 8. In case of a One Person Company , the name of company must end with the word OPC.
2. Situation clause/Registered office Clause: - states the name of the State in which the registered office of the company is proposed to be situated.
3. Objects clause: It shall state the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.
4. Liability clause: It shall state as to whether the liability of members of the company is limited or unlimited.
   In case of a company limited by shares, it shall state that liability of every member shall be limited to the amount unpaid on the shares held by him.
   In case of a company limited by guarantee, it shall state that liability of every member shall be limited to the amount that he has undertaken to pay to the company, in the event of winding up of the company.
5. Capital clause: In case of a company having a share capital, capital clause shall state the amount of share capital with which the company is registered (viz. the authorized Share Capital) & the division of the authorized share capital into shares of a fixed amount.
6. Subscription (Association) clause: states the no. of shares which the subscribers to the MOA agree to subscribe which shall not be less than 1 share; & the number of shares each subscriber intends to take, indicated opposite his name.
7. Nomination Clause: In the case of OPC, the name of the person who in the event of death of the subscriber shall become the member of the company

ARTICLES OF ASSOCIATION

Statutory Definition [Sec. 2(5)]

'Articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous companies law or of this Act.

SECTION 5- ARTICLES

1) The articles of a company shall contain the regulations for mgmt. of the company.

2) The articles shall also contain such matters, as may be prescribed. A company may include any additional matter in its articles which is considered necessary for the management of the company.

Provision of Entrenchment

3) The articles may contain the provisions for entrenchment (to protect something), i.e. certain specified provisions of the articles can be altered only by complying with such conditions or procedures as are more restrictive than those as are applicable in case of a Special Resolution (75% votes of members in meeting).

(4) These provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a Special Resolution in the case of a public company.

(5) Where the articles contain provisions for entrenchment, the company shall give notice to the Registrar of such provisions

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

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

(8)) Nothing in this section shall apply to the articles of a company registered under any previous company law unless amended under this Act.

THE COMPANIES ACT, 2013

MODEL FORMS OF MOA & AOA [SCHEDULE I]

Form of Memorandum

- Table A: Memorandum of a company limited by shares
- Table B: Memorandum of a company limited by guarantee and having no share Capital
- Table C: Memorandum of a company limited by guarantee and having a share capital
- Table D: Memorandum of an unlimited company having no share capital
- Table E: Memorandum of an unlimited company having a share capital.

Form of Articles

- Table F: Articles of a company limited by shares
- Table G: Articles of a company limited by guarantee and having a share capital
- Table H: Articles of a company limited by guarantee and having no share capital
- Table I: Articles of an unlimited company having a share capital
- Table J: Article s of an unlimited company having no share capital.

DIFFERENCE BETWEEN MOA & AOA

1. Objectives: Memorandum of Association defines and prescribes the objectives of the company whereas the Articles of association lays down the rules and regulations for the internal management of the company. Articles determine how the objectives of the company are to be achieved.
2. Relationship: Memorandum defines the relationship of the company with the outside world and Articles define the relationship between the company and its members.
3. Alteration: Memorandum of association can be altered only under certain circumstances and in the manner provided for in the Act. In most cases permission of the Regional Director or the Tribunal is required. The articles can be altered simply by passing a special resolution.
4. Ultra Vires: Acts done by the company beyond the scope of the memorandum are ultra- vires and void. These cannot be ratified even by the unanimous consent of all the shareholders. The acts ultra- vires the articles can be ratified by a special resolution of the shareholders, provided they are not beyond the provisions of the memorandum.

SEC 10: EFFECT OF MOA & AOA

1) Subject to the provisions of this Act, the MOA & AOA shall, when registered, bind the Co. and the members thereof to the same extent as if they respectively had been signed by the Co.& by each member, and contained contracts on its and his part to observe all the provisions of the MoA & AoA.
2) All money payable by any 'member to the company under the memorandum or articles shall be a debt due from him to the company.

Company is bound to members: If a company has committed breach of any terms and conditions of MOA or AOA, any member can sue the company, directors and the persons responsible for such breach.

Members are bound to company: Every member shall be bound to comply with the provisions contained in the MOA & AOA. In case of non- compliance, the company may sue a member.

Members are not bound inter se (i.e., with each other): There is no privity of contract between the members. However, a member may enforce his rights against another member through the company,
but not directly.

Company is not bound to outsiders: Memorandum and the articles do not bind a company to the outsiders. This is based on the general rule of law that a stranger to a contract does not acquire any rights under the contract. Therefore, an outsider cannot take the help of the articles to establish a contract with the company

DOCTRINE OF ULTRA VIRES

Ultra means 'beyond' or 'in excess of' and vires means 'powers'. Thus, ultra vires means an act or transaction beyond or in excess of the powers of the company.

An act or transaction shall be ultra vires if it is not permitted or authorised by the Companies Act, 2013

- it falls outside the object clause of memorandum; &
- its attainment is not incidental or ancillary to the attainment of main objects.

Effects of Ultra Vires Transactions

- **Void- ab- initio:**
  An act which is ultra vires the company is void and of no legal effect. Neither the company nor the other contracting party derives any right under an ultra vires contract. Even ratification of an ultra vires contract by the whole body of shareholders doesn't make an ultra vires contract valid or enforceable.

- **No ratification or estoppel:**
  An ultra vires contract can never be made binding on the company.

- **Injunction against the company:**
  Any member may obtain an injunction order from the Court, i.e., an order of the Court restraining the company from proceeding with the ultra vires contract.

- **Personal liability of Directors:**
  If funds of the company are misapplied or wasted by entering into ultra vires transactions, the directors shall be personally liable to the company for breach of trust.

- **Ultra vires property:**
  If the company acquires some property under an ultra vires transaction, the company has the right to hold that property and protect it against damage by other parties.

Leading Case Law: Ashbury Railway Carriage & Iron Company Ltd. V Richie

DOCTRINE OF CONSTRUCTIVE NOTICE

Applicability of Doctrine

This doctrine operates in favour of the company, i.e., it creates a presumption in favour of the company.
It operates against the persons dealing with the company.

Effect of the doctrine

- Once registered the MOA & AOA become public documents (Sec. 399). Therefore, every person dealing with the company is presumed to have read the MOA &AOA. Further, it is presumed that he has understood the provisions of memorandum and articles correctly, i.e. in the right sense.

- Thus, it is required of every person to apprise himself with the requirements of the memorandum and articles, before entering into any contract with a company.

- The doctrine prevents any person dealing with the company from alleging that he did not know the provisions contained in the AOA & MOA.

- If a person enters into a contract with the company in contravention of the provisions of the MoA & AoA, he cannot enforce such a contract.

Leading Case Law: Kotla Venakataswamy vs. C Rammurthi

DOCTRINE OF INDOOR MANAGEMENT [TURQUAND RULE]

Purpose of Doctrine This doctrine operates in favour of the outsiders, i.e., this doctrine creates a presumption in favour of the outsiders. The doctrine of Indoor Management is the exception to the doctrine of constructive notice.

Meaning of the Doctrine:
As per this doctrine, outsiders dealing with the company are not required to enquire into the internal management of the company. Outsiders dealing with the company are entitled to assume that as far as internal proceedings of the company are concerned, everything has been done regularly.

Effect of the Doctrine:
If a contract is entered into on behalf of the company by any director or officer of the company, it is enforceable against the company, if provisions contained in the MOA & AOA have been complied with, even though while entering into such a contract, some internal irregularity had arisen of which the outsider was unaware.

Leading Case law: Royal British Bank v Turquand

Exceptions to the Doctrine(CO. NOT LIABLE)

• Knowledge of irregularity (Howard v Patent Ivory Manufacturing Company)

• Negligence - Suspicious circumstances or unusual magnitude of transactions
(Anand Bihari Lal v Dinshaw & company)
(Underwood v Bank of Liverpool)

• Forgery
(Ruben v Great Fingall Consolidated Company)

SHARES AND SHARE CAPITAL

Concept of Capital

In relation to a company limited by shares, the word capital means share- capital, *i.e.,* the capital or figure in terms of so many rupees divided into shares of fixed amount. In other words, the contributions of persons to the common stock of the company form the capital of the company.

In the domain of Company Law, the term 'capital' is used in the following senses:

a) Nominal or Authorised or Registered capital Sec 2(8): means such capital as is authorised by the MOA of a company to be the maximum amount of share capital of the company. At the time of registration of the company, the company has to pay fees to CG which is calculated with respect to authorised capital.

b) Issued capital Sec 2(50): which means such capital as the company issues from time to time for subscription.

It is that part of authorised capital which is offered by the company for subscription and includes the shares allotted for consideration other than cash. Schedule III makes it obligatory for a company to disclose its issued capital in the balance sheet.

c) Subscribed capital Sec 2(86): defines "subscribed capital" as such part of the capital which is for the time being subscribed by the members of company.
It is the nominal amount of shares taken up by the public.

d) Called- up capital Sec 2(15): means such part of the capital, which has been called for payment. It is the total amount called up on the shares issued.

e) Paid- up capital: is the total amount paid or credited as paid up on shares issued. It is equal to called up capital less calls in arrears.

KINDS OF SHARE CAPITAL (SEC. 43)

a) Preference share capital; and

b) Equity share capital
i. with voting rights; or
ii. with differential rights as to dividend, voting or otherwise, in accordance with such rules as may be prescribed by CG.

a) Preference share capital: Share capital carrying a preferential right with respect to dividend and repayment of capital is termed as preference Share capital.

b) Equity share capital: Share capital which is not preference share capital is termed as equity share capital.

NATURE OF SHARES (SEC 44)
The shares and debentures shall be -
a) movable property
b) transferable in the manner provided by the articles of the company.

NUMBERING OF SHARES (SEC. 45)
Every share shall be distinguished by its distinctive number.
Exception: Shares held in depository system shall not have distinctive numbers