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VIRTUAL COACHING CLASSES ORGANISED BY BOS, ICAI

INTERMEDIATE LEVEL PAPER 2: CORPORATE AND OTHER LAWS

Faculty: Ms. Sonali Shah



CHAPTER 2: INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO





PROMOTERS

- Persons who **initiate promotion** of a company are known as **promoters**. All persons who **take steps for the registration of a company** e.g., those associated with the preparation of a prospectus or in drawing up the Memorandum of Association of the company and assisting in its registration are regarded as promoters.
- A promoter conceives an idea for setting-up a particular business at a given place and performs various formalities required for starting a company. A promoter may be a individual, firm, association of persons or a company. The persons who assist the promoter in completing various legal formalities are professional people like Counsels, Solicitors, Accountants etc. and not promoters.



PROMOTERS

- Promoters are in a **fiduciary relationship** with the company and its investors and shareholders, and **must avoid conflicts of interests** and exercise reasonable care in performing their duties. They are neither the agent nor trustee of the company.

The fiduciary duties of promoters include:

- **not to make any secret profit** out of the promotion of the company.
- to make **full disclosure** to the company of all relevant facts, including any profit made by them in transactions with the company.

- Eg. Shiv Nadar of HCL, Munjals of Hero motors etc.





PROMOTERS

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

- (a) who has been **named as such in a prospectus** or is **identified by the company in the annual return** referred to in section 92; or
- (b) who has **control [defined under S. 2(27)] 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.**

Exception: a person who is acting merely in a professional Capacity, shall not be regarded as promoter [under (c)], e.g., the solicitor, banker, accountant etc.





PROMOTERS

There are certain liabilities that the promoter has under Companies Act, 2013

- The promoter in case of misstatement has an obligation to pay compensation for error in the prospectus
- A promoter of the company can be compelled by the members of the company to provide full disclosure as to any secret profit made while imparting his duties.
- Promoters have an obligation to give exit opportunity to dissenting shareholders.
- Upon the report of company liquidator the liability to be examined before the tribunal
- Promoters have both civil and criminal liability under the Companies Act in case the prospectus contains an untrue statement.



FORMATION OF COMPANY (SECTION 3)

Acc. To Section 3:“(1) A company may be formed for **any lawful purpose** by—

- **(a) seven or more persons**, where the company to be formed is to be a **public company**;
- **(b) two or more persons**, where the company to be formed is to be a **private company**; or
- **(c) one 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:



FORMATION OF COMPANY (SECTION 3)

*Provided that the memorandum of One Person Company shall indicate the **name of the other person**, with his **prior written consent** in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles:*

*Provided further that **such other person may withdraw his consent** in such manner as may be **prescribed**: [S. 2(66) Prescribed means prescribed by rules made under this Act;]*



FORMATION OF COMPANY (SECTION 3)

Provided also that the member of One Person Company may at any time change the name of such other person by giving notice in such manner as may be prescribed:

*Provided also that it shall be the **duty of the member of One Person Company to intimate the company the change**, if any, in the name of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed, and **the company shall intimate the Registrar any such change** within such time and in such manner as may be prescribed:*



FORMATION OF COMPANY (SECTION 3)

Provided also that any such change in the name of the person shall not be deemed to be an alteration of the memorandum.

(2) A company formed under sub-section (1) may be either—

- *(a) a company limited by shares; or*
- *(b) a company limited by guarantee; or*
- *(c) an unlimited company*
- **Exception:** a Specified IFSC public or Specified IFSC Private company shall be formed only as a company limited by shares.
- IFSC stands for “INTERNATIONAL FINANCIAL SERVICES CENTRES”. An IFSC caters to customers outside the jurisdiction of the domestic economy. Gujarat International Finance Tec-City (also called GIFT City), is India’s first IFSC

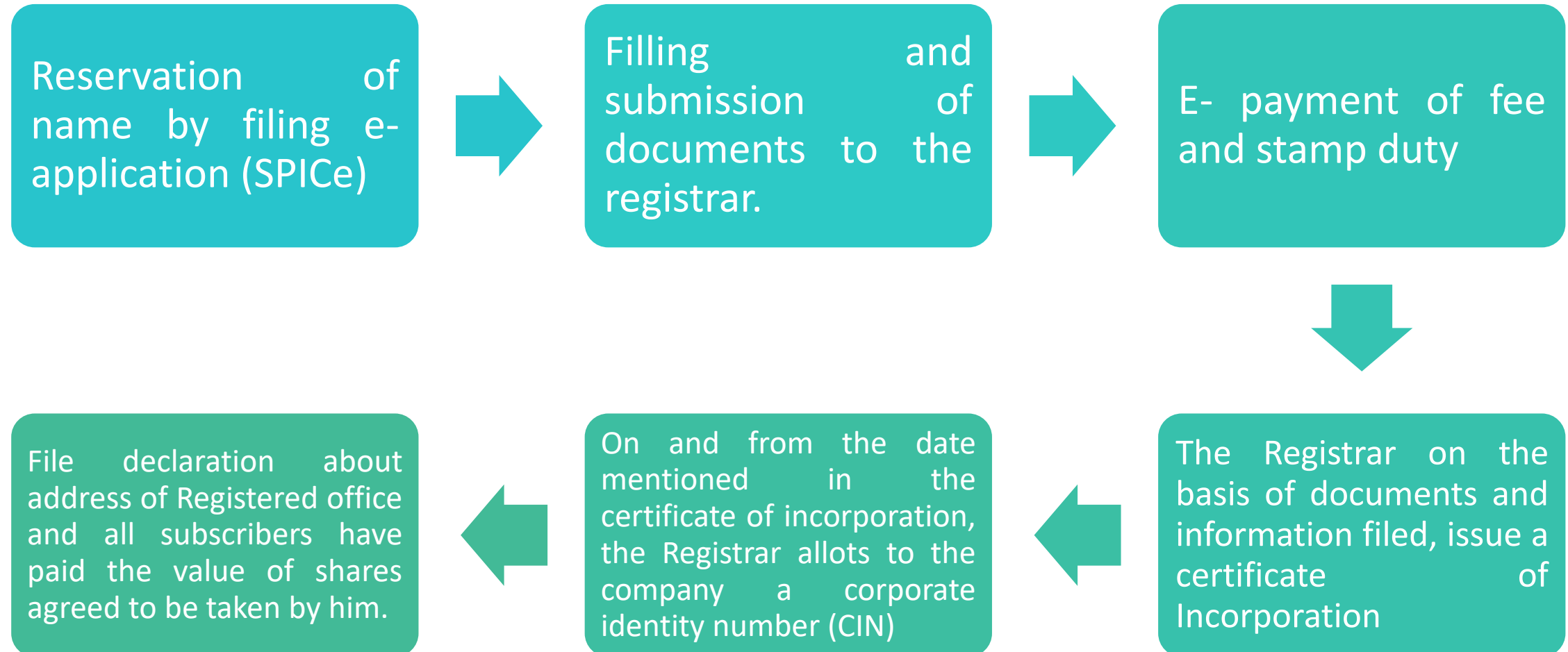


Maintain minimum number of members [Section 3A]

If at any time the **number of members of a company** is **reduced**, in the case of a public company, **below seven**, in the case of a private company, **below two**, and the company carries on business for **more than six months** while the number of members is so reduced, **every person** who is a member of the company during the time that it so carries on business after those six months and is **cognizant** (aware) of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be **severally liable** for the payment of the whole debts of the company **contracted during that time (after six months)**, and may be severally sued therefore.



STEPS FOR INCORPORATION OF COMPANY [Section 7]





STEPS FOR INCORPORATION OF COMPANY [Section 7]

SPICe stands for Simplified Performa for Incorporating Company electronically. The new SPICe form takes advantage of re-engineering of the existing process and establishment of Central Registration Centre to complete government processing of incorporation application of a company in a single day. SPICe integrates the allotment of Directors Identification Number (DIN), name approval, incorporation certificate, Permanent Account Number (PAN) and Tax Deduction Account Number (TAN) allotment under a single process, single form.



TYPES OF DOCUMENTS AND INFORMATION TO BE SUBMITTED WITH THE REGISTRAR

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

1. the **memorandum and articles** of the company duly signed by all the subscribers to the memorandum. These documents have to be e filed and e stamped
2. a **declaration by person who is engaged in the formation of the company** 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



TYPES OF DOCUMENTS AND INFORMATION TO BE SUBMITTED WITH THE REGISTRAR

3. a **declaration from each of the subscribers** to the memorandum and from persons named as the first directors, if any, in the articles stating that
- a. he is **not convicted of any offence** in connection with the promotion, formation or management of any company, or
 - b. 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,
 - c. 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;



TYPES OF DOCUMENTS AND INFORMATION TO BE SUBMITTED WITH THE REGISTRAR

4. the address for correspondence till its registered office is established;
5. **the particulars** (names, including surnames or family names, residential address, nationality) of **every subscriber** to the memorandum along with proof of identity, and in the case of a subscriber being a body corporate, such particulars as may be prescribed.
6. the **particulars** (names, including surnames or family names, the Director Identification Number (DIN), residential address, nationality) of **the persons mentioned in the articles as the first directors** and such other particulars including proof of identity as may be prescribed; and
7. the **particulars of the interests of the persons mentioned in the articles as the first directors** of the company in other firms or bodies corporate along with their consent to act as directors of the company in such form and manner as may be prescribed



Contd..

Maintenance of copies of all documents and information: Acc. To Section 7(4)
The company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.



INCORPORATION OF COMPANY BY FURNISHING FALSE INFORMATION

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



ORDER OF TRIBUNAL

*Section 7 (7) provides that: "Without prejudice to the provisions of sub-section (6), where a company has been incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, **the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—***

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



ORDER OF TRIBUNAL

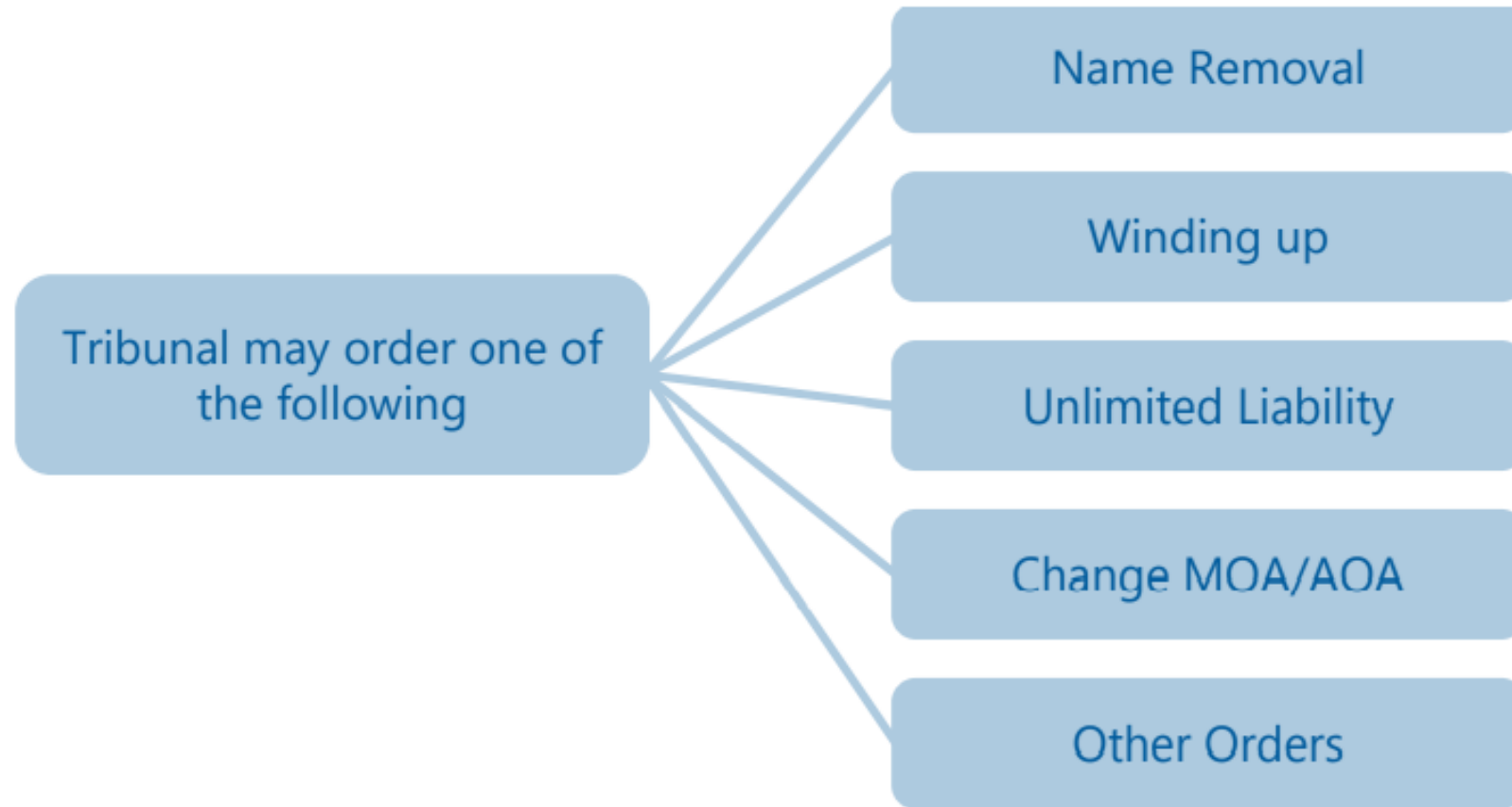
- *(b) direct that liability of the members shall be unlimited; or*
- *(c) direct removal of the name of the company from the register of companies; or*
- *(d) pass an order for the winding up of the company; or*
- *(e) pass such other orders as it may deem fit:*

Provided that before making any order under this sub-section,—

(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.

ORDER OF TRIBUNAL





INCORPORATION OF OPC

Law with respect to formation of OPC provides that—

- The **memorandum** of OPC shall indicate the name of the other person (**nominee**), who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- The other person (**nominee**) whose name is given in the memorandum shall give his **prior written consent** in prescribed form[INC- 3] and the same shall be **filed** with **Registrar** of companies at the time of incorporation along with its Memorandum of Association and Articles of Association.
- Such other person (nominee) may be given the **right to withdraw his consent**.
- The **member** of OPC may at any time **change the name** of such other person (**nominee**) by giving notice to the company and the company shall intimate the same to the Registrar .





INCORPORATION OF OPC

- Any such change in the name of the person shall **not** be deemed to be an **alteration of the memorandum**.
- **Eligibility to become a member of OPC**
 - Only a **natural person**
 - who is an **Indian citizen**
 - and **resident in India**

shall be **eligible** to incorporate a One Person Company; (b) shall be a **nominee** for the sole member of a One Person Company.

the term "**resident in India**" means a person who has stayed in India for a period of not less than **182 days** during the immediately preceding financial year.





INCORPORATION OF OPC

Restrictions on members with respect to OPC

A natural person shall **not** be a **member of more than one OPC** at any point of time and the said person shall not be a **nominee of more than one OPC**..

Where a natural person, being member in One Person Company becomes a member in another OPC by virtue of his being a nominee in that OPC, then such person shall meet the eligibility criteria of being a member in only one OPC within a period **of one hundred and eighty days, i.e.**, he/she shall withdraw his membership from either of the OPCs within one hundred and eighty days.

No minor shall become member or nominee of the OPC or can hold share with beneficial interest.





INCORPORATION OF OPC

Restrictions on OPC

a. Such Company **cannot** be incorporated or **converted** into a company under **section 8** of the Act. Though it may be **converted** to **private or public companies** in certain cases. The procedure of conversion is given in the rules 6 & 7 of *Company Incorporation Rules, 2014*.

B. Such Company cannot carry out **Non-Banking Financial Investment** activities including investment in securities of anybody corporate or be a S.8 Company.

C. OPC cannot **convert voluntarily** into any kind of company unless **two years** have expired from the date of incorporation, **except** where the paid up share capital is increased **beyond fifty lakh rupees** or its **average annual turnover** average annual turnover of immediately preceding three consecutive financial years **exceeds two crore rupees**.

MANDATORY CONVERSION OF OPC

In case the paid up share capital of an OPC exceeds fifty lakh rupees or its average annual turnover of immediately preceding three consecutive financial years exceeds two crore rupees, then the OPC has to mandatorily convert itself into **private or public company**. The OPC shall inform RoC in form INC-5, if the threshold limits is exceeded and is required to be converted into private or public company. Form INC-5 shall be filed within sixty days of exceeding threshold limits.

Example 1: Rajesh has formed a 'One Person Company (OPC)' with his wife Roopali 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.

Example 2: Abha formed a 'One Person Company (OPC)' on 15th October, 2017 with her husband Akhil as nominee and Rs. 10 lacs as Authorised and paid-up share capital. In the month of April, 2018 she got in touch with a foreigner and is expecting to receive a substantial export order by May, 2018 whose final delivery must be completed by December, 2018. She is contemplating to convert her OPC into a private limited company before she receives the export order in May 2018. In this case, Abha cannot voluntarily convert her OPC into a private limited company before expiry of two years from 15-10-2017 i.e. upto 14th October, 2019



SECTION 8 COMPANY

- A. It is formed to **promote the charitable objects** of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment etc.
- B. apply its profit in promoting its objects
- C. **prohibits the payment of any dividend** to its members.
- D. It is a limited liability Co. the addition of words 'Limited' or 'Private limited' to its name, is not mandatory. It can be incorporated as company limited by shares or guarantee.
- E. shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government [power delegated to RoC]
- F. It **may convert itself into company of any other kind by passing a special resolution at a general meeting for approving such conversion.**

-
- A firm may be a member of the company registered under section 8.
 - **Conversion into any other kind of Company:** A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed. A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.



REGISTRATION OF SECTION 8 COMPANY

Section 8 States that:

1) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company—

- (a) 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;*
- (b) intends to apply its profits, if any, or other income in promoting its objects; and*
- (c) intends to prohibit the payment of any dividend to its members,*



REGISTRATION OF SECTION 8 COMPANY

*the **Central Government** may, by licence issued in such manner as may be prescribed, and on such conditions as it deems fit, allow that person or association of persons **to be registered as a limited company** under this section without the addition to its name of the word “Limited”, or as the case may be, the words “Private Limited” , and thereupon the Registrar shall, on application, in the prescribed form, register such person or association of persons as a company under this section.*

*(2) The company registered under this section **shall enjoy all the privileges and be subject to all the obligations of limited companies.***

*(3) **A firm may be a member of the company** registered under this section.*

[Membership of such firm shall cease upon dissolution of the firm. However, partners of the dissolved firm may continue to be the members of such Company in their individual capacity]



REGISTRATION OF SECTION 8 COMPANY

*(4)(i) A company registered under this section **shall not alter the provisions of its memorandum or articles** except with the previous approval of the Central Government.*

*(ii) A **company registered under this section may convert itself into company of any other kind only** after complying with such conditions as may be prescribed.*

They will have to pass a special resolution at a general meeting approving such conversion

Note: *As per Section 2 (85) Proviso(B) – Section-8 Company will not be treated as Small Company.*



POWER OF CENTRAL GOVERNMENT TO ISSUE THE LICENSE

(5) Where it is proved to the satisfaction of the Central Government that a **limited company registered** under this Act or under any previous company law has been formed with any of **the objects specified** in clause (a) of sub-section (1) and **with the restrictions and prohibitions** as mentioned respectively in clauses (b) and (c) of that sub-section, it may, **by licence, allow the company to be registered under this section** subject to such conditions as the Central Government deems fit and to **change its name by omitting the word “Limited”, or as the case may be, the words “Private Limited”** from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company. [*The power of CG is delegated to the ROC having Jurisdiction over the area where the Registered office of the company is proposed to be situated.*]



REVOCACTION OF LICENSE

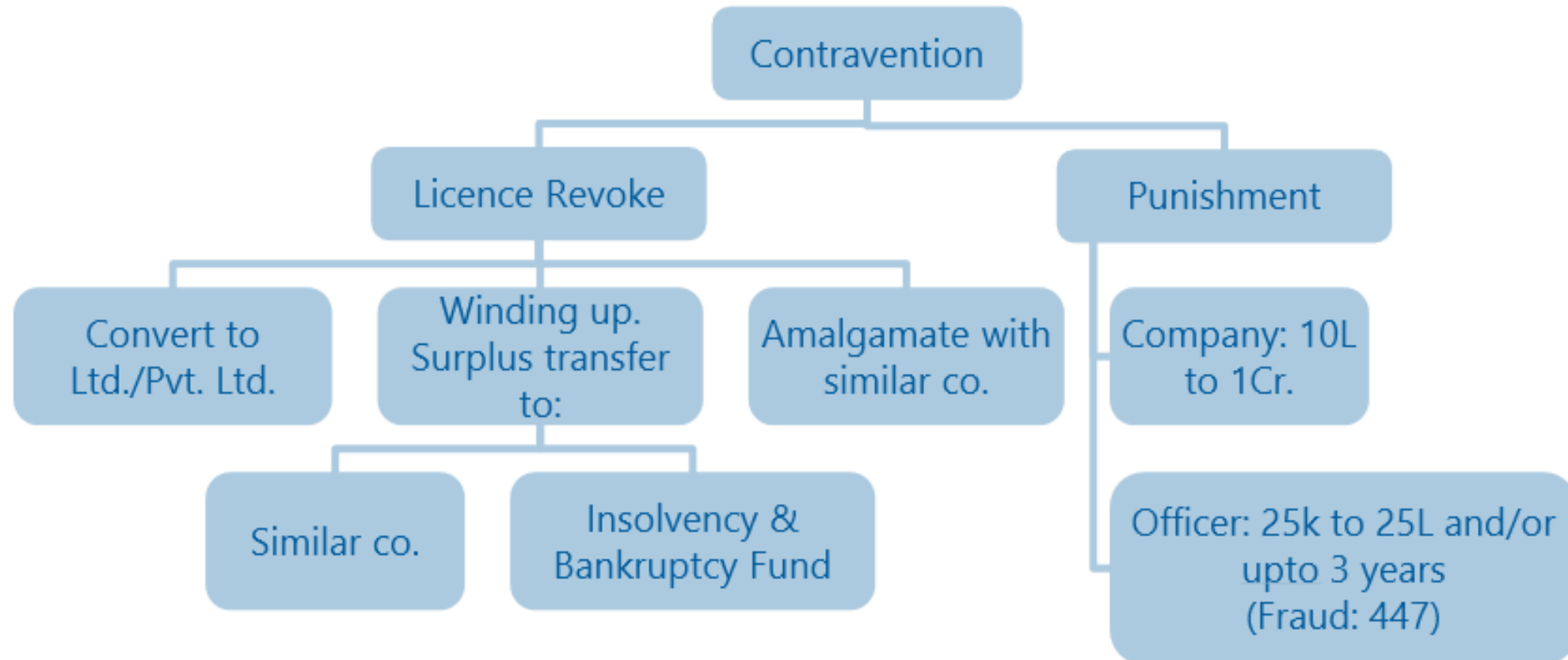
(6) **The Central Government may, by order, revoke the licence granted to a company registered under this section if the company contravenes any of the requirements of this section or any of the conditions subject to which a licence is issued or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and without prejudice to any other action against the company under this Act, direct the company to convert its status and change its name to add the word “Limited” or the words “Private Limited”, as the case may be, to its name and thereupon the Registrar shall, without prejudice to any action that may be taken under subsection (7), on application, in the prescribed form, register the company accordingly:**

Provided that no such order shall be made unless the company is given a reasonable opportunity of being heard:

Provided further that a copy of every such order shall be given to the Registrar.



REVOCACTION OF LICENSE





EFFECT OF REVOCATION OF LICENSE

(7) Where a licence is revoked under sub-section (6), the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that **the company be wound up under this Act or amalgamated with another company registered under this section:**

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



EFFECT OF REVOCATION OF LICENSE

(8) Where a licence is revoked under sub-section (6) and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be **amalgamated with another company registered under this section and having similar objects**, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.



EFFECT OF REVOCATION OF LICENSE

(9) If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to the Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016.

(10) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.



PUNISHMENT FOR CONTRAVENTION

(11) If a **company** makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, **be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees, or with both:**

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



EXCEPTIONS

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



EFFECT OF REGISTRATION [S.9]

Section 9 of the Companies Act, 2013 provides for the effect of registration of a company.

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



EFFECT OF REGISTRATION [S.9]

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



EFFECT OF REGISTRATION [S.9]

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

EFFECT OF REGISTRATION [S.9]

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



COMMENCEMENT OF BUSINESS- SECTION 10A

(1) **A company** incorporated after the commencement of the Companies (Amendment) Ordinance, 2019 and **having a share capital** shall not **commence** any **business** or exercise any **borrowing powers** unless—

- (a) a **declaration** is filed by a director within a period of **180 days** of the date of incorporation of the company with the **Registrar** 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; and
- (b) The company has filed with the Registrar a **verification of its registered office** as provided in sub-section (2) of section 12.



COMMENCEMENT OF BUSINESS- SECTION 10A

(2) If **any default is made**, the company shall be **liable to a penalty** of fifty thousand rupees and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.

(3) **Where no declaration has been filed** with the Registrar within a period of one hundred and eighty days of the date of incorporation of the company 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.



COMMENCEMENT OF BUSINESS- SECTION 10A

As per Rule 23A [Declaration at the time of commencement of business.] of the **Companies (Incorporation) Rules, 2014**, the **declaration** under section 10A by a director shall be in **prescribed form with prescribed fees** and the contents of the said form shall be **verified by a Company Secretary or a Chartered Accountant or a Cost Accountant**, in practice:

Provided that 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**.



MEMORANDUM OF ASSOCIATION

As per section 2(56) — *memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act;*

It is the base document for the formation of the company and along with the Articles of Association (AOA) is regarded as the Constitution of the Company.

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

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



FORM OF MOA

Table A: is applicable to companies limited by shares

Table B: is applicable to companies limited by guarantee and not having a share capital;

Table C is applicable to the companies limited by guarantee and having a share capital

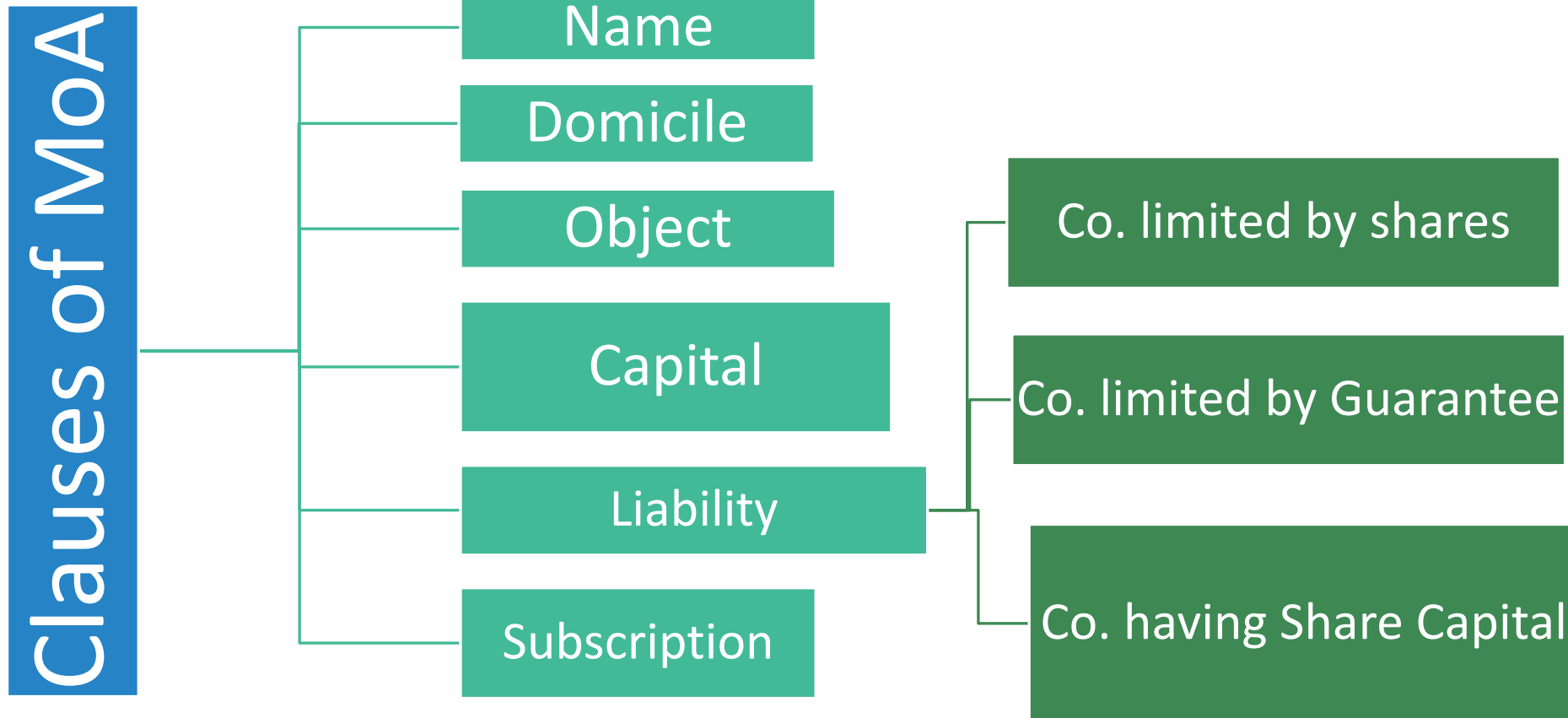
Table D is applicable to unlimited companies and not having a share capital;

Table E is applicable to unlimited companies and having a share capital.





CLAUSES OF MOA- S. 4



Note: In case of OPC, Name of person who in the event of death of subscriber, shall become the member of the Co. is also included in the MOA



NAME CLAUSE

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

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



NAME CLAUSE

- contains—
 - (i) any word or expression which is likely to give the impression that the company is in any way connected with, or **having the patronage of, the Central Government, any State Government, or any local authority**, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or
 - (ii) **such word or expression**, as may be prescribed, **unless the previous approval of the Central Government has been** obtained for the use of any such word or expression. eg., words like -Board; Commission; Authority; Undertaking; National; Union; Central; Federal; Republic; President etc.



NAME CLAUSE

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

- (i) the **name** of the proposed company; or
- (ii) the name to which the company proposes to **change** its name.



NAME CLAUSE

Reserving the name: Upon receipt of an application for the **reservation of name**, 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 as may be prescribed.

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.



NAME CLAUSE

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

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

Example: Mr. Anil Desai, has applied for reservation of company name with a prefix “Sanwariya”. He claimed that the Prefix “Sanwariya” is registered trademark in his name. Later on, it is found that the said prefix is not registered with Mr. Anil Desai, however, he has formed company by giving incorrect documents/information while applying the name of the company. In such case, The Registrar shall take action as per the provisions of the act after giving opportunity of being heard.



NAME CLAUSE

Note: Circular:

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

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



EXAMPLES

- Green Technology Ltd. is same as Greens Technology Ltd./Greens Technologies Ltd.
- ABC Ltd. is same as A.B.C. Ltd. and A B C Ltd.
- TeamWork Ltd. is same as Team@Work Ltd. and Team-Work Ltd
- Ascend Solutions Ltd. is same as Ascended Solutions Ltd. and Ascending Solutions Ltd.
- chemtech Ltd. is same as Chemtec Ltd., Chemtek Ltd., Cemtech Ltd., Cemtek Ltd., Kemtech Ltd., and Kemtek Ltd
- Ultra Solutions Ltd. is same as Ultrasolutions.com Ltd.
- Ravi Builders and Contractors Ltd. is same as Ravi Contractors and Builders Ltd.
- National Electricity Corporation Ltd. is same as Rashtriya Vidyut Nigam Ltd.
- If Salvage Technologies Ltd. is an existing name, it is same as Salvage Technologies Delhi Ltd and Salvage Delhi Technologies Ltd.



OBJECT CLAUSE

It contains the **object** for which the company is formed and therefore identifies the possible scope of its operations beyond which its actions cannot go.

It enables **shareholders, creditors** and all those who deal with company to **know** what its powers are and what activities it can engage in.

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

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



DOCTRINE OF ULTRAVIRES

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

The rule is meant to **protect** shareholders and the creditors of the company.

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

FACTS: In the given case the memorandum of the company defined its objects as : “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.....”.





DOCTRINE OF ULTRAVIRES

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.





DOCTRINE OF ULTRAVIRES

Decision: 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.

The purpose of doctrine of ultra vires has been **defeated** as now the object clause can be easily altered, by passing just a special resolution by the shareholders.



LIABILITY CLAUSE

(a) This clause covers details on the **liability of members** of the company, whether limited or unlimited, and also state—

- in the case of a company **limited by shares**, that the liability of its members is limited to the **amount unpaid**, if any, on the shares held by them; and
- in the case of a company **limited by guarantee**, the amount up to which each member undertakes to **contribute**—
 - to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
 - to the costs, charges and expenses of winding-up and
 - for adjustment of the rights of the contributories among themselves;



LIABILITY CLAUSE

- **(b)** in the case of a company having a **share capital**—
 - the **amount** of share capital with which the company is to be registered and the **division** thereof into shares of a fixed amount and the number of shares which the **subscribers** to the memorandum agree to subscribe which shall not be less than **one share**; and
 - the **number of shares** each subscriber to the memorandum intends to take, indicated **opposite his name**;

The clause, in the case of One Person Company, covers the name of the person (nominee) who, in the event of death of the subscriber, shall become the member of the company.



DOMICILE CLAUSE/ REGISTERED OFFICE CLAUSE

The name of federal **state** is mentioned where the registered office is to be situated. Registered office is the permanent address of the company. It is residence of company.





SUBSCRIPTION & CAPITAL CLAUSE

Subscription clause

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

Capital Clause

This clause details the maximum capital that a company can raise which is also called the authorized/nominal capital of the company. This also explains the division of such capital amount into the number of shares and the nominal value of each share.



THANK YOU