MEMORANDUM OF ASSOCIATION, ARTICLES OF ASSOCIATION & PROSPECTUS

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1. Memorandum of Association

A company is formed when a number of people come together for achieving a specific purpose. This purpose is usually commercial in nature. Companies are generally formed to earn profit from business activities. To incorporate a company, an application has to be filed with the Registrar of Companies (ROC). This application is required to be submitted with a number of documents. One of the fundamental documents that are required to be submitted with the application for incorporation is the Memorandum of Association.

Section 2(56) of the Companies Act, 2013 defines Memorandum of Association. It states that a "memorandum" means two things:

- *Memorandum of Association as originally framed;*

  Memorandum as originally framed refers to the memorandum as it was during the incorporation of the company.

- *Memorandum as altered from time to time;*

  This means that all the alterations that are made in the memorandum from time to time will also be a part of Memorandum of Association.

The section also states that the alterations must be made in pursuance of any previous company law or the present Act.

In addition to this, according to Section 399 of the Companies Act, 2013, any person can inspect any document filed with the Registrar in pursuance of the provisions of the Act. Hence, any person who wants to deal with the company can know about the company through the Memorandum of Association.

Memorandum of Association is a legal document which describes the purpose for which the company is formed. It defines the powers of the company and the conditions under which it operates. It is a document that contains all the rules and regulations that govern a company's relations with the outside world.

It is mandatory for every company to have a Memorandum of Association which defines the scope of its operations. Once prepared, the company cannot operate beyond the scope of the document. If the company goes beyond the scope, then the action will be considered ultra vires and hence will be void.

It is a foundation on which the company is made. The entire structure of the company is detailed in the Memorandum of Association.

The memorandum is a public document. Thus, if a person wants to enter into any contracts with the company, all he has to do is pay the required fees to the Registrar of Companies and obtain the Memorandum of Association. Through the Memorandum of Association he will get all the details of the company. It is the duty of the person who indulges in any transactions with the company to know about its memorandum.

Object of registering a Memorandum of Association or MOA

Memorandum of Association is an essential document that contains all the details of the company. It governs the relationship between the company and its stakeholders. Section 3 of the Companies Act, 2013 describes the importance of memorandum by stating that, for registering a company,

1. In case of a public company, seven or more people are required;
2. In case of a private company, two or more people are required;
3. In case of a one person company, only one person is required.

In all the above cases, the concerned people should first subscribe to a memorandum before registering the company with Registrar.

Thus, Memorandum of Association is essential for registration of a company. Section 7(1)(a) of the Act states that for incorporation of a company, Memorandum of Association and Articles of Association of the company should be duly signed by the subscribers and filed with the Registrar. In addition to this, a memorandum has other objects as well. These are,

1. It allows the shareholders to know about the company before buying it shares. This helps the shareholders determine how much capital will they invest in the company.
2. It provides information to all the stakeholders who are willing to associate with the company in any way.

Format of Memorandum of Association

Section 4(5) of the Companies Act states that a memorandum should be in any form as given in Tables A, B, C, D, and E of Schedule 1. The Tables are of different kinds because of different kinds of companies.

Table A – It is applicable to a company limited by shares.

Table B – It is applicable to a company limited by guarantee and not having a share capital.

Table C – It is applicable to a company limited by guarantee and having a share capital.

Table D – It is applicable to an unlimited company not having a share capital.

Table E – It is applicable to an unlimited company having a share capital.

The memorandum should be printed, numbered and divided into paragraphs. It should also be signed by the subscribers of the company.

Content of Memorandum of Association

Section 4 of the Companies Act, 2013 states the contents of the memorandum. It details all the essential information that the memorandum should contain.

Name Clause

The first clause states the name of the company. Any name can be chosen for the company. But there are certain conditions that need to be complied with.

Section 4(1)(a) states

1. If a company is a public company, then the word 'Limited' should be there in the name. Example, "Robotics", a public company, its registered name will be "Robotics Limited".
2. If a company is a private company, then 'Private Limited' should be there in the name. "Secure"a private company, its registered name will be "Secure Private Limited".
3. This condition is not applicable to Section 8 companies.

What are Section 8 companies?

Section 8 Company is named after Section 8 of the Companies Act,2013. It describes companies which are established to promote commerce, art, sports, education, research, social welfare, religion etc. Section 8 companies are similar to Trust and Societies but they have a better recognition and legal standing than Trust and Societies.

What kind of names are not allowed?

The name stated in the memorandum shall not be,

1. Identical to the name of another company;
2. Too nearly resembling the name of an existing company.

According to Rule 8 of the Company (Incorporation) Rules,2014.

- If a company adds 'Limited', 'Private Limited', 'LLP', 'Company', 'Corporation', 'Corp', 'inc' and any other kind of designation to its name to differentiate it from the name of the other company, the name would still not be accepted.

Illustration: Precious Technology Limited is same as Precious Technology Company.

- If plural or singular forms are added to differentiate between names. Illustrations: Greentech Solution is same as GreenTech Solutions.

Colors Technology is same as Color Technology.

- If type, and case of letters, or punctuation marks are added.

Illustration: Wework is same as We.work.

- Different tenses are used in names.

Illustration: Ascend Solution is same as Ascended Solutions.

- If there is an intentional spelling mistake in the name or phonetic changes in the name.

Illustrations: Greentech is same as Greentek.

DQ is same as DeeQew.

- Internet related designations are used like .org, .com, etc.

Illustration: Greentech Solution Ltd. is same as Greentech Solutions.com Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Change in order of combination of words.

Illustration: Shah Builders and Contractors is same as Shah Contractors and Builders.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition of a definite or indefinite article.

Illustration: Greentech Solutions Ltd is same as The Greentech Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Slight variation in spelling of two names, including a grammatical variation.

Illustration: Colours TV Channel is same as Colors TV Channel.

- Translation of a name, from one language to another.

Illustration: Om Electricity Corporation is same as Om Vidyut Nigam.

- Addition of the name of a place to the name.

Illustration: Greentech Solutions Ltd. Is same as Greentech Mumbai Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition, deletion or modification of numericals in the name.

Illustration: Greentech Solutions Ltd. Is same as 5 Greentech Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

In addition to this, an undesirable name will also not be allowed to be chosen.

Undesirable names are those names which in the opinion of the Central Government are:

1. Prohibited under the Provisions of Section 3 of Emblems and Names (Prevention and Improper Use) Act, 1950.
2. Names which resemble each other, which are chosen to deceive.

3. The name includes a registered trademark.
4. The name includes any word or words which are offensive to a section of people.
5. Name which is identical to or too nearly resembles the name of an existing Limited Liability Partnership.

Furthermore, statutory names such as the UN, Red Cross, World Bank, Amnesty International etc. are also not allowed to be chosen.

Names which in any way indicate that the company is working for the government are also not allowed.

Reservation of a Name

Section 4(5)(i) of the Act states that for formation of the Company, the Registrar on receiving the required documents can reserve a name for 20 days. If the application is made by an existing company, then once the application is accepted, the name will be reserved for 60 days from the date of application. The company should get incorporated with the reserved name in these 60 days.

If after making the reservation of a name, it is found that some wrong information is given. Then two cases arise.

1. In case the company has not been incorporated. In this case, the Registrar can cancel the reservation of the name and impose a fine of Rupees 1,00,000.
2. In case the company has been incorporated. In this case, after hearing the reasons of the company, the Registrar has 3 options. These are,

- On being satisfied, he can give 3 months' time to the company to change the name by passing an ordinary resolution.
- He can strike off the name from the Register of Companies.
- He can file a petition of winding up of the company.

Rule 8 and 9 of the Company (Incorporation) Rules, 2014 state that the application for reservation of name under section 4(4) should be filed on Form INC – 1.

Registered Office Clause

The Registered Office of a company determines its nationality and jurisdiction of courts. It is a place of residence and is used for the purpose of all communications with the company.

Section 12 of the Companies Act, 2013 talks about Registered Office of the company.

Before incorporation of the company, it is sufficient to mention only the name of the state where the company is located. But after incorporation, the company has to specify the exact location of the registered office. The company has to then get the location verified as well, within 30 days of incorporation.

It is mandatory for every company to fix its name and address of its registered office on the outside of every office in which the business of the company takes place. If the company is a one-person company, then "One-person Company" should be written in brackets below the affixed name of the company.

Change in place of Registered Office should be notified to the Registrar within the prescribed time period.

Object Clause

Section 4(c) of the Act, details the object clause. The Object Clause is the most important clause of Memorandum of Association. It states the purpose for which the company is formed. The object clause contains both, the main objects and matters which are necessary for achieving the stated objects also known as incidental or ancillary objects. The stated objects must be well defined and lawful according to Section 6(b) of the Companies Act, 2013.

By limiting the scope of powers of the company. The object clause provides protection to:

Shareholders – The object clause clearly states what operations will the company perform. This helps the shareholders know their investment in the company will be used for what purpose.

Creditors – It ensures the creditors that capital is not at risk and the company is working within the limits as stated in the clause.

Public Interest – The object clause limits the number of matters the company can deal with thus, prohibiting diversification of activities of the company.

Doctrine of Ultra Vires

If the company operates beyond the scope of the powers stated in the object clause, then the action of the company will be ultra vires and thus void.

Consequences of Ultra Vires

1. Liability of Directors: The directors of the company have a duty to ensure that company's capital is used for the right purpose only. If the capital is diverted for another purpose not stated in the memorandum, then the directors will be held personally liable.
2. Ultra Vires Borrowing by the Company: If a bank lends to the company for the purpose not stated in the object clause, then the borrowing would be Ultra Vires and the bank will not be able to recover the amount.
3. Ultra Vires Lending by the Company: If the company lends money for an ultra vires purpose, then the lending would be ultra vires.
4. Void ab initio: Ultra Vires acts of the company are considered void from the beginning.

5. Injunction: Any member of the company can use the remedy of injunction to prevent the company from doing ultra vires acts.

Liability Clause

The Liability Clause provides legal protection to the shareholders by protecting them from being held personally liable for the loss of the company.

There are two kinds of limited liabilities:

i. Limited By Shares: Section 2(22) of the Companies Act, 2013 defines a company limited by shares. In a company limited by shares, the shareholders only have to pay the price of the shares they have subscribed to. If for some reason they have not paid the full amount for the shares and the company winds up then their liability will only be limited to the unpaid amount.
ii. Limited By Guarantee: It is defined in Section 2(21) of the Companies Act, 2013.A company limited by guarantee has members instead of shareholders. These members undertake to contribute to the assets of the company at the time of winding up. The members give guarantee of a fixed amount that they will be liable for.

Non-profit Organizations and other charities usually have a structure of companies limited by guarantee.

Capital Clause

It states the total amount of share capital in the company and how it is divided into shares. The way the amount of capital is divided into what kind of shares. The shares can be equity shares or preference shares.

Illustration: The share capital of the company is 80,00,000 rupees, divided into 3000 shares of 4000 rupees each.

Subscription Clause

The Subscription Clause states who are signing the memorandum. Each subscriber must state the number of shares he is subscribing to. The subscribers have to sign the memorandum in the presence of two witnesses. Each subscriber must subscribe to at least one share.

Association Clause

In this clause, the subscribers to the memorandum make a declaration that they want to associate themselves to the company and form an association.

Memorandum of Association for One-Person-Company

A one-person company is called so because it can be formed by one person. The minimum capital required to form a one-person company is 1,00,000 Rupees.

It is a new concept which has been introduced to promote entrepreneurship. All the laws which are applicable on private companies will be applicable on one-person company.

Section 2(62) of the Companies Act, 2013 defines one-person company.

A one-person company is a separate legal entity from its owner. It is mandatory for the company to be converted into a private limited company in case its annual turnover crosses the 2 Crore mark.

In case of one-person-company, in addition to all the other clauses, the Memorandum of Association contains a clause called the Nomination Clause. This clause mentions the name of an individual who will become the member in case the subscriber dies or becomes incapacitated. The nominee must be an Indian citizen and resident of India i. e. he must have been living in India for at least 182 days in the preceding year. A minor cannot be a nominee.

The individual whose name is mentioned should give his consent in written form and it is required to be filed with the Registrar of Companies at the time of incorporation.

If the nominee wants to withdraw, he shall give it in writing and the owner of the company will have to nominate a new person within 15 days

What's the use of Memorandum of Association?

1. It defines the scope & powers of a company, beyond which the company cannot operate.
2. It regulates company's relation with the outside world.
3. It is used in the registration process, without it the company cannot be incorporated.
4. It helps anyone who wants to enter into a contractual relationship with the company to gain knowledge about the company.
5. It is also called the charter of the Company, as it contains all the details of the company, its members and their liabilities.

Subscription of Memorandum of Association

Subscribers are the first shareholders of the company. They are the people who agreed to come together and form the company. The name of each subscriber along with their particulars are mentioned in the memorandum.

Different kinds of companies require different number of subscribers for incorporation.

1. Private Company: In case of a private company, the minimum number of subscribers required are 2.
2. Public Company: In case of a public company, 7 or more subscribers are required.

3. One-Person-Company: In case of one-person-company, only one person is required.

Who can Subscribe?

Rule 13 of the Companies (Incorporation) Rules, 2014 describes the provisions of subscribing to the memorandum.

There are specific kinds of persons (natural or artificial) who can subscribe to the memorandum. These are:

1. Individuals – An individual or a group of individuals can subscribe to the memorandum.
2. Foreign citizens and Non Resident Indians – Rule 13(5) of the Companies (Incorporation) Rules, states that for a foreign citizen to subscribe to a company in India, his signature, address and proof of identity will need to be notarized.

The foreign national must have visited India and should have a Business Visa.

For a Non Resident Indian, the photograph, address and identity proof should be attested at the Embassy with a certified copy of a passport. There is no requirement of Business Visa.

1. Minor – A minor can only be a subscriber through his guardian.
2. Company incorporated under the Companies Act – The company can be a subscriber to the memorandum. The Director, officer or employee of the company or any other person authorized by the board of resolution.
3. Company incorporated outside India – Foreign Company is defined in Section 2(42) of the act, it states that a foreign company is a company incorporated outside India. A company registered outside India can also subscribe to the memorandum by fulfilling the additional formalities.
4. Society registered under the Societies Registration Act, 1860.
5. Limited Liability Partnership – A partner of a limited liability partnership can sign the memorandum with the agreement of all the other partners.
6. Body corporate incorporated under an Act of Parliament or State Legislature can also be a subscriber to the memorandum.

Printing and Signing of Memorandum of Association

Section 7(1)(a) states that the memorandum should be duly signed by all the subscribers and should be in a manner prescribed by the Act.

Rule 13 of the Company (Incorporation) Rules, 2014 describes the manner in which the memorandum should be signed.

1. The Memorandum of Association should be signed by each subscriber to the memorandum. The subscriber shall mention his name, address, occupation and the number of shares he is subscribing to. The documents should be signed in the presence of at least one witness. The witness would also mention his name, address, and occupation. By signing the memorandum, the witness states that, "I witness to subscriber/subscriber(s)who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in."

2. If the person subscribing to the document is illiterate, he can either authorize an agent to sign the document through Power of Attorney or he can put his thumb impression on the column for signatures. The person's name, address, occupation and the number of shares he is subscribing to should be written by a person who has been allowed to write for him. The person who is writing for the illiterate person should read and explain the contents of the document to an illiterate person.

3. Where the person subscribing to the memorandum is an artificial person i. e. a body corporate the memorandum shall be signed by the employee, officer or any person authorized by the Board of Resolution.

4. Where the person subscribing to the memorandum is a foreign national who does not reside in India but in a country,

- in any part of the Commonwealth, his signatures and address on the memorandum and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.

- in a country which is a signatory to the Hague Apostille Convention, 1961, his signature and proof of identity and address on the memorandum shall be notarized before the Notary (Public) of the country of his origin and be duly approved in accordance with the said Hague Convention.

- in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (40 of 1948).

Section 3 of the Diplomatic and Consular Officers states that, every Diplomat or any officer in a foreign country can perform the functions of a notary public.

1. Where there is no Diplomatic or Consular officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889.

2. If the foreign national visited India and intended to incorporate a company, in such a case the incorporation shall be allowed if, he is having a valid Business Visa.

Section 15 of the Companies Act, 2013 states that the memorandum should be in printed form.

The Ministry of Corporate Affairs has clarified that a document printed in form laser printers will be considered valid provided it is legible and fulfills other requirements as well.

The submission of xerox copies is not allowed. The xerox copies can be submitted to the members of the company.

Alteration, Amendment & Change in Memorandum of Association under Companies Act, 2013

The term "alter" or "alteration" is defined in Section 2(3) of the Act, as any additions, omissions or substitutions. A company can alter the memorandum only to the extent as permitted by the Act. According to Section 13, the company can alter the clauses in the memorandum by passing a special resolution.

A resolution is a formal decision taken in a meeting. There are two kinds of resolutions, ordinary and special. A special resolution is one which requires at least 2/3rd majority to be effective. The alteration to the clauses also require the approval of the Central Government in writing.

The alteration of memorandum can happen for a variety of reasons. The alteration can be made if,

1. Enables the company to carry its business more effectively;
2. Helps to achieve the objectives;
3. Helps the company to amalgamate with another company;
4. Helps the company dispose off any undertaking.

Alteration of Memorandum

The alteration of various clauses of the memorandum have different procedures:

1. Alteration to the Name Clause: To alter the name of the company, a special resolution is required. After the resolution is passed, the copy is sent to the registrar. For changing the name, the application needs to be filed in Form INC- 24 with the prescribed fees. After the name is changed, a new certificate of incorporation is issued.
2. Alteration to the Registered Office Clause: The application for changing the place for Registered Office of the company shall be filed with the Central Government in Form INC- 23 with the prescribed fees.

If the company is changing its Registered Office from one to another, then the approval of the Central Government is required. The Central Government is required to dispose off the matter within 60 days and should ensure that the change of place has the consent of all the stakeholders of the company.

- Alteration to the Object Clause: To alter the object clause, a special resolution is required to be passed. The changes must be confirmed by the authority. The document

which confirms the changes by authority with a printed copy of the altered memorandum should be filed with the Registrar.

If the company is a public company, then the alteration should be published in the newspaper where the Registered Office of the company is located. The changes to the object clause must also mentioned on the company's website.

- Alteration to the Liability Clause: The Liability clause of the memorandum cannot be altered except with the written consent of all the members of the company. By altering the liability clause, the liability of the directors of the company can be made unlimited. In any case, the liability of the shareholders cannot be made unlimited. Changes in the liability clause can be made by passing a special a special resolution and sending a copy of the resolution to the Registrar of Companies.

Alteration to the Capital Clause: The capital clause of a company can be altered by an ordinary resolution.

The company can,

1. Increase its authorised share capital;
2. Convert the shares into stock;
3. Consolidate and divide all of its shares;
4. Cancel the shares which have not been subscribed to;
5. Diminish the share capital of the shares cancelled.

The altered Memorandum of Association should be submitted to the Registrar within 30 days of passing the resolution.

2. Articles of Association

Articles of Association is a document which prescribes the rules and bye-laws for the general management of the company and for the attainment of its object as given in the memorandum It is a document of paramount significance in the life of a company as it contains the regulations for the internal administration of the company's affairs.

The articles of association are a subsidiary to the memorandum of association of the company. They define the rights, duties, powers of the management of a company as between themselves and the company at large. Further, they also prescribe the mode and form in which changes in the internal regulation of a company may be made from time to time. The articles of association of a company must always be in consonance with the memorandum of that company and being subordinate to the memorandum; they cannot extend the objects of a company as specified in the memorandum of the company.

In the case of **Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd**, the Supreme Court provided that the articles of association of a company also establish a contract

between the company and its members as well as between the members. This contract governs the ordinary rights and obligations incidental to the membership in the company.

Articles of association are like the partnership deed in a partnership. They particularly provide for matters such as the making of calls, forfeiture of shares, directors qualifications, the procedure for transfer and transmission of shares and debentures, powers, duties and appointment of auditors.

The Articles of Association can be seen as a rule book within a company. This is in a document form and is a part of the company's constitution alongside the memorandum. This document contains internal detailed governing aspects of the company's organisation. These include shares, (issue and rights attached to them) the conduct of the company meetings and the role and powers of the directors. The Articles detail rules which govern the conduct of directors, the rights of the shareholders and the relationship between the two.

The articles of association set out how the company is run, governed and owned. The articles can put restrictions on the company's powers – which may be useful if shareholders want comfort that the directors will not pursue certain courses of action, at least without shareholder approval. By default, however, the Companies Act 2006 gives a company unlimited powers.

In addition to the articles, which is a public document, the shareholders may enter into a shareholders' agreement to augment the articles in relation to the running, governance and ownership of the company that they want to keep out of the public domain.

Importance of Articles of Association

Under sec 36, the memorandum and the articles when registered, shall bind the company and its members to the same extent as if it had been signed by them and had contained a covenant on their part that the memorandum and the articles shall be observed.

With respect to the above section, the importance of articles of association can be summed up as follows:

i. Binding on members in their relation to the company- the members are bound to the company by the provisions of the articles just as much as if they had all put their seals to them.
ii. Binding on company in relation to its members- just as members are bound to the company, the company is bound to the members to observe and follow the articles.
iii. Neither company, nor members bound to outsiders- articles bind the members to the company and company to the members but neither of them is bound to an outsider to give effect to the articles.
iv. Binding between members inter se- the articles define rights and liabilities of the members. As between members inter se the articles constitute a contract between them and are also binding on each member as against the other or others. Such contract can be enforced only through the medium of the company.

Contents of the Articles of Association:-

Each limited liability company must have articles of association. They are the company's internal regulations, which bind the company, its administrative bodies, management and auditors. The articles of association must be complied with in the same manner as the Limited Liability Companies Act.

The formulation of the articles of association is of great importance from the point of view of the company's activities. Articles of association that are not suitable for the company's purposes may decrease the benefits, which the shareholders can obtain from the company. It is recommendable to pay due attention to the contents of the articles of association already during the company's founding phase, because the amendments thereof always require at least two-thirds (a qualified majority) of the votes and of the shares represented at the general meeting of shareholders. In practice, significant amendments always need to be agreed between the shareholders. Moreover, amendments always result in Trade Register costs as the amendments become effective only following registration in the Trade Register.

The articles of association must include provisions regarding the following

I. Company name

The company name of a private limited liability company must include the words "limited liability company" or the abbreviation "limited / Ltd" (in Finnish "osakeyhtiö" / "Oy", in Swedish "aktiebolag" / "Ab"). If the company intends to use its company name in two or more languages, the names in other languages must be stated in the articles of association.

II. A Finnish municipality as the company's place of business

A company may practice its activities in several places and also abroad, but its registered place of business can only be in one Finnish municipality. The company's registered place of business is of significance, as the general meetings of shareholders generally need to be held in the municipality of the place of business and any legal actions against the company need to be brought to the court of the municipality in question (forum domicilii).

III. The company's field of activity

The term "field of activity" refers to the fields in which the company carries on its business activity. Any activity, which may be pursued legally in the form of a limited liability company, can constitute the company's field of activity. A company can have several fields of activity, but they must all be registered. Although legislation is silent about how precise the definition of the field of activity needs to be, inexact and unnecessarily extensive definitions should be avoided. The definition of the field of activity has legal significance when assessing the competence of the company's organs to take care of company matters. Moreover, the field of activity is of importance when evaluating the use of company assets. The field of activity may also consist of a general field of activity. Definitions of the field of activity, which are too narrow, can cause extra costs and inconvenience, as the expansion of the company's activity

requires for the articles of association to be amended correspondingly and for the changes to be registered with the Trade Register.

IV. Share capital

The minimum amount of a private limited liability company's share capital is 2,500 euros. The minimum amount of a public limited liability company's share capital must be at least 80,000 euros. The share capital can be stated either as a fixed amount or as minimum and maximum amounts. In case the share capital has been defined as minimum and maximum capital, it can be increased and decreased within these limits without a need to amend the articles of association.

V. Nominal value and number of shares

If the nominal value is defined in the articles of association, all shares must have the same nominal value.

VI. Number of members of the board of directors and auditors as well as the possible deputy members, or the minimum and maximum number thereof. The number of the members of the board of directors and auditors, as well as the possible deputy members and their term of office may be stated in the articles of association. The number of the members may also be stated as a minimum or maximum amount. At least one of the members of the board of directors must have his/her place of residence in the EEA, unless the National Office of Patents and Registration of Finland grants the company a permission to deviate from this requirement. Legally incompetent or bankrupt natural persons or a legal person cannot be members of the board of directors. In addition, the articles of association may include special provisions concerning the eligibility of a board member and a deputy member.

There may be more than one auditor. The competence of an auditor is regulated in the Auditing Act [5.1.7 Audit]. In case only one auditor has been elected and the auditor is not an auditing KHT or HTM-firm approved in accordance with the Auditing Act, then at least one deputy auditor must be elected in addition.

VII. Notice of a general meeting of shareholders

The articles of association may stipulate the manner in which and when the notice to the annual general meeting of shareholders must be given. The notice may be given e.g. by announcement in a newspaper or by a written notice delivered to the persons who have been entered in the share and shareholders' registers. If not mentioned in the articles of association, according to the Limited Liability Companies Act, the notice must be issued in private limited liability companies no later than one week prior to the date of the general meeting, or the special date of registration stated in the articles of association, and no earlier than two months prior to the date of the general meeting or the registration date.

VIII. The agenda of the annual general meeting

The articles of association may state the agenda of the annual general meeting. Matters, which according to mandatory law provisions must be considered at the annual general meeting, shall also be included on the agenda.

IX. Accounting period of the company

According to the Auditing Act, the accounting period of the company may be a calendar year or any other period of twelve (12) months. The accounting period may be shorter or longer than this period when the company's activity is being set up or closed down or when the time for the financial statements is being changed. The maximum length of the accounting period is eighteen (18) months.

X. Supplementary provisions

The Limited Liability Companies Act provides several legal alternatives, the use of which requires supplementary provisions to be inserted into the articles of association. Regulating the matter in the articles of association is usually a prerequisite, if the company wishes to derive a legal benefit from the alternative. For instance, a redemption right does not relate to a share, if the matter has not been stated in the articles of association (a so-called redemption clause). Nevertheless, the inclusion of such regulations in the articles of association is entirely voluntary. The use thereof depends on whether the company wants to utilize the alternative provided by legislation.

XI. Other provisions

In addition to mandatory provisions, the shareholders may also quite freely include other provisions in the articles of association. The other provisions may not, however, contradict the mandatory principles provided by the Limited Liability Companies Act, e.g. by limiting the transferability of the shares in another way than by way of a redemption or consent clause as provided by law. These voluntary provisions may concern e.g. following matters:

- appointment of a managing director
  the manner of calling the general meeting;
- nomination of the chairman of the general meeting or election of a director of the board;
- minimum attendance at the general meeting;
- expansion of the scope of the tasks of the general meeting to cover e.g. decisions on transfers of or mortgage on fixed assets, or on floating charges;
- determination of the majority required for resolutions adopted by the general meeting above the ordinary;
- withdrawal of the decision power of the chairman in the event of equal votes so that the outcome may be determined e.g. by the drawing of lots;
- an arbitration clause, which binds the company, the shareholders, the board, the supervisory board, a member of the board and a member of the supervisory board, the managing director and the auditor with the same effect as an arbitration agreement.

Entrenchment

The articles of association may contain entrenchment provisions. However, this concept of entrenchment was not present in the Companies Act, 1956. The word entrench means to establish an attitude, habit, or belief so firmly that change is very difficult or unlikely. Thus, an entrenchment clause is the one which makes certain amendments either impossible or difficult.

The company has the discretion to include entrenchment provisions in its articles of association. Such provision may relate to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with. An entrenchment provision can be made at the time of incorporation of the company, or after the incorporation of the company by way of an amendment to the articles of association of the company.

The format for the articles of association of a company must be in the manner prescribed by the form provided in Schedule I of the Companies Act, 2013.

Usually, the articles of association of a public limited company are prepared by taking good professional advice and are very carefully prepared from the beginning. It is only the **private limited companies which have to keep a check on the following while drafting the articles of association:**

i. The Companies Act, 2013 provides for the model articles for a company under section 5. Thus, it is to be remembered that even though there is the use of the words such as 'preparation of articles' while getting a company incorporated, it only means an adoption of the model articles as provided by the act with a few modifications as the promoters may insist.
ii. As much as possible, the promoters must refrain from any additions, changes, alterations or deletions in the model articles provided by the act. This is mainly because, Schedule I of the Companies Act, 2013, from table – to the table – , provides for the forms for articles of different type of companies. Thus, more or less the model articles contain the required contents for a particular company. Additions or alterations must only be done if it is necessary to have a new regulation in the articles of association, or if a new regulation is a must for promoting the company.
iii. The additions, changes or alterations which are made to the model articles, must be done with careful scrutiny of the provisions of the Companies Act, 2013.

Alteration of articles

Section 31 empowers every company to alter its articles at any time with the authority of a special resolution of the company and filing copy with the Registrar. Since it is a statutory power a company will not be deprived of the power of alteration by a contract with anyone.

The power of alteration of articles conferred by sec 31 is almost absolute. It is subject only to two restrictions

1. It must not be in contravention with the provisions of the Act.
2. It is subject to the conditions contained in the memorandum of association.

The proviso to sub-section (1) says that an alteration which has the effect of converting a public company into a private company would not have any effect unless it is approved by the Central Government.

I. ***Alteration against memorandum:*** In **Hutton v. Scarborough Cliff Hotel Co**, a resolution was passed in a general meeting of a company altered the articles by inserting the power to issue preference shares which did not exist in the memorandum. It was held inoperative. However, after **Andrews v. Gas Meter Co Ltd** this view has been changed where a company was allowed by changing articles to issue preference shares when its memorandum was silent on the point. The power of alteration of art is subject only to what is clearly prohibited by the memorandum, expressly or impliedly.

II. ***Alteration in breach of contract****:* a company may change its articles even if the alteration would operate as a breach of contract. If the contract is wholly dependent on the articles, the company would not be liable in damages if it commits breach by changing articles. But if the contract is independent of the articles, the co will be liable in damages if it commits breach by changing articles. Thus in Southern Foundries Ltd v. Shirlaw, where a Managing Director was appointed for a term of ten years, but was removed earlier under the new articles on amalgamation with another company, the company was held liable for breach of contract.

III. ***Alteration as fraud on minority shareholders:*** An alteration must not constitute a fraud on the minority. It should not be an attempt to deprive the company or its minority shareholders of something that in equity belongs to them.

IV. ***Alteration increasing liability of members:*** No alteration can require a person to purchase more shares in the company or to increase his liability in any manner except with his consent in writing.

The power of alteration should be exercised in absolute good faith in the interest of the company.

S.No.	**Memorandum of Association**	**Articles of Association**
1.	It details the relationship of a company with the outside world.	It regulates the internal affairs of the company.
2.	It is defined in section 2(56) of the Companies Act, 2013.	It is defined in section 2(5) of the Companies Act, 2013.
3.	It contains the objects of the company.	It contains all the rules of the company.
4.	Approval of the Central Government is required for alteration.	Approval of the Central Government is not required for alteration.
5.	Acts ultra vires to the memorandum are void and cannot be made legitimate by ratification of shareholders.	Acts ultra vires to the Articles can be made legitimate by ratification of shareholders.
6.	The memorandum should not be in contravention to the provisions of the Companies Act, 2013.	The articles should not be in contravention to the memorandum.

3. Prospectus and its Contents

The Companies Act, 2013 defines a prospectus under section 2(70). Prospectus can be defined as "any document which is described or issued as a prospectus". This also includes any notice, circular, advertisement or any other document acting as an invitation to offers from the public. Such an invitation to offer should be for the purchase of any securities of a corporate body. Shelf prospectus and red herring prospectus are also considered as a prospectus.

Essentials for a Document to be called as a Prospectus

For any document to considered as a prospectus, it should satisfy two conditions.

1. The document should invite the subscription to public share or debentures, or it should invite deposits.
2. Such an invitation should be made to the public.
3. The invitation should be made by the company or on the behalf company.
4. The invitation should relate to shares, debentures or such other instruments.

Statement in Lieu of Prospectus

Every public company either issue a prospectus or file a statement in lieu of prospectus. This is not mandatory for a private company. But when a private company converts from private to public company, it must have to either file a prospectus if earlier issued or it has to file a statement in lieu of prospectus.

The provisions regarding the statement in lieu of prospectus have been stated under section 70 of the Companies Act 2013.

Advertisement of Prospectus

Section 30 of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. This section states that when in any manner the advertisement of a prospectus is published, it is mandatory to specify the contents of the memorandum of the company regarding the object, member's liabilities, amount of the company's share capital, signatories and the number of shares subscribed by them and the capital structure of the company. Types of the prospectus as follows.

- Red Herring Prospectus
- Shelf Prospectus
- Abridged prospectus
- Deemed Prospectus

Shelf Prospectus

Shelf prospectus can be defined as a prospectus that has been issued by any public financial institution, company or bank for one or more issues of securities or class of securities as mentioned in the prospectus. When a shelf prospectus is issued then the issuer does not need to issue a separate prospectus for each offering he can offer or sell securities without issuing any further prospectus.

The provisions related to shelf prospectus has been discussed under section 31 of the Companies Act, 2013.

The regulations are to be provided by the Securities and Exchange Board of India for any class or classes of companies that may file a shelf prospectus at the stage of the first offer of securities to the registrar.

The prospectus shall prescribe the validity period of the prospectus and it should be not be exceeding one year. This period commences from the opening date of the first offer of the securities. For any second or further offer, no separate prospectus is required.

While filing for a shelf prospectus, a company is required to file an information memorandum along with it.

Information Memorandum [Section 31(2)]

The company which is filing a shelf prospectus is required to file the information memorandum. It should contain all the facts regarding the new charges created, what changes have undergone in the financial position of the company since the first offer of the security or between the two offers.

It should be filed with the registrar within three months before the issue of the second or subsequent offer made under the shelf prospectus as given under Rule 4CCA of section 60A(3) under the Companies (Central Government's) General Rules and Forms, 1956.

When any company or a person has received an application for the allotment of securities with advance payment of subscription before any changes have been made, then he must be informed about the changes. If he desires to withdraw the application within 15 days then the money must be refunded to them.

After the information memorandum has been filed, if any offer or securities is made, the memorandum along with the shelf prospectus is considered as a prospectus.

Red Herring Prospectus

Red herring prospectus is the prospectus which lacks the complete particulars about the quantum of the price of the securities. A company may issue a red herring prospectus prior to the issue of prospectus when it is proposing to make an offer of securities.

This type of prospectus needs to be filed with the registrar at least three days prior to the opening of the subscription list or the offer. The obligations carried by a red herring prospectus

are same as a prospectus. If there is any variation between a red herring prospectus and a prospectus then it should be highlighted in the prospectus as variations.

When the offer of securities closes then the prospectus has to state the total capital raised either raised by the way of debt or share capital. It also has to state the closing price of the securities. Any other details which have not been included in the prospectus need to be registered with the registrar and SEBI.

The applicant or subscriber has right under Section60B(7) to withdraw the application on any intimation of variation within 7 days of such intimation and the withdrawal should be communicated in writing.

Abridged Prospectus

The abridged prospectus is a summary of a prospectus filed before the registrar. It contains all the features of a prospectus. An abridged prospectus contains all the information of the prospectus in brief so that it should be convenient and quick for an investor to know all the useful information in short.

Section33(1) of the Companies Act, 2013 also states that when any form for the purchase of securities of a company is issued, it must be accompanied by an abridged prospectus.

It contains all the useful and materialistic information so that the investor can take a rational decision and it also reduces the cost of public issue of the capital as it is a short form of a prospectus.

Deemed Prospectus

A deemed prospectus has been stated under section 25(1) of the Companies Act, 2013.

When any company to offer securities for sale to the public, allots or agrees to allot securities, the document will be considered as a deemed prospectus through which the offer is made to the public for sale. The document is deemed to be a prospectus of a company for all purposes and all the provision of content and liabilities of a prospectus will be applied upon it.

In the case of **SEBI v. Kunnamkulam Paper Mills Ltd.**, it was held by the court that where a rights issue is made to the existing members with a right to renounce in the favour of others, it becomes a deemed prospectus if the number of such others exceeds fifty.

<u>Process for filing and issuing a prospectus</u>

Application forms

As stated under **section 33,** the application form for the securities is issued only when they are accompanied by a memorandum with all the features of prospectus referred to as an abridged prospectus.

The exceptions to this rule are:

- When an application form is issued as an invitation to a person to enter into underwriting agreement regarding securities.
- Application issued for the securities not offered to the public.

Contents

For filing and issuing the prospectus of a public company, it must be signed and dated and contain all the necessary information as stated under section 26 of the Companies Act,2013:

1. Name and registered address of the office, its secretary, auditor, legal advisor, bankers, trustees, etc.
2. Date of the opening and closing of the issue.
3. Statements of the Board of Directors about separate bank accounts where receipts of issues are to be kept.
4. Statement of the Board of Directors about the details of utilization and non-utilisation of receipts of previous issues.
5. Consent of the directors, auditors, bankers to the issue, expert opinions.
6. Authority for the issue and details of the resolution passed for it.
7. Procedure and time scheduled for the allotment and issue of securities.
8. The capital structure of the in the manner which may be prescribed.
9. The objective of a public offer.
10. The objective of the business and its location.
11. Particulars related to risk factors of the specific project, gestation period of the project, any pending legal action and other important details related to the project.
12. Minimum subscription and what amount is payable on the premium.
13. Details of directors, their remuneration and extent of their interest in the company.
14. Reports for the purpose of financial information such as auditor's report, report of profit and loss of the five financial years, business and transaction reports, statement of compliance with the provisions of the Act and any other report.

Filing of copy with the registrar

As stated under sub-section 4 of section26 of the Companies Act, 2013, the prospectus is not to be issued by a company or on its behalf unless on or before the date of publication, a copy of the prospectus is delivered to the registrar for registration.

The copy should be signed by every person whose name has been mentioned in the prospectus as a director or proposed director or the assigned attorney on his behalf.

Delivery of copy of the prospectus to the registrar

As per section26(6) of the Companies Act 2013, the prospectus should mention that its copy has been delivered to the registrar on its face. The statement should also mention the document submitted to the registrar along with the copy of the prospectus.

Registration of prospectus

Section26(7) states about the registration of a prospectus by the registrar. According to this section, when the registrar can register a prospectus when:

1. It fulfils the requirements of this section, i.e., section 26 of the Companies Act, 2013; and
2. It contains the consent of all the persons named in the prospectus in writing.

Issue of prospectus after registration

If a prospectus is not issued before 90 days from the date from which a copy was delivered before the registrar, then it is considered to be invalid.

Contravention of section

If a prospectus is issued in contravention of the provision under section 26 of the Companies Act 2013, then the company can be punished under section 26(9). The punishment for the contravention is:

- Fine of not less than Rs. 50,000 extending up to 3,00,000.

If any person becomes aware of such prospectus after knowing the fact that such prospectus is being issued in contravention of section 26 then he is punishable with the following penal provisions.

- Imprisonment up to a term of 3 years, or
- Fine of more than Rs. 50,000 not exceeding Rs. 3,00,000.

Misstatements in the prospectus

Since prospectus is relied on by the members of the public to subscribe or purchase the securities of a company, any misstatements on it invite penal consequences. Misstatement may occur when a statement which is untrue or misleading in form or context is included in the prospectus. Also, any inclusion or omission of any matter which is likely to mislead will also be considered as a misstatement (sec. 34). For e.g., a statement on the purpose of offering

shares which is untrue, or statement on the locations of offices for a company which is misleading will amount to misstatement in the prospectus.

Liability for misstatement in the prospectus

A person who has signed and given consent to the prospectus is liable for misstatement. Persons who had the management of the whole, or substantially whole of the affairs of the company can be held liable for misstatement in prospectus if they have signed the prospectus and had given consent for the same. Managers, Company Secretaries, and Directors will come under this category. However, the mere signing of the declarations in the prospectus will not result in liability for misstatement if the person signing is neither a manager of the company nor draw salary from the company. In the Matter of Sahara India Commercial Corporation Ltd., SEBI 31 Oct. 2018. Here, SEBI considered the submission of the Company Secretary that he signed the prospectus on behalf of the directors under their power of attorney and concluded that he was not liable for misstatement as the director of the company.

Likewise, in **Hafez Rustom Dalal vs Registrar of Companies**, the Gujarat High Court observed that while issuing notices, the respondent authority has to point out the statements in the Prospectus which they consider false or deliberate or made to induce the public for subscribing the shares of the Company.

A misstatement in the prospectus can invoke criminal (sec. 34) and civil liabilities (sec. 35). Misstatements can lead to punishment for fraud under Sec. 447.

Criminal Liability

A person who authorizes the issue of a prospectus which has untrue or misleading statements is liable for punishment under Sec. 34. Such a punishment is for fraud as set out in Sec. 447. "Fraud" under Sec. 447 includes an act, omission, concealment of any fact with an intent to deceive, gain undue advantage, or to injure the interests of the company or its shareholders or its creditors or any other person. It is not necessary that such an act involve any wrongful gain or wrongful loss. Abuse of position committed by a person is also considered fraud under this section. *Sec. 447 further sets out the punishment for fraud*:

- **If the fraud involves an amount of ten lakh rupees or more, or one per cent. of the turnover of the company** (whichever is lower) the person who is found guilty of fraud shall be punishable with imprisonment for a minimum term of six months which may extend to ten years. Such a person shall also be liable to a fine of an amount not less than the amount involved in the fraud and the fine may extend to three times of such amount.
- **If the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company** (whichever is lower) and does not involve public interest, the imprisonment may extend to five years or with fine which may extend to fifty lakh rupees or with both.

- **If the fraud in question involves public interest**, the term of imprisonment shall not be less than three years.

Civil Liability

Civil liability for misstatements in prospectus will arise when a person has sustained any loss or damage by subscribing securities of a company based on a misleading prospectus (sec. 35). In such instances the following persons shall be liable under sec 447 and will have to pay compensation to persons who have sustained such loss or damage:

1. director of the company at the time of the issue of the prospectus;
2. person who has agreed to be named as a director in the prospectus and is named as a director of the company, or has agreed to become such director;
3. is a promoter of the company;
4. has authorised the issue of the prospectus; and
5. is an expert who has been engaged or interested in the formation or promotion or management of the company.

Prohibition of the Company and directors from dealing with securities following misstatement

In the Matter of Taksheel Solutions Limited, the SEBI (25 Oct. 2013) found that the Red Herring Prospectus/Prospectus had several missing vital pieces of information which resulted in misstatement. SEBI had earlier prohibited the company, its promoters/directors and independent directors from buying, selling, or dealing in securities in any manner. The Board noted that the company had the duty to make true and correct disclosures and statements in the Prospectus to help the applicants take an informed investment decision. The Board further observed that the Prospectus failed to disclose a related party transaction too. Therefore, the Board confirmed the interim order of prohibition on the Company and its Promoters/Directors in dealing with securities. However, the Board vacated the prohibition on the independent directors who had resigned from the Company and had undergone the restraint for more than twenty-one months.

Suspension of the auditor for false certificate attached to the Prospectus

In **The Institute of Chartered Accountants of India v. Mukesh Gang, Chartered Accountant**, Referred Case. No.2 of 2011, the High Court of Andhra Pradesh noted that the prospectus is a special document and a false certificate is issued by the auditor would amount to his failure to discharge his statutory duties. The court added that he must be presumed to be aware of the consequences that flow from such gross negligence of a false certification because the public subscribe to the shares based on the invitation (Prospectus). The court further observed that as per Section 65 of the Companies Act, 1956 untrue statements in the prospectus will result in liability for the loss or damage sustained by a person while subscribing for shares

or debentures based on such statements in the Prospectus. Here, the court found that the certification by the statutory auditor has resulted in misleading the general public into subscribing to the shares of the company by placing faith on such a certificate. Therefore, the court suspended the respondent from practising as a Chartered Accountant for a period of three years under Section 21(5) of the Chartered Accountants Act, 1949.

Exceptions from liability for misstatements in Prospectus

A person shall not be criminally liable under sec. 34 if he proves that: the statement or omission was immaterial or he had reasonable grounds to believe that the statement was true or the inclusion or omission was necessary and believed in it up to the time of issue of the prospectus.

Likewise, **a person shall not be liable** under sub-section (1) of sec. 35 (**civil liability**), if he proves that:

- he withdrew his consent to become a director of the company before the issue of the prospectus, and that it was issued without his authority or consent; or
- the prospectus was issued without his knowledge or consent, and
- on becoming aware of its issue, he gave a reasonable public notice that it was issued without his knowledge or consent.

A person may **not be liable for a misleading statement made by an expert** if:

- the report is a correct and fair representation of the statement, or
- a correct copy or a correct and fair extract of the report or valuation; and
- he had reasonable ground to believe that such expert was competent to make the statement and had given the consent required by sub-section (5) of section 26 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration. (sec. 35(2)(c)).

End Note: The prospectus being an invitation to the public to subscribe to the securities of a company must be made with utmost care. The public rely on the statements and reports attached to the prospectus to take an investment decision. Therefore, the Companies Act provide for liabilities and punishments for persons who provide misleading and untrue statements in the prospectus.

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