

CHAPTER ELEMENTS OF COMPANY LAW PART I

CHAPTER AT A GLANCE

Introduction

- Word “**company**” is derived from Latin word “**Com Panis**” meaning **Com i.e.** with/together and **Panis i.e. bread.**
- it is originally referred to an association of persons who took their meals together.
- The word “company” denotes a joint stock enterprise in which the capital is contributed by a large number of people.
- In *Smith V. Anderson*, it was observed that company in broad sense may mean an association of individuals formed for some purpose.
- Company can be an **incorporated (profit making)** or **unincorporated** (non profit making like a club or a society) body.

An incorporated company refers to a separate person distinct from the individuals constituting it.

An unincorporated company such as-partnership refers to only a collection of individuals.

- It is called a body corporate because the persons comprising it are made into one body by incorporating it according to law and clothing it with legal personality and so turn it in ' a corporation.
- Word “**Corporation**” is derived from Latin word “**corpus**” which means “**body**”.
- It is a legal person created by process other than natural birth, thus called artificial person.
- A Company have a personality, distinct and separate from its members.
- The Incorporated company is formed either:
 - (i) under Special Act of Parliament: E.g. LIC, Damodar Valley Corporations etc. or
 - (ii) under Companies Act, 2013 or under any previous Company law. E.g. Hindustan Lever Ltd., Tata Steel Ltd., etc.

- As per Section 2(20) of the Companies Act, 2013. “Company” means a company incorporated under Companies Act, 2013 or under any previous company law. Section should be exactly as per law.

The unincorporated Company formed not for profit purpose falls within the meaning of a company licenced U/S 8 of the Companies Act, 2013.

Characteristics:

(1) Corporate Personality

- Company is a separate legal entity distinct from individuals who are its members. (It is also known as separate legal entity)
- It is known by its own name.
- It has its own seal. (Common seal i.e. official signature of a company) [Amendment of Sec. 9 - “the word common seal” has been omitted]
- Its members are its owners but they can be its creditors simultaneously.
- It is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.
- A shareholder cannot be held liable for the company’s act even if he holds virtually the company’s entire share capital.
- Shareholders are not the company’s agent and so they cannot bind it by their acts.
- This was brought forward in the case of **Salomon V. Salomon and Co. Ltd., (1897)**
- The company does not hold its property as an agent or trustee for its members and they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities.

Respective Case Law:

(1) Salomon V. Salomon and Co. Ltd

- Mr. Salomon was carrying on the business of leather merchant and boot manufacturing as a sole proprietor.
- He formed a limited company for taking over his business.
- The Company's nominal capital was £ 40,000 in £1 shares.
- Payment of total purchase consideration of £ 38,782 was in the following form:
 - (i) Fully paid shares of £, each issued to Salomon £ 20,000
 - (ii) Secured debentures issued to Salomon £10,000
 - (iii) Cash Paid £ 8,782
- Other 6 members of his family were issued 1 share each.
- Salomon held virtually the entire share capital of the company. Hence, the company was called as '**one man company**'
- Due to trade depression, company went into liquidation.
- Company's liabilities was £ 10,000 secured by debentures and its assets realised £ 6,050.
- **Unsecured creditors** owing £ 8,000 claimed that Salomon was carrying on business in the name of the company. Thus, company was a mere agent of Salomon. They claimed that **one man** cannot owe money to himself.
- Court held that:
 - (i) Salomon & Co. was a real company fulfilling all the legal requirements.
 - (ii) It had an identity separate from its members.
 - (iii) Thus, secured debentures even though held by Salomon, were to be paid in priority to unsecured creditors.

This case established the legality of "one-man company" and principle of limited liability.

(2) Lee V. Lee's Air farming Ltd.

Alternative

Case Study:

Corporate personality: Salomon v/s Salomon & Co. Ltd. (1897)

(2) Limited Liability

- Members of a company cannot be held liable for its debts.
- In case of **limited company**, the liability of members is limited to the extent of unpaid value of shares held by them.
- In case of **company limited by guarantee**, members are liable to the extent of amount guaranteed by them.
- Guaranteed amount can be called only at the time of company's liquidation winding up.

(3) Transferability of Shares

- Shares are **movable property** which are transferable subject to certain conditions.
- In public company, shares are freely transferable.
- However, there are certain restrictions on the transfer of shares in a private company.
- Any absolute restriction on the right to transfer shares is void.
- Shares in a public company can be transferred without any restriction but shares in private company can not be transferred.

(4) Common Seal

- It is the official signature of the company.

- Company's name is engraved on it.
- A document not bearing common seal of the company is not authentic and has no legal force behind it.
- A rubber stamp does not serve the purpose.
- Amendment made by Companies (Amendment) Act, 2015.

Amendment of Section 9:

- In Section 9 of the Principal Act, the words "and a common seal" shall be omitted.

Amendment of Section 22:

- In Section 22 of the Principal Act,

(i) In Sub-Section(2)

(a) for the words "under its common seal", the words "under, its common seal" if any, shall be substituted;

(b) **the following proviso shall be inserted, namely:**

"Provided that in case a company does not have a common seal, the authorisation under this sub-section shall be made by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary".

(ii) In sub-section (3), the words "and have the effect as if it were made under its common seal" shall be omitted.

Amendment of Section 46:

In Section 46 of the Principal Act, in sub-section (1), for the words "issued under the common seal of the company", the words "issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary" shall be substituted.

(5) Perpetual Succession

- Death, insolvency, insanity etc. of any member does not affects continuity legal existence and identity of the company.
- "Members may come and go, but the company goes on forever."
- It can be dissolved only under law through winding up procedure.

(6) Separate Property

- No member can claim to be the owner or co-owner of company's property. Member cannot get insurance of the property belonging to the company.
- Company can own and hold property in its own name.

Relevant Case Law: Macaura V. Northern Assurance Co. Ltd.

(7) Capacity to sue and be sued in its own name:

- A company is a legal person, thus it can sue others and can be sued by others in its own name.

- In an unincorporated association, an action may have to be brought in name of members either individually/collectively.

Lifting of Corporate Veil

- Due to law's fiction, company is seen as an entity distinct from its members, but actually company is an association of persons who are the beneficial owners of company's property.
- No member can be held, liable for the company's act even if he holds virtually the entire share capital of the company.
- **Lifting of corporate veil** means ignoring the company's separate legal identity. It involves disregarding of the corporate personality and looking behind the corporate entity, at the controlling

persons and make them liable for debts and obligations of the company.

- It is permissible only when it is permitted by the statute.
- It is permitted in the following cases:
 - (i) If the company is formed for commission of.
 - (a) fraud and improper conduct.
 - (b) to defraud creditors
 - (c) to avoid legal obligations.

Relevant Case Law:

1. Gilford Motor Co. V. Horne
 2. Jones V Lipman
- (ii) To determine whether company is an enemy company or not.

Relevant Case Law:

1. Daimler Co. Ltd. V. Continental Tyre and Rubber Co.
- (iii) To prevent evasion of taxes and duties.

Relevant Case Law:

1. CIT V Meenakshi Mills Ltd.
 2. Sir Dinshaw Manakjee Petit.
- (iv) If purpose of company's formation is to avoid a welfare legislation e.g. reducing its liability of bonus payable under Bonus Act.

Relevant Case Law:

1. The workers employed in Associated Rubber Industries Ltd. Bhavnagar V. The Associated Rubber Industries Ltd. Bhavnagar and other, A.I.R. 1986 SCI
- (v) For the purpose of protecting the public policy and thus, preventing the transaction contrary to public policy.

Relevant Case Law:

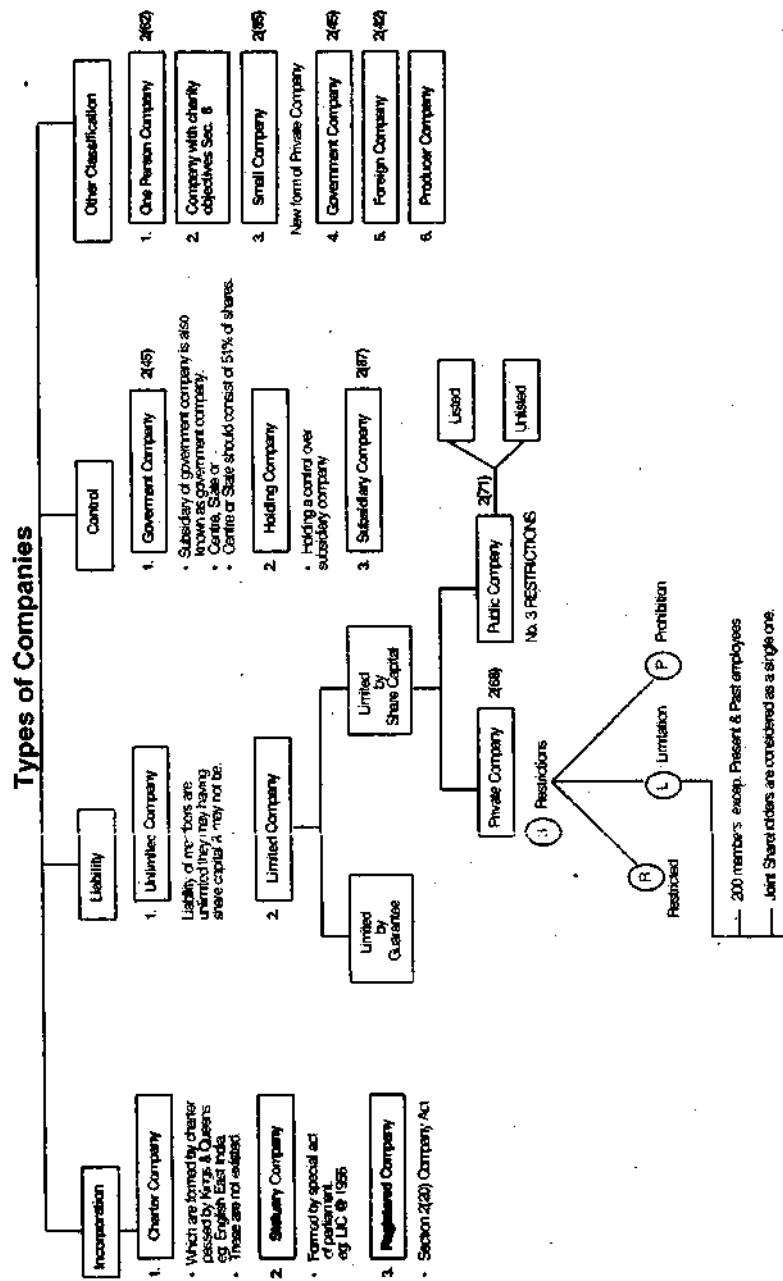
1. Connors Bros V. Connors
- (vi) If the holding company has incorporated the subsidiary company for the sole purpose of using it as an agent. .

Relevant Case Law:

1. Re, R.G Films Ltd.

| Various Statutory Provisions for lifting the corporate veil are as follows:

1. Reduction in Membership
2. Misdescription of name.
3. Presentation of group accounts of holding and subsidiary companies.
4. Fraudulent Trading.
5. Payment of Arrears of tax.
6. Ultra-vires acts.
7. Misrepresentation in prospectus.



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Difference Between Company and Partnership

Company	Partnership
1. Complex formation due to various legal formalities.	1. Easy formation due to comparatively less legal formalities.
2. Compulsory registration is required.	2. Registration is not compulsory.
3. Governed by Companies Act, 2013.	3. Governed by Partnership Act, 1932.
4. Separate legal entity of company from its members.	4. No separate legal entity.
5. Management is in the hands of B.O.D. appointed by shareholders.	5. Its affairs are managed by all or any of them acting for all.
6. Property of the Co. is not the property of individuals.	6. Property of the firm, is the property of individuals.

7. Members of the Co. are not its agents.	7. Partners are the agents of the firm.
8. Members can contract with the company.	8. Partners cannot contract with the firm.
9. Shares are freely transferable.	9. Shares are transferable with the consent of the other partners.
10. Liability of a shareholder is limited by shares or a guarantee.	10. Liability of a partner is unlimited.
11. Death or insolvency of a shareholder does not effect the life of the company.	11. Death or insolvency of a partner dissolves the firm.
12. A Co. is legally required to have it's accounts audited annually by a Chartered Accountant.	12. The accounts of the firm are audited at the discretion of the partners.

Differences between Company and LLP

Company	LLP
(1) It is regulated by statute i.e. Companies Act, 2013.	(1) It is regulated, by a contractual agreement between partners.
(2) There is a management- ownership divide.	(2) There is no such divide.
(3) It is less flexible than LLP.	(3) It has more flexibility.
(4) It has comparatively more compliance requirements than LLP.	(4) It has lesser compliance requirements.

LLP is a separate legal entity, liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.

No partner is liable on account of the independent or un-authorized actions of other partners.

LLP is not relieved of the liability for its other obligations as a separate entity. As LLP consists elements of both 'a corporate structure' as well as 'a partnership firm', it is called a **hybrid** between a company and a partnership.

Difference Between Company and HUF

Company	HUF
1. It consists of heterogeneous members.	1. It consists of homogeneous members.
2. No karta and coparceners system.	2. Karta has the sole authority to contract, debts for the purpose of the business. While coparceners do not have such authority.
3. Person becomes member on fulfilment of certain requirements.	3. Person becomes member by birth.
4. Its registration is compulsory.	4. Its registration is not compulsory.

Difference Between Company and Club

Company	Club
1. It is a trading association.	1. It is a non-trading association.
2. Its registration is compulsory.	2. Its registration is not compulsory.

Difference Between Company and Corporation

- Corporation refers to an association of persons incorporated as per the relevant law and covered with a legal personality separate from the persons constituting it.
- It is wider than the word 'company'

- it is also known as 'body corporate'

It includes:	It does not include:
<ul style="list-style-type: none"> • a company incorporated outside India. 	<ul style="list-style-type: none"> • a co-operative society registered under any law relating to societies, cooperative. • any other body corporate (not being a company as defined in this act), which the CG may by notification specify in this behalf.

Society whether a body corporate or not?

- Any society registered under Societies Registration Act does not come under body corporate.

Relevant Case Law:

- (i) Board of Trustees V State of Delhi, A.I.R. 1962 S.C. 458

Advantages of an incorporated Company

- **Corporate Personality:** It has a legal personality which is completely separate from its members.
- **Limited liability:** Liability of the members is limited by shares or guarantee.
- **Perpetual Succession:** Death or insolvency of members does not affect the existence or continuity of the company. Even death of a member does not affect its existence.
- **Transferability of Shares:** Members are allowed to transfer their shares freely, thus having liquidity of their investment. Share of Private Co. are not freely transferable.
- **Separate Property:** Being an artificial legal person, company can own funds and assets in its own name. Company's property is not its member's property.
- **Capacity to Sue:** Company can sue and be sued by others in its own name.
- **Flexibility and autonomy:** Company can form and amend its own policy with much independence subject to the principles of law, equity and good conscience and in accordance with provisions of Companies

. Act, 2013 MOA and AOA. Key Managerial Personnel (KMP) has been defined in Companies Act, 2013 to mean:

- (i) the Chief Executive officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial officer; and
- (v) such other officer as may be prescribed.

As per the Amendment made by Companies (Amendment) Act, 2017 Revised Section 2(51)-

"Key Managerial Personnel" in relation to a company, means—

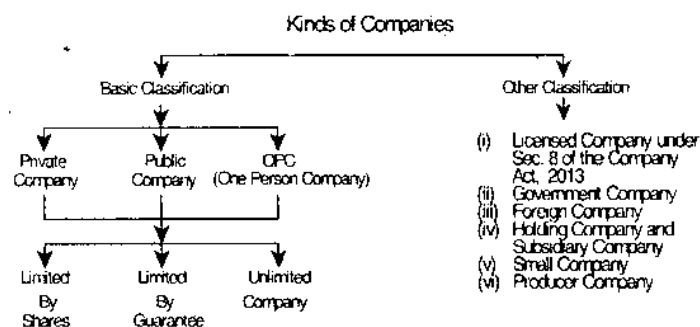
- (i) the Chief Executive Officer or the Managing Director or the Manager;
- (ii) the Company Secretary;
- (iii) the Whole-time Director;
- (iv) the Chief Financial Officer;
- (v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
- (vi) such other officer as may be prescribed;"

Disadvantages of an Incorporated Company

- Several legal formalities: Incorporation of a company involves adherence to several legal formalities which requires lot of time and money. Failure to perform any formality or provision attracts

penal consequence.

- **Separation of Ownership and Management:** Members have no direct control over the affairs of company which makes their ownership position more passive.
- **Greater Tax Burden:** It is liable to pay income tax at a flat rate without any minimum taxable limit.
- **Corporate Disclosures:** Members have comparatively restricted accessibility to company's internal management and day to day working.
- **Greater Social Responsibility:** The enormous powers used by companies have an impact on society, thus are subject to greater control and regulation.
- **Lengthy winding up procedure:** Even at the time of its winding up, detailed procedure is to be followed which is expensive and time consuming.



Private Company [Section 2(68)]

- A company which has the following features is a private company.
 - (a) restricts the right to transfer its shares.
 - (b) except in case of 'one person company' a private company should have minimum 2 members and cannot have more than 200 members (excluding employee and ex-employee members).
 - (c) prohibits any invitation to the public to subscribe for any securities of the company.
 - (d) has a minimum paid up capital of one lakh rupees or such higher paid-up capital as prescribed.
- The company can only accept deposit from its members, directors or their relatives.
- Joint shareholders are counted as one member.
- It must add the words **'Private Limited'** at the end of its name.
- They are granted certain privilege and exemptions under Companies Act. 2013 because not much public interests is involved in private companies.
- Company is required to file it's financial statement and annual returns to ROC (Register of Company) which can be accessed by any person by paying fees.

NOTE:

According to Companies (Amendment Act, 2015):

Provides that in Clause (68), the words "of one lakh rupees or higher paid up capital" shall be omitted.

Certain privileges granted to private company

- (i) Only 2 members are required for its incorporation. (One in case of OPC)
- (ii) Minimum 2 directors are required to be appointed.
- (iii) Does not requires commencement of business certificate.
- (iv) Provisions of managerial remuneration does not apply.
- (v) No limit on borrowings, etc.

Public Company [Section 2(71)]

- Public Company means a company which:

- (a) is not a private company
- (b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital as may be prescribed.
- (c) is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purpose of this act. Subsidiary of public co. is also treated to be public company.
- (d) should have minimum seven members and have no limit for maximum members.
 - It requires minimum 7 members for its formation.
 - Any member of public can acquire its shares/debentures.
 - Its shares are capable of being dealt in stock exchange.
 - **According to Companies (Amendment) Act, 2015:**

Provides that in Clause (71), the words “of 5 lakhs or higher paid up share capital” shall be omitted.

Differences Between Public and Private Company

Sl. No.	Basis of Differentiation	Private Company	Public Company
1.	Minimum number of member	Two (one in case of OPC)	Seven
2.	Maximum number of member	200	Unlimited
3.	Transferability of shares	Restricted	Freely transferable
4.	Raising Capital from public	Not allowed	Allowed
5.	Number of Directors	Minimum-two maximum :15	Minimum - 3 Maximum-15
6.	Name of company	Name must end with the words ' Private Ltd. '	Name must end with the word ' limited '
7.	Exemption from several legal restriction	Not required to observe several legal restrictions	Too many legal formalities and restriction to be adhered to
8.	Minimum paid-up capital	One lakh as per the Amendment made by Companies (Amendment Act, 2015), provides that in clause (68) the words of one lakh rupees or higher paid up capital shall be omitted.	Five lakh.. as per the Amendment made by Companies (Amendment Act, 2015), provides that in clause (71) the words of ? Five lakh or higher paid up capital shall be omitted.

Company limited by Shares

- It is a registered company whether public or private company.
- Liability of members is limited to the unpaid amount on the shares held by them.
- This should be stated in the MOA of such company.
- It arises when a valid call is made by the company.

Company limited by Guarantee

- It is a registered company whether public or private company.
- Liability of members is limited to the amount that he has guaranteed to pay to the company.
- Liability arises only in the event of winding up of company.

- Its MOA should state the amount of guarantee given by members.
- E.g - clubs, trade associations etc.

Unlimited Company

- Its memorandum does not in any way limits the liability of its members.
- Every member is liable to contribute to the company's assets until all its debts are paid in full.
- Not common in India
- Members are not however, liable directly to the company's creditors.
- Liquidator asks the members to contribute in the event of company's winding up.
- It may be subsequently converted into a limited company, subject to certain conditions.
- The liability is extended to the personal property of the members.

Company with Charitable Objects Non-Profit Companies / Licenced Companies [Section 8]

- **Licence may be granted by CG if the following conditions are satisfied:**
 - (i) Company's object is to promote art, commerce, science, religion, charity or any other useful object.
 - (ii) Company applies its income in promoting its object.
 - (iii) Company prohibits payment of any dividend to its members.
 - It is not required to use the words 'Limited' or 'Private Limited' at the end of its name even though it is a Limited Company.
 - It shall enjoy all privileges and be subject to all the obligations of limited company.
 - A firm may become its member.
- **Company can alter its object clause in MOA or AOA only by** obtaining previous approval of CG in writing.
 - It can convert itself into company of any kind only after complying with the prescribed conditions.
- **Conditions for revoking licence by CG:**
 - (i) Company contravenes any of the requirements or any of the conditions subject to which a licence was issued,
 - (ii) Its affairs are conducted fraudulently •
 - (iii) Its affairs are conducted in manner violative of company's objects, or
 - (iv) Prejudicial to public interest.
- **On revocation CG may also direct the company:**
 - to wound up, or
 - amalgamate with another company registered under section 8, if it is in public interest.
- **On revocation of licence by CG:**
 - (i) 'Words limited' or 'Private limited' shall be inserted at the end of company's name.
 - (ii) Company shall cease to enjoy exemptions granted by CG Under Section 8
 - Before revocation, CG shall give an opportunity of being heard to the company.

Government Company [Section 2(45)]

- **It is a company -**
 - (i) In which not less than 51% of the paid up share capital is held by:
 - CG (Central Government)
 - SG (State Government)
 - Partially by CG and partially by SG

- (ii) Which is a subsidiary of a Government Company.
 - Its auditor is appointed by the Comptroller and Auditor General of India (C & AG).
 - **C & AG:**
 - (i) Directs the manner in which the accounts are to be audited.
 - (ii) Gives instructions to auditor regarding the performance of his functions.
 - (iii) Conducts supplementary test audit by persons authorised by him.
 - (iv) Comments upon or supplements the audit report submitted to him by the auditor.
 - If CG holds shares in the company, it is required to place before both houses of Parliament an annual report of its working within 3 months of its AGM along with a copy of audit report and any comments or supplements to it by Comptroller and Auditor General of India.
 - If SG holds shares in the company, its annual report is to be placed in the same manner before the house or both the houses State Legislature.
 - If CG does not holds shares in the company, every SG who holds shares in the Co. or where only one SG holds shares in the co. shall cause its annual report to be placed in the same manner before the house or both the houses of state legislature.
 - CG by notification in the Official Gazette can grant them certain exemptions from some provisions of Companies Act.

Foreign Company [Section 2(42)]

- Foreign Company means any company or body corporate incorporated outside India which:
 - (a) has a place of business in India, whether by itself or through agent, physically or through electronic mode and;
 - (b) conducts any business activity in India in any other manner.

Thus, the companies doing business through electronic mode are also termed as foreign company and need to comply with the specified provisions.

Under foreign company

- If not less than 50% of the paid-up capital is held by:
 - one or more citizens of India, or
 - one or more companies or body corporate incorporated in India, or
 - partly by above two,

Whether singly or in aggregate, it has comply with:

- (i) provisions of chapter XXIII dealing with company incorporated outside India, and
- (ii) other prescribed provisions of Companies Act, 2013 as if it were a company incorporated in India.

The following documents are required to be submitted by a foreign company with the Roc of New Delhi and with ROC of the State in which such place of business is situated within 30 days of the establishment.

- Certified copy of the Constitution of the company
- Full address of the principle or registered office
- Particulars' of the directors and secretary of the company
- Name and address of the authorised person in India
- Full address of the principle place of business in India.

Holding and Subsidiary Company [Section 2(46) and 2(87)]

- When a company:
 - (a) controls the composition of board of directors, or

(b) exercises or controls more than one half of the total share capital either at its own or together with one or more of its subsidiary companies then, it is known as the holding company and the other company is the subsidiary company.

Total share capital for this purpose means the aggregate of:

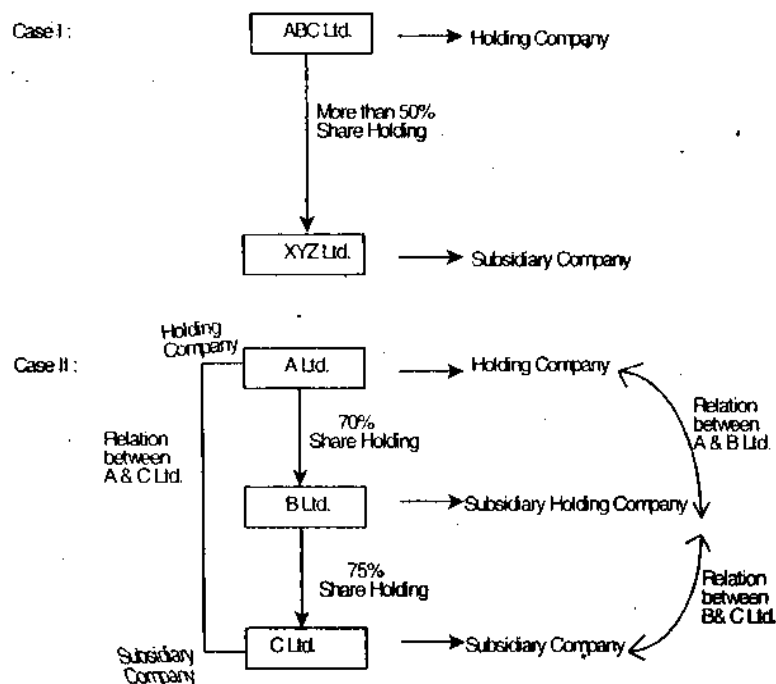
1. Paid-up equity shares capital and
 2. Convertible preference share capital.
- Holding Company shall not have layers of subsidiaries beyond prescribed limit.

The expression "Company" includes any body corporate.

• The word control includes;

- (i) The right to appoint majority of the directors or
- (ii) to control the management or
- (iii) the policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly including by virtue of their share holding or
- (iv) management rights or shareholders agreements or voting agreements or in any other manner.
- (v) As per the Amendment made by Companies (Amendment) Act, 2017 For the purposes of this clause, the expression "company" includes anybody corporate;

Holding Company



One Person Company (OPC) [Section 2(62)]

- It means a company which has only one person as a member.
- The MOA of such a company is required to indicate, the name of the other person, with his prior 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 be filed with ROC at the time of its incorporation along with MOA and AOA.
- Only a natural person who is an Indian citizen and resident in India is eligible to incorporate OPC and be its nominee.
- "Resident in India" means a person who has stayed in India for a period of not less than 182 days during immediately preceding one calendar year.

- It is considered as a private company.
- It has been granted many relaxations in compliance and procedural aspects.
- No person shall be eligible to incorporate more than one OPC or become nominee in more than one OPC.
- No minor shall become member or nominee of OPC or hold share with beneficial interest.
- It cannot be incorporated or converted into Section 8 company.
- It cannot carry out Non-Banking Financial Investment Activities including investment in securities of any Body corporates.
- It cannot convert voluntarily into private company unless two years have expired from date of its incorporation, except if its paid-up capital is increased beyond 50 lakh rupees or its average annual turnover exceeds two crore rupees.

Small Company [Section 2(85)]

Such classification is based on size i.e, paid up capital & turnover

- It means a company other than a public company whose:
 - (a) paid-up capital does not exceeds` 50 lakh or such higher amount as may be prescribed which shall not be more than` 5 crore.
 - (b) turnover as per last profit and loss account does not exceeds` 2 crore or such higher amount as may be prescribed, which shall not be more than` 20 crore.
- These are small sized private companies
- However, nothing applies to:
 - (a) holding company or subsidiary company,
 - (b) company registered under section 8
 - (c) company or body corporate governed by any Special Act.

As per the Amendment made by Companies (Amendment) Act, 2017 “Small Company means a company, other than a public company,—

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

Producer Company

- A company registered under part chapter IX A.
- If the company is engaged in activities which is not described under Section 581 B, ROC can cancel the registration exclusively engaged in the activities specified by Section 581 B.

The membership of producer companies is to open such people who themselves are primary producers, which is an activity by some agricultural products is produced by such primary producer.

- Any existed company can not convert itself in to producer and; Producer can not convert itself in to any other company.

Promotion and Incorporation of a Company

- Company should be formed for lawful purpose i.e. it, should not be in contravention of general law of the country.
- Registrar of Companies (ROC) is a body which -
 - (i) registers the company.
 - (ii) receives documents and forms from the company and registers them.
 - (iii) maintains company's record.

- (iv) makes these records available for public inspection.
- (v) ensures that company comply with provisions of Companies Act, 2013.
- Company formation involves 3 steps:
 - (i) Promotion,
 - (ii) Incorporation by Registration, and.
 - (iii) Commencement of Business.

Promotion

- Is the process of conceiving an idea and developing it into a concrete proposition or project to be accomplished by the incorporation and floatation of a company.
- The person who takes necessary steps to accomplish these objectives is known as promoter.
- **Promoter [Section 2(69)] means a person:**
 - (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92; or
 - (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
 - (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that sub-clause (c) shall not apply to a person who is acting merely in a professional capacity.

- A director/officer/employee who has control over the affairs of the company, directly or indirectly whether as a share holder, director or otherwise is considered as a promoter.
- However, a director/officer/employee of the issuer or a person, if acting as such merely in his professional capacity, shall not be treated as a promoter.
- **Functions of promoters include:**
 - (i) Decides the company's name and ensures its acceptance by ROC.
 - (ii) Decides the company's detail about MOA, AOA, director's nomination, solicitors, bankers, auditors, secretary etc.
 - (iii) Identifies the registered office of the company.
 - (iv) Arranges for printing of MOA, AOA, registration, issue of prospectus etc.
- He is responsible for bringing the co. in the existence for the object which he has in mind.
- Company cannot ratify the contract made by promoter before its incorporation.

Relevant case law:

1. Kelner V. Baxter
 - A promoter is neither an agent nor a trustee of the company, as the company has not come into existence.
 - A promoter stands in a fiduciary capacity towards the company.
- **Duties of promoter includes:**
 - (i) Not to make any secret profit.
 - (ii) Full and fair disclosure of interests.

Relevant case law:

1. Glluckstein V. Barnes.
 - **Remedies available to company are:**
 - (i) Recession of contract
 - (ii) Recovery of secret profit made by the promoter
 - (iii) Company may sue the promoter for breach of trust

Procedure for Incorporation or Registration

- Certain legal requirements to be fulfilled:
 - (i) There must be an association of persons.
 - (ii) Minimum 2 persons are required in case of private company (One in case of OPC) and 7 persons in case of public company.
 - (iii) Company must have a common object.
 - (iv) Company must be formed for lawful object.
 - (v) MOA and AOA must be subscribed.
 - (vi) Formalities of incorporation must be complied with.

Availability of Name

- Company must have a name of its own to establish its separate identity.
- Name is a symbol of its independent corporate existence.
- Company may adopt any suitable name provided it is not undesirable.
- As per Section 4(2), name shall not be:
 - (i) identical with or resemble too nearly to name of an existing company registered under this Act
 - (ii) such that its use by company:
 - will constitute an offence under any law for the time being in force, or
 - is undesirable in opinion of CG.
- Section 4(3) states that company, shall not be registered with a name which contains any word or expression:
 - (i) giving an expression that it is in any way connected or having a patronage of CG, any SG, local authority, or corporation etc., or
 - (ii) prescribed, unless approved by CG.
- As per Section 4(4) person has to make an application in e-form no. INC1 alongwith fee to ROC for reservation of
 - proposed name, or
 - name to which it proposes to change.
- ROC with reserve the name for 60 days from date of application.
- The main object is to prevent the use of name likely to mislead the public.
- **Vetting of MOA and AOA, Printing, Stamping and Signing**

Promoters have to approach ROC for the required help. ROC do not charges any fees. A written request is to be made by the promoters. ROC helps and assists them and after vetting of MOA and AOA, he gets them printed. They have to be stamped as per the Stamp Act of the state in which the registered office is situated. They are to be signed by the subscribers or an agent on their behalf.

- MOA and AOA shall be signed in following manner as per Rule 13 of Companies Rules, 2014:
 - (i) They shall be signed by each subscriber to MOA in presence of atleast one witness who shall attest the signature.
 - (ii) Both the subscriber and witness shall add his name, address, description and occupation.
 - (iii) If subscriber is illiterate, he shall affix his thumb impression or mark.,
 - (iv) Person writing on his behalf shall describe the mark, place name of subscriber against it and authenticate it by his own signature, and write no. of shares taken by him.
 - (v) Such person shall read and explain contents of MOA and AOA to subscriber.
 - (vi) If subscriber is a body corporate, then it shall be signed by director, officer, or employee of body corporate authorized by resolution passed by BOD.

(vii) If such person is a LLP, then it shall be signed by a partner of LLP, duly authorized by resolution passed by all the partners.

(viii) Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to MOA & AOA.

Where the subscriber to the memorandum is a foreign national residing outside India.

	(a) Country in any part of common wealth	(b) Country which is party to the Hague Apostille Convention 1961	(c) Country outside the common wealth and not party to the Hague Apostille Convention 1961
Signatures and address on MOA and AOA and proof of identity	Notarized by a Notary (Public) in that part of the common wealth	Notarized by a Notary (Public) of the country of his origin and duly certified by Hague convention.	Notarized by a Notary (Public) of such country and certified by a diplomatic or consular officer empowered in this behalf.

(d) Visited in India and he is not a person of Indian origin or overseas citizen of India and intended to incorporate a company, in such a case the incorporation shall be allowed if he/she is having a valid business visa. • **Power of Attorney**

Promoters may appoint an attorney for carrying out instructions and requirements by registrar. Power of attorney is to be executed on a non judicial stamp paper for this purpose.

Documents required to be filed with ROC Compulsory

S. No.	Form No.	Title	Particulars
1.	f. INC. 33 under SPICE	Memorandum of Association	Constitution of company
2.	f. INC. 34 under SPICE	Articles of Association	Regulations relating to internal management of company.
3.	INC.8	Declaration from Professional	Section 7(1)(b) requires filing of a declaration in the prescribed form by an advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, who is engaged in the formation of the company and by person name in AOA as Director, manager or secretary of the company.
4.	INC.9	Affidavit from subscribers to MOA.	Section 7(1)(c) requires filing of Self declaration from subscribers of MOA and from persons named as first directors.

These are to be filed within 30/180 days of incorporation respectively, but before the commencement of business.

s. No.	Form No.	Title	Particulars
1.	INC.22	Notice of registered address	Location of the company's registered office

2.	DIR.12	Particulars of directors/ Consent to act as a director	As per Section 7(1) (f) & (g) if company appoints any person as its director, manager or secretary by virtue of its AOA, its particulars must be filed and also the particulars of their interests in other firms or body corporate along with their consent, to act as directors.
3.		Particulars of subscribers	Section 7(1)(e) requires filing of particulars of name, residential address, nationality and other particulars of every subscriber to MOA along with the proof of identity.

- The prescribed fees for the registration of the company depending upon the company's nominal capital is required to be paid to the ROC.

- ROC will register all the documents filed with him and there after register the company by issuing a certificate of incorporation, if he is satisfied that:

- (i) Ail requirements aforesaid have been complied with.

- (ii) Company is authorised to be registered under the Act.

- Incorporation has the following effects [Section 9]

- (i) Company becomes a body corporate

- (ii) It acquires a legal recognition

- (iii) it gets a name in which it will carry on business.

- (iv) Its object are laid down.

- (v) Subscribers become the members of the company.

- Incorporation certificate issued by ROC shall be a **conclusive** evidence that [Section 7]

- (i) all requirements of Companies Act have been, complied with in respect of registration and matters precedent and incidental thereto,

- (ii) association is a company authorised to be registered,

- (iii) association has been duly registered under the Companies Act.

A significant step is taken by MCA by introducing e-forms INC - 32 under SPICE scheme vide MCA's notification dated 01/10/2016 notifying companies (Incorporation) fourth Amendment Rules, 2016.

SPICE means simplified performa for Incorporating Companies Electronically.

The SPICE form is also introduced with a function to prepare e-MOA & e- AOA (electronic MOA/AOA) via this attribute there is no opportunity to prepare the manual MOA/AOA & no option to physically sign the MOA/AOA by subscribers and witness. Form INC. 32 under SPICE scheme is a single window form which can be used for the following purposes:

1. Application of DIN

2. Application for availability of name

3. No need to file separate form for first director (DIR. 12)

4. Address of Regd. Office (INC. 22)

5. No need to file separate form for PAN/TAN. Form INC. 33 is meant for e-MOA (electronic MOA) & form INC. 34 is meant for e-AOA (electronic AO A).

Relevant Case Law:

- (i) Jubilee Cotton Mills Ltd. v. Lewis

- (ii) Moosa v. Ebrahim

Even if MOA was signed by 2 adults and 5 others, who were minors, due to which certificate issued was

void, however certificate is conclusive for all purpose and it prevents anyone from alleging that the company does not exist.

(iii) Performing Right Society Ltd. v. London Theatre of varieties.

Where the object of a company is unlawful, it has been held that the certificate of registration is not conclusive for this purpose.

Allotment of Corporate Identity Number (CIN)

- As per Section 7(3), ROC shall allot CIN to the company from the date mentioned in the incorporation certificate.
- This shall be a distinct identity for the company.

Memorandum of Association (MOA)

- It contains the constitution of the company
- It is the first step in company's formation
- As per Section 2(56), "memorandum" means the memorandum of association of a company as originally framed and altered from time to time in pursuance of any previous company law or this Act.
- It not only shows the objects of formation but also determines the scope of its operations beyond which its actions cannot go.
- According to Palmer, "MOA is a document of great importance in relation to the proposed company."
- It is the charter of a company
- It is the premise on which the whole foundation of the company stands
- It contains 6 clauses which are known as the '**conditions of memorandum**'.
- **Name Clause**
 - (i) Contains the name of the proposed company
 - (ii) Name should not be undesirable
 - (iii) It should not be identical with the name of another company
 - (iv) It should not be prohibited one
 - (v) It should end with Words Limited or Private Limited.
 - (vi) It must be approved by ROC
- **Situation Clause / Registered Office Clause**
 - (i) It contain only the name of the state in which the registered office is situated
 - (ii) It does not contains the complete address of the registered office.
- **Object Clause**
 - (i) It contains the objects to be pursued by the proposed company.
 - (ii) It is sub divided into:
 - (a) Main objects, and other incidental and ancillary objects.
 - (b) Other objects.
- **Liability Clause**
 - (i) It is required by the limited company only
 - (ii) It contains whether the liability of members is limited by shares, guarantee or both.
- **Capital Clause**
 - (i) It is mandatory for every company
 - (ii) It states:
 - (a) The number of shares

- (b) The nominal value of each share, and
- (c) The total capital with which the company is to be registered.

- **Subscription Clause**

- (i) MOA must be subscribed by atleast 7 persons in case of public company and atleast 2 persons in case of private company.(1 in case of OPC)
- (ii) Every subscriber shall take atleast one share in case of company limited by shares. The MOA should be signed by each subscriber also stating his address description and occupation.
- (iii) Particulars of every subscriber shall be witnessed.
 - in case of OPC, name of person who is in the event of death of subscriber, shall become the member of company.

Articles of Association

- As per section 2(5) "AOA" means the articles of association of company as originally framed or as altered from time to time or **applied in** pursuance of any previous Company Law or Act.
- It contains the regulations relating to the internal **management of the** company.
- These rules and regulations are framed by-the company **for its** own governance.
- It is also called as regulations or bye laws of the company.
- It is subordinate to and is controlled by the memorandum of **association**
- In case of contradiction with AOA, MOA prevails.
- Public company limited by shares need not have its **own articles. It can** adopt Table F of Schedule I.
- Private company must register its own articles.
- Some of the important clauses of articles are as follows:

Share capital and variation of rights, lien, on shares, forfeiture of shares, directors, their appointment, accounts and audit, GM, share certificates, etc.

- Forms of Articles include:

Table F	Articles of company limited by shares.
Table H	Articles of company limited by guarantee not having share capital.
Table G	Articles of company limited by guarantee having share capital.
Table I	Articles of an unlimited company having share capital.
Table J	Articles of an unlimited company not having share capital.

- The Articles plays a part that is subsidiary to the memorandum of association.
- The Articles govern the ways in which the object of the company are to be carried out and can be framed and altered by the members.
- It must be within the limits marked out by the memorandum and the Companies Act.
 - it must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum.

Content of Articles:

The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F
2. Adoption of preliminary contracts
3. Number and value of shares
4. Issue of preference shares

5. Allotment of shares
6. Calls on share
7. Lien on shares
8. Transfer and transmission of shares.
9. Nomination
10. Forfeiture of shares
11. Alteration of capital
12. Buy Back
13. Share certificates
14. Dematerialisation
15. Conversion of shares into stock
16. Voting rights and proxies
17. Meetings and rules regarding committees
18. Directors, their appointment and delegation of powers
19. Nominee directors
20. Issue of Debentures and stocks
21. Audit committee
22. Managing Director, whole time Director, Manager, Secretary
23. Additional Director
24. Remuneration of Directors
25. General meetings
26. Directors meetings
27. Borrowing powers
28. Dividends and Reserves
29. Accounts and Audit
30. Winding up
31. Indemnity
32. Capitalisation of Reserves

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