STUDY MATERIAL FOR B.COM.,

COMPANY LAW

SEMESTER – III

ACADEMIC YEAR 2023-24

PREPARED BY

COMMERCE DEPARTMENT

INDEX

UNIT - I

INTRODUCTION TO COMPANY LAW

In the Companies Act 2013, the definition of a "company" refers to an entity formed and registered under the provisions of the Act. Specifically, Section 2(20) of the Companies Act 2013 defines a company as follows:

"A company formed and registered under this Act or an existing company as defined in clause (ii) of section 2."This definition encompasses both new companies registered under the Act and existing companies that were registered under previous company laws but continue to exist under the Companies Act 2013.

Additionally, under Section 2(11) of the Companies Act 2013, the term "company" also includes: “Anybody corporate incorporated under any law for the time being in force but shall not include any co-operative society registered under any law relating to co-operative societies. “This broader definition ensures that all entities registered as companies under various laws are covered under the Companies Act 2013, except for co-operative societies which are governed by separate legislation.

CHARACTERISTICS OF COMPANY

1. **Legal Personality**: A company is a legal entity separate from its owners (shareholders). This means it can enter into contracts, sue or be sued, own property, and conduct business in its own name.

2. **Limited Liability**: One of the key advantages of forming a company is limited liability for its shareholders. This means that the liability of shareholders is generally limited to the amount unpaid on their shares. Personal assets of shareholders are protected in most cases, and they are not personally liable for the company's debts and obligations beyond their shareholdings.

3. **Perpetual Succession**: A company has perpetual succession, meaning its existence is not affected by changes in its membership (shareholders). Even if shareholders change or transfer their shares, the company continues to exist until it is legally dissolved.

4. **Separation of Ownership and Management**: The owners (shareholders) of a company are separate from its management. Shareholders elect a board of directors to oversee the management and strategic decisions of the company. The day-to-day operations are typically managed by professional managers appointed by the board.

5. **Transferability of Shares**: Ownership in a company is represented by shares, which are freely transferable (unless otherwise restricted by the company's Articles of Association or applicable laws). Shareholders can sell or transfer their shares to others without affecting the existence of the company.

6. **Statutory Compliance**: Companies are required to comply with various legal and regulatory requirements, such as filing annual returns, conducting annual general

meetings, maintaining proper accounting records, and adhering to corporate governance standards. This ensures transparency and accountability to stakeholders.

7. **Capital Formation**: Companies provide a platform for pooling resources and raising capital from a large number of investors through the issuance of shares. This facilitates investment in large-scale projects and business expansion.

8. **Corporate Governance**: Companies are governed by a set of rules and regulations that promote transparency, fairness, and accountability in their operations. This includes the duties and responsibilities of directors, protection of shareholders' rights, and disclosure of financial information.

Lifting or piercing the corporate veil

Lifting" or "piercing" the corporate veil is a legal doctrine that allows courts to disregard the separate legal personality of a company in certain circumstances. Normally, a company is considered a separate legal entity from its shareholders, meaning the shareholders are not personally liable for the debts and obligations of the company beyond their investment (limited liability). However, there are situations where courts may lift the corporate veil and hold shareholders personally liable for the company's actions or debts. Here are some common reasons why the corporate veil may be pierced:

1. **Fraud or Illegality**: If a company is used to perpetrate fraud or illegal activities, courts may lift the corporate veil to hold the individuals (shareholders, directors, or officers) responsible for those activities personally liable. This could involve situations where the company is a sham or a facade for illegal actions.

2. **Agency**: When the actions of the company are really the actions of the shareholders or directors acting in their personal capacity rather than on behalf of the company, the corporate veil may be pierced. This typically occurs when there is no clear separation between the personal affairs of the shareholders and the company's affairs.

3. **Undercapitalization**: If a company is formed without adequate capital to carry out its intended business, and this leads to harm to creditors or other parties, courts may lift the corporate veil to hold shareholders liable for the company's debts. This situation can arise if shareholders fail to adequately fund the company but still engage in risky business activities.

4. **Group of Companies**: In cases involving a group of companies (subsidiaries and parent companies), courts may pierce the corporate veil to treat the group as a single economic entity, especially if one company is used to avoid legal obligations or liabilities.

5. **Avoiding Statutory Obligations**: If a company is used to evade statutory obligations or to circumvent legal requirements, courts may disregard the separate legal personality to prevent injustice or unfairness.

Vs Partnership Firm

The differences between LLP and partnership firms in India are as follows:

Liability:

Partnership: In a general partnership, all partners have unlimited liability. This means each partner is personally liable for the debts and obligations of the partnership. Creditors can go after the personal assets of any partner to settle business debts.
LLP: In a Limited Liability Partnership, partners have limited liability, similar to shareholders in a corporation. This means that partners are generally not personally liable for the debts and liabilities of the LLP beyond their capital contribution, unless they have personally guaranteed them or engaged in wrongful acts.

Legal Status:

Partnership: A partnership is not a separate legal entity from its owners (the partners). Partnerships are formed by an agreement between individuals who carry on a business together with a view to making a profit. It is governed by the Partnership Act of the respective country.
LLP: An LLP is a separate legal entity from its partners. It is formed by registering with the appropriate government authority (such as Companies House in the UK or the Registrar of Companies in India). LLPs combine elements of partnerships and corporations, offering limited liability to their partners.

Management and Structure:

Partnership: Partners typically have equal control and management rights unless otherwise specified in the partnership agreement. Decisions are generally made jointly by the partners.
LLP: LLPs often have a more structured management system, which may include designated partners who have responsibilities akin to directors in a company. LLPs may also have more formal decision-making processes.

Taxation:

Partnership: Generally, partnerships are not subject to separate taxation. Instead, profits and losses "pass through" the business to the partners, who report them on their personal tax returns.
LLP: LLPs may be taxed similarly to partnerships, where the LLP itself does not pay taxes; instead, partners report their share of profits or losses on their personal tax returns. However, tax treatment can vary by jurisdiction.

Continuity and Dissolution:

Partnership: A partnership dissolves upon the death, withdrawal, or bankruptcy of a partner, unless the partnership agreement specifies otherwise.
LLP: An LLP can continue its existence irrespective of changes in partners, unless dissolved as per the LLP agreement or by law.

CLASSIFICATION OF COMPANIES

The classification of a company can vary based on different criteria. Here are some common classifications:

I. Companies on the Basis of Liabilities

When we look at the liabilities of members, companies can be limited by shares, limited by guarantee or simply unlimited.

a) Companies Limited by Shares

Sometimes, shareholders of some companies might not pay the entire value of their shares in one go. In these companies, the liabilities of members is limited to the extent of the amount not paid by them on their shares.

This means that in case of winding up, members will be liable only until they pay the remaining amount of their shares.

b) Companies Limited by Guarantee

In some companies, the memorandum of association mentions amounts of money that some members guarantee to pay.

In case of winding up, they will be liable only to pay only the amount so guaranteed. The company or its creditors cannot compel them to pay any more money.

c) Unlimited Companies

Unlimited companies have no limits on their members' liabilities. Hence, the company can use all personal assets of shareholders to meet its debts while winding up. Their liabilities will extend to the company's entire debt.

II. Companies on the basis of members

a) One Person Companies (OPC)

These kinds of companies have only one member as their sole shareholder. They are separate from sole proprietorships because OPCs are legal entities distinct from their sole members. Unlike other companies, OPCs don't need to have any minimum share capital.

b) Private Companies

Private companies are those whose articles of association restrict free transferability of shares. In terms of members, private companies need to have a minimum of 2 and a maximum of 200. These members include present and former employees who also hold shares.

c) Public Companies

In contrast to private companies, public companies allow their members to freely transfer their shares to others. Secondly, they need to have a minimum of 7 members, but the maximum number of members they can have is unlimited.

III. Companies on the basis of Control or Holding

In terms of control, there are two types of companies.

a) Holding and Subsidiary Companies

In some cases, a company's shares might be held fully or partly by another company. Here, the company owning these shares becomes the holding or parent company. Likewise, the company whose shares the parent company owns becomes its subsidiary company.

Holding companies exercise control over their subsidiaries by dictating the composition of their board of directors. Furthermore, parent companies also exercise control by owning more than 50% of their subsidiary companies' shares.

b) Associate Companies

Associate companies are those in which other companies have significant influence. This "significant influence" amounts to ownership of at least 20% shares of the associate company.

The other company's control can exist in terms of the associate company's business decisions under an agreement. Associate companies can also exist under joint venture agreements.

IV. Companies in terms of Access to Capital

When we consider the access a company has to capital, companies may be either listed or unlisted.

Listed companies have their securities listed on stock exchanges. This means people can freely buy their securities. Hence, only public companies can be listed, and not private companies.

Unlisted companies, on the other hand, do not list their securities on stock exchanges. Both, public, as well as private companies, can come under this category.

V. Other Types of Companies

a) Government Companies

Government companies are those in which more than 50% of share capital is held by either the central government, or by one or more state government, or jointly by the central government and one or more state government.

b) Foreign Companies

Foreign companies are incorporated outside India. They also conduct business in India using a place of business either by themselves or with some other company.

c) Charitable Companies (Section 8)

Certain companies have charitable purposes as their objectives. These companies are called Section 8 companies because they are registered under Section 8 of Companies Act, 2013.

Charitable companies have the promotion of arts, science, culture, religion, education, sports, trade, commerce, etc. as their objectives. Since they do not earn profits, they also do not pay any dividend to their members.

d) Dormant Companies

These companies are generally formed for future projects. They do not have significant accounting transactions and do not have to carry out all compliances of regular companies.

e) Nidhi Companies

A Nidhi company functions to promote the habits of thrift and saving amongst its members. It receives deposits from members and uses them for their own benefits.

f) Public Financial Institutions

Life Insurance Corporation, Unit Trust of India and other such companies are treated as public financial institutions. They are essentially government companies that conduct functions of public financing.

UNIT – II
FORMATION OF COMPANY

Formation of Company

Formation of a company is a complex activity involving completion of legal formalities and procedures. It involves three distinct stages that are promotion, incorporation and subscription of capital.

Introduction

The word 'company' is derived from Latin word 'Com' which means 'Together' and the word 'panies' which means 'bread'. A company is thus an association of persons who took their meal together. In simple language the term company means an association of persons formed for some common purpose. When a few persons form a company for the purpose of some business of profit it is called Joint Stock Company. The persons forming the company are called 'shareholders'. The liability of the members of the company is usually limited.

Meaning

A joint stock company is an artificial person created by law having separate legal entity with a perpetual succession and common seal.

Definition

According to Section 3(1) of the Companies Act 1956, "a company means a company formed and registered under the act or an existing company" and "Existing Company means a company formed and registered under any of the previous companies act."

According to section 2(20) of the Companies Act,2013, "The term Company means a Company incorporated under the Companies Act 2013 or any previous Company Law".

According to Lord Justice Lindley "Company is a voluntary association of many persons who contribute money or money's worth to a common stock and employs it in some trade or business and who share the profit and loss arising there from"

Steps in Formation Of Joint Stock Company:

In the formation of a public limited company having share capital, mainly foru stages are involved viz.,

- Promotion
- Incorporation
- Capita Subscription
- Commencement of business

In the case of formation of a private company, only the first two stages are involved.

1. Promotion

The person who undertakes responsibility to bring the company into existence are called promoters.

The steps which are taken to persuade a mummer of persons to come together for the achievement of a common objective through the company form of organisation are called promotion.

According to Guthmann and Doughall, "A Promoter is a person who assembles the men, money and the materials into a going concern."

Steps in Company Promotion:

Discovery of an idea: The promoter starts out with an idea to start some business either in a new field which has not been commercially exploited or in some existing lines of manufacture or business. He makes a preliminary investigation to find out whether it is worthwhile to make a detailed investigation.

Detailed Investigation: The promoter needs to make a detailed investigation of his idea with the assistance of many experts. It will help him to know whether the estimated income is adequate to cover the estimated costs and compensate the owner fort the risks and services.

Assembling: After a detailed investigation, if the promoter is satisfied with the practicability and profitability of the proposed concern, he starts assembling. Assembling means getting the support and consent of some other persons to act as directors or founders, arranging for patents, a suitable site for the company, machinery and equipment and making contracts for filling the positions.

Financing the proposition: After assembling the proposition, the promoter prepares a prospectus to present to public and to underwriters to persuade them to finance the proposition.

Functions of promoters:

- **Promotion of the company:** The most important function of the promoters is the promotion of the company. They undertake various processes of promotion.
- **Incorporation of the company:** Promoters also undertake the function of getting the company registered. They prepare necessary do necessary documents such as M.O.A, A.O.A, etc and submit them to the registrar and the company incorporated
- **Raising Capital:** In the case of public limited company having Share capital promoters raise the required capital and obtain business commencement certificate.
- **Nursing the company:** Promoters are also associated with the company and nurse the company (They work for the growth of the company).

Types of promoters:

- **Professional promoters:** They are experts who specialise in company promotion. They float the company and hand it over to the shareholders or their respective. Promotion is their main profession or occupation.
- **Occasional promoters:** They promoters take interest in floating some companies. They are not engaged in promotion work on a regular basis. They take up the promotion of some company and once it is over they go to their original profession. For instance, engineers, lawyers etc. May float some companies.
- **Entrepreneur promoters:** They are both promoters and entrepreneurs. They conceive idea of a new business unit, does the ground work to establish it and subsequently become a part of the management.
- **Financier Promoters:** Some financial institutions, like investment banks or industrial banks, may take up the promotion of a company with a view to find opportunities for investment.

Position of a promoter:

The company not being in existence, a promoter is neither an agent of, nor a trustee for, the company. But he occupies a fiduciary position (i.e. position of trust of confidence) in the relation to the company he promotes.

The fiduciary relation requires full disclosure of the relevant facts, including any profile made.

A promoter starts working for the company even before the company is an entity or is in existence. There being no entity or existence of the company, there can be no contract between the promoter and the company.

2. Incorporation:

The second stage is the formation of the company is incorporation stage where in, the company must be registered with the registrar of the companies.

a) Approval of name

It has to be ensured that the name selected for the company does not match with the name of any other company. For this, the promoter has to fill in a "name availability form" and submit it to the registrar of companies along with necessary fees.

b) Filing of documents

For registration an application has to be filed with the registrar of the companies along with the following documents:

- Memorandum of association properly stamped and signed by the signatories
- Articles of association properly stamped and signed by the signatories.
- Notice of the address of the registered office of the company.
- Copy of the letter received from the department of company law and administration of the Government, giving intimation about the availability of the proposed names of the company. Statutory declaration stating that all the requirements of the companies act have been compiled with
- Statement of nominal capital of the company
- Details of persons(name, addresses, occupation etc.) who have accepted to act as the first directors of the company
- The written consent of the directors to act so
- An undertaking by the directors to take up and pay for the qualification shares
- Particulars of managing directors, manager, secretary, etc., if any.

c) Payment of filing and registration fees

Along with application and the necessary documents promoter must also pay required stamp duty, filing fees, registration fees. The registrar will scrutinise the documents and if satisfied will enter the name of the company in the register and will issue the company its birth certificate called the 'Certificate of Incorporation.'

3. Capital Subscription or Raising of Share Capital

A private company can commence the business immediately after incorporation but a public company having a share capital can commence business only after obtaining another certificate called "Certificate of Commencement of Business" from the registrar of companies.

In this stage the company has to make arrangements for obtaining the necessary capital for the company.

a) **Issue of prospectus:** In order to raise the require capital a prospectus has to be issued inviting the public to subscribe for the shares. After receiving the applications from the public the company proceeds with the allotment if the minimum subscription has been reached.

b) **Minimum Subscription:** It is the minimum amount of capital that should be subscribed for by the public before the company can proceed with allotment of shares. This amount should be stated in the prospectus. It has to be 90% of the issued share capital.

c) **Allotment of shares:** it means distribution of the shares among the applicants or subscribers. A company can proceed with the allotment of shares only after receiving the minimum subscription from the public. After the distribution is done by the director's letter of allotment should be sent to those applicants who have been allotted the shares and letter of regret should be sent to those applicants who have not been allotted any shares and their application money should be returned.

4. Commencement of Business:

To obtain certificate of commencement of business the promoter should apply to the registrar together with prescribed fees. This will be granted only if the following conditions are fulfilled:

- A prospectus or a statement in lieu of prospectus has to be filed with the registrar of companies. A statement in lieu of prospectus has to be prepared by those companies which do not find it necessary to issue a prospectus.
- Company has received the minimum subscription amount.
- Directors have paid the application and allotment money payable on the shares held buy them
- Declarations by the directors or secretary of the company that the requirement of companies act have been complied with

If the registrar is satisfied he will issue the business commencement certificate. From the date of receipt of this certificate the company is legally authorised to commence the business.

Memorandum of Association:

The Memorandum of association is the most important document of the company. This is a document which sets out the constitution of a company. It defines the company's relations with the outside world, and the scope of its activities. Its purpose is to enable the shareholders, creditors as well as those who deal with the company to know the company's permitted range of enterprises.

Clauses of Memorandum:

- **Name Clause:** The clause contains the name of the company. The name selected should not be similar to or identical with that of any existing company. Also the name must not be one which is considered undesirable by the Central Government. The name of the company should end with the word 'Limited' if it this public company. If it is private company the name should end with the words 'private limited'. The purpose of adding the word 'Limited' is to enable all those who deal with the company to know that the liability of the members is limited.
- **Situation Clause:** In this clause, the state in which the company's registered office is located should be given. To avoid any unnecessary legal formalities and expenses if there is a subsequent change in the address of the company, the exact address within the state is not given and only the name of the state is given.
- **Object Clause:** It should specify in unambiguous language the objects for which the company is formed. Great care would be taken in drawing up this clause, as the company will not be allowed to do any business which is not specifically mentioned here. As it is difficult to alter the pobject clause later, it is necessary that promoter's should include in this clause, all possible types of business in which a company may engage in the future.
- **Liability Clause:** This clause states that the liability of members is limited to the face value of shares taken up by them. If a member has already paid some amount on the shares, he can be called upon to pay only the unpaid amount of the shares.
- **Capital Clause:** In this clause, particulars regarding the amount of share capital with which the company is proposed to be registered and the division for the capital into shares is fixed amount are included.

- **Association or subscription clause:** This contains a declaration by the subscribers to the memorandum. This declaration just precedes the names of the signatories to the memorandum.

Articles of Association:

Meaning

The articles are the internal regulation of the company on the basis of which its internal affairs are managed. They lay down the powers of the directors, shareholders and officers.

It is not compulsory for the public company to prepare its own article of association as it can follow Table A of companies act whereas preparation of articles of association is compulsory for private company.

Contents:

The following are the contents of AOA:

- Share capital and variation of rights
- Exercise of lien by the company
- Calls on shares
- Transfer, transmission, forfeiture and surrender of shares
- Issues of shares warrants
- Alteration and reduction of capital
- Voting powers of members
- Borrowing powers
- Proceedings at the board and at the general body meetings
- Appointment, powers, duties qualifications, remuneration etc, of directors. Appointment of manager, managing director and secretary
- Dividends and reserves
- Maintenance of books of accounts and their audit
- The company's seal
- Winding up

Doctrine of ultra vires memorandum and articles:

The term is derived from two Latin words 'ultra' and 'vires'. Ultra means beyond and vires means power or authority. Ultra vires means doing an act which is beyond the legal powers and authority of the company. In corporate law, ultra vires describes acts attempted by a corporation that are beyond the scope of powers granted by the corporations' object clause, articles of association or in a clause in its Bye-laws, in the laws authorizing a corporation's formation or similar documents. Actsattempted by a corporation that are beyond the scope of its character are void and voidable.

Differences between Memorandum and Articles of Association:

SI No	Memorandum of Association	Articles of Association
1.	It is the charter of the company setting out its constitution.	It is the bye-law of the company for the internal administration.
2.	It lays down the conditions of incorporationand defines the limits and powers of the company.	It defines the rights and duties of directors, members etc.
3.	It states the objects for which the companyis established.	It states the rules or manners of carrying out the business as stated in the memorandum. They cannot be contrary to the powers and objects set forth in the memorandum.
4.	Its preparation is compulsory without whichincorporation is not possible.	Its preparation is not compulsory for the public company. Table A will be applicable in its absence.
5.	It governs the external relations of the company.	It defines the relationship between members and the management of the company. Internal administration is its main area.
6.	It is a primary and fundamental document, foundation for company's structure, responsible for company's birth; it is unchallenged on statutory matters.	It is a secondary, subordinate, subsidiary document. It should be read and understood in light of memorandum. It compliments or supplements memorandum.
7.	It lays down the area or scope of the company beyond which the company cannotgo.	Its activities must be confined to the area and scope of memorandum. All the articles which are ultra vires articles and intra vires memorandum are not void and can be ratified by a special resolution.
8.	It can be altered only by a special resolution and subject to the sanction of the court or central government as the case may be.	It can be altered by a special resolution and the sanction is not necessary.

Prospectus
Meaning:

According to sec 2(70) of the companies act of 2013, "A prospectus, notice, circular, advertisement or Other document inviting offers for the public for the subscription or purchase of any shares in or debentures of a body corporate".

Objects of prospectus

- ✓ To inform the public about the forming of a new company
- ✓ To induce the investors to invest in its shares and debentures
- ✓ To preserve an authentic record of the terms on which the investors have been invited and to make the directors responsible for the statements in the prospectus

Types of prospectus

1. Red-herring prospectus

A prospectus for stocks and bonds are issued in different stages – the first stage is the preliminary prospectus, which contains the details of the business and proposed financial action. It is nicknamed as *Red Herring*. When a company decides to attract investors to invest in their company, they use a prospectus named Red Herring Prospectus. It is basically a prospectus which is used in the public issue to attract different investors. In this prospectus, the price and quantum are not mentioned or disclosed.

2. Pink-herring prospectus

A prospectus that is issued without disclosure of the number of securities being offered or, in an initial public offering, the estimated or indicative price range. It is a preliminary prospectus that precedes the filing of a red-herring prospectus.

3. Free-writing prospectus

Any sort of written, electronic, or graphic statement that describes an offer in terms of its issuer or securities. It includes a legend stating that the investor can have a copy of the prospectus at the website of relevant securities commission. Typically, the issuer must file this prospectus with the securities commission no later than the first date it is obtained. In the case of inexperienced issuers, the securities commission may require that a preliminary prospectus is filed before the filing of a free-writing prospectus.

4. Abridged prospectus

Abridged Prospectus is the actual *summary* of a prospectus. It contains all the salient features of a prospectus. The original prospectus that a company files to the exchange regulator is too large. The abridged prospectus contains the summary of the same prospectus.

Reading the entire prospectus may be too much time consuming for an investor. Instead, they go through the abridged prospectus, which gives them the basic idea about the company.

The abridged prospectus contains all the important and materialistic information. No company will issue the share buying from without the abridged prospectus attached to it so that investors can take a well-informed decision.

5. Reconfirmation prospectus

A prospectus that a shell company must prepare and submit for the approval of relevant securities and exchange authorities (the SEC) prior to considering a reverse merger. This prospectus contains detailed information about the private company merging into the shell. It is handed over to purchasers in the shell's initial public offering (IPO) who must reconfirm their investment after perusing the prospectus before the merger can be finalized. At least 80 percent of purchasers must reconfirm so that the merger transaction can be effected. Purchasers who do not confirm will receive their investment back (of course, less expenses).

Contents of Prospectus

The revised format is effective from 1st November 1991.

Part 1 of schedule II

1. General Information

a) Name and address of registered office of the company
b) Date of opening of the issue
c) Name and address of auditors and lead managers

II. Capital Structure of the Company

a) Authorised capital
b) Issued capital
c) Subscribed capital
d) Paid up capital

III. Terms of the present issue

a) Right of the instrument holders
b) How to apply, availability of forms, prospectus and mode of payment
c) Any special tax benefits for company and its shareholders

IV. Particulars of the issue

a) Objects
b) Project cost

V. Company, Management and Project

a) History and main objects and present business of the company
b) Subsidiary of the company if any
c) Promoter and their background
d) Infrastructure facilities for raw materials and utilities like water, electricity etc.
e) Nature of products
f) Approach to marketing
g) Export possibilities and export obligations if any
h) Future prospects – expected capacity utilization during the first three years from the date of commencement of production and the expected year when the company would be able to earn cash profits and net profits.

Part 1I of schedule II

1. General Information

a) Consent of the directors, auditors, managers to issue, registrar to issue, bankers to the company, bankers to the issue and experts
b) Expert opinion if any
c) Procedure and time schedule for allotment and issue of certificate

II. Financial information

a) A report by the auditors of the company with respect to-

- Profits and losses and assets and liabilities in accordance with sub-clause(2) (3) of this clause as the clause as the case may require and
- The rates of dividend if any paid by the company in respect of each class of shares in the company for each of the five financial years immediately preceding the issue of the prospectus

III. Statutory and other information

a) Minimum Subscription
b) Expenses of the issue giving separately fee payable to: advisers, registrars to the issue, managers to the issue, trustee for the debenture holders
c) Underwriting commission and brokerage
d) Previous public or right issue if any, date of allotment, date of refunds, date of listing on the stock exchange, closing date
e) Commission or brokerage on previous issue
f) Details of purchase of property

Part 1II of schedule II

1. **Any report by part II of this schedule shall either**

a) Indicate by way of note any adjustments as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary

b) Making those adjustments and indicate that adjustments have been made

2. **Any report by accountants required by part II of this schedule**

a) Shall be made by accountants qualified under this act for appointment as auditors of the company

Statement in Lieu of Prospectus

When the prospectus is not issued by the company a statement in lieu of prospectus, must be filed with the Registrar at least three days before the allotment of shares. The contents of the statement in lieu of prospectus are very much similar to the prospectus. The statement must be signed by all the directors or their agents authorized in writing. These provisions do not apply to a private company.

Certificate of Incorporation

Registered firm's 'birth certificate' showing its legal name and date of incorporation. A certificate of incorporation is a legal document relating to the formation of a company or corporation. It is a license to form a corporation issued by state government. It is also called as 'Certificate of registration'.

Filing of documents to get Certificate of Incorporation

For registration an application has to be filed with the registrar of the companies along with the following documents:

- Memorandum of association properly stamped and signed by the signatories
- Articles of association properly stamped and signed by the signatories.
- Notice of the address of the registered office of the company.
- Copy of the letter received from the department of company law and administration of the Government, giving intimation about the availability of the proposed names of the company. Statutory declaration stating that all the requirements of the companies act have been compiled with
- Statement of nominal capital of the company
- Details of persons(name, addresses, occupation etc.) who have accepted to act as the firstdirectors of the company
- The written consent of the directors to act so
- An undertaking by the directors to take up and pay for the qualification shares
- Particulars of managing directors, manager, secretary, etc., if any.

Certificate of Commencement of business

The certificate of commencement of business was a mandatory step under Companies Act, 2013. It was mandatory for public companies with share capital to obtain certificate of commencement of business. The certificate is issued by the registrar of joint stock companies.

Procedure for Obtaining Certificate of Commencement of Business

In order to obtain COB, a public company shall file the following documents with the Registrar of Companies as desired by section 149 of 1956 Act:—

(1) A prospectus/statement in lieu of prospectus as the case may be along with following documents:—

(a) List of the members of the company with their shareholdings;

(b) confirmation for paid up share capital to the extent of Rs. 5,00,000 and proof thereof, viz copy of bank statement etc.

(c) List of Directors, Manager, Secretary, Auditors and changes among them, if any;
(d) Consent of the Auditors to include their name in the Prospectus/Statement in lieu of Prospectus
(e) Copy of the agreements for appointment of Managing Director, Underwriters, contracts enteredinto by the promoters before incorporation of the company, etc. if any;
(f) Printed and certified copy of the Memorandum and Articles of Association of the company;
(g) Details of the preliminary expenses incurred by the company;
(h) Power of attorney to make corrections in the Prospectus/Statement in lieu of prospectus and toobtain certificate for commencement of business from the Registrar of Companies;
(i) Certified copy of the resolution passed by the Board for approval of prospectus /statement in lieuof prospectus for filing with the Registrar.
(2) A duly verified declaration on stamp paper that provisions of section 149 of the Act have been complied with, by one of the directors or secretary or, where there is no secretary, by a secretary in whole time practice, in e-Form 19/20 as the case may be.

E-filing

Web-based applications that will allow users to view, modify, and submit filings on-line. The processof using a computer program to transmit information electronically to another party. This allows the user to complete and submit the information in a timely fashion.

Registrar of companies

According to Companies Act 2013 Sec 2 (75) “Registrar” means a Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, having the duty of registering companies and discharging various functions under this act.

Share Capital

Introduction

In the post-pandemic era, there is a significant increase in retail investments in connection with the financial markets. The return from equity instruments tends to outperform any other investment avenues. Within equity instruments, there are various alternatives available to investors. The most common source of equity investment is share capital.

The shareholders of a company invest in the company. The maximum liability of the shareholders is capital investment. In return, shareholders attain voting rights to company matters. The shareholders also appoint the board of directors. Additionally, shareholders earn returns by way of dividends and capital appreciation. There are various types of share capital based on the rights and obligations offered to the investors.

Classes of Share Capital

Broadly, there are two classes of share capital available to a company –

A. Preferred Share Capital

Preferred share capital refers to funds raised by the issue of shares with privileged rights. Preferential rights include fixed dividends. Also, preferred share capital entitles shareholders to receive share capital before common shareholders. A company must pay preferred dividends irrespective of cash flows like debt instruments. The company may accrue dividends and pay preferred equity holders at a later date or upon maturity.

B. Common or Equity Share Capital

Common equity refers to share capital raised with the issuance of ordinary shares. Equity share capital extends a share in profits and voting rights to the shareholders. However, the company is under no obligation to pay dividends. Additionally, the company may offer bonus shares or right issues to its common shareholders.

Types of Share Capital

1. Authorized Share Capital

Authorized share capital refers to the maximum number of shares a company may issue. The Memorandum of Association limits the authorized capital to a fixed amount. Authorized share capital is more than the total outstanding shares.

A company may increase its authorized capital for several reasons, such as acquiring another company or employee stock options. Any change in the authorized capital requires shareholder approval since an increase in the authorized capital may shift the balance of power between the shareholders and other stakeholders.

2. Unissued Share Capital

Unissued shares still need to be issued to the general public or employees. Unissued stock forms part of the company's treasury and does not impact the shareholders. The Board of Directors controls unissued shares. Unissued shares are not tradeable in the secondary market.

Most companies hold a significant percentage of their unissued shares. The value of unissued share capital is low. The objective is to sell or allocate unissued shares at a premium in the future. The company may use unissued stock to pay off debt or to raise money for new investments. Directors may even allocate unissued shares to a minority shareholder if necessary.

3. Issued Share Capital

Issued share capital is the number of shares a company issues to its shareholders. Issued share capital is a mix of common equity shares and preferred capital.

It is a major component of the shareholder's funds under the liabilities of a balance sheet. Also, analysts use issued capital to evaluate the worth of common equity stock. For example, ABC Ltd issues thousand shares with a face value of Rs. 10. The company issues the shares for Rs. 15 per share. Therefore, ABC Ltd. raises Rs. 10,000 from the initial sales of shares. Rs. 5,000 is surplus and constitutes the company's reserves.

4. Subscribed Capital

A company's authorized share capital is equal to its registered capital. A fraction of the issued capital is the subscribed capital. Shareholders promise to purchase or subscribe to a company's shares. The payment of subscribed share capital may be in instalments.

Subscribed capital represents the portion of a company's issued capital accepted by the public. The public shows interest in a company by way of a subscription. A company can only issue part of the share capital in one instance.

It may issue additional shares over time. Moreover, the company may only require payment of part of the share's entire face value.

5. Paid-Up Capital

Paid-up capital is investment received by a company from a share issue. Typically, a company issues fresh capital to raise funds. Fresh share capital constitutes the company's paid-up capital. As per the Companies Act 2013, the minimum paid-up capital requirement is Rs. 1 lakh.

Paid-up Capital is essential for fundamental analysis. A company with a low paid-up capital may have to rely on debt to finance its operations. Conversely, high paid-up capital signifies less reliance on borrowed funds.

6. Called-Up Capital

Called-up Capital is the subscribed capital section that consists of the shareholder's payment. The balance sheet separately captures called-up capital under the shareholders' equity. Called-up capital is useful for companies with unforeseen or emergency fund requirements.

On issuance of shares, the company calls upon its shareholders to pay a part of the capital. Thus, called-up capital offers more flexibility in the investment and payment terms.

7. Reserve Share Capital

Reserve capital refers to share capital that a company cannot access except in case of bankruptcy. The company can issue reserve share capital only with a special resolution. Moreover, a company cannot modify the articles of association to issue reserve share capital. The purpose of reserve share capital is to make liquidation easier. Reserve capital represents the company's emergency funds and is subject to multiple restrictions.

8. Uncalled Share Capital

Uncalled share capital is shares issued but not claimed. Uncalled share capital appears in the company's contingent liabilities. It represents the balance amount after the adjustment of the called-up capital from the total shares allotted.

Issue of Shares

The issue of shares is the procedure in which enterprises allocate new shares to the shareholders. Shareholders can be either corporates or individuals. The enterprise follows the rules stipulated by Companies Act 2013 while circulating the shares. The Issue of Prospectus, Receiving Applications, and Allocation of Shares are 3 key fundamental steps of the process of issuing the shares.

The significant steps in the process of issue of shares are given below:

- Issue of Prospectus: The enterprise initially issues the prospectus to the public generally. The prospectus is an appeal to the public that a new enterprise has come into the presence and it would require funds for operating the trading concern. It comprises of complete data regarding the enterprise and the way in which the money is to be collected from the prospective investors.
- Receipt of Applications: When the prospectus is circulated to the public, prospective investors contemplating to sign up and subscribe the share capital of the enterprise would make

an application along with the application money and deposit it with a scheduled bank as mentioned in the prospectus.

- Allocation of shares: Once the minimum subscription has been done, the shares can be allocated. Normally, there is always oversubscription of shares, so the allocation is done on pro-rata ground. Letters of Allotment are sent out to those people who have been allocated their part of shares. This results in an authentic contract between the enterprise and the claimant, who will now be a part-owner of the enterprise.

Alteration of Share Capital

Alteration of share capital refers to the process of changing the capital structure of a company by increasing or decreasing the number of shares, or by modifying the rights attached to existing shares. It can be done for various reasons, such as to raise capital, to consolidate shares, to convert shares from one class to another, or to cancel shares. Alteration of share capital is a complex process and involves compliance with legal and regulatory requirements.

In this blog, we will discuss the various aspects of alteration of share capital, including the reasons for alteration, the types of alteration, the legal requirements, and the procedure for alteration.

Reasons for Alteration of Share Capital

There can be several reasons for altering the share capital of a company. Some of the common reasons are:

1. To raise capital: Companies may need to raise additional capital to fund their expansion plans or to meet their working capital requirements. Alteration of share capital allows them to issue new shares and raise capital from the market.
2. To consolidate shares: Companies may have a large number of small denomination shares, which may make it difficult to manage their share capital. Alteration of share capital allows them to consolidate their shares into larger denominations, which makes it easier to manage.
3. To convert shares from one class to another: Companies may have different classes of shares with different rights attached to them. Alteration of share capital allows them to convert shares from one class to another.
4. To cancel shares: Companies may have unissued or cancelled shares on their balance sheet, which may affect their financial statements. Alteration of share capital allows them to cancel these shares and improve their financial statements.

Types of Alteration of Share Capital

There are several types of alteration of share capital, which include:

1. Increase of share capital: This involves increasing the authorised share capital of the company, which allows the company to issue more shares.
2. Decrease of share capital: This involves reducing the authorised share capital of the company, which may be done to reduce the company’s capital or to cancel unissued shares.
3. Consolidation of shares: This involves consolidating several shares into one share of larger denomination.
4. Sub-division of shares: This involves dividing one share into several shares of smaller denomination.
5. Conversion of shares: This involves converting one class of shares into another class of shares, such as converting preference shares into equity shares.

Legal Requirements for Alteration of Share Capital

Alteration of share capital is governed by various legal and regulatory requirements. Some of the key legal requirements are:

1. Approval of shareholders: Any alteration of share capital must be approved by the shareholders of the company through a special resolution passed at a general meeting.
2. Approval of regulatory authorities: Certain types of alterations may require approval from regulatory authorities such as the Registrar of Companies, Securities and Exchange Board of India (SEBI), and Reserve Bank of India (RBI).
3. Filing of documents: After the approval of the shareholders and regulatory authorities, the company must file the necessary documents with the Registrar of Companies, such as the altered memorandum and articles of association, and obtain a certificate of registration.

For Alteration of Share Capital

The procedure for alteration of share capital involves several steps, which include:

1. **Board resolution:** The first step is to pass a board resolution proposing the alteration of share capital and convening a general meeting of shareholders.
2. **Notice of general meeting:** The company must issue a notice of the general meeting to all shareholders, specifying the date, time, and place of the meeting and the proposed resolution.
3. **General meeting:** The shareholders must approve the proposed resolution by a special resolution passed by a majority of not less than three-fourths of the members present and voting.
4. **Approval of regulatory authorities:** If the proposed alteration requires regulatory approval, the company must obtain the necessary approvals from the relevant regulatory authorities.
5. **Filing of documents:** After obtaining the necessary approvals, the company must file the necessary documents with the Registrar of Companies, such as the altered memorandum and articles of association, and obtain a certificate of registration.
6. **Share certificates:** If the alteration involves the issue of new shares, the company must issue new share certificates to the shareholders.
7. **Update of records:** The Company must update its records to reflect the altered share capital, and inform relevant parties such as stock exchanges, depositories, and banks.

Dividends

Dividends are the percentage of a company's earnings that is paid to its shareholders as their share of the profits. Dividends are generally paid quarterly, with the amount decided by the board of directors based on the company's most recent earnings.

Dividends may be paid in cash or additional shares. When a company announces a dividend, it also will announce the payment date on which the dividend will be paid into the shareholders' accounts.

Who Gets Dividends and How

Common stock shareholders of dividend-paying companies are eligible to receive a distribution as long as they own the stock before the ex-dividend date. This is essentially a cut-off date for assigning the dividend payment when shares change hands.

Important Dividend Dates

Dividend payments follow a chronological order of events, and the associated dates are important to determining which shareholders qualify to receive the dividend payment.

- **Announcement date:** Dividends are announced by company management on the announcement date (or declaration date) and must be approved by the shareholders before they can be paid.
- **Ex-dividend date:** The date on which the dividend eligibility expires is called the ex-dividend date or simply the ex-date. For instance, if a stock has an ex-date of Monday, May 5, shareholders who buy the stock on or after that day will NOT qualify to receive the dividend. Shareholders who own the stock one business day prior to the ex-date, on Friday, May 2, or earlier, qualify for the distribution.
- **Record date:** The record date is the cut-off date, established by the company to determine which shareholders are eligible to receive a dividend or distribution.
- **Payment date:** The Company issues the payment of the dividend on the payment date, which is when the money is credited to investors' accounts.

Reasons - Companies Pay Dividends

Many investors buy stocks for their dividends rather than for their potential for share price growth. Some extraordinarily successful companies like Coca-Cola Co. are prized more by investors for their steady dividends than for their potential price growth.

Dividends are often expected by shareholders as their share of the company's profits. Dividend payments reflect positively on a company and help maintain investors' trust.

A high-value dividend declaration can indicate that a company is doing well and has generated good profits. But some may interpret it as an indication that the company does not have much going in the way of new projects to generate better returns in the future. It's using its cash to pay shareholders instead of reinvesting it into growth.

Debentures

A debenture is a type of bond or other debt instrument that is unsecured by collateral. Since debentures have no collateral backing, they must rely on the creditworthiness and reputation of the issuer for support. Both corporations and governments frequently issue debentures to raise capital or funds.

Types of Debentures

Registered vs. Bearer

When debts are issued as debentures, they may be registered to the issuer. In this case, the transfer or trading in these securities must be organized through a clearing facility that alerts the issuer to changes in ownership so that they can pay interest to the correct bondholder.

A bearer debenture, in contrast, is not registered with the issuer. The owner (bearer) of the debenture is entitled to interest simply by holding the bond.

Redeemable vs. Irredeemable

Redeemable debentures clearly spell out the exact terms and date by which the issuer of the bond must repay their debt in full. Irredeemable (non-redeemable) debentures, on the other hand, do not hold the issuer liable to repay in full by a certain date. Because of this, irredeemable debentures are also known as perpetual debentures.

Convertible vs. Nonconvertible

Convertible debentures are bonds that can convert into equity shares of the issuing corporation after a specific period. Convertible debentures are hybrid financial products with the benefits of both debt and equity.

Companies use debentures as fixed-rate loans and pay fixed interest payments. However, the holders of the debenture have the option of holding the loan until maturity and receiving the interest payments or converting the loan into equity shares.

Convertible debentures are attractive to investors who want to convert to equity if they believe the company's stock will rise in the long term. However, the ability to convert to equity comes at a price since convertible debentures pay a lower interest rate compared to other fixed-rate investments.

Nonconvertible debentures are traditional debentures that cannot be converted into equity of the issuing corporation. To compensate for the lack of convertibility investors are rewarded with a higher interest rate when compared to convertible debentures.

Features of a Debenture

When issuing a debenture, first a trust indenture must be drafted. The first trust is an agreement between the issuing corporation and the trustee that manages the interest of the investors.

Interest Rate

The coupon rate is determined, which is the rate of interest that the company will pay the debenture holder or investor. This coupon rate can be either fixed or floating. A floating rate might be tied to a benchmark such as the yield of the 10-year Treasury bond and will change as the benchmark changes.

Credit Rating

The company's credit rating and ultimately the debenture's credit rating impacts the interest rate that investors will receive. Credit-rating agencies measure the creditworthiness of corporate and government issues. These entities provide investors with an overview of the risks involved in investing in debt.

Credit rating agencies, such as Standard and Poor's, typically assign letter grades indicating the underlying creditworthiness. The Standard & Poor’s system uses a scale that ranges from AAA for excellent rating to the lowest rating of C and D. Any debt instrument receiving a rating of BB and lower is said to be of speculative grade.

Maturity Date

For nonconvertible debentures, mentioned above, the date of maturity is also an important feature. This date dictates when the company must pay back the debenture holders. The company has options on the form the repayment will take.

Most often, it is as redemption from the capital, where the issuer pays a lump sum amount on the maturity of the debt. Alternatively, the payment may use a redemption reserve, where the company pays specific amounts each year until full repayment at the date of maturity.

Advantages and Disadvantages of Debentures

Debentures are the most common form of long-term debt instruments issued by corporations. A company will issue these to raise capital for its growth and operations, and investors can enjoy regular interest payments that are relatively safer investments than a company's equity shares of stock.

Debentures are unsecured bonds issued by corporations to raise debt capital. Because they are not backed by any form of collateral, they are inherently more risky than an otherwise identical note that is secured.

Because of the increased risk, debentures will carry a comparatively higher interest rate in order to compensate bondholders. This also means that bond investors should pay careful attention to the creditworthiness of debenture issuers.

The relative lack of security does not necessarily mean that a debenture is riskier than any other bond. Strictly speaking, a U.S. Treasury bond and a U.S. Treasury bill are both debentures. They are not secured by collateral, yet they are considered risk-free.

Pros

- A debenture pays a regular interest rate or coupon rate return to investors.
- Convertible debentures can be converted to equity shares after a specified period, making them more appealing to investors.
- In the event of a corporation's bankruptcy, the debenture is paid before common stock shareholders.

Cons

- Fixed-rate debentures may have interest rate risk exposure in environments where the market interest rate is rising.
- Creditworthiness is important when considering the chance of default risk from the underlying issuer's financial viability.
- Debentures may have inflationary risk if the coupon paid does not keep up with the rate of inflation

Promoter

As per Section 2(69) of the Companies Act, 2013, promoter means any of the following persons:

A person named as a promoter in the prospectus or identified by the company in its annual return in Section 92.

A person who controls the company affairs, indirectly or directly, whether as a director, shareholder or otherwise.

A person in accordance with whose directions, advice or instructions the Board of Directors of a company are accustomed to act.

In simple words, promoters perform the preliminary steps, like floating the securities in the market, making the prospectus of the company, etc., for establishing the company's business. However, if a person is doing these things professionally, they will not be considered a promoter.

Types of Promoters of a Company

A promoter is a person/entity who conceives the idea of company formation. An individual, firm, association of person or company can be a promoter. A promoter of a company can be any of the following types:

Professional promoter: A professional promoter is an expert in promoting the business during its formation or inception. They transfer the ownership of the business to shareholders when it is established in the market.

Financial promoter: A financial promoter is a promoter who invests capital or money and has a sizable company share. They promote banks or financial institutions. They aim to assess the market's financial situation and start a company at the right moment.

Managing promoter: A managing promoter helps in company formation. They also get the managing rights in the company after it is formed.

Occasional promoter: An occasional promoter is a promoter whose main job is to float the company. They do not promote the business routinely since they are in charge of two to three enterprises, and they get involved only in the crucial matters of the business.

Duties of a Promoter

The promoters have certain duties towards the company, which are as follows:

Disclose hidden profits

The first duty of the promoters is to be loyal to the business and not involve in malpractice. They should not earn secret or hidden profits while carrying out promoting activities such as buying a property and selling it for a profit without disclosing it. They are not barred from making such profits, but the only condition is that they must disclose it. They must share all the information regarding their profitability and earnings with all the relevant company stakeholders.

Disclose all material facts

A promoter has a relationship of trust and confidence with the company, i.e., a fiduciary relationship. Under this fiduciary relationship, the promoter has the duty to disclose all material facts relating to the company's business and formation with the relevant stakeholders.

Act in the best interest of company

In all situations, promoters should prioritise the company's interest over their personal interests. They must give utmost consideration to the company's best interest in its formation and all business dealings.

Disclose all private arrangements

While forming and establishing a company, many private transactions take place. However, such transactions must be disclosed by the promoters to the stakeholders. It is the duty of the promoters to disclose all private transactions and the profit earned from them to the stakeholders.

Rights of a Promoter

The rights of promoters include the following:

Right of indemnity

Promoters are jointly and severally accountable for any hidden profits made by any of them and false statements made in the prospectus. All the promoters are individually and equally responsible for the company's affairs. Thus, one promoter can claim the compensation or damages paid by him/her from the other promoters.

Right of preliminary expenses

A promoter is entitled to reimbursement for preliminary expenditures incurred for the company's establishment, such as solicitors' fees, advertising costs and surveyors' fees.

Right of remuneration

A promoter has the right to receive remuneration from the company unless a contract to the contrary. The company's Articles of Association can also provide that the directors can pay an amount to the promoters for their services. However, the promoters cannot sue the company for remuneration unless there is a contract.

Liability of a Promoter

The liabilities of a promoter include the following:

They cannot make secret profits out of company profits or deals for personal promotion. The promoters are liable to pay such profits to the company when they make such profits.

They can be held liable for damages or losses suffered by a person who subscribes for debentures or shares due to the false statements made in the company prospectus.

They are criminally liable for mentioning untrue statements in the prospectus.

They can be held liable for a public examination of private company documents when there are reports alleging fraud in the company formation or promotion activities.

They are also liable to the company where there is a breach of duty on their part, misappropriated company property or guilty of breach of trust.

UNIT III
MEETING

Meaning of company meetings

This is when two or more persons (shareholders or the directors or the debenture holder or of the contributories), get together at one place, at a specific time, for lawful purposes, to discuss any common issue.

Types of meetings

1. Statutory meeting

Every public company limited by shares and every company limited by guarantee and having a share capital, must within a period of not less than one month and not more than 3 months from the date at which the company is entitled to commence business, hold a general meeting of the members which is to be called the Statutory Meeting. This meeting is held once in the lifetime of a company.

In this meeting, the members are to discuss a report by the directors, known as the statutory report, which contains particulars relating to the formation of the company.

Private companies are exempted from holding this meeting.

2. Annual General Meeting (AGM)

General meeting of a company means a meeting of its members for specified purposes. Public companies must hold an annual general meeting within or by the end of the six months of its financial year. Private companies are not required to hold an annual general meeting, unless they are a traded company (a corporation whose shareholders have a claim to part of the company's assets and profits) or their articles require it.

Every company must in each year hold, in addition to any other meeting, AGM. The notice conveying the meeting must specify that it is a notice of the AGM. Every AGM must be held during business hours and on working days.

The registrar may, for any special reason, extend the time for holding any AGM by any given period; but no extension of time is granted for holding the first AGM.

There should be at least one AGM per year and as many meetings as there are years.

Ordinary Business of an AGM

The normal business transacted at an AGM depends upon the articles. The article provides that the ordinary business of such a meeting shall be: –

(i) The declaration of dividends.

(ii) The consideration of accounts.

(iii) The election of directors in place of the retiring.

(iv) Appointment of and fixing of the remuneration of auditors.

Any business which is not defined as “ordinary business” of an AGM is known as special business.

3. Extra ordinary general meeting

Any general meeting of the company which is not an AGM or a statutory meeting is called extra ordinary general meeting.

Extra ordinary meetings can be convened either by the directors whenever they think fit or on the requisition of members of the company.

Where directors think fit to convene a meeting, they do so by resolution passed at a duly convened and constituted meeting of the Board. Note that everything transacted at an extra ordinary meeting shall be deemed as special.

The extra ordinary general meeting may be convened: –

(a) By Board of Directors on its own or on the requisition of the members

(b) By the requisitionists themselves on the failure of Board of Directors to call the meeting

Extra ordinary meeting convened by Board of Directors:

a) **On its own**: The Board of Directors may call an extra ordinary meeting whenever some special business is to be transacted which in the opinion of the Board of Directors, cannot be postponed till the next AGM.

b**) On requisition of members**: – The requisite number of members of a company may ask for an extra ordinary general meeting to be held. The Board of Directors shall proceed to call such a meeting. The requisition for such a meeting by the members shall be signed:

(i) In case of a company with share capital holders of not less than 10% of the paid-up capital of the company having a right of voting in regard to the matter of acquisition.

(ii) In case of a company with no share capital, by members representing not less than one tenth of the total voting power in regard to the matter of requisition.

A requisition signed by one of the joint owners of the shares has the same force and effects as if it has been signed by all of them.

The requisition shall set out all matters for consideration on which the meeting is called and shall be deposited in the registered office of the company. The directors are required to convene such a meeting within 21 days from the date of deposit of the requisition, but if they fail to do so, the requisitionists themselves may convene the meetings, as nearly as possible in the manner required by the company's articles for convening the meeting.

The company must compensate the requisitionists for any reasonable expenses incurred and may repay out of sums payable by the company to such directors as were in default.

Note:

Unless the meeting is called to pass a special resolution, the requisite notice for an extra ordinary general meeting is 14 days (Saturdays, Sundays, Public holidays are not included). In case of unlimited company, 7 days' notice is required, but where special resolution is required, 21 days.

4. Class meeting

These meetings are held by a particular class of shareholders. The purpose of this meeting is effecting variation in the Articles in respect of their rights and privileges or for conversion of one class into another.

The provision for variation must be contained in the Memorandum or Articles. However, this variation must not be prohibited by the terms of issue of shares of that particular class. Such resolutions are to be passed by three-fourth majority of the members of that class.

5. Meeting of debenture holders

These meetings are called according to the rules and regulations of the trust deed or debenture bond (Rules printed on the reverse of the debenture certificates issued by the company). Such meetings are held from time to time where the interests of debenture holders are involved at the time of re-organization, reconstruction, amalgamation or winding-up of the company. The rules regarding the appointment of chairman, notice of the meeting, quorum etc. are contained in the trust deed.

The meetings of the debenture holders are called;

(i) When the terms of repayment of debentures need to be altered.

(ii) When the rights of the holders of debentures need to be alter.

6. Meeting of the Board of Directors

The management of the company is vested on the Board of Directors. Therefore, the directors are to meet frequently to decide both policy and routine matters.

The provisions regarding board meeting are:

Board meeting must be held once in every three calendar months and at least four times in every year. This provision may be exempted by the central government. Notice of board meeting shall be given in writing to every director for the time being in Kenya and at his usual address in Kenya.

7. Meeting of creditors

These meetings are called when the company proposes to make a scheme of arrangement with its creditors. The court may order a meeting of the creditors or a class of creditors on the application of the company or of liquidator in case of a company being wound-up.

Such a meeting is held and conducted in such a manner as the court directs. If the arrangement is passed by a majority of three-fourth in value of creditors and the same is sanctioned by the court, it is binding on all the creditors.

8. Meeting of creditors and contributories

These meetings are held when the company has gone into liquidation to ascertain the total amount due by the company to its creditors. The main purpose of these meetings is to obtain the approval of the creditors and contributories to the scheme of compromise or rearrangement to save the company from financial difficulties. Sometimes, the court may also order for such a meeting to be held.

When a company desires to vary the rights of debenture holders, such meetings are to be held according to the rules laid down in the debenture trust deed. They are also held to enable the company to issue new debentures or to vary the rate of interest payable to debenture holders. The term “contributory” covers every person who is liable to contribute to the assets of the company when the company is being wound-up.

Requisites of a valid meeting

There must be some requisites in order to validate the meeting. The necessary pare-conditions of a valid meeting are stated below:

1. Right convening authority: A valid meeting must be convened by the proper authority otherwise it wills loss its validity. Company’s secretary is the proper authority to call a formal meeting.

2. Proper notice: Duty signed notice must be submitted to members before meeting. The place of meeting, time and date must be stated on the notice.

3. Proper publicity of agenda: Every member of the meeting should be properly informed of the agenda.

4. Legal purposes: Every meeting must have a legal purpose. Any meeting should be properly informed of the agenda.

5. Requisite quorum: For valid meeting requisite quorum is necessary. The meeting should not be stared until the requisite members of member s are resent.

6. Presence of right persons: Only legal members can present in the meeting. If there is an unauthorized person in the meeting, the meeting will lose its validity.

7. Proper presiding officer: The chairman of a valid meeting must be a proper person.

8. Conducting meeting according to the agenda: A valid meeting must be conducted according to the agenda. No decision will get validity, if it is not related to the agenda.

Proper Authority:

Notice: Length of Notice: Agenda:

Place of the Meeting:

Voting and Demand for Poll

Generally, initially matters are decided at a general meeting by a show of hands. If the majority of the hands raise their hands in favour of a particular resolution, then unless a poll is demanded, it is taken as passed. Voting by a show of hands operates on the principle of "One Member-One Vote". However, since the fundamental voting principle in a company is "One Share-One Vote", if a poll is demanded, voting takes place by a poll. Before or on declaration of the result of the voting on any resolution on a show of hands, the chairman may order *suo motu* (of his own motion) that a poll be taken. However, when a demand for poll is made, he must order the poll be taken. The chairman may order a poll when a resolution proposed by the Board is lost on the show of hands or if he is of the opinion that the decision taken on the show of hands is likely to be reversed by poll. When a poll is taken, the decision arrived by poll is final and the decision on the show of hands has no effect.

A poll is allowed only if the prescribed number of members demand a poll. A poll must be ordered by the chairman if it is demanded:-

a. in the case of a public company having a share capital, by any member or members present in person or by proxy and holding shares in the company-

i. which confer a power to vote on the resolution not being less than one-tenth of the total voting power in respect of the resolution, or
ii. on which an aggregate sum of not less than fifty thousand rupees has been paid up.

b. in the case of a private company having a share capital, by one member having the right to vote on the resolution and present in person or by proxy if not more than seven such members are personally present, and by two such members present in person or by proxy, if more than seven such members are personally present.

c. in the case of any other, by any member or members present in person or by proxy and having not less than one-tenth of the total voting power in respect of the resolution.

Quorum

Quorum refers to the minimum number of members who must be present at a meeting in order to constitute a valid meeting. A meeting without the minimum quorum is invalid and decisions taken at such a meeting are not binding. The articles of a company may provide for a quorum without which a meeting will be construed to be invalid. Unless the articles of a company provide for larger quorum, 5 members personally present (not by proxy) in the case of a public company and 2 members personally present (not by proxy) in the case of a private company shall be the quorum for a general meeting of a company.

It has been held by Courts that unless the articles otherwise provide, a quorum need to be present only when the meeting commenced, and it was immaterial that there was no quorum at the time when the vote was taken. Further, unless the articles otherwise provide, if within half an hour from the time appointed for holding a meeting of the company, a quorum is not present in the person, the meeting: - if called upon the requisition of members, shall stand dissolved; in any other case, it shall stand adjourned to the same day in the next week, at the same time and place, or to such other day and time as the Board of Directors may determine. If at the adjourned meeting also, the quorum is not present within half an hour from the time appointed for holding the meeting, the members present shall a quorum.

In case the Company Law Board calls or directs the calling of a meeting of the company, when default is made in holding an annual general meeting, the government may give directions regarding the quorum including a direction that even one member of the company present in person, or by proxy shall be deemed to constitute a meeting. Similarly the Company Law Board may, direct a meeting of the company (other than an annual general meeting) to be called and held where for any reason it is impracticable to call a meeting and direct that even one member present in person or by proxy shall be deemed to constitute a meeting.

Proxy

In case of a company having a share capital and in the case of any other company, if the articles so authorise, any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of himself. Every notice calling a meeting of the company must contain a statement that a member entitled to attend and vote is entitled to appoint one proxy in the case of a private company and one or more proxies in the case of a public company and that the proxy need not be member of the company.

A member may appoint another person to attend and vote at a meeting on his behalf. Such other person is known as "Proxy". A member may appoint one or more proxies to vote in respect of the different shares held by him, or he may appoint one or more proxies in the alternative, so that if the first named proxy fails to vote, the second one may do so, and so on.

The member appointing a proxy must deposit with the company a proxy form at the time of the meeting or prior to it giving details of the proxy appointed. However, any provision in the articles which requires a period longer than forty eight hours before the meeting for depositing with the company any proxy form appointing a proxy, shall have the effect as if a period of 48 hours had been specified in such provision.

A company cannot issue an invitation at its expense asking any member to appoint a particular person as proxy. If the company does so, every officer in default shall be liable to fine up to Rs1,000. But if a proxy form is sent at the request of a member, the officer shall not be liable. Every member entitled to vote at a meeting of the company, during the period beginning 24 hours before the date fixed for the meeting and ending with the conclusion of the meeting may inspect proxy forms at any time during business hours by giving 3 day's notice to the company of his intention to do so.

The proxy form must be in writing and be signed by the member or his authorised attorney duly authorised in writing or if the appointer is a company, the proxy form must be under its seal or be signed by an officer or an attorney duly authorised by it.

The proxy can be revoked by the member at any time, and is automatically revoked by the death or insolvency of the member. The member may revoke the proxy by voting himself before the proxy has voted, but once the proxy has exercised the vote, the member cannot retract his vote. Where two proxy forms by the same shareholder are lodged in respect of the same votes, the last proxy form will be treated as the correct proxy form.

A proxy is not entitled to vote except on a poll. Therefore, a proxy cannot vote on show of hands.

Meaning of company Resolution

Company resolutions are legally binding decisions made by the members (shareholders or guarantors) or directors of a limited company. They are required when formal decisions need to be made on matters beyond the scope of day-to-day business operations, such as appointing or removing a director or altering the articles of association.

Typically, company resolutions are passed (approved) by a majority vote of members at a general meeting or directors at a board meeting, but it is often possible to pass resolutions in writing instead.

The different types of company resolutions are:

- Ordinary resolution of the members
- Special resolution of the members
- Written resolution (can be ordinary or special) of the members
- Directors' resolution (or 'board resolution')
- Directors' written resolution

Ordinary resolution of the members

Used for routine matters that require approval from company members, an ordinary resolution is a formal decision requiring approval by a simple majority (i.e., above 50%). Ordinary resolutions are normally proposed and voted on at general meetings, with eligible members casting their votes by a show of hands (or by proxy) or on a poll. In certain cases, it is possible to pass an ordinary resolution in writing.

Director Appointment & Resignation Service

An ordinary resolution is passed when more than 50% of all votes are cast in favour of the motion (i.e., the proposed resolution). Some shareholders may have more than one vote, e.g., if they hold multiple shares, or their shares carry more than one vote each. This is why the outcome of a resolution is based on the number of votes cast for or against a motion, rather than simply the number of members.

The types of decisions that normally require an ordinary resolution of the members include:

- Appointing a director
- Removing a director
- Appointing or removing a company secretary
- Granting additional powers to directors
- Approving directors' loans
- Making changes to a director's contract
- Authorising shareholders' dividend payments
- Increasing authorised share capital
- Authorising the company to purchase its own shares

Some companies may specify in their articles that certain decisions normally requiring an ordinary resolution must be passed by special resolution instead, so it is important to check the articles of association beforehand.

Special resolution of the members

Used for more critical business matters that extend beyond the powers of directors and cannot be passed by an ordinary resolution of the members, special resolutions require approval of at least 75% of members' votes. They can be proposed and voted on at general meetings, or by written resolution if provided for in the articles of association.

The Companies Act 2006 specifies a number of important decisions that require a special resolution of the members, including:

- Amending the articles of association
- Making changes to the shareholders' agreement
- Changing the company name
- Disapplying shareholders' pre-emption rights
- Altering the objectives of the business
- Allotting new shares
- Reducing the company's share capital
- Approving share transfers
- Appointing a chairperson of the board
- Changing a private limited company to a public limited company (PLC), or vice versa
- Authorising compensation for directors
- Winding up the company by members' voluntary liquidation

Many companies choose to alter their articles and shareholders' agreements to specify the use of special resolutions for other types of decisions, including those which are normally passed by ordinary resolution or board resolution. Or to specify that a higher majority or unanimous approval is required for some or all decisions made by special resolution.

Change of Company Name Service - including special resolution

By including such provisions in the articles and shareholders' agreement, a greater level of protection is enjoyed by members, particularly minority shareholders. This minimises the risk of certain decisions being made without proper consideration or at the will of only majority shareholders.

Directors' resolutions

Board resolutions are formal decisions made by the director(s) of a company. Typically, this type of resolution is passed by a simple majority at a board meeting, unless a higher majority or unanimous approval is specified in the articles. Directors usually have one vote each, which they will cast on a show of hands (or by proxy) or on a poll. Board resolutions can also be passed in writing, unless prohibited under the articles.

The types of decisions that company directors can make by board resolution depend on the powers they are granted under the articles and shareholders' agreement. Normally, however, board resolutions are used for more routine management decisions, such as changing the company's registered office address, changing the location of statutory company registers, appointing an accountant, or entering into important contracts with clients.

Written resolutions

Written resolutions are a practical and convenient alternative to passing company resolutions in person at general meetings or board meetings. Provided there are no restrictions in the articles of association, member's resolutions (ordinary and special) and directors' resolutions can be passed in writing. This option, however, is only available to private limited companies, not PLCs.

Audit & Auditors

Audit

Audit is an examination of the books and accounts of the company. The examination also includes statutory records, and vouchers of an organization to ascertain the fairness of the financial statements, as well as non-financial disclosures, in order to present a true and fair view of the concern. There are two main types of audits: external audits, internal audits.

1. **External Audits**: External Audits are performed by Certified Public Accounting firms, in order to perform an external check.
2. **Internal Audit**: This is to make improvements in the company.

Qualifications for Appointment as the Auditor

A person in order to be appointed as the auditor should meet the following qualifications-

1. A person shall be a Chartered Accountant.
2. A firm where majority of the partners practising in India are qualified for appointment may be appointed by its firm name to be the auditor of the company.
3. In case of an LLP, only those partners who are Chartered Accountants shall be authorized to act and sign on behalf of the firm.

Disqualifications of Auditor

The following persons are not eligible to be appointed as the auditor-

1. A body corporate except an LLP registered under Limited Liability Act,2008.

2. An employee or officer of the company.

3. A person who is a partner or who is in employment of an officer or employee of the company.

4. A person who or his relative or partner is having interest or holding security in a company.

However, a relative can hold security or interest in a company not exceeding the face value of Rs. 1,000 or Rs. 1,00,000 as prescribed by the rules. In case the amount of security or interest held by a relative exceeds the threshold limits, a corrective action shall be taken by the auditor to maintain the limits, within 60 days from the date of such acquisition or interest.

5. A person who or his relative or partner has indebted to a company or its holding or its subsidiary or an associate company or a subsidiary of such holding company for an amount exceeding Rs. 5,00,000.

6. A person who or his relative or partner has given guarantee to the indebtedness of any third party to the company or its holding or its subsidiary or an associate company or a subsidiary of such holding company for an amount exceeding Rs. 1,00,000.

7. A person or a firm who, whether directly or indirectly has any business relationship with the company or its holding or its subsidiary or an associate company or a subsidiary of such holding company.

However, the commercial transactions in the nature of professional services permitted to be rendered an auditor or an audit firm under Chartered Accountants Act, 1949 and the rules and regulations made thereunder and the commercial transactions which are made in the ordinary course of business of the company at an arm's length price shall not be considered as business relationship.

8. A person whose Relative is a director or is in employment of the company as director or Key Managerial Personnel of the company.

9. A person who is full-time employed elsewhere.

10. A person who is convicted of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction.

11. A person who directly or indirectly renders any service referred to in section 144 of the Companies Act, 2013 to the company or its holding company or its subsidiary Company.

Appointment of auditor

Section 139 of the Companies Act, 2013 states the appointment of an Auditor. In the first annual general meeting, the company shall appoint a person as to its auditor. In each annual general meeting, there must be ratification by the members.

1. Written consent of the auditor to such appointment
2. Certificate that

(a) The auditor is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;

(b) The proposed appointment is as per the term provided under the Act;

(c) The proposed appointment is within the limits laid down by or under the authority of the Act;

(d) The list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

After the appointment, the auditor must have a meeting with the ROC within 15 days of appointment. These rules must comply with ADT-1.

Removal of an Auditor

The auditor appointed may be removed from his office before the expiry of his term only by way previous approval of CG and a special resolution of the company to be passed in a general meeting within 60 days of receipt of approval of CG. However, it must be noted that the auditor is given a fair chance to represent himself or herself. The auditor must provide a statement to the ROC within a period of thirty days from the date of removal. The auditor may be punished with a fine between 50,000-5,00,000 in case of non-compliance.

UNIT - IV
MANAGEMENT & ADMINISTRATION

DEFINITION OF DIRECTOR

The Companies Act, 2013 does not contain an exhaustive definition of the term

"Director". However, Sec. 2(34) of the Act prescribed that "Director" means a director appointed to the Board of a company.

Legal Position Board of Directors

It is not easy to explain the exact position of directors of a company As Bowen L.J. said

"Directors are described sometimes as agent sometimes as trustees and sometimes as managing partners".

1. Directors as Agents

A company is an artificial being invisible, intangible and existing only in contemplation of law. As such, the company can act only through persons known as directors. In this capacity, the directors are the agents of the company. The position was clearly defined in Ferguson V. Wilson, "The Company has no person; it can act only through directors and the case is, as regards those directors, merely the ordinary case of principal and agent exists".

2. Directors as Trustees

As was held in G.E. Railway Co's case, "The directors are the mere trustees or agents of the company". The directors are not the trustees for the individual shareholder or for the creditors of the company or for third parties who have made contracts with the company.

3. Directors as Employees

The directors, generally, are not the employees of the company because they act according to the provisions of the Companies Act and no shareholder can instruct them to act according to his will and pleasure. Even then a director may be an employee of the company if a special contract to that effect exists between the company and the directors. The above view is supported by the provisions in the Act, contained in Sec 67,

188, 191 and 197. According to these sections, a director can be in the full time or part time employment of the company.

4. Directors as Officers

As per Sec. 2(59) of the Act, directors are considered as officers of the company under certain specified circumstances.

APPOINTMENT OF DIRECTORS

1. Appointment of First Directors [Sec. 152(1)]

The first directors are named by the subscribers to the Memorandum or mentioned in the

Articles. If no one is appointed either by the subscribers or by the Articles, then all the subscribers who are individuals will become the first directors [Sec. 152(1)]. They will hold the office till the conclusion of the first Annual General Meeting. In the case of a One Person

Company, an individual being a member shall be deemed to be its first director until the directors are duly appointed by the member in accordance with the provisions of Sec. 152.

2. Subsequent Directors [Sec. 152 (2) to 152(7) (b)]

General provisions relating to appointment of directors-

1. Every director shall be appointed by the company in general meeting [Sec. 152(2)].

2. Director Identification Number is compulsory for appointment of director of a company

[Sec. 152(3)].

3. Every person proposed to be appointed as a director shall furnish his Director

Identification Number and a declaration that he is not disqualified to become a director under the Act (Sec. 152(4)].

4. A person appointed as a director shall on or before the appointment give his consent to hold the office of director [Sec. 152(5)] in physical form DIR-2 1.e. Consent to act as a director of a company. Company shall file Form DIR-2 within 30 days of the appointment as director along with necessary fee [Rule 8].

3. Appointment of Additional Director [Sec. 161(1)]

The board of directors can appoint additional directors, if such power k conferred on them by the Articles of Association. Such additional directors hold office only up to the date of next annual general meeting or the last date, on which the annual general meeting should have been held, whichever is earlier. A person who fails to get appointed as a director in a general meeting cannot be appointed as Additional Director.

4. Appointment of Alternate Director [Sec. 161(2)]

Sec. 161(2) of the Act allowed the following:

(i) The Board of Directors of a company must be authorized by its Articles or by a resolution passed by the company in general meeting for appointment of alternate director

(ii) The person in whose place the Alternate Director is being appointed should be absent for a period of not less than 3 months from India.

(iii) The person to be appointed as the Alternate Director shall be the person other than the person holding any alternate directorship for any other Director in the Company.

5. Appointment of Directors by Nomination [Sec. 161(3)]

This new sub-section now provides for appointment of Nominee Directors. It states that subject to the Articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government Company.

6. Appointment of Directors in Causal Vacancy [Sec. 161(4)]

If any vacancy is caused by death or resignation of a director appointed by the shareholders in General meeting, before expiry of his term, the Board of Directors can appoint a Director to fill up such vacancy. The appointed director shall hold office only up to the term of the director in whose place he is appointed.

7. Appointment of Directors to be Voted Individually [Sec. 162(1)]

A single resolution shall not be moved for the appointment of two or more persons as directors of the company unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

A resolution moved in contravention of aforesaid provision shall be void, whether or not any objection was taken when it was moved. A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

8. Proportional Representation for Appointment of Directors [Sec. 163]

The Articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation, whether by the single transferable vote or by a system of cumulative voting or otherwise and such appointments may be made once in every three years and casual vacancies of such directors shall be filled as provided in Sec. 161(4).

REMOVAL OF DIRECTORS [SEC, 169]

A company may, remove a director except the director appointed by National Company

Law Tribunal u/s 242, before the expiry of the period of his office alter giving him a reasonable opportunity of being heard after passing the ordinary resolution.

However, where the company has availed itself of the option given to it u/s 163 to appoint not less than two thirds of the total number of directors according to the principle of proportional representation the above said provision shall not apply.

Any resolution to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed shall require a special notice.

QUALIFICATIONS OF A DIRECTOR:

As regards to the qualification of directors, there is no direct provision in the Companies

Act, 2013. But, according to the different provisions relating to the directors; the following qualifications may be mentioned:

1. A director must be a person of sound mind.

2. A director must hold share qualification, if the article of association provides such.

3. A director must be an individual.4. A director should be a solvent person.

5. A director should not be convicted by the Court for any offence, etc.

DISQUALIFICATIONS OF A DIRECTOR:

Section 164 of Companies Act, 2013, has mentioned the disqualification as mentioned below:

1) A person shall not be capable of being appointed director of a company, if the director is

(a) Of unsound mind by a court of competent jurisdiction and the finding is in force;

(b) An un discharged insolvent;

(c) Has applied to be adjudicated as an insolvent and his application is pending;

(d) Has been convicted by a court of any offence involving moral turpitude and sentenced

In respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence;

e) Has not paid any call in respect of shares of the company held by him, whether alone

Or jointly with others, and six months have elapsed from the last day fixed for the payment of the call; or

(f) An order disqualifying him for appointment as director has been passed by a court in Pursuance of section 203 and is in force, unless the leave of the court has been obtained for his appointment in pursuance of that section;

2) Such person is already a director of a public company which:

(a) Has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or

(b) Has failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more.

DUTIES OF DIRECTORS [SEC. 166]

1. Act in accordance with the Articles of the company.

2. Act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, and the community and for the protection of environment.

3. Exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

4. Not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

5. Not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

6. Not assign his office and any assignment so made shall be void. If a director of the company contravenes the provisions of this section such director shall be punishable with fine, which shall not be less than 1, 00,000 but which may extend to 5, 00,000.

POWERS OF DIRECTORS

The Board of Directors is the head and brain of the company. When the brain functions, the company is said to function. For the proper functioning, the directors should be properly entrusted with some powers. The directors generally acquire their powers from the provisions of the Articles of Association and then from the Companies Act.

1. General Powers

The Board of Directors of a company shall be entitled to exercise al such powers and to do all such acts and things, as the company is authorized to exercise and do. Further the Board shall not exercise any power or do any act or thing, which is directed or required, whether under this Act or by the Memorandum or Articles of the company or otherwise, to be exercised or done by the company in general meeting I Sec 179(1)

No regulation made by the company in general meeting shall invalidate any prior act of the

Board, which would have been valid if that regulation had not been made I Sec. 179(2).

2. Specific Powers

In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the Articles of the company, be filled by the Board of Directors at a meeting of the Board. The Board Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board

(a) To make calls on shareholders in respect of money unpaid on their shares

(b) To authorize buy-back of securities u/s 68

(c) To issue securities, including debentures, whether in or outside India

(d) To borrow monies

(e) To invest the funds of the company

(f) To grant loans or give guarantee or provide security in respect of loans

(g) To approve financial statement and the Board's report

(h) To diversify the business of the company

(i) To approve amalgamation, merger or reconstruction Sec. 179(3)

DIRECTOR IDENTIFICATION NUMBER (DIN) [S.153andRule9]:

The Companies Act, 2013 has introduced a new provisions relating to company directors. This relates to **Director Identification Number (DIN)** to directors. No person can be appointed as a director in a company unless he has been allotted a Director Identification Number (DIN) by the Central Government. It is like PAN Number or Aadhar Number given to individual directors. DIN will be issued by the Central Government and will be useful for easy and quick identification of Company Directors at the National level. Sections 153 to 159 of Companies Act 2013 deals with DIN. These Sections give essential details of DIN which are noted below.

Section 153: Application for allotment of Director Identification Number – Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in such form (Form DIR-3) and manner along with such fees as may be prescribed.

Section 155: Prohibition to obtain more than one Director Identification Number- No individual, who has already been allotted a Director Identification Number under section 154, shall apply for, obtain or possess another DIN.

Section 156: Director to intimate Director Identification Number- Every existing director shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his DIN to the company or all companies wherein he is a director.

Section157: Company to inform DIN to Registrar-

1. Every company shall, within fifteen days of the receipt of intimation under section 156,furnish the DIN of all its directors to the Registrar or any other officer or authority as

may be specified by the Central Government with such fees as may be prescribed or with such additional

2. Fees as may be prescribed within the time specified under section 403 and every such intimation shall be furnished in such form and manner as may be prescribed.
3. If company fails to furnish DIN under subsection(1), before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with find which shall not be less than 25,000 rupees but which may extend to 1,00,000 rupees and every officer of the company who is indifferent shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to1,00,000 rupees
4. Section 158: Obligation to indicate DIN - Every person or company, while furnishing any return, information or particulars as are required to be furnished under this Act, child mention the Director Identification Number in such return, information of particulars in case such returns. Information or particulars relate to the director or containing any reference of any director
5. Section 159: Punishment for contravention- If any individual or director of a company,contravenesanyoftheprovisionsofsection152section155andsection156,suchindividualordirectorofthecompanyshallbepunishablewithimprisonmentforatermwhichmayextendto6 month or with fine which may extend to 50,000 rupees and where the contravention is continuing one with a further fine which may extend to 500 rupees for every day after the first during which the contravention continuous.

Powers - Board of directors

Board of directors is the biggest authority of the company and is vested with the various powers under section 179 of the companies' act 2013. The board of directors holds complete control over the company's operations, but must act within the limits set by the company's memorandum and articles and cannot perform acts reserved for shareholders in general meetings.

Section 179(3) of the Act provides that the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board-

(a) To make calls on shareholders in respect of money unpaid on their shares;

(b) To authorise buy-back of securities under section 68;

(c) To issue securities, including debentures, whether in or outside India;

(d) To borrow monies;

(e) To invest the funds of the company;

(f) To grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) To diversify the business of the company;

(i) To approve amalgamation, merger or reconstruction;

(j) To take over a company or acquire a controlling or substantial stake in another company;

(k) Any other matter which may be prescribed

RELATED PARTY TRANSACTIONS

A related party is a party related to a body corporate/ company in any other way other than by the companies' own transactions. It means that a special relationship persists between the parties even before the transaction takes place. Section 2(76) of the Companies Act, 2013 ("the Act"), defines a related party with reference to a company, to mean:

A. director or a key managerial person or their relatives or

B. a firm, private company in which the partner, director/ manager or his relative is a partner

C. a private company or a public company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital.

The definition also includes a. anybody corporate who's Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager and any person on whose advice, directions or instructions a director or manager is accustomed to act as related party transactions. The provisions of related party transactions are applicable to private and public companies.

Related party concerning a Companies Act, 2013:

1. A Director or his/her relative.
2. Key managerial personnel or his/her relative.
3. A company in which a director, manager or his relative is a partner.
4. A public firm in which a director or manager is a director or holds along with his relative more than two per cent of his paid-up share capital.
5. A private firm in which a director or manager is a member or director.
6. Any corporate whose board of directors, managing director or manager is accustomed to Companies act: In accordance with the advice, directions of a director or manager.
7. Any person on whose advice, instructions a director or manager is customary to companies act.
8. Any firm which is a holding, subsidiary or an associate company of such firm.

9. A director or critical managerial staff of the holding, subsidiary or associate firm of such company or his relative.
10. Any company which a subsidiary of a holding firm to which it is also the subsidiary.
11. Any person appointed by senior management in the company or its holding, subsidiary or associate company that is the personnel of the company or its holding, subsidiary or associate company who is core management team excluding the board of directors comprising all members of management one level below the executive directors, including functional heads.

Related Party Transactions

Following transactions between a firm and its related party is described as a related party transaction.

a. Sale, purchase or supply of any materials or goods
b. Availing or rendering of any service
c. Selling or buying property of any kind
d. Leasing of the property of any kind
e. Appointment of an agent for the sale or purchase of goods, materials, service or property
f. Related party's appointment to the place of profit or office in the company, associate and subsidiary
g. Firm underwriting the subscription of any securities or derivatives of the company

Board committee

A board committee is a small working group identified by the board, consisting of board members, for the purpose of supporting the board's work. Committees are generally formed to perform some expertise work. Members of the committee are expected to have expertise in the specified field.

Committees are usually formed as a means of improving board effectiveness and efficiency, in areas where more focused, specialized and technical discussions are required. These committees prepare the groundwork for decision-making and report at the subsequent board meeting. Committees enable better management of full board's time and allow in-depth scrutiny and focused attention.

The structure of a board and the planning of the board's work are key elements to effective governance. Establishing committees is one way of managing the work of the board, thereby strengthening the board's governance role. Boards should regularly review its own structure and performance and whether it has the right committee structure and an appropriate scheme of delegation from the board.

Committees often serve several different functions:

Governance: In large organizations participation of each and every director is not possible in decisions making of the organization as a whole, a committee is given the power to make decisions, spend money, or take actions. Some or all such powers may be limited or effectively unlimited. Members of the committee take decisions, keeping in view the interest of all stakeholders

Coordination: Where there is a large board, it is common to have committees with more specialized functions for better coordination - for example, audit committee, finance committee, compensation committee, etc. wherein members meet regularly to discuss developments in their areas, review projects that cut across organizational boundaries, talk about future options, etc

Research and recommendations: Committees are often formed to do research and make recommendations on a potential or planned project or change. For example, an organization considering a major capital investment might create a temporary working committee of several people to review options and make recommendations to the Board of Directors. Such committees are typically dissolved after giving recommendations.

NEED FOR COMMITTEES

A Board can either delegate some of its powers to the committee, enabling it to act directly, or can require the recommendations of the committee to be approved by the Board. The Board will normally depend heavily on the findings and recommendations of its committees, although final decisions to accept or reject these recommendations will be made by the Board. Committees thus have an important role to play in company governance.

Committees may be formed for a range of purposes, including:

1. Board development or Governance Committee – to look after/administer/support Board members and committee members and other executive positions
2. Selection Committee/Nomination Committee – to select Board members, to select a CEO, to select key managerial and senior management personnel
3. Investment Committee
4. Risk Management Committee
5. Safety, Health & Environment Committee
6. Committee of Inquiry – to inquire into particular questions (disciplinary, technical, etc.)to manage the business of the organization between Board meetings.
7. Finance or Budget Committees – to be responsible for financial reporting, organising audits, etc.
8. Marketing and Public Relations Committees – to identify new markets, build relationship with media and public, etc.

COMMITTEE MANAGEMENT

- Committees function in accordance with the terms of reference established by the board.
- Board Committees may be standing committees; or ad hoc committees that cease when the activities are completed. Standing committees should be included in the articles or bylaws.
- Committees recommend policy for approval by the entire board. Committees make full use of board members' expertise, time and commitment, and ensure diversity of opinions on the board.
- They do not supplant responsibility of each board member; they operate at the board level and not the staff level.
- Minutes should be recorded for all Committee meetings and final minutes are required to be placed before the Board.

Functions of the Committee Section 177(4) of the Act

Provides that every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board. Terms of reference as prescribed by the board shall inter alia, include, –

- the recommendation for appointment, remuneration and terms of appointment of auditors of the company;
- review and monitor the auditor's independence and performance, and effectiveness of audit process;
- examination of the financial statement and the auditors' report thereon;
- approval or any subsequent modification of transactions of the company with related parties;
- scrutiny of inter-corporate loans and investments;
- valuation of undertakings or assets of the company, wherever it is necessary;
- evaluation of internal financial controls and risk management systems;
- Monitoring the end use of funds raised through public offers and related matters.

INSIDER TRADNG

Corporate governance and insider trading are opposed to each other as they are contradictory in nature. They are contradictory in the sense that the former curbs transparency to the shareholders of the corporate entity while the latter promotes the same. Hence it is regarded as a menace to corporate governance.

Generally in a company meetings are held to ensure that the shareholders come together once in a year to ensure and review the working of the company. The information released in the Annual Report and Annual General Meeting relate to the performance of the company and hence play a valuable role in shaping the minds of the existing and prospective shareholders. The general public and shareholders get knowledge of this information only during the Annual General Meeting or when the company announces it in a press conference, etc. however persons in the company itself or otherwise concerned to the company are in possession of such information before it actually made public. This knowledge of this unpublished price sensitive information in hands of persons connected to the companies puts them in an advantageous position over others who lack it. Such information can be used to make gains by buying shares at a cheaper rate anticipating that it might rise. Similarly it can be used to insulate themselves against losses by selling shares before the prices fall down. Such transaction entered into by persons having access to any unpublished price sensitive information is called insider trading. Such trading's not based on a level playing field and can prove detrimental to the interests of the shareholders of the company. Consequently SEBI (The Securities and Exchange Board of India] banned insider trading and laid down the SEBI (prohibition of Insider Trading) Regulations 1992.

According to the above said regulation an insider is, "Any person who, is or was connected with the company or is deemed to have been connected with the company, and who is reasonably expected to have access, by virtue of such connection, to unpublished price sensitive information i respect of securities of the company or who has received or has had access to such unpublished price sensitive information."

SEBI (prohibition of Insider Trading) Regulations 2015 has come into force with effect from 15th May 2015 after having been gazetted on 15th Jan 2015.it replaces the regulations of 1992 which was amended in the year 2002. The regulation of 2015 is with the same name and style with 2015 substitution of 1992.

The companies Act 2013 is partially in force certain provisions of the Companies Act 1956 are still in force.

Section 195 of the Companies Act 2013 provides for prohibition of insider trading of securities. Prior to this provision there was no provision regarding insider trading under the Companies Act 1956. 84 Definitions under the new Act: Regulation 2(g) defines Insider as

A connected person In possession of or having access to unpublished price sensitive information. Regulation 2(I) defines Trading as "Trading to mean and include subscribing buying, selling or dealing or agreeing to subscribe, buy, sell, deal in any securities and trade shall be construed accordingly." Section 2(1) defines unpublished price sensitive information"Any information relating to a company or its securities, directly or indirectly that is not generally available which upon becoming generally available is likely to materially affect the price of the securities and shall. Ordinarily including but not restricted to, information relating to the following:

1. Financial results.

2. Dividends.

3. Change in capital structure

4. Mergers, demergers, acquisitions de listings disposals and expansion of business and such other transaction. Changes in key managerial personnel.

5. Material events in accordance with the listing agreement.

MANAGING DIRECTOR UNDER THE COMPANIES ACT, 2013

Every Company must have Directors and they will be called the Board of Directors (BOD). But all the directors cannot engage in the management of the company due to different reasons. For smooth running of the company they elect one person to manage all the affairs of the company. And the person can be a Manager or a Managing Director but not both at a time.

There is a difference between a Manager and a Managing Director of the company. It is clear that a Managing Director should be a Director in the 1st place. A Manager need not be a director, he/she is just an employee of the company. There are certain other differences like the number of persons that can be appointed, contract of engagement and disqualifications applicability. The Manager Director of a company will have a contract with company and the Manager does not require such.

The Managing Director plays a duel role. He/she is the authority of the company as director who attends Board meetings and as a Manager, he/she performs the managerial functions of the company also.

The appointment of a Managing Director is not mandatory for a company. But if a Managing Director is appointed:

- He/ She will be a bridge between the Board and the management actions of the company.
- He/ She will know the company's policies better and will execute them with the correct strategic plans and in a rightful manner.
- Maximum Number of Managing Director that a company can appoint at a time is 2 and not more than that. But in case of a Manager it is only one.

Who can be appointed as a Managing Director

Any individual who is a member of the Board of Directors (BOD).The law does not specify the qualifications of a person to be a Managing Director. But it does state some disqualification for a person not being a Managing Director. Which are as below:

- A person who was declared as an insolvent during the appointment or at any time in the past,
- A person who is not a resident of India

- ❖ A person who has been convicted by court of offense and sentenced for a period more than 6 months
- ❖ A person who suspends or suspended any payment to a creditor at any time in the past
- ❖ The person should not be below 21 years and above 70 years old.

But a Person who is above 70 years can be appointed as a Managing Director with a special resolution and approval from the Central Gov., which will be given with proper reason for the appointment of such person.

Secretarial Audit

An audit is not always necessarily about accounting and financial records. An audit actually means a close examination or review of anything – a process, records, efficiency etc. A secretarial audit is a process to review a company's compliance with the law and its rules and regulations. Let us learn more.

A Secretarial Audit is a mechanism to check the compliance of an organization to the laws, rules, regulations, and notifications etc. prevalent at the time of the audit. In this case, it is to check if a company has been complying with the provisions of the Companies Act 2013 and all of its rule therein. The rules and regulations around companies are very complex and ever increasing. The responsibilities of the directors, promoters and other managerial positions are also very complicated and crucial. So it is important that a Practicing Company Secretary (PCS) be hired to conduct a secretarial audit.

Secretarial Audit as per Companies Act

Section 2014 (1) of the Act deals with the provisions regarding Secretarial Audit. As per the act, the audit is compulsory for the following companies,

i. Every listed company

ii. Public company with paid-up capital greater than 50 crores

iii. Public company with turnover greater than 250 crores

iv. Any private company who is a subsidiary of a public company which falls under the above two categories

The act also states that only a practicing Company Secretary who is a member of the Institute of Company Secretaries of India (ICSI) has authorization to carry out a statutory secretarial audit of these companies.

Scope of the Secretarial Audit

So a Company Secretary (member of the ICSI) is appointed as a secretarial auditor usually at the beginning of the financial year. This appointment is by the board members via a board resolution.

He will then submit a report of his audit to the same board. It is preferable to submit a report quarterly, so the company can stay on top of the compliance requirements.

Now when the auditor submits his report, he has to review the compliance of five specific laws. This is the scope of his audit. The five laws are as follows,

i. Companies Act 2013
ii. Securities Contracts (Regulation) Act, 1956
iii. Depositories Act 1956
iv. FEMA 1999
v. Rules and Regulations under the SEBI Act

Other than this the auditor will also check the company's compliance with,

i. The Secretarial Standards which the ICSI issues from time to time
ii. The Listing Agreement of the company with the appropriate stock exchange

Winding Up National Company Law Tribunal (NCLT) National Company Law Appellate Tribunal (NCLAT)

The National Company Law Tribunal (NCLT) is a specialized quasi-judicial body in India. Under the Companies Act 2013, it was established to handle matters related to corporate disputes and insolvency proceedings. NCLT has jurisdiction over cases involving companies, limited liability partnerships, and other entities specified under the Companies Act. It has benches located in various cities across India to facilitate accessibility. NCLT is responsible for resolving disputes related to company law, mergers, amalgamations, and company winding up. It plays a crucial role in promoting efficient and timely resolution of corporate disputes and insolvency matters in the country.

National Company Law Tribunal (NCLT), 2013

- ✓ The National Company Law Tribunal (NCLT) is a quasi-judicial organization established to oversee businesses formed under the Companies Act of 2013.
- ✓ It has jurisdiction over various procedures under the Companies Act, including arbitration, agreements, compromise, reconstruction, and company winding up.

- ✓ NCLT is the successor entity to the Company Law Board and was established based on the recommendations of the Justice Erandi Committee for insolvency and company winding up.
- ✓ Additionally, NCLT serves as the Adjudicating Authority for insolvency proceedings under the Insolvency and Bankruptcy Code, 2016.
- ✓ Civil courts do not have jurisdiction over matters handled by NCLT.
- ✓ Once NCLT grants an insolvency petition under the IBC, 2016, the case cannot be dismissed even if the parties agree to settle, except under the authority of the Supreme Court citing Art. 142.
- ✓ NCLT can summon a General Meeting if a company fails to hold an Annual General Meeting or Extraordinary General Meeting as required by the Companies Act.
- ✓ It also has the authority to change a corporation's fiscal year established in India.

Objectives of NCLT

- ❖ Initiated before the Company Law Board under the previous act (the Companies Act 1956)
- ❖ Pending before the Board for Industrial and Financial Reconstruction (BIFR), including those pending under the Sick Industrial Companies (Special Provisions) Act, 1985
- ❖ Pending before the Appellate Authority for Industrial and Financial Reconstruction
- ❖ Pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

Functions of the National Company Law Tribunal (NCLT)

- ✓ The function of NCLT entails jurisdiction over cases previously handled by the Board for Industrial and Financial Reconstruction (BIFR) and cases under the Sick Industrial Companies (Special Provisions) Act of 1985.
- ✓ It can relieve investors affected by unlawful conduct committed by corporate management or affiliated consultants and advisers.
- ✓ Depositors who have harmed their rights can seek recourse through class lawsuits against the company.
- ✓ NCLT can instruct the company to reopen or modify its financial statements, but reopening accounts is not permitted.
- ✓ The company's director can apply to the Tribunal to modify financial statements.
- ✓ NCLT has the authority to conduct investigations worldwide and assist foreign investigation agencies and courts.
- ✓ Provisions are in place to support the inquiry processes of investigation agencies and courts from other countries.

Significance of NCLT

1. The NCLT is a quasi-judicial organization established to deal with civil company disputes originating under the Companies Act.
2. NCLT operates along the lines of a normal Court of Law in the country and is required to fairly and without bias determine the facts of each case.
3. Under the Insolvency and Bankruptcy Code of 2016, the NCLT adjudicates the insolvency resolution process of corporations and limited liability partnerships.
4. The NCLT's decisions can be appealed to the National Company Law Appellate Tribunal (NCLAT)
5. It also decides matters by natural justice principles and offers conclusions from decisions in the form of orders to continue such decisions.
6. Concerning accusations of oppression and mismanagement of a company, company winding up, and all other rights given by the Companies Act.

Powers of National Company Law Tribunal

1. It can take over the cases pending before the Appellate Authority for Industrial and Financial Reconstruction.
2. It can also take on cases of corporate persecutors and mismanagement.
3. It has the authority to request the aid of the Chief Metropolitan Magistrate.
4. It can deregister companies.
5. It can order de-registration of businesses in specific instances where company registration is obtained illegally or incorrectly.
6. It has the power to hear complaints against businesses' refusals to transfer securities and to correct the register of members.
7. It gives protection to diverse stakeholders' interests, particularly non-promoter shareholders and depositors.

The National Company Law Appellate Tribunal (NCLAT) was constituted under Section 410 of the Companies Act, 2013 for hearing appeals against the orders of National Company Law Tribunal(s) (NCLT), with effect from 1st June, 2016.

The NCLAT is also the Appellate Tribunal for hearing appeals against the orders passed by NCLT(s) under Section 61 of the Insolvency and Bankruptcy Code, 2016 (IBC), with effect from 1st December, 2016 and also Appellate Tribunal for hearing appeals against the orders passed by Insolvency and Bankruptcy Board of India under Section 202 and Section 211 of IBC.

The NCLAT is also the Appellate Tribunal to hear and dispose of appeals against any direction issued or decision made or order passed by the Competition Commission of India (CCI) – as per the amendment brought to Section 410 of the Companies Act, 2013 by Section 172 of the Finance Act, 2017, with effect from 26th May, 2017.

COMPOSITION OF APPELLATE TRIBUNAL:

The president and member of the appellate tribunal shall poses following qualifications:

1. The chairperson shall be a person who is or has been;
   a. Judge of the Supreme Court; or
   b. The Chief Justice of a High Court.

2. A Judicial Member shall be a person who is or has been;
   a. Judge of a High Court; or
   b. Judicial Member of the Tribunal for five years.

3. A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of not less than twenty-five years, in law, industrial finance, industrial management or administration, industrial reconstruction, investment, accountancy, labour matters, or such other disciplines related to management, conduct of affairs, revival, rehabilitation and winding up of companies.

Procedure before Tribunal and Appellate Tribunal (Sec. 424)

The said Tribunals shall not be bound by the procedure laid down by the Civil Procedure Code, 1908 but guided by the principles of natural justice. They have the power to regulate their own procedure. For the purpose of discharging their functions under the Act, the Tribunals shall have the same powers as are vested in a civil court while trying a suit with respect to the following:

a) Summoning and enforcing the attendance of any person and examining him on oath;

b) Requiring the discovery and production of documents;

c) Receiving evidence on affidavit;

d) Subject to the provisions of Sections 123 and 124 Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

e) Issuing commissions for the examination of witnesses or documents;

f) Dismissing a representation for default or deciding it ex parte;

g) Setting aside any order of dismissal of any representation for default or any order passed by it parte;

h) Any other matter as may be prescribed.

The orders of the Tribunals are enforceable in the same manner as a court decree. In the case of a company, the order will be sent for enforcement to the court in whose local limit the office of the company is situated. If the order is against an individual, the order is to be sent to the court in whose local limits the individual resides or carries on business or professionally works for gain.

Difference between NCLT and NCLAT

Basis	NCLT	NCLAT
Meaning	National Company Law Tribunal (NCLT) is like a special court in India that deals with problems related to companies.	National Company Law Appellate Tribunal (NCLAT) is like a higher court in India for company problems. When people don't agree with decisions made by the NCLT, they can appeal to the NCLAT.
Main Role	NCLT is like a court that deals with various company issues at the initial level	NCLAT is a higher court that hears appeals against the decisions made by NCLT.
Jurisdiction	NCLT has the original authority to handle company law cases.	NCLAT has the authority to review and decide on appeals from NCLT decisions.
Hierarchy	It is the first instance where company disputes are addressed.	NCLAT is higher than NCLT, serving as the final appellate authority in these cases.
Benches	NCLT has 16 benches across the country.	NCLAT has multiple benches across the country.
Final Authority	NCLT decisions are subject to review by NCLAT, making NCLAT the final authority.	Decisions of NCLAT are generally final, with limited appeal options to the Supreme Court.
Time Frame	The time it takes to resolve cases in NCLT varies based on the case complexity.	NCLAT aims for timely resolution but depends on the specifics of each appeal.

Special court

The special court shall consist of a single judge holding office as Session Judge or Additional Session Judge for offence providing for imprisonment of two years or more and Metropolitan Magistrate or a Judicial Magistrate of the First Class, in any other case who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working. Section 60 of the Companies (Amendment) Act, 2020 has given exception to Section 452 from the applicability of provisions related to Special Courts. The excluded section provides for Punishment for wrongful withholding of property by the officer or employee of a company.

Powers of the Special Court

Under Companies Act, 2013, the judicial magistrate or executive magistrate may authorize the detention for 15 Days or 7 Days only respectively. These magistrate(s) are also empowered to forward the person accused to the Special Court without unnecessary detention. The Special Courts are empowered to take cognizance of the offence without accused being committed for trial upon perusal of the police report and also to try an offence under the Code of Criminal Procedure, 1973 with which the accused may be charged at the same trial. The Special Courts may also try an offence summarily for which the imprisonment is provide for a term not exceeding three years. However, the punishment for conviction in a summary trial is limited toone year. The provisions of reversion back to the regular trial and condition thereto are also provided under the act. The person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Special Courts under IBC:

The Special courts under IBC are vested with criminal jurisdiction arising out of offences as laid out in Chapter VII of the Code. While the procedural aspects of the Code maintain that the Adjudicating Authority is empowered to arrive at a finding or observation and that certain action comes under the purview of Chapter VII of Part II of the Code, once such finding or observation is made, the power to initiate a trial shifts to a Special Court under Section 236 of the IBC. The Special Court shall be deemed to be a Court of Session and the person conducting the prosecution shall be deemed to be a public prosecutor (section 236 of the Code). Section 236 of the Code thus lays down that the offences shall be tried by a Special Court established under Chapter XXVIII of the Companies Act, 2013 as mentioned above. However, the corporate offenders in the above-mentioned cases undergo a trial only when prescribed authorities approach the Court of law with a complaint. This has been underlined in the Act of 2013 as well. The Special Courts, thus, can take cognisance of the offences only when a complaint is made by the Central Government, the IBBI or an authorised person as the case may be, as laid down by section 236 (2) of the Code

Ministry of Corporate Affairs had earlier proposed for setting up 8 special courts under the National Company Law Tribunal to deal with the insolvency cases. These courts have been proposed to be set up in Mumbai, Delhi, Chennai, Kolkata and Hyderabad.

UNIT – V
WINDING-UP OF COMPANY

MEANING OF WINDING UP OF A COMPANY

The process of ending the life of a company by administering its properties for the benefit of shareholders & creditors of the company is known as winding up of a company. A company is a corporate body which is an association of people for some common purpose of carrying on the business and earning profits. A company has to be incorporated and registered according to the Companies Act 2013. Chief Justice Marshall defines a company as “a corporation which is an artificial being, invisible, intangible and exists only in contemplation of law.” A company, being a corporate body has the following characteristics:

- It has a separate legal entity.
- It is an artificial person.
- It has limited liability.
- It can own separate properties and assets.
- It has a common seal.
- It has perpetual succession.
- It can sue and be sued in its own name.
- In a public company, shares can be transferred freely.

From the above definition, it is clear that a company has to be incorporated according to the provisions of the Act. Similarly, when a company is to be closed, a proper procedure has to be followed. This process of realisation of assets, payment to creditors and distribution of surplus among the shareholders in order to finally dissolve the company is called winding up. Thus, it can be said that winding up is the last stage after which a company ceases to exist and is finally dissolved.

- **Cessation of Business Activities:** The Company stops conducting its usual business operations.
- **Appointment of Liquidator:** A liquidator is appointed to oversee the process.
- **Asset Liquidation:** The Company’s assets are collected and sold.
- **Debt Settlement:** The proceeds from the asset liquidation are used to pay off creditors.
- **Distribution of Remaining Assets:** Any surplus is distributed among the shareholders.
- **Legal Entity Status:** The Company retains its legal entity status during the winding-up process and can engage in legal proceedings.

- **Dissolution:** The final step is when the company is officially dissolved and ceases to exist.

The primary goal of winding up is to ensure that the closure of the company is conducted in an orderly manner, with due regard to the interests of all stakeholders, including creditors, employees, and shareholders.

MODES OF WINDING UP OF A COMPANY

Under Section 293 of the Companies Act 2013, there are three primary ways to wind up a company:

- Compulsory Winding Up (By the Court)
- Voluntary Winding Up
- Winding Up Subject to the Supervision of the Court

COMPULSORY WINDING UP OF COMPANY

Compulsory winding up is one of the modes of winding up a company; it is initiated by a court order, usually upon the petition of a creditor, the company itself, or the Registrar of Companies. The conditions under which a court can order the winding up of a company include:

- **Inability to Pay Debts:** If a company is unable to pay its debts and a creditor has demanded payment and not received it within three weeks, the creditor can petition for winding up.
- **Special Resolution:** If the company has resolved by a special resolution that it should be wound up by the court.
- **Default in Holding Statutory Meeting:** If the company has not held its statutory meeting or filed its statutory report.
- **Acts against Sovereignty and Integrity:** If the company is found to be acting against the sovereignty and integrity of India or public order.
- **Fraudulent Conduct:** If the business of the company is being conducted fraudulently or for an unlawful purpose.

Once a winding-up order is made, an official liquidator is appointed by the court to take control of the company's assets and liabilities.

VOLUNTARY WINDING UP OF COMPANY

Voluntary winding up can be initiated by the members of the company without court intervention. There are two types of voluntary winding up:

- **Members' Voluntary Winding Up:** This occurs when the company is solvent and able to pay its debts in full within a specified period. The directors must make a declaration of solvency, followed by a resolution passed by the members in a general meeting. An official liquidator is then appointed to wind up the company's affairs.
- **Creditors' Voluntary Winding Up:** This occurs when the company is insolvent and unable to pay its debts. The process begins with a resolution by the members, followed by a meeting of the creditors. The creditors have a significant role in appointing the liquidator and overseeing the winding-up process.

In both types of voluntary winding up, the liquidator is responsible for collecting the company's assets, paying off its liabilities, and distributing any remaining assets to the members.

CONSEQUENCES OF WINDING UP

According to Section 278 of the Act, the order of winding up will operate in favour of all creditors and contributories as if it has been made on their joint petition. Section 279 further provides that no suit or any other legal proceeding can be initiated against a company against whom an order of winding up has been passed without any permission from the tribunal, against whom the order of winding up has been passed. An application in this regard will be decided within 60 days.

POWERS OF TRIBUNAL

Powers of tribunal with respect to winding up of a company

According to Section 273, the tribunal can pass the following orders with respect to a petition filed for winding of a company:

- Dismiss the petition with or without costs;
- Any interim order;
- Appointment of provisional liquidator till the order of winding up is made;
- Order of winding up of a company either with or without costs;
- Any other order.

Any such order must be passed within ninety days from the date the petition is presented in the tribunal. The Section also provides that before appointing a provisional liquidator, the tribunal will give a notice and reasonable opportunity to the company to make the representations. It further provides that if a petition is presented on the ground that it is just and equitable for the company to wind up, the tribunal can refuse to order for winding up if any other remedy for the same is available and the petitioners are not acting reasonably.

According to Section 274, when a petition for winding up is made, the tribunal is satisfied if the case can order the company to file its objections along with its statement of affairs within 30 days. The tribunal can also direct the petitioner to deposit security for costs as a precondition to the issuance of directions to the company.

According to Section 285, after the order of winding up of a company has been passed by the tribunal, it will also settle a list of contributories, rectify the register of members required and apply for the discharge of assets of the company. It will also differentiate between contributories in their own rights and those who are representatives of or liable for the debts of others. While settling the list, the tribunal must include every person who is or has been a member, a person liable to contribute an amount sufficient for payment of debts and liabilities to the assets of the company upon satisfying the following conditions:

- A person will not be liable to contribute if he ceases to be a member for preceding one year before the process of winding up commenced.
- A person will not be liable for any debt or liability of the company which is contracted after he ceases to be a member.
- A person will not be liable unless the present members are not able to satisfy the required contributions.
- If a company is limited by shares, a person will not be liable for an amount exceeding the amount unpaid of the shares for which he is liable.
- If a company is limited by guarantee, no contribution will be taken from the member exceeding the amount to be contributed by him to the assets of the company if it was being wound up. But if the company has a share capital, the member has to contribute to the extent of such sum unpaid on shares held by him if the company was limited by shares.

PETITION FOR THE WINDING UP OF A COMPANY

According to Section 272 of the Companies Act, 2013, the following persons can present a petition for the winding up of a company to the Tribunal:

Company

According to Section 272(1)(a), a petition for winding up can be presented by a company itself. However, before presenting a petition, the company must pass a special resolution in this regard. In the case of BOC India Ltd. Zinc Products & Co. (P) Ltd. (1996), a petition for winding up was presented by a person not authorised to do so by the board of directors and hence, the petition was declared as incompetent.

Any contributory

According to Section 2(26) of the Act, a contributory is a person who is liable to contribute towards assets of the company in case it is wound up. However, according to Section 272(2), a contributory will be allowed to present a petition for winding in spite of him being the holder of fully paid up shares or the company has no surplus assets left for distribution among its shareholders after satisfying all the liabilities. One important requirement is that the shares in respect of which a person is a contributory were allotted or registered under him for at least 6 months during the period of 18 months before the commencement of winding up or such shares devolved on him by the death of the former holder.

All or any persons mentioned above

The petition for winding up can also be presented by the company and the contributories together or separately.

Registrar

The registrar can file a petition for the winding up of a company under the following circumstances:

- Actions of the Company were against the interests of sovereignty and integrity of the country, Security of States, friendly relations, morality etc.
- If the tribunal is of the opinion that the company was formed with a fraudulent aim and unlawful purpose or its affairs have been conducted in a fraudulent manner or the persons who formed the company are guilty of fraud or misconduct.
- There was a default in filing the financial statements or annual returns of the company with the Registrar.
- It is just and equitable for the tribunal to wound up the company.

Person authorised by central government

Section 272(1)(e) provides that a petition for winding up can also be filed by any person who is authorised by the Central Government to do so.

Central or State government

The Central or State government can also present a petition for winding up of a company if its actions are against the sovereignty and integrity of the country, public order, morality, decency, foreign relations etc.

COMPANY LIQUIDATOR (APPOINTMENT OF OFFICIAL LIQUIDATOR)

The official liquidator is an officer who is appointed to proceed with the winding up of a company and its affairs. Section 275 provides that in order to wind up a company, the tribunal will appoint an official liquidator from a panel maintained by the Central Government which consists of names of advocates, Chartered Accountants, Company Secretaries, Cost Accountants etc. having at least ten years of experience in the matters related to the company. However, if a provisional liquidator is appointed, his powers will be restricted by an order of appointment by the tribunal. A provisional liquidator is a person appointed by the court or tribunal to carry on the process of winding up of a company.

The central government also has the power to remove the name of any person from the panel on the grounds of misconduct, fraud, breach of duties, professional incompetence etc, but before doing so an opportunity to be heard must be given to him. The liquidator so appointed must within seven days of appointment make a declaration regarding conflict of interest or lack of independence with respect to his appointment with the tribunal.

According to Section 276, a provisional liquidator or a company liquidator appointed by the tribunal can be removed by the tribunal on the following grounds:

- Misconduct;
- Fraud or misfeasance;
- Professional incompetence or failure to exercise due care and diligence;
- Inability to act as a liquidator;
- Conflict of interest or lack of independence during the term of appointment

Powers of liquidator

According to Section 277(5), a company liquidator will be the convener of meetings of the winding up committee which will assist in the liquidation proceedings and related functions like:

- Take over the assets.
- Examination of statement of affairs.
- Recovery of property and other assets of the company.
- Review of audit reports and accounts.
- Sale of assets.
- Finalising the list of creditors and contributories.
- Compromise and settlement of claims.
- Payment of dividends.
- Any other function.

According to Section 290, the Company liquidator will have the power to:

- Manage the business of the company for the process of winding up.
- Execute deeds, receipts and other documents on behalf of the company and use its seal if necessary.
- Sell the immovable and movable property and actionable claims of the company, either by public auction or private contract.
- Sell the undertaking of the company.
- Raise money required for the security of assets of the company.

- Institute or defend suits or other legal proceedings, whether civil or criminal, on behalf of the company.
- Settle claims of creditors, employees or any other claimant and distribute the sale proceeds.
- Inspect the records and returns of the company.
- Draw, accept, make and endorse any negotiable instrument which includes a cheque, bill of exchange, hundi or promissory note on behalf of the company.
- Obtain any professional assistance from any person or appoint any professional for the protection of assets of the company.
- Take actions and steps and sign, execute and verify papers, deeds, documents, and applications etc. For winding up of the company, distribution of assets and discharge of duties and obligations of liquidator.