



# **UNIT 6: DRAFTING**

Drafting Under Companies Act, 2013

# 1. Debenture Trust Deed

- Debenture Trust deed is a written instrument legally conveying property to a trustee often for the purpose of securing a loan or mortgage. It is the document creating and setting out the terms of a trust.

# 2. Types of Resolutions

1. Board Resolution
2. Ordinary Resolution
3. Special Resolution
4. Unanimous Resolution
5. Passing of Resolution by Circulation

# 3 Enforceability of Pre-incorporation contract

- Companies Act, 2013 does not contain any provisions about Promoter's Contract. The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre incorporation contracts
- legal position is that since presence of two consenting parties is necessary for a contract, and the company before incorporation is a non-entity, the promoters cannot act as agents for the company, which has yet to come into existence. As such, the company is not liable for the acts of the promoters done before its incorporation.

# 4. memorandum of association

- Memorandum of association of the company is the fundamental formation document. It is the constitution and charter document of the company. It contains the basic conditions on the strength of which the company is incorporated.
- Contents of MOA:
  1. Name of the company
  2. Registered Office of the Company
  3. Objects of the Company
  4. The Liability of Members
  5. Capital Clause
  6. Subscription Clause:

# 5. Articles of Association

- According to Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table F in Schedule I of the Act, in so far as they apply to the company.
- articles of a company shall contain the regulations for management of the company.
- It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association.

# 6. UNDERWRITING AGREEMENTS

*Underwriting is an insurance against risk. When shares or debentures of a company are issued to the public, they are, by and large, underwritten to ensure that all the shares or debentures issued are taken up and thus the required capital is raised. Before entering into an underwriting arrangement with a member of any recognised stock exchange, it is the duty of the directors of the concerned company to ensure that the underwriter has sufficient financial resources to meet any obligation which may devolve upon him in the event of the issue not being fully subscribed by public.*

# 7. CONTRACT OF APPOINTMENT OF MD

- According to Section 2(54) of the Companies Act, 2013, “managing director” means “a director who, by virtue of the article of a company an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company, and includes a director occupying the position of a managing director, by whatever name called.”
- **While drafting a contract of appointment, the following points have to be taken care of:**
  - The person who is being appointed as managing director must be a director of the company; and
  - He must be entrusted with substantial powers of management.

# 8. SPECIMEN RESOLUTIONS

- Board Resolutions for Appointment of Managing Director/CEO
- Board Resolutions for Appointment of Chief Financial Officer (CFO)
- Board Resolutions for Appointment of Whole-Time Company Secretary of the Company
- Board Resolution for Approval of Annual Financial Statement of the Company for the financial year ended 31st March\_\_\_\_\_
- Ordinary Resolution passed by the members of the Company for adoption of the Directors' Report and the Audited Balance Sheet of the Company as on 31st March \_\_\_\_\_ and the Statement of Profit & Loss for the year ended 31st March \_\_\_\_\_ with the Auditors Report thereon.
- Board Resolution Recommending Payment of Dividend on Equity Shares out of Profits
- Ordinary Resolution for Declaration of Dividend by Members at an AGM

# 8. SPECIMEN RESOLUTIONS

- Board Resolution for Declaration of Interim Dividend on Equity Shares
- Board Resolution for Approval for Filing of Form CSR -1
- Resolution for Approval and Adoption of CSR Policy
- To Identify Implementing Agencies and To Approve Allocation of CSR Amount
- To approve the annual action plan for the financial year \_\_\_\_\_
- To approve opening of a bank a/c for unspent csr amount
- To Approve Ongoing Project and Transfer to the 'Unspent CSR A/C'
- To Approve Transfer of Unspent CSR Amount to Specified Fund Under Schedule VII to the Companies Act, 2013
- To Approve Appointment of Independent Agency for Undertaking Impact Assessment
- Special Resolution for borrowing of funds under Section 180(1)(c) of the Companies Act, 2013

# 8. SPECIMEN RESOLUTIONS

- To make Investments, give Loans, Guarantees and provide Securities under Section 186 of the Companies Act, 2013
  - Special Resolution passed for creation of security on the properties of the company in favour of the lenders
  - Ordinary Resolution for Approval of Related Party Transactions
  - Omnibus Approval of Related Party Transactions For F.Y.
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# MORTGAGE & ITS TYPES

- A mortgage is a transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of a loan, existing or future debt or the performance of an acknowledgement, which may give rise to pecuniary liabilities (Section 58 of the Transfer of Property Act, 1882).
- **Kaun banega Crorepati ? (Mortgagor & Mortgagee)**
- 1. Any living person, company, or association or body of individuals, who has an interest on immovable property can mortgage that interest.
- 2. In the case of a company mortgage of the property should be duly authorised by 'Object Clause' of the Memorandum of Association and approved by a resolution of the Board of directors.
- 3. Further, for creation of a mortgage, the Financial Institutions usually insist on a resolution of the shareholders.
- 4. Any person capable of holding property may take a mortgage unless he is dis-qualified by any special law from doing so. A minor may be a mortgagee but as he cannot enter into a contract, the mortgage should not involve any covenants by him.

# Points to include in a mortgage deed

- 1. Parties
- 2. Recitals: “Whereas the borrower is the absolute owner of the property hereby mortgaged free from encumbrances”. The second form of recital is as to the agreement for loan, such as: “And Whereas the mortgagee has agreed with the borrower to lend him the sum of Rs.....upon having the re-payment thereof with interest hereinafter mentioned secured in manner hereinafter appearing”.
- 3. Covenant for re-payment
- 4. MORTGAGE CLAUSE
- 5. (I) Covenants by the mortgagor: To repair the mortgaged property, in default the mortgagee is given power to enter into possession without being liable as a mortgagee in possession, with a view to effect repairs. Mortgagee’s expenses for this purpose are considered properly incurred.
- (ii) Covenant to insure: The mortgagor covenants to insure the mortgage property in the name of the mortgagee of an insurance office approved by the mortgagee. In default, the mortgagee is entitled to insure and the costs incurred are to be charged to the mortgagor.
- (iii) Covenant not to grant leases or accept surrender thereof: It often happens that the mortgagor while in possession, grants long term leases to the detriment of the mortgagee. To guard against such a contingency, it is agreed that the mortgagor shall not grant leases of mortgaged property for a period exceeding one year without the written permission of the mortgagee or accept surrender of existing leases without like permission. (See Section 65A of the Transfer of Property Act)
- (iv) Covenant to pay outgoings: The borrower undertakes to pay and discharge and indemnify the mortgagee against all rates, taxes, duties, charges, assessments, outgoings, whatever.

- 6. Period
- 7. Power of sale
- 8. Power to appoint receiver
- 9. Possession Jayega ya nahi? (Depending on the mortgage)
- 10. Attestation, stamp duty, Reg.: Compulsory
- **The powers and functions of the Receiver**
- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- (ii) in keeping down all annual sums or other payments, and the interest on all principals sums, having priority to the mortgage in right whereof he is Receiver;
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (iv) in payment of the interest falling due under the mortgage; (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee.

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## TYPES OF MORTGAGE

Simple: The mortgagor without delivering possession, binds himself to personally pay the mortgaged money.

Conditional Sale: The property is sold subject to the condition that on default in repayment on a certain date, the sale shall become absolute or else it shall be void

Usufructuary: Mortgagor delivers possession of the property to the mortgagee who retains the possession until repayment. The mortgagee will usufruct in lieu of interest and principle

English: The mortgagor binds himself to repay the money and transfers then property absolutely which shall be re-transferred on repayment

Mortgage by deposit of title deeds: Oral transaction, where to no written acknowledgement is required.

Anomalous

ILLUSTRATED BY  
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Agar shuru karne ki himmat thi toh...

Khatam karne se kyu Ghabre rahe ho?

STUDY HARD