

3. MEMORANDUM AND ARTICLES OF ASSOCIATION AND ITS ALTERATION

Memorandum of Association

- Memorandum means MoA of a company originally framed and altered from time to time.
- charter document of the company.
- It contains the object of the company.
- It determines scope of its operation
- Object includes ancillary or incidental objective along with main objective

Model OF MOA

- Table
- A - Company limited by shares
 - B - limited by guarantee not having share capital.
 - C - Limited by guarantee having share capital.
 - D - Unlimited company not having share capital.
 - E - Unlimited company having share capital

Content OF MOA

1. Name clause
2. Address clause (Registered office clause)
3. Object Clause
4. liability Clause
5. Capital Clause
6. Subscription clause

1. Name clause

- Name shall not be identical or resemble too nearly of an existing company
- Name shall not be such that its use will constitute an offence or undirable in the opinion of central government.
- Any word or expression which gives impression that company is connected with or having ^{support/benefit} patronage of Central government / state government / Local Authority or body corporate constituted by central government / state government.
- Such word or expression is prohibited by central government. However to use such word obtain permission from central 30-11

Reservation of name

- Application for reservation of name in Form SPICE + (INC-32) and for change in name by using Reserve Unique Name Facility

- Upon application name shall be reserve for 20 days and in case of change in name, reserve for 60 days.

Note: 1. Registrar before allowing the name must make preliminary enquiries that name shall not be misleading

2. Court can pass the order to change the name of company, however court cannot directly tell ROC to change the name.

3. Atlas cycle Ltd. v. Atlas product Pvt. Ltd.

→ Court pass the order & defendants were restrain from using the word Atlas.

2. Registered Office Clause (Address clause)

- It specifies the name of state in which registered office is situated. which helps to determine the jurisdiction of ROC.
- Paint, affix, its name & address on the outside of every office at place where its business is carried on.
- Engraved the name on common seal.
- Name, address, fax no., website, email id shall print on all business document and on hundis, promisory note & bill of exchange
- Company has changed its name during last 2 years then print former name also.

3. Object Clause

- It specifies the object for which the company is proposed to be incorporated.
- Specify main object, incidental object and other object in object clause
- Any Act beyond the object of the company shall be void and entire body of shareholder cannot ratify it.

4. Liability Clause

- It specifies the liability of member.
- Whether it is limited by shares or guarantee company or unlimited company

5. Capital clause

- It specifies the maximum capital that company can raise i.e. Authorised capital
- Company cannot raise capital beyond its authorised capital however company can alter the capital clause

6. Subscription Clause

- It specifies who are signing the MoA
- Each subscriber must state the number of shares he is subscribing
- Each subscriber must take at least 1 share and write opposite his name, the number of shares he is subscribing.

Articles of Association

- Article means AOA of the company as originally framed and altered from time to time.
- It contains the regulation for management of the company.
- MoA lays down scope and AOA governs ways in which object are to be carried.
- Shall not contain anything illegal or ultra vires to MoA

Registration of Articles

- Company shall file MoA and AOA duly signed by all subscribers to ROC

Alignment of AOA with Companies Act.

- Provision of this Act shall have effect notwithstanding anything to the contrary contained in MoA & AOA or resolution or agreement which means any provision in AOA, MoA, agreement, resolution which is contrary to Companies Act shall be void.

Entrenchment provision

- AOA may contain provision for Entrenchment i.e. provision in AOA may be more strict than Companies Act, 2013.
- Entrenchment referred in shall be made either:
 - At the time of incorporation, or
 - by amending AOA
- Give notice to RoC about the entrenchment in form SPICE + or MGT-14.

Legal Effect of MoA & AOA

1. Member bound to the Company

- MoA and AOA shall be binding on member.
- Each member are bound to the company.
- Member must observed the provision of MoA.
- Member could not enter into an agreement which is contrary or inconsistent with AOA.
e.g. AOA specify that on bankruptcy of a member, his shares would be sold at price fixed by director. In such case, member is bound to follow AOA.

2. Company bound to the member

- AoA shall be binding on the company towards the member.
- Member can bring legal action against the company for infringement of MoA

3. Member bound to Member

- Member ^{between} inter se bound by the provision of AoA & MoA. however MoA & AoA does not create express contract between the member.
- Member of a company has no right to bring a suit to enforce the article in its own name.

4. Company not bound to Outsider.

- Outsider means other than member
- MoA & AoA would not give any contractual right to outsider against the company.

e.g. AoA provides that solicitor would not be removed from office except misconduct however company removed such solicitor, still solicitor cannot file suit against the company because AoA did not constitute any contract between company and himself.

Alteration of AOA

It includes

- (a) Adoption of new set of article
- (b) addition / insertion of new clause
- (c) deletion of clause
- (d) amendments of a specific clause
- (e) substitution of specific clause

Alteration includes conversion of private company into public company or public company into private company

- After conversion file altered AoA along with copy of central government order to RoC within 15 days from alteration.

Limitation on power to alter article

- Alteration must not exceed the power given in MoA
- Must not be inconsistent with companies Act, however entrenchment is allowed.
- Not include anything which is illegal or opposed to public policy.
- Alteration must be bona fide, for the benefit of company
- must not constitute a fraud on minority by majority
- Cannot compel to an existing member to subscribe more shares.
- Cannot escape from its contractual obligation.
- Cannot alter as to give ^{from the beginning} retrospective effect.

Procedure for alteration of AoA

- Hold board meeting and pass resolution
- Approve the proposal of alteration of AoA
- Approve the notice to call general meeting
- Give authority to director to sign the document & file necessary document to RoC.
- Prepare minutes & send to all director within 15 days from board meeting.

Procedure

- ① Board meeting → Board Resolution
- ② General meeting → Special Resolution
- ③ - Hold general meeting pass special Resolution
- File MgT-14 to RoC within 30 days from Special Resolution along with
 - (a) Copy of special Resolution with explanatory statement
 - (b) Notice of General Meeting
 - (c) Certified true copy of altered AoA
- ④ - Follow Companies Act and MoA
 - Alteration of ~~MoA~~ AoA shall not violate the MoA and Companies Act
- ⑤ Approval of Central government
 - Obtain Central government approval in case of conversion of public company to Private company.
 - No stamp duty on alteration of AoA

Effect of Altered article

- Binding on a company and member to the same extent as article originally formed.

Incorporation Contract pre incorporat

Incorporation Contract

Pre-Incorporation Contract

- promoter may enter into pre-incorporation contract on behalf of the proposed company

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promoter shall be liable until unless such contract is adopted by company in first board meeting by passing board resolution.

Past-Incorporation Contract

- Company enter into contract on its own name

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Company shall liable for such contract

Procedure for Adaption of pre-incorporation Contract

- Such adoption is within the power of object clause of the company
- Article of Association shall give power to a director to adopt such contract
- Convene first board and pass board resolution to adopt such contract

Note: Company can not acquire shares prior to its incorporation.

Alteration of Name Clause

- (a) Board meeting → Board Resolution → Consider - New Name
- Authorised company secretary / Director for application to ROC
- Application to ROC by using RUN (Facility for availability of New Name).
- ROC shall reserve new name 60 days.
- Hold Board meeting & approve the notice of General Meeting
- Hold General Meeting & pass special Resolution.

- Apply to Central government (power given to RoC) in form INC-24 within 30 days from Special Resolution or 60 days from Reservation of Name, whichever is earlier.
- File MGT-14 which is certified by practicing CA-AS-CMA within 30 days to RoC.
- RoC shall give new certificate of INC in form INC-25
- Intimate stock exchange and dip depository.

Additional Condition for Listed Company

- 1 year elapse from previous Name change
- If Name change \rightarrow suggest the activity then
 - 50% Revenue shall be from activity suggested under New Name, OR
 - 50% of total assets must be invested in such activity (Investments includes: Fixed assets, Current assets, working capital)
- Use old name & New Name for atleast 1 year on the website.
- If listed entity has changed its activity which are not reflected in its name, it shall change its name within a period of 6m
- effect of

Effect of change in Name

- No change in rights obligation and legal proceeding due to change in Name
- All the activity shall be continued in its new Name

Direction by Central Government to change the Name

- If central Government gives the direction to change the name of the company because the name is identical with other company, then company by passing ordinary resolution and obtain Central government approval and change the name of the company.
- Change the name within 3 months from such direction

Change / Alteration of Object Clause

- Pass special Resolution
- File copy of special resolution to RoC
- RoC shall register the alteration and certify the registration within 30 days from filing of special resolution
- If company raised money from public and has any unutilised amount then satisfy the following condition.
 - Resolution shall be published in the newspaper where Register office is situated, and
 - Provide exit opportunity to dissenting shareholder by promoter or shareholder having control.
- Special Resolution shall be passed by postal ballot if company having more than 200 members or money raised through prospectus still has unutilised amount.
- File MGT-14 to RoC within 30 days from special Resolution.

Procedure for Alteration of object clause

1. - Board meeting - special Resolution
- Approve Notice of General meeting
- Delegate authority to director to sign and certify the requisite form to RoC

2. Hold General Meeting & pass special resolution.
 - pass special resolution through postal ballot, if company having more than 200 members or company has raised money from public & still has any unutilised amount.
3. Public Advertisement & Exit opportunity.
 - If company has any unutilised amount need to give public advertisement in one English newspaper & one in regional language and also give exit opportunity to dissenting shareholder by promoter or shareholder in control.
4. Filing with RoC
 - file MGT-14 to RoC along with following attachment.
 - (a) Copy of special resolution along with explanatory statement
 - (b) Notice of General meeting
 - (c) Altered MoA
5. Registration of alteration.
 - RoC shall register the change within period of 30 days from filing with RoC

Alteration of Liability Clause

- Pass special resolution
- Pass MGT-14 to RoC within 30 days

Alteration of Capital clause

- Alteration Types of Alteration of Capital
 - (a) Increased in authorised capital
 - (b) Consolidate and divide share capital (No change in voting percentage)
 - (c) Convert fully paid up shares into stock
 - (d) Sub-division of shares
 - (e) Cancel shares which has not been taken by any person.

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- No need to obtain NCLT approval except change in voting %.
- Copy of resolution shall be filed with RoC within 30 days

Procedure for alteration of MoA by increasing authorised Cap.

1. Board meeting - Special Resolution
 - Hold Board Meeting & pass Board Resolution
 - Approve Notice of General Meeting
 - Issue Notice of General Meeting by director or C.S.
2. General Meeting - Ordinary resolution
 - Hold General Meeting and pass ordinary Resolution
3. Filing with RoC
 - File SH-7 to RoC within 30 days along with copy of notice of General meeting, ordinary resolution and altered MoA.
4. RoC shall check the document & approve the increase in authorised Capital.
5. However if alteration of capital clause results in alteration of AOA then pass special resolution file MGT-14 to RoC.

Alteration of Registered office clause

- (a) Change within the local limit of same town ^(same city, RoC & state) (Pune to Pune)
- pass board Resolution
 - Intimation to RoC & verification of registered address.
 - File INC-22 within 30 days from such change to RoC.
 - Does not involve alteration of MoA.

- (b) Change outside the local limit of any city, town or village ^(different city, same RoC, same state) (Pune)
- Pass special Resolution through postal ballot process
 - Hold Board Meeting - Board Resolution
 - General Meeting - Special Resolution.

- Intimation to Rac within 30 days in form INC-22
- File MGT-14

(different city different Rac if same state)

- (c) Change within the same state from one Rac to another Rac
(Pune to Mumbai)
- Board Meeting - Board Resolution
 - General Meeting - Special Resolution
 - Approval from Regional director

Process

- Hold Board Meeting and pass Board Resolution
- Hold General Meeting and pass special Resolution
- Application to Regional director in form INC-23 along with fees and prescribe documents.

(a) Copy of board Resolution & special Resolution

(b) Declaration by key Managerial Person (KMP) or two directors that no default in workmen dues, creditors and has obtained consent or provision of repayment.

(c) declaration that no change in jurisdiction of court for pending litigation

(d) acknowledged any copy of intimation to chief secretary of state that employee's interest is not adversely affected.

(e) Regional director shall examine the application & may approve or reject the application within 15 days from receipt of application.

(F) file certified copy of order of Regional director to Rac in form INC-28 within 30 days from such order.

- Change of Regional Director from one state to another state
- Board Meeting - Board Resolution
 - General Meeting - Special Resolution
 - approval from central government.
 - Results of Alteration of MoA

Process

1. Hold Board Meeting and pass special Resolution
 - Approve notice to General Meeting
 - Engage Company secretary to represent before Regional director.
 - listed Company → give public notice atleast 7 days before Board Meeting in news paper.
 - Intimate stock exchange within 24 hours from conclusion of board Meeting.
 - Publish the notice of EGM (Extra ordinary General Meeting) in newspaper.
2. General Meeting - Special Resolution
 - Hold General Meeting & pass special Resolution
 - File MGT-14 to RoC within 30 days
 - Intimate stock exchange within 24 hours from conclusion of EGM.
3. Application to Regional Director in form INC-23 with following document copy of MoA & AOA
 - Certify Copy of Special Resolution and notice of EGM.
 - Copy of minutes
 - list of creditors & debenture holders
 - Affidavit from director that no employee shall be retrenched

- Obtain consent of creditors, debenture holder or discharge the debt.
- Details of prosecution
- Statement of reason for shifting of Regional Director

4. Filing of advertisement

- Not more than 30 days prior to filing of INC-23 give public advertisement in form INC-26 in English and vernacular language.
- File copy of advertisement to central government.
- Serve individual notice to creditors and debenture holder.

5. Objection

- If objection not received then Central government shall approve the application within 15 days from receipt of application.
- If objection received then Central Government shall hold hearing to reach the ^{same mind / meeting of mind} consensus & pass an order approving the shifting within 60 days from application.
- If consensus is not reached then central government may confirm or reject the application within 60 days from filing.

6. Order with Condition

- Order includes shifting of Regional director of issue shall not be allowed if any enquiry, inspection is pending.

7. Effective date

- Effective from the date of issue of registration certificate

8. Form INC-22

- After order from Regional Director, file Form INC-22 to ROC along with following ~~statement~~ document

- (a) Copy of title deed or lease agreement
- (b) Authorisation from owner to use premises.
- (c) Proof of utility services.

9. File certified copy of order to ROC in form INC-28 within 30 days from order.

10. ROC shall give new certificate of incorporation within 30 days.