LLB | **Paper Code: 307**
Subject: Corporate Law | **L4 C4**

Objective: The paper aims to provide insight into formation and winding up of companies besides Corporate Administration.

Unit-I: Formation, Registration and Incorporation of company **(Lectures – 10)**

a. Nature and kinds of company
b. Promoters: Position, duties and liabilities
c. Mode and consequences of incorporation,
d. Uses and abuses of the corporate form, lifting of corporate veil,
e. Memorandum of Association, alteration and the doctrine of ultra vires,
f. Articles of association, binding nature, alteration, relation with memorandum of association, doctrine of constructive notice and indoor management- exceptions.

Unit-II: Capital Formation **(Lectures – 08)**

1. Prospectus: Issues, contents, Kinds, liability for misstatements, statement in lieu of prospectus,
2. The nature and classification of company securities,
3. Shares and general principles of allotment,
4. Statutory share certificate, its objects and effects,
5. Transfer of shares,
6. Share capital, reduction of share capital,
7. Duties of court to protect interests of creditors and shareholders.
8. Debentures, kinds, remedies of debenture holders.

Unit – III: Corporate Administration **(Lectures– 10)**

a. Directors – kinds, powers and duties,
b. Insider trading,
c. Meetings kinds and procedure,
d. The balance of powers within companies - Majority control and minority protection, Prevention of oppression, and powers of court and central government,
e. Emerging trends in Corporate social responsibility, legal liability of company - civil, criminal, tortuous and environmental.

Unit-IV: Winding up of Companies **(Lectures – 08)**

a. Kinds, consequences and reasons of winding up,
b. Role of the court,
c. Liability of past members,
d. Payment of liabilities,
e. Reconstruction and amalgamation.

UNIT-1

Nature of company

1. Definition of a Company

A company is a "corporation" - an artificial person created by law.

A human being is a "natural" person.

A company is a "legal" person.

A company thus has legal rights and obligations in the same way that a natural person does.

2. Companies and Partnerships Compared

(a) A company can be created only by certain prescribed methods – most commonly by registration under the Companies Act 2013. A partnership is created by the express or implied agreement of the parties, and requires no formalities, though it is common to have a written agreement.

(b) A company incurs greater expenses at formation, throughout its life and on dissolution, though these need not be excessive.

(c) A company is an artificial legal person distinct from its members. Although in Scotland a partnership has a separate legal personality by virtue of s.4(2) of the Partnership Act 1890, this is much more limited than the personality conferred on companies.

(d) A company can have as little as one member and there is no upper limit on membership. A partnership must have at least two members and has an upper limit of 20 (with some exceptions).

(e) Shares in a company are normally transferable (must be so in a public company). A partner cannot transfer his share of the partnership without the consent of all the other partners.

(f) Members of a company are not entitled to take part in the management of the company unless they are also directors of it. Every partner is entitled to take part in the management of the partnership business unless the partnership agreement provides otherwise.

(g) A member of a company who is not also a director is not regarded as an agent of the company, and cannot bind the company by his actions. A partner in a firm is an agent of the firm, which will be bound by his acts.

(h) The liability of a member of a company for the debts and obligations of the company may be limited. A partner in an ordinary partnership can be made liable without limit for the debts and obligations of the firm.

(i) The powers and duties of a company, and those who run it, are closely regulated by the Companies Acts and by its own constitution as contained in the Memorandum and Articles of Association. Partners have more freedom to alter the nature of their business by agreement and without formality, and to make their own arrangements as to the manner in which the firm will be run.

(j) A company must comply with formalities regarding the keeping of registers and the auditing of accounts which do not apply to partnerships.

(k) The affairs of a company are subject to more publicity than those of a partnership - e.g. companies must file accounts which are available for public inspection.

(l) A company can create a security over its assets called a floating charge, which permits it to raise funds without impeding its ability to deal with its assets. A partnership cannot create a floating charge.

(m) If a company owes a debt to any of its shareholders they can claim payment from its assets rate ably with its other creditors. A partner who is owed money by the partnership cannot claim payment in competition with other creditors.

(n) A partnership (unless entered into for a fixed period) can be dissolved by any partner, and is automatically dissolved by the death or bankruptcy of a partner, unless the agreement provides otherwise. A company cannot normally be wound up on the will of a single member, and the death, bankruptcy or insanity of a member will not result in its being wound up.

3 **kinds of Company**

A company can be formed in a number of ways:

(a) By Royal Charter (Chartered Companies) Formed by grant of a charter by the Crown.

Promoters of the company petition the Privy Council attaching draft of proposed charter to the petition. Still used to incorporate learned societies and professional bodies.

No longer used to incorporate trading companies

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(b) By Act of Parliament (Statutory Companies) Formed by private Act of Parliament. Formerly used to incorporate public utilities such as gas, electricity and railways.

(The privatized public utilities have been incorporated as registered companies).

(c) By Registration (Registered Companies) Formed by registration under the Companies Act 2013 .Registration is the most commonly used means of forming a company and virtually the only method now used to form a trading company.

CA 2013, "Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability."

Classification of Registered Companies

"Limited Liability" - this refers to the liability of the members, not the liability of the company. The company will always be liable to the full extent of its debts.

The liability of the members, whether limited or unlimited, is to the company, not to the individual creditors of the company.

(a) Unlimited Companies

(i) Members have unlimited liability (If company is being wound up, members can be made to contribute to the company's assets without limit to enable it to pay its debts.)

(ii) Cannot be public companies.

(iii) Can be set up with or without a share capital.

(iv)Not subject to the same restrictions on alteration of capital as other types of company, and do not normally have to file annual accounts.

(b) Companies Limited by Guarantee

(i) Members agree to contribute a specified amount to the company's assets in the event of the company being wound up. (Total amount payable by all members is called the "guarantee fund")

(ii) Members do not have to pay anything as long as company is a going concern - so company has no contributed capital.

(iii) Companies limited by guarantee are not usually formed for business ventures.

(iv) Prior to 1980, a company could be registered as a company limited by guarantee, but also have a share capital - these are called "hybrid companies".

(c) Companies Limited by Shares

(i) The most common kind of registered company.

(ii)Members of the company take shares issued by the company.

Each share is assigned a nominal value - the amount that must be paid to the company for the share. Members may also agree to pay an extra amount - called a premium (iii)When the company is registered, its memorandum must state the total nominal value of all the shares it is going to issue (called the registered capital, or nominal capital or authorized share capital).

The memorandum also states the number of shares to be issued:

e.g. 10,000 shares of £1 each = registered capital of £10,000. (iv) Liability of a member (shareholder), when the company is wound up is limited to the amount, if any, of the nominal value of his shares which has not been paid. (Shareholder is also contractually bound to pay any premium which has not been paid).

(v) Shares are normally partly or fully paid for when issued, so company will have a contributed capital.

Companies Limited by Shares may be public or private

(i) Public Companies

CA 2013, 1(3): "a company limited by shares which has a memorandum stating that it is to be a public company and which complies with the requirements of the Act for registration as a public company."

Main requirements:

- A company cannot be registered as a public company unless it has a minimum allotted share capital of £50,000, at least one quarter of which has actually been paid.
- A public company must have at least two shareholders and at least three directors.

(ii) Private Companies

CA 2013 defines a private company as "any company that is not a public company".

Private companies have no authorized minimum share capital.

A private company is only required to have two director and, since 1992, it can be formed with only one member. Only Public Companies can have their shares listed on the Stock Exchange – but Public Companies are regulated much more strictly than Private Companies.

ONE PERSON COMPANY:

The concept of One person company (OPC) is newly introduced by sec 2(62) of the Company Act , 2013 and it means a company which has only one person as a member .It can be framed as a private limited company.

II. FORMATION OF A COMPANY

1. **Promoters: position**

Promotion of a company is concerned with taking the steps necessary for incorporation.

(a) Definition sec. 2(69)

"Promoter" is not defined in the Companies Act.

Some attempts at definition have been made by the courts:

Twycross v Grant

Whaley Bridge Printing Co v Green

Whether someone is acting as promoter of a company is a question of fact rather than a question of law.

(b) **Duties and liabilities of Promoters**

In the 19th century, it was common for promoters to sell their own property to a newly formed company at an inflated price, or to acquire assets for the company and receive a commission from the seller. The courts then began to impose a fiduciary duty on promoters similar to that imposed on agents. A promoter must disclose any profit or potential conflict of interest to either:

(i) An independent board of directors, or

(ii) Existing or intended shareholders.

(c) Remedies for Breach of Promoters Duty

(i) Where promoter has sold his own property to the company, without disclosing this - the company can rescind the contract and recover the purchase price:

Erlanger v New Sombrero Phosphate Co

Right of recission is lost if restitutio in integrum is not possible.

(ii)The promoter may have to account to the company for any profit he has made.

Gluckstein v Barnes

(iii)The company may be able to sue the promoter for damages for breach of fiduciary duty.

Re Leeds & Hanley Theatre of Varieties

(d) Payment of Promoters

A company cannot enter into a contract before incorporation - so a promoter has no legal claim against the company for fees and expenses.In Scotland, memorandum or articles of the company can be drawn up with a provision that the company will pay fees and expenses incurred in promoting the company.

(e) Suspension of Promoters

Company Directors Disqualification:

The court can make a disqualification order against a person who has been convicted of an indictable offence in connection with the promotion, formation or management of a company. The order can be for a maximum of 15 years - a person who is disqualified is prohibited from directly or indirectly taking part in the promotion or formation of a company.

2. **Pre-Incorporation Contracts**

A company has no contractual capacity prior to incorporation - so contracts cannot be made on its behalf.

(a) Effect of Pre-Incorporation Contract on the Company

Company cannot be bound to the contract because it had no contractual capacity

Company cannot ratify the contract because it was not in existence at the time the contract was made.

Company cannot sue or be sued on the contract.

(b) Effect of Pre-Incorporation Contract on Person Purporting to Contract on Behalf of the Company

At Common Law:

- If third party knew company was not yet in existence, he could make the purported agent liable on the contract. (Kelner v Baxter).

- if it appeared that the contract was with a company already in existence, the court might hold there was no contract at all, and neither the company nor the purported agent could enforce it.

Newborne v Sensolid (GB) Ltd

A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary,as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."

This means the "agent" will always be personally liable on the contract unless there is agreement to the contrary.

Exceptions:

(i) Companies Bought "Off the Shelf"

It does not apply where promoter makes contract on behalf of existing company he later buys. The company can then ratify the contract.

(ii) Companies struck off the Register

It does not apply where a company has been in existence but has been struck off the register. The section only applies where the company has never been in existence.

Cotronic (UK) Ltd v Dezonie

(c) Avoiding Personal Liability

(It does not apply if the parties have agreed that the promoter will not be personally liable. This requires express agreement - courts will not infer it.

Phonogram Ltd v Lane

(ii)Promoter and third party could make an agreement for innovation. (innovation = substitution of a new obligation for an old one)Promoter could agree with third party that promoter's liability will end when the company, once formed, enters new contract on same terms.

III. REGISTRATION OF A COMPANY

1. **The Registrar of Companies**

A company is registered by filing certain documents with the Registrar - he is a public official appointed by the Secretary of State. Duties include registering new companies, maintaining company files and supervising compliance with the administrative and disclosure requirements of the Companies Act. The Companies

Act 1985 (Electronic Communications) Order 2000 allows most documentation to be submitted in electronic form.

2. **Documents Required for Registration**

These are listed

(a) Memorandum of Association

(b) Articles of Association

These are the documents which make up the constitution of the company. The

Companies (Tables A - F) give suggested forms for memoranda and articles for different kinds of company.

A public company's memorandum must be in accordance with Table F of the Regulations. Public and Private companies limited by shares can adopt the articles in Table A of the Regulations - Table A will also apply automatically so far as not modified or excluded by the company's own articles.

The Memorandum must be signed (subscribed) unless submitted in electronic form, and must show the number of shares each subscriber is taking.

(c) A statement giving the address of the company's registered office and the details (name, address, nationality, occupation and date of birth) of the company's first directors and secretary.

Statement must be signed by the subscribers to the memorandum and include a written consent to act signed by those named as directors/secretary.

(d) Statutory Declaration of Compliance - a statement that all the requirements of the with regard to registration have been complied with.

The statutory declaration must be signed by a solicitor involved in the formation of the company or by one of the persons named as director or secretary.

3. **Incorporation**

If Registrar is satisfied that requirements of the Act have been met, he registers the documents and issues a certificate of incorporation. This is the company's "birth certificate". The Registrar publishes the issue of the certificate in the London or Edinburgh Gazette.

Certificate is conclusive evidence that registration requirements have been met. It is also conclusive evidence as to the date of incorporation.

Registrar is entitled to refuse to register a company where it has been formed for an unlawful purpose:

R v Registrar of Joint Stock Companies, ex p Moore

The court may also be petitioned to cancel a registration if it appears that the company has been registered for purposes which are unlawful or contrary to public policy: R v Registrar of Companies, ex p Attorney-General Trading Certificates. Private companies can begin to trade as soon as the certificate of incorporation has been issued.

Public companies require a further certificate - called certificate or trading certificate.

Registrar will only issue a certificate if satisfied that minimum capital requirements for a public company have been met.

A public company which begins to trade without a trading certificate commits a criminal offence - the company and any director responsible for the default can be convicted.

(This does not affect the validity of any contracts entered into by the company).

MODE AND CONSEQUENCES OF INCORPORATION

1. **Separate Legal Personality**

A company is a separate person in law from its members. This has several important consequences:

(a) Company is liable for its own debts .The shareholders are not liable for the debts and liabilities of the company and cannot be sued by the company's creditors. A shareholder can be a debtor or creditor of the company and can sue or be sued by the company.

Salomon v A Salomon & Co Ltd

Lee v Lee's Air Farming Ltd

(b) Limited Liability

The fact that the company is a separate person from its shareholders makes limited liability possibl .(Remember: the company's liability is always unlimited - it is the members' liability that is limited and that liability is to the company, not to the individual creditors.)

(c) Company Property

A company owns its own property - the shareholders have no direct right to this or
any share of it.Person who no longer wishes to be a member is only entitled to whatever price he can get for his shares.

A shareholder has no legal interest in the company's property and cannot insure it against theft, damage, etc.

Macaura v Northern Assurance Co.

(This may not apply to someone who is a secured debenture holder.)

(d) Contractual Capacity

A company has full contractual capacity - and only the company can enforce its contracts. (Companies may also be liable in negligence - shareholder cannot be made liable for the negligence of the company, unless he was also personally negligent).

(e) Crimes

A company can be convicted of a crime, regardless of whether its directors are also convicted. Some limitations:

- It has been held that a company cannot be convicted of a crime which requires the physical act of driving a vehicle:

Richmond on Thames Borough Council v Pinn & Wheeler

- A company cannot be convicted of any crime for which the only available sentence is imprisonment.

There are particular problems with crimes which require mens rea ("a guilty mind") - most common law crimes require mens rea, while many statutory offences involve strict criminal liability. In order to convict companies of common law crimes, courts may regard the mens rea of those individuals who control the company to be the mens rea of the company. However, the courts have been very restrictive in their use of this approach: Tesco Supermarkets v Nattrass

R v P&O European Ferries (Dover) Ltd

R v Kite and OLL Ltd

Transco plc v HM Advocate (No 1)

Crimes against the Company

A company can be the victim of crime. It is theft to steal from a company, even if those accused of the theft are also the company's only shareholders:

R v Philippou

(f) Perpetual Succession

Separate personality means that the existence of a company does not depend on the existence of its members. Membership may change or members may die – the company continues in existence until wound up.

(g) Borrowing

A company can borrow money and grant a security for a debt. Only a company can create a floating charge.

Floating charge = a kind of security for a loan. The charge "floats" because is does not attach to any particular asset, but floats over the company's assets as they exist from time to time. Certain events cause the charge to "crystallize" and attach to whatever assets the company has at the time.

USES AND ABUSES OF CORPORTE FORM:

Veil of Incorporation

Separate legal personality of company operates as a shield - the courts will not normally look beyond the façade of the company to the shareholders who comprise it. The screen separating the company from its individual shareholders and directors is commonly referred to as "the veil of incorporation".

Lifting of the Corporate Veil

Sometimes the law is prepared to examine the reality which lies behind the company façade - this is described as "lifting" or "piercing" the corporate veil.

(a) Statute

Some statutory provisions have the effect of piercing the corporate veil to make directors personally liable. Presumption is in favour of separate personality and courts will not normally infer that legislation is intended to pierce the corporate veil. Dibble & Sons Ltd v NUJ .Situations where "veil is lifted" by Statute

(i) Companies Act 2013 s.24 - where membership of a company falls below two for more than six months. Member who knows he is the sole member but continues to trade will be jointly and severally liable with the company for company debts contracted after the six month period has elapsed. (S.24 no longer applies to private limited companies)

(ii) - where public company trades without obtaining a trading certificate. If the company fails to comply with any obligations under a transaction within 21 days of being called on to do so, the directors of the company are jointly and severally liable to indemnify the third party against any loss.

(iii) Companies Act 2013, s.198 - if person acting on behalf of a company signs or
authorizes the signing of a bill of exchange, cheque, order for goods or similar document in which the company's name is not correctly stated, the person signing will be personally liable if the company fails to pay.

This provision is rigidly enforced:

Durham Fancy Goods v Michael Jackson (Fancy Goods) Ltd

(iv) Insolvency Act 1986, ss.213 & 214

s. 213 apply where company is being wound up and it appears that business has been carried on with intent to defraud creditors. s. 214 applies where company is in insolvent liquidation and the director(s) should have known this, but did not take sufficient steps to minimise losses to creditors.

In either case, the court can order that those involved make a contribution to the company's assets for the benefit of creditors.

(v) Insolvency Act 1986, s.216 & 217

The director of a company which has gone into insolvent liquidation cannot become a director of another company with the same name within a five year period. If he does he can be made personally liable for all the debts of the new company.

(vi) Company Directors Disqualification Act 1986, s.15

A person will be jointly and severally liable with the company for all the company's debts if he takes part in the management of the company while he is under a disqualification order.

NB: For the purposes of these provisions, "person" includes legal as well as natural persons.

(b) Common Law

The courts are willing to pierce the veil of incorporation in some circumstances:

(i) Fraud, Façade or Sham

Courts will examine the reality behind the company where the company was set up purely to evade a legal obligation, or to allow someone to do something he would not be allowed to do as an individual:

Gilford Motor Co v Horne

Jones v Lipman

Re Bugle Press Ltd

(ii) Agency

Court may lift the veil on the basis that one company is merely carrying on business as the agent of another - so that transactions entered into by the subsidiary can be regarded as transactions of the holding company:

Smith, Stone & Knight v Birmingham Corporation

Firestone Tyre & Rubber Co v Lewellin

But see: Adams v Cape Industries Ltd

(iii) Single Economic Unit

In the past, courts have been willing to lift the veil on the basis that a group of companies was not a group of separate persons, but a single economic unit:

DHN Food Distributors v Tower Hamlets

Later cases have doubted this principle:

Woolfson v Strathclyde Regional Council

Adams v Cape Industries Ltd

(iv) State of Hostility

In times of war, courts may regard a British company as an enemy alien if the company is controlled by nationals of an enemy country:

Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd

(v) Justice and Equity

Courts have sometimes been prepared to pierce the corporate veil where they feel this is in the interests of justice:

Re a Company (Case 31)

Creasey v Breachwood Motors Ltd

But see: Adams v Cape Industries Ltd

Ord v Belhaven Pubs Ltd

Yukong Lines Ltd v Rendsburg Investment Corp

THE CORPORATE CONSTITUTION

The constitution of a company consists of its memorandum of association and its articles of association.

1. **The Memorandum of Association (alteration)**

For a company limited by shares, the memorandum must contain the following:

(a) Name Clause

CA 2013, s.4 - the name of a public limited company must end with the words "public limited company", the name of a private limited company must end with the word "Limited". Abbreviations may be used instead: "plc" or "Ltd".

It is an offence to carry on business under a name which uses these words or abbreviations when not entitled to do so - the penalty is a fine.

Under CA, it is not possible to register a company name which includes the words "public limited company", "limited", "unlimited" or their abbreviations anywhere except at the end of the name.

There are also other restrictions on the use of names:

(i) Under CA, a company cannot be registered under a name which is identical to a name already registered.

(ii) A company cannot be registered under a name which is regarded as offensive or where the use of the name would constitute a criminal offence.

(iii) A company cannot be registered under a name which suggests that the company is connected with the government or a local authority - or under any name including a word listed in the Company and Business Names Regulations 1981 - unless the Secretary of State gives permission for the name to be used.

(iv) CA does not prevent the registration of a name very similar to that of another company - but if the similarity is deceptive and likely to lead to confusion, the established business may bring an action to restrain the new company from using the name. This is called a "passing-off" action. Court will take into account:

- Scope of pursuer's reputation - similarity of kind of business

Ewing v Buttercup Margarine Co Ltd

Dunlop Pneumatic Tyre v Dunlop Motor Co

Aerators Ltd v Tollitt

Exxon Corpn v Exxon Insurance

(v) A company must have its name printed on all business documents and it must be displayed at the registered office and all business premises.

A company which wishes to trade under a name other than its registered name comes within the provisions of the Business Names Act 1985.

(vi) Insolvency Act 1986, s.216 prevents the director of a company which has gone into insolvent liquidation from taking part in the management of any business trading under the same name as the insolvent company.

(vii) A company can change its name by special resolution (requires approval of holders of 75% of the company's shares).The Secretary of State can order a compulsory name change within 12 months of registration if he discovers the name is the same as or too like one previously registered. The Secretary of State can order a compulsory name change at any time if he discovers that the name gives a misleading impression of the activities of the company.

(b) Registered Office Clause

CA 2013 s.12 - the memorandum states whether registered office is to be in England and Wales or in Scotland.

This establishes company's nationality and its domicile, but not its residence.

Registered office is important because:

- It determines the jurisdiction in which the company can be sued.
- It is the address at which notices and documents must be served on the company.

- It is the address at which the company's registers and records must be kept and made available for inspection by the public. Address of registered office can be changed by ordinary resolution (simple majority vote of shareholders), provided this does not also change the domicile.

(c) Objects Clause

Company's memorandum must contain an objects clause - a clause which states the purpose or purposes for which the company was incorporated.

(i) **The Ultra Virus Rule/Doctrine:**

If the company does something beyond the scope of its objects clause, this is said to be ultra virus (beyond the powers of the company).Previously this was of great importance - transaction entered into beyond the company's powers was void and could not be enforced by or against the company, and it could not be ratified. This was called the ultra virus rule.

Ashbury Carriage and Iron Co v Riche

(ii) Abolition of the Rule

The Rule has been abolished by statute as far as third parties are concerned.

- The validity of an act done by a company shall not be called into question on the grounds of lack of capacity by anything in the company's memorandum. The rule still operates internally of the company - a shareholder can bring an action to restrain the company from carrying out an ultra virus act.

(The court will not restrain the company from doing anything it is already under a legal obligation to do)A director may be liable to the company for any costs incurred by the company on an ultra virus transaction. Potential problems can be avoided: CA 1985 s.3A allows a company to state in its memorandum that its object is to carry on business as a general commercial company. It can then carry on any trade or business whatsoever.

(iii) Change of Objects Clause

Under CA 2013, s.12 a company can change its objects clause by special resolution. Members (holding at least 15% of the nominal issued share capital) who did not consent to the change can apply to the court to have the alteration set aside.

Application must be made within 21 days of the resolution being passed. The alteration will not then come into effect unless it is confirmed by the court.

(d) Limitation of Liability Clause

If members' liability is to be limited, memorandum must have a clause to this effect.

(e) Capital Clause

Limited company with share capital must have a clause stating the total amount of share capital with which it proposes to be registered and the division of that capital into shares of a fixed amount. No minimum capital for private companies; £50,000 minimum for public companies.

(f) Association Clause

This is a clause stating that the subscribers are desirous of being formed into a company in pursuance of the memorandum. This is followed by signatures of subscribers (attested by one witness) and the number of shares each has agreed to take.

(g) Other Clauses

Public company must have clause stating it is to be a public company.

No other clauses are necessary but it is possible to have others.

(h) **Alteration of Memorandum**

CA 1985, s.2 (7) - a company cannot change its memorandum except in the circumstances and manner expressly provided for in the Act.

Memorandum can be altered to change company from public to private and vice versa - requires special resolution of shareholders.

Company can be changed from unlimited company to limited by special resolution -change from limited to unlimited requires written consent of all the members.

Reduction of share capital requires special resolution.

CA 2013 Sec. 66- any provision in the memorandum which could have been contained in the articles can be altered by special resolution.

- No member of a company can be bound to an alteration which makes him liable to take more shares or which increases his liability in any other way unless he consents in writing. When company resolves to alter its memorandum, a copy of the resolution, and the amended memorandum, must be sent to the Registrar within 15 days - failure to do this is a criminal offence punishable by a fine.

2. **Articles of Association, binding nature:**

(a) Articles Generally

The articles govern the internal management and organization of the company.

The articles are secondary to the memorandum - if there is conflict between the

Articles and the memorandum, the memorandum prevails.

Re Duncan Gilmore & Co Ltd Companies (Tables A - F) Regulations 1985 provides a model set of articles for a company limited by shares.

A company has three options:

(i) It may adopt Table A in full.

(ii) It may adopt Table A with modifications.

(iii) It can exclude Table A entirely and write its own articles.

(Table A has existed in various forms since 1862 - a company which adopts Table A will be bound by the Table A existing at the time it was incorporated, not a later version).Articles must be: (i) printed

(ii)Set out in numbered paragraphs

(iii)Signed by the subscribers to the memorandum

(b)**Alteration of Articles**

CA2013- articles can be altered by special resolution, which must be notified to the Registrar of Companies within 30 days. Any provision in the articles which would have the effect of making them unalterable is void. There are certain restrictions on the company's power to alter its articles:

(i) Express Statutory Restrictions cannot alter articles to increase a member's liability without his consent.

It sets out notice periods for calling meetings and states this cannot be shortened by a provision in the articles.

(ii) General Law and Public Policy

A provision in the articles which is contrary to public policy is void.

St Johnstone Football Club Ltd v SFA

The same would apply to any provision which was inconsistent with the companies legislation.

(iii) Court Order

Certain sections of the CA give the court power to order that no alteration be made to the articles.

(iv) Memorandum: An alteration to the articles which conflicts with the memorandum would be effectively void.

(v) Improper Use of Power to Alter Articles

The Power to alter the articles must be exercised bona fide for the benefit of the company as a whole. A member cannot challenge an alteration carried out in good faith for the benefit of the company, even if the alteration adversely affects his own rights.

Allen v Gold Reefs of West Africa Ltd

Greenhalgh v Arderne Cinemas Ltd

The courts will usually allow the alteration, but have sometimes found that it is not bona fide for the benefit of the company as a whole:

Brown v British Abrasive Wheel)

Dafen Tinplate Co Ltd v Llanelly Steel Co

3. Legal Effect of Memorandum and Articles/ Relationship:

The legal effect is described in s.10 CA 2013. The memorandum and articles operate as a contract between the company and its members, which both parties are bound to honor.

The effect of this is:

(a) Each member, in his capacity as a member, is bound to the company as if he personally had signed the memorandum and articles.

Hickman v Kent or Romney Marsh Sheep Breeders Association

(b)The company is bound to each member in his capacity as a member.

Wood v Odessa Waterworks Co

(c)The memorandum and articles do not constitute a contract binding the company or any member to an outsider - or to a shareholder in any other capacity than as a member. Eley v Positive Government Life Assurance Co Ltd

Beattie v E & F Beattie Ltd

(d) Provisions of the memorandum or articles can sometimes form part of an extrinsic contract **b**etween the company and an outsider. This can happen in one of three ways:

(i) Where provisions of the memorandum or articles are expressly incorporated into an express contract between the company and the outsider.

(ii) Where there is no express contract but a provision in the memorandum/articles is incorporated by implication from the conduct of the parties.

(iii) Where there is an express contract which is silent on a particular matter, and relevant provisions in the articles or memorandum are used to fill in any gaps. The company is not actually liable to the outsider on the basis of the articles, but under the extrinsic contract. Re New British Iron Co, ex parte Beckwith

(e) A member has a right to compel the company to act according to the articles even if not enforcing a right which is personal to himself as a member. Salmon v Quinn & Axtens Ltd

(f) The memorandum and articles constitute a contract between each member and every other member. Rayfield v Hands

Doctrine of Ultra-virus.

Introduction

The object clause of the Memorandum of the company contains the object for which the company is formed. An act of the company must not be beyond the objects clause, otherwise it will be ultra virus and, therefore, void and cannot be ratified even if all the members wish to ratify it. This is called the doctrine of ultra virus.

The word 'ultra' means beyond and 'virus' means powers. Thus the expression ultra vires means an act beyond the powers. Here the expression ultra vires is used to indicate an act of the company which is beyond the powers conferred on the company by the objects clause of its memorandum.

The application of the doctrine of ultra-virus was first demonstrated by the House of Lords in **Ashbury Railway Carriage & Railway Co. v. Riche**, where the mem of a co defined its objects: 1) to manufacture and sell railway carriages etc; 2) to carry on the business of mechanical engineers and general contractors. The company contracted with Richie to finance the construction of a railway line in Belgium and subsequently repudiated it as one beyond its powers. Richie brought an action for breach of contract. The House of Lords held that the contract was ultra virus and void. They were of the opinion that general terms like general contractors must be taken in reference to the main objects of the company which otherwise would authorize every kind of activity making the memorandum meaningless.

In the next leading case of **Attorney General v. Great Eastern Railway Co,** this doctrine was made clearer. The House of Lords held that the doctrine of UV as explained in **Ashbury case** should be maintained but reasonably understood and applied. Thus, an act which is incidental to the objects authorized ought not to be held as UV, unless it is expressly prohibited. Thus in **Evans v. Brunner, Mond & Co**, a chemicals manufacturing company was allowed to donate 1, 00,000 pounds to universities and scientific institutions for research as this would be conducive for the progress of the company.

In India the Supreme Court has affirmed the doctrine in **A Lakshmanaswami Mudaliar v. LIC**, where the donation made as charity was held ultra vires and the directors were held personally liable to compensate the money.

Thus an act of the company is ultra virus if it is not

a) Essential for the fulfillment of the objects stated in the memorandum;

b) Incidental or consequential to that attainment of its objects

c) Which the company is authorized to do by the Company's Act, in course of its business.

Present position

In England the doctrine of ultra virus has been restricted by the European Communities Act, 1972. Thus, as against a third person acting in good faith, the company can no longer plead that the contract was ultra-virus.

In India, the principles laid down in **Ashbury case** are still applied without restrictions and modifications. Thus, in India the ultra virus act is still regarded, as void and it cannot be validated by ratification.

Consequences

1) **Injunction**- whenever an ultra vires act has been or is about to be done, any member of the company can get an injunction to restrain the co from proceeding further.

2) **Personal liability of the directors-** it is the duty of the directors to see that the funds of the company are used only for legitimate business of the company. If the funds of the company are used for a purpose foreign to its memorandum, the directors will be personally liable to restore it.

3) **Breach of warranty of authority**- an agent who acts beyond the scope of his authority will be held personally liable. The directors of a company are its agents. If they induce an outsider to contract in a matter the company does not have power to act, they will be personally liable to him.

4) **Ultra virus acquired property**- if a company's money has been spent ultra virus in purchasing some property, the company's right over that property must be held secure. For that asset, though wrongfully acquired, represents corporate capital.

5) **Ultra virus contracts**- an ultra virus contract being void ab initio, cannot become intra virus by reason of estoppel, lapse of time, ratification, acquiescence or delay. No performance of either side can give an unlawful contract any validity or right of action upon it.

6) **Ultra virus torts**- a company can be made liable for an ultra vires tort committed, provided, it is shown that

a) The activity in the course of which it has been committed falls within the scope of the memo.

b) That the servant committed the tort.

Conclusion

It can be concluded that an UV act is void and cannot be ratified. It prevents the wrongful application of the company's assets likely to result in the insolvency of the company and thereby protects creditors. It also prevents directors from departing the object for which the company has been formed and, thus, puts a check over the activities of the directions. However, it has sometimes led to injustice of third parties acting in good faith.

Explain the Doctrine of Constructive Notice.(L)

Introduction

Every person who enters into any contract with a company will be presumed to know the contents of the memo of ass and the articles of ass. This is known as the doctrine of constructive notice.

The memorandum and the articles of association of every company are registered with the Registrar of Companies. The office of the Registrar is a public office. Hence, the memo and the articles of ass become public documents. It is therefore the duty of person dealing with a company to inspect its public documents and make sure that his contract is in conformity with their provisions.

As observed by Lord Hatherley, "…whether a person actually reads them or not, he is to be in the same position as if he had read them". Every person will be presumed to know the contents of the documents.

The practical effects of this rule can be observed in **Kotla Venkataswamy v. Ramamurthy**- The articles of a company provided that its deeds etc should be signed by the managing director, the secretary and a working director on behalf of the co. the plaintiff accepted a deed of mortgage executed by the secretary and a working director only. The plaintiff could not claim his deed. It was held that, "notwithstanding, therefore, she may have acted in good faith and the money may have been applied for the purposes of the company, the bond is nevertheless invalid."

Another effect of this rule is that a person dealing with the company is taken not only to have read the documents but also to have understood them according to their proper meaning. Further, there is a constructive notice not merely of the memo and art, but also of all the documents, such as special resolutions and particulars of charges which are required by the Act to be registered with the Registrar. But there is no notice of documents which are filed only for the sake of record, such as returns and account.

Statutory reform of constructive notice

The 'doctrine of constructive notice' is more or less an unreal doctrine. It does not take notice of the realities of business life. People know a company through its officers and not through its documents. Section 9 of the European Communities Act, 1972 has abrogated this doctrine. These provisions are now incorporated in sec 35 of the (English) Companies Act, 1985.

Position in India

The courts in India do not seem to have taken the doctrine seriously. For example, the Calcutta High Court in **Charnock Collieries Co Ltd. v. Bholanath**, enforced a security which was not signed in accordance with the company's articles.

Also, in Dehra **Dun Mussorie Electric Tramway Co. v. Jagmandardas,** the Allahabad High Court allowed an overdraft incurred by the managing agent of a company when under the articles the directors had no power to delegate their borrowing power.

Conclusion

Thus, the doctrine of constructive notice seeks too protect the company against the outsider by deeming that such an outsider had the notice of the public documents of the company. However, in India the courts with a view to protect the innocent third parties acting in good faith have not relied upon the doctrine seriously.

Explain the Doctrine of Indoor Management OR

Explain the Rule laid down in Royal British Bank v. Turquand.(L)

Introduction

The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, a person dealing with a company is bound to read only the public documents. He will not be affected by any irregularity in the internal management of the company.

The rule of indoor management had its genesis in **Royal British Bank v. Turquand-** The directors of the company borrowed a sum of money from the plaintiff. The company's articles provided that the directors might borrow on bonds such sums as may from time to time be authorized by a resolution passed at a general meeting of a company. The shareholders claimed that there was no such resolution authorizing the loan and, therefore, it was taken without their authority.

The company was however held bound for the loan. Once it was found that the directors could borrow subject to a resolution, the plaintiff had the right to assume that the necessary resolution must have been passed.

The rule is based on public convenience and justice and the following obvious reasons:
1.The internal procedure is not a matter of public knowledge. An outsider is presumed to know the constitution of a company, but not what may or may not have taken place within the doors that are closed to him

.

2. The lot of creditors of a limited company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of officials to act on its behalf.

The rule/doctrine is applied to protect persons contracting with companies from all kinds of internal irregularities. It has been applied to cover the acts of de facto directors, who have not been appointed but have only assumed office at the acquiescence of the shareholders or whose appointment is defective, or have exercised authority which could have been delegated to them under the Act but actually not delegated, or who has acted without quorum.

Exceptions to the rule

1) **Knowledge of irregularity** A person who has actual knowledge of the internal irregularity cannot claim the protection of this rule, because he could have taken steps for self-protection. A person who himself is a party to the inside procedure, such as a director is deemed to know the irregularities, if any.

T.**R Pratt (Bombay) Ltd. V. E.D. Sassoon & Co. Ltd**. - Company A lent money to Company B on a mortgage of its assets. The procedure laid down in the articles for such transactions was not complied with. The directors of the two companies were the same. Held, the lender had notice of the irregularity and hence the mortgage was not binding.

2) **Negligence and suspicion of irregularity**: where a person dealing with a company could discover the irregularity if he had made proper inquiries, he cannot claim the benefit of the rule of indoor management. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry.

3) **Forgery**: The rule in **Turquand's case** does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. In **Ruben v. Great Fingall Ltd**, a co was not held bound by a certificate issued by tit secretary by forging the

signature of two directions. However, in **Official Liquidator v. Commr of Police**, the Madras High Court held the company liable where the Managing Director had forged the signature of two other directors.

4) **Representation through articles**: A person who does not have actual knowledge of the company's articles cannot claim as against the company that he was entitled to assume that a power which could have been delegated to the directors was in fact so delegated. In **Rama Corporation v. Proved Tin and General Investment Co**, the plaintiffs contracted with the defendant co and gave a cheque under the contract. The director could have been authorized but in fact, was not. The plaintiffs had not read the articles. The director misappropriated the cheques and plaintiff sued. Held, director not liable as it was outside his authority.

UNIT -II

Prospectus

Definition

Issues:

Section 2(70)**-"** any document described or issued as a prospectus and includes any notice, circular, advertisement, or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any share in, or debentures of, a corporate body."

In simple words, any document inviting deposits from the public or inviting offers from the public for the subscription of shares or debentures of a company is a prospectus.

Contents

"The Companies Act contains a comprehensive set of regulations intended to protect the investing public from victimization". The intention of the Legislature in making these regulations, is "to secure the fullest disclosure of material and essential particulars and lay the same in full view of all the intending purchasers of shares"

The relevant rules and regulations are-

1. Every prospects must be dated
2. A copy of the prospectus must be registered with the Registrar and this fact must be stated on the face of the prospectus. The Registrar can refuse to register a prospectus which does not comply with the disclosure requirements (section 60). The prospectus must be issued within 90 days of its registration.
3. If the prospectus includes a statement purporting to be made by an expert, consent in writing of that expert must be obtained and this fact must be stated in the prospectus. (Section 58). The expert should be unconnected with the formation or management of the company. (Section 57). Section 59 provides that the expression "expert" includes an engineer, a valuer, an accountant and any other person whose profession gives authority to a statement made by him. Thus the expert becomes a party to the prospectus and liable for untrue statements, if any.
4. Section 56 requires every prospectus to disclose the matters specified in Schedule II of the Act. The information required to be disclosed refers to the objects of the company, details as to shares, managerial personnel, minimum subscription, underwriting, preliminary expenses, material contracts, etc.
5. Lastly, the "golden rule" –the public is at the mercy of the company promoters. Everything must, therefore, be stated with strict and scrupulous accuracy"

Statement in lieu of prospectus:-
Under Section 70(1) of the Companies Act,1956, a Public Company, having a share capital is required to file with the ROC, a statement called 'statement in lieu of prospectus' in the following cases, namely:-
a) Where it does not issue a prospectus on or with reference to its formation(because it feels that it can raise enough capital without inviting the subscription from the public)

or

b) where it issues a prospectus but has not proceeded to allot any of the shares **offered to the public for subscription** (because the issue has been a failure and the minimum subscription has not been received)
The 'Statement in lieu of Prospectus' must be filed with the ROC at least three(3)days before any allotment of shares or debentures is made.
Schedule III to the Companies Act contains a model form of a statement in lieu of prospectus to be filed with the ROC under the above two circumstances.
Further, it is provided in Section 44(1) of the Companies Act, 1956, that if a Private Company ALTERS its articles in such a manner that they no longer include the provisions WHICH, under clause (iii) of sub-section(1) of Section 3, are required to be included in the articles of a company in order to constitute it a Private Company, the Company shall:-
a) as on the date of the alteration, cease to be a private company AND
b) shall within a period of thirty(30)days after the said date, file with the ROC, either a prospectus or a statement in lieu of prospectus. Schedule IV contains a model form of a statement in lieu of prospectus when a private company is converted into a public company in pursuance of Section 44.

Kinds of prospectus

A prospectus is a brief, legal document formulated in a simple style and used to present to potential investors all important information about a given company (issue of securities, investment offering, etc) in relation to its . This document must be prepared by the company which files it with and gets it approved by the securities commission before the company may issue shares or debt to the public. The company sets out in its prospectus the securities offered for sale, the unit and total issue price, its management, its operations, how it intends to use the raised funds, and all relevant technical and financial information (underwriting agreement, dividend policy, capitalization, etc). A typical prospectus must contain all material information that would allow investors to make an informed decision as to whether to purchase the securities of the company that constitute the offer.

The most common types (classifications) of prospectus are red-herring prospectus, pink-herring prospectus, free-writing prospectus, abridged prospectus, and reconfirmation prospectus.

- **Red-herring prospectus**: a prospectus that contains most of the information that will be presented in the final prospectus but often does not mention a price and/or the number of securities. It can be distributed to potential investors after the registration statement for securities offering has been filed with the securities commission. The name is derived from the red legend printed across the body of the prospectus illustrating that the registration has been filed but is not yet effective. A red-herring prospectus is alternatively known as a preliminary prospectus.

- **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.
- **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.
- **Abridged prospectus**: a shorter version of the prospectus that includes all the most key elements of the typical prospectus. An abridged prospectus contains information very similar to the typical prospectus but in a concise and compact form. Both versions of the prospectus must comply with the disclosure requirements prescribed by the relevant securities commission.
- **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).

Other types that do exist in the global world of investment include shelf prospectus and deemed prospectus:

- **Shelf prospectus**: a prospectus that describes a set of unissued, but registered securities. It is used in situations where securities are issued in consecutive stages over a period of time because the size of issue is too large (and funds to be raised are enormous, making the filing of prospectus each time very expensive). Later on, an issuer will only need to file the so-called information memorandum with the relevant securities commission.
- **Deemed prospectus**: a prospectus that is deemed to have been made by the issuer, though it is actually offered to the public by a third party or the so-called issue house (Indian terminology). The issuer saves the underwriting expenses in selling its securities

Prospectus- Liability for Misstatements: statements in lieu of prospectus

1. **Rescission for misrepresentation**-the shareholder can also sue the company for rescission of the contract. Under this remedy the contract is cancelled and the money given by the shareholder refunded. Under Section 75 of the Contract Act, a person who lawfully rescinds a contract is entitled to compensation for any damage which he has sustained through non-fulfillment of the contract.

Loss of right of rescission

(a) **By affirmation**-if the allotter with full knowledge of the misrepresentation upholds the contract, he cannot afterwards rescind.

(b) **By unreasonable delay**- any man who claims to retire from a company on the ground that he was induced to become a member by misrepresentation, is bound to come at the earliest possible moment after he becomes aware of the misrepresentation." An action after 5 months was held to be too late.

(c) **By commencement of winding up**-the right of rescission is lost on the commencement of the winding up of the company. "But where a shareholder has started active proceedings to be relieved of his shares, the passing of the winding up order during their pendency would not prevent his getting the relief."

2. **Damages for deceit**-any person induced by a fraudulent statement in a prospectus to take shares, is entitled to sue the company for damages. He must prove the same matters in claiming damages for deceit as in claiming rescission of the contract. He cannot both retain the shares and get damages against the company. He must show that he has repudiated the shares and has not acted as a shareholder after discovering the fraud or misrepresentation.
3. **Compensation**-Section 62-every director, promoter and every person authorizes the issue of the prospectus is liable to pay compensation to the aggrieved party for loss or damage he may have incurred by reason of any untrue statement in the prospectus.

The persons who are liable to pay compensation are

(a) Directors at the time of issue of prospectus

(b) Persons who have authorized themselves to be named as directors in the prospectus

(c) Promoters

(d) Persons who have authorized the issue of prospectus.

Defences

(a) **Withdrawal of consent**-a director, etc is not liable if he withdrew his consent before the issue of the prospectus and it was issued without his consent or authority

(b) **Absence of consent**-where a prospectus was issued without the a directors', etc knowledge or consent, and on becoming aware of its issue, he forthwith gave reasonable public notice of that fact, he is not liable.

(c) **Ignorance of untrue statement**-a director, etc may sometimes be ignorant of the untrue statement contained in the prospectus. If after te issue of the prospectus and before allotment there under, he on becoming aware of any untrue statement therein withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reasons therefore, he is not liable.

(d) **Reasonable ground for belief**-if a director, etc has reasonable ground to believe that the statement was true and he, in fact, believed it to be true up to the time of allotment, he is not liable.

(e) **Statement of expert**-if the statement is a correct and fair representation or extract or copy of the statement made by an expert who is competent to make it and had given his consent and not withdrawn it, the director, etc is not liable.

Classification of company securities

A **security** is a tradable financial asset of any kind.[1] Securities are broadly categorized into:

- Debt securities, (e.g., banknotes, bonds and debentures)
- equity securities, (e.g., common stocks)
- Derivative securities, (e.g., forwards, futures, options and swaps).

The company or other entity issuing the security is called the issuer. A country's regulatory structure determines what qualifies as a security. For example, private investment pools may have some features of securities, but they may not be registered or regulated as such if they meet various restrictions.

Securities may be represented by a certificate or, more typically, "non-certificated", that is in electronic or "book entry" only form. Certificates may be bearer, meaning they entitle the holder to rights under the security merely by holding the security, or registered, meaning they entitle the holder to rights only if he or she appears on a security register maintained by the issuer or an intermediary. They include shares of corporate stock or mutual funds, bonds issued by corporations or governmental agencies, stock options or other options, limited partnership units, and various other formal investment instruments that are negotiable and fungible.

Classification

Securities may be classified according to many categories or classification systems:

- Currency of denomination
- Ownership rights
- Terms to maturity
- Degree of liquidity
- Income payments
- Tax treatment
- Credit rating
- Industrial sector or "industry". ("Sector" often refers to a higher level or broader category, such as Consumer Discretionary, whereas "industry" often refers to a lower level classification, such as Consumer Appliances. See Industry for a discussion of some classification systems.)
- Region or country (such as country of incorporation, country of principal sales/market of its products or services, or country in which the principal securities exchange where it trades is located)
- Market capitalization
- State (typically for municipal or "tax-free" bonds in the US)

Debt and equity

Securities are traditionally divided into debt securities and equities (see also derivatives).

Debt

Debt securities may be called debentures, bonds, deposits, notes or commercial paper depending on their maturity and certain other characteristics. The holder of a debt security is typically entitled to the payment of principal and interest, together with other contractual rights under the terms of the issue, such as the right to receive certain information. Debt securities are generally issued for a fixed term and redeemable by the issuer at the end of that term. Debt securities may be protected by collateral or may be unsecured, and, if they are unsecured, may be contractually "senior" to other unsecured debt meaning their holders would have a priority in a bankruptcy of the issuer. Debt that is not senior is "subordinated".

Corporate bonds represent the debt of commercial or industrial entities. Debentures have a long maturity, typically at least ten years, whereas notes have a shorter maturity. Commercial paper is a simple form of debt security that essentially represents a post-dated cheque with a maturity of not more than 270 days.

Money market instruments are short term debt instruments that may have characteristics of deposit accounts, such as certificates of deposit, Accelerated Return Notes (ARN), and certain bills of exchange. They are highly liquid and are sometimes referred to as "near cash". Commercial paper is also often highly liquid.

Euro debt securities are securities issued internationally outside their domestic market in a denomination different from that of the issuer's domicile. They include Eurobonds and euro notes. Eurobonds are characteristically underwritten, and not secured, and interest is paid gross. A euro note may take the form of euro-commercial paper (ECP) or euro-certificates of deposit.

Government bonds are medium or long term debt securities issued by sovereign governments or their agencies. Typically they carry a lower rate of interest than corporate bonds, and serve as a source of finance for governments. U.S. federal government bonds are called treasuries. Because of their liquidity and perceived low risk, treasuries are used to manage the money supply in the open market operations of non-US central banks.

Sub-sovereign government bonds, known in the U.S. as municipal bonds, represent the debt of state, provincial, territorial, municipal or other governmental units other than sovereign governments.

Supranational bonds represent the debt of international organizations such as the World Bank, the International Monetary Fund, regional multilateral development banks and others.

Equity

An equity security is a share of equity interest in an entity such as the capital stock of a company, trust or partnership. The most common form of equity interest is common stock, although preferred equity is also a form of capital stock. The holder of equity is a shareholder, owning a share, or fractional part of the issuer. Unlike debt securities, which typically require regular payments (interest) to the holder, equity securities are not entitled to any payment. In bankruptcy, they share only in the residual interest of the issuer after all obligations have been paid out to creditors. However, equity generally entitles the holder to a pro rata portion of control of the company, meaning that a holder of a majority of the equity is usually entitled to control the issuer. Equity also enjoys the right to profits and capital gain, whereas holders of debt securities receive only interest and repayment of principal regardless of how well the issuer performs financially. Furthermore, debt securities do not have voting rights outside of bankruptcy. In other words, equity holders are entitled to the "upside" of the business and to control the business.

Hybrid

Hybrid securities combine some of the characteristics of both debt and equity securities.

Preference shares form an intermediate class of security between equities and debt. If the issuer is liquidated, they carry the right to receive interest and/or a return of capital in priority to ordinary shareholders. However, from a legal perspective, they are capital stock and therefore may entitle holders to some degree of control depending on whether they contain voting rights.

Convertibles are bonds or preferred stock that can be converted, at the election of the holder of the convertibles, into the common stock of the issuing company. The convertibility, however, may be forced if the convertible is a callable bond, and the issuer calls the bond. The bondholder has about 1 month to convert it, or the company will call the bond by giving the holder the call price, which may be less than the value of the converted stock. This is referred to as a forced conversion.

Equity warrants are options issued by the company that allow the holder of the warrant to purchase a specific number of shares at a specified price within a specified time. They are often issued together with bonds or existing equities, and are, sometimes, detachable from them and separately tradable. When the holder of the warrant exercises it, he pays the money directly to the company, and the company issues new shares to the holder.

Warrants, like other convertible securities, increases the number of shares outstanding, and are always accounted for in financial reports as fully diluted earnings per share, which assumes that all warrants and convertibles will be exercised.

The securities markets

Primary and secondary market

Public securities markets are either primary or secondary markets. In the primary market, the money for the securities is received by the issuer of the securities from investors, typically in an initial public offering (IPO). In the secondary market, the securities are simply assets held by one investor selling them to another investor, with the money going from one investor to the other.

An initial public offering is when a company issues public stock newly to investors, called an "IPO" for short. A company can later issue more new shares, or issue shares that have been previously registered in a shelf registration. These later new issues are also sold in the primary market, but they are not considered to be an IPO but are often called a "secondary offering". Issuers usually retain investment banks to assist them in administering the IPO, obtaining SEC (or other regulatory body) approval of the offering filing, and selling the new issue. When the investment bank buys the entire new issue from the issuer at a discount to resell it at a markup, it is called a firm commitment underwriting. However, if the investment bank considers the risk too great for an underwriting, it may only assent to a best effort agreement, where the investment bank will simply do its best to sell the new issue.

For the primary market to thrive there must be a secondary market, or aftermarket that provides liquidity for the investment security—where holders of securities can sell them to other investors for cash. Otherwise, few people would purchase primary issues, and, thus, companies and governments would be restricted in raising equity capital (money) for their operations. Organized exchanges constitute the main secondary markets. Many smaller issues and most debt securities trade in the decentralized, dealer-based over-the-counter markets.

In Europe, the principal trade organization for securities dealers is the International Capital Market Association. In the U.S., the principal trade organization for securities dealers is the Securities Industry and Financial Markets Association,which is the result of the merger of the Securities Industry Association and the Bond Market Association. The Financial Information Services Division of the Software and Information Industry Association (FISD/SIIA) represents a round-table of market data industry firms, referring to them as Consumers, Exchanges, and Vendors. In India the equivalent organization is the securities exchange board of India (SEBI).

Public offer and private placement

In the primary markets, securities may be offered to the public in a public offer. Alternatively, they may be offered privately to a limited number of qualified persons in a private placement. Sometimes a combination of the two is used. The distinction between the two is important to securities regulation and company law. Privately placed securities are not publicly tradable and may only be bought and sold by sophisticated qualified investors. As a result, the secondary market is not nearly as liquid as it is for public (registered) securities.

Another category, sovereign bonds, is generally sold by auction to a specialized class of dealers.

Listing and OTC dealing

Securities are often listed in a stock exchange, an organized and officially recognized market on which securities can be bought and sold. Issuers may seek listings for their securities to attract investors, by ensuring there is a liquid and regulated market that investors can buy and sell securities in.

Growth in informal electronic trading systems has challenged the traditional business of stock exchanges. Large volumes of securities are also bought and sold "over the counter" (OTC). OTC dealing involves buyers and sellers dealing with each other by telephone or electronically on the basis of prices that are displayed electronically, usually by commercial information vendors such as Super Derivatives, Reuters and Bloomberg.

There are also euro securities, which are securities that are issued outside their domestic market into more than one jurisdiction. They are generally listed on the Luxembourg Stock Exchange or admitted to listing in London. The reasons for listing euro bonds include regulatory and tax considerations, as well as the investment restrictions.

Market

London is the centre of the euro securities markets. There was a huge rise in the euro securities market in London in the early 1980s. Settlement of trades in euro securities is currently effected through two European computerized clearing/depositories called Euroclear (in Belgium) and Clear stream (formerly Cede bank) in Luxembourg.

The main market for Eurobonds is the EuroMTS, owned by Borsa Italiana and Euronext. There are ramp up market in Emergent countries, but it is growing slowly.

Nature of securities

Certificated securities

Securities that are represented in paper (physical) form are called certificated securities. They may be bearer or registered.

DRS securities

Securities may also be held in the Direct Registration System (DRS), which is a method of recording shares of stock in book-entry form. Book-entry means the company's transfer agent maintains the shares on the owner's behalf without the need for physical share certificates. Shares held in un-certificated book-entry form have the same rights and privileges as shares held in certificated form.

Bearer securities

Bearer securities are completely negotiable and entitle the holder to the rights under the security (e.g. to payment if it is a debt security, and voting if it is an equity security). They are transferred by delivering the instrument from person to person. In some cases, transfer is by endorsement, or signing the back of the instrument, and delivery.

Regulatory and fiscal authorities sometimes regard bearer securities negatively, as they may be used to facilitate the evasion of regulatory restrictions and tax. In the United Kingdom, for example, the issue of bearer securities was heavily restricted firstly by the Exchange Control Act 1947 until 1953. Bearer securities are very rare in the United States because of the negative tax implications they may have to the issuer and holder.

Registered securities

In the case of registered securities, certificates bearing the name of the holder are issued, but these merely represent the securities. A person does not automatically acquire legal ownership by having possession of the certificate. Instead, the issuer (or its appointed agent) maintains a register in which details of the holder of the securities are entered and updated as appropriate. A transfer of registered securities is affected by amending the register.

Non-certificated securities and global certificates

Modern practice has developed to eliminate both the need for certificates and maintenance of a complete security register by the issuer. There are two general ways this has been accomplished.

Non-certificated securities

In some jurisdictions, such as France, it is possible for issuers of that jurisdiction to maintain a legal record of their securities electronically.

In the United States, the current "official" version of Article 8 of the Uniform Commercial Code permits non-certificated securities. However, the "official" UCC is a mere draft that must be enacted individually by each U.S. state. Though all 50 states (as well as the District of Columbia and the U.S. Virgin Islands) have enacted some form of Article 8, many of them still appear to use older versions of Article 8, including some that did not permit non-certificated securities.[5]

Global certificates, book entry interests, depositories

To facilitate the electronic transfer of interests in securities without dealing with inconsistent versions of Article 8, a system has developed whereby issuers deposit a single global certificate representing all the outstanding securities of a class or series with a universal depository. This depository is called The Depository Trust Company, or DTC. DTC's parent, Depository Trust & Clearing Corporation (DTCC), is a non-profit cooperative owned by approximately thirty of the largest Wall Street players that typically act as brokers or dealers in securities. These thirty banks are called the DTC participants. DTC, through a legal nominee, owns each of the global securities on behalf of all the DTC participants.

All securities traded through DTC are in fact held, in electronic form, on the books of various intermediaries between the ultimate owner, e.g. a retail investor, and the DTC participants. For example, Mr. Smith may hold 100 shares of Coca Cola, Inc. in his brokerage account at local broker Jones & Co. brokers. In turn, Jones & Co. may hold 1000 shares of Coca Cola on behalf of Mr. Smith and nine other customers. These 1000 shares are held by Jones & Co. in an account with Goldman Sachs, a DTC participant, or in an account at another DTC participant. Goldman Sachs in turn may hold millions of Coca Cola shares on its books on behalf of hundreds of brokers similar to Jones & Co. Each day, the DTC participants settle their accounts with the other DTC participants and adjust the number of shares held on their books for the benefit of customers like Jones & Co. Ownership of securities in this fashion is called beneficial ownership. Each intermediary holds on behalf of someone beneath him in the chain. The ultimate owner is called the beneficial owner. This is also referred to as owning in "Street name".

Among brokerages and mutual fund companies, a large amount of mutual fund share transactions take place among intermediaries as opposed to shares being sold and redeemed directly with the transfer agent of the fund. Most of these intermediaries such as brokerage firms clear the shares electronically through the National Securities Clearing Corp. or "NSCC", a subsidiary of DTCC.

Other depositories: Euro clear and Clear stream

Besides DTC, two other large securities depositories exist, both in Europe: Euro clear and Clear stream.

Divided and undivided security

The terms "divided" and "undivided" relate to the proprietary nature of a security.

Each divided security constitutes a separate asset, which is legally distinct from each other security in the same issue. Pre-electronic bearer securities were divided. Each instrument constitutes the separate covenant of the issuer and is a separate debt.

With undivided securities, the entire issue makes up one single asset, with each of the securities being a fractional part of this undivided whole. Shares in the secondary markets are always undivided. The issuer owes only one set of obligations to shareholders under its memorandum, articles of association and company law. A share represents an undivided fractional part of the issuing company. Registered debt securities also have this undivided nature.

Fungible and non-fungible security

The terms "fungible" and "non-fungible" is a feature of assets.

If an asset is fungible, this means that if such an asset is lent, or placed with a custodian, it is customary for the borrower or custodian to be obliged at the end of the loan or custody arrangement to return assets equivalent to the original asset, rather than the specific identical asset. In other words, the redelivery of fungibles is equivalent and not in specie. For example, if an owner of 100 shares of IBM transfers custody of those shares to another party to hold for a purpose, at the end of the arrangement, the holder need simply provide the owner with 100 shares of IBM identical to those received. Cash is also an example of a fungible asset. The exact currency notes received need not be segregated and returned to the owner.

Undivided securities are always fungible by logical necessity. Divided securities may or may not be fungible, depending on market practice. The clear trend is towards fungible arrangements.

Duties of court to protest invest of shareholder and creditor

The court is burdened with onerous duties . the basic function of the court, however is look after the interest of creditor and shareholder.

Interest of creditor

Creditor are likely to be the hit only when the reduction diminishes the liability of share holder to pay the un called capital or whrer the proposed reduction involves payment to any share holder of any paid up share capital. Officers of company concealing the names of creditor are made punishable.

Interest of shareholder

The second duty to court is to look after the interest of the shareholder. the proposed scheme of reduction must be reasonable and fair between all the classes of shareholder in the company if the capital of a company consists of only one class of shares and all of them are to bear the reduction proportionately the scheme is obviously fair and must be confirmed Marwari Store Ltd. V Gouri Shankar Goenka Air 1936 Cal 327.

SHARES CAPITAL AND

Nature of Shares and Share Capital

(a) What is a Share?

A share is the unit of measure for determining a member's interest in the company.

The memorandum states the nominal value for each share - members must contribute at least this amount.

(b) **Share Capital**

There are different aspects to this: Authorized Share Capital

Total value of shares the company is allowed to allot - also known as nominal or registered capital.

Allotted Share Capital

Value of shares the company has actually allotted to members.

Paid-up Share Capital Amount that members have paid on their shares, excluding any premium.

Called-up Share Capital

Paid-up capital + any amount members have been called on to pay.

Uncalled Capital and Reserve Capital

Uncalled capital is the amount owing on partly paid shares which members have not yet been called on to pay.

Reserve capital is uncalled capital the company has resolved not to call unless the company is wound up.

2. **Classification of Shares**

(a) Typical Rights of Shareholders

Member's rights are detailed in the Articles, but the following are typical:

- Right to control company through voting at meetings
- Right to participate in distribution of profits
- Right to participate in surplus assets in a winding up.

(b) Preference Shares

Give preferential right to a dividend of fixed amount or fixed percentage per share -this dividend is paid before anything is paid to ordinary shareholders. Right to dividend is normally cumulative. Preference shares usually give a preferential right to repayment of capital on a winding up. Preference shareholders normally have restrictions placed on their power to vote at general meetings.

(c) Ordinary Shares

Dividend depends on company profits and there is no automatic right to a dividend

Share general principles of Issue **and Allotment of Shares**

Issuing is the process by which members take shares in the company.

A share is allotted when someone acquires an unconditional right to be entered in the register of members.

(a) Allotment Contracts

Usual rules of contract apply. There must be an offer met by an acceptance. A prospectus is not an offer to sell shares; it is an invitation to treat.

It is possible to have a conditional contract which gives an option to demand the allotment of shares at a later date. These options can be traded like shares.

(b) Authorization of Allotment

Directors cannot allot shares without authority given by the existing shareholders or the articles. The authority must state the maximum number of shares to be allotted. It is a criminal offence to allot shares without proper authorization, but the allotment remains valid.

(c) Pre-emption Rights

The existing shareholders must be offered the opportunity to buy any new issue of shares before they are offered elsewhere. Shareholder must be given 21 days to decide whether to buy. Private companies can avoid pre-emption rights.

4. **Transfer of Shares**

CA 2013, s.56 - shares must be transferable.

Private companies usually restrict members' rights to transfer shares.

(a) Transfer of Unlisted Shares - transferor signs stock transfer form - form is given to transferee with share certificate. - if only part of shareholding is being transferred, form and certificate are sent to the company instead, for certification. - Transferee sends form and certificate to company, which enters him on register of members. New share certificate is issued after two months.

(b) Transfer of Listed Shares

- can be done as for unlisted shares.

- Companies that support CREST can transfer listed shares electronically -records are computerized and no share certificate is issued.

(c) Transmission of Shares

Transmission is the automatic transfer of shares by operation of law. It takes place in a number of circumstances.

(i) Death of Shareholder

Shares of deceased shareholder transmit to his executor to deal with as directed by the will or the rules of intestacy.

(ii) Insanity of Shareholder

If shareholder becomes a patient under the Mental Health Acts and a public guardian is appointed, the shares transmit to the public guardian.

(iii) Bankruptcy of Shareholder

Shares held by a bankrupt transmit to his trustee in bankruptcy.

Holder of shares through transmission has the same rights and benefits as a member even if not registered as a member - but he cannot vote. He can choose to be registered and can then vote.

5. **Share Capital, reduction of share capital**

Members are entitled to a dividend out of profits. A company cannot return capital to the members. This provision operates to protect creditors.

CA 2013 sets out some legal methods by which the capital of a company can be returned to the members.

(a) Reduction of Capital

CA 2013 sec.66: A company can reduce its capital if this is authorised by the articles and the reduction is confirmed by the court. It also requires alteration of the share capital as stated in the memorandum - this needs a special resolution.

The court will only confirm the reduction if satisfied that the company's creditors have been paid or have consented to the reduction.

(b) Redeemable Shares

A company can issue redeemable shares if power to do so is given by the articles.

The shares give a temporary membership of the company - the nominal value (and sometimes a premium) is paid to the shareholder at the end of the period.

When shares are redeemed they must be cancelled by the company. The company must make up its capital by issuing new shares or transferring funds from the profit and loss account to the capital redemption reserve account. Any premium payable on redemption must be paid out of profits. Private companies can pay for redemption completely out of capital - this needs a special resolution and a declaration from the directors that the assets will exceed liabilities after the payment is made.

(c) Company purchasing its own Shares

Generally this is prohibited but allows a company to buy its own shares in the circumstances provided by the Act and if authority is given in the company's articles.

(i) Market Purchase

Must be authorized by ordinary resolution, which must state maximum number of shares to be purchased and minimum and maximum price to be paid. The authority cannot last more than 18 months.

(ii) Off-Market Purchase

This requires a special resolution approving the specific purchase contract. If the company is a public company, the authority to buy must expire within 18 months.

When a company has bought its own shares it must cancel them and compensate for lost capital by a new share issue or a transfer of profits to the capital redemption reserve.

Debentures

The most usual form of borrowing by a company is by the issue of debentures. According to Section 2(12)**,** 'debenture' includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not. Section 2(12) however does not explain as to what a debenture really is.

'Debenture' means a document which either creates a debt or acknowledges it.-**Levy v Abercorris Slate & Slab Co.**

Kinds of debentures

Classification according to negotiability

1. **Bearer debentures/unregistered debentures**-these debentures are payable to the bearer. These are regarded as negotiable instruments and are transferable by delivery and a bona fide transferee for value is not affected by the defect in the title of the prior holder.
2. **Registered debentures**-these are debentures which are payable to the registered holders. A holder is one whose name appears both on the debenture certificate and in the company's register of debentures.

Classification according to security

1. **Secured debentures**-debentures which create some charge on the property of the company are known as secured debentures. The charge may be a fixed charge or floating charge.
2. **Unsecured or naked debentures**.-debentures which do not create any charge on the assets of the company are known as unsecured debentures. The holders of these debentures like ordinary unsecured creditors may sue the company for recovery of debt.

Classification according to permanence

1. **Redeemable debentures**-debentures are usually issued on the condition that they shall be redeemed after a certain period. Such debentures are known as redeemable debentures. They may be re-issued after redemption in accordance with the provisions of Section 121.
2. **Irredeemable or perpetual debentures**-when debentures are irredeemable, they are called perpetual debentures.

Classification according to convertibility

1. **Convertible debentures**-these debentures give an option to the holders to convert them into preference or equity shares at stated rates of exchange, after a certain period.
2. **Non-convertible debentures**-these debentures do not give any option to their holders to convert them into preference or equity shares. They are to be duly paid as and when they mature.

Classification according to priority

1. **First debentures**-these are the debentures which are to be repaid in priority to other debentures which may be subsequently issued.
2. **Second debentures**-these are the debentures which are to be paid after the 'first debentures' have been redeemed.

Remedies of debenture holders

The remedies of a debenture-holder of a company vary according to whether he is secured or unsecured. An unsecured debenture-holder is in exactly the same position as an ordinary trade creditor. Like any other unsecured creditor he has two remedies-

1. He may sue for his principal and interest
2. He may, if he wishes, petition under Section 439 for the winding up of the company by the Court on the ground that the company is unable to pay its debts.

A **secured debenture-holder** has both the above remedies in addition to the following-

1. **Debenture-holder's action**-he may sue on behalf of himself and all other debenture-holders of the same class to obtain payment and enforce his security by sale. If several debenture holders sue separately, the Court can consolidate their suits into one.

2. **Appointment of receiver**-he may appoint a receiver if the conditions which give him power to do so are fulfilled or apply to the Court in a debenture-holders' action to appoint one.

3. **Foreclosure**-he may apply to the Court for foreclosure of the company's right to redeem the debentures. Foreclosure is a process by which the mortgagor, failing to repay the money lent on the security of property, is compelled to forfeit his right to redeem the property.

4. **Sale**-he may sell the property charged as security if an express power to do so is contained in the terms of issue of debentures. He may also have the property sold through trustees if such power is given by the debenture trust deed.

5. **Proof of balance**-if the company is insolvent and his security is insufficient, he may value his security and prove for the balance. In the alternative, he may surrender his security and prove for the whole amount of his debt.

Floating Charges

A floating charge is an equitable charge which is created on some class of property which is constantly changing, e.g, a charge on stock-in-trade, trade debtors, etc. The company can deal in such property in the normal course of its business until the charge becomes fixed on the happening of an event. The main idea behind floating charge is to allow the company to carry on its business in the ordinary course as if no charge had been created. Debentures usually create a floating charge on the assets of a company.

Characteristics: In Re Yorkshire Wool combers' Ass. Ltd-

1. it is a charge on a class of assets of the company both present and future
2. that class of assets is one which, in the ordinary course of the business of the company, is changing from time to time
3. It is contemplated by the charge that, until some steps are taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way.

Consequences of a floating charge

The company can-

1. deal in the property on which a floating chare is created, till the charge crystallizes

2. notwithstanding the floating charge, create specific mortgages of its property having priority over the floating charge
3. Sell the whole of is undertaking if that is one of its objects in the Memorandum, in spite of the floating charge on the undertaking.

Crystallization

Crystallization gets fixed when

1. the company goes into liquidation
2. the company ceases to carry on business
3. a receiver is appointed
4. a default is made in paying the principal and/or interest and the holder of the charge brings an action to enforce his security.

UNIT-III

MEETINGS: KIND AND PROCEDURE

1. **Shareholders and Shares**

Day to day management of a company is in the hands of the directors, not the shareholders - but the shareholders retain some important powers - many decisions require a resolution of the shareholders and cannot be decided by the directors alone.

(a) Who is a "Member?"

(i) Anyone who subscribes the memorandum.

(ii)Any other person who agrees to become a member and whose name is entered on the register of members.

(b) Register of Members

It requires every company to keep a register of its members. The register must show: - name and address of each member. - date person became a member and, where applicable, the date he ceased to be a member.- the number of shares held by each member and the amount paid on them.

2. **Kinds of Meetings**

(a) Annual General Meeting

Most companies must hold an AGM.

(i) CA 2013s.96 provides that an AGM must be held every calendar year with not more than 15 months between meetings. A newly incorporated company must hold its first AGM within 15 months of incorporation. (ii) if a company does not hold an AGM as required, any member can apply to the Secretary of State to call or to direct the calling of the meeting. (iii) - members of a private company can choose to dispense with the holding of an AGM by elective resolution - but any member of such a company can require that an AGM be held in a particular year by giving notice at least 3 months before the end of the year. (iv) - if it is impracticable to call a meeting or conduct a meeting in the manner prescribed by the company's articles, any member or director who would be entitled to vote can apply to the court which can order the meeting to be called or held.

Re Sticky Fingers Restaurant Ltd

(b) Usual Business of an AGM

(i) Directors lay before the company annual accounts and reports for t the most recent financial period.

(ii) Auditor's term of office ends at AGM, so they must be re-appointed or new auditors must be appointed.

(iii) Director's recommendation for the dividend to be paid to shareholders will be voted on. (iv) The Articles may provide that directors are to retire in rotation. Some directors will retire at the AGM and must be re-appointed or replaced.

(v) Resolutions may be required to pay directors' and auditors' fees.(Now normally fixed by contract). (vi)Shareholders may have their own resolutions placed on the agenda.

(c) Extraordinary General Meetings Any meeting which is not an AGM. Table A provides that only directors can call an

EGM, unless there are too few directors in the UK to make up a quorum - then any member can call one.

7. Directors must call an EGM if requisitioned by holders of 10% of the paid up capital of the company. Power of the court to order the holding of an AGM also applies to EGMs.

Public company must hold an EGM if the company's net assets have fallen to less than half of its called up capital. Meeting must be called within 28 days of the directors becoming aware of the loss of capital, and must be held within 56 days of that date.

Where auditor has resigned and has made a statement of circumstances he thinks should be brought to the attention of creditors and shareholders' - the auditor can requisition the directors to hold an EGM so that he can explain the circumstances of his resignation.

3. **Convening Meetings**

(a) Notice of Meetings

(i) Authority to Call a Meeting

Authority normally rests with the directors.

If person without authority issues notice of a meeting the notice is void.

(ii) Who must be notified? Depends on the Articles. Table A provides that notice must be given to all shareholders, directors and auditors.

Failure to notify someone entitled to notice will invalidate the meeting unless the failure was purely accidental:

Young v Ladies Imperial Club

Re West Canadian Collieries Ltd

(iii) Method of Service

Articles can provide for any method - Table A requires written notice to be delivered personally or by post

Bradman v Trinity Estates Ltd

The Companies Act 1985 (Electronic Communications) Order 2000 allows notice to be given by electronic means such as via a website provided the member agrees to being given notice in this way. (iv) Length of Notice

Articles can set any length of notice, but by s.369, notice must be at least 21 days for an AGM, or 14 days for an EGM - unless all members agree shorter notice period.

(v) Contents of Notice

Set out by articles. Table A requires notice to specify date, time and place of meeting and a general indication of business to be dealt with. Notice must state if meeting is an AGM.

If meeting is being convened to pass a special or extraordinary resolution, or a resolution for which special notice is required, these resolutions must be set out in full in the notice.

Notice will be invalid unless it contains enough detail to allow a reasonable shareholder to judge whether he needs to attend the meeting.

Baillie v Oriental Telephone & Electric Co Ltd

(vi) Special Notice

Some kinds of resolution require special notice to be given: - resolution to dismiss a director - resolution to appoint replacement director at same meeting as dismissal. - Appointment or retention of public company director aged 70 or over. - Resolutions concerning dismissal or appointment of auditors.

Special notice = at least 28 days notice to the company of the intention to move the resolution. The company must then give the members at least 21 days notice of the meeting.

4**. Procedure of meeting**

(a) Quorum

"Quorum" = the minimum number of persons who must be present before the meeting will be valid.

Articles can provide for any quorum:

Table A requires two members entitled to vote, or their proxies.

If Table A has been excluded without providing an alternative, requires two members personally present.

Single Member Private Companies - one member will form a quorum, notwithstanding anything in the articles.

A meeting held without a quorum cannot validly transact any business:

Sharp v Dawes

(b) Chairman

Usual to have a chairman to preside over a meeting - Table A provides this should be the chairman of the board or another director nominated by the board.

Chairman's role is to keep order - he/she has no power to adjourn or dismiss a meeting unless this is specified in the articles.

Chairman has no casting vote unless given one by the articles. (Table A gives a casting vote.)

(c) Minutes

Companies must keep minutes of general meetings at the registered office for inspection by members.

Chairman signs the minutes - they then become prima facie evidence of what occurred at the meeting.

(d) Voting and Proxies - all companies must allow a member who cannot attend a meeting to allow a proxy to vote in his

Appointment of proxy must be in writing and lodged with company at least 48 hours before meeting.

There are two methods of voting at company meetings:

(i) Show of Hands

Voting can be by show of hands unless articles provide otherwise.

Each member has just one vote regardless of number of shares he has - hands are counted and the result declared by the chairman. Result is conclusive once recorded in the minutes.

Proxies cannot vote on a show of hands unless the Articles allow this.

(ii) Voting by Poll

A company cannot refuse a demand for a poll made by: - at least 5 members having the right to vote, or - any member/members representing one-tenth or more of the total voting rights.

Members normally have one vote per share in a poll.

Members are entitled to exercise their votes according to their own interests.

Northern Counties Securities Ltd v Jackson & Steeple

5. **Resolutions**

(a) Special Resolutions

Requires vote of 75% of members present in person or by proxy, who are entitled to vote and do vote.

Meeting at which resolution is proposed must have had at least 21 days notice, unless shorter period was agreed by majority in number of members holding at least 95% of the shares.

Certain matters can only be decided by special resolution and the articles cannot provide to the contrary.

Printed copy of special resolution must be sent to Registrar within 15 days of it being passed.

(b) Extraordinary Resolutions

Same requirements as for special resolution except for notice period required, which depends on type of meeting. (21 days for AGM, 14 days for EGM - shorter notice possible by agreement).

Extraordinary resolution must be used: - for voluntary winding up when company cannot pay its debts (IA 1986 s.84 (1)) - to authorize a liquidator to make an arrangement with creditors in members' voluntary winding up (IA 1986 s.165 (2))

(c) Elective Resolutions

Apply only to private companies. Lists circumstances - e.g. election to dispense with AGM.

Requires 21 days notice of meeting - resolution must be supported by all members entitled to attend and vote. Must be filed with Registrar within 15 days of being passed.

An elective resolution can be revoked by an ordinary resolution - which must also be filed with the Registrar within 15 days.

(d) Ordinary Resolutions

Most matters can be decided by ordinary resolution and some must be (e.g. decision to remove a director).

Ordinary resolution requires simple majority - 50% + 1 vote of members present in person or by proxy.

(e) Written Resolutions allows private company to pass resolutions without holding

Written resolution is passed by being signed by or on behalf of all members who would be entitled to attend and vote at a meeting.

Companies cannot be restricted from using s.381A procedure by anything in the articles.

Resolutions to remove a director or an auditor before his term of office has expired cannot be taken by written resolution.

DIRECTORS

1. **Appointment of Directors**/kinds of director

Sec 149- public companies must have at least two directors, private companies at least one.

(a) First Directors

Persons named in the statement of first directors and secretary submitted on registration are deemed to be appointed as directors as soon as company is incorporated.

(b) Subsequent Directors

Appointed in manner laid down by Articles - usually ordinary resolution.

(c) Persons who cannot be Appointed Directors

(i) Share Qualification

If the articles provide for a share qualification, director must obtain this within two months.

(ii) Over-age Persons

No upper age limit for private company unless articles so provide.

Person cannot be appointed as director of a public company if he has reached the age of 70

(iii) Undercharged Bankrupts

CDDA 1986, s.11 - criminal offence unless permission given by the court.

Applications for Permission are usually refused:

Re Altim Pty Ltd

Acting in contravention of s.11 is a strict liability offence:

R v Brockley

(iv) Persons Disqualified by the Court

CDDA 1986 - it is a criminal offence to act as director of a company while under a disqualification order.

Court may make a disqualification order where:

- Where a person is convicted of an indictable offence in relation to the company (Maximum period - 15 years).

- Person has been in persistent default in filing returns or documents with the Registrar (Maximum 5 years).

- Company is being wound up and person has apparently committed fraud in relation to the company (Maximum period - 15 years.)

- DTI requests a disqualification order in the public interest after an investigation. (Maximum 15 years.)

- Person has been found liable for wrongful trading under s.214 Insolvency Act

(Maximum 15 years)

The court must make a disqualification order where:

- a person is director of a company which has become insolvent and that person's conduct makes him unfit to be concerned in the management of a company.

(Minimum 2 years, Maximum 15 years)

R v Austen

Re Sevenoaks Stationers (Retail) Ltd

Re Firedart Ltd

(v) Auditors and Secretaries

- Auditor of a company cannot also be a director of it.

- Secretary of a company cannot also be the sole director of it.

2. **Proceedings of Directors and meeting**

(a) Meetings

(i) Notice

No prescribed notice period - directors are entitled to reasonable notice of board meetings.

Re Homer District Gold Mines

Browne v La Trinidad

Bentley Stephens v Jones

Shaw v Tati Concessions Ltd

(ii) Quorum for Board Meetings Whatever the articles provide. A director with a personal interest in the matter being discussed does not count toward the quorum:

Re North Eastern Insurance Co Ltd

(iii) Minutes

Minutes must be recorded, but shareholders have no right to inspect them.

3. **Powers of Directors**

Directors have sole power to manage the business of the company, but power vests in the shareholders if the directors are unable or unwilling to act:

Barron v Potter

A director who exceeds his powers may be liable for any loss the company suffers, unless the shareholders ratify his actions:

Bamford v Bamford

Shareholders can now also ratify ultra viru transactions, unless this amounts to a fraud on the minority. Third parties are protected by and can enforce transactions even if directors exceed their powers.

4. **Duties of Directors**

(a) Fiduciary Duties

Director's fiduciary duties are owed only to the company, not to the individual shareholders.

Percival v Wright

Allan v Hyatt

The Fiduciary Duties are:

(i) A duty to act bona fide for the benefit of the company as a whole:

Re W & M Roith Ltd

(ii) A duty to use powers only for the purpose for which they were conferred:

Howard Smith v Ampol Petroleum

(iii) A duty to avoid a conflict between his own interests and those of the company.

Aberdeen Railway Co v Blaikie Bros

A director cannot vote on any matter in which he has a personal interest, and, by a director with any interest in a proposed contract must disclose this to the board:

Guinness plc v Saunders

Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald

(iv) A duty not to make a personal profit out of his connection with the company.

If he does he must account for the profit to the company:

Boston Deep Sea Fishing Ltd v Ansell)

Regal (Hastings) Ltd v Gulliver

IDC Ltd v Cooley

The shareholders can vote to permit the director to keep the profit - unless there is a fraud on the minority:

Cook v Deeks

(b) Duty of Care and Sk

Relates to director's competence in managing the company. Traditionally, the duty has been minimal - director is judged according to his own knowledge and experience:

Re City Equitable Fire Insurance Co Ltd

Re Brazilian Rubber Plantations & Estates

Dorchester Finance Co Ltd v Stebbing

More recent cases suggest a move to a tougher standard - the level of skill reasonably to be expected from a person undertaking the same duties.

Norman v Theodore Goddard

Re D' Jan of London Ltd

5. **Vacation of Office by Directors**

(a) Age

A director of a public company must normally retire when he reaches the age of 70, unless:

- Articles of the company provide otherwise, or
- Shareholders approve his continued appointment.

(b) Retirement under the Articles

Table A, Art 81 - a director must vacate office if: - he becomes bankrupt or insane - he becomes disqualified - he is absent from board meetings for more than six months without permission.

Director can also resign by giving notice.

(c) A director can be dismissed at any time by an ordinary resolution of the company - this cannot be overridden by the articles or director's service contract.

Special notice must be given of a resolution to remove a director and the director has the right to make representations at the meeting.

The articles may give a director's shares special voting rights - this may defeat the operation .

Bushell v Faith

Insider trading:

Insider trading is the trading of a public company's stock or other securities (such as bonds or stock options) by individuals with access to non-public information about the company. In various countries, trading based on insider information is illegal. This is because it is seen as unfair to other investors who do not have access to the information.

The authors of one study claim that illegal insider trading raises the cost of capital for securities issuers, thus decreasing overall economic growth. However, some economists have argued that insider trading should be allowed and could, in fact, benefit markets.

Trading by specific insiders, such as employees, is commonly permitted as long as it does not rely on material information not in the public domain. However most jurisdictions require such trading be reported so that these can be monitored. In the United States and several other jurisdictions, trading conducted by corporate officers, key employees, directors, or significant shareholders must be reported to the regulator or publicly disclosed, usually within a few business days of the trade.

The rules around insider trading are complex and vary significantly from country to country and enforcement is mixed. The definition of insider can be very wide and may not only cover insiders themselves but also any person related to them such as brokers, associates and even family members. Any person who becomes aware of non-public information and trades on that basis may be guilty.

IX. **MAJORITY RULE AND MINORITY PROTECTION AND CONTROL**

The general rule in company law is that the wishes of the majority will prevail.

1. **The Rule in Foss v Harbottle**

Foss v Harbottle

When a wrong is done to a company, it is for the company to decide what action to take.

Power of court

The courts will not usually hear an action brought by a member or members of the company.

(a) Reasons for the Rule

(i) The Proper Plaintiff Principle

The company is the proper plaintiff (pursuer) in any action to right a wrong against it.

(ii) The Internal Management Principle

The courts will not interfere with the internal management of a company. It is for the company to decide whether it is being properly managed.

(iii) Irregularity Principle

A member cannot sue to rectify a mere informality where the act would be within the company's powers if done properly and the wishes of the majority are clear.

(b) Problems with the

The majority of shares often belong to directors.The majority are in the best position to prejudice the company - then decide that the company will not bring an action against them.

There is thus a need for minority protection - enforcement of minority rights falls into three main categories.

2. **Exceptions to the Rule in Foss v Harbottle**

(a) Preliminary Points

A number of matters must be established first:

(i) The company is entitled to the remedy - shareholder cannot have a wider right to bring an action than the company itself would have had.

(ii) It is not possible to petition under (these will usually be easier).

(iii)The action falls within one of the recognized exceptions to the Rule in Foss v Harbottle. (iv) It is not possible to obtain authority to bring an action in the company's name (i.e. must show the company has decided not to sue).

(b) The Recognized Exceptions Edwards v Halliwell identified four exceptions:

- Fraud on the minority by wrongdoers in control
- Invasion of member's personal rights
- Ultra virus acts
- Material procedural irregularities

In reality, only the first of these is a true exception to Foss - the others are cases where the Rule has no application.

(i) Fraud on the Minority by Wrongdoers in Control

"Control" = voting control (50% + 1 vote) - but some suggestion that de facto control is enough:

Prudential Assurance v Newman Industries

"Fraud" = unconscionable use of majority power resulting in loss to or discrimination against the minority.

Negligence is not enough to amount to fraud:

Pavlides v Jensen

But "self-serving" negligence might be:

Daniels v Daniels

Oppression of the minority will be regarded as fraud:

Menier v Hooper's Telegraph Works

Cook v Deeks

Also conduct which is an abuse of majority powers:

Estmanco v GLC

(ii) Invasion of Personal Rights

Invasion of the shareholder's personal rights is not really an exception to the rule in Foss v Harbottle - because the shareholder would be the proper person to bring the action:

Wood v Odessa Waterworks Co

Salmon v Quinn & Axtens Ltd

(iii) Illegal or Ultra Virus Acts

Any shareholder is entitled to bring an action to restrain the company from doing something which is outside the company's objects. (iv)Material Procedural Irregularities

General rule that the courts will not interfere with the internal management of a company when an action is brought by a shareholder does not apply if the act done by the company was one which required a special majority which was not obtained.

If this exception did not exist, the company would be able to act in breach of its own constitution.

Edwards v Halliwell

3. **Unfairly Prejudicial Conduct**

(a) Companies Act

This allows a shareholder to petition the court where the company is being managed in a way that is unfairly prejudicial to the interests of some of the members. (but only to his interests in his capacity as a member).

(b) Meaning of "Unfairly Prejudicial"

The Act does not define this, but:

(i) Test is concerned with effect of conduct, not motive:

Re Bovey Hotel Ventures Ltd

(ii) The conduct must be both unfair and prejudicial.

Re Saul Harrison & Sons plc

(iii) The words are flexible in meaning.

(c) Clean Hands No bar to petition that the pursuer's own conduct has not been beyond reproach – no requirement for "clean hands".

Re London School of Electronics

(d) Irregularity Principle

The court will not hear a petition under s.459 brought on the basis of a procedural irregularity that could easily be rectified. (As in Browne v La Trinidad and

Bentley Stephens v Jones

(e) Grounds for a Petition

(i) Exclusion from Management

Dismissing a member of a quasi-partnership from the office of director may amount to unfairly prejudicial conduct:

Re a Company

Re Ghyll Beck Driving Range Ltd

(ii) Diversion of Business

Where majority diverts business of the company elsewhere to benefit the majority but prejudice the minority.

Re London School of Electronics Ltd

(iii) Non-Payment of Dividends

Majority pay themselves high directors' salaries but the company pays no or very low dividends.

Re Sam Weller & Sons Ltd (iv) Dilution of Minority

Majority allots shares to dilute percentage of shares and thus voting power held by minority.

Re D & R Chemicals Ltd)

(v) Serious Mismanagement

Bad management would not normally be grounds for petition - but there is some suggestion that it might be if serious enough:

Re Elgindata Ltd

Limits to the petition:

The concept that members have a legitimate expectation that the company will be run in a way that differs from the articles of association will not normally apply to a public company:

Re Astec BSR plc

The concept that breach of a legitimate expectation could give rise to a petition based on was given a more restricted interpretation by the House of Lords in:

O'Neill v Phillips)

(f) Remedies

The court has wide discretion - it can grant any order it thinks fitting in the circumstances. In particular, it can:

- regulate the future affairs of the company.
- order the company to bring civil proceedings.
- order the purchase of the aggrieved shareholder's shares.

UNIT-IV

Winding up

Insolvency Act 1986, s.122 (1)(g) - a company may be wound up by the court if the court is of the opinion that this would be just and equitable.

(a) Locus standii (Who can petition)

Any shareholder provided he has had his shares for at least 6 months during the eighteen months prior to bringing the petition, or have inherited them, or have obtained them by direct allotment from the company.

(b) "Just and Equitable"

This is not defined by the Act - the courts have described it as a broad and flexible concept. "Clean hands" are essential for a petition.

(c) Grounds for Granting the Petition

(i) Breakdown of Mutual Trust and Confidence

Most petitions are brought by members of quasi-partnerships. Court will probably grant the petition if it is evident that the members have lost confidence in each other and can no longer work together:

Re Yenidje Tobacco Co Ltd

(ii) Exclusion from Management

This also applies only to quasi-partnership companies, where the members have a legitimate expectation of taking part in the management of the company.

Ebrahimi v Westbourne Galleries Ltd

(iii) Lack of Probity of Directors

Where shareholders have joined a small family company or quasi-partnership on the basis that it will be managed in a certain way and this has not been done, the petition may be granted where the shareholders have lost confidence in the management.

Loch v John Blackwood

Jesner v Jarrad Properties Ltd

The court is unlikely to grant a winding up order if the petitioner could have had an equally viable remedy under s.459. Winding up is a drastic remedy.

(d) Effect of Presentation of Petition

(i) Presentation of the petition freezes the company's affairs while the matter is decided.

(ii) The company can apply for a validating order, which will allow it to carry in business pending a decision.

(iii) The company can take out a cross-undertaking for damages against the petitioner - the petitioner would then be liable for any loss suffered by the company because of the petition if the petition eventually fails.

A company is a juristic person that comes into existence by way of incorporation and can be dissolved by undertaking a winding-up process as per the provisions of the Companies Act, 2013 ("New Act"). The winding up process is the last stage in the life of a company, wherein its existence is dissolved and all its assets are used to satisfy the creditors and shareholders.

Reasons for Winding Up

The reasons for compulsory winding up under the Companies Act, 1956 (Old Act) and the New Act remain same, except that the following grounds stand deleted as reasons for compulsory winding up under the New Act:

a. Suspension of the business for one year from the date of incorporation or suspension of business for a whole year; or

b. Reduction in number of members of a company below two (in case of a private company) and seven (in case of a public company).

However, a new ground has been added for compulsory winding up under the New Act. On the application by the Registrar or any other person authorised by the Central Government by way of notification under the New Act, if the Tribunal is of the opinion that the affairs of the company have been carried out in a fraudulent manner or unlawful purpose or any person concerned or involved in the management or affairs of the company has acted in a fraudulent manner or misfeasance or misconduct, that it is better to wind up the company.

Kinds of winding

Chapter XX, Part-I of the New Act deals with the compulsory winding up process. The petition for compulsory winding up can be presented to the appropriate authority by:

a. The company; or
b. The creditors (contingent/ prospective creditors1/creditors); or
c. Any contributory or contributories; or
d. All or any person specified in (a) (b) (c) together; or
e. By the Central or the State government2; or
f. By the Registrar or any person authorized by the Central government for that purpose.

Consequences of winding up:

If the court is satisfied, that sufficient reasons exist in the petition for winding up, then it will pass a winding up order. Once the winding up order is passed, following consequences follow:

1. Court will send notice to an official liquidator, to take change of the company. He shall carry out the process of winding up,
2. The winding up order, shall be applicable on all the creditors and contributories, whether they have filed the winding up petition or not.
3. The official liquidator is appointed by central Government
4. The company shall relevant particulars, relating to, assets, cash in hand, bank balance, liabilities, particulars of creditors etc, to the official liquidator.
5. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the court regarding:
    i. Particulars of Capital
    ii. Cash and negotiable securities
    iii. Liabilities
    iv. Movable and immovable properties
    v. Unpaid calls, and
    vi. An opinion, whether further inquiry is required or not

The Central Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry.

Filing of Winding up Petition

The draft rules provide that a winding up petition ('Petition') is to be filed under section 272 of the New Act in the prescribed form no 1, 2 or 3, whichever is applicable and is to be submitted in three sets.

Statement of Affairs of the Company

If the company files the Petition, it shall be accompanied with the statement of affairs ('Statement') in Form No. 4 read with section 272(5) of the New Act. The Petition shall state the facts up to a specific date, which shall not be the date more than fifteen days prior to the date of making of the Statement. A Chartered Accountant in practice shall duly certify this Statement. The fee for filing the Petition shall be submitted as prescribed in Annexure-B of the draft rules.

Advertisement of the Petition

Subject to the directions of the Tribunal, the petition shall be advertised in not less than fourteen days before the date fixed for hearing in one daily newspaper in English language and one daily newspaper in the principal regional language circulating in the State or union territory where the registered office of company is situated. The advertisement needs to be carried out in Form No 6. The previous requirement of publication in the official gazette of the State or union territory mentioned in Company Court Rules (1959), has been done away with under the New Act.

Final Order and its Content

The Tribunal after hearing the Petition has the power to dismiss it, with or without cost, or to make an interim order, as it thinks fit, or can appoint the provisional liquidator of the company till the passing of the winding up order. An order for winding up of a company will be in Form 11 and contains the footnote prescribing the following duties:

a. To submit the complete and audited book of accounts up to the date of order;
b. To attend the company liquidator at the required time and place with all information;
c. To surrender the assets3 of the company and documents related to it, including those documents from which the benefit from the assets accrues.

Winding up or liquidation is not a legal exercise only to satisfy the debts of creditors, but also signifies loss of brand value that the company enjoyed in its entire history. There is not much of a difference in the manner in which the two legislations deal with the process of liquidation, except that the New Act has somewhat simplified the process. The draft rules pertaining to the winding up of a company are yet to be released by the Ministry of Corporate Affairs. Winding-up of every company is food for thought to others in the field to understand what went wrong in governing a company.

Liability of past members

Sec (285) a past member is not liable to contribute if he has ceased to be a member earlier than one year or the commencement of winding up

A past member liability extend only to liability incurred by the company up to date of his membership and not for subsequent debts of company

The past member shall be liable to contribute only when the tribunal is satisfied that the present members are unable to meet the entire liabilities of the company

Role of the court in winding up

Winding Up Subject To Supervision Of Court/ Role of court

1. Winding up subject to supervision of court, is different from "Winding up by court."

2. Here the court can only supervise the winding up procedure. Resolution for winding up, is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also.

3. However, liberty is granted to creditors, contributories or other to apply to court for some relief. (522) Where a Company is being wound up voluntarily, any person who would have been entitled to petition for compulsory winding up may petition instead for the voluntary winding up to be continued subject to the supervision of court.

4. The Petitioner must prove that voluntary winding up cannot continue with fairness to all concerned parties.

5. Court may then appoint an additional Liquidator or continue with the existing Liquidator to

Give security.

6. The Liquidator must file with the Registrar every three months a report of the progress of the liquidation - The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy.

7. Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.

8. The court also may exercise powers to enforce calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court.

Winding up an Unregistered Company

According to the Companies Act, an unregistered company includes any partnership, association, or company consisting of more than seven persons at the time when petition for winding up is presented. But it will not cover the following:-

a) A railway company incorporated by an Act of Parliament or other Indian law or any Act of the British Parliament;

b) A company registered under the Companies Act, 1956;

c) A company registered under any previous company laws.

d) An illegal association formed against the provisions of the Act.

However, a foreign company carrying on business in India can be wound up as an unregistered company even if it has been dissolved or has ceased to exist under the laws of the country of its incorporation. The provisions relating to winding up of an unregistered company:-

a) Such a company can be wound up by the Tribunal but never voluntarily.

b) Circumstances in which unregistered company may be wound up are as follows:

· If the company has been dissolved or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.

· If the company is unable to pay its debts.

· If the Tribunal regards it as just and equitable to wind up the company.

Payment of liabilities

· Contributory means a person who is liable to contribute to the assets of a company in the event of its being wound up. Every person shall be considered a contributory if he is liable to pay any of the following amounts - Any debt or liability of the company; Any sum for adjustment of rights of members among themselves; Any cost, charges and expenses of winding up; on the making of winding up order, any legal proceeding can be filed only with the leave of the Tribunal.

Locus Standi of a contributory to bring a petition for winding up

Recently, the Supreme Court of India in **Severn Trent Inc. v. Chloro Controls (India) PvtLtd**. [(2008) 4 SCC 130] dealt with an interesting point of law related to the locus standi of a contributory to file a petition for winding up. The issue before the Supreme Court called for an interpretation of Section 439(4(b) of the Companies Act, 1956. Under this Section, a contributory is not entitled to present a petition for winding up unless the shares in respect of which he is a contributory, or some of them, (a) were originally allotted to him; or (b) were held by him and registered in his name for a certain period; or (c) devolved on him through the death of a former holder. Severn Trent did not dispute that category (a) was inapplicable in the case; but argued that it should be held to have conformed to categories (b) and (c).

Essentially, the contention was that the requirement of the shares having to be "registered in his name" was not a mandatory requirement, and could be waived in certain circumstances. Otherwise, a company (particularly in cases where two groups of shareholders are severely hostile to each other) could prevent a contributory from bringing a petition for winding up by simply refusing to register the shares in the name of the contributory. Alternatively, Severn Trent argued that the shares could be deemed to have devolved upon it through the "death" of the former holder. After the merger between Capital Control (Delaware) and Severn Trent, the former had effectively met its "civil death", and its shares had then devolved upon the latter.

The Court held that the plain language of Section 439 could not be modified or read down; and to come under category (b), it was essential that the shares should be held by the contributory and registered in his name. Section 439(4) was held to be a complete code in this respect, leaving no room for equitable considerations to be used to allow a petition in cases where a strict reading of the provisions would not allow one. Court stated, "… if there is omission, default or illegal action on the part of the Company in not registering the name of the contributory even though he/it can be said to be a contributory by holding the shares… the law provides a remedy."

This case is significant because it is perhaps the only clear Supreme Court decision on the issue of locus stand of a contributory to bring a petition for winding up. The case now conclusively settles that Section 439(4) is an exhaustive code on the subject of winding up by contributories; and in order to present a petition for winding up, a contributory must be able to bring itself within the wordings of the categories mentioned in Section 439(4) (b); with all the categories being construed according to a strict literal meaning.

RECONSTRUCTION & AMALGAMATION Sections 230 and 232 provide for facilitating Arrangements for the purpose of „Reconstruction" or „Amalgamation" of The termϖcompanies. Reconstruction implies the formation of a new company to take-over the Assets of an existing company with the idea that the persons interested and the nature of business The termϖsubstantially remains the same. Amalgamation is taken to mean as the union of two or more companies, so as to form a third entity or one company is absorbed into another company.

Both reconstruction as well as Amalgamation require similar legal procedures and schemes can be carried out :(a) Section provide for Reconstruction or Amalgamation of companies by winding up the company voluntary .(b) provide for a scheme of Reconstruction and Amalgamation without winding up . Section 230lays down that: 1. Transfer of the undertaking, property or liabilities of one company to another .2.The allotment or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company. 3 The continuation by or against the transferee company of any legal proceedings pending by or against the transferor company, 4. The dissolution, without winding up, of the transferor company .5.The provision to be made for any person who dissents from the scheme .6. Such incidental, consequential and supplemental matters as may be necessary to secure that the reconstruction or Amalgamation shall be fully and effectively carried out.

Acquisition of shares of dissenting shareholders in case of Take-over Bid The method of Amalgamation by take-over bid is quite common. A "take over Bid" means an offer to acquire shares of company with a view to obtaining legal control of the company. Section 395 provides for the compulsory Acquisition of the shares of the dissenting minority, the provisions of are as follows: 1.The offer of the transferee company to acquire the shares or Any class of shares, must be placed before the shareholder of the transferor company.

The shareholders have the option to approve the offer within four months. Approval must be Accorded by the holders of at least 90 per cent in value of the shares .whose transfer is involved (other than shares already held by transferee company at the date of the offer or by its nominees or by its subsidiary) 3. If the scheme is so approved, the transferee company may, at any time , within two months , after the expiration of the Above four months , give notice to the dissenting share holders .4. The dissenting shareholders can, within one month of the receipt of such notice, apply to the court for annulling the scheme.

If the court refuse to issue the order annulling the scheme of Amalgamation or if no application is made to the court, the transferee company shall be entitled and bound to Acquire the share of dissenting shareholders .6.The transfer of shares pursuant to the notice given by the transferee company after the disposal of the appeal filed by the dissenting share holders .7. Any sums which so received by the transferee company must be paid in to a bank account and this amount or any other consideration received must be held for dissenting share holders.

Amalgamation in national interest under section 232 of the Act, the central Govt. is given power to order Amalgamation of two or more companies in public interest. The section provide as follows: 1. if the central govt. is satisfied that it is essential in the public interest that two or more companies should be Amalgamated the order aforesaid may provide for the continuation by or against the transferee company of any legal proceedings pending by transferee company.3. Every member, debenture holder or any other creditors of the Amalgamation companies, continue to have the same interest in the new company,

No order under this section shall be made by the central govt. unless :(a) A draft copy of the proposed order has been sent to each of the companies to file their objectives and suggestions.(b)

The time for preferring an appeal to company law board has expired .(3) It has considered and made such modifications if any , in the draft order as may seem to it desirable in the light of any suggestions and objectives.5. Copies of the order made by the govt. in this connection must, as soon as possible, be laid before both the house of parliament.

Refrence;-

1. avtar singh ; company law
2. dr. n.v paranjape; the new company law book
3. www.law notes/company law
4. www.wikepedia,com