

DRAFTING OF MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION

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Memorandum of Association and Articles of Association are the two basic documents required in the process of incorporation of Company. These documents define the very objectives for which a Company is registered and the means and procedures led down for achieving and regulating those objectives.

Let us first understand something about Memorandum of Association.

1. MEMORANDUM OF ASSOCIATION

As we are all aware that Company is formed with certain minimum number of persons who come together with a common objective and with basic understanding about liability of each of them, capital contribution by each of the members, and an undertaking about subscription to number of shares as might have been agreed *inter se*.

A Memorandum of Association of a Company exactly describes all details constituting a Company. Memorandum as it is sometimes called is a Charter of Company. A Charter in its true sense means:

Grant of authority or rights, stating that the granter formally recognizes the prerogative of the recipient to exercise the rights specified. It is implicit that the granter retains superiority (or sovereignty), and that the recipient admits a limited status within the relationship, and it is within that sense that charters were historically granted, and that sense is retained in modern usage of the term.

If the above definition is seen in the context of Memorandum of Association, it means such a document which comprises of all the objectives, rights, liabilities, mentioned therein, in relation to constitution of proposed Company and which is recognized by law as valid, acceptable and binding on all those subscribing to such Charter and all those who deal with the Company formed.

A Memorandum of Association generally has following clauses:

- a. Name Clause: This clause contains full of the Company with which it is incorporated.
- b. Registered Office Clause/Domicile Clause: This clause indicates the jurisdiction of Corporate Regulator, under which the Company's registered office falls.

- c. **Objects Clause:** This clause indicates the objects for which Company is incorporated.
- d. **Liability Clause:** This clause tells us about limit on monetary liability of each member towards Company.
- e. **Capital Clause:** This clause denotes the maximum capital which Company can raise at given point of time.
- f. **Subscription OR Association Clause:** This clause is in the nature of Declaration and Undertaking given by all the subscribers to Memorandum of Association to the effect they have agreed to form a Company and further undertake that they will pay for the shares agreed to subscribe.

➤ **Indian Context:**

The provisions of Memorandum of Association can be found as prescribed by statute, as early as, year 1892 when the provisions of Indian Companies Act 1892 were in force, subsequently provisions of Indian Companies Act 1913 also provided for the Memorandum of Association and Articles of Association.

Memorandum of Association and provisions of the Companies Act 1956

The provisions pertaining to Memorandum of Association are comprised in section 13 to section 17 of the Act.

For every Company which is required to be registered under the provisions of the Companies Act 1956 it is mandatory to draft and submit a copy of Memorandum of Association keeping in mind, the provisions of the Act. It may be noted that in terms of provisions of section 13 read with sec 14 and 15 of the Act, every Memorandum of Association should be:

- 1) In such Form as contained in Table B,C,D, or E of Schedule-I as may be applicable to the Company or as near thereto as the circumstances admit Sec 14.
- 2) Printed, all pages should be numbered consecutively, divided into paragraphs and signed by Subscribers and witnessSec 15.
- 3) Further the exhaustive provisions of section 13 requires that:
 - (i) Complete name of the Company with word Limited in the case of a public limited company or Private Limited in the case of a private limited company; - **Name Clause**
 - (ii) the State in which the registered office of the company is to be situate;- **Domicile/Registered Office Clause**

(iii) in the case of a company is incorporated before 15th Oct 1965:

- the Objects of the Company
- In the case of a company formed after 15th October 1965, the Object Clause with specific classification as to:-
 - (a) the main objects of the company to be pursued by the company on its incorporation;
 - (b) objects incidental or ancillary to the attainment of the main objects;
 - (c) other objects of the company not included in sub-clause (a) and (b); above
- In the case of companies (other than trading corporations), with objects not confined to one State, the States to whose territories the objects extend.
.....**Object Clause**

(iv) Where the proposed Company, is a Company limited by shares, the Memorandum of such Company shall also state that the liability of its members is limited- **Liability Clause**

- In case of Company limited by guarantee, the Liability clause shall also state the amount each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company, or of such debts and liabilities of the company as may have been contracted before he ceases to be a member, as the case may be, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(v) In the case of a company having a share capital , the Memorandum shall also state:

- (a) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount; **Authorised Share Capital;**
- (b) Minimum paid Capital of Rs. 1,00,000/- if the Company is a Private Co and Rs. 5,00,000/- in case Company is a public Company..... **Paid up Capital**

(vi) In terms of Association/ Subscription Clause each of the Subscribers to Memorandum of Association should subscribe to at least one Equity Shares apart from executing Memorandum of Association in his own handwriting.

Specific points to be remembered while drafting Clauses of the Memorandum of Association (MoA):

- ❖ The name of the Company appearing in the MoA should match EXACTLY with the as approved by the Registrar of Companies (RoC)
- ❖ The jurisdiction of RoC to be mentioned in Registered Office (Domicile Clause) should be based on location district of the state in which registered office is proposed to be situated; hence clarity should be provided with respect to office of RoC under whose jurisdiction the district of the state falls. This is important because in case of state of Maharashtra and Tamil Nadu there are two offices of the RoC with jurisdiction over different districts of the state. Conventionally therefore the clause is drafted on the following lines:

“The Registered Office of the Company is situated in the state of Maharashtra, within the jurisdiction of Registrar of Companies, Maharashtra, Mumbai”

- ❖ Drafting of Objects Clause(s) of the Company is one of the very crucial aspects in preparing Memorandum of Association.

Rationale behind the Object Clause

- 1) Since the shareholder while making the investment in any company must possess the information regarding the business plans of the company, these object clauses serve the purpose of providing the information to the shareholder about the prospects of the company. Further since, the shareholder is putting his money in the company he must know the purpose for which the money has been put to the use.
- 2) The object clause confers a degree of security to the creditors since the object clause defines the limit to which the company can operate the creditor will remain safe if the objects clauses are provided for and the company sticks to those objects.
- 3) These objects also serve the public interest by preventing the concentration of the economic power and giving the public a chance of knowing the direction in which the company is heading.

The Object clause in the Memorandum is classified as:

(a) Main Objects:-

These are the objects which Company wish to attain immediately after it is incorporated. These objects needs to be very clear and should encompass all the activities such as manufacture, sale, trade, import, export, exchange, of which are part of main business activities.

E.g. A Company whose object is to manufacture electronic equipments' will encompass manufacture, sale, trade, import, export of all types of electronic devices, circuits, equipments for use by common man, industrial use etc.....

Covering maximum possible activities as a part of main object provide the clarity for the Company and outsiders dealing with the Company about its exact nature of business.

(b) Objects ancillary and incidental to the attainment of main object

These objects cover activities which are secondary in nature but are essential for attainment of main (primary) Object, these objects generally do not include profit making or revenue generating activities and are transitory in nature.

Activities such as seeking mandatory registrations, enrollments, bank accounts, marketing and business promotion, staff welfare, borrowing powers, power to take-over new business, merger & amalgamation empowerment of the Company.

Though it is not possible to have an exhaustive list of activities which can be classified as Objects ancillary and incidental to the attainment of main object, Company may undertake any such activity which is not prohibited by law but can contribute to attainment of main object.

(c) Other Objects:

These are the Objects which are classified as objects not included in (a) or (b) above. These objects are entirely different from those in which Company is dealing presently, and will include those in which it proposes to deal any time in future.

It is not mandatory to have the Other Objects in the Memorandum of Association, further in case of public Company if any activity comprised in Clause C- Other objects is to be commenced by the Company, it is mandatory to seeking members approval in the general meeting.

Main Object Clause of section 25 Company:

Typically the Main Object clause of the Company licensed u/s 25 of the Act, a not-for-profit organization will not have the object of profit making or doing any business. Further section 25 Company cannot commence an activity other than the activity for which it had been granted license.

A specimen of main object clause of section 25 Company:

To be and act and serve as non-profit organization of Brahmin community for development of industries, trade, and professions carried out by Brahmins so as to benefit all, irrespective of any religion, caste, and to promote, manage, establish, maintain, encourage, organize and assist in the development and promotion of trade, business, industries, education for Brahmins which will empower them to lead the life in accordance with Truth and high Morality at all levels and will help in their economic and social empowerment.

Main Object Clause of Company registered pursuant to conversion of Partnership Firm u/s. 565 or 566 of the Act:

In case of conversion of existing partnership firm into a Company often described as re-registration of existing joint stock Company, there is no specific requirement of main object clause in the Memorandum of Association submitted for incorporation as it is an existing Company with on-going business activity, though it is customary to provide a complete Memorandum of Association.

A specimen of Memorandum of Association for Company registered under section 565/566 (part IX of the Act) is as below:

THE COMPANIES ACT, 1956
(COMPANY LIMITED BY SHARES)
MEMORANDUM OF ASSOCIATION

OF

..... PRIVATE LIMITED

The Memorandum of Understanding of (A Company under Part IX of Companies Act, 1956) made and entered into at Mumbai this day of2013 and executed by:

1. son of of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the First Part".
2. son of of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the Second Part".
3.son of of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the Third Part".
4. wife ofi of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the Fourth Part".
5. wife of of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the Fifth Part".
6. son of of Mumbai, Indian Inhabitant, hereinafter referred to as "The Party of the Sixth Part".
7. Wife of, Indian Inhabitant, hereinafter referred to as "The Party of the Seventh Part".

WHEREAS, the parties hereto are presently carrying on business of real estate development in partnership in the name of which is registered with Registrar of Firm, Maharashtra and having permanent capital of Rs. (Rupees only) contributed and held by the parties hereto to the extent specified in the subscription Clause hereto.

WHEREAS the said Partnership Firm has been constituted under a Deed of Partnership dated, as supplemented by Supplemental Deed of Partnership dated, entered into between the parties hereto :

- a)
- b)
- c)
- d)
- e)
- f)
- g)

WHEREAS the said partnership firm is a Joint Stock Company within the meaning of Section 566 of the Companies Act, 1956.

AND WHEREAS the parties have mutually settled the share-holdings of the subscribed capital amongst themselves as the members of the said Joint Stock Company in the following manner:

Name	Amount	Percentage
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WHEREAS the Partners of the Firm vide their individual consent, expressed their willingness for registration the said firm under part IX of the Companies Act, 1956 and execute this Memorandum of Association with the intention of continuing to carry on the same business of through the Company limited by shares and so that on registration, all property, movable and immovable including actionable claims belonging to or vested in the said at the date of registration shall pass to and vest in the Company so registered for all the estate and the interest of the said, and so that such registration shall not affect its rights or liabilities in respect of any debt or obligation incurred, or any contract entered into by, to with or on behalf of the said

Now it is agreed by and between the parties hereto as under:

- I. The name of the Company is PRIVATE LIMITED
- II. The Registered Office of the Company will be situated in the State of Maharashtra, within the jurisdiction of Registrar of Companies, Maharashtra, Mumbai
- III. The Main Objects for which the Company is established.....

Amendment to Object Clause:

Provisions of section 16 and 17 of the Act deals with Alternation to Memorandum of Association which requires approval of members and in case of change of jurisdiction of Registrar (RoC) as stated in Domicile Clause of Memorandum such alteration before becoming effective requires confirmation of Regional Director.

Amendment to Capital clause:

A Company may by resolution in the members' meeting increase, consolidate and divided, convert, re-classify, cancel shares mentioned in the capital clause without approaching Court pursuant to provisions of section 94 of the Act.

❖ Association/Subscription Clause:

This is very important clause in the Memorandum of Association as the whole basis of Company incorporation will be given effect only if the subscribers to MoA have executed through this clause and have agreed to pay for the number of shares to which they have subscribed.

A Memorandum of Association has the following declaration in its Subscription/Association Clause:

We, the several persons whose names, addresses, descriptions and occupations as hereunto subscribed, are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company as set opposite our respective names.

<i>Name, address and description of the Subscribers</i>	<i>Number of Equity shares taken by each subscriber</i>	<i>Signature(s)</i>	<i>Witness</i>
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Few more points in the drafting of MoA which have emerged as a result of various circulars issued by the Ministry of Corporate Affairs as the procedure for Company registration went on with refinement:

- 1) A proposed Company whose main object comprise of : 'Insurance' , 'Bank' , 'Stock Exchange' , 'Venture Capital' , 'Asset Management' , 'Nidhi' , 'Mutual fund' the Company will be allowed to be incorporated only after in-principle approval is obtained from concern Sectoral Regulator such as RBI, IRDA, SEBI etc.
- 2) Where a Foreign Company proposed to incorporate a Company in India, it is mandatory that Certificate of Incorporation of such Company issued in the country of registration and resolution of its Board of Directors duly Appostile/ certified by Indian Consulate Officer is submitted. Further in case Memorandum of Association is executed outside India then such Memorandum of Association and Articles of Association is required to be Appostile/ certified by Indian Consulate Officer.

2. ARTICLES OF ASSOCIATION

In the process of Company registration and regulation, Articles of Association is one of the mandatory documents. All Companies incorporated under the Companies Act 1956 are required to have Articles of Association.

Articles of Association ("the Articles") are the bye Laws or rules and regulations that govern the management of Companies internal affairs and the conduct of its business. The Article play very important role in the affairs of the Company. The Articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and the members *inter se*. The Articles are merely regulations governing the management, procedures, and members and has no force of law and any provision in the Articles or Memorandum which is contrary to any provisions of Law will be invalid *in toto*.

Articles of Association: Provisions of the Companies Act, 1956:

The provision of section 2 clause (2) defines Article as:

(2) "Articles" means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act, including, so far as they apply to the company, the regulations contained, as the case may be, in Table B in the Schedule annexed to Act No. 19 of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882 (6 of 1882), or in Table A in the First Schedule annexed to the Indian Companies Act, 1913, (7 of 1913), or in Table A in Schedule I annexed to this Act;

In terms of provisions of section 26 of the Companies Act, 1956 following Companies must have their own Articles:

- a) Companies with unlimited liability of its members
- b) Companies limited by guarantee
- c) Private Companies Limited by Shares

The Companies who are mandatorily required to have registered Articles may adopt all or any of the regulations contained in Table A of First Schedule of the Act. If the Articles are not registered, the provisions of Table A shall be applicable. In respect of Public Companies, any provision in the Articles which is inconsistent with the provisions of the Act, such provision is automatically invalidated and provisions of the Act override the same.

In terms of Section 27, the Articles of Company with unlimited liability of its members, it is mandatory to state the number of Members with which the Company is to be registered.

The Companies limited by guarantee or companies with unlimited liabilities of its members may adopt regulations of Table C, D, E of Schedule 1 as its Articles.

In terms of Section 30 of the Act, Articles must be printed divided into paragraphs numbered consecutively, stamped adequately and should be signed by subscribers to Memorandum and witnessed.

Contents of Articles of Association

Generally the Articles of Association contains following matters:-

1. Exclusion wholly or in part of Table A
2. Adoption of preliminary contracts
3. Definitions
4. Capital - Authorised / paid-up
5. Allotment of shares, calls on shares, lien on shares
6. Specific provisions pertaining to Preference shares, Debentures
7. Transfer and transmission of shares, nomination, forfeiture of shares
8. Share certificates, De-materialization
9. Conversion of shares into stocks
10. Voting rights and proxies
11. Meetings and rule regarding Committee
12. First Directors, Appointment of Managing Directors, Additional Directors, Secretaries and Managers
13. Delegation of Powers to directors, remuneration to directors
14. Meetings of Board, Committees of Board
15. General Meetings
16. Accounts, Audit, Borrowing powers, dividend and reserves
17. Indemnity
18. Winding up

It may not be possible to cover the exhaustive list of matters in Articles of Association. In such case, the provisions of Table A would be applicable where no specific provision is found in the Articles.

Alteration in Articles of Association

Company has inherent right to amend its Articles of Association. Section 31 of the Act provides that subject to the provisions of the Act and the conditions contained in company's Memorandum, Company by Special Resolution alter its Articles as if any alteration so made shall be valid as contained originally in the Articles.

Though the Company has complete freedom to alter the clauses of its Articles, it is subject to certain limitations:

1. The alteration of any clause of Articles should not result in exceeding the powers or boundaries set by the clauses of the Memorandum of Association, equally the alteration should not be inconsistent with the provisions of the Company's Act.
2. The Articles should not lay down any procedure or regulate any activity which is illegal or is opposed to public policy and alteration should be *bona fide* in nature.
3. Any alteration which constitutes a fraud on minority or oppressive in nature, is liable to be challenged.

Doctrine of Indoor Management

This Doctrine was laid down in famous case of *Royal British Bank vs Turquand (1856) 119 E.R. 886*, the highlighting point in this judgment is that persons dealing with company having satisfying themselves that any transaction, business done with Company is not in its nature inconsistent with the Memorandum and Articles, are not bound to enquire about regularity of any internal proceedings. In other words while persons contracting with Company are presumed to know the provisions of the contents of Memorandum and Articles they are entitled to assume that the provisions of Articles have been observed by the Officers of the Company and it would not be *ultra vires* the contract, if any officer has failed to comply with internal regulations.
