

MEMORANDUM OF ASSOCIATION

Important documents of the company are:

1. Memorandum of Association (MoA)
2. Articles of Association (AoA)
3. Prospectus

MoA and AoA are the documents required for formation of company. While prospectus is drafted for issue of securities as per the requirements of law. The chapter discusses the meaning, contents and provisions regarding alteration in Memorandum of Association.

“MEMORANDUM OF ASSOCIATION” [SEC. 2(56)]

As per Sec. 2(56), “Memorandum” means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. The definition given under the Act does not throw any light on the nature of MoA, therefore, reference is made to following definitions:

According to **Palmer**, “the Memorandum of Association contains the objects for which the company is formed. It defines the boundary beyond which the company cannot go.”

According to **Lord Cairns**, “The Memorandum defines the limitations of the powers of the company it contains in it, both that which is affirmative and that which is negative”. MoA defines and confines (sets limits to) the powers of the company. It is clear from above definitions that MoA is a document of prime importance. This document tells the permitted range of activities of the company.

Memorandum is rightly called the ‘Charter’ of the Company as it specifies the objectives of the Company. This document provides the foundation on which the company is built.

Contents of memorandum of association (Sec. 4)

The memorandum of association of a company shall state-

1. **NAME CLAUSE:** the name of the company with the last word
 - (a) "Limited" in the case of a public limited company,
 - (b) "Private Limited" in the case of a private limited company.
 - (c) Sec. 8 company is exempt from the requirement of adding 'Limited' or 'Private Limited' to its name.
 - (d) 'OPC' - in case of One person company.
 - (e) A specified IFSC private company and specified IFSC public company shall have the suffix International Financial Service Company or IFSC as part of its name (notification dated 4-1-2017).
 - (f) In case of Government company, it must end with 'limited' (whether it is a private company or public company), (notification dated 5-6-2015).

Restrictions regarding Name of the Company

The name stated in the memorandum shall not-

1. be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

Case Laws:

Ewing (Trading as Buttercup Dairy Company) vs. Buttercup Margarine Company Ltd. (1917)

The plaintiff had been carrying on business under the name of Buttercup Dairy Company. He filed a suit against a newly registered company Buttercup Margarine Company Ltd. restraining it from carrying business with the said name on the ground that the name resembled their company's name. He alleged that public might think that the two businesses were connected. The plaintiff succeeded in getting the injunction.

Society of Motor Manufacturing & Traders Ltd. v. Motor Manufacturers & Traders Mutual Assurance. (1925)

It was held that the plaintiff was a trade protection society for motor manufacturers and traders while defendant company was an insurance company for motor manufacturers and traders. So no one could conclude that the two were connected, therefore both the companies could continue with their respective names.

2. be such that its use by the company-
 - (a) will constitute an offence under any law for the time being in force; or
 - (b) is undesirable in the opinion of the Central Government.

3. A company shall not be registered with a name which contains-
- (a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government, any State Government under any law for the time being in force, or
 - (b) such word or expression, as may be prescribed e.g., National, Authority, Republic, Bureau, etc. unless the previous approval of the Central Government has been obtained for the use of any such word or expression. The Companies (Incorporation) Fifth Amendment Rules w.e.f. 10-5-2019 explain restrictions regarding name of the company. These amended rules provide ample illustrations to avoid ambiguity in name reservation. As a result of it, name rejection rate has fallen drastically.

Approval based words such as insurance, bank, stock exchange etc. cannot be used without the approval of concerned authority. Word 'Insurance' can be used only with approval from Insurance Regulatory and Development Authority (IRDA), word 'Bank' can be used only with approval of Reserve Bank of India (RBI). Similarly word 'Stock Exchange' can be used only with the approval of Securities and Exchange Board of India (SEBI).

The name shall be considered undesirable if it is prohibited under the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950 unless a previous permission has been obtained under that Act. The name shall also be considered undesirable if it includes a trade mark registered under the Trade Mark Act, 1999 without the consent of the owner of the trade mark.

2. **DOMICILE CLAUSE OR REGISTERED OFFICE CLAUSE :** It shall specify the State in which the registered office of the company is to be situated;
3. **OBJECTS CLAUSE:** It states the objects for which the company is proposed to be incorporated and any matter considered necessary for furtherance thereof;
4. **LIABILITY CLAUSE:** It states the liability of the members of the company, whether limited or unlimited, and also state,-
 - (a) in the case of a company limited by shares, the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
 - (b) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute-
 - (i) 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 as may have been contracted before he ceases to be a member, as the case may be; and

(ii) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

5. **CAPITAL CLAUSE (only in case of company having share capital):** The amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share;
6. **NOMINATION CLAUSE (only in case of OPC):** In the case of One Person company, the name of the person who in event of death of the subscriber, shall become member of the company; and
7. **SUBSCRIPTION OR ASSOCIATION CLAUSE:** The number of shares each subscriber to the memorandum intends to take is indicated opposite his name.

Model Form of Memorandum of Association [Sec. 4(6)]

The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

Schedule I	
Table A	: Memorandum of Association of a company limited by shares.
Table B	: Memorandum of Association of a company limited by Guarantee and not having a share capital.
Table C	: Memorandum of Association of a company limited by Guarantee and having a share capital.
Table D	: Memorandum of Association of an unlimited company and not having share capital.
Table E	: Memorandum of Association of an unlimited company and having share capital.

Doctrine of Ultra Vires: Term 'Ultra Vires' means 'beyond power'. In the context of company, ultra vires acts may be of following types:

1. Acts ultra vires the MoA or objects clause of the memorandum or ultra vires the company (used interchangeably).
2. Acts ultra vires the AoA but intra vires (within power) the company.
3. Acts ultra vires the directors but intra vires the company.

It needs to be noted that acts which are ultra vires the company can never be made intra vires even by unanimous consent, while the acts in second and third points above can be made intra vires if the consent is obtained later.

The concept of 'ultra vires' if nothing 'additional stated' is construed as to be ultra vires the company. It was established in *Ashbury Railway Carriage Co. Ltd v. Riche* case that ultra vires acts shall not be binding on the company. Directors shall be themselves liable for such contracts. In the above case where the company was authorized to 'construct the railway lines' when diverted from its objects and

started 'financing of construction of railway lines' this act was held to be ultra vires the company, therefore, the directors were held liable for such acts and not the company.

In *Lakshmanaswamy v. LIC of India (1963)* the Apex Court held that the company cannot go beyond the objects. Such an act is absolutely void and cannot be ratified even if all the shareholders agree.

Ultra-vires acquired property - If company's money has been spent ultra-vires in acquiring some property, the right of the company on that property is held secure, as it represents the corporate capital.

TABLE 5.1: ALTERATION OF MEMORANDUM OF ASSOCIATION

Clause	Nature of Change	Procedure of Change
1. Name Clause	1. Any change in the name of the company.	<ul style="list-style-type: none"> ● In conformity with provisions of Sec. 4 + Special Resolution in General Meeting + ● Approval of Central Government in writing. Approval of name using web form RUN (Reserve Unique Name).
	2. Change involving addition thereto or deletion therefrom, of the word 'Private' on conversion.	Special Resolution in General Meeting. Change of name using web form RUN.
	3. Rectification of name of the company (Sec.16): (a) if a name on first registration or registration by new name in the opinion of the Central Government is identical with or too nearly resembles the name of the previously registered company, it may direct the company to change its name or new name as the case may be.	(i) within a period of 3 months from the issue of such direction after adopting an Ordinary Resolution . Within 15 days of change give notice to Registrar along with order of Central Government. Necessary changes in the Certificate of Incorporation and Memorandum shall be made. (ii) in case of non-compliance of direction within 3 months, new name of company shall be the letters ORDNC (Order of Regional Director not complied), the year of passing of the direction, the serial number and the existing CIN of the company. The Registrar shall enter such name in Register of Companies and Company will have to mention 'ORDNC' in brackets below the name of company wherever printed, affixed or engraved. This will continue until company subsequently changes its

Clause	Nature of Change	Procedure of Change
	(b) on application by a registered proprietor of a trade mark with in 3 years of incorporation of a company, if in the opinion of the Central Government, name on first registration or registration by a new name is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name.	<p>name in accordance with Sec. 13. [Rule 33A inserted by Companies (Incorporation) Fifth Amendment Rules, 2021 w.e.f. 1/9/2021]</p> <p>(i) within a period of 3 months from the issue of such direction after adopting an Ordinary Resolution. Within 15 days of change give notice to Registrar along with order of Central Government. Necessary changes in the Certificate of Incorporation and Memorandum shall be made.</p> <p>(ii) in case of non-compliance of direction within 3 months, new name of company shall be the letters ORDNC (Order of Regional Director not complied), the year of passing of the direction, the serial number and the existing CIN of the company. The Registrar shall enter such name in Register of Companies and Company will have to mention 'ORDNC' in brackets below the name of company wherever printed, affixed or engraved. This will continue until company subsequently changes its name in accordance with Sec. 13. [Rule 33A inserted by Companies (Incorporation) Fifth Amendment Rules, 2021, w.e.f. 1/9/2021]</p>
2. Domicile Clause	<p>1. From one place to another within the same city, town or village*.</p> <p>2. From one city, town or village to another city, town or village**.</p> <ul style="list-style-type: none"> ◆ where it involves <u>change in jurisdiction of RoC***</u> ◆ where it does not involve change in jurisdiction of RoC <p>3. Change of Registered Office from one state to another.</p>	<p>Board Resolution</p> <ul style="list-style-type: none"> ◆ Special Resolution in General Meeting + Approval of Regional Director. ◆ Special Resolution in General Meeting. ◆ Form No. INC-23 to be filed with Special Resolution passed in General Meeting + Approval of Central Government (Central Government shall give its approval only after having 'No Objection' from Creditors, debenture holders and the persons concerned with the company and ensuring that no employee shall be retrenched).

Clause	Nature of Change	Procedure of Change
		<ul style="list-style-type: none"> ◆ Shifting not allowed during pendency of any enquiry/inspection/investigation/prosecution against the company. ◆ Where the management of the company has been taken over by new management under a resolution plan approved under Insolvency Bankruptcy Code, 2016 and no appeal against the resolution plan is pending in any Court or Tribunal and no inquiry, inspection, investigation is pending or initiated after the approval of the said resolution plan, the shifting of the registered office may be allowed (enforced w.e.f. 21st October 2023). ◆ RoC of State where office is shifted shall issue fresh Certificate of Incorporation indicating alteration.
3. Object Clause	1. A company which has raised money from public through prospectus and still has unutilized amount shall change its objects for which it raised the money.	Special Resolution General Meeting + details be published in two newspapers, one English and one in Vernacular Language plus on website of the company indicating justification of change + the dissenting shareholders shall be given an opportunity to exit. RoC shall register alteration within 30 days of filing of Special Resolution.
	2. In other cases	Special Resolution in General Meeting. RoC shall register alteration within 30 days of filing of Special Resolution.
4. Capital Clause	1. Increase of Authorised Capital. Sec. 61(1)(a) 2. Conversion of shares into stock or <i>vice versa</i> . Sec. 61(1)(c) 3. Consolidation**** or splitting of shares. Sec. 61(1)(b) and Sec. 61(1)(d) 4. Diminution of Capital (Cancellation) of unsubscribed portion of capital. Sec. 61(1)(e)	Authorisation by Articles + Ordinary Resolution
	5. Reduction of capital (Sec. 66) <ul style="list-style-type: none"> ◆ by extinction or reduction of liability on any of its shares in respect of share capital not paid up or ◆ either with or without extinction or reduction of liability on any of its shares: 	Special Resolution in General Meeting + Approval of Tribunal on 'No Objection' from: <ul style="list-style-type: none"> (i) Creditors (ii) Central Government (iii) Registrar (iv) SEBI

Clause	Nature of Change	Procedure of Change
	<p>(i) cancel any paid up share capital which is lost or unrepresented by available assets, or</p> <p>(ii) payoff any paid-up share capital which is in excess of the wants of the company.</p>	<p>Tribunal shall not sanction any application for reduction unless accounting treatment for reduction proposed is in conformity with provisions regarding it.</p> <p>Officers knowingly concealing or mis-representing the nature, amount or claim of any creditor (or being privy to such concealment or mis-representation) shall be liable under Sec. 447.</p>

Note : Rule 33A w.e.f. 1-9-2021.

***&**Do not amend the M/A as it (M/A) mentions only the name of the State. These points are covered here only for the sake of convenience.**

*****Change in jurisdiction of RoC :** The State of Maharashtra has 2 RoCs (Mumbai and Pune) and the State of Tamil Nadu has 2 RoCs (Chennai and Coimbatore). Therefore, change in registered office from one place to another place within the same State in above mentioned States may involve change in jurisdiction of RoC.

******Consolidation** shall require approval of Tribunal if it results in changes in voting percentage of shareholders (notified on 11-06-2016)

Note: Whenever an alteration is made it needs to be intimated to RoC along with relevant resolutions and approvals. RoC shall certify the registration within particular time frame and alteration shall become effective.

TABLE 5.2: DIFFERENCE BETWEEN DIMINUTION OF CAPITAL & REDUCTION OF CAPITAL

Basis	Diminution of Capital	Reduction of Capital
1. Meaning	Cancellation of unsubscribed portion of capital.	Reduction of subscribed or paid-up capital.
2. Kind of Resolution Required	Ordinary Resolution is required to be passed.	Special Resolution is required to be passed.
3. Other required Compliances	Only a few such as Authorization by Articles and Ordinary Resolution as interest of creditors is not affected by diminution.	In addition to Special Resolution in general meeting, approval of Tribunal (on receiving 'no objection' from different stakeholders such as Creditors, Central Govt., Registrar, SEBI) is required.

QUESTIONS

- Q 1. What is Memorandum of Association? State its contents.
- Q 2. How can various clauses of Memorandum of Association be altered?
- Q 3. Explain the Doctrine of Ultra-vires. State its consequences. (DU, B.Com.(H), 2022)
- Q 4. Explain the provisions of the Companies Act, 2013 regarding Alteration of Name Clause. (DU, B.Com.(H), 2023)
- Q 5. Discuss the statutory provisions regarding 'Reduction of Share Capital'. (DU, B.Com., 2022)
- Q 6. State the importance of 'Memorandum of Association' of the company. Explain the procedure relating to the alteration of object clause of Memorandum of Association. (DU, B.Com.(H), 2022, Modified)

PRACTICAL PROBLEMS

- Q 1. A company has its registered office at Mumbai in the state of Maharashtra for better administrative convenience, the company wants to shift its office at Pune in the state of Maharashtra. What formalities the company has to comply with for shifting its registered office? (DU, B.Com. 2019, Modified)
- Q 2. A company wants to shift its registered office from Chennai to Coimbatore both in the state of Tamil Nadu for administrative convenience. What provisions the company has to comply with under the Companies Act, 2013 for shifting its registered office?