

Memorandum of Association (Sec 4) Part-1

1. Legislative Background

The notes to clauses of the Companies Bill, 2011 reads as: “This clause corresponds to sections 13, 14 and 20 of the Companies Act, 1956 and seeks to provide for the requirements with respect to memorandum of a company. The memorandum shall mention the name of a company, State in which the registered office of the company is to be situated, objects for which the company is proposed to be incorporated, liability of members, etc. The memorandum of a company shall be in respective forms as per Tables A,B,C,D and E specified in Schedule I. Any provision in memorandum or articles of a company not having share capital shall not give any right to participate in the divisible profits otherwise than as member of the company.”

2. Clauses of Memorandum

According to sub-section (1) of Section 4 of the Act, the memorandum of a company shall have following clauses:

- (a) **Name Clause:** Name of the company to end with either “Limited”, “Private Limited” unless it is a company registered under Section 8 of this Act. In case of OPC, word “One Person Company” shall be written within bracket after the name as per subsection (3) of section 12.
- (b) **Registered Office Clause:** This Clause specifies the name of the State in which the Registered Office is situated. This Clause is also known as situation clause. The State of Registered Office is required to determine jurisdiction of Local Government, Office of Registrar and Stamp duty calculations.
- (c) **Objects Clause:** Objects of the company for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof. There cannot be ‘other objects’ clause under this Act, as it was in the earlier Act. However, a company may have more than one object as its main objects.
- (d) **Liability Clause:** Liability of the members, whether limited or unlimited, and its extent as mentioned in this Section. In case of limited liability extent shall be defined in term of shares or guarantee as the case may be in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them. In case of a company limited by guarantee, extent shall be defined to the amount up to which each member undertakes to contribute in the event of winding up.
- (e) **Capital Clause:** In the case of a company having a share capital the authorized share capital and its division in number and amount, and number

of shares agreed to be subscribed by subscribers to the memorandum opposite their name. There is no requirement to have minimum paid-up capital as per the amendment made in clause (68) and (71) of Section 2 (definition of 'Private Company' and 'Public Company' respectively) by Section 2 of the Companies (Amendment) Act, 2015.

- (f) **Subscription clause:** The clause relating to the subscription specifies the name of the person, address, occupation and number of shares which the person agrees to take. In case of a company limited by guarantee, this clause simply states the name of the person, address and occupation. The subscribers may be natural persons or legal persons. The subscribers may jointly subscribe to the Memorandum. The signing by person is to be witnessed. The manner of signing is dealt with in detailed manner in the latter part. This is the only clause of the Memorandum which is a static clause i.e. it harkens back to the date of subscription and cannot be amended.
- (g) **Nominee Clause:** In case of OPC, name of the nominee. The subscriber and nominee, in case of OPC shall be individual. This position is further clarified in the Rule 3(1).

3. Name of company

3.1 Identical Names

According to sub-section (2) of Section 4, the name of the company shall not be identical with or resembles too nearly to the name of an existing company. The name of the company shall not be such that its use by the Company constitutes an offence under any law for the time being in force or is undesirable in the opinion of the Central Government.

Rule 8(1) provides that before granting any name, it will be examined whether name is identical with name of any other company/LLP or any other name already allowed to a company/LLP. To determine whether a proposed name is identical with another, the differences which are arising on account of the following are to be disregarded:

- (a) Words like Private, Pvt, Pvt., (P), Limited, Ltd, Ltd., LLP, Limited Liability Partnership appeared anywhere in the proposed name and any name already granted.
- (b) Words appearing at the end of the names – company, and company, co., co, corporation, corp, corpn, corp.
- (c) Plural version of any of the words appearing in the name.

- (d) Type and case of letters, spacing between letters and punctuation marks.
- (e) Joining words together or separating the words does not make a name distinguishable from a name that uses the similar, separated or joined words.
- (f) Use of a different tense or number of the same word does not distinguish one name from another.
- (g) Using different phonetic spellings or spelling variations shall not be considered as distinguishing one name from another.
- (h) Misspelled words, whether intentionally misspelled or not, do not conflict with the similar, properly spelled words.
- (i) The addition of an internet related designation, such as .com, .net, .edu, .gov, .org, .in does not make a name distinguishable from another, even where (.) is written as 'dot'.
- (j) The addition of words like New, Modern, Nav, Shri, Sri, Shree, Sree, Om, Jai, Sai, The, etc. does not make a name distinguishable from an existing name and similarly, if it is different from the name of the existing company only to the extent of adding the name of the place, the same shall not be allowed. Such names may be allowed only if no objection from the existing company by way of Board resolution is submitted.
- (k) Different combination of the same words does not make a name distinguishable from an existing name, e.g., if there is a company in existence by the name of "Builders and Contractors Limited", the name "Contractors and Builders Limited" shall not be allowed unless it is change of name of existing company.
- (l) If the proposed name is the Hindi or English translation or transliteration of the name of an existing company or limited liability partnership in English or Hindi, as the case may be.

3.2 Undesirable Names

According to Rule 8(2) (a), the Name shall be considered undesirable, if –

- (i) It attracts the provisions of section 3 of the Emblems and Names (Prevention and Improper Use) Act, 1950. The said Section prohibits the improper use of certain names and emblems which are covered under the Schedule to the said Act.
- (ii) It includes the name of a registered trade mark or a trade mark which is subject of an application for registration, unless the consent of the owner or

applicant for registration, of the trade mark, as the case may be, has been obtained and produced by the promoters, and

- (iii) It includes any word or words which are offensive to any section of the people.

3.3 Other undesirable Names

According to Rule 8(2) (b), following names are considered undesirable and not available:

- (i) The proposed name is identical with or too nearly resembles the name of a limited liability partnership.
- (ii) The Proposed name is not in consonance with the principal objects of the company as set out in the memorandum of association. Every name need not be necessarily indicative of the objects of the company, but when there is some indication of objects in the name, than it shall be in conformity with the objects mentioned in the memorandum.
- (iii) The company's main business is financing, leasing, chit fund, investments, securities or combination thereof, such name shall not be allowed unless the name is indicative of such related financial activities, viz., Chit Fund or Investment or Loan, etc.
- (iv) The Proposed name resembles closely with the popular or abbreviated description of an existing company or limited liability partnership.
- (v) The proposed name is identical with or too nearly resembles the name of a company or limited liability partnership incorporated outside India and reserved by such company or limited liability partnership with the Registrar.
- (vi) Any part of the proposed name includes the words indicative of a separate type of business constitution or legal person or any connotation thereof e.g. cooperative, sehkari, trust, LLP, partnership, society, proprietor, HUF, firm, Inc., PLC, GmbH, SA, PTE, Sdn, AG etc.

According to Explanation to this clause, for the purposes of this sub-clause, the name including phrase 'Electoral Trust' may be allowed for Registration of companies to be formed under section 8 of the Act, in accordance with the Electoral Trusts Scheme, 2013 notified by the Central Board of Direct Taxes (CBDT). The name application is accompanied with an affidavit to the effect that the name to be obtained shall be only for the purpose of registration of companies under Electoral Trust Scheme as notified by the Central Board of Direct Taxes.

- (vii) The proposed name contains the words 'British India'.
- (viii) The proposed name implies association or connection with embassy or consulate or a foreign government.
- (ix) The proposed name includes or implies association or connection with or patronage of a national hero or any person held in high esteem or important personages who occupied or are occupying important positions in Government.
- (x) The proposed name is vague or an abbreviated name such as 'ABC limited' or '23K limited' or 'DJMO' Ltd: abbreviated name based on the name of the promoters will not be allowed. The existing company may use its abbreviated name as part of the name for formation of a new company as subsidiary or joint venture or associate company but such joint venture or associated company shall not have an abbreviated name only e.g. Delhi Paper Mills Limited can get a joint venture or associated company as DPM Papers Limited and not as DPM Limited. The companies well known in their respective field by abbreviated names are allowed to change their names to abbreviation of their existing name after following the requirements of the Act.
- (xi) The proposed name is identical to the name of a company dissolved as a result of liquidation proceeding and a period of two years have not elapsed from the date of such dissolution. If the proposed name is identical with the name of a company which is struck off in pursuance of action under section 248 of the Act or Section 560 of the Companies Act, 1956, then the same shall not be allowed before the expiry of twenty years from the publication in the Official Gazette being so struck off.
- (xii) It is identical with or too nearly resembles the name of a limited liability partnership in liquidation or the name of a limited liability partnership which is struck off up to a period of five years.
- (xiii) The proposed name include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA etc. have been complied with by the applicant.
- (xiv) The proposed name includes the word "State", the same shall be allowed only in case the company is a government company.
- (xv) The proposed name is containing only the name of a continent, country, state, city such as Asia limited, Germany Limited, Haryana Limited, Mysore Limited.

- (xvi) The name is only a general one, like Cotton Textile Mills Ltd. or Silk Manufacturing Ltd., and not Lakshmi Silk Manufacturing Co. Ltd.
- (xvii) The name is intended or likely to produce a misleading impression regarding the scope or scale of its activities which would be beyond the resources at its disposal.
- (xviii) The proposed name includes name of any foreign country or any city in a foreign country, the same shall be allowed if the applicant produces any proof of significance of business relations with such foreign country like Memorandum of Understanding with a company of such country. The name combining the name of a foreign country with the use of India like India Japan or Japan India shall be allowed if, there is a government to government participation or patronage and no company shall be incorporated using the name of an enemy country.

According to Explanation to the clause, for the purposes of this clause, enemy country means so declared by the Central Government from time to time.

(To be continued...)

Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30th September, 2016.