BURYING THE MEMORANDUM OF ASSOCIATION:

A COMPARATIVE STUDY

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LIST OF ABBREVIATIONS

- MOA Memorandum of Association
- AOA Article of Association
- UK United Kingdom
- ASIC Australian Securities and Investments
- JSC Joint Stock Companies
- DOS Deed of Settlement
- CC Company Constitution
- CLR Company Law reform

CHAPTER 1- AN INTRODUCTION

Corporate bodies have withstood over two hundred years of modernization, industrialization and rapid changes in political spheres because of their ability to constantly evolve and adapt to their changing environment. This adaptation, however, is not possible until the legal system facilitates it. Most countries legal systems had similar laws at the outset but gradually diverged and found their own direction in corporate law-making. Constant evolution of law, it has been argued, is a key ingredient to key law.[1]

In that light, it is notable that India is one of few countries whose companies' law has chosen to retain the need for two constitutional documents for incorporation. Historically, it has been seen that many countries (especially those part of the common-wealth) have been at this stage wherein in order to register a company, a Memorandum of Association and an Articles of Association were required. This method of incorporation was derived from the British. Over a period of time, as law evolved, it was realized that it was time to put down the Memorandum and create a new Company Constitution.

Industrial has revolution led to the emergence of large scale business organizations. These organization require big investments and the risk involved is very high. Limited resources and unlimited liability of partners are two important limitations of partnerships of partnerships in undertaking big business. Joint Stock Company form of business organization has become extremely popular as it provides a solution to overcome the limitations of partnership business. The Multinational companies like Coca-Cola and, General Motors have their investors and customers spread throughout the world. The giant Indian Companies may include the names like Reliance, Talco Bajaj Auto, Infosys Technologies, Hindustan Lever Ltd., Ranbaxy Laboratories Ltd., and Larsen and Tubro etc.

Traditionally, there are six clauses present in Memorandum of Association but this research aims to prove that out of the six, only one- the objects clause is the most important and is inadvertently the deciding factor for existence of the Memorandum. The researcher in furtherance of this assertion aims to also establish a connection between the doctrine of *ultra vires*, its subsistence or abolition, its subsistence or abolition, a far more important factor in the existence of the Memorandum. The Companies Act, 1956 required that companies at time of registration are mandated to state their main objects and ancillary objects. This requirement was done away with under the 2013 Act. The new Act in Section 4(1)(c) requires that companies state their objects.

[1] Katharinna Pisto, Yoram Keinan, Jan Kleinheisterkamp and MarkD-West, The Evolution of Corporate Law:A Cross-Country Comparison, UNIVERSITY OF PENNSYLVANIA, JOURNAL OF INTERNATIONAL ECONOMIC LAW 791(2002).

This is in fact a free way for companies to draft wide objects clause in order to circumvent the attacks of the doctrine of *ultra vires*. Such an objects clause deteriorates the significance of the clause.

It is pertinent to note that the doctrine of ultra vires is practically non-existent in most countries. And, it is the weakening of this doctrine and a similar state of objects clause in those countries that have caused them to take the bold step of not only doing with it. Different countries have chosen a different approach in doing this. While the UK has retained the two documents, the Memorandum does not contain anything of significance and the Company Constitution has been created to include clauses of the previous Memorandum and the Articles of Association. Each of these countries has made this change in their legal systems at different points of time. Australia's amendment was as early as 1999 while Hong Kong incorporated it only in 2014.

It can be seen that the merger of the Memorandum of Association and the Articles of Association into a single constitution or to simply do away with the Memorandum has become a step towards modernization. Therefore, the time has come to analyze if India is in the same position as these countries to make a similar amendment towards simplifying the process of incorporation. This researcher aims to study the evolution of company law with respect to the Memorandum of Association in the United Kingdom, Australia, Hong Kong, Singapore and India and to assess of India could afford to make similar changes in its law.

Generally, social entrepreneurs and professionals have a very basic concern w.r.t. the type of entity for engaging in activities relating to charity i.e. whether such activity should be in the form of a trust or society or a company with charitable objects. The decision is taken based on the nature of activities, persons involved in decision making process, accounting aspects, taxation aspects, etc According to the provisions of Section 8 of the Companies Act, 2013 (the Act), following are the 3 conditions or restrictions on its activities of such company

(i) the company's objective shall include activities for promotion of commerce, art,

science, sports, education, research, social welfare, religion, charity, protection of

environment or any such other object;

(ii) the company intends to apply its profits, if any, or other income in promoting its

objects (as stated above); and

(iii) the company intends to prohibit the payment of any dividend to its members.

The Central Government issues a licence on such terms and conditions as it deems fit. Based on the licence, the company can be incorporated under Section 8 of the Act without addition to its name of the word "limited"

or “private limited” as the case may be. This article provides a detailed compliance checklist for incorporation of companies with charitable objects (i.e. companies incorporated under Section 8 of the Act). The applicable provisions are Rules 8, 12 and 19 of the Companies (Incorporation) Rules, 2014 read with Section 8 of the Act. The entrepreneurs and professionals shall ensure compliance of following provisions:

1. Minimum number of directors.—If the company (under Section 8 of the Act) to be incorporated is a private company then minimum directors should be 2 and in case of public company, the minimum directors should be 3.

2. Minimum number of members.—If the company (under Section 8 of the Act) to be incorporated is a private company then minimum members should be 2 and in case of public company, the minimum members should be 7. A partnership firm may be a member of company incorporated under Section 8 of the Act.

3. Application for name.—The name of proposed company shall be considered undesirable, if: (i) it attracts the provisions of Section 3 of Emblems and Names (Prevention of Improper Use) Act, 1950; (ii) it includes the name of a trade mark registered or trade mark which is subject of an application for registration under

Trade Marks Act, 1999 (unless the consent of owner or applicant for registration, of trade mark, as the case may be, has been obtained and produced by the

LITERATURE REVIEW

Frank Evan[2]s (1908), in his paper has traced how trading corporations have been regulated under the law from prerogative royal charters to the Act passed in 1844 in England. He has made note of the requirement of a "Charter of Incorporation" under the 1834act as well the requirement of a "Deed or an Agreement of Partnership" under the 1837 Act. Although his article enumerated the events which subsequently led to the enactment of the Companies Act, it has not ventured into the intricacies of drafting the charter documents and the value bestowed on them.

Andrew Hicks and S.H. Goo[3] (2008) in their book have dedicated a whole chapter to the Memorandum of Association. The authors have discussed the requirements under the 1844 Act till the present 2006 Act explaining concisely how a single deed of Settlement evolved into two separate documents namely, the Memorandum of Association and the Articles of Association. They have also made mention of important review groups who have discussed the need of these documents.

Author Samuel Evans[4] (1908), in very clear and constructive manner portrays how the idea of an association took shape into a body corporate in old England. He also attempted in his article to bring to light the rationale behind the various powers that a corporate enjoyed before than 1800.

Len Sealy and Sarah Worthington[5] (2016) made mention of the reasons behind the separation of the Deed of Settlement into two documents. It was indicated that the Memorandum was the primary document that informed the public of its objects while the Articles of Association was for internal management. The author however seems to indicate that some of these reasons do not hold value in the present day as it has a very limited role. Her observations have become pertinent in adjudging the reason as well as the present-day importance of a Memorandum of Association.

Professor **Stephen Bottomley's[6]** book is of particular importance in this research. He has, be some additional reasons for the creation of a separate Memorandum not mentioned in Sealy and Worthington's work. He has brought to light a procedural problem that existed with the Deed of Settlement that the Memorandum of Association and Articles of Association sought to alleviate. He stated that the earlier Deed of Settlement

[2] Frank Evans, The Evolution of the English Joint Stock Limited Trading Company, 8 COLUMBIA LAW REVIEW 339 (1908).
[3] Andrew Hicks and S.H. Goo, Cases and Materials On Company Law (Oxford University Press 2008).
[4] Samuel Williston, History of the Law of Business Corporations Before 1800, 2 HARVARD LAW REVIEW 105(1888).
[5] Len Sealy and Sarah Worthington, Sealy and Worthington's Text, cases and Materials in Company Law (Oxford University Press, 2016)
[6] Stephen Bottomley, the Constitutional Corporation: Rethinking Corporate Governance (Ashgate Publishing Ltd.2013)

required all the members signature and the Memorandum was introduced to help with this issue as companies grew and the presence of all members caused difficulties. His chapter 'Front Contract to Constitution' has helped in making important inferences in the progress of this research.

Ms. Phyllis McKenna[7] (2014) delivered a speech on the new company ordinance of Hong Kong hhighlighting not only all the changes under the new law but also the objective of the law makers behind each change. She discussed abolition of Memorandum of Association as a requirement for company registration and the reasons cited by the law makers behind the drastic change.

The Government of Hong Kong (2014) in answer to the plethora of questions that arose after the praising of the new company ordinance decided to publish a FAQ in order to be better explain the changes. A separate section of fifteen questions have been dedicated to the abolition of Memorandum of Association, the reasons for the abolition and how it will affect the new and existing companies. However, there are certain important aspects such as public access to charter documents that have not been addressed.

Charltons Solicitors[8] (2014) have published a series of newsletter at the time the new ordinance was passed. Part seven of the newsletter was dedicated to the abolition of the Memorandum of Association. The writers have aptly made comparison between the position under the old company and the new. Theyhave also added certain points of criticism of the new law with recommendations. This enables the reader to view some changes in different light.

Gursharan Singh[9] (2014) in his research paper has discussed the importance of the Memorandum of Association and the difference in the Memorandum between the provisions of the 2013 Companies Act and that of l956. He has also attempted to sketch the evolution of the company law in India along with the doctrine of ultra vires which proves to be of q ¡Omar interest to this research. Since most countries which have done away with the "Memorandum of Association have attributed it to the death of the doctrine of ultra vires, the Indian scenario portrayed by Singh is important for consideration.

[7] Ms Phyllis McKenna 2014, Speech on the New Hong Kong Company Ordinance (Cap.622), viewed 27th May 2021, https://www.cr.gov.hk/en/publications/speech.htm

[8] New Companies Ordinance Relating to Memorandum of Association and Analysis of the Doctrine of Ultra Vires https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504364 , viewed 26th May 2021

[9] Gursharan Singh, Introduction to the new avatar of Memorandum of Association and Analysis of the Doctrine of Ultra Vires https://dx.doi.org/, viewed on 23rd May 2021

Walter Woon[10] (2011) discussed the final report of the Steering Committee to the Minister of Finance, Singapore in April, 2011. Among the various recommendations of the Committee, Mr. Woon who chaired the Committee, focused on three major points. One of the points is on administration and management of companies wherein the Steering Committee has recommended the merger of the Memorandum of Association and the Articles of Association into a single constitution.

Jiang Yu Wang[11] (2014) in his research article has analysed the 2014 revision of the Singaporean Companies Act. He has traced history of the Singaporean law till date and has proven how Singaporean has elevated from a position of copying foreign laws to internalizing and making the company law more relevant to Singaporean businessmen. Since the 2014 amendment which included the merger of the Memorandum and Articles of Association, it is of particular importance for understanding the driving force that led to one of the most significant development of company law in Singapore.

Chris Nyombi's[12] article, *the gradual erosion of the ultra vires doctrine* (2014) in English Company law, has greatly aided in this research. His article has covered every minute detail of development in the use of the doctrine over the years of English company law. He has indicated how the judiciary and the legislature have played a role in watering down the doctrine of *ultra vires*. His article has also talked of the developments in the object clause in the Memorandum of Association and its final abolition. This article has been increasingly helpful in establishing the connection between the Memorandum, the objects clause and the doctrine of *ultra vires*.

The development of Joint Stock Companies Act from 1856 to 1858 can be best learned through the work of **Charles Wordsworth**[13] (1859). In his article, he has discussed the Sections of the three Acts during the period and the changes that have been incorporated. He has also covered the components of the Memorandum of Association during that period which is relevant to this study.

[10] Walter Woon, Reforming Company Law in Singapore, 23 SAcLJ795 (2011).
[11] JingYu Wang Making Singapore Company Law More Singaporean? – A critical Examination of the recent revision of the Companies Act in the light of Comparative Law, THE ASIAN BUSINESS LAWYER 15 (2014).
[12] Chrispas Nyombi, *the gradual erosion of the ultra vires doctrine in English Company Law*, 56 INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT 347-362(2014).
[13] Charles Wordsworth*, The New Joint Stock Company Law of 1856, 1857 and 1858 with all the statues and instructions – How to form a company and herein of the liabilitie4s of the persons engaged in so doing, Shaw and Sons Law Publisher*s (1859), available at https://archieve.org.details/newjointstockco00wordgoog.

Margaret Hyland and Alex Lau[14](2011) have drawn a comparative study of the corporate ' regulators in Australia and Hong Kong. Although corporate regulator is not the subject of this Study, the article is relevant as they have started out by studying the historical developments in corporate law both in Australia and Hong Kong, and have also discussed their common law origins. Since both Australia and Hong Kong are part of this study, to look at their developments simultaneously have been helpful.

Australia was a federation and lacked uniformed corporate regulations. Their effort towards achieving a nationalized legislation with the favour of the states is important in tracing the history behind the Corporations Act 2001. **R.I Barett**[15] (2012) has traced the development of company law in Australia over 150 years. He argues that the present state of affairs is more exactly a harmonized legislation and more has to be done to get the states unified.

Harold Ford[16] (1991) discusses the cooperative scheme and the national scheme in Australia. In studying the history of corporate legislation, it is important to understand the previous attempts of unifying corporate law. In his article he has discussed when entailed in the cooperative scheme and why it failed. He has also discussed the national scheme which was the product of the Alice Springs Agreement.

Michael J Whincop[17] (1999) is yet another author who has analyzed the corporate law reform in Australia. He has added to his research by going into an in-depth study on the Corporate Law Simplification Taskforce and the Corporate Law Economic Reform Program of 1997. Both these entities have been instrumental in drafting of the Corporations Act, 2001 which presently governs Corporate bodies in Australia.

Roman Tomasic, Stephen Bottomley and Rob McQueen[18] (2002) in their book on Australian Corporations Law have dedicated a chapter to the history of corporate form and regulation. In the chapter they have discussed two important cases; Re Wakim; ex parte McNally and the Queen v Hughes which forced the Australian Commonwealth to reconsider the national scheme and the corporations law. The case proved that the scheme was unconstitutional and it enabled the government to draft a new and even better arrangement.

[14] Margret Hyland and K.L. Alex Lau, A Comparative study of the corporate regulators in Australia and Hong Kong, 22(7) International Company and Commercial Law review 212-217 (2011)
[15] R.I. Barret. Towards Harmonised Company Legislation – *Are we there yet*. 40 FEDERAL LAW REVIEW 141(2012).
[16] Harold Ford, *Australia's New Companies Legislation*, 2(1) INTERNATIONAL COMPANY AND COMPANY LAW REVIEW 15-17(1991).
[17] Michael J. Whincop, *The Political Economy of Corporate Law Reform in Australia*, 27 Federal Law Review 77(1999).
[18] Roman Tomasic, Stephen Bottomley and Rob McQueen 1: HISTORY OF CORPORATE FORM AND ITS REGULATION, CORPORATIONS LAW IN AUSTRALIA 27 (FEDERATION)

Another chapter has been dedicated to constituting the corporations which discusses the components of the Memorandum of Association and has been included in this study.

Philip Lipton[19] (2007) discusses the development of Australia corporate law in light of their colonial history. He shows that as English enacted and amended their companies Act, there was an immediate effect on the companies Law in Australia. Therefore, when Memorandum of Association and Articles of Association were introduced in England, it immediately was introduced in Australian law. He has adequately evaluated the legal evolution in this respect.

Stephen J. Leacock[20] (2006) conducted a comparative study with respect to the doctrine of *ultra vires* in the United Kingdom, United States and the Commonwealth Caribbean. He talked about the evolution of the doctrine and the reasons it was instituted. He also showed in his article how the doctrine gradually disappeared from the laws of these nations and the reasons behind it. Towards the end of the article, he also briefly covered the status of the doctrine in Australian and a few other commonwealth nations.

Paul Von Nessen[21] (1999) in his article talked about how the doctrine of ultra vires was eliminated from the Australian law. He mentions of the Company Law simplification Bill, 1997 and the company Law Review Act, 1998 which removed the doctrine and gave corporations all powers of a natural person. He has noted that the main aim of the drafters was to introduce a simplified and flexible manner of registration of companies.

Ian R. Harper[22] (2002) has written article on the Wallis Report. The Report looked into the financial system in Australia and suggested changes and reforms to ensure that Australia could become better competitive in the world market. He mentioned that the Simplification Bill and the reviews that were undertaken during this period had an ultimate goal of making Australia commercially favorable.

[19] Philip Lipton, *A History of Company Law in Colonial Australia Economic development and Legal Evolution*,31 MELBOURNE UNIVERSITY LAW REVIEW 805 (2007).
[20] Stephen J. Leacock, *Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom and Commonwealth Caribbean Corporate Common Law: A Triumph Experience Over Logic,* 5 DEPAUL business and commercial law journal 67(2006).
[21] Paul Von Nessen, *The Americanization of Australian Corporate Law,* 26 SYRACUSE JOURNAL OF INERNATIONAL LAW AND COMMERCE 239(1999).
[22] Ian R. Harper, *The Wallis Report: An Overview, 30* THE AUSTRALIAN ECONOMIC REVIEW 288-300 (2002).

Cally Jordan[23] (1997) has written an informative article on the steps that Hong Kong has taken to modernize its laws. She mentions of the problems in the previous Hong Kong Ordinance and the recommendations that have been made in the Consultancy Report. The New Companies Ordinance was only passed in 2012 therefore, the developments since the Consultancy Report and efforts by the government were relevant for this study.

S.H. Goo[24] (2013) conducted a full study on just the process of incorporation in Hong Kong. He has traced this development from the period when Hong Kong was a British Colony till the 2012 Act. He has provided a useful timeline for timeline for this study. He has shown that initially the English law was taken as a point of reference in drafting Hong Kong's company laws.

In his article **Christopher Bates** [25](1985) had discussed how closely Hong Kong replicated English law. He also pointed out that a point the Companies Ordinance of 1984 was in replication of English Act of 1984 by which time several amendments were made in the English law. Due to this delay and the rising needs of businesses, a Steering Committee was set up the same year.

Stefan H.C Lo's[26] (2013) article on the New Companies Ordinance in Hing Kong is extremely relevant to this research. He examines the reforms in the new land and in doing so, traces the history or legislative attempts and review processes that took place behind it. He especially talks about the Rewrite Project wherein the government decided to rewrite the company law instead of amending the existing law.

Lutz- Christian Wolff[27] (2003) has published a well written article on the doctrine of ultra vires in China including Hong Kong. He discusses the origin of the doctrine and the reasons why Hong Kong has decided to abandon it. In this process, he also talks of the legislative provisions that have been put in place for *ultra vires* acts of companies.

Petra Mahy and Ian Ramsay[28] (2014) have written a very relevant article on legal transplants. The articles main focus is o how Malaysia as a transplant country of the British, enacted its laws including corporate law.

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[23] Cally Jordan, *Hong Kong looks to Cast off UK Company Law Past, 16 INTERNATIONAL FIANANCIAL LAW REVIEW* 29(1997).
[24] S.H. Goo FULL STUDY REPORT ON HISTORY OF COMPANY INCORPORATION IN HONG KONG - A STUDY COMMISSIONED BY THE COMPANIES REGISTRY, HONG KONG SPECIAL ADMINISTRATIVE REGION 14(2013)
[25] Christopher Bates *Companies(Amendment) Ordinance 1984, 15 Hong Kong Law Journal 167(1985).*
[26] Stefan H.C Lo's, *Corporate Governance and the New Companies Ordinance in Hong Kong, 21 Asia Pacific Law review 267 (2013).*
[27] Lutz- Christian Wolff, The Disappearance of the Ultra Vires Doctrine in Greater China: Harmonized Legislative Action or (simply) an Accident of History? 23 NRTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 633 (2003).
[28] Petra Mahy and Ian Ramsay, *Legal Transplants and Adaptation in a Colonial Setting: Company Law in British Malay*, SINGAPORE JOURNAL OF LEGAL STUDIES 123(2014).

But since Singapore and Malaysia was part of one Crown Colony, the early origins of Singapore have also been dotted in this article. A table has also been created by the authors with UK, Singapore and Malaysia's corporate law enactments in similar periods.

Wai Yee Wan[29] (2014) has also written an article on ultra vires and corporate capacity in Singapore. He has also observed the origins of the doctrine and how it was handled in Singapore. He mentioned that when the objects clause in Memorandum of Association became alterable, the doctrine no longer held its significance. He states that it is because of this that Australia abolished the doctrine and Singapore did the same.

Umakanth Varrotil [30](2016) traced the development of Indian Companies Act from the time it was British colony till 2013. He noted that Indian Companies Acts were kept similar to that of English in order to favor British businesses but after independence, the legislation was amended to fit Indian needs. He covered in detail the discussion of the Bhabha Committee as well as the 2013 Bill.

P.S. Sangal's [31](1963) views formed an useful article to understand the doctrine of ultra vires and how it developed in Indian company law. He stated that initially. The 144 Joint Stock Companies Act did not have an objects clause. It was when the objects clause was introduced in 1856, that the doctrine today than boons which has been noticed by several jurisdictions. He was disappointed to find the Bhabha Committee unfortunately did not feel that the evil was so rampant to do away with the doctrine entirely.

[29] Wai Yee Wan, *Recent Development in Singapore on Company Law and Regulations: Review of the Singapore Companies Act,* COMPANY LAWYER 143(2014).

[30] Umakanth Varrotil, *The Evolution of Corporate Law in Post- Colonial India: From Transplant to Autochthony, 31 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 253 (2016).*

[31] P.S. Sangal's, *Ultra Vres and Companies: The Indian Experience, 12 THE INTERNATIONAL AND COMPARATIVELY LAW QUARTERLY 967- 988 (Cambridge University Press, 1963)*

OBJECTIVE OF THE STUDY

The objective of this study is;

1. To the understand the significance of the Memorandum of Association and the Articles of Association.

2. To understand the evolution of Memorandum of Association and Articles of Association in India.

3. To compare the status of the Memorandum of Association and the Articles of Association under the Companies Acts in UK, Australia, Hong Kong and Singapore in order to understand the reasons behind the abolishing of the Memorandum of Association.

4. To make appropriate suggestions for the continuation of the Memorandum of Association and the Articles of Association as separate documents or for the merging of these two documents through the findings of this research.

PROBLEM STATEMENT

Indian Companies Act requires that every company at the time of incorporation is required to draft a Memorandum of Association as a compulsion. The only essence of this document is the objects clause which over time has lost its significance. Through a comparative analysis, researcher aims to identify the significance of this document and its applicability in the present scenario.

RESEARCH QUESTION

There is only one question is only one research question to be considered;

1. Should India change its law to do away with the Memorandum of Association or merge the Memorandum of Association and the Articles of Association of companies into a single constitutional document?

METHODOLOGY

This study will essentially follow a **comparative approach** of research on the topic. As there are several countries that have chosen to do away with the Memorandum of Association a comparative study will throw light on whether India is better suited to abolish the Memorandum of Association. In order to understand the and hold the grasp of the dissertation a separate study and analysis was ensured to unveil the real approach of this topic by studying it from the eyes of different countries. The type of information required and relevant to

the study are the company laws of the respective countries and secondary sources in the form or journals, commentaries and articles related to the said laws.

SIGNIFICANCE OF THE RESEARCH

The result of this research study could potentially enable the speed of incorporation and the ease of registration for companies. Moreover, this research topic is very narrow and therefore, articles and studies on this aspect are absent. Therefore, it significantly adds to of knowledge on comparative corporate laws. It would also act as a stepping research that may pave the way for future amendments in the Companies Act.

FRAMEWORK

The chapters have been arranged country-wise and in the order of the years relevant amendment have been made.

- Chapter 2 discusses the various aspects of Memorandum of Association by way of provisions detailed under the Companies Act and its significance.

- Chapter 3 covers several concepts on following the topics
  (i) Modes of Acquiring Membership in a Company.
  (ii) Validation of Memorandum of Association.
  (iii) Distinction between Memorandum of Association and articles of Association.

- Chapter 4 discusses Legal effects of Memorandum of Articles when registered.

- Chapter 5 discusses over-riding effect on the Memorandum of Association.

- Chapter 6 discusses the state of affairs in UK which has been the pioneer in modern company law. It discusses how concepts have been developed and how law has evolved to date.

- Chapter 7 discusses how Australia has modernized its company law by diverging from its English origins. It includes the evolution of the clauses of Memorandum of Association. It was one of the first of the commonwealth countries to introduce a company constitution.

- Chapter 8 focuses on Hong Kong whose amendments were only passed in 2012.

- Chapter 9 talks about the development in Singapore which amended its law in 2014 but has localized it and distinguished it from the previous countries.

- Chapter 10 discuss the position in India and the developments in company law. Lt proves that the reasons cited by UK, Australia and Hong Kong cannot stand ground in India.

- Chapter 11 concludes and makes suggestions of possible amendments to better Indian companies' legislation. This chapter also includes scope for further research.

CHAPTER 2- WHAT IS MEMORANDUM OF ASSOCIATION?

The memorandum of association is a document of great importance in relation to the proposed company. It contains the fundamental conditions upon which alone the company is allowed to be incorporated. It is the charter of company and it defines the companies reason for existence. It lays down the area of operation of the company. It also regulates the external affairs of the company in relation to outsiders. Its purpose is to enable share-holders and those who deal with the company to know what is permitted range.it not only shows the object of the formation of a company but also the utmost passible scope of it[32].

The formation of a company is introduced in Section 3 of the Companies Act, 2013 ("the Act") wherein it says that any 7 people or more in case of a public company, 2 people or more in case of a private company a and a person alone in case of a one-person company can form such company by subscribing their names to a memorandum provided they comply with the requirements of registration under the Act. A memorandum thus is an essential prerequisite for forming a company. It is the charter of the company, laying down the constitution of the company, the object it strives for, the share capital it has (if any), the name of its directors and so on. It is an open--to-access document from which a person interested in the company may gather all essential information about the company and its business before deciding whether to be associated with it or not. It is the self-defined limits of the company and shall operate only within its confines. As per section 2 of the Companies Act, 2013 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.

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.[33]

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:

[32] **Read more at Legal Bites © Reserved: https://www.legalbites.in/memorandum-of-association-moa/**

[33] Drafting of Memorandum of Association And Articles of Association https://www.wirc-icai.org/images/material/Article-on-MoA-AoA-CA-Satish-Shanbhag, (visited On 3rd June 2021)

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.

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 956 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 witness ……..Sec 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:

ƒ the Objects of the Company

ƒ 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**

ƒ 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**

ƒ 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 sate 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 notfor-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 of ……..2013 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 of ……i 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

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.

Name, address and description of the Subscribers	Number of Equity shares taken by each subscriber	Signature(s)	Witness

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.

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.

SIGNIFICANCE OF THE MEMORANDUM OF ASSOCIATION

There can be no doubt that the significance of the Memorandum of Association ("Memorandum") has gradually diminished ever since the first limited companies were recognised under English law over 150 years ago. A company's Articles of Association ("Articles"), once of secondary importance to the Memorandum, have now taken primacy in the relationship between the 'constitutional' documents of a company. This shift is due to common law and statutory responses to the challenges faced by modern companies. However, the final implementation of the Companies Act 2006 (the "2006 Act") which came into force on 1st of October 2009 marked the end of the Memorandum as a document of any ongoing significance for the regulation of a company's affairs. Rather the Act has rendered the Memorandum nothing more than a 'historic snapshot' of the company which simply contains the details of its subscribers on incorporation. This essay examines the role and importance of both the Memorandum and Articles before and after the 2006 Act came into force.

The Joint Stock Companies Act 1856 (the "1856 Act") first introduced the constitutional framework whereby a company's external affairs were governed by the Memorandum and its internal affairs regulated by its Articles. Under this arrangement, which continued for over 150 years until 30 September 2009, the Memorandum was a constitutional document which stated the company's: name; domicile; objects; whether a private or public company; whether limited by shares or guarantee; and the authorised share capital (if limited by shares). When introduced under the 1856 Act, the Memorandum was the most fundamental document which prevailed over the Articles where there was any inconsistency. One essential difference was the company's power to amend its constitutional documents. Whereas companies could amend their Articles by special resolution, the 1856 Act made no provision for amending the Memorandum. It was not until the Companies Act 1862 (the "1862 Act") that companies were given the power to amend the Memorandum to allow the company to change its name and capital requirements however any other amendments were prohibited. Subsequent Company Acts widened the scope of amendments to the Articles but there was never a general power to amend and each amendment was subject to special procedural requirements.

Reform of the constitutional documents of companies under the 2006 Act began in 1998 when the Department of Trade and Industry commissioned an independent steering group to carry out a fundamental review of company law. This steering group led the "Company Law Review" (CLR) which was instructed to consider how company law could be modernised so that an efficient, cost effective and simple framework for business could be established. The CLR carried out a comprehensive programme of research and consultation and presented its report to the Secretary of State for Trade and Industry in 2001. The report set out recommendations and areas of reform and included a recommendation that company law should be made as simple for small businesses and their advisers as possible so that cost savings could be made and

entrepreneurial dynamism encouraged. This ideal was carried on by the CLR when determining the function of the Memorandum and Articles. The philosophy of simplicity was highlighted by the Standing Committee of the House of Lords when reviewing the bill which was the forerunner to the 2006 Act. Lord Sainsbury summarized the reform to the role of Memorandum very succinctly as follows:

"The Company Law Review looked very carefully at the question of the company's constitution. It was keen to see the company's internal rules as far as possible set out logically in one place and pointed out the potential for overlap under current arrangements between a company's memorandum and its articles… we wanted to do away with any scope for confusion between the memorandum and the articles, and introduce a clear distinction between the information in the memorandum, which will be in effect an historical snapshot, which, once provided, has no continuing relevance, and the constitution of the company properly-so-called, as contained essentially in its articles, which will be of real significance in the company's life."

This summary reflects the present position under the 2006 Act. Lord Sainsbury described the new Memorandum as "a historical snapshot, which, once provided, has no continuing relevance".

Back in the nineteenth century the Memorandum was important because it concisely set out to a company's creditors or potential investors what activities the company could legally carry out in the objects clauses. The objects clauses reassured investors that their money could only be used for the purpose of the stated activities. The courts supported this by developing the ultra vires doctrine which held that a company was legally incapable of doing something unless it was empowered to do so in its objects clause. In other words, any acts outside the objects were held to be ultra vires and void. Following this decision the law regarding the strict application of ultra vires began to develop and the judiciary sought ways to reform the law.

Within five years the strict rule was relaxed with the allowance of a contract which, whilst outside the remit of the strict objects, were incidental to the main objects. However at this point the courts were still using ultra vires effectively and failure to achieve all its objectives could cause the company to be wound up.

Further changes introduced by the Companies Act 1890 (the "1890 Act") allowed alterations to the objects to be made with restrictions; it must be for a purpose defined within the act, the company must have the change passed by special resolution and this must go before the court for confirmation. Following the legal amendments and **Re: German Date Co., in 1918** the law further relaxed its attitude to the objectives

identifying that each object clause was considered to be independent rather than a subsidiary of the main object clause. This judgement led to companies forming long lists of object clauses as an all encompassing strategy. The next significant alteration came in Bell Houses Ltd v City Wall Properties Ltd. Their objects included a generalised clause which allowed the company to "…carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to the general business of the company". This clause was accepted to be valid by the courts diminishing further the importance of defining object clauses. This was enhanced by the Companies Act 1985 (the "1985 Act") which subsequently allowed alteration of object clauses by special resolution.

It is important to note that an action of ultra vires can only be held as such if the other party had no actual or assumed knowledge that it was ultra vires. The protection of outsiders was further strengthened by the 1985 Act which confirmed that actions would not be deemed ultra vires providing the company was dealing with a director or responsible representative, they were acting in good faith and had no knowledge or suspicion of ultra vires. Another challenge to the viability of ultra vires came when the courts distinguished pursuance of objects from the exercising of powers contained in the Memorandum.

The Companies Act 1989 (the "1989 Act") further altered the legal standing of the object clauses. Instead of allowing the doctrine of ultra vires to render an action void, it placed liability onto the Directors of the company for any activities which fell outside the remit of the Memorandum. The liability was in respect to any loss suffered by the company as a result of working outside the object clause. The 1989 Act provided "The validity of an act done by a company shall not be brought into question on the grounds of lack of capacity by reason of anything in the company memorandum".

The 2006 Act has subsequently removed the need for companies incorporated after 1 October 2009 to include objects in their Memorandum. This disempowerment of members is part of a historical trend for the doctrine of ultra vires although the doctrine is still applicable for Company Directors. The law deems companies to have limitless objects unless there are self imposed restrictions contained in the Articles. For existing companies, the objects contained in the Memorandum are deemed to be transferred to the Articles and held as self imposed restrictions but can be removed by special resolution.

In a similar manner, the requirement to state authorised share capital has also been removed by the 2006 Act. Directors of companies limited by shares incorporated after 1 October 2009 need not include any reference to authorised share capital in the Memorandum or Articles therefore directors will be permitted to issue unlimited

number of shares unless a self imposed restriction is contained in the Articles. Nevertheless, directors will generally still require the authorisation of the members before making any allotment of shares to new shareholders. This is subject to a new exception which allows directors of private companies composing only one class of share to allot shares without a shareholder resolution. The only new requirement under the 2006 Act is that directors must file a statement of capital with Companies House stating the number, class and nominal value of the company's shares in issue. For existing companies the authorised share capital will continue to act as a cap setting the maximum amount of the shares that can be allotted by the directors of the company.

The 2006 Act abolishes the power of companies to place absolute entrenched rights in the Memorandum. Previously a company could place entrenched rights in the Memorandum and provide that they could not be changed or only changed under in accordance with strictly defined rules, although companies were not forced to act in a way that was against their best interests. Under the 2006 Act companies can only conditionally entrench elements of the company's constitution in the Articles and absolute entrenchment is not permitted for new companies.

The Articles, whilst always part of Company Law have had their importance greatly enhanced by the 2006 Act. Now considered the predominant document encompassing both the internal and external affairs of the company, every company must have Articles. The role of the Articles as internal regulations have not been altered significantly by the 2006 Act it is the addition of the external regulations formally contained within the Memorandum which has meaningfully added to the legal standing of the Articles.

The 2006 Act provides model Articles now distinct for private and public companies which can be adopted by companies in whole or in part or companies can produce their own. When adopting alternative Articles the company can include any clauses it deems appropriate. However this is subject to restrictions. Illegal provisions will be deemed void. Provisions inconsistent with company legislation will be void. Provisions unrelated to membership will not be contractually bound. The company must use forms specified in the Act to transfer fully paid up shares. Limitations on Director power placed in the Articles does not affect the rights of any person dealing with the company who is acting in good faith.

Alterations to the Articles must be made by special resolution, communicated to Companies House and are subject to restrictions; a company can now require greater than the specified seventy five percent support for

a designated article alteration enabling certain articles to be further entrenched within the constitution. A company is not able to require any member to invest any additional monies outside the initial agreement.

Individual members are permitted to claim for unfair prejudicial conduct or treatment irrespective of their individual shareholding thus affording protection to minority shareholders. The Articles additionally enable varied voting rights to be applied.

The Articles contain contractual obligations and can bestow rights on the members themselves. However, they also provide private rights for shareholders and members to rely upon although this does not alter the Articles. Where Directors are also members the courts consider the nature of the claim; if the claim relates to shareholding thereby to the external affairs it is deemed contract law but if the claim is in connection with the internal affairs it is deemed a breach of company regulation. Information detailed in the Articles can also be implied into another contract and where the Articles detail terms for non members these are said to be incorporated into the non-members contract on appointment. Contractual obligations are set out in Section 33 of the 2006 Act.

The 2006 Act has placed any residual duties once included in the Memorandum into the Articles. This has been seen above by the manner in which objects, authorized share capital and entrenched rights have been either abolished or placed in the Articles. A further change that must not be overlooked is the requirement for companies limited by shares to include a statement limiting liability in the Articles.

The Articles continue to govern the relationship between the company, the shareholders and the company's officers. However the 2006 Act now specifically states instances where a company can exercise powers even if they are not included in the Articles. For example, private companies no longer require authority in their Articles to issue redeemable shares. Instead the 2006 Act provides a general authority for private companies to issue redeemable shares subject to any constraints in the Articles. Furthermore, companies no longer need authority in their articles to buy their own shares subject to any self imposed restrictions in the Articles which had not previously been the case.

The Memorandum was until very recently the most important constitutional document of UK companies. It set the limits of the company's business activities and powers and identified the maximum authorised share capital which whilst important for investor reassurance and protection particularly through the development

of the ultra vires doctrine, gave no protection for outsiders because the ultra vires doctrine rendered actions and contracts void preventing the trading party from pursuing a court claim even though they may have been acting in good faith. This was unfair and caused the law to be somewhat defective. Nevertheless the Memorandum was not reformed in any meaningful way until very recently, a culmination of a 10 year process including a 3 year programme of research and consultation. The 2006 Act has removed the requirement for stated authorized share capital and objects although if they are included the company would be bound by them[34].

The 2006 Act has simplified and streamlined company law and the ascendancy of the Articles to the dominant constitutional documents recognizes the reality of the modern era and dismisses the old fashioned delineation between external and internal affairs of the company. In modern business practice the Articles are the first place any potential stakeholder looks to determine whether the company has the correct procedures in place to enter into a proposed transaction. The 2006 Act encourages companies to keep their Articles short and simple by creating presumptions in its provisions which presume that companies have certain powers unless they are excluded by their Articles. This is unlike the regime under the 1985 Act where the presumption was that companies lack authority to act unless it was contained in their Articles which caused companies to replicate whole sections of the 1985 Act in their Articles making them increasingly long[35].

In conclusion, the role of the Memorandum has been rendered largely redundant by the 2006 Act. Modern business practice has led to the emergence of the Articles as the core constitutional document and the Memorandum is no only of historical significance.

[34] Mason, French and Ryan: Company Law (26th edition Blackstone Press, Oxford 2009).
[35] Paul L Davies; Gower and Davies: The Principles of Modern Company Law (7th edition Sweet and Maxwell 2003)

CH- 3 MODES OF ACQUIRING MEMBERSHIP IN A COMPANY

A person may become a member in a company in any of the following ways:

1. **Membership by Subscribing to Memorandum (Section 41)**

All the subscribers to the memorandum are deemed to have agreed to become members of the company and on the registration of the company their names are automatically entered as members in the company's register of members. Thus, the signatories to the memorandum become members of the company simply by reason of their having signed the memorandum. Neither an application form nor allotment of shares is necessary for becoming a member in their case. A person who signs the memorandum enters into a contract with the company to take the number of shares written opposite his name and be cannot repudiate his contract on the ground of misrepresentation. In the case of Metal Constituents Co., (1902) 1.Ch. 707, a subscriber agreed to take 350 shares. Then, he wanted to rescind the contract on the ground of misrepresentation on the part of the promoters. Held that the subscriber by signing the Memorandum becomes liable to other members in the company brought into existence by his own act. So he can not rescind the contract.

2. **Membership by Qualification shares**

Before a person can be appointed a director of a public company, he must take, or sign an undertaking to take and pay for the qualification shares. He thus becomes a member and is in the same position as a subscriber to the memorandum of the company is.

3. Membership by Application and Allotment

A person may become a member of a company by an application for shares subject to formal acceptance by the company. The ordinary law of contracts applies to the agreement to take shares in a company. An application for shares may be absolute or conditional. If it is absolute, a simple allotment and notice thereof to the applicant will constitute the agreement. If it is conditional, the allotment must be made on the basis of the conditions specified. Where there is a conditional application for shares and an unconditional allotment, there is no contract constituted. R agreed to take shares in a company provided he was appointed local manager of the company. Shares were allotted to him but he was not given the appointment. R refused to take the shares. It was held that R was not a member as his application was conditional and allotment was unconditional.[36]

[36] [Roger's case (1868) L.R. 3Ch. 633].

4 **Membership by Transfer**

Where a transfer of share is made and the transfer is registered with the company, the transferee becomes entitled to be placed on the company's register of members in the place of the transferor in respect of the shares so transferred.

5. **Membership by Transmission**

On the death of a member his shares rest with his legal representative. The legal representative is entitled to be registered as the holder of the shares and to get his name entered as member in the register of members provided there is no provision in the articles of the company and for the purpose no instrument of transfer is required to be delivered by him to the company. If a company unduly refuses to accept a transmission, the same remedies are available to the legal representative as in the case of transfer. In the case of Indian Chemical Products V. State of Orissa, AIR (1967) SC 253, by devolution, the state of Orissa had become entitled to the shares of the Maharajas. But the company refused to register the shares in the name of state's representative. It was held that the company was bound to register the shares in favour of the state's representative because it was a case of transmission. And the state became entitled to the shares due to the operation of law.

6. **Membership by Estoppel**

If a person holds himself out in writing or allows his name to be on the register of members, he is deemed to be a member of the company. Thus if a person's name is improperly placed on the register of members, and he knows and assents to it, he cannot afterwards say that he is not a member. Estoppel is simply a rule of evidence which prevents a person from denying the legal implications of his conduct.

Validation of Memorandum of Association.

Do you believe in perfection, so that you could just avoid rework? That is exactly what you could be achieving if Memorandum of Association (MoA) the document that is considered the charter of the company is drafted with perfection and validated by law. Critics, you might just say, entrepreneurs hardly have the time or expertise to quality check these documents. Well, imagine when you plan to raise funding, and add directors to the company's board of directors, the investor would hesitate to associate himself with your firm because the MOA that you long back drafted is hardly a valid one. In this blog we shall look into How to validate your Memorandum of Association Document?

MOA 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.

For every Company which is required to be registered under the provisions of the Companies Act 956 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

A Memorandum of Association generally has following clauses:

Name Clause: This clause contains full name of the Company as incorporated.

- 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;
- The State in which the registered office of the company is situated

Registered Office Clause: This clause indicates the jurisdiction of Corporate Regulator, under which the Company's registered office falls.

Objects Clause: This clause indicates the objects for which Company is incorporated. The objects which are part of main business activities 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 etc.,

Liability Clause: This clause tells about limit on monetary liability of each member towards the Company. 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.

In case of Company limited by guarantee, the Liability clause 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 contributors among themselves, such amount as may be required, not exceeding a specified amount.

Capital Clause: This clause denotes the maximum capital which Company can raise at given point of time. In the case of a company having a share capital, the Memorandum shall also state:

(a) The amount of share capital in form of Authorized Share Capital with which the company is to be registered and the division thereof into shares of a fixed amount.

(b) Minimum paid Capital in the form of Paid up

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.

Things you should not make any mistakes:

- 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.
- 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
- The objects which Company wish to attain immediately after it is incorporated. These objects which are part of main business activities needs to be very clear and should encompass all the activities such as manufacture, sale, trade, import, export, exchange, 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. Activities such as seeking mandatory registrations, enrolments, bank accounts, marketing and business promotion, staff welfare, borrowing powers, power to take-over new business, merger & amalgamation empowerment of the Company, if included would be best to maintain transparency.
- 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 Sectorial Regulator such as RBI, IRDA, SEBI etc.
- 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 Apostle/ 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.

How MOA can be validated? MOA attestation in India?

A Memorandum of Association is a crucial commercial document that necessitates legalization. The verification of the Memorandum of Association is important in proving your and your document's genuinity. The procedure of attestation is implemented by the home government granting the permission to enter the foreign country. The concerned government office needs the approval that you are advantageous individual when you are procuring a visa or providing attested documents. Also, the method of legalization in India is a broad and dreary. There is a dimension of initiative that insist the document attestation until the last one. Along these lines, finishing the attestation the help of adroit firms can finish being valuable.

Why Attestation of Memorandum of Association is required?

Memorandum Of Association attestation is one of the significant processes of legalization in which an attestation stamp from the concerned officials is procured. It needs to be done from the certificate issued country i.e. India. The MOA indicates the name of the Company, the names of its members (shareholders) and the number of shares held by them, as well as the centre of their registered office. It also indicates the objectives of the organization, the legal share capital, the members' liability for shares or assurance, and the type of contracts that the company may enter into. The authentication of this document is necessary when the company intends to sell its product abroad. Also, when a company wants to open a branch in a concerned country, it necessitates to produce this document to the embassy. The commercial certificate attestation in India is in demand for business reasons and many of the corporates look for the best Memorandum of Association Attestation service provider in India to help all the businesses, we founded PEC which renders secure solutions to customers.

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वाणिज्य मंडल में सहायक सचिव एवं संयुक्त/उप सचिव के हस्ताक्षर प्रमाणित किए जाते हैं।

The Signature of Asstt. Secretary/Dy. Secretary/Secretary of Chamber of Commerce Attested.

विदेश मंत्रालय इस दस्तावेज के किसी भी विषय वस्तु की जिम्मेदारी नहीं लेता।

Ministry of External Affairs accepts no responsibility for the contents of this document.

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How to get Memorandum of Association attested in India?

Attestation services are how you can get suitable attestation for your commercial documents. Attestation agents at PEC render services like attestation of the certificate in India. The services given are reputed and well-known, and the team is customer oriented. We have experienced the field for about 6+ years and now we have swift and quick serviceability. The services that are being given are all legalised and we shall get the complete process done for you. We also offer pickup and drop facility to suit your necessity. We shall gratify your attestation needs that a client sees as a must.

What is the process for a Memorandum of Association Attestation?

Attestation of commercial documents is not a direct process. There are necessary steps to go through before final attestation. It starts with attestation by notary and finishes with attestation by embassy/consulate. The detailed procedure for attestation in India is as follows

- **Chamber Of Commerce Attestation**

  Chamber of Commerce is an organization of the local businessmen and verification from this organization is the initial step for the commercial document legalization. Commercial documents are evidence that your business is legitimate and hence, commercial document legalization helps in proving the same.

- **MEA Stamp**

  MEA or Ministry of External Affairs is the last level of authentication from the home government after which an MEA stamp is applied on the document. MEA is the central department that deals with the foreign matters of the country.

- **Embassy Attestation**

  It is performed by the officials of the respective country the documents are being attested for. It is the last step of the certification for most nations after the Ministry of External Affairs.

- **How long does it take to get Memorandum of Association Attestation?**

  The time-span required depends upon several reasons, for example, for which country you mandate the attestation for, or the kind of documents, or the state you need it from. Normally, it will take about 8 days to 10 days to finish. However, it can still stretch up to a couple of weeks more than a month. The overall time will still be influenced by aspects referred to previously.

- **How much does it cost to get a Memorandum of Association Attestation?**

  Attestation of Memorandum Of Association fees changes from country to country and state to state. It will also be affected by the urgency of the requirement, also from the state the documents were issued. The attestation cost could be low or high and can yet differ with the extra services like attestation of documents with pick up and drop service.

- **Step by step process for MOA application**

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1

Fill Details

2

Submit Originals

3

Payment

MOA is a constitutional document of the company?

From the Deed of Settlement present in the 1844 Joint Stock Companies Act, the constitutional document of the company splits into Memorandum of Association and the Article of Association which was first adopted by the Joint Stock Companies Act, 1856. It was split into two depending on the importance of the entries; as it was believed that the basic characteristics of a company had to be distinguished from the operations of the company. The personality of the company is however limited to the purpose for which it has been envisaged which has to be stated in the Objects clause. Memorandum of Association should contain the fundamental document of the company and should be unalterable in the interest of the shareholders, public and especially the creditors of the company while the Articles of Association should be freely alterable by the shareholders in the general meeting.

Nature of the liability of the members is one of the vital aspects apart from the sphere of operations of the company. Companies can be classified into limited liability companies and unlimited companies. Limited liability can be further classified into company limited by shares and company limited by guarantee (with share capital or without share capital). Companies having limited liability are also classified into public companies and private companies. Unlimited companies are also with share capital or without share capital.

But this classification of companies on the basis of their liabilities is an erroneous conception as the liability of the company is always unlimited; it is the liability of the members that is limited or unlimited.

In a company limited by shares, the liability of the members will be judged according to the yardstick of his shareholding together with the premium paid for those shares. This liability may arise when the company is a going concern or when the company has to pay off its creditors. There is no link between members of a company and its creditors between whom there is no vinculum juris (an obligation of law). The memorandum of the company limited by share must state that the liability of the members is limited and should also state the number of shares and the nominal value of each share.[37]

In a guarantee company which is usually resorted to by charity institutions, a member undertakes that in certain eventualities when the company is wound up and its assets are not sufficient enough to pay off the creditors, then the guarantee amount will be paid and this is in the guarantee clause in the Memorandum of Association. As regards the nature of liability, there is no distinction between a guarantee company or unlimited company because the liability only arises on winding up and when the assets are not enough to meet the creditor's needs. But the extent of liability of a guarantee company is limited unlike an unlimited company.

A guarantee company having a share capital and an unlimited company with a share capital are hybrid companies, though the capital clause appears in the Memorandum of Association for the former but in the Article of Association for the latter. The members have a two fold liability: liability on the guarantee clause and the liability on the shares. For unlimited companies there is a liability on undertaking in the Article of Association and on the shares. The qualitative difference between the two liabilities is that the share liability is applicable to a going concern but the guarantee liability is only on winding up. The voting power in a guarantee company having a share capital is determined by the share holding, not by the guarantee.

If the company is issuing a share capital, then the nominal value must be stated in the Memorandum of Association except in the case of an unlimited company, wherein it is stated in the Article of Association as per section 27 of the Companies Act, 1956 . This is because the capital clause is not significant for the third parties because members are any way liable to an unlimited company. Further under section 16, the Memorandum of Association cannot be altered and the procedures for the name change are stringent. However for the limited companies since the third parties rely on the share capital it should not be conducive to easy

[37] C.M. Schmitthoff and J.H. Thompson, Palmer's Company Law (21st ed.,London: Stevens & Sons Limited, 1968) at 50-51.

change and hence it is in the Memorandum of Association. According to section 31, principle lying under Article of Association is freely alterable. Putting the statement of share capital in articles instead of the memorandum makes it easier for an unlimited company to alter its authorized capital.

Section 13 provides obligatory provisions in the Memorandum of Association

This includes name, office, objects, capital clause and the association clause besides the nature of the liability of the members. If there is limited liability, then the name of the company must have 'Limited' and for private companies, it should have 'Private Limited' except for Section 25 companies. The format of the Memorandum of Association must be strictly in accordance with the procedure laid down. The legislative direction that a company should have a memorandum in the form of one of the model memoranda provided by statutory instrument or as near to that form as circumstances permit means only that companies should follow the formal layout and does not extend to prescription of the contents of the document.

But it is not necessary to adhere to this format only; there is scope for them to take a sideway from this track.. This leeway from the general format is good for the development of the companies as it is not possible for every company to adhere to the same set of rules and regulations.[38] Circumstances of the particular company have to be taken into consideration while drafting guidelines of any particular company.

The contents of the memorandum and articles, as distinct from their arrangement, must correspond to the models in the regulations but their contents will be held to be valid even though they differ radically from those of the models.

The Memorandum of Association and Article of Association must be printed and signed. If the company has a share capital then the Memorandum of Association has to be signed by subscribers, who should write opposite to their names, the shares agreed to be taken by them.

In the case of an unlimited company the clause in the Memorandum that the liability of the members is limited is omitted, and the name of the company need not incorporate Limited or Public Limited Company at the end[39].

[38] Robert R Pennnington, Company Law (7th edn., London: Butterworths, 1995) at 4.
[39] Gaimon v. National Association for Mental Health, [1970]3 WLR 42. Gaimon v. National Association for Mental Health, [1970]3 WLR 42.

Object clause is the fundamental provision of the Memorandum of Association. It gives the contractual capacity of the company. Statutory corporations, by virtue of the enactment of the statute are limited in their powers as it has been reasonably restricted. If the powers exercised are not in reasonable relation with the specified activities, then the act is ultra vires.[40]

Liability clause is applicable only in respect of companies limited by shares and by guarantee (with or without share capital).

For the alteration of the Object clause, there is no scrutiny of courts but a special resolution needs to be passed only on seven specific grounds.

Memorandum and Articles of the company can be altered subject to the Companies Act. Section 31 provides that Article of Association can be altered by Special Resolution and any agreement to make an item in the Article of Association unalterable is void under section 9. Section 16 on the other hand clearly says that the company shall not alter the Memorandum of Association clearly evincing legislative policy. The change in the Article of Association is permitted in order to allow the company to change with the times.[41] However, section 17 says that under circumstances the objects clause can be amended by a special procedure which involves a special resolution and filing of the same in the Registrar. Items in the Memorandum of Association are only those which are required to be there under section 13 or any other express provisions. Section 16(3) also says that non-obligatory clauses in the Memorandum of Association are treated as clauses in the Article of Association and can be altered. If there is a conflict, then the Memorandum of Association and the Article of Association must be harmoniously construed failing which the Memorandum of Association will prevail.

For Article of Association, the change must be consistent with the obligatory provisions of the Memorandum of Association. Section 38 which gives the effect of an alteration fixes the maximum and minimum liability of members. The liability of a member cannot be increased by an alteration of the Memorandum of Association or Article of Association unless the member himself agrees to the alteration or in case of a non-profit making association where a periodic subscription is to be paid up. The alteration also cannot require him to take more shares.[42] Again, class rights cannot be varied without the consent of the class as in section 106. However, a Memorandum of Association from the very outset can provide for such a clause increasing liability but cannot provide that an alteration to that effect is valid.

[40] P.L. Davies, Gower's Principles of Modern Company Law (6th ed., London: Sweet & Maxwell Ltd., 2000) at 107.
[41] S.W. Mayson et al., Mayson, French & Ryan on Company Law (21st edn., New York: Oxford University Press, 2004) at 56.
[42] J.M.J. Sethna, Sethna's Indian Company Law Vol. 1 (11th ed., New Delhi: Modern Law Publications, 2005) at 784.

In case of guarantee companies, where specific provisions in the Articles of Association providing for transfer of member's interest, provisions of section 108(1) would not be applicable as such provisions relates to shares only.

The Supreme Court in **Narendra Kumar Agarwal v. Saroj Maloo** held that there is material difference between the set of Articles in relating to companies limited by shares and limited by guarantee and as such same principles of transfer for shares and membership cannot apply. The right of a guarantee company to refuse to accept the transfer by a member of his interest in the company is on a different footing than that of a company limited by shares.

The Legislature did not in section 29[43] provide for voting rights of members of the company limited by guarantee as was done in the case of companies limited by shares but wanted to achieve the same purpose by prescribing the forms in the Tables. A change in the wording of section 28 and 29 implies a change in the contents of the two provisions. While in section 28 the Articles may adopt all or any of the regulations, but in section 29 the Articles of any company shall be in such form or in a form as near thereto as circumstances admit. The alteration in the languages has been deliberately made for a stricter conformation to the prescribed form. The statutory provision has not been worded in such a way that an undeviated Form is required. There could be variations in the Article consistent with the model form. The aim and object of the Act and form in Table giving every member a right of one vote would be defeated, if the direction of the legislature is not strictly observed. It is thus imperative to adopt the form. The provision of Section 29 was inserted with an object of participation in the management of the companies. That would be nullified and hence the provision would be mandatory.

OBSERVATION

Constitutional documents should be crystal clear and no scope should be left for its ambiguity. Tables given in the First Schedule should be their role model; though before preparing the memorandum and articles, following matters should be obtained by the draftsmen:

1. The nature of the business should be known in connection with the objects clause of the memorandum. The courts will not look outside the memorandum to discover what the objects are, though it may look at the surrounding circumstances to determine the stated objects.

[43] Section 29 of the Companies Act, 1956

2. The amount of nominal capital and the denomination of the shares into which it is to be divided (for company having share capital) should be known prior to the preparation of the memorandum and articles of association.

3. If there are any special requirements which deviate from the normal as exemplified by the appropriate Table, like matters dealing with quorums and the maximum and minimum number of directors should be known to the draftsmen in advance only.

Apart from these three information, it should also be kept in mind that the other requirements of the Act as to the contents of the memorandum and articles are complied with and they are in the statutory form. With the aid of these information, it will be very conducive enough for the draftsmen to come up with a detail and clear constitutional documents for different types of company; thus restricting the scope of multiple interpretations.

Legal effects of Memorandum and Articles when registered

The effect of the Memorandum of Association and the Articles of Association when registered is that

- they bind each member to the company,
- they bind the company to the members,
- they bind members inter se i.e., bind each member to other members, but they do not bind either the company or the members to the outsiders.

Bind Each Member to the Company

It is presumed that each member has signed both the Memorandum and the Articles of the company. These documents are treated as contracts entered into between the company and outsiders. So these documents bind the members to the company.

Binding Effects of Memorandum and Articles of Association

"Subject to the provisions of this Act, the Memorandum and Articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the Memorandum and of the Articles."

Thus, the Articles bind the company to its members, the members to the company and the members to each other. They constitute a contract between a company and its members in respect of their rights and liabilities as members. A member may sue the company, just as the company may sue the members to enforce and restrain any breach of the articles.

1. Binding the company to its members:

The company is bound to the members to observe and follow the articles. In case the company commits a breach of the articles, members can restrain the company from doing so, by bringing an injunction against the company.

Members may sue to restrain a company from doing any ultra-vires or illegal acts or from acting on a resolution obtained by fraud or which is inconsistent with the Articles.

Members may also sue the company for the enforcement of their personal right under the Articles, e.g., right to receive divided which has been declared. However, only a shareholder or a member of the company, in the capacity of a member and not in any other capacity, can enforce the rules and regulations contained in the Articles.

The case of Wood v Odessa Waterworks Co. provides an illustration of binding of articles on the company to its members.

The articles of the Waterworks Co. provided that 'the directors may, with the sanction of the company at general meeting, declare a dividend to be paid to the members'. Instead of paying the dividend in cash to the shareholders a resolution was passed to give them debenture bonds.

In an action by a member to restrain the directors from acting on the resolution, the Court held: "The question is whether that which is proposed to be done in the present case is in accordance with the articles of association of the company.

Those articles provide that the directors may, with the sanction of a general meeting, declare a dividend to be paid to shareholders. Prima facie that means to be paid in cash. The debenture bonds proposed to be issued are not a payment in cash." Accordingly the directors were restrained from acting on the resolution.

2. Binding on members in their relations to the company:

An article of Association is a 'contract of the most sacred character' between the company and each member, binding the members to the company under a statutory covenant.

All money payable by any member to the company under the Memorandum or Articles shall be a debt due from him to the company. Articles are taken to be signed and agreed to be observed by each member. Members are bound by the articles just as if every one of them had contracted to conform to them. A company can sue its members for the enforcement of its Articles as well as for restraining their breach. A case in point is:

Borland's Trustees v. Steel Bros. & Co. Ltd. (1901):

The articles of association of the company provided that in the event of the bankruptcy of a member his shares would be sold at a price to be fixed by the directors. Borland became bankrupt. His trustee in bankruptcy wanted to sell these shares at their true value contended that he was not bound by the articles. It was held that he was bound to abide by the provisions of the company's articles.

3. Binding between members:

The contractual force given to the articles is limited to the matters arising out of company's relationship of the members as members and does not extend beyond the company relationship. The articles constitute a contract between each member and the company. The articles do not regulate their rights inter se.

Such rights can only be enforced by or against a member through the company. However, this is not without exception. Courts have extended the articles to constitute a contract between individual members qua members without joining the company as a party to the action. The case of Rayfield v Hands (1960) is a pointer to the issue.

Rayfield was a shareholder in a company. He was required to inform the directors in the event of his intention to transfer the shares. The directors were required to take the shares at a fair value. Rayfield informed the directors in accordance with the articles. The directors contended that they were not bound to take and pay for Rayfield's shares and the articles could impose no such obligation on them.

The court set aside this argument by treating the directors as members and compelled them to take Rayfield's shares at a fair value. The court also held that it was not necessary for Rayfield to join the company for bringing a suit against the directors.

4. No binding in relation to the outsiders:

The memorandum and articles do not constitute a contract between the company and the third party. Neither the company nor the members of the company is bound to the outsiders to give effect to the provisions of the memorandum and the articles. For example:

In Browne v La Trinidad, the articles of the company contained a clause to the effect that Browne should be a director and should not be removable. He was, however, removed and had brought an action to restrain the company from excluding him.

It was held that there was no contract between Browne and the company. No outsider can enforce articles against the company even if they purport to give him certain rights.

Thus, an outsider cannot take advantage of the Articles to found a claim thereon against the company. Even a member enjoying certain rights in a capacity other than a member cannot enforce them against the company. The member would be an outsider for those 'outside rights'. The leading case is that of Eley v Positive Government Security Life Assurance Co.

The articles of a company contained a clause that Eley would be the solicitor of the company and would not be removed except for misconduct. He became member in the company also. He acted as solicitor of the company but the company removed him. He brought an action against the company for breach of the articles.

His suit was dismissed. The Court held, "An outsider to whom rights purport to be given by the Articles in his capacity as such outsider, whether he is or subsequently becomes as member, cannot sue on those articles to enforce those rights."

DISTINCTION BETWEEN ARTICLES OF ASSOCIATION AND MEMORANDUM OF ASSOCIATION

The difference between memorandum of association and articles of association is as under:

Memorandum of Association	Article of Association
It is character of company indicating nature of business & capital. It also defines the company's relationship with outside world.	They are regulation for the internal management of the company and are subsidiary to the memorandum
It defines the scope of the activities of the company, or the area beyond which the company actions of the company cannot go	They are the rules for carrying out the objects of the company as set out in the Memorandum.
It, being the charter of the company, is the Supreme document.	They are subordinate to the Memorandum. If there is a conflict between the Articles and Memorandum, the act of the Company.
Any act of the company which is ultra vires the Memorandum is wholly void and cannot be ratified even by the whole body of the shareholders	Any act of the company which is ultra vires the articles can be confirmed by the share holders if it is intra vires the memorandum.
Every company must have its own Memorandum	A company limited by Shares need not have Articles of its own.
There are strict restrictions on its alteration. Some of the conditions of incorporation contained in it cannot be altered except with the sanction of the Central Government.	They can be altered by a special resolution, to any extent, provided they do not conflict with the Memorandum and the Companies Act.

CASE LAWS UNDER THE UMBRELLA OF MEMORANDUM OF ASSOCIATION

Vasant Investment Corporation ...

Vs

Official Liquidator, Colaba Land

6 July, 1979

Bench: S V Manohar

In re reported in [1939] 1 Ch 41; 9 Comp Cas 229 (Ch D) it was held that a company has no power to enter into, nor can the court sanction, any arrangement or compromise which necessarily involves the doing of any act which is ultra vires the company, being in excess of its corporate powers as defined in its memorandum of association. But every alteration of the memorandum of association required under a scheme of compromise or arrangement cannot be looked upon as an ultra vires act. In the first place, under s. 391, the court has very wide power of reconstituting company. When, for example, a scheme is proposed which involves a restructuring of the capital of the company - as in a case where the rights of the various shareholders are sought to be altered - it can also be said that under the existing memorandum and articles of association of the company, the rights of the shareholders are fixed in a certain way and to change them would involve sanctioning an act which is ultra vires the memorandum and articles of association. Strictly speaking, such an act may be considered as ultra vires. But, in fact, the very purpose of a scheme of reconstruction is to make suitable alterations in the structure of the company to enable it to function. A scheme, therefore, which contains such "ultra vires" provisions can be - and is, in fact - sanctioned in a number of cases. It is in connection with such a reorganisation that Justice Rangnekar has observed in Katni Cement and Industries Co. Ltd., In re [1937] 7 Comp Cas 348; 39 Bom LR 675 (Bom) that under s. 153 of the Indian Companies Act, 1913, the court can sanction a scheme or arrangement even though it involves acts which, apart from its provisions, would be ultra vires the company.

Leela Kumar

Vs

Government of India

7 April, 1997

Bench: D Raju, A Lakshmanan

In the case of K. Leela Kumar v. Government of India , the Court held that Memorandum of Association cannot contain anything contrary to Companies Act, 1956 however articles of association in many cases deals with personal matters and may not be challenged on the aboveground. In Sivashanmugam v. Butterfly Marketing (P.) Ltd. , the Court held that where the objects clause provided that the company may enter into any partnership for any purpose which may benefit the company, it was held that this enabled the company enter into partnership for manufacturing garments. In NEPC India Ltd. v. Registrar of Companies , the Court held that a complaint alleging that a company was indulging in activities not mentioned in the objects clauseof the Memorandum of Association had to be filed within six months of the date of knowledge.

Liability clause: A declaration that the liability of the members is limited in case of the company limited by the shares or guarantee must be given. The MA of a company limited by guarantee must also state that each member undertakes to contribute to the assets of the company such amount not exceeding specified amounts as may be required in the event of the liquidation of the company. A declaration that the liability of the members is unlimited in case of the unlimited companies must be given. The effect of this clause is that in a company limited by shares, no member can be called upon to pay more than the uncalled amount on his shares. If his shares are already fully paid up, he has no liability towards the company.

The following are exceptions to the rule of limited liability of members:-

If a member agrees in writing to be bound by the alteration of MA / AA requiring him to take more shares or increasing his liability, he shall be liable up to the amount agreed to by him.

If every member agrees in writing to re-register the company as an unlimited company and the company is re-registered as such, such members will have unlimited liability.

If to the knowledge of a member, the number of shareholders has fallen below the legal minimum, (seven in the case of a public limited company and two in case of a private limited company) and the company has carried on business for more than 6 months, while the number is so reduced, the members for the time being constituting the company would be personally liable for the debts of the company contracted during that time.

Capital clause: The amount of share capital with which the company is to be registered divided into shares must be specified giving details of the number of shares and types of shares. A company cannot issue share capital greater than the maximum amount of share capital mentioned in this clause without altering the memorandum.

SEBI

Vs

Burren Energy India Ltd. & Ors.

2nd December 2016

Bench: Ranjan Gogoi & N.V. Ramana

Burren Energy India Ltd ("Burren") is incorporated in England, to acquire the entire of the equity share capital of one Unocal Bharat Limited ("UBL"), which is incorporated in Mauritius. The shares of UBL were acquired by one Unocal International Corporation ("UIC") incorporated in California in USA. UBL at the relevant time, held 26.01% of the issued share capital of Hindustan Oil Exploration Co. Ltd. ("the target company"). Burren entered into a share purchase agreement with UIC on 14th February, 2005 to acquire the entire equity share capital of UBL, in England and by virtue thereof all the shares of UBL were registered in the name of Burren on the same day itself. On account of this transformation Burren came to hold 26.01% of the share capital in the target company. As the acquisition was beyond the stipulated 15% of the equity share capital of the target company the Regulations got attracted making it obligatory on the part of Burren to make a public announcement, which was accordingly made for sale/purchase of 20% of the shares of the target company at a determined price of Rs.92.41 per fully paid up equity share was made on 15th February, 2005 by Burren and UBL acting as a person acting in concert. On 14th February, 2005 i.e. date of execution of the share purchase agreement Burren appointed two of its Directors on the board of UBL and on the same date UBL, which is a person acting in concert with Burren, appointed the same persons on the board of directors of the target company. This, according to SEBI, amounted violation of Regulation 22(7) of the Regulations inasmuch as the said appointment was made during the offer period which had commenced on and from 14th February, 2005 i.e. date of execution of the share purchase agreement. The adjudicating authority imposed a penalty of Rs.25 lakhs which was set aside by the Securities Appellate Tribunal. Hence the appeal by SEBI.

Decision: Appeal allowed.

Reason:

The main thrust of the contentions advanced on behalf of the appellant appears to be that the words 'Memorandum of Understanding' are, in an appropriate situation may also include a concluded agreement between the parties. Even in a given case where a Memorandum of Understanding is to fall short of a concluded agreement and, in fact, the concluded agreement is executed subsequently, the 'offer period' would still commence from the date of the Memorandum of understanding. If the offer period commences from the date of such Memorandum of 2 n Securities Laws 73 Understanding, according to the learned counsel, there is no reason why the same should not commence from the date of the share purchase agreement when the parties had not executed a Memorandum of Understanding. It is also submitted that the commencement of the 'offer period' from the date of public announcement would primarily have relevance to a case where acquisition of shares is from the market and there is no Memorandum of Understanding or a concluded agreement pursuant thereto. In reply, the respondents urged that Regulation 22(7) of the Regulations can have no application to the present case inasmuch as the disqualification from appointment on the board of directors of the target company will operate only when the acquirer or persons acting in concert are individuals and not a corporate entity. In the present case, while Burren was the acquirer, UBL was the person acting in concert. This is evident from the letter of offer (public announcement) dated 15th February, 2005. The embargo under Section 22(7) is both on the acquirer and a person acting in concert. The expression 'person acting in concert' includes a corporate entity [Regulation 2(1) (e) (2) (i) of the Regulations] and also its directors and associates [Regulation 2(1) (e) (2)(iii) of the Regulations]. If this is what is contemplated under the Regulations we do not see how the first argument advanced by Shri Divan on behalf of the respondents can have our acceptance. Insofar as the second argument advanced by Shri Divan is concerned it is correct that in the definition of 'offer period' contained in Regulation 2(1)(f) of the Regulations, relevant for the present case, a concluded agreement is not contemplated to be the starting point of the offer period. But such a consequence must naturally follow once the offer period commences from the date of entering into a Memorandum of Understanding which, in most cases would reflect an agreement in principle falling short of a binding contract. If the offer period can be triggered of by an understanding that is yet to fructify into an agreement, we do not see how the same can be said not to have commenced/started from the date of a concluded agreement i.e. share purchase agreement as in the present case. On the view that we have taken we will have to hold that the learned Tribunal was incorrect in reaching its impugned conclusions and in reversing the order of the Adjudicating Officer. Consequently the order of the learned Tribunal is set aside and that of the Adjudicating Officer is restored. The penalty awarded by the Adjudicating Officer by order dated 25th August, 2006 shall be deposited in the manner directed within two months from today.

M/S DURO FELGUERA S.A

Vs.

GANGAVARAM PORT LIMITED

10th October 2017

Bench: Bhanumati J.

The Respondent GPL intended to expand its facilities in the Port with respect to Bulk Material Handling Systems. This included Engineering, Design, Procurement of Materials, Manufacturing, Supply, Erection, Testing and Commissioning of Bulk Material Handling Systems, as well as all other associated works and integration of the same with the existing coal handling systems etc. After post-bid negotiations, the petitioner Duro Felguera and its subsidiary (FGI) were considered by GPL and Duro Felguera and FGI were selected as "the Contractors" for the work. After discussion between the parties, the main contract i.e. Original Package No. 4 TD was divided into five different and separate Packages.Separate Letters of Award for five different Packages were issued to M/s Duro Felguera, S.A. and the Indian Subsidiary-FGI for the above said work respectively. Each of the Packages has special conditions of contract as well as general conditions of contract. Each one of the Contract/Agreement for works under split-up Packages contains an arbitration clause namely subclause 20.6. Duro Felguera had also entered into a Corporate Guarantee dated 17.03.2012 guaranteeing due performance of all the works awarded to Duro Felguera and FGI. The said Corporate Guarantee had its own arbitration clause namely clause (8).

In addition, Duro Felguera and FGI have executed a tripartite Memorandum of Understanding with GPL. In the said MoU, Duro Felguera and FGI have agreed to carry out the works as per the priority of documents listed therein. Dispute arose between the parties. GPL contended that all the five contracts are composite contract and one arbitration tribunal should be appointed. On the other hand, Petitioner contended that all five contracts are separate contracts and different arbitration tribunals should be appointed.

Decision : Different arbitration tribunals appointed.

Reason: The learned Senior Counsel for GPL relied upon Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. & Ors. (2013) 1 SCC 641, to contend that where various agreements constitute a composite transaction, court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Even though Chloro Controls has considered the doctrine of "composite reference", "composite performance" etc., ratio of Chloro Controls may not be applicable to the case in hand. In Chloro Controls, the arbitration clause in the principal agreement i.e. clause (30) required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. The words thereon "under and in connection with" in the principal agreement was very wide to make it more comprehensive. In that background, the performance of all other agreements by respective parties including third parties/nonsignatories had to fall in line with the principal agreement. In such factual background, it was held that all agreements pertaining to the entire disputes are to be settled by a "composite

reference". The case in hand stands entirely on different footing. As discussed earlier, all five different Packages as well as the Corporate Guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the Original Package No.4 TD nor on the MoU, which is intended to have clarity in execution of the work. Duro Felguera being a foreign company, for each of the disputes arising under New Package No.4 and Corporate Guarantee, International Commercial Arbitration Tribunal are to be constituted. M/s. Duro Felguera has nominated Mr. Justice D.R. Deshmukh (Former Judge of Chhattisgarh High Court) as their arbitrator. Gangavaram Port Limited (GPL) has nominated Mr. Justice M.N. Rao (Former Chief Justice of Himachal Pradesh High Court). Along with the above two arbitrators Mr. Justice R.M. Lodha, Former Chief Justice of India is appointed as the Presiding Arbitrator of the International Commercial Arbitral Tribunal. Package No.6 (Rs.208,66,53,657/-); Package No.7 (Rs.59,14,65,706/-); Package No.8 (Rs.9,94,38,635/-); and Package No.9 (Rs.29,52,85, 558/-) have been awarded to the Indian company-FGI. Since the issues arising between the parties are inter-related, the same arbitral tribunal, Justice R.M. Lodha, Former Chief Justice of India, Justice D.R. Deshmukh, Former Judge of Chhattisgarh High Court and Justice M. N. Rao, Former Chief Justice of Himachal Pradesh High Court, shall separately constitute Domestic Arbitral Tribunals for resolving each of the disputes pertaining to Packages No.6, 7, 8 and 9.

SHYAM SUNDER AGARWAL

Vs.

P. NAROTHAM RAO

23rd July 2018

Bench – R.F. Nariman, J.

The present dispute arises out of a Memorandum of Understanding (MoU)/Agreement executed between the parties for sale and purchase of shares of a Company called M/s Mancherial Cement Company Private Limited of which all the parties are Directors. The bone of contention in the present proceedings is as to whether Clause 12 of the said Agreement can be stated to be an arbitration clause, as in the said clause the word "decision" is used; the word "Mediators/Arbitrators" is used; the expression "any breaches" is used; and the "decision" is to be final and binding on all parties to the said Agreement.

Decision: Appeal dismissed.

Reason: What emerges on a conspectus of reading of these clauses is that Mr. Sudhakar Rao and Mr. Gone Prakash Rao, though styled as Mediators/Arbitrators, are without doubt escrow agents who have been appointed to keep certain vital documents in escrow, and to ensure a successful completion of the transaction contained in the MOU. Indeed, the very fact that they have been referred to as "Mediators/Arbitrators" and as "Mediators and Arbitrators" would show that the language used is loose – the idea really is that the two named persons do all things necessary during the implementation of the transaction between the parties to see that the

transaction gets successfully completed. This becomes even clearer when Clauses 8 and 11 are seen minutely. Clause 8 expressly declares and confirms "that for successful completion of this transaction in order to avoid any further unforeseen litigations", the two escrow agents have been appointed. Clause 11 further makes it clear that these two gentlemen are escrow agents but shall not handover certain documents till the total transaction is satisfactorily completed. We agree that Clause 12 has to be read in the light of these Clauses of the MOU, and that, therefore, the expression "decision" used in Clause 12 is only a pro tem decision – namely, that the two escrow agents are to make decisions only during the period of the transaction and not thereafter. He has correctly contended that, to use a well- known latin expression, they are "functus officio" after the transaction gets completed. Further, the "breaches" that are referred to in Clause 12 refer, inter alia, to an undertaking given by the party of the first part which is contained in Clause 10, which, if breached, the escrow agents have necessarily to decide on before going ahead with the transaction. Therefore, when viewed as a whole, it is clear that the two escrow agents are not persons who have to decide disputes that may arise between the parties, whether before or after the transaction is completed, after hearing the parties and observing the principles of natural justice, in order to arrive at their decision. A reading of the MOU as a whole leaves no manner of doubt that the said MOU only invests the two gentlemen named therein with powers as escrow agents to smoothly implement the transaction mentioned in the MOU and not even remotely to decide the disputes between the parties as Arbitrators. In the present case, it is clear that the wording of the Agreement, as has been held by us above, is clearly inconsistent with the view that the Agreement intended that dispute be decided by arbitration. Indeed, three of the four purchasers did not read Clause 12 as an arbitration clause, but approached the Civil Court instead, strengthening our conclusion that the subsequent conduct of the parties to the Agreement also showed that they understood that Clause 12 was not an arbitration clause in the Agreement.

PRANAMI TRADING PVT LTD.

Vs.

KIEON DEVELOPERS PVT. LTD

11th June 2016

Bench - Mr Bhaskara Pantula Mohan

The Appellant had filed Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 before the NCLT against the Respondent which came to be rejected on the ground of limitation.

The Appellant had booked a flat with the Respondent on 16th May 2012 and paid an amount of Rs.60 Lakhs and the allotment letter was issued to the Appellant. Subsequently, on 16.07.2012, an MOU (Annexure – D - Page – 42) was executed between the Appellant and Respondent and both the parties cancelled the booking on terms and conditions as laid down in the MOU. The Respondent agreed to pay the Appellant the amount

of Rs.60 Lakhs within 18 months from the date of receipt of the boking amount, i.e. on or before 15th November 2013. In addition, Respondent agreed to pay Rs.8, 10,000/- every six months to the Appellant till entire booking amount was duly paid. Other conditions were also incorporated. According to the Appellant, in furtherance to the MOU and undertaking, the Respondent paid Rs.3, 24,000/- each on 16.11.2012 and 15.05.2013. Even Respondent had issued some cheques for refund of the amount but on 6th January 2014, wrote letter to the Appellant that the cheques are to be replaced. When the Appellant presented two cheques, the same bounced. The Appellant claimed that no interest had been paid on the booking amount, i.e. the principal amount of Rs.60 Lakhs after 15th May 2013 and the principal amount had also not been repaid. The Appellant wanted to invoke second condition of the MOU with regard to the allotment of the flat, but Respondent did not comply and created third party rights which led to the Appellant filing L.C. Suit No.954 of 2014. In the written statement dated 21st July 2017, Respondent claimed that it was a pure loan transaction and accepted that the Respondent had received the money. The Appellant claims that on 16.07.2018, it filed Section 7 proceeding before the Adjudicating Authority, but it was wrongly dismissed on the ground of limitation.

The Impugned Order shows that the Adjudicating Authority took into consideration the Application filed under Section 7 and the Affidavit filed by the Corporate Debtor claiming that the amount concerned was barred by limitation. The date of default was stated to be 21.07.2017 which was date of the written statement in the Suit. The Adjudicating Authority observed that written statement filed in the Suit did not amount to acknowledgement of the debt and could not reset the limitation. Consequently, the Application was rejected.

Decision: Appeal allowed.

Reason: Admittedly, the Appellant had paid Rs.60 Lakhs and allotment letter was issued on 16th May 2012. The Memorandum of Understanding (Annexure – D) shows that the parties mutually agreed to cancel the booking on the "terms and conditions arrived at between the two parties" as mentioned in the documents.

It appears that the Appellant received some amounts which now Appellant classifies as towards the "interest" component and thereafter, neither the principal nor interest, which was recurring, was paid and the Appellant invoked the third para of the Terms and Conditions. The Appellant –Plaintiff filed Suit (Annexure – F) seeking Decree of the flat and in the written statement dated 21.07.2017 (Annexure G – Page 73), the Respondent – Defendant accepted that the respondent had received consideration amount from the Plaintiff as per the statement and claimed that it was a loan transaction.

Thus, the provisions of the Limitation Act shall apply "as far as may be" [s.238 of IBC]. Although the Adjudicating Authority has observed that admission in the written statement will not amount to acknowledgement, we need not deliberate to settle that issue looking to the Term – 1 of the MOU which we have reproduced above. In the transaction, the term clearly shows liability of Rs.8, 10,000/- getting created every 6 months for the Respondent to pay the Appellant "till the entire booking amount has not been repaid".

When the entire booking amount has not been paid, this component keeps getting attracted and liability invoked and when Section 7 Application was filed, the amount due and outstanding was clearly more than Rs.1 Lakh and thus, in our view, the Application under Section 7 could not have been rejected as time barred. There was a debt which was due, and the default was of more than Rs.1 Lakh and therefore, it was sufficient to trigger Section 7 proceeding.

Neither the parties nor the Impugned Order shows that there was any other defect in the Section 7 Application which had been moved so as to say that the Application was not complete. In that view of the matter, the Application filed before NCLT deserves to be admitted. For reasons mentioned, the Appeal is allowed. We remit back the matter to the Adjudicating Authority.

CH- 5 OVERIDING EFFECT ON THE MEMORANDUM OF ARTICLES

The legions of companies have over the period given rise to various circumstances resulting into innumerable conflicts, the most significant one being the terms of constitution of companies itself. There is no ambiguity in stating that this heterogeneous composition of the companies all around the globe is disparate. This disparity as we all know causes conflict and therefore giving rise to the need of standardization. The purpose of overriding effect of the Companies Act, 2013, is to achieve a minimum standard for constitution, procedure and functioning of companies. For this purpose, section 6 of the Companies' Act, 2013 gives overriding force and effect to the provisions of the Act, notwithstanding anything to the contrary contained in the Memorandum or Articles of a Company or in any agreement executed by it or for that matter in any resolution of the Company in general meeting or of its Board of Directors. A provision contained in the Memorandum, Articles, Agreement or Resolution is to the extent to which it is repugnant to the provisions of the Act, is regarded as void.

OVERRIDING EFFECT:

This section provides for supremacy of the Act over contrary provision in any agreement, resolution, memorandum or articles but not any other statutes. Thus, where any right is conferred under this Act, the same is not protected from all other statutes – as held in 20th Century Finance Corporation Ltd v. RFB Latex Ltd5., where parties entered into arbitration agreement to resolve their disputes and then were seeking shelter of section 9 of the Companies Act (corresponding to Section 6) but it did not survive in view of Section 8 of the Arbitration and Conciliation Act, 1996.Section 9 of the Companies Act, 1956 is specific

and the provision of the act shall apply in all matters where there is a specific provision. However the provisions of the article shall apply where they are more stringent than what is prescribed by the Companies Act. For example, Where the Act provides for sanction by a general meeting by ordinary resolution and the articles provide for special resolution, the provisions of the article shall prevail.

Where the Act itself provides that the overriding effect of the Act is not applicable on certain provisions incorporated in any of the aforesaid documents, such documents do not contravene provisions of section 9 if such conflicting provisions are there in any of the documents.

Privy Council in the case of Nazir Ahmed v. King Emperor, has held that where a power is given by a statute to do a certain thing in a certain way, the thing must be done in that way or that thing must not be done at all. Other methods of performance are necessarily forbidden.

This section makes it clear specifically with reference to the Companies Act that no action which is contrary to the terms of the statute can be sustained in law. When any action of a company is contrary to the terms of the statute the principle of ultra vires would also come in to play [General Commerce Ltd. v. Apparel Export Promotion Council].

In the case of **Surjit Malhan and B.K. Malhan v. John Tinson and Co**.,the articles of a private company prescribing share qualification in the terms of S.270 of the Companies Act,1956, the section being not applicable to the private companies, has been held to be void and therefore a director was not permitted to be removed under automatic vacation of office under S.283 (S. 167 of the 2013 Act) when he failed to take his qualification shares as required by the articles. Bombay High Court while deciding the case of **Miheer Hemant Mafatlal v. Mafatlal Industries Ltd.** ruled that a provision in the articles of a company depriving the company of its powers to increase its capital is void because it runs against S. 94 of the

Companies Act, 1956.

Further, in the case of **Mahant Vaishnav Dass v. Shri Fakir Chand**, the court stated that,

"When the Companies Act is amended requiring all the existing companies, to modify their memorandum and articles to the requirements of the new act and if they do not comply with the same, the inconsistent provisions in their memorandum and articles will be void.

PROVISIONS OF MEMORANDUM AND ARTICLES CONTRARY TO OTHER LAWS:

Till now we have discussed upon the provisions of articles and memorandum which are contrary to the provisions of the Companies Act itself. As witnessed above through various case laws, such provisions will be void. The position of such provisions does not change merely upon being in conformity with the provisions of the Companies Act because they very much have to be in conformity with other statues as well. The provisions conflicting with other laws will be equally void.

In the case of **Kinetic Engineering Ltd v. Sadhna Gandhi**, the question for consideration was whether any provision in the articles which is violative of the provisions of any statute can be enforced.

The court while determining the validity of the provisions of Articles of Association or Memorandum which are contrary to the provisions of any other statute in the case of Kinetic Engineering Ltd v Sadhna Gandhi also outlined the dissimilitude between Memorandum, AoA and Bye-Laws.

Every incorporated company has its own memorandum and articles of association. Memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. These are the conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The Articles

are for the internal regulations of the company. Articles cannot alter or vary that which would be the result of the memorandum standing alone. The memorandum must prevail where its object is clear and the articles should not be so construed as to nullify a provision in the memorandum.

Bye-laws of a company are framed in order to carry out the provisions contained in the articles of association themselves. Bye-laws are subordinate to the articles of association and the articles of association are subordinate to the memorandum. Memorandum and articles of association are statutory terms of a contract governing the relationship between the company and the shareholders. Articles of association are not only a contract between the company and its members but they also constitute a contract between the members to regulate their rights inter se.

However, this does not mean that either the articles of association or the memorandum have the force of law and will be binding on every member of the society. Articles of association are essential for internal management of the company and the memorandum defines the powers of the company as well as those of the directors. In view of this, it is very clear that if any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid ab initio.

In **World Phone India Pvt. Ltd. & Ors v. Wpi Group Inc** the question was whether the provisions of an agreement, that are not inconsistent with the Act, but are also not part of the AoA, can be said to be applicable. All that Section 9 states is that clauses in the agreement that are 'repugnant' to the Act shall be 'void'. This does not mean that clauses in the agreement which are not repugnant to the Act would be enforceable, notwithstanding that they are not incorporated in the AoA.

In **Malleson v. National Insurance & Guarantee Corp**, it was held that each member is bound by the covenants of memorandum and articles as originally framed or as altered form time to time in accordance with the provisions of the companies Act. Articles of Association are the regulations of the company binding on the company and on its shareholders. Shareholders therefore, cannot among themselves enter into an agreement which is contrary to or is inconsistent with the articles of the company.

OBSERVATION

Section 6 of the Companies Act, 2013 corresponds to the section 9 of the Companies Act, 1956. The articles or memorandum of association is drafted by Companies itself. In the absence of overriding effect of Companies Act, the personnel drafting Company's Articles or Memorandum of Association might draft the same in a manner which at the cost of prescribed standard and the provisions of the Act is more lucrative for the Company. Such absence will create a tendency to formulate Articles and Memorandum which might in no way hold the Company and its personnel liable for any act which is contrary to the provisions of the Companies

Act. It might even nullify the effect of the Act as it is this overriding effect that enforces the provisions of the same and if not for s.6 the provisions of articles and memorandum would supersede the provisions of Companies Act consequently giving an overriding effect to the former instead.

As seen in the case of Guinness v. Land Corporation of Ireland Ltd, bye-laws are subordinate to the articles of association while the articles of association are subordinate to the memorandum, also due to the said provision i.e. s.6 of the Companies Act, 2013 the Memorandum, AoA, any agreement or resolution thereto is superseded by the provisions of the Companies Act.

Memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated, Articles are for the internal regulations of the company, Bye-laws of a company are framed in order to carry out the provisions contained in the articles of association themselves, whereas Shareholders' Agreement (for short SHA) is essentially a contract between some or all other shareholders in a company, the purpose of which is to confer rights and impose obligations over and above those provided by the Company Law.

The point here to be noted is that, all the provisions of MoA, AoA, SHA or the Byelaws are subjected to the provisions of the Companies Act, 2013. Provisions contrary not only to the Companies Act but to any other law in force will be equally void as seen in the case of Kinetic Engineering Ltd v. Sadhna Gandhi.

To conclude we can say that the legislators have though given liberty to the Companies to draft its own MoA and AoA, but its liberty is not absolute so as to keep a check and maintain a minimum standard of functioning within legions of Companies.

CHAPTER 6 - POSITION IN THE UK

Development of company law with respect to the Memorandum of Association

The company law in England could be traced back to 1844 when the first ever legislation was enacted. For the first time, a 'Deed of Settlement' was introduced for registration of companies. These acted as the principal constitutional document of the company.[44] Joint stock companies formed in this manner had a large number of members sometimes running into the hundreds and allowed the companies to enter into huge ventures with tile help of the common fund and the 'joint stock'.[45] However, registration under the Act required that the Deed of settlement be executed by every member of the! company which increasingly became inconvenient to large companies. [46]

The Joint Stock Companies Act of 1856 replace the requirement of a Deed of Settlement with the Memorandum of Association and the Articles of Association.[47] Therefore, the 1856 Act eliminated a practical procedural problem of obtaining execution from a diverse group of members.[48] Subsequent companies Acts followed this method of registration of companies Name of the company, domicile, object clause, capital clause and liability clause were required to be part of the Memorandum.[49] The Articles of Association contained aspects of the company's internal affairs.[50]

In 1988, the Company Law Review Steering Group recommended that the company law must be amended such that only a single constitutional document is required replacing the current Memorandum of Association and Articles of Association in order to simplify the process of registration and to modernize the law.[51] In that light, it was further recommended that the clause, a primary aspect of the Memorandum, be removed.[52] The proposals were accepted by the Government and gave reflected in the present 2006 Act. Although the new Act still requires a Memorandum of Association and an Articles of Association, the Memorandum plays a limited role of merely having the formation clause and nothing else.[53] The Articles of Association is part of the new Company Constitution as prescribed under Part 3 of the Companies Act, 2006. Therefore, the two documents that are now required at the time of registration are the Memorandum of Association and the Company Constitution.

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[44] Len Sealy And Sarah Worthington Sealy &Worthington's cases and Materials In Company law 5, (OUP OXFORD, 2013)
[45] *Ibid*
[46] Stephen Bottomley, the constitutional corporation: Rethinking Corporate Governance 24, (Ashgate Publishing Ltd, 2007)
[47] Len Sealy And Sarah Worthington Sealy &Worthington's cases and Materials In Company law 5, (OUP OXFORD, 2013)
[48]Stephen Bottomley, the constitutional corporation: Rethinking Corporate Governance 24, (Ashgate Publishing Ltd, 2007)
[49] Governance 24, (Ashgate, Publishing Ltd, 2007)
Andrew Hicks And S.H. Goo, Cases And Materials On Company Law 157, (OUP, OXFORD, 2008)
[50] *Ibid*
[51] *Ibid*
[52] *Ibid*
[53] *Ibid*

Evolution in terms of the components of the Memorandum of Association

Under the Joint Stock Companies Acts of 1856, 1857 and 1858, the components of the Memorandum of Association reminded fairly the same. It was required for the Memorandum to include the following;[54]

1. the name of the proposed company;
2. the part of the United Kingdom where the registered office of the company is located;
3. The objects of the proposed company;
4. The liability of the shareholders;

5. The amount of nominal capital of the shareholders;
6. The division of capital into shares and the value of each such share.

This format of the Memorandum of Association continued in all subsequent Acts including the Companies Act, 1985 which was in effect prior to 2006, Under the Companies Act, 2006 the Memorandum of Association simply must contain the following;[55]

1. That the subscribers wish to form the company;
2. That the subscribers agree to become members of the company and if the company has a share capital, agree to take at-least one share each.

According to the Act, provisions that were previously part of the Memorandum of Association but which are not required under Section 8 of the new Act will be treated as part of the Articles of Association. Therefore, the new Memorandum of Association is a very limited document compared to the previous legislations.

It is in fact because of this aspect that the Company Law Review Group in their first report stated that they see no necessity to maintain the distinction between the Memorandum of Association and Articles of Association, and they could be merged into a single constitutional document. The Government has agreed in its White Paper released in 2002 that the separation between the Memorandum of Association and Articles of Association no longer serves any useful purpose. It can be deduced that the objects clause became the deciding factor for merging the two documents. As all other clauses of the Memorandum remain to exist in the Articles of Association (now Company Constitution), it is the objects clause that has made the difference.

[54] Charles Wordsworth, The New Joint Stock Company, Law of 1856, 1857 and 1858 with all the statues and instructions – How to form a company and herein of the liabilities of the persons engaged in so doing (Shaw and Sons Law Publishers, 1859) available at https://archive.org/details/texts

[55] Companies Act, Section 8, Part 2 (2006), available at https://www.legislation.gov.uk/

Doctrine of Ultra Vires- Is It a factor?

The doctrine of *ultra vires* was imported into company law in order to ensure that company activities did not deviate from what was expressed in the Memorandum of Association.[56]The doctrine was incorporated in the interest of investor protection as well as public's interests.[57]

The Joint Stock Companies Act, 1844 introduced incorporated in the interest of investor protection as well as public interests.[58] The Joint Stock Companies Act, 1844 introduced incorporation by registration but did not place restrictions on the capacity of a company which enabled companies to function like partnerships.[59] After the enactment of the Limited Liability Act of 1855, a need was felt that the capacity of the company must be restricted for the benefit of creditors.[60] The Joint Stock Companies 1856 while replacing the Deed of Settlement with the Memorandum of Association and Articles of Association, mandated that the Memorandum must include an objects clause in order to limit the capacity of a company.

The 1862 Act sought to eliminate the limitations of the 1856 Act and provided that the objects clause in the Memorandum could not be altered except in two situations namely; change of company name and reorganization of share capital.[61] Members of companies in order to circumvent the restrictions placed by this law started creating arduously long objects clause that covered every conceivable form of transaction.[62] Therefore, the courts construed the *ejusdem generis* rule wherein a company's objects have to be in context of the main corporate objects.[63] The Memorandum of Association now had to contain 'main objects' and 'other objects'.

In *Cotman vs. Brougham*, the House of Lords held that if a company's Memorandum was approved by the registrar, it implies that all registration requirements have been fulfilled and the objects clause is valid.[64] It led to the creation of the Cotman clauses which included main objects and ancillary objects further eroding the doctrine of *ultra vires*.[65] The importance objects clause was watered down in the case of *AG vs. The Great Eastern Railway Company* where the House of Lords held that a company can conduct business not in its principal objects clause as long as that course of business was reasonably incidental to the principal objects.[66]

[56] Chrispas Nyombi, The gradual erosion of the ultra vires doctrine in English Company law, 56 International Journal of Law and Management 347-362(2014).
[57] *Ibid*
[58] *Ibid*
[59] *Ibid, 349*
[60] *Ibid*
[61] *Ibid, 350*
[62] *Ibid*
[63] *Ibid, 351*
[64] *Ibid*
[65] *Ibid*
[66] *Ibid, 352*

The Companies Act, 1945 allowed the alteration of the objects clause by a special resolution.[67] This amendment surely brought relief to corporations who were looking for new business opportunities. The Companies Act, 1989 introduced a standard objects clause in the Memorandum which allowed the company to pursue any activity within its commercial sector.[68] Although such an objects clause is so watered down, its presence in the Memorandum which allowed the company to pursue any activity within its commercial sector.[69] Although such an objects clause is so watered down, its presence in the Memorandum meant that there could be activities outside the scope of a company's objects. This in turn implied the weak survival of the doctrine of *ultra vires*.

The Company Law Review Group in 1998 recommended that there be a single constitutional document thereby completely abolishing the requirement for an objects clause.[70] The Government's white paper published in 2002 stated that the objects clause no longer served any real purpose.[71] The proposals were incorporated into the 2006 Act and the objects clause was no longer made a mandatory requirement of the Mandatory of Association.

OBSERVATION

It is evident that the doctrine of *ultra vires* is now non-existent in English company law. Whether it was the watering down of the doctrine that lead to the abolition of objects clause or the need to increase corporate capacity that has lead to the death of doctrine is debatable. But what is evident in looking at the history of *ultra vires* and the objects clause in the law is that it has always had a lasting effect on the Memorandum of Association. The presence or absence of object clause in the Memorandum has caused legislators and academic scholars to wonder if the presence of Memorandum is truly all that important. This in turn shows that there is a strict connection between the existence of a Memorandum of Association and the objects clause. It is further cemented by the fact that the Company Law Review Group in 1998 recommended the creation of a single constitutional document as a result of the abolition of the objects clause. Presently, both documents do exist but the Memorandum without the objects clause is nothing but a mere statement by the first members that they intend to form a legal entity.[72] The recommendation to altogether abolish the Memorandum is yet to be implemented but we can see why the abolition would be justified.

[67] *Ibid, 354*
[68] *Ibid, 357*
[69] *Ibid*
[70] *Ibid, 358*
[71] *Ibid*
[72] Len Sealy And Sarah Worthigton, Sealy &Worthington's Cases And Materials In Company Law 5, (OUP Oxford, 2013)

It can we observed that there is a very real and necessary connection between the doctrine of *ultra vires* and the objects clause. And, there is a more real connection between the existence of the objects clause and Memorandum of Association so much so that it could act as prerequisite to abolish the Memorandum.

CHAPTER 7 – POSITION IN AUSTRALIA

Origin and development of company law

Australia formerly was the colony of England. Therefore, its origin in terms of the law are also derived from the English legislation.[73] The Statue of Westminster 1931 and the Australia Act 1986 completely disconnected Australia from the United Kingdom and allowed it to freely legislate.[74] Australia became a federation in 1900 and so the requirements for incorporation of corporations vested in the states.[75] The Commonwealth had very limited powers but the need for uniformity was always felt.[76] In 1978, a formal agreement was made between the Commonwealth and the states that lead to Cooperative scheme wherein the Commonwealth was allowed to enact comprehensive legislation on companies and securities which the states may choose to adopt by passing application Acts.[77] The National Companies and Securities Commission was established in 1980 to further the objects of the said scheme.[78] This Cooperative scheme worked till the year 1990 but the need for the commonwealth to be sole legislator on business corporations emerged.[79] This eventually lead to the Corporations Act, 1989 however the High Court of Australia soon adjudged that many of the sections in the Act were *ultra vires* the Commonwealth Constitution.[80]

In 1990, a new national scheme was introduced wherein the states were granted money in order to compensate for the loss of revenue in return for giving full authority of corporations to the Commonwealth.[81] This Agreement was known as the Alice Springs Agreement. In 1993, the government established a new Taskforce called the 'Corporate Law Simplification Taskforce' which was charged with the duty of simplifying the corporate legislation.[82] The failure of the Taskforce led to the establishment of the Corporate Law Economic Reform program in 1997 which suspended the Alice Springs Agreement.[83] The National Scheme of 1990 continued till June 2001.[84] As the scheme's constitutional validity was question in the High Court Cases (Re Walkin; ex parte McNally and The Queen v Hughes), the time came to revise the structure of Australian corporate law once again. The December 2000, it was agreed between the Commonwealth could enact a national corporations law. The necessary legislations were passed in May and June, 2002 by the remaining

[73] Margret Hyland and K.L. Alex Lau, A comparative study of the corporate regulators in Australia and Hong Kong, 22(7), International Company and Commercial Law Review 212-217(2011). See also, R.I. Barret, Towards Harmonised Company Legislation – Are we there yet, 40 Federal Law Review 141 (2012)
[74] *Ibid*
[75] *Ibid*
[76] Harold Ford, Australia's New Companies Legislation, 2(1), International Company and Commercial Law Review 15-17(1991).
[77] *Ibid*
[78] *Ibid*
[79] *Ibid*
[80] *Ibid*
[81] *Ibid*
[82] Michael J. Whincop, The Politocal Economy of Corporate Law Reform in Australia. 27 Federal Law Review 77 (1999)
[83] *Ibid*
[84] Roman Tomasic, Stepehn Bottomley and Rob McQueen, Chapter 1: History Of Corporate Form And Its Regulation, Corporations Law In Australia 27 (Federation Press 2002).

states. The Corporations Act, 2001 was the first ever legislation to govern corporate regulation throughout the country.[85] The Corporations Act, 2001 was the first ever legislation to govern corporate regulation throughout the country. The legislation has continued to govern corporations till date.

Evolution in terms of the Memorandum of Association

In the 1830s and 1840s there were a number of Joint Stock Companies that functioned under a deed of settlement.[86] This same development could be seen in Australia during the same period.[87] A consolidated companies legislation was passed in England in 1862 and a replica of the same appeared in Australia between 1863 and 1874 in the various colonies.[88] A distinguishing feature of this legislation is that it allowed for companies to be incorporated by registering with two constitutional documents namely; the Memorandum of Association and the Articles of Association. The existence of these two documents continued to persist in England and therefore, remained in the legislations of Australian colonies.

Companies registered with a Memorandum of Association and Articles of Association till July 1998.[89] After July 1998, the companies that were already registered had two options; to adopt a company constitution according to the new rules of the law or to retain there Memorandum and Articles which together will be considered Memorandum and Articles which together will be considered as the company constitution.[90] It's a company does not want to create its own constitution, the Corporations Act provides for Replaceable Rules that can be adopted by the company although this does not apply for sole proprietary companies.[91] The company may state its objects in the Company Constitution but there is o compulsion to do the same as permitted under Section 125 of the Corporations Act.[92] But from a casual glance of the Act, it is evident that there is a lot of flexibility and leeway as to what can and cannot be included in the constitution as well as how the constitution can be adopted if one choose to do so.[93] This method of registration is so simplified that it guarantees a positive impact on business.

[85] *Ibid. 68*
[86] Philip Lipton, A History of Company Law in Colonial Australia: Economic Development and Legal Evolution, 31 Melbourne University Law Review 805 (2007).
[87] *Ibid*
[88] *Ibid*
[89] Roman Tomasic, Stephen Bottomley And Rob McQueen, Chapter 1: History Of Corporate Form And Its Regulation, Corporations Law In Australia 27 (Federation Press, 2002)
[90] *Ibid*
[91] Constitution And Replaceable Rules, Australian Securities And Investments Commission available from https://sitesearch.asic.gov.au/s/search.html?query=Replaceable+rule&collection=asic&profile=asic
[92] Roman Tomasic, Stephen Bottomley And Rob McQueen, Chapter 1: History Of Corporate Form And Its Regulation, Corporations Law In Australia 27 (Federation Press, 2002)
[93] Report On The Draft Second Corporate Law Simplification Bill 1996, Parliamentary Joint Committee On Corporations And Financial services, Parliament Of Australia available from Joint Committees – Parliament of Australia (aph.gov.au)

The Company Constitution

A Corporation Law Simplification Program was established by the Commonwealth attorney general in October 1993. The goal of the program was to make the corporation law understandable and to remove unnecessary regulations.[94] The first stage of the program was completed and the First Corporate Law Simplification Act was passed in 1995.[95] The second Corporate Law Simplification Bill aimed to improve the legislations in many areas including company formation. Accordingly, this Bill proposed to abolish the Memorandum of Association which previously contained the traditional six clauses and provided for 'Replaceable Rules' that could take the place of Articles of Association. The Bill was tabled in 1996.[96] In 1997, the government established the Corporate Law Economic Reform program which was to take over from the taskforce. With added elements of this program, the legislation was passed in 1998[97] and soon reflected in the 2001 Act.

According to the Corporations Act 2001, a company may apply to be registered with the Australia Securities and Investment Commission.[98] The company is managed by the Replaceable Rules or a constitution or a combination of both. Replaceable Rules apply to companies which were incorporated after July 1998 and to those companies incorporated before July 1998 which have repealed their constitution. Section 136 of the Act provides that a company may adopt a constitution but if it does not, a constitution may be adopted at a later date by passing of a special resolution. Sub-Section 5 of the same Section mandates public companies to submit their constitution or special resolutions that adopt, modify or mandate is given to other companies.

The Company Constitution is the document that governs the internal management of the company. In other words, it is the same document that was formerly known as the 'Articles of Association'. Therefore, the new Act has completely abolished the requirement for a Memorandum of Association.

Doctrine of Ultra Vires and Objects clause

As seen in the previous chapter, there exists a close connection between the doctrine if *ultra vires* and the objects clause of the Memorandum of Association. As a Commonwealth country, a majority of Australia's legislation have been inspired by the British. The doctrine of *ultra vires* as a concept was first introduced in the case Ashbury *Railways Carriage & Iron Co. v Riche (1875)* wherein it was held that a company's capacity

[94] *Ibid*
[95] *Ibid*
[96] Bills Digest No. 133 1997-98 Company Law Review Bill 1997, Parliament Of Australia available from https://www.aph.gov.au/Parliamentary_Business/Committees/Joint
[97] *Ibid,* see also Company Law Review Act, 1998
[98] Corporations Act, Chapter 2A: Registering a company, Part 2A.2, Section 117 (2001).

is limited by the objects clause in its Memorandum.[99] Australia having replicated the 1862 legislation[100] is expected to have similar regulations in its states. The doctrine of *ultra vires* protects shareholders and creditors but it was soon found out that there were several practical limitations in it.

The Second Company law Simplification bill[101] is of utmost importance in tis context. The aim behind this Bill was to provide for a regulation that is efficient, flexible and transparent.[102] It was under this legislation that the concept of *ultra vires* was eliminated with the introduction of the company constitution.[103] The parliamentary joint committee on corporations and financial services has noted that the change in the process of registration has benefited all companies especially newly registered companies in Australia.

The same has been reflected in the Corporations Act, 2001. According to the present Act, a company may limit its powers and set out objects but it is not a mandatory requirement. However, the same provision states if a company acts beyond its power, the action is not invalidated merely because it is outside the scope of its objects.[104] It clearly means that the doctrine of *ultra vires* does not apply. The Act also states that a company has the capacity is not affected even if its acts in a manner that negatively affects it.[105]

It is clear from Australian history that the gradual erosion of the doctrine of *ultra vires* has negatively impacted the value of the objects clause in corporations. As corporations were attracted to form long winded clauses, it seemed better to do away with the objects clause altogether. It is however unclear if the doctrine of *ultra vires* and the objects has played a role in the abolition of the Memorandum of Association. Upon perusing the 1999 Bill and the reports on it, the reasons cited by the legislature are learning towards modernization of the law and increasing efficiency. The ultimate logic, it has been argued, is tat the reform aims to make Australia better competitive in a changing environment and more commercially favorable.[106]

[99] Stephen J. Leacock, Rise and Fall of the Ultra vires Doctrine in United States, United Kingdom and commonwealth Caribbean Corporate Common Law: A Triumph of Exercise Over Logic, 5 Depaul Business And Commercial Law Journal 67 (2006)
[100] Roman Tomasic, Stephen Bottomley And Rob McQueen, Chapter 1: History Of Corporate Form And Its Regulation, Corporations Law In Australia 193 (Federation 2002).
[101] Report On The Draft Second Corporate Law Simplification Bill 1996, Parliamentary Joint Committee On Corporations And Financial Services Parliament Of Australia available from Joint Committees – Parliament of Australia (aph.gov.au). The Bill was substantially based on the recommendations from the Wallis Report.
[102] Paul von Nessen, The Americanization of Australian Corporate Law, 26 Syracuse Journal Of International Law And Commerce 239 (1999)
[103] Joint Committees – Parliament of Australia (aph.gov.au)
[104] CHAPTER 6: Proprietary Company Registration 6.28, Report On The Matters Arising From The Company Law Review Act, 1998, Parliament Of Australia October, 1999 available at Joint Committees – Parliament of Australia (aph.gov.au).
[105] Corporations Act, Chapter 2B: Basic features of a company, Part 2B.4, Section 124(2001)
[106] Lan R. Harper, The Wallis Report: An Overview, 30 The Australian Economic Review 288-300 (2002).

OBSERVATION

Australian corporate law has had a roller coaster of a ride in terms of amendments and political changes. Being a purely federal state, the unification of corporate legislation appeared to be the central focus of the Commonwealth government since the 1960s. The government not only aimed to localize the law to fit Australian corporations but also to simplify it. The abolition of the Memorandum of Associates appears to be a step towards simplification and an aftermath of the demise of the concept of *ultra vires*. It is unclear whether the law is truly simplified. Company constitution must be registered with the ASIC for public companies but is not the case for other companies. Proprietary companies have their own set of regulations for incorporation. They have the option to not adopt a constitution and follow the Replaceable Rules in the Act. Companies with unlimited liability here still other regulations to follow. Although objects clause is no longer mandatory, it may be stated if a company so desires. It is rather apparent in the case of Australia that there is more complexity than simplicity in the law but that is for Australian legislators to debate. The point of note here is that there has been a sequence of events that has been established. The doctrine of *ultra vires* was virtually abolished as noted by Leancock[107] which has ultimately led to the abolition of the Memorandum of Association.[108]

[107] Stephen J. Leacock, Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic, 5 Depaul Business And Commercial Law Journal 67 (2006).
[108] See Second Company Law Simplification Bill and the Company Law Review Act 1998.

CHAPTER 8 - POSITION IN HONG KONG

The development of company law

Hong Kong has emerged as an international trading and financial centre.[109] Similar to many commonwealth jurisdictions, Hong Kong's company legislation was relatively taken from its UK counterpart with very few changes.[110] The 1862 Act was introduced in the 1865 Ordinance, the 1908 Act in the 1911 Ordinance and the 1929 Act in the 1932 Ordinance.[111] However, after this period, Hong Kong enacted the UK legislations fairly slower than other common law jurisdictions. The 1984 Companies Ordinance, for example, was derived from the English 1943 Act with some changes.[112] By this time, UK had already passed new companies legislations in 1976, 1980, 1981 and 1983 with more changes to the 1948 Act.[113] Due to this, A Standing Committee on Company Law Reform was established in 1984 in order to be responsive to the needs of the business sectors and make timely amendments to the law keeping at6 par with the United Kingdom.[114]

By the end of 1995, many businesses started to register themselves under foreign jurisdictions and therefore, the government saw the need to simplify and streamline the existing law.[115] In this context, a consultancy report was published in 1977 making several recommendations to the existing company ordinance but was not favored by the Standing Committee of Company Law Reform.[116] The government then launched a Rewrite project wherein phase1 dealt with the creation, administration and dissolution of companies and phase 2 dealt with winding up and other miscellaneous provisions.[117] A new Companies Ordinance was passed in 1997 based on the recommendations of the Standing Committee. Significant changes included the partial abolition of the doctrine of *ultra vires*, abolition of the doctrine of constructive notice and an optional objects clause in Memorandum of Association.[118] The concept of One Person Company was introduced under the 2003

[109] Cally Jordan, Hong Kong looks to Cast off UK Company Law Past, 16 International Financial Law Review 29(1997).
[110] Ibid. Hong Kong was a colony of the British until 1997.
[111] S.H. GOO, Full Study Report On History Of Company Incorporation In Hong Kong – A Study Commissioned By the Companies Registry, Hong Kong Special Administrative Region 14(2013), available at Companies Registry - Home (cr.gov.hk)
[112] Christopher Bates, Companies (Amendment) Ordinance 1984, 15 Hong Kong Law Journal 167 (1985).
[113] *Ibid.*
[114] Executive Summary, Review Of the Hong Kong Companies Ordinance Consultancy Report (1997), available at https://www.cr.gov.hk/en/home/index.htm.
[115] Cally Jordan, Hong Kong looks to Cast Off UK Company Law Past, 16 International Financial Law Review 29(1997). Also see Consultancy Report (1997). "*Approximately 50% of Hong Kong listed companies are incorporated in Bermuda for convenience. An estimated 100,00 British Virgin Islands Companies are in Hong Kong out of which only 1000 or so are registered under the current Ordinance."*
[116] Stefan H.C. Lo, Corporate Governance and the New Companies Ordinance in Hong Kong, 21 Asia Pacific Law Review 267 (2013).
[117] *Ibid.*
[118] S.H. Goo, Full Study Report On History Of Company Incorporation In Hong Kong – A Study Commissioned By the Companies Registry, Hong Kong Special Administrative Region 14(2013), available at https://www.cr.gov.hk/en/home/index.htm.

Amendment.[119] Several more amendments took place in the companies legislation before the passing of the present Companies Bill in 2012.

This new Company Ordinance in Hong Kong commenced in the year 2014. Divided into 21 parts, it consists of 921 sections and 11 schedules. The main objectives for the passing of the new company ordinance were;

1. Ensuring corporate governance
2. Ensuring better regulation
3. Facilitating business, and
4. Modernizing the law

Development in terms of the Memorandum of Association

The first Companies Ordinance 1865 introduced the registration of two constitutional documents namely; the Memorandum of Association and the Articles of Association. The Memorandum of Association was to contain the traditional six clauses on the basis of the UK 1962 Act.[120] The Companies Ordinance 1890 did not substantially change the contents of the Memorandum of Association but one remarkable development was that it allowed for the first time the alteration of the objects clause.[121] The Companies Ordinance 1932 stipulated that the Memorandum of Association and the Articles of Association be written in English and further allowed for alteration of the Memorandum under some conditions.[122]

The 1984 Act was tailored after the 1948 UK legislation and therefore, retained the Memorandum of Association and the Articles of Association as the documents required for incorporation.[123] The clauses that were the name clause which now allowed for a company to have a Chinese name, Registered office, objects clause, liability clause, capital clause and the par of shares.[124]

When the 2014 ordinance was enacted, abolishing the Memorandum of Association and retiring the concept of par value was considered to be a step towards the objective of modernizing the law.[125]

[119] Companies (Amendment) Ordinance, Section 4 (2003).
[120] S.H. GOO, Full Study Report On History Of Company Incorporating In Hong Kong – A Study Commissioned By The Companies Registry, Hong Kong Special Administrative Region 14(2013), available at Companies Registry - Home (cr.gov.hk).
[121] *Ibid.*
[122] *Ibid.*
[123] Christopher Bates, Companies (Amendment)Ordinance 1984, 15 Hong Kong Law Journal 167 (1985).
[124] *Ibid*.
[125] Ms. Phyllis McKenna 2014, Speech On The New Hong Kong Company Ordinance (Cap.622), viewed 27th May 2021, https://www.cr.gov.hk/en/home/index.htm.

The Companies Registry of Hong Kong answered certain frequently asked questions with regard to the new company ordinance and especially the abolition of the Memorandum of Association. The Government cited the following reason for doing away with the Memorandum.

"*The Memorandum of Association used to contain the objects clause of company. However the objects clause of a company is now less significant given the coalition of the doctrine of ultra vires in relation to corporate capacity. In 1977 and all companies now have the capacity and rights of a natural person. As all the information provided on incorporation apart from the objects clause and the authorized capital (which has been removed following the migration to no par) is contained in the Articles of Association and the incorporation form, the need to retain the Memorandum of Association as a separate constitutionalized document has diminished. It is on the basis that the requirement to have a Memorandum of Association is abolished under the new Co."*[126]

Since 1997, the objects clause has been optional. For most companies, it is not mandatory to state the objects in the Articles but a company may do so (Section 82(2) of the New Co.) Where a company does not state its objects, it has the capacity and the rights, power and privileges of a natural person (section 115 of the New Co), but may not exercise its powers in a manner contrary to its constitutional documents.[127]

It can be gathered from the above that the two reasons for the abolition of the Memorandum are

1. The lack of significance of the object clause given the abolition of the doctrine of *ultra vires* in 1997. and
2. The removal of the concept of par which in turn eliminates the requirement of a minimum authorized capital.

Therefore, under the new Companies Ordinance, a company may be formed by delivering the incorporation form and a copy of the Articles of Association to the registrar.[128] The clauses of the Memorandum which still subsist such as the name clause, liability clause, registered office clause and so on will now be part of the Articles (It is still optional to state the objects).[129] Model articles are also provided for companies to use.[130]

[126] Frequently Asked Questions, https://www.cr.gov.hk/en/home/index.htm (last visited 26th May, 2021).
[127] *Ibid*.
[128] New Companies Ordinance, Section 67(2012).
[129] New Companies Ordinance, Subdivision 3, Part 3 (2012).
[130] Briefing Notes On Part 3, New Companies Ordinance (2012), available at chrome extension:// https://www.cr.gov.hk/en/home/index.htm .

The doctrine of Ultra Vires

The doctrine of *ultra vires* was imported from the British and the benefit of the doctrine was felt in the Hong Kong legislations. To the extent that prior to the Companies Ordinance 1890, the objects clause in the Memorandum of Association was unalterable. The 1890 legislation for the first time allowed for the alteration of this clause by special resolution under specified conditions.[131]

The 1984 legislation retained the *ultra vires* doctrine. It has been explained that it was too difficult to draft the legislation at that without the doctrine.[132] And, it was considered that the doctrine would serve as effective protection to the shareholders and creditors alike. The question of the doctrine's existence was nevertheless before the Standing Committee in 1985.

The Standing Committee in 1992 recommended for the abolition of the doctrine of *ultra vires* and it was enacted in the Companies (Amendment) Ordinance 1997. The 1997 Consultancy Report recommended that in light of the abolition of the doctrine of *ultra vires*, the objects clause in the Memorandum be made optional. This Act introduced two new Sections that are worth mentioning. Section 5A provided that a company has the capacity, rights, powers and privileges of a natural person. And Section 5B provided that a company chooses to have an objects clause and transacts beyond those objects, a shareholder may obtain an injunction if the transaction was not completed. However, if the transaction was completed, it cannot be considered invalid merely because it was beyond the objects clause of the company. During the same amendment, the doctrine of constructive notice was also abolished.

The legislature cited the main reasons for the abolition of the doctrine of *ultra vires* was in order to protect innocent third parties who would otherwise suffer in their dealings with a company that has acted beyond its listed powers.

OBSERVATION

In the case of Hong Kong, the legislature has clearly established the connection between the doctrine of *ultra vires* and the Memorandum of Association unlike the case of Australia. The government has answered that one of the main reasons for the abolition of the Memorandum of Association was the abolition of the doctrine of *ultra vires* in 1997. The objects clause is only optional and does not have much value according to the wordings of the legislation itself. Yet again, the sequence has been maintained and it is as follows; abolition of doctrine of *ultra vires* led to the depletion of the value of objects clause which in turn has ultimately ended

[131] S.H.GOO, Full Study Report On History Of Company Incorporation In Hong Kong – A Study Commissioned By The Companies Registry, Hong Kong Special Administrative Region 14(2013) available at https://www.cr.gov.hk/en/home/index.htm. The alteration is allowed only after confirmation by the Court. However, the 1963 Amendment removed this prerequisite as well and companies were free to alter their objects.

[132] Christopher Bates, Companies (Amendment) Ordinance 1984, 15 Hong Kong Law Journal 167 (1985).

in the Memorandum. Although it had taken15 years for the government since the removal of *ultra vires*, it that the requirement of Memorandum of Association ultimately was not needed.

CHAPTER 9 – POSITION IN SINGAPORE

Tracing the development of company law

Singapore and Malaysia have similar beginnings given that both countries were part of the Crown Colony under the British by the Straits Settlement.[133] The first Companies Ordinance was enacted in 1889 modeled after the English 1862 Act.[134] It had 9 parts similar to that of the English Act and became the foundation of the 1965 Companies Act in Malaysia.[135] Subsequently Singapore also enacted its own companies legislation in 1967 similar to that of Malaysia.[136] The Act has undergone 16 Amendments since then.[137]

In 1999, Company Legislation and Regulatory Framework Committee conducted a comprehensive review on the then legislation. The review led to several changes in the law.[138] The Committee published a report in 2002 with a number of recommendations.[139] Following the report, various amendments were enacted in 2002, 2003, 2004 and 2005.[140] However, Walter Woon has argued that these extensive amendments only led to further inconsistencies in the Sections causing more anomalies.[141]

In 2007, a Steering Committee was appointed by the Ministry of Finance chaired by Mr. Walter Woon to conduct a review of the Companies Act.[142] The Steering Committee made two strategic decisions[143] at this point;

1. That the entire Companies Act should be rewritten and not amended again.
2. That a foreign statue should not act as a template for a Singaporean legislation.

The guiding principles of the Steering Committee were as follows;

1. That the regulatory burden on business be reduced;
2. Legislation must be deconsolidated such that the Companies Act only provides for core Company laws;
3. Obsolete provisions be deleted;

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[133] Petra Mahy and Ian Ramsay, Legal Transplants and Adaptation in a Colonial Setting: Company Law in British Malaya, Singapore Journal Of Legal Studies 123 (2014).
[134] *Ibi.*
[135] Jiang Yu Wang, Making Singapore Company Law and Regulation?- A critical Examination of the recent revision of the Companies Act in the light of Comparative Law, 14 The Asian Business Lawyer 15 (2014).
[136] *Ibid.*
[137] Walter Woon, Reforming Company Law in Singapore, 23 SAcLJ 795 (2011).
[138] Wai Yee Wan, Recent Development in Singapore Company Law and Regulations: Review of the Singapore Companies Act, Company Lawyer 143(2014).
[139] Jiang Yu Wang, Making Singapore Company Law More Singaporean?- A Critical Examination of the recent revision of the Companies Actin light of the Comparative Law, 14 The Asian Business Lawyer 15(2014).
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] Walter Woon, Reforming Company Law in Singapore 23 SAcLJ 795 (2011).

4. Non-problematic previsions be retained;
5. That a legislative amendment in a foreign country would be relevant but not the determining factor for Singaporean legislature;
6. That the new law be flexible and facilitate business;
7. And finally to reconsider if all breaches of provisions to be treated as offences.

The Steering Committee was divided into five working groups which dealt with corporate governance, shareholders right, administration, accounts and audit.[144] In 2011 the Committee produces a report to the Ministry of Finance which contained a total of 217 recommendations.[145] 192 recommendations were accepted, 17 were modified and 8 were rejected.[146] The Ministry of Finance rewrote the Companies Act and was passed in October 2014.[147]

Development in terms of the Memorandum of Association

The Memorandum of Association and the Articles of Association were introduced by the British into the first Companies Ordinance of 1889. As it was a close replica of the 1862 Act, the clause and requirements of the Memorandum of Association were fairly the same. Singapore continued to follow the English way of incorporation till the 1990s when it started to realize that it was time to diverge and localize its law. Up until this period, six clauses of the Memorandum of Association remained the same as in the case of UK. The Company Legislation and Regulatory Framework Committee in 2002 recommended that Singapore's private companies be provided with a model constitution similar to model Articles being drafted in the UK. The recommendation was accepted by the government but decided to wait till UK's model were finalized.[148]

The Steering Committee observed that the separation between the Memorandum of Association and the Articles of Association is no longer meaningful. It noted that in practice, the two documents are bound together.[149] Another reason cited by the committee was that the Memorandum of Association contains minimal information and son on, the merging of the two documents will not cause practical difficulties to the companies.[150] Therefore the Committee recommended in their report that the two documents be merged

[144] *Ibid.*
[145] Jiang Yu Wang, Making Singapore Company Law More Singaporean?- A Critical Examination of the recent revision of the Companies Actin light of the Comparative Law, 14 The Asian Business Lawyer 15(2014).
[146] Response of the Ministry Of Finance To The Report Of The Steering Committee For Review Of The Companies Act (2012), available at Accounting and Corporate Regulatory Authority (acra.gov.sg).
[147] Jiang Yu Wang, Making Singapore Company Law More Singaporean?- A Critical Examination of the recent revision of the Companies Actin light of the Comparative Law, 14 The Asian Business Lawyer 15(2014).
[148] Part III, Report Of The Steering Committee For Review Of The Companies Act (2011). UK's models were enacted in 2008.
[149] Walter Woon, Reforming Company Law in Singapore, 23 SAcLJ 795(2011).
[150] Part III, Report Of The Steering Committee For Review Of The Companies Act (2011).

together into a single constitution.[151] The Committee further recommended that model constitutions be provided for private companies and companies limited by guarantee.[152] This recommendation of the Committee was enacted in the 2014 Act in its entirety. A further advantage to this scheme was that companies that choose to adopt the Model Constitution are no longer required to file the document with the Accounting and Corporate Regulatory Authority.[153] This considerably speeds up the process of incorporation and makes it a one-step procedure. In this manner, the Steering Committee has been successful in attaining their goal of reducing regulatory burden and easing compliance.

How relevant is the doctrine of ultra vires?

The doctrine of *ultra vires* also found its way to the Singaporean companies Act when the first ordinance was enacted in 1889.[154] The doctrine as in the case of the UK was developed to protect shareholders but it is to be noted that at the time the doctrine was established, the objects clause was unalterable. When objects clause became alterable, the value of the doctrine of *ultra vires* depleted.[155] It also led to a situation wherein companies started to draft long objects clause to circumvent the doctrine. Due to these, Australia decided to amend its provisions[156] on the doctrine of ultra vires and Singapore followed suit.[157] Section 25 of the Singaporean Companies Act read that a "transaction is not invalid by reason only that the company lacks capacity or power to enter into such transactions." At this point of time, companies were still required to list their objects. Therefore, the implication of this amendment was that if a company had a main object, say to run a travel company but has the power to borrow and decides to borrow for running a pig breeding business, although the practically put an end to the doctrine of *ultra vires*. By this amendment, an outsider who need not be concerned if an act is within a company's capacity but it was still relevant within the company.[158]

By the amendment in 2004, the Companies Act gave Singaporean companies all powers of a natural person.[159] Section 23 now provides that "A company has the full capacity to carry on or undertake aby business or activity, do any act or enter into any transaction". Section 23(1)A and 1(B) further provide that "A company may have objects" and "A company may limit its capacity in the constitution".[160] Therefore, the objects clause has been made optional and whether to have a limited corporate capacity or not is left to the discretion of the company. It can be derived from these Sections and Sections 25 of the Act that the doctrine of *ultra vires* is still present in the legislation but its exercise fully depends on how the companies model their constitutions.

[151] Recommendation 5.6, Report Of the Steering Committee For Review Companies Act (2011).
[152] *Ibid, Recommendation 5.7.*
[153] Recommendation 5.6, Report Of The Screening Committee For Review Of The Companies Act (2011).
[154] The Act was a copy of the English 1862 Act with vey few amendments.
[155] Walter Woon, Ultra Vires and Corporate Capacity in Singapore, 1 Singapore Academy of Law Journal 795 (1989).
[156] The Uniform Companies Acts of 1960-61 Australia gave companies all rights and privileges of a natural person by the 1985 Amendment which completely removed the doctrine of ultra vires from its books.
[157] Walter Woon, Ultra Vires and Corporate Capacity in Singapore, 1 Singapore Academy of Law Journal 795 (1989).
[158] *Ibid.*
[159] Report of the Steering Committee For Review Of the Companies Act (2011).
[160] All these Amendments were made under the Companies (Amendment) Act, 2014 which came into effect in 2016.

The existence of the doctrine of *ultra vires* and the development in the objects clause indeed has a direct correlation in Singapore. However, the extent to which these amendments have affected the merger of Memorandum of Association and Articles of Association is questionable.

OBSERVATION

Singapore has taken a slightly different approach in comparison to the previous jurisdictions discussed in this research study. While Australia and Hong Kong have chosen to completely do away with the Memorandum of Association, Singapore ahs chosen to simply merge it with the Articles of Association. The difference lies in the contents of this "Company Constitution". In the case of Australia and Hong Kong the contents, are strictly to do with the Articles of Association where none of the Memorandum clause found its way. On the other hand, Singapore has retained the six clauses Memorandum in which the Objects clause is optional.

Another distinguishing factor in the study on Singapore is that the doctrine *ultra vires* has not been completely abolished and still appears in the text of the legislation. Therefore, the merger of the Memorandum and the Articles as in the case of previous two countries cannot be attributed to the abolition of *ultra vires* and the objects clause. The Steering Committee has mentioned of a list of guiding principles based on which the Companies Act was rewritten. And it was in light of these principles of modernization, that two documents were merged. The Steering Committee also noted as mentioned earlier that the separation of the document is unnecessary and its merger does not affect the businesses practically. In this manner, Singapore Companies Act does not stand out.

CHAPTER 10 – POSITION IN INDIA

The development of company law

The evolution of company law in India has been closely linked to company laws of England, Registration of companies was introduced for the first time *vide* the Joint Stock Companies Act of 1844 in England. India followed suit keeping this Act as a base by passing a similar legislation in the year 1850. This Act mandated that a company could be registered only by way of a deed of Settlement.[161] This Act was soon repealed and replaced with the Joint Stock Companies Act of 1856 in England wherein for the first time, the single deed of settlement was split into two; the Memorandum of Association and the Articles of Association. It was believed that the basic characteristics of the company must be kept separate from the operations of the company. India soon enacted the Companies Act of 1857 closely following the English Act which for the first time, introduced concept of limited liability. When the English Companies Act 1866. The provisions of the two Acts were very similar. The amendments of the English companies Act, 1862 were soon incorporated in the Companies Act, 1882.

The English Consolidation Act was passed in 1908 and India enacted the Companies Act 1913 inspired by the new English legislation. After the passage of the English Act of 1929, India started to make amendments to make its Companies Law more amenable to Indians.[162] This development could be seen in the Indian Companies (Amendment) Act of 1936. It must be noted here that the Indian Companies Acts were kept in par and fairly similar to that of the English laws in order to facilitate British businesses and facilitate better trade the two countries.[163]

After independence, the Government of India Appointed a Committee in 1950 to comprehensively review the entire Companies Act so that it would be tailored for the particular needs of India. The Committee was chaired by H.C. Bhaba. The Bhaba Committee submitted its report in 1952 with changes in mainly 7 aspects;

1. Promotion and formation of companies;
2. Capital structure;
3. Company settings and procedure
4. Audit and accounts including the powers and duties of auditors'
5. Inspection of company affairs;
6. Constitution of Board of Directors including the powers and duties of directors and managing directors and;
7. Administration of company law.

[161] It was known as a "Deed of Partnership" in India.
[162] Umakanth Varottil, The Evolution of Corporate Law in Post Colonial India: From Transplant Autochthony, 31 American University International Law Review 253 (2016).
[163] *Ibid.*

Still there was significant reliance on the English law by making reference to it 148 times.[164] Subsequently, the Act underwent a number of amendments and passed a number of subsidiary legislations that evidently diverged from the English Act. The 1956 Act managed to subsist till 2013.

An expert committee was established in 2004 under the chairmanship of J.J . Irani. The committee recommended that new company legislation be passed in order for sustainable economic reform.[165] The committee made several recommendations to modernize the law and meet international standards. The Companies Bill, 2008 was then presented in Parliament but lapsed.[166] The Companies Bill, 2009 was referred to the Parliamentary Standing committee on Finance which reviewed the bill and added recommendations on corporate governance in its report 2010.[167] Based on the report, another Companies Bill was drafted and presented in 2011 but the Bill was sent back for review. A second report was issued by the Standing Committee before finally the Companies Act, 2013 was passed.

Development in terms of the Memorandum of Association

The Joint Stock Companies Act, 1850 was India's first company legislation. In this Act, the constitutional document was only one and was known as the 'Deed of Partnership'. The content of the deed included the name clause, share capital clause, registered office clause and formation clause but there was no clause to indicate the objects of the company.[168] This was not similar to the 1844 English Act which required a objects clause.

The Joint Stock Companies Act, 1857 replaced the 1850 Act and introduced two constitutional documents namely; the Memorandum of Association and the Articles of Association. In the same Act, a new clause was introduced to limit the liability of companies.[169] It also mandated that the objects of a company be prescribed and established for the first time, the traditional six clauses of the Memorandum in India.[170] The Act allowed for the alteration of the Articles of Association but not the Memorandum.

The 1866 Act replaced the 1857 Act. It introduced a provision which stated that the Memorandum of Association in binding on the members of company.[171] The clauses of the Memorandum remained the same. The Companies Act 1956 was a significant legislation that was a product of the bhaba Committee. The Act regulates the companies in India for decades. There were several amendments to the Act and the Memorandum

[164] *Ibid.*
[165] Report of The Expert Committee On Company Law, Ministry of Company Affairs (2005).
[166] Umakanth Varottil, The Evolution of Corporate Law in Post Colonial India: From Transplant Autochthony, 31 American University International Law Review 253 (2016).
[167] *Ibid.*
[168] P.S. Sangal, Ultra Vires and Companies; the Indian Experience, 12 The International And Comparatively Law Quarterly 967-988(Cambridge University Press, 1963)
[169] *Ibid.*
[170] *Ibid.*
[171] Indian Companies Act, Section 11 (1866).

of Association became alterable under a special resolution.[172] The remaining clauses remained more or less the same.

Prior to 1956 Amendment, the company law required for simply the objects clause as one of the requirements in the Memorandum. After the 1956 amendment, the Companies Act allowed companies to state "main objects" and "other objects".[173] The Companies Act 2013 is the present legislation governing corporations in India and it has remained the same when it comes to the existence of the Memorandum of Association and the clauses in it. According to Section 4(1) of the Companies Act, the Memorandum of Association needs to include the

1. Name of the Company;
2. State where the registered office is located;
3. Objects including any matter in furtherance of the objects;
4. The liability of members clause and;
5. The share capital clause.

It is evident that the status of the Memorandum of Association has been relatively the same.

Doctrine of ultra vires

Since the 1850 Act did not require for an objects clause[174], there is no question of acts that are *ultra vires.* Therefore, during the subsistence of the Act, the doctrine of *ultra vires* did not have a place in Indian company law. However, the 1857 Act introduced the objects clause for the first time limiting the capacity of companies. The Act also made the Memorandum of Association unalterable. The 1866 Act added that a registered Memorandum binds its members.[175] It is based on Sections 6,8,11 and 12 of the English Companies Act, 1862[176] that the doctrine of *ultra vires* was established.

Section 6 provided that: Any seven or more persons associated for any lawful purpose may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requisition of the Act in respect of registration, form an incorporated company, with or without limited liability.

Section 8 provided that the Memorandum of Association should state, among other things "the objects for which the proposed company is to be established."

Section 11 provided that the Memorandum of Association shall, when registered, "bind the company and members thereof to the same extent as if each member had subscribed his name, thereto, and there were in

[172] See Companies Act, Sections 15A, 15B, 16 and 17(1956).
[173] Companies Act, Section 13 (1956).
[174] See previous Sub-Section.
[175] Companies Act, Section 11 (1866).
[176] Sections 6,8,11and12 of the Indian Companies Act 1862 are the same.

Memorandum contained, on covenant to observe all the conditions of such Memorandum subject to the provisions of this Act.

Section 12 provided that "Any company limited by shares may so far modify the conditions contained in its Memorandum of Association, . . . as to increase its capital . . . or to consolidate and divide its capital into shares of larger amount that its existing shares, or to convert its paid up shares into stock, but save as aforesaid, and save as hereinafter provided in the case of a change of name, no alteration should be made by any company in the conditions contained in its Memorandum of Association.

Some cases on *ultra vires* acts appeared in Indian Courts.[177] P.S. Sangal argued that while the doctrine of *ultra vires* was introduced for the benefit of shareholders, soon companies started showing very long objects clause.[178] A major pitfall that he recognized as early as 1963 was that an outsider of the company may be negatively affected by this doctrine.[179] He further argued in his concluding remarks that the doctrine of *ultra vires* should be abolished and that companies should be accorded the capacity of natural persons.[180]

The Bhaba Committee Report 1952 discussed the question of altering the Memorandum of Association.[181] It said that several complaints have been received from shareholders on companies drafting long objects clauses with every possible transaction they could imagine. Therefore, where a Company's principal object was to manufacture cotton textiles, the shareholders found the company producing industrial solvents instead.[182] The Committee admitted that they could not find a workable solution to the problem and stated that imposing further restrictions on the powers of directors in order to make them more responsible towards the members of the company rather than relaxing the rule on the objects clause. They recommended that the Government should take stock of the situation and if in future it so requires, must address the evil but for now it is not so serious for immediate action. Based on the recommendations of the Committee, the 1956 Act was passed which retained the objects clause.

The J.J. Irani Committee which was instrumental in the enactment of the 2013 Act, did not take the concept of doctrine of *ultra vires* and the necessity of the objects clause in their report.[183] The Companies Act 2013 rather prescribes that a company must state its objects and any matters that are considered necessary to further those objects.[184] Perhaps the object behind such a wording is to avoid the mishap of unrelated objects found in Memorandums.

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[177] See Jahangir Rastamji Modi v. Shamji Ladha (1866-67), report Canning Company Limited (1871),Kathiawar Trading Company v. Virchand Dipchand (1894), Ahmed Sait v. Bank of Mysore (1930), The Imperial Bank of India v. Bengal National Bank (1930), Re Madras Native Permanent Fund Ltd. (1931). These are a few of the early cases on the doctrine of ultra vires.

[178] P.S. Sangal, Ultra Vires and Companies; the Indian Experience, 12 The International And Comparatively Law Quarterly 967-988(Cambridge University Press, 1963)

[179] *Ibid.*

[180] *Ibid.*

[181] Chapter V, Bhaba Committee Report On Company Law(1952).

[182] *Ibid.*

[183] See Report Of The Expert Committee On Company Law, Ministry of Company Affairs (2005).

[184] Companies Act, Section 4 (1)(c)(2013).

In 2016, the Companies Law Committee made a recommendation to amend the objects clause in the Memorandum. Instead of doing away with the clause altogether, the Committee suggested that companies be allowed to add a general objects clause such as "to engage in any lawful act or activity or business as per the law for time being in force".[185] The Committee felt that there adequate provisions for disclosure of the objects of a company due to mandatory annual reporting and moreover, the sectoral regulators have the power to restrict companies as well.[186] The Committee also noted that since the objects clause is alterable, it has significantly diluted the doctrine of *ultra vires.* Therefore, the Committee thought that liberal and generic objects would be workable. This recommendation appeared in the Amendment Bill[187] but was not passed.[188] The Standing Committee on Finance to whom the Bill was referred to, stated that "making the object clause redundant is far-fetched.[189]" The Committee stated that an open-ended clause may lead to incorporation of bogus entities. It further added that stating the objects is not a cumbersome act for it to be removed together. At this juncture, it is pertinent to note that the reason for maintaining the objects clause has evolved. While earlier the objects clause helped established the doctrine of *ultra vires*, based on the 2016 report, it appears that the objects clause helps prevent "bogus entities"[190].

Observation: An abolition or merger?

As early companies legislations were enacted in India keeping British interests in mind, it should not be forgotten that the origin of a particular law and the reasons behind should still stand. If the doctrine of *ultra vires* and the objects clause is a conception of British mind, the reasons for their establishment must be weighed in today's scenario regardless of the country we stand in. It is pertinent to note that the time when the doctrine of *ultra vires* was established, the Memorandum of Association could not be altered let alone the objects clause. When the objects clause became alterable, the doctrine of *ultra vires* sees no purpose. This has been observed and accepted in several jurisdictions. Whether the purpose of retaining the objects clause be "to prevent bogus entities" can be debatable. The Company Law Committee did state that due to the verification procedures in place, the possibility of an increase in bogus companies is scarce.[191] But, the abolition of the Memorandum of Association cannot be made possible as long as the objects clause stands. After all, it is a defining element of the Memorandum.

The second question that arises is if India could afford to merge the Memorandum of Association and the Articles of Association. Studying the development of the two documents has shown that the essential

[185] Report of The Companies Law Committee, Ministry of Corporate Affairs (2016).
[186] *Ibid.*
[187] See Companies (Amendment) Bill, 2016.
[188] See Companies (Amendment) Act, 2016.
[189] Recommendation 3.32, Report Of The Standing Committee On Finance, Government of India (2016).
[190] *Ibid.*
[191] Report of The Companies Law Committee, Lok Sabha Secretariat (2016).

distinction between the two documents is that the Memorandum shows the external aspects of the company's constitution while the Articles shows the internal aspects. While the Memorandum is a document that would interest the outsider (who essentially looks at the obejcts clause), the Articles is a document that would interest to the insider. But, both documents are public documents and can be obtained by the way of application to the Ministry of Corporate Affairs. At this juncture, it is important to consider the position of Singapore. Singapore is the oddity amongst the countries shown in this research. It not only chose to retain the doctrine of *ultra vires* in its texts, but also maintained all the clauses of the Memorandum although the objects clause was optional. The Singapore government saw that merging the two documents into a single constitution cannot affect businesses practically and took the step. Perhaps, it is time for India to consider the reasons cited and steps taken by the Singapore government with this respect. The objective of law making bodies in India today is to make it simpler. The Company Law Committee in 2016 had the theme 'ease of doing business' while drafting the amending Bill. Merging the Memorandum of Association and the Articles of Association may be yet another step towards facilitating the ease of doing business in India.

The Doctrine of Ultra Vires has certain exceptions:

"An act which is within the powers of the company but is beyond the authority of the directors specifically may be ratified by its shareholders in an appropriate format."

"An act which is within the powers of the company but is committed irregularly can be validated by the consent of its shareholders."

"If the company through an ultra vires act, acquires any property in the form of investment, will continue to possess such right over that property."

"While applying the said doctrine, the consequences which are incidental to the concerned act will not be invalid unless the same is expressly prohibited by the Companies Act."

"There are some acts under the Company law, which are not explicitly mentioned in the memorandum of Association, but are impliedly within the power of the company and subsequently cannot be said to be ultra vires."

"An act of the company which is ultra vires of its Articles of Association can be validated by altering the Articles of Association."

Case Analysis:

"**T. Gattaiah And 86 Ors. vs Commissioner Of Labour And Anr. on 2 March, 1981 Andhra High Court**"

"It is therefore, clear that a writ of mandamus would lie against the respondent-company to compel it to carry out directions of the Parliamentary enactment contained in Chapter V-B of the Industrial Disputes Act. But because mandamus is a public law remedy, its use is governed by considerations which are peculiar and

appropriate for the exercise of such public law remedy. In this case there is no doubt that Chapter V-B of the Industrial Disputes Act imposes a public duty on the respondent-company not to retrench the petitioners except in accordance with the conditions laid down by the Parliament. Those limitations are conceived not merely in the interests of individual workman but in the general interest of industrial peace. In an unreported judgment in W.P. No. 3086 of 1978, this Court has held that Chapter V-B of the Industrial Disputes Act imposes public duties on the manufacturing concerns. Following that, I hold that the respondent-company is under a public duty to observe those conditions mentioned in Chapter V-B of the Industrial Disputes Act. If so, for the reasons which are mentioned above, I hold that a writ of mandamus should issue against the respondent-company not to retrench the petitioners except in accordance with conditions laid down by the Parliament. According to Parga Tools case, it is not the body that matters, but it is the nature of the duty that is important. A statutory duty cast on a private body so long it is public duty can be mandamused, according to that decision. The body must be functionally assessed to find out whether it is performing public duty or not. For the purpose of this assessment, the question whether a body is private body or a public body is immaterial. As I held that the respondent company is under a public duty to observer the conditions mentioned in Chapter V-B of the Industrial Disputes Act, I hold that writ of mandamus is competent to issue to the respondent-company."

In the above case, the petitioners filed a case against a company stating that they were laid-off and retrenched by the said company. So, they urge the court to issue a writ in the nature of mandamus or any other appropriate writ against the company since the above-mentioned charges are in violation of the statutory provisions. The court held that any company working beyond its power would be void and this court issued a writ of mandamus against the respondent company.

"Syed Moosa Quadri vs State Of Andhra Pradesh And Ors. on 13 March, 1979 Andhra High Court"

"It is well-known that " the powers of a Corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purpose of its incorporation" (see Halsbury's Law of England, Fourth Edition Para 1333 and also M. Pentaiah v. Veeramallappa). The impugned action of the Hyderabad Municipal Corporation in entering into contract with the third respondent is clearly ultra vires of its powers and is therefore null and void. The Corporation had entered into such a contract which is so patently ultra vires of its authority because it acted to the dictates of G. O. Ms. No. 928 M. A. dated 13-11-1978, issued by the State Government directing the Hyderabad Municipal Corporation to consider and accept the tender of the third respondent. It was in those circumstances, that the Writ petitioner challenged the validity of the action of the Hyderabad Municipal Corporation. Our learned brother Gangadhara Rao, J., having held that the action of the

Municipality is ultra vires of its powers, yet, dismissed the Writ Petition on the ground that it is not in public interest to issue a writ as that is likely to involve the Corporation in litigation. With greatest respect to Gangadhara Rao, J., I cannot agree with him. I utterly fail to see how refusal to enforce rule of law would promote public good. It could only promote cynicism towards law. If this Court does not interfere on behalf of the citizens to checkmate the illegal activities of the State, there is a grave danger of the people's faith in the judicial process being eroded and finally imperiled."

The above case says that the corporation should work within in limits which are mentioned in its object clause of the Memorandum of Association. The corporation here entered into a contract with a party but it ultra vires its powers clearly and it is null and void.The writ petitioner here charged the validity of the action of the authority mentioned above.

"Ashbury Railway Carriage and Iron Company Ltd v. Riche (1875)"

In the above case, it is said that the company entered into an agreement or contract with another party but later on this company breached the agreement or contract and the plaintiff filed a case against the company. One thing is noticed here that the members of the said company had ratified the clause of the contract before its non-performance. The court held that the company acted beyond its power and limit or it has acted beyond the object clause of the company. Hence, the contract made between them is void and also mentioned that it was ultra vires.

Observation:

There are many companies which have been established and many other companies are also coming up and the people who are willing to establish a company should get a Memorandum of Association to get registration of their company. Memorandum of Association is the main and basic document required to form a company because this document contains the name clause, object clause and other clauses which control, guides and protect the members, investors, shareholders and directors of the company. There are clauses of Ultra Vires which also safeguards the company in many ways and its importance is discussed above with case laws.

CHAPTER 11 – CONCLUSION

The concept of a company constitutional document was derived from the British. Its evolution into two documents; the Memorandum of Association and the Articles of Association was also a product of English legislation. A perusal of the reasons behind the separation of the two documents makes us a better judge of whether separation is still justified. In the process of this research study, comparison has been made with common law countries and how they have diverged from their English origin. The UK which established the principles and rationale behind the Memorandum of Association has quietly departed to a more practical position. Although is still mandates a Memorandum of Association, it has transplanted all the clauses but the formation clause into its Articles which is now called the Constitution. Australia and Hong Kong on the other hand decided to completely do away with their Memorandum of Association and simply retain a Company Constitution. In fact, Australia's reforms took place long before the UK amendments. The common thread of reasoning that has flowed in these companies can be listed sequentially as follows;

- The alterability of the objects clause has rendered the doctrine of *ultra vires* useless.
- The need for a restrictive objects clause finds no place in their companies laws.
- The objects clause is the heart of the Memorandum of Association.
- And therefore, the need for a separate Memorandum of Association is unnecessary.

It is in the sequence of these thoughts that the Memorandum of Association no longer stands in these countries. Singapore, on the other hand, has found a different sequence of its own. It has retained the diluted doctrine of *ultra vires.* But, it has cited that the separation of the two documents have no real practical necessity and therefore, has merged them for simplicity.

India may be little behind with regard to its development of the objects clause. All the countries went through similar stages before arriving at an optional objects clause. The stages can be defined as follows;

Stage 1 – Restricted and unalterable objects clause

Stage 2- Alterable Objects Clause

Stage 3- Principal and ancillary objects (which led to long-winded clauses encompassing every imaginable transaction).

Stage 4- Generic objects clause (with the capacity of a natural person)

UK, Australia, Hong Kong and Singapore went through all the stages to arrive at the 'generic objects clause' stage. India, on the other hand, has invented a new Stage;

Although a clever conception to maintain the doctrine of *ultra vires* and retain one theme of objects in a company's mind, the necessity to keep the clause has still been questioned from watering down of the doctrine of *ultra vires* and better disclosure requirements, a company may be allowed to have a generic clause. The Standing Committee rejected this recommendation and accorded a new reason to retain it – prevention of bogus entities. The fact that writing an objects clause is not cumbersome does not mean that it must be retained.

As long as the objects clause is present in the Memorandum, it would perhaps be especially difficult to do away with it. Therefore, Singapore provides a more amenable alternative which is to marge the two documents while maintaining all the odds clauses. This would probably be a suggestion for India. As there are no practical limitations that a company would face by the merger, it would be an apt step to not only facilitate easy setting up of business but would also modernize it to keep up with international developments.

Limitations

This research has been confined to the developments of four common law jurisdictions to the exclusion of others. The stance of *ultra vires* in civil law countries and the formation of their company constitutions have not been discussed and in this manner limits this research. The entire study has been developed by study of history and evolution of corporate law in countries. Although there is scope for empirical analysis, time constraints have made it not possible to be included in this research.

Scope for further research

The scope of this research study has been confined to the laws of UK, Australia, Hong Kong, Singapore and India. There is further scope to do comparative studies on other countries and how they have modified their company constitutions. It is also worth looking at jurisdictions which similar to India have continued the separation of these documents in order to find similarity in reasoning and analyses.

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